ALASKA STATE LEGISLATURE
SENATE RESOURCES COMMITTEE
May 18, 2002
4:05 p.m.

MEMBERS PRESENT

Senator John Torgerson, Chair
Senator Gary Wilken, Vice Chair
Senator Rick Halford
Senator Robin Taylor
Senator Ben Stevens
Senator Kim Elton
Senator Georgianna Lincoln

MEMBERS ABSENT

All Members Present

OTHER LEGISLATORS PRESENT

Senator Johnny Ellis
Senator Loren Leman

COMMITTEE CALENDAR

SENATE JOINT RESOLUTION NO. 201
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

PREVIOUS COMMITTEE ACTION

SJR 201 - No previous action to record.

WITNESS REGISTER

Mr. Bruce Botelho
Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300

Ms. Loretta Bullard, President
Kawerak, Inc.
PO Box 948
Nome, AK 99762

Ms. Julie Kitka, President
Alaska Federation of Natives
1577 C Street, Suite 300

Anchorage, AK 99501

Ms. Carol Daniels
AFN Counsel
1577 C Street, Suite 300
Anchorage, AK 99501

Mr. Bill Calswell, Attorney
No address available
Fairbanks, AK

ACTION NARRATIVE

TAPE 02-32, SIDE A
Number 001

CHAIRMAN JOHN TORGERSON called the Senate Resources Committee meeting to order at 4:05 p.m. All members were present. Also present were Senators Leman and Ellis. Chairman Torgerson announced the committee would hear SJR 201 and that he issued an invitation to four individuals to testify before the committee: Bruce Botelho, Attorney General; Julie Kitka, President of the Alaska Federation of Natives; Dick Bishop, Alaska Outdoor Council; and Loretta Bullard, President of Kawerak, Inc.

SENATOR HALFORD commented, "I'm just noticing the make-up of the room. If we could have half the people on the right move to the left and half the people on the left move to the right and everyone changed in the seating arrangement, we might get a negotiation going that would produce something."

CHAIRMAN TORGERSON replied, "That's our goal today." He then asked Attorney General Botelho to address the committee.

[THE FOLLOWING IS A VERBATIM TRANSCRIPT]

MR. BRUCE BOTELHO, Attorney General of the State of Alaska: Mr. Chairman, that's why I positioned myself both in the back and....

CHAIRMAN TORGERSON: I saw that, right in the center.

MR. BOTELHO: I hope, Mr. Chairman that will also reflect my testimony in general today. For the record my name is Bruce Botelho, Attorney General. I appreciate the opportunity to speak with you today about SJR 201 and, particularly the seriousness with which I know this committee and the legislature is approaching what has been a very divisive issue over the last many years, perhaps less so over the broad issue of the importance of subsistence in Alaska than to who should be able to make use of that resource as the highest beneficial use. The essence - the history, basically, of SJR 201, is an outcome of a process started specifically last August when the Governor

convened a summit of a broad range of Alaskans, including the Senate President and others, Senator Lincoln, to discuss how we could come to resolution. Perhaps what was different in that process from others was the focus on cultural values - what it is we wanted Alaska to look like and, out of that, again, [indisc.] a renewed effort to pass a constitutional amendment.

The Governor asked 11 Alaskans to make an attempt to draft a constitutional amendment that would fulfill the expectations of that summit and that originally became SJR 41 in the last regular session. It has three elements, in general terms. The first subsection really attempts to declare as public policy our view of the high importance and high value we place upon subsistence and the subsistence way of life of [indisc.] peoples and the role it continues to play in the state. I know some have expressed concern about that in terms of conferring some special rights. We were quite clear in our commentary as a group that we did not intend to confer any special rights on any group of people but that it was important for us to provide a vision to Alaska about what it is we were attempting to achieve.

Subsection (b) of this proposed amendment really goes to the heart of the subsistence issue. Mr. Chairman, I think it also directly addresses the issues that you asked us, this afternoon in inviting testimony, to address. It provides the priority in the taking of fish, wildlife and other renewable resources in the following way, first of all, acknowledging that any use of resources is first subject to the principle of sustained yield. We're talking about harvestable surpluses. Second, that when it becomes necessary then to pose restrictions on that harvestable surplus, the customary and traditional subsistence uses of or by rural residents of the state shall receive priority over all other consumptive uses. And this is the basic, what I would call - describe - the rural priority.

We tried to address the second issue here that is not so much tied to what we call the McDowell decision, but another decision of the Alaska Supreme Court, Kenaitze v. State, in which the Alaska Supreme Court struck down one of three provisions in terms of Tier II. Let me just briefly explain – I know that most of the committee is familiar with this but just as a helpful refresher. There are situations when the harvestable surplus is not sufficient even to meet the needs of the subsistence or all subsistence users in a given area and the question comes up when that arises who of those users in that area should have first priority in getting that limited resource and this is where Tier II comes in. State law, until the Kenaitze case, and again, Title VIII of ANILCA provides the same Tier II system, would basically say that the people who should be able to first exercise it should be determined on three factors: the first one their historic dependence on that resource; second, their proximity to the resource – how close are they to it vis a vis others; and third, the availability of other resources. The Alaska Supreme Court in the Kenaitze case and largely, perhaps even foreshadowed by McDowell

itself, when presented with the question said proximity to the resource, and using that as a factor in determining who should have first crack at it, is unconstitutional under the state constitution. This provision, subsection (b), would make clear that this legislature would be free to enact laws that would reinstate that provision or that proximity test in Tier II.

The third feature of SJR 201 is an authorization, but not a requirement, to the legislature to provide for lower subsistence priorities after one has satisfied the rural priority, to other Alaskans in preference to personal use, sports use and commercial use. This was the subject of great debate in our own group, many feeling that the one thing you don't want to do is expand the class of people who should be able to obtain subsistence because the more people who participate, again the resource is limited and there are consequences in that sense, perhaps, against other subsistence users and, equally importantly, the more one can exercise a claim for subsistence use, the less that would be available for the other beneficial uses of the resource. Others have suggested it is important to recognize that there are residents of Alaska, particularly in communities like Eklutna and the Kenaitzes, who have, since time immemorial, a subsistence tradition. Through no fault of their own, communities - urban areas have surrounded them so they should be able to continue to participate. Another category that has frequently been mentioned to us are those who have had rural experiences and now live in urban Alaska but have a direct connection to customary and traditional uses in rural Alaska and that there should be some opportunity for them to participate. In any event, our solution here was simply not to solve the issue but to authorize the legislature to solve it or address it as it would choose.

Those are the three features then Mr. Chairman. First of all, a statement of policy identifying the importance as a value of subsistence and the role it has played and continues to play, specifically with respect to indigenous peoples of Alaska.

[THE NEXT PORTION OF ATTORNEY GENERAL BOTELHO'S TESTIMONY IS INAUDIBLE DUE TO TELECONFERENCE EQUIPMENT PROBLEMS.]

ATTORNEY GENERAL BOTELHO: The second subsection, which grants the priority itself with respect to Alaskans in rural areas - again, I - understand under that both rural but, more specifically, local within rural and also providing authorizing for proximity to be an element in a Tier II scheme and the third feature is authorization for lower subsistence priorities.

Mr. Chairman, this afternoon when you invited us to testify, you asked us specifically to focus on four principles, which I take to be factors that you're looking for in evaluating any constitutional amendment that this committee would consider. And with your permission, let me just briefly state them and then go back and

measure this particular amendment against those four criteria. The first was place of residence; that the state constitution needs to be changed to allow the legislature to assign a preference for subsistence hunting and fishing based on local residence within a rural subsistence area. Second, there's a rural subsistence limitation. A subsistence preference must be limited to subsistence hunting and fishing in rural Alaska. Third, customary and traditional uses - a subsistence preference must be limited to fish stocks and game populations that have been customarily and traditionally used for subsistence. And finally, legislative discretion – the constitutional amendment should be discretionary, that is 'may' rather than mandatory, 'shall.'

Mr. Chairman, comparing SJR 201 to your first criterion – place of residence, that is, the legislature should be able to assign a preference for subsistence hunting and fishing based on local residence within a rural subsistence area. And again though, we don't expressly use the term rural residence. If you will look at subsection (b), we made clear that we're talking about customary and traditional subsistence uses of that resource by rural residents in the area of the state in which those customary and traditional uses have occurred and I would suggest that [indisc.] the term in the area is really the equivalent of – at your request – that there be a local residence feature. We view that as being the equivalent. [Indisc.] lots of forces at work today, not just the force. The second - so, in short, I believe that this amendment directly meets your first criterion.

The second is a rural subsistence limitation – that it must be a preference limited to subsistence hunting and fishing in rural Alaska. Our clear intent here is to see this as a rural preference, that is to say we have local within rural but subsistence activities are a rural activity to be regulated further in a local area.

The third is customary and traditional uses. You declare that the preference must be limited to fish stocks and game populations that have been customarily and traditionally used and we expressly make that clear in lines 14 and 15 where we're talking about subsistence uses of those resources that are customary and traditional.

Mr. Chairman, the one area that we did not meet your test is the issue of discretionary versus mandatory directive to the legislature and acts as a priority. This version at line 11 declares that the legislature shall provide, not may. Our view in drafting this, and again not without extensive debate within the committee, was that this would be – this is a directive to the people or to the legislature from the people that this is such an important issue to be resolved that the legislature really should not be given discretion to either deal or not deal with the issue but it was important that it be compelled to provide for the priority and not simply from the standpoint of bringing the state into compliance with

ANILCA that on its merits, such a priority is just a good value for Alaska. That's what we stand for in terms of protecting a way of life that most of us in urban Alaska have not or do not [indisc.] which we're fortunate to see occurring in many parts of our state.

Mr. Chairman, again [indisc.] approach that limit. I'm certainly available to answer any questions.

CHAIRMAN TORGERSON: Questions for the Attorney General? Senator Taylor?

SENATOR TAYLOR: In light of the Bess v. Ulmer decision, does this change or constitute a revision of the Constitution or merely an amendment?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, my view is that this is in the nature of an amendment and not a revision. I know that there are some who would see this as altering the state constitution, that it would require a constitutional convention rather than a – simply a vote of the people after a vote of the legislature. I know that people – and I'm willing to go into detail here – people can argue that issue. The only way it gets answered, however, if one wants to defend a good answer [indisc.] spotty, to vote the record of two-thirds, place it on the ballot, allow it to be challenged, allow the Supreme Court, which is the final arbiter of constitutionality of any provisions in the Constitution to make that decision.

SENATOR TAYLOR: Just one follow-up?

CHAIRMAN TORGERSON: Senator Taylor.

SENATOR TAYLOR: Does the Governor's constitutional amendment place the state in compliance with Title VIII ANILCA?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, it does not. The test – what it does – what it would do – would be to authorize legislation that would presumably bring the state into compliance. The test under Title VIII of ANILCA is whether the state has laws of general applicability that provide for the priority, that provide for the participation and definitions that are found in ANILCA. The effect of McDowell was to declare that there was not legislative authority to provide for that priority. This amendment, if it were adopted as it is now, would authorize you to pass legislation that would bring the state into compliance.

SENATOR TAYLOR: That's disturbing because this document has been sold as the solution and, apparently from your statement it's not, that it would then take additional actions from the legislature. Would the Administration support linking specific amendments to ANILCA with a constitutional amendment?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, we do not believe there is any necessity of any changes to ANILCA in order to - in the enactment of this amendment. Others may disagree but in our view this amendment, followed appropriately by statutory changes that would provide for the priority, is all that's required.

SENATOR TAYLOR: I'm concerned about that answer because I have several memos from members of your own legal staff that indicate that unless changes are made to Section 807 of ANILCA, it basically takes the state out of the management of our fish and game and causes major problems as far as federal oversight, review, and who's actually going to be deciding fish and game management decisions. These are not coming from any source that I've requested. These are the members of your own staff and your own [indisc.].

ATTORNEY GENERAL BOTELHO: Mr. Chairman, if it would be helpful to have members of my own legal staff appear before you I would be glad to offer them up.

SENATOR TAYLOR: I was asking the question because....

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I hope I was responsive.

CHAIRMAN TORGERSON: Other questions?

[A SHORT PORTION OF THE RECORDING IS INAUDIBLE DUE TO TELECONFERENCE EQUIPMENT PROBLEMS.]

SENATOR LINCOLN: ...SJR 201 - one of the questions that Senator Taylor asked is one I wanted to ask, as well as how it - if it comes into compliance with ANILCA and how we get there and I think you answered that but one of the recommendations by the Governor's leadership conference on subsistence recommended that the legislature adopt a constitutional amendment guaranteeing a rural subsistence priority and a law that provides a form of co-management. Do you see this tool as one addressing that - in co-management?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, in my view a constitutional amendment is not required to allow for co-management. I think that's a decision that falls within the power of the legislature today and I would also indicate that, again, I wouldn't be averse if the question is whether including that would in some way strengthen management, but I would tell you that throughout the discussions over the last several years that I've participated in we have worked on the assumption number one, that the legislature had such authority and, second, as we have drafted statutes before, we have expressly contemplated forms of cooperative management.

SENATOR LINCOLN: As a follow-up Mr. Chairman?

CHAIRMAN TORGERSON: Go right ahead.

SENATOR LINCOLN: Although we do have the authority to do that, we haven't obviously passed a subsistence resolution yet after all of these years that it doesn't preclude us from also writing within 201 the necessity to have co-management. You're not suggesting that it has to be a separate law but you just didn't put it in here?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, we have not contemplated any specific provision in the constitutional – this constitutional amendment that would specifically address co-management. I'm not sure that I am being responsive but...

CHAIRMAN TORGERSON: Basically you're saying that we can do it statutorily and it's just a detail – it doesn't need to be in the Constitution.

ATTORNEY GENERAL BOTELHO: That's my view.

SENATOR LINCOLN: And then, Mr. Chairman, there's the question that – the questions that were posed to you by our good Chairman, Senator Torgerson, was the limitation of the subsistence to hunting and fishing and within the resolution you've added or other renewable resources. Could you expound on that a little bit?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, to the extent that the state truly wishes to address compliance with Title VIII, while our focus in the debates has been largely on fish and wildlife, the priority on federal lands is for fish, wildlife and other renewable resources and probably the most common example would be the harvesting of berries for subsistence uses. While there have been many contributions [indisc.] that have been considered either by this body or the other body, they're focused on fish and wildlife. Our language seeks to mirror Title VIII of ANILCA and that is to include the other renewable resources.

SENATOR LINCOLN: And finally, Mr. Chairman, the question that I have is on Section (c) of 201. Under Section (c), wouldn't this allow urban subsistence users to come to rural Alaska to compete for the already scarce wildlife resources in some areas and won't that also lead to a Tier II situation more quickly than otherwise would occur?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, there are circumstances where that could be the effect, that is to the extent that one authorizes non-rural residents to participate in subsistence harvesting in rural Alaska, though not necessarily. You could have features where, again, using the example of the Eklutans, them being able to use – look at their customary and traditional harvesting patterns in their area, but not necessarily work to the diminution of rural residents. Probably most important to point out is were this to be enacted, the second sentence of subsection (c) makes clear that the priorities are to be granted only after one has satisfied the subsistence priority

of rural residents in the state. Some people have talked about rural plus – that is to have not only rural residents but some additional right now undefined group of people all on the same additional level to access subsistence resources. This amendment would say you have to satisfy – before you open it up to anyone else, you have to satisfy the rural subsistence needs first so we have defined that, to a certain extent, as rural comma plus, as opposed to rural plus.

CHAIRMAN TORGERSON: Senator Halford?

SENATOR HALFORD: Is there anything in Section (c) that grants any authority to the state lawmaking bodies that doesn't exist without Section (c)?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I do not believe so. I think the legislature likely has this authority today.

SENATOR HALFORD: With regard to the way federal oversight works when we are in compliance with ANILCA versus when we're not in compliance with ANILCA, would you kind of go through an explanation of how that works?

ATTORNEY GENERAL BOTELHO: Just so we are really clear, are we assuming that the federal – the state government has taken over management throughout the state and now we have a situation where someone comes in and says the state – you're not operating in accordance with...

SENATOR HALFORD: The access to federal court, with regard to the complaints about the operation of the system, appears to be only on federal lands and waters when we were out of compliance, but it is stated to be including federal lands and waters and state lands and waters when we're in compliance.

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I believe that is a correct reading of what is in Section 807 but I think I would also underscore that I think the oversight that's being discussed here is very limited in nature in terms – or scope – in terms of what a federal court would be able to do and that is the requirement, in terms of giving relief to a person who brings a case in federal court in Alaska requires first of all that it take place only after exhaustion of administrative remedies. Second, that the relief to be provided is simply that the state adopt regulations that do comply with Section 804 that is providing for the priority and participation and only for that period of time – reading it from the statute – for such a period of time as normally provided by state for the regulations at issue, which, in our state, is normally a one year cycle.

SENATOR HALFORD: Now that's reading from the provision of ANILCA but what has been your experience with regard to the cases that we've actually had in the state since then?

ATTORNEY GENERAL BOTELHO: Well, there are actually relatively few federal cases that have challenged the state system in the area – but I don't know that they necessarily commend themselves - I think particularly the federal Kenaitze decision in trying to define rural. We had a district court, which improperly concluded that the Kenai was not a rural area. The Ninth Circuit's reversed on appeal. We've had review of specific regulations [indisc.] where the courts questioned the factual basis of the determination made by the board, whether it had really evaluated properly the evidence. That I don't find particularly [indisc.] difficult kind of, I think, issue that [indisc.] whether the state or federal courts would engage in. It's a rational basis, reasonable basis, for the administrative action of the [indisc.].

SENATOR HALFORD: Would you support the amendment package that Senator Stevens was able to pass several years ago that expired with regard to definitions and modifications?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, again I – let me say two things first of all. Our view as the Administration is that there are no necessary changes to ANILCA in order to bring the state management of fish, game and other resources throughout the state. At the same time, I personally participated in reviewing Senator Stevens' past – I can't say here that they were [indisc.] in any respect strengthened – put sideboards on – a persistence in a way that was beneficial to the state. The Administration's view, and I represent that today, is that those are not necessary and that, in order to move forward, from our perspective, all that is required is a constitutional amendment and statutory changes.

CHAIRMAN TORGERSON: Other questions? Senator Halford.

SENATOR HALFORD: With regard to your number one point on the question between local versus rural – do you think local works within the intent of the original goal of ANILCA?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, to the extent that it is in a context that it's local within rural, yes. In fact that is the way it is to be applied – the way it is applied today. Perhaps an apocalyptic answer is the so-called Barrow that goes to Angoon to hunt deer. To my knowledge, no one has established that as a customary and traditional pattern. That Barrow hunter, therefore, would not be able to do so. It is really looking at population and stock – specifically what are the customary and traditional patterns – who's harvested in and that is the essence of local and that is really the context, when we talk about rural residents of an area. I guess my caveat is, and it's one of the issues that – in looking at Senator Ward's proposal has been somewhat of a concern to me, is whether it is intended that the starting point is Tier II, which then suddenly puts us into an individual evaluation of who in an area gets

the priority. Our view is that you start with a community of people who have customarily and traditionally harvested the resource in an area. You look to those patterns. Only when there isn't sufficient supply to satisfy those subsistence users would you go to the individual criteria that is reflected in Tier II and so I think there is a latent ambiguity about whether you start in that amendment – if you simply say local, whether you intend to go local individual or local collective.

SENATOR HALFORD: How does that jibe with what you just said about the Barrow-Angoon deer hunter? It sounded like the reason that the Barrow-Angoon deer hunter wouldn't qualify was because that individual couldn't or didn't have a customary or traditional use pattern. I agree that, at some point, individual criteria become unworkable but it just seems like you just used it in your previous example.

ATTORNEY GENERAL BOTELHO: Well, I use it in a sense that you'd be hard to put to establish that it was a tradition of Barrow hunters collectively to go to Angoon to hunt deer. That's what your – so if you see the Barrow person as the collective rather than the individual, the point is you start off, Mr. Chairman, looking at a group in an area and as you look at stocking – really, perhaps you start - rather than looking at the people you look at the stock or the population and with respect to that stock or population what had been the customary and traditional use patterns. Who has customarily and traditionally harvested the resource? That is your local. Then, when you talk about the next step, that population or stock is insufficient in terms of what is the harvestable surplus to satisfy all those users you go to Tier II and you're making a choice now individually about who is, say, most deserving using those three criteria – proximity, dependence and availability of alternative resources – deciding who gets to harvest.

SENATOR HALFORD: So if local were a collective criteria instead of rural, then you would still go to individual criteria with the exception of local, which you already used when you go to Tier II.

ATTORNEY GENERAL BOTELHO: Yes. The only, again, but one other caveat here, I think, local still has to be in the context of rural local. I mean – presumably, let me explain why. I guess I wouldn't say it would have to be that way but there are, I suspect, pitfalls that you would not want to have to engage in if you were going to again have a local subsistence priority in Anchorage, for example, Ship Creek, or on the Kenai where suddenly Kenai residents are all subsistence users for purposes of the Kenai River, having to decide who among them then gets to make a choice – gets to harvest. I think it's a bureaucratic nightmare that's going to put not just neighbor against neighbor, but also truly the kind of pressure on the resource is going to be very difficult to expect sustainability over time.

SENATOR HALFORD: Should customary and traditional be at a volume of use or should it be at a species of use or a kind of species and volume?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, as I understand it, it is really, even today, really both. You are looking to the species that have been customarily and traditionally harvested and we also, in deciding at any given point, what is the harvestable surplus for subsistence in making a decision about quantity.

SENATOR HALFORD: But the reason I asked the question is, if you have a major community that grows at a particularly high intensity area, and there has been some customary and traditional use so there is a priority there, but the growth of the community totally engulfs either the commercial fish harvest on the same resource or whatever the other harvest is, I think competing - particularly commercial fisheries want to see some kind of limitation on growth of the customary and traditional sector and I just...

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I think that probably raises a larger issue, a long term one that I think most everyone recognizes and again, as we've done it in the context of rural generally, it is really what is rural. What criteria should be used in initially establishing what rural is and then mechanisms for recognizing that the demographics of the state change. There are going to be areas - there are areas today - that we would say are in transition in terms of being rural and non-rural and that will constantly evolve.

SENATOR HALFORD: Thank you Mr. Chairman. I'm sorry to....

CHAIRMAN TORGERSON: That's all right. Good questions. Senator Elton.

4:45 p.m.

SENATOR ELTON: Thank you Mr. Chair. I mean we've struggled with the definition of rural in this context for a long time. Has anybody yet begun to define what local is in this context?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, in the context of the constitutional amendment, I think the answer is we haven't. I mean - our focus, we have talked about in areas and - looking at rural residents in areas and, in that respect, we use the term local when it would be focusing on the species by species what is the customary use again, what will we have with respect to the Nilchina caribou herd, for example, which will be different from some fish stock in the area because again, by species, [indisc.] varieties. That remains the starting point in defining area or local, in my view, but it's not one that gets resolved at the constitutional level other than setting the broad parameters ultimately as something that you expect the expertise of your boards of fisheries and game, in consultation, as the appropriate advisory bodies in the scheme that we have

advanced before and which I think ANILCA contemplates is a form of regional councils who can provide their own knowledge about what those use patterns are and what local really constitutes.

CHAIRMAN TORGERSON: Senator Taylor.

SENATOR TAYLOR: I'm still a little troubled because I didn't understand your answer, I guess Bruce, to the question I posed [indisc.] attorneys and the memos that they had written on Section 807, which was the same section Senator Halford was inquiring of you about and you answered it by saying you want them to come in here and talk. I mean, your own attorney said failure to amend Section 807 in adopting any form of compliance with this federal law – failure to do that and include that in the constitutional amendment of ANILCA is a fatal flaw. That's their words, not mine. I [indisc.].

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I don't have the memos at hand. I don't know what they are. I don't know who they're by. My suspicion would be that this – these memos may have been what, 8 or 10 years old, Mr. Chairman. I don't know which ones they are. I would be glad to take a look at them but if there are people that are on my staff, I would gladly offer them up to this committee so that Senator Taylor would have the opportunity to directly examine them. I don't know what statements you're referring to.

SENATOR TAYLOR: But your position today is that there's no changes necessary to ANILCA? I think you've said that [indisc.].

ATTORNEY GENERAL BOTELHO: Mr. Chairman that is correct.

SENATOR TAYLOR: One last thing and get back to what Senator Halford was talking about and I don't know the answer to this question but we always talk about rural when we talk about users and people, who may or may not take various resources. We've not yet talked about the resources themselves that may be within urban areas. If we do amend this Constitution of ours and make all of our state lands and waters subject to federal law, what would prevent a person who is a rural person within the federal definition from coming in and taking, literally, all of the fish in Ship Creek, from taking moose in Anchorage?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, the – again, the amendment is to operate in rural Alaska, not urban Alaska. I think that's the first and most important distinction. ANILCA does not require that the management of a subsistence priority be everywhere in the state. It is to be in rural Alaska, however that's defined and it's not defined by the federal government, ultimately. It's to be defined by the instrumentality that is responsible for the management and if you adopt the instrumentality that is responsible for the management and if you adopt this constitutional amendment and the people [indisc.] constitutional amendment that would enact the laws, it would be the

State of Alaska determining what those rural boundaries are, obviously subject to challenge but they are today and that is the extent, I think, of the – of how this works. I can't contemplate a scenario that Senator Taylor has suggested in which somehow a rural come in to Anchorage to harvest moose in Anchorage has a priority over others. Anchorage is a non-subsistence area under both federal and state regimes and this constitutional amendment certainly – it might change that back.

SENATOR TAYLOR: Only the residents of Anchorage, because they are living in an urban area, are precluded from participating. Whoever those residents are, wherever they came from, they are currently precluded under that federal law. They are not rural, they are urban. It's a definition for people. It's not a definition for resources and if resources are found in an urban area.... [END OF SIDE A]

TAPE 02-32, SIDE B

SENATOR TAYLOR: ... habitat friendly portion of Anchorage. It's a big area, the city is, it takes in clear down to Girdwood I think. If – well, if something - if resources, those sheep, for instance, wander around by the highway down there, it's certainly a game population that would be available for harvest. Is the resource also defined by the definition of the user? Is that what you're telling me?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, it's defined by the rural area. Yes.

SENATOR TAYLOR: The last question I'd have then is does the Governor's amendment to our Constitution take us out of co-management or does it leave us still in a co-management or tri-management system like we are today?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, it removes us from co-management with the federal government in virtually every aspect with some exceptions, which the federal government has exclusive control over in any event. Marine mammals is an example - certain migratory waterfowl. That won't be changed one way or another, but there will be unitary management in the sense that the State of Alaska's agencies will be those responsible for managing fish and wildlife for all beneficial uses, not just subsistence. Again, and I'm not sure whether Senator Taylor is alluding to this, there will of course be the opportunity for people who believe that they have been aggrieved under Title VIII by the State, to try and seek judicial redress, especially in federal courts. They have the right to do that as well as in state courts and they do exercise that right in both.

SENATOR TAYLOR: I just wanted to make sure that option of going to the federal court by any person dissatisfied with the state's management, after you have amended the Constitution and placed all of the state lands and waters within this federal jurisdiction, you then

have [indisc.] where today, on state lands and on state waters, they go to state court, don't they?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, those who are aggrieved about state management on state resources, the remedy is to go into the state courts today. And, with respect to federal management on federal lands, their remedy is to go into federal court today. While this is an express act of Congress, it makes clear that any person aggrieved or organization aggrieved about whether we have satisfied the priority and the participation in Title VIII, now can, were we to enact this amendment go in to federal court. Again, both what the federal courts can do is limited but I think, more importantly, I'm not at all troubled by the idea – I don't think any of us should be here, that people should be able to seek judicial review, federal or state, of actions they believe are contrary to law by government agencies. I swore an oath to uphold the federal as well as state constitutions, here. I'm not ashamed of the federal courts. I may disagree with some of their decisions. I'll tell you I also disagree with some of the decisions of the Alaska Supreme Court and I know, Senator Taylor, you share that view. One is not inherently better than the other. They are simply avenues for redress for allegations of governmental overreaching and if there's any comfort here, I would say for those who are concerned about what federal courts can do, it's in many respects more limited than what state court remedies can be.

SENATOR TAYLOR: I just wanted to clarify that one point.

CHAIRMAN TORGERSON: Thank you Senator Taylor. Senator Lincoln?

SENATOR LINCOLN: I just wanted each of the testifiers to also answer the one question of if we do nothing, what, in your estimation, would occur.

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I believe that the fish and game managers can much more eloquently answer this question but what is clear, first of all, is that we do have a truly dual management system that is coming into play. It's stronger [indisc.] passage of time in terms of one regime in the state, which has only one responsibility, and that is to make sure that all subsistence needs are satisfied on the public lands – federal lands of the state. And, a second system, which on state lands has a responsibility to manage both for subsistence and other uses but to allocate among beneficial uses and we have areas of the state where both claim jurisdiction trying to apply those competing management responsibilities, which provide both a conflict for the managers but also on the ground conflict for the users. I think that is one [indisc.] the most. I'm concerned that apart from that [indisc.] any more from a political-social viewpoint of the consequence of failure to act, what it's doing in dividing states, regional lines, racial lines, and my sense is that finally passing an amendment, implementing statutes will do a

lot to heal that division that is clearly emerging.

CHAIRMAN TORGERSON: Thank you Bruce for your testimony today.

ATTORNEY GENERAL BOTELHO: Thank you, Mr. Chairman.

CHAIRMAN TORGERSON: Let's go next to Dick Bishop.

MR. DICK BISHOP, Alaska Outdoor Council: Thank you Mr. Chairman. My name's Dick Bishop. I live near Fairbanks in an urban area. I am speaking on behalf of the Alaska Outdoor Council and appreciate the opportunity to address the committee and I will try to address your queries or the areas that you indicated were of particular importance first and then, hopefully, I'll stick to that but I may have to elaborate a little bit longer as well as the attorney general did.

I'd start out by saying that I really appreciate the Governor's comment yesterday that I heard over the radio on a newscast that each and every word is extremely important in a constitutional amendment. I think that's something that's essential that all of us who are considering changes, and especially legislators since they have the decision making responsibility, have to keep in mind so I may get back to that later. But, overall, I'd like to point out that from my standpoint and the standpoint of the Alaska Outdoor Council, the imperative that's implied in questions or statements one through three here, we don't believe are imperatives. For example, it says the state constitution needs to be changed, etcetera, to allow the legislature to assign a preference for subsistence hunting based on local residence. Well, we would take exception to that. We don't feel that the state constitution necessarily needs to be changed in that way. These questions very significantly relate to what I've heard in the last several days called the litmus test of meeting conformity with the federal law. That's – in our view, that is not a legitimate litmus test because, in our view, the federal law is fatally flawed and to change our constitution, modify some of the very important provisions in that constitution, both from the standpoint of conservation, that is, the wise use of wildlife resources – fish and wildlife and other resources in this case, and also from the standpoint of civil rights, Title VIII of ANILCA is fatally flawed and it is not a good ideal to try to conform to that law despite the difficulties that the conflict between the state and federal law invite. In our view it is better to do it right at least on state lands and waters than to simply work to conform to federal law.

And I guess I would like to respond to Senator Lincoln's question in that regard, what if you don't conform to federal law. Well, what if you don't is that you have approximately [indisc.] state lands and what state waters we still have authority over that are under the responsibility and authority of the State of Alaska and, from our standpoint, especially since it includes many of the most significant fisheries in the state, that's very important that the state would

not be burdened with the requirements of the federal law, which they would be if the state conforms to the federal law and takes that responsibility, enacts the appropriate statutes, etcetera, then the state is burdened with the mandates of the federal law. They will be overseen by the federal agencies, which are bound by ANILCA, to report to Congress and the performance of the state will be measured by the federal courts, ultimately the last stop. So, we don't think that's a good standard, a good litmus test. So we think there are other ways to look for to get out of this box that we're in, which I've characterized as a box built of good intentions and bad judgment, and that is Title VIII of ANILCA.

With regard to place of residence, the first statement, I'd like to remind the committee and the legislature and the public that when this question came before the Alaska Supreme Court, they ruled against using place of residence as a means of distinguishing who can receive the priority. They summed it up in two words, extremely crude, and they didn't mean in terms of morals, they meant in terms of its ability to address the underlying deed of the law that it was supposed to address. They have pointed out that the rural priority was both over-inclusive of those who depend on wild resources for their livelihood and under-inclusive because it included people in rural Alaska who didn't need it and excluded, by the stroke of a pen, those in urban Alaska who did need it and they pointed to records to verify the basis for the decision from the Department of Fish and Game that showed there is a significant number of urban residents who indeed relied on the use of fish and game, in particular to maintain a subsistence lifestyle fashion. They went on to say that it would be much better to base a priority on individual characteristics that related to – excuse me – the needs of the people who were seeking these basic necessities and that that would be less invasive of the common use and equal access provisions of the Constitution so we don't believe that place of residence is an appropriate way to distinguish and separate subsistence uses and we agree with that characterization of it that it's extremely true.

With regard to the second point, rural subsistence limitation – again I would object to the idea that the preference must be limited to subsistence hunting and fishing [indisc.] of Alaska. First off, you know we're really talking about two different things. One is a question of identity and philosophy and that is who is a subsistence user and who determines that. That is, as we've heard and I'm sure you've heard over the last several days, a question of values and it's not a question that you or I or the legislature collectively or anyone can really determine. If I want to be able to identify as a subsistence user and I place those values among my highest ones and I believe that they characterize my life and my lifestyle for my purposes, that's my business. Unfortunately, or fortunately perhaps, I don't think it's the Legislature's business or the Governor's, for that matter, or the President's as far as that goes. But, when it comes to providing a priority for the uses of public, commonly held,

common property resources, then it is the Legislature's business, in this case, to decide who should receive the priority among those who wish to consider themselves a subsistence user and who may wish to qualify for that priority. So we have two things. It's not appropriate, I don't think, to tell people they are or are not a subsistence user but it is appropriate for the state through the normal process to decide who among those people who may identify themselves that way should receive the priority, if there is one, for subsistence uses and under what basis. So, I don't think that a rural limitation is appropriate. There are people, as I mentioned, in urban Alaska who firmly believe – passionately believe, they are subsistence users and as people have discussed now for 25 or 30 years, the spectrum of those who identified themselves in that way is extremely broad. It runs really across the society. So, I don't think that's – and we don't think and never have, the Alaska Outdoor Council, that the rural subsistence preference must be limited to subsistence hunting and fishing in rural Alaska or, for that matter, by rural Alaskans. The important thing, I think, is with regard to deciding who has the priority is in order to assure that no one's opportunities are compromised that the same standards could be devised – standards that are devised should be the same for those who live in urban Alaska and those who live in rural Alaska. The same values underlie the reason for the priority. The desire to have one - the same standards should apply.

It was interesting the attorney general brought up the subsistence summer from last summer in this regard, with regard to values and where the priority goes and what the limitations should be because at that summit the participants agreed to adopt as an overall statement of the role of subsistence in the lives of Alaskans the findings from Alaska statutes that were passed in 1992, which as I pointed out before - I drafted first for Governor Hickel's subsistence advisory council and in those findings we attempted to identify the shared values and the fact they are not limited to rural, urban, non-Native, etcetera, and pointed out this, and I'll read a little bit from it. 'Although customs, traditions and beliefs vary, these Alaskans share ideals of respect for nature, the importance of using resources wisely, and the value and dignity of a way of life in which they use Alaska's fish and game for a substantial portion of their sustenance. This way of life is recognized as subsistence.' And it goes on to say that these customary and traditional uses originated with Alaska's Native people and have been adopted and supplemented, imitated and so on by others and that they are socially, culturally, and philosophically and so on important among us all. So I'd just remind you that as an important consideration of what kind of limitation should there be. Should there be a rural limitation? Should it be a place of residence? Something to keep in mind.

Lastly on that subject, I can't ever consider this subject without thinking of Elizabeth Peratrovich who successfully testified on behalf of civil rights for Alaska Natives in the early '50s, if I

remember correctly, and essentially turned the Alaska Territorial Senate on its ear with her speech after they had derided the idea of a civil rights law that accorded equal treatment to Alaska Natives and criticized the idea very – very poorly actually. At that time the tradition was that people could stand up in the gallery and have their say, which she did. And she said – you know it's surprising to me, and I won't quote entirely – it's surprising to me that I have to stand here and remind you gentlemen of our Bill of Rights. And what she was seeking was equal rights for Alaska Natives, not special rights – not special rights for rural people, not special rights for Native people but equal rights for all Alaskans. She made a huge step forward.

With regard to customary and traditional use, this is a problematic term and I disagree that the subsistence preference must be limited to that. However, it has potential with advantageous use but under the terms of the federal law with which the state would eventually be in conformity if HJR 201 – I had to change my button - it said 41, I had to stick on a little deal over the top that says HR 201 - is the urban rural divide. I had to change that this morning but, at any rate, if the state conforms to the federal law, then there really needs to be change in the federal definition of customary and traditional use. The reason is that so far, it's been a blank check for the extent and amount both and kind of uses by those who qualify for the subsistence priority and it has brought some rather severe constraints on management. For example, in the Bobby (ph) case, the judge, Judge Holland, decided and told the state at that time it was in compliance, you can't substitute abundant fish for scarce moose. You have to create regulations that accommodate customary and traditional use unless you can prove to me that that use is going to threaten the viability or the well being of the moose population. So, on the one hand you just had a set of evidence that established that there was customary and traditional use there, on the other hand if that were to be challenged by the state on the issue of whether it was a threat to the population, you would have to do it on the basis of a scientific study by the state that would prove a very high probability that that was a problem for conservation or wise use. So, if there is – if customary and traditional use continues to be used and especially if it were a case of the state coming into conformity with the federal law, then it, at the very least, ought to be a requirement in ANILCA, an amendment to ANILCA that would make a requirement that it conform to the definition of customary and traditional use as defined in state law and I would urge the legislature at that point to look carefully at that definition again.

An interesting sidelight on customary and traditional use and the terms of HJR 201 and of the federal law is that, if you'll notice, it says that a subsistence preference for rural residents would have a priority over all other consumptive uses of resources. It is painfully silent on how it would compete with non-consumptive uses. There is nothing in either in the federal law or in HJR 201 that

gives even subsistence uses a priority over non-consumptive uses. In my view, that is something that could lead to mischief eventually where people – and it's actually happened in proposals before the Board of Game, people have proposed that there be no hunting areas where there is wildlife viewing so that's something to keep in mind too. It was kind of a hollow victory in a sense. Fortunately it hasn't caused too much problem for hunters and subsistence users so far.

Then to the last point – legislative discretion. It's – we think it's extremely important that, with regard to the may-shall choice, that it be made. That does put the responsibility and authority for deciding what the right treatment of the subsistence uses is in the hands of the legislature where it belongs. It's my understanding that if the word shall is used, then that responsibility and authority is removed and it is the courts, be they state or federal depending on the law, will decide what the interpretation of that constitutional language is. So, that would be a pickle to get into for sure if the legislature passed the law and said – and agreed to passing shall in there and low and behold they woke up a year later and found out they had essentially handed off the authority to create the appropriate kind of law to provide for subsistence use and as necessary limit it or other related uses. So, as I mentioned at the outset, I'm really glad that Governor Knowles pointed out the importance of examining the significance and – pointing out the significance of each word of the Constitution and examining that very carefully.

And in that regard, I would add one almost final comment and that is that the maker of the use of the words in HJR 201 is very troublesome in that the only subsistence traditions among Alaskans that, by policy, would be recognized by the State of Alaska, are the subsistence traditions of Alaska's indigenous people. The question that comes to mind is did the authors believe that there were no other traditions related to subsistence among other Alaskans or did they believe that those traditions were inconsequential or insignificant or of no account and just what does it mean and what does it mean when you take that language and go to Part B where is says that customary and traditional use by rural residents will be given preference.

CHAIRMAN TORGERSON: I think we need to wrap up here.

MR. BISHOP: Okay - which customary and traditional use, by whom, and how that will affect those in urban Alaska. I thank you very much for your time.

CHAIRMAN TORGERSON: Senator Taylor and then Senator Halford.

SENATOR TAYLOR: Yes, very briefly. I'm assuming you're in opposition to the Governor's bill that's before us?

MR. BISHOP: That's a correct assumption Mr. Senator.

SENATOR TAYLOR: Can you tell me, of the state's 103 to 105 million acres of land, adding to that the state's jurisdiction over all navigable waters – every stream, river, all waters seaward of us for three miles, and the lands conveyed to both Native corporations and Native villages and the private lands owned within the state, under whose jurisdiction are those waters and lands today?

MR. BISHOP: Mr. Chairman, Senator Taylor, in general, under the state's jurisdiction, there's a dispute over some portion of that – those waters and submerged lands and I don't know how much is involved. Those so called reserve waters, which under the Katie John case, the federal court ruled that the state had – the federal government had the authority to manage for subsistence so I don't know how much is involved there. It certainly takes away from the state's navigable waters quotients I guess you could call it, but other than that, all of them are under the responsibility and authority of the State of Alaska - state, private lands and waters, including navigable waters, except those disputed perhaps, and private lands and waters.

SENATOR TAYLOR: What would happen to state jurisdiction over all of those lands, waters, Native village land, the corporate land, all state land, all private land, all the waters of the state. What would happen? Who would be in charge of and who would have the jurisdiction over those lands and waters upon passage of something like this that has been proposed by the Governor.

MR. BISHOP: Assuming that - Mr. Chairman and Senator Taylor – assuming that the state then accepted the responsibility and created the appropriate laws and so on, the state would be responsible for administering the federal law as it related to Title VIII of ANILCA. They would have the role of – it depends on if you're having a bad day or not, the hireling, the lackey, the servant, the – whatever, you know, hired hand of the government. In terms of, in our view, which law dictates ultimately how management would be conducted because Title VIII demands laws of general applicability on behalf of the State, then the terms of the federal law would apply to 100 percent of Alaska.

CHAIRMAN TORGERSON: Senator Halford.

SENATOR HALFORD: Thank you Mr. Chairman. I'm – I mean obviously there's agreement that subsistence – there may be definition differences, but subsistence in the time of need is the highest and best use but we're debating what method of allocation is constitutional and it's been held by our Supreme Court and by a lot of us for a great many years that rural was too blunt. I guess the question that followed and the question that an alternative proposal brings out is local is a little bit sharper but not in your view

sharp enough. But I think I hear you saying that no criteria short of individual criteria is sharp enough. Is that what you're saying?

MR. BISHOP: Mr. Chairman, Senator Halford. That's basically what we're saying. We think if the priority or preference is going to be provided in a fair fashion to all Alaskans, then we take comfort, I guess, in the advice of the Alaska Supreme Court that a priority based on individual characteristics would be far preferable and less invasive of the common use equal access provisions of the U.S. Constitution as it stands today.

SENATOR HALFORD: It's just hard to view fairness upon – on a relative scale and then apply administrative possibility to that scale. I start at the same place but I come back to some point where I think the Supreme Court would say that there may be some collective determination that are accurate enough and reasonable enough to be constitutional. The things that we like – none of us like to think of our constitutional rights as relative but we really know that they all are and that the world is full of all kinds of discrimination and there's constitutionally permissible discrimination and constitutionally impermissible discrimination. I wish I could find the right set of reasonable criteria that didn't have to be administered individually because I believe that's an impossibility that would actually be accurate enough to fit kind of the middle of that mold on what's constitutional and what isn't and that's pretty hard.

MR. BISHOP: It's tough and I empathize with the legislature in trying to find that correct treatment.

SENATOR HALFORD: Well - I mean I think obviously going to local is a huge step in the right direction but that doesn't mean that will make it work. Obviously it depends on what everything says.

MR. BISHOP: Mr. Chairman, Senator Halford, one of the other comments that was made in the McDowell case was a discussion, I can't remember it accurately offhand, but, about the question of a community priority versus an individual community, basically what they said was that the community was the sum of the individuals and I have sometimes thought that if you're looking at an individual priority, for example, then it's not illogical to think that you could sum the individual priorities in a place that could be characterized as a community priority. Would it fly constitutionally? I don't know. But logically or rationally, you know if the individual priority is okay, then the sum of the individual priorities presumably might be okay. You get into some deep equal protection waters there, I think, that I don't have high enough boots on today to get into.

SENATOR HALFORD: Well and you complicate it with proxy harvest and the fact that only a very small percentage of the people are actually the harvesters for the whole community and they may be the people

through ambition, experience or whatever, who would be specifically excluded from any individual criteria based on need.

MR. BISHOP: Mr. Chairman and Senator Halford, I think that's a good thing to explore because – I'm just speaking for myself now, I can't say that AOC's actually considered this question so don't take it as AOC's scare tactics or anything but with regard to the question of being based on need or dependence, I don't know that that necessarily equates entirely to whether you're rich or poor. You know if, for example, you choose to rely heavily on resources as a matter of lifestyle, you may have a significant income I suppose, but still that is a part of your – again it goes back to being related to your values and if that's the way you want to live, you know, I don't know.

SENATOR HALFORD: One last question.

CHAIRMAN TORGERSON: Senator Halford.

SENATOR HALFORD: What would you think if the federal government passed an amendment to ANILCA that just said that for purposes of this act, all Alaska residents are considered to be rural?

MR. BISHOP: Well, Mr. Chairman, Senator Halford, I think with respect to the question of subsistence, they'd be a lot closer than they are now.

SENATOR HALFORD: Because we're – most of what we talk about is the difference between Tier I and Tier II.

CHAIRMAN TORGERSON: Other questions? [No response.] Okay, next we'll go to Julie Kitka and maybe Loretta. Do you want to both come up or one at a time or however you want to do it?

INAUDIBLE COMMENT

CHAIRMAN TORGERSON: Oh, okay, that'd be fine. Loretta come – please – and if you would just introduce yourselves for the record. That's for the camera so...

MS. LORETTA BULLARD, President of Kawerak, Inc.: Good afternoon. My name is Loretta Bullard and I am president of Kawerak, which is the regional non-profit for the Bering Straits region of Alaska and thank you for this opportunity to testify. We're a regional non-profit consortium authorized by the 20 tribally – federally recognized tribal governments in the Bering Straits region and I'm here on behalf of our corporation today and just to express our support for a state constitutional amendment allowing the state to come into compliance with ANILCA. We support the constitutional amendment proposed by Governor Knowles provided that it's coupled with implementing legislation that brings the state into compliance. We

urge the Alaska Legislature to allow Alaskans to vote on a constitutional amendment so that we can bring closure to this divisive issue. In the Bering Straits region of Alaska we have about 9,000 individuals residing in the region and I would guestimate that probably about 7,000 of those are Alaska Native. Nome is about 4,000, of which is about 50-50 and then in our villages it's predominantly Alaska Native. The folks in our villages are very, very dependent on the resources of the area – fish, marine mammals, birds and we believe that the harvesting and using of fish and game in our area and in other areas of the state is such a core part of our culture that unless that ability to harvest those resources is protected, that we feel that over time that our cultures and the resources on which we depend on if [indisc.] allowed access to those resources our ability to follow our way of life in rural Alaska will diminish.

Regardless of how anti-subsistence activists and legislators may address their arguments in terms of equal protection, state rights or common use, in essence they are arguing, and this is from our point of view, that the urban majority has a paramount right to destroy minority [indisc.] culture by sheer weight of numbers. I used to live in the Anchorage area and like many of you I'm sure, have gone down to the Kenai River and fished there at Russian River and I've seen the combat fishing and that's kind of how we envision the onslaught of urban people when they come to the rural areas and it's not that bad in our area but I think there's fear of that, that we can't compete with the sheer numbers of urban residents which would like to have the ability to hunt and fish in our particular areas. While Alaska state law provides that subsistence is the highest use of fish and game because the state court decisions have decided that everybody is a subsistence user, in reality there is no protection for subsistence users under state law and because the Bering Straits region is mostly state land, there's very little federal land in our area, chances are we're going to continue to remain under state management. I've heard folks talk about they want to do an individual criteria. They want to see the systems set in place based on individual criteria. Using myself as an example, I've lived in Anchorage but the time I lived in Anchorage I would never dream to present myself as being eligible for a subsistence priority. I live in rural Alaska and using individual criteria, assuming that part of that might be income, I certainly wouldn't be eligible for participation as a subsistence user, you know, and just thinking about the fact that, for example, when we go to fish camp it's myself, my family, extended family, I mean some people would be eligible, others wouldn't. I mean I don't know how you're going to split those hairs in terms of who gets to participate in subsistence fishing and who does not and so I just think that individual criteria will not work.

Although Kawerak supports a state constitutional amendment and a return to unified fish and game management consistent with ANILCA, this is by no means the way – no means universal within the

community. I think that was AVCP and Tanana Chiefs Conference that testified at the House Resources that they are in support of remaining under federal management. The federal subsistence management system is increasingly appealing, especially in regions where most of the land is federal. The Alaska boards, of fish and game for example, are politically appointed and their composition depends on the political whim of the governor and the legislature, which I think was illustrated here recently. There's a real risk in Alaska that individuals in institutions that oppose our way of life will be vested with the authority to destroy the very foundations of our culture. We need continued federal oversight to protect our ability to live off of the land. To have federal [indisc.], you have to have federal oversight.

Title VIII of ANILCA is the modern equivalent of a treaty. It replaces the aboriginal hunting and fishing rights that were extinguished in ANCSA and is just as much a part of the overall settlement as Native lands claim as was the transfer title to Native corporation lands. Nothing, not the U.S. Constitution, nor the 1867 purchase of Alaska from Russia, nor the Statehood Act, not ANCSA, not ANILCA, gives the majority urban culture in Alaska the moral or legal right to destroy the very foundation of our cultures.

In response to the four points that have been identified in the memo for this hearing, in terms of place of residence, we believe that a local residence subsistence priority might be developed that works as well or better than ANILCA rural preference. We think that doing so would be very complex and that the language creating that would have to be developed along with the constitutional amendment because you can't analyze that unless you have something to actually look at. ANILCA in effect is already a local preference since the preference is for non-wasteful uses and subsistence uses are defined as customary and traditional uses by rural residents. The customary and traditional part of the definition implicitly contains a local limitation since, for example, there's no customary and traditional use of fish and game stocks that are too remote for community access. It does need to be, I think, the use areas. Local use areas need to be defined pretty broadly. People do travel a long ways, for example, when they're going caribou hunting. 150, 200 miles is not unusual. We suspect it would be possible to draw up the rural residence limitation and develop a system based on CNT findings and/or a local priority that would work just like ANILCA in rural areas but would have the advantage of not precluding some subsistence priorities for urban folks in their own areas but again you need to see supporting legislation and we think it would be very difficult to develop this in a special session actually. The more a proposal deviates from the existing ANILCA language, the more complicated the discussion and the more important it is to see the entire package.

In terms of the legislative discretion on the may versus shall, initially our region – it didn't really matter to us whether it was

may versus shall but yesterday, I think it was Charlie Cole, was testifying in the House Resources Committee [indisc.] suggested that if the language was may, that the parties could continue to seek amendments to ANILCA which would just kind of drive this whole process on for the next 20 or 30 years with people going back to Congress trying to amend ANILCA. For that reason, we support the word shall in the constitutional amendment. We don't want to see this argument carried on for the next 30, 40, 50 years. It's time to put it to rest.

I encourage the state legislature to put a constitutional amendment on the ballot that will provide a rural priority for subsistence. Every year rural Alaska's engaged the - six times - rural Alaska's engaged the state legislature in trying to get this issue addressed. We've been blocked for the last 12 years by a small group of legislators who are opposed to a rural priority. We need to address this issue and move on. The longer rural Alaska stays with the federal system, the better that system is working and the situation, if it's allowed to continue, will evolve to the point where a majority of rural Alaskans will oppose a return to state management. The state is already losing many of its experienced fish and game personnel to the federal system who collect their state retirement and go to work for the feds. Right now the state has management authority over 104 million acres of state land and 44 million acres of Native lands. The feds own and manage the rest. Unless the state legislature acts to gain management by amending the Constitution [indisc.]. Thank you for the opportunity to testify.

CHAIRMAN TORGERSON: We'll pick that up in a minute. My staff just left so we'll get that handed out. Questions? Senator Taylor.

SENATOR TAYLOR: Thank you for your testimony. I appreciate it. I'm trying to understand the fear - the Russian River example that you used. I mean I've been there and I can assure you I'm frightened of it too. They haven't got a road to Wrangell yet so I [indisc.] heard about them reaching there but... Under state management do you have any example of people within your region being denied access to subsistence resources by the state?

MS. BULLARD: Yes, I do actually. I would say just recently the state finally changed its game [indisc.] regulations in our area from once every four - it was once every four years for both subsistence and sports hunting and part of this, it's probably been for the 10 years prior to that we were trying to get them to amend....[END OF TAPE]

TAPE 02-33, SIDE A

MS. BULLARD: ...years ago but part of that used to be on an annual basis and, for example, my uncle that used to go out every year to get a spring bear was unable to do that when it was once every four years. Then he went out once every four years to get a bear. Now we

have this huge bear population in our area, which Fish and Game finally made the change to allow people to take annual takes of bears but we had to argue that point for ten years before the state Board of Game process.

SENATOR TAYLOR: But you've had it now for four years?

MS. BULLARD: For four years, and now people are hardly hunting bears anymore.

SENATOR TAYLOR: Yea, I understand that. Thank you.

CHAIRMAN TORGERSON: Any questions? Senator Lincoln.

SENATOR LINCOLN: Just a quick comment. I appreciate the folks in the room staying around the three extra days waiting to be heard and I know you have a plane to catch and I would have said that to Dick too but I know he is here most of the time, but I do want to express my appreciation for you and others who have stayed around to testify.

CHAIRMAN TORGERSON: Are you going on the 7 o'clock? Is that ...? If there are no more questions you can certainly leave or wait for Julie or whatever you like.

UNIDENTIFIED SPEAKER: She's getting home.

SENATOR LINCOLN: We will eventually too.

SENATOR TAYLOR: It all depends on you.

5:45 p.m.

MS. JULIE KITKA, President, Alaska Federation of Natives (AFN): Mr. Chairman, I would like to ask Carol Daniels to accompany me up here. Well, first of all, Mr. Chairman and members of the committee, I want to extend our appreciation for you holding this hearing. I know that you have many issues that you're dealing with and many crises and it is an intensely difficult period of time to kind of focus on anything, let alone this issue on that and I do appreciate the hearing.

First of all, I want to note that we have a number of distinguished Native leaders in the audience who, if time were allowed on that, would have been more than willing to provide very important information to the committee of what's happening on the ground in our villages and why they do or do not support a return to state management – and a reference – the president and distinguished former legislator Martin Ivan, and the president of AVCP who is in the audience. And, like I said, there's other folks that are here that have very important perspectives so if at some point there's an opportunity for opening up the hearing or getting additional

witnesses and stuff, there's people that have traveled in that would be very helpful.

So, I want to just alert the committee that we have, at our own expense in our own effort to be helpful to you and your deliberations on that, assembled a team of resource people that are both experts in both federal Indian law, that are experts in co-management arrangements that have a number of different expertises, that can contribute should there be an opportunity to move forward and try to pull all of the pieces together for resolution on that that we have, like I said, put together a good team to try to be helpful. I also just want to state, for the record, many people think that we just are advocating for our own needs and our own people on that but our view is the welfare of the resource is very important and that is one of the reasons why we stay at the table, not only to try to help the state regain some semblance of harmony and bridge this divide that keeps growing, but we do care about the resource under split dual management and whether or not, in the long term, that is going to be helpful or harmful to the resource, as well as our people who depend on it.

I also wanted to highlight a few things that are new. There's an awful lot that we can provide to the committee that we would think would be helpful for your deliberations and many of you have seen that over the years but I did want to put in the record a 13 page analysis that we put together of what our advisors believe the state needs to do to reassume management and we offer it in the spirit of being helpful. We urge your committee counsel to take a look at it and if you agree or disagree on that, but that's our definitive assessment of what it takes for the state to regain and I'd like to have that introduced in the record. [See Appendix I.]

The second thing I would like to introduce on the record is a videotaped copy, and we don't have a written copy, of a recent U.S. Senate Indian Affairs congressional hearing on subsistence that was chaired by Senator Inouye and other senators attending – Senator Frank Murkowski and Senator Ben Nighthorse-Campbell from Colorado - and I ask that that be put into the record, primarily for a couple of things, is, we asked for that hearing primarily to inform the committee of what was happening on the ground in our communities with the fish shortages and to be able to lay out for the congressional committee the seriousness of this continuing conflict, the seriousness of how everything that is going on impacts real people in their real lives and I'd like to introduce that into the record. At some point, you know, that might be something that you might want to reference back, if you want a refresh why we're all doing this and why we're working real hard to try to resolve it is there really are people that are depending upon this and they are being harmed by the current impasses going on. The second reason why we asked for this congressional hearing is the Native people, as many of you know, have not sat on the sidelines during all these years. We have constantly

tried to look at solutions and bring forward ideas and so we wanted to inform the congressional committee what our best thinking of Native solutions and there was a range of solutions on that but if, in your reference, if this doesn't get resolved in this special session, if you want to take a look at some of our best thinking, we want to introduce it in the record just for your information and review.

[A COPY OF THE VIDEOTAPE OF THE U.S. SENATE INDIAN AFFAIRS HEARING THAT MS. KITKA REFERRED TO IS LOCATED IN THE SENATE RESOURCES COMMITTEE FILE IN THE LEGISLATIVE LIBRARY.]

We also wanted at the time to have the best thinking of the state and the federal government on what the status quo is and that, again, is in the hearing record – a snapshot from the state's perspective and a snapshot from the federal so just take a look at that and you'll get a good hands-on view of what's going on and I urge – if you do have the time to take a look at that, both the video or the unofficial written copy.

The third document I'd like to put on the record, and would ask permission to do that, would be a couple of documents [Appendix II] from churches that is recent new things – both the Catholic perspective on subsistence, the current pastoral letter that the Catholic church and bishops put out in the state on that and I think that that is a new development, the churches stepping forward saying there is a spiritual aspect to what is going on. There's a religious freedom aspect to it. There's a moral issue at stake and both the Catholic pastoral letter as well as the Episcopalian statement from the Bishop of Alaska on that I think will give you a very clear picture in very recent terms of their deliberations and their meetings and what they feel [indisc.] and, again, we feel very strongly that there is a very serious religious aspect in this conflict that is very much in danger of being trampled upon as people look at quick and easy solutions on that and we urge you in your deliberations to reflect on that aspect.

The fourth document I'd like to ask to be included into the record is a recent Alaska Advisory Committee to the U.S. Civil Rights Commission report, which was released just several weeks ago. It's a 53-page document specifically on Alaska. Many of you recall the horrid paintball incident in the state and the lack of a really timely response by any governmental or other entity to provide a forum for people to express their pain in what has been going on. In response to that, we asked the U.S. Civil Rights Commission to come up. They've held several hearings on that. They have released their preliminary report. It's 53 pages and there is a segment on the subsistence hunting and fishing rights and I bring that to your attention, especially in light of previous testimony referencing civil rights and what that is and I also urge you to consider at your very earliest opportunity a very serious inquiry, by this legislature, in the things that are documented in the reports both

dealing with homicides and unresolved murders and discrimination and a whole range of things on that. We are going to be asking the U.S. Attorney General and the Justice Department to take a look at it but I strongly feel that this is also a legislative and administrative responsibility. I particularly bring this to your attention with the segment on subsistence hunting and fishing but I do think that there's a whole lot of really critical, important issues that I feel that you would not be fulfilling the best responsibility to all of us citizens on that if that was not given some serious attention.

[The Alaska Advisory Committee to the U.S. Commission on Civil Rights report can be accessed on the internet at www.usccr.gov/pubs/aksac02/main.htm or in the Senate Resources Committee file in the Legislative Library.]

The next item I'd like to ask to be included in the record, and this is in specific response - we've participated in the hearing in the House Resources Committee the other day chaired by Representative Beverly Masek and one of the first witnesses was one of your colleagues, Senator Jerry Ward, introducing his draft legislation on a local preference and we have put together a more refined analysis than what we were able to give at that time, both a one-page analysis on bullets and a longer six-page analysis on issues pertaining to that [Appendix III]. I would like to ask that be entered into the record and I have counsel here that can go over point-by-point of those aspects on that should that be something that you're of interest.

Like I said, in regard to the Governor's legislation, AFN is in support of the Governor's constitutional amendment. We think it can be strengthened. We have draft amendments, which we would like to be considered in regard to that amendment. We have language, what that constitutional amendment would look like with those amendments and the primary reason why we're supportive of that is we do believe that it's important for this rural-urban divide to be addressed and taken seriously. We're concerned about inaction but even more we're concerned about the wrong actions being taken by the legislature and one of our biggest fears is the legislature might get carried away with some idea and go and pass something and my worst nightmare is the Native community would be urged to vote against a constitutional amendment or an action because, in our people's judgment, it does more harm than good. So it's better to leave it at the status quo than try to put something forward and stampede it. And the people that are most affected by it are the ones that feel that they're being damaged even more and so I urge extreme caution and [indisc.- paper shuffling] doesn't have a core amount of support from the Native community on that. I think it's better to leave it at the status quo and spend more time working toward solutions rather than build that route and so I just want to – I'm not putting that on the table as a threat. It's a great fear that I have.

My people are very concerned with how politicized this has been over the years. I've had people tell me that they feel like they're being kicked around and they just hate it. They just hate all of this attention over such a small amount of resources. Sometimes it seems like how people are being treated it really is making a mockery of our people's way of life and our people believe in our values and somehow that's gotta stop and there's got to be a resolution that's fair, it's gotta be a resolution that the Native people can support and live with and this continuing polarization has got to stop. The legislature's got to step up to the responsibility and not do things that just drive people apart and so I just want to conclude with that and would ask that that be put into the record and would like an opportunity, if you wish to have some specific response on the local bill, to ask Carol to address some of those specifics. We have seven main points that we wanted to address on that. If not, you can just take a look at the written statements and, at a later point after you have a chance to digest some of this you want to call us back or if you want to do whatever, we'll be here and our people are prepared to answer questions, are prepared to draft additional analyses if people have questions, respond to written questions, you name it.

CHAIRMAN TORGERSON: Carol, how long would it take you to go through your seven points?

MS. CAROL DANIELS, AFN Counsel: Well, it's a one-page document. I could go through it pretty quickly but it's directed...

CHAIRMAN TORGERSON: Why don't - just focus on the local aspect. Is that what you're talking about?

MS. DANIELS: Right.

CHAIRMAN TORGERSON: Okay.

SENATOR TAYLOR: Maybe before you do that...

CHAIRMAN TORGERSON: Senator Taylor.

SENATOR TAYLOR: I'd move that each of the documents, including the video that Ms. Kitka has requested, be made part of this record and I'd also do the same as concerns letters. We've received several from different organizations and other people that they also be included and be made a part of the record.

CHAIRMAN TORGERSON: Without objection. I was going to say that earlier but I got off track [indisc.] and I didn't want to interrupt you so – we do want those documents and certainly to read and I appreciate your offer to hang around until we can digest this. It's a lot of information.

MS. KITKA: Yes. Like I said, we're willing to spend as much time.

We’re very patient and we will respond to any written questions as well.

CHAIRMAN TORGERSON: Great. Thank you. Senator Halford.

SENATOR HALFORD: We’re not going to have time for questions?

CHAIRMAN TORGERSON: No, I think we will. I just wanted Carol to go through that if it wasn’t going to be real lengthy and then I think that may couch a few more questions, is what I’m thinking. Go ahead and introduce yourself for the record.

MS. DANIELS: Thank you Mr. Chairman. My name is Carol Daniel and I work with the Alaska Federation of Natives. I am an attorney. Basically the seven points that we put together were directed primarily at Senator Ward’s proposal but they are some of the points that we make in that paper that would be applicable to any formation of a local priority. First I would like to point out that a local priority would require both a constitutional amendment and amendments to ANILCA as it’s worded in the Ward proposal. The preference in that proposal is not mandatory. We think it needs to be mandatory and I think you’ve heard testimony from Ms. Bullard to that effect. It is the position of AFN that it should be a mandatory priority.

Although a local subsistence priority – the priority that is contained in Senator Ward’s proposal, is being described as a local subsistence priority, it – the preference that it authorizes would not be in place at all times, only in times of shortages. In other words, until there’s a shortage there would be no means for the boards of fish and game to accommodate customary and traditional harvest practices of people who live in those local areas and that, in terms of special seasons or bag limits so we see that as a problem in that proposal.

The proposal also is – uses the term ‘in the vicinity.’ That term is very vague. It will obviously entail drawing boundaries. It is a term that hasn’t been used before in either federal or state law and without foreseeing the implementing statute, it is difficult to tell whether those boundaries would comply with local areas customary and traditional harvest practices. We think that local area or local residency would be very difficult to define in any local residency. We’ve seen how difficult it has been to define rural and that is a more well understood term than local and there’ve been many permeations or suggestions on the local everything from a local game management unit to a regional ANCSA lands to what the Governor’s proposal proposes, which is customary and traditional use areas within rural areas so we think it will be very difficult to define and one of our suggested amendments attempts to address that issue.

The reference – I’ve lost my – I apologize for a moment. If the subsistence area provision of the state law is retained, a local

priority is not likely to benefit residents of tribal communities who have been surrounded by an urban population since most of their customary and traditional harvest practices occur in the areas where they live. The – I've already mentioned the fact that the priority would operate only in times of shortages. Proximity to the resource or place of residence – that has been put forward various times as a proposed local priority and, in terms of whether that would comply with the McDowell decision in requiring – in that case the court held that the urban-rural classification was extremely crude, as has been pointed out by other witnesses, so we feel the term 'proximity to resource' is also not specific enough to give the legislature the direction that it would need to enact the enabling laws that would be consistent with that.

In terms of the Ward proposal, it uses – references the term 'rural area' in the last sentence and implies that there would continue – which implies there would continue to be the non-subsistence or non-rural areas within the states where subsistence uses would not be allowed. As I've pointed out, this would not benefit those surrounded tribal villages who harvest in that area. It also uses the term 'one who has customarily and traditionally used fish' which tends to define user instead of under the federal law, which refers to subsistence uses as opposed to users and is fundamentally different from a resident of a rural area.

Finally, the proposal as introduced by Senator Ward does not provide authorization for distinguishing among rural residents when there are insufficient resources to provide the priority to all residents of a subsistence harvest area. I think the problems with coming up with a local priority are outlined in the longer paper and it would take longer to go through that point by point so...

CHAIRMAN TORGERSON: That's fine but that was a good overview and I appreciate getting that and we'll read through that. I just have two questions before I open this up. I understand that you do not support the resolution as written now, the Governor's resolution.

MS. KITKA: AFN does support the resolution and we would like to see some amendments added to it to strengthen and clarify it and I...

CHAIRMAN TORGERSON: But without the amendments, and I'm trying to separate the two, without your amendments do you support this the way it's written currently?

MS. KITKA: We think that the – if – we would like to have you consider the amendments that we have and if you choose not to do the amendments, we would like you to move it out of committee and give us another opportunity as we go forward to keep working on those amendments. We think the amendments are very straightforward and they're nothing new or surprising or that we have asked for in the past at all so they are just core concerns...

CHAIRMAN TORGERSON: We're not going to take up amendments today but make sure you include those at least in my packet – well to everybody so we can all – or we'll make the copies and give it to everybody.

MS. KITKA: And the key thing on the local, just to sum up for Carol's thing, is we feel very strongly that we're not talking about writing on a blank piece of paper, you know, since ANILCA's been passed, there is a lot of history and a lot of litigation and the conflict over things, a lot of things settled and now, you know, opening up, going down new paths or opening up a whole lot of things that have already been settled and litigated and you should not make the mistake of thinking we just have a blank piece of paper and all of a sudden designed something else. There's a lot of history and a lot of work, a lot of the terms that have been defined in different courts. A lot of our people have used the judicial system, which is their right, and have spent resources, time, years of time pursuing their rights and just to, you know, just flip over their court decisions or say it's not important anymore and that does not do a justice to the people that have been, like I said, trying to be good citizens and exercising their rights when they feel that the government has overstepped the [indisc.]. I just wanted to just remind you because often we get tempted like – here we have another special session, we have a new opportunity that - it's not a blank sheet, it really isn't.

CHAIRMAN TORGERSON: And my last question for either you or Carol, I think I picked up that you believe if we pass the amendment, the Governor's amendment, that we need a change to ANILCA because of – okay, go ahead, or either one of you.

MS. KITKA: No, we were talking about Senator Ward's bill.

CHAIRMAN TORGERSON: Oh, all right. I was on the wrong track.

MS. KITKA: In fact that is one of the reasons that we are more attracted to the Governor's proposal because we believe that that can help the state regain management without ANILCA amendments. Our people are very much in opposition to ANILCA amendments and I also wanted to bring to the committee's attention something that we have said for years is our fear if ANILCA gets opened up, we're not the only people that would be affected. Other Alaskans would be affected as well. We have said for years that the environmental community, the environmental lobby in this country, has always had a strong interest in what happens in regard to ANILCA. You don't have to look any further than the Bush Administration's recent policy on the Tongass to know that the environmental community will see opening up ANILCA as another opportunity to overturn the Administration's policy on that. You have seen recent examples of them galvanizing and exercising their strength in the ANWR debate and you cannot expect that if you open up ANWR that you are only dealing with the Native

community and that’s it. You are going to have all kinds of interests. Every time that we deal with issues like this back there, we get hit with other competing ones that want to extract a pound of flesh out of us in order for us to try to protect our interests and I think that the state should be very weary of just opening up – and just saw that in the paper the other day on the Tongass one and it reminded me so...

CHAIRMAN TORGERSON: Yea, thank you. Senator Halford and Senator Taylor and Senator Wilken.

SENATOR HALFORD: Thank you. A couple of things, one is the question of only in time of shortage. If there is essentially no shortage, there’s a long moose season in the fall and there’s a long moose season in the winter when everything is frozen so you can keep meat, why is there a need for a preference? If there’s adequate resource for long seasons and reasonable opportunity for harvest, why does there need to be a preference in that time versus only in time of shortage.

MS. DANIELS: Mr. Chairman, Senator Halford, I guess I would point to the Bobby case, the litigation over the Bobby case, Lime Village, as an example of why the priority is important to be in place at all times, even if there are an abundance of the resource and the reason for that is that Congress, in passing Title VIII of ANILCA, was intent on protecting a way of life – a subsistence way of life for rural and Native people and part of that way of life is the customary and traditional harvest practices of the people who live in rural Alaska and, in the Bobby case for example, there is no local store or at the time there was no local store, the state regulatory system had imposed individual bag limits and restricted seasons where you had a group of people, a small group of people in the community who actually did the hunting for the community and they hunted when they were hungry or when they needed the meat. So, and the court found that in setting those regulations, that the Board of Game did not take into consideration the actual practices of the people who live there so I think – I mean there are other examples.

SENATOR HALFORD: Let me just – so it is your opinion that the framers of Title VIII intended exactly what the Bobby case said, which was that the priority occurs whenever there is any season at all, any bag limit, any limitation on normal methods and means that basically there always had to be a priority if there were any limitation at all on any taking at any time of the year in any way? And that’s what the case says as I read it.

MS. DANIELS: The case criticizes the [indisc.-coughing] – the record did not support the regulations that were put in place for the village of – for Lime Village and I think that the court was correct in that the board should have been taking into consideration the residents of that community’s customary and traditional harvest

practices when they set the regulations. I'm not suggesting, and I don't think anyone would suggest, that the law requires there to be no regulation of subsistence. It depends on what the customs and traditions of the people of the community are. Not every village in Alaska warrants a year-long season and no bag limits but...

SENATOR HALFORD: In the case of Lime Village the result is a year-long season and no bag limits, is it not?

MS. KITKA: Mr. Chairman? If you'd like, we have Lime Village's counsel here in the audience and I would like to invite him up to give just a very short background on that. This is a very important issue. Mr. Calswell (ph)?

CHAIRMAN TORGERSON: Good afternoon. Introduce yourself for the record.

MR. BILL CALSWELL, Lime Village counsel: Good afternoon. I'm Bill Calswell. I'm a lawyer from Fairbanks and it's been a long time since I litigated the Lime Village case but I think you're right, Mr. Chairman, if I may, I think Senator Halford's right about the reading the case and I think we think that's what Congress intended in ANILCA by mandating that the subsistence – customary and traditional subsistence uses - shall have priority over all other uses.

SENATOR HALFORD: It is an all time, continuous priority whenever there is any restriction at all in any use.

MR. CALSWELL: Whenever there is any restriction of customary and traditional uses, then you can't continue to allow other...

SENATOR HALFORD: ...any other use.

MR. CALSWELL: ...other competitive uses to the same level if you have to impose those restrictions and, in the Lime Village case, you know, the result wasn't year-round seasons with no bag limits. The ultimate result was, excuse me, and this is in the federal regulatory scheme now for the part of the hunting grounds that are out there on federal land, there's a community bag limit for the village for both moose and caribou so even though the seasons are year round, there is a limit on the harvest which is based on the best estimate of the customary and traditional harvest levels for that community so each individual hunter is not limited by an individual bag limit but there's a community harvest reporting system that, in effect, caps the harvest [at] that customary and traditional level.

SENATOR HALFORD: I'm glad you added 'in effect.' I haven't got any other questions.

CHAIRMAN TORGERSON: Senator Taylor?

SENATOR TAYLOR: I have made this suggestion before and it was well

received at the time but it didn't fit politically with some agendas. I want to make the same suggestion. By the way Julie, I was in Washington, D.C. and I already had the opportunity to watch a good part of the Inouye hearing and I'm glad you brought that tape. Thank you because I think it does get some interesting points we haven't really talked about much before and we need to. My suggestion has been a system where we get rid of the term advisory on our game boards and our fish boards and we turn them into regional fish and game boards and give complete autonomy and control to the people within those regions to set bag limits, seasons, etcetera, and to make certain that they protect the subsistence users who actually use it for sustenance and not to just sell some eggs to the Japanese fish buyers. [Indisc. - paper shuffling.] If we want autonomy and control, and when I say 'we' I'm talking about the rural people that I represent, we get very frustrated with state fish boards and I was scared to death at the current state game board [indisc.]. I didn't think another wolf would ever be killed around McGrath if those people sat there. I would only retain the game board and the fish board as appellate boards for biological purposes only to make sure that the herds and the runs of fish were protected and that over-consumption, over-use, did not occur. That system of course would require all of us to trust one another. The commercial fishermen would have to trust the sport fishermen. The sport fishermen would have to trust the subsistence fishermen. All Alaskans would be afforded a level of respect. I think that that system, which would throw out the federal bureaucrat that we all have to pay some sort of deference to the federal bureaucrat that destroyed the salmon runs of Southeast Alaska. I don't know anybody in my district who wants the federal government to come back in and start managing our fish. They destroyed them. Maybe people in your area want federal management. I hope it's much more successful than the federal management that my people saw pre-Statehood. I don't know why there is such an inability to trust one another that we can't allow the people of the Kuskokwim to decide how many caribou are taken in that area, how many fish are taken in that river, what communities should take because, you see, we do have the power under the Constitution to regulate uses of resources and that's very possible for all of us to do right here. You know the only reason we won't be able to do that is because we can't do it on federal land. They passed a law that says we don't get the right to trust each other there.

I would hope someday Alaskans can sit down around the very same table and trust each other enough to let the people in Nome take care of Nome, let the people of Wrangell take care of Wrangell [indisc.] and I propose that to you and I have before, everybody says, gee that would be a wonderful idea but we really can't do that. We're all hung up on ANILCA, we're all hung up on a state subsistence law that doesn't work very well and [indisc.]. I throw that out because I'd like you to reconsider that. I believe that's what every elder that I listened to in 1960, as I attended every single land claims hearing in this state - I think that's what they said. I heard them saying we want autonomy. We want some control locally. We don't want you guys from Washington, D.C. or some guy from Wrangell to tell us how to run our fish up here. [Indisc.]

CHAIRMAN TORGERSON: You'll reconsider that, right? Whatever it is – I don't want to debate something we don't even have before us today. Senator Halford, then Senator Wilken.

SENATOR HALFORD: Just coming back to the question of the priority among rural residents, and I assume that was Tier II by your attorney, do we think we have any problem with that constitutionally because that really was a much more accurate priority under the existing constitutional authority, was it not? You mentioned as a shortcoming of the other proposal that it didn't provide for a priority among rural residents as Tier II of the federal law does. Has there ever been any really serious consideration that Tier II was somehow unconstitutional under the state constitution?

MR. CALSWELL: Well, in the Kenaitze case, the Alaska Supreme Court [indisc.].

SENATOR HALFORD: That was on local.

MR. CALSWELL: But that was one of the Tier II criteria so they held that...

SENATOR HALFORD: Okay, I got you.

MR. CALSWELL: They held that component of the Tier II criteria.

SENATOR HALFORD: With the exception of the – I was thinking of the dependence, alternative resources, the Tier II criteria that would remain if you use local as the entry screen criteria. I'd never thought there was any problem with those criteria.

MR. CALSWELL: I don't - as far as dependence on the resource and availability of alternative resources, there hasn't been. But it was the proximity of the resource – the third criterion that the Supreme Court...

SENATOR HALFORD: You would have to overturn Kenaitze with regard to the term 'local' with a constitutional amendment to be able to use it. I agree with that. Just a couple of other questions kind of based on the first sentence of the constitutional amendment proposed by the Governor refers to the subsistence traditions of indigenous people. Would that matter if it was the – as Mr. Bishop mentioned, the question was what about the subsistence traditions of non-indigenous people? Would that matter if it said the subsistence traditions of all Alaskans and is that a place – that seems like the statement that puts subsistence as the highest and best use. And then the second portion of the Governor's proposal is how that is really going to be implemented in terms of who gets it but the positive statement about subsistence I would think would apply to all Alaskans.

MS. KITKA: I guess our interest in that provision is the recognition of Native people as indigenous people. We don't see why there's anything to be fearful of that. I mean we look at the State of Hawaii's Constitution and they have Hawaiian Native preference rights right in their constitution. It's something they're proud of and I

just think that that's a value to have in there. I don't think it denigrates anybody else by doing it. It just recognizes indigenous people were the first people here and that – you look at congressional findings on Title VIII and they differ between how they describe the congressional policy toward Alaska Natives and other rural residents. I don't have the words right there but if you looked at that they don't describe them the same even in the congressional findings.

SENATOR HALFORD: Yea. I haven't got any problem with the mention of indigenous people. The thing I was concerned with is it looked like, by the way Mr. Bishop read it, that it is saying that the only subsistence traditions that are intended to have a priority were the subsistence traditions of indigenous people and I would think that we would be looking at – I mean you don't get to rural people if you don't recognize all rural people in terms of the threshold statement as well. That's what my concern was. I'm not saying take something out. I was saying add something.

MS. KITKA: I'm sure that there's a way that you could redraft-add other language into that. In fact, I think one of our amendments might have some changes to that provision.

SENATOR HALFORD: With regard to the third, I guess the third section, it looks like a, b, and c, the Attorney General testified that there is nothing in that section that couldn't be done already under the existing Constitution and my thought would be that if we don't need it to fix something, maybe we don't need to put it in there just because it's not broken. Is that a piece that is of interest to AFN?

MS. KITKA: I think that that is in there for a specific reason to try to respond to other Alaskans that would like to have it in there meaning I don't believe that originated from the Alaska Federation of Natives. Look at our written position on the Governor's package and our proposed amendments and the rationale on that. Our primary concern is to address the needs of our people in a fair way, in a permanent way. I mean the whole issue of shall versus may, we're very fearful that if it says may, we're just going to revisit warfare in the state for the next 20, 30 years and we'd like some finality to this. People are going to go through all this process of voting on a constitutional amendment so that is why we're asking for shall versus may. Like I said, it will just continue on indefinitely if it's just at the whim – just the dynamics of the politics of the state and that troubles us.

SENATOR HALFORD: The third section, I guess basically you said it's not your concern particularly. It was there to answer some of the...

MS. KITKA: Our concerns, other than the straight rural priority, is our Native people that live in urban areas and in particular our Native people that are living in areas surrounded by urban growth and we, you know, our solutions are amendments to the Governor's proposal all deal around strengthening things like that.

SENATOR HALFORD: Okay.

CHAIRMAN TORGERSON: Senator Wilken.

SENATOR WILKEN: Thank you Mr. Chairman. My question revolved around line 8, the issue of indigenous peoples, and I think Senator Halford asked the question I was going to ask so thank you, I have an answer.

CHAIRMAN TORGERSON: Senator Lincoln.

SENATOR LINCOLN: I have just two quick questions bur first I have to – my good friend on my right leaned over when Senator Taylor was asking about expanding the boards of game and fish to instead of advisory to mandatory boards of fish and how long that would take to get through the process of confirmation since we couldn't quite get through just a couple of names here. I thought that was good.

[Indiscernible comments by several members.]

SENATOR LINCOLN: Well because they're not advisory see, when they go from advisory to policy making and we would have to do that perhaps...

SENATOR TAYLOR: You'd let the local people elect them.

SENATOR LINCOLN: But anyway Mr. Chairman – Julie, I asked the other testifiers what would happen if we do nothing this year on the subsistence dilemma and I'd like to hear your response to that, and the second question that I've got is how important is it to AFN for the language of co-management in the whatever resolution that we come up with for the fish and game and other resources.

MS. KITKA: Well let me address the co-management issue first and, again, there is someone in the audience on that that would be, at some later time if you want to get into that on the whole area of co-management with concrete examples across the Arctic where that's used as well as examples here in the state. Co-management is a very progressive management tool. It is something where I think the State of Alaska needs to go towards. It's very highly used in Canada, very successfully, where they have over a thousand Native villages. It's a way to involve the local people in decision making. It is not something that state or federal government usually voluntarily steps into it because they're evolving some authority and they normally don't like to do that, at least the state or federal agencies, and so it's something that takes leadership in order to make happen but I think that that is one of the essential pieces of the resolution to this in the long term. It not only brings your state of management in the state up into the next century instead of being old and antiquated on a military-type model of bureaucracy, it brings you into the new age of involving people at the greatest extent at the local level whose lives are affected. That's my short version of why I think it's important. I ultimately think it will be an essential component when you come to a resolution of this because I believe that either yourselves, if this gets resolved here, or the Congress, if it goes back to there, will see in their wisdom that the co-management is something that's a very powerful tool. It doesn't have

to be a threat to people. It can, like I said, develop in the state instead of just kind of looking at the way people always did things in the past so I would say it's very important to us. It's very important to different regions in the state. There are successful models that are working now. [Indisc. - paper shuffling] Delta area, you can look at a number of examples where it is not a threat to people and yet it empowers the people to be more involved in – I believe that if people are more involved in that kind of thing, they're going to take better care in paying attention to the resources and the long term survival of the resources so it's really good for the resource in our view.

On the issue of what happens – you mean if the Legislature does nothing, I think that you just see the gridlock stay in place. We're very happy with the federal advisory boards that are in place that make up part of the system of the federal subsistence board and our primary reason – not only have they got 10 plus years of making decisions on the game level and starting to build more experience on the fisheries, but our primary reason is that they've got a lot of really good people appointed that are very well respected in their communities and we respect their judgment, we respect their dedication, and so we would expect they would continue and do the best job they could in a system which ultimately really is broken in the state between the feds and the state so I know that people would still take a look at the resource and the welfare of the resource first, but people would make that work. I do believe that you'd probably see continuing litigation. You'd see continuing conflict. You would see probably more people, at least from the Native community, pull away from wanting to help the state regain management. Already you can see by how few people come down to the halls in the special session how much people are disillusioned and are not trustful and don't believe anything's going to happen and what it is is it's years and years of experience and people's stress level is just not there and so I just think that heightened and continued that. That's my assessment. It's not a very good assessment but people will make the best that they can of that. That's all I can think of.

CHAIRMAN TORGERSON: Other questions?

SENATOR HALFORD: Thank you.

CHAIRMAN TORGERSON: I'd like to thank all of the panel for coming out today and I know – I gave you the letter on short notice so I appreciate you hanging out. Make sure we get copies of the things you wanted us to – oh, we already go them, okay. With nothing else to come before us we will adjourn for today. [APPENDICES ATTACHED.]

REQUIREMENTS FOR STATE RE-ASSUMPTION OF SUBSISTENCE MANAGEMENT ON THE PUBLIC LANDS

Section 805(d) of ANILCA, as amended in 1998,[1] offers Alaska the option of managing subsistence uses of fish and wildlife on federal "public lands" if "the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805." Section 803 defines "subsistence uses" as, among other things, "the customary and traditional uses by *rural Alaska residents."* Section 804 requires that "the taking on the public lands of fish and wildlife for subsistence uses shall be accorded priority over the taking ... for other purposes." Section 804 also requires that, when subsistence takings must be restricted for conservation purposes or to protect continued subsistence uses, the subsistence priority must be implemented through the application of three criteria (customary and direct dependence, local residency, and availability of alternative resources), known in state legal parlance as the "Tier II" criteria. Sections 805(a)-(c) establish a local/regional system of local advisory committees and regional advisory councils for the purpose, in the words of section 801(5), "of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands."

Since the July 1, 1990 effective date of the Alaska Supreme Court's decision in *McDowell* v. *State,* 785 P.2d 1 (Dec. 22, 1989), the State has been disabled by the Alaska Constitution from complying with the conditions set forth in section 805(d) of ANILCA. Consequently, the federal Departments of Agriculture and

---

[1] The 1998 amendments, in conjunction with the final *"Katie John* moratorium," deleted "one year after the date of enactment of this Act [i.e., December 2, 1980]" from section 805(a) and "within one year from the date of enactment of this Act" from section 805(d). Pub. L. No. 105-277, § 339(c), 112 Stat. 2681, 2681-296 (Oct.-21, 1998). By thus eliminating ANILCA's original one-year deadline. Congress enabled the State to displace federal management at *any* future time that it might choose to comply with the conditions of section 805(d).

the Interior ("the Secretary") have been responsible for managing subsistence uses of fish and wildlife on federal lands and waters for the past 11 years. In *McDowell,* the Court held that the so-called "equal access" clauses of Article VIII of the Alaska Constitution ("a special type of equal protection guarantee," 785 P.2d at 11) prohibit the Legislature from affording a priority for subsistence uses on the basis of "rural" residency.[2] The Court accordingly invalidated the 1986 state subsistence law insofar as it limited the subsistence priority to rural residents, as required by ANILCA. Subsequently, in *State v. Kenaitze Indian Tribe,* 894 P.2d 632 (1995), the Court unanimously invoked *McDowell's* construction of the "equal access" clauses to prohibit the Legislature from utilizing local residency for *any* subsistence-priority purpose, even as one of the three "Tier II" criteria of dependence and need to determine which subsistence users should be preferred when a particular fish or wildlife resource is not sufficiently abundant to satisfy all subsistence uses.3 The Court viewed the statutory "proximity" criterion as a residency-based bar to participation in Tier II subsistence uses, and hence an

---

[2] The three provisions of Article VIII which the Court terms the "equal access clauses" are the Common Use Clause (§ 3), the No Exclusive Fishery Clause (§ 15), and the Uniform Application Clause (§ 17).

The Common Use Clause provides:

> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

The No Exclusive Fishery Clause provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

The Uniform Application Clause provides:

> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

The Sustained Yield Clause (§ 4) also is relevant; it provides:

> Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

[3] The three Tier II criteria of the 1992 state subsistence law, AS 16.05.258(b)(4)(B), are (i) "customary and direct dependence" on the resource "for human consumption as a mainstay, of livelihood," (ii) "proximity of the domicile of the subsistence user" to the resource, and (iii) "the ability of the subsistence user to obtain food if subsistence is restricted or eliminated." As mentioned, section 804 of ANILCA imposes a similar scheme, though the state criteria are not identical.

impermissible limitation on admission to the "subsistence user group." *See* 894 P.2d at 638-642.

This paper briefly addresses the law-making steps Alaska must undertake in order to comply with section 805(d) of ANILCA and displace federal "public lands" subsistence management. To achieve that goal, the Alaska Constitution must be amended (or revised), and any implementing legislation would have to differ in significant respects from the provisions of previous state subsistence laws, i.e., those adopted in 1978, 1986, and 1992 (the current law).

Must the Alaska Constitution be changed before the State will be able to meet the conditions of section 805(d)?

Consistent with section 805(d) of ANILCA (as amended in 1998 by repeal of the one-year deadline), the Secretary's regulations provide a rulemaking mechanism for Alaska to supersede the Federal Subsistence Management Program governing public lands whenever the State has enacted and implemented subsistence management and use laws that conform to the requirements of sections 803-805. 50 C.F.R. § 100.14(d). Since the relevant provisions of ANILCA plainly require that "rural Alaska residents" be accorded priority for subsistence hunting and fishing on the public lands, any such state laws must, at a minimum, provide a subsistence priority to *rural* Alaskans. While ANILCA does not prohibit the State from allowing state-law "subsistence uses" by non-rural residents, any privilege given to non-rural users must be subordinate to the priority right of rural users. And that can be accomplished only through a priority scheme that ultimately employs rural residency as an eligibility criterion. But the Alaska Supreme Court has unequivocally held that the Alaska Constitution forbids any such residency-based limitation on participation in subsistence hunting and fishing. It thus appears that the popular (and official) understanding that a change in the Alaska Constitution is necessary for the State to "regain" management authority is entirely correct.

Neither the Legislature nor the people legislating by initiative, of course, may enact laws that alter the meaning of the

Alaska Constitution.[4] Any attempt to legislate a rural subsistence priority without an authorizing constitutional change would thus appear to be doomed from the outset—at least so long as *McDowell* and *Kenaitze* remain good law. And there is no reason to believe (or hope) that the *McDowell/Kenaitze* construction of the constitutional "equal access" clauses will not continue to be good law. The Alaska Supreme Court will "'not lightly overrule our past decisions,'" and in fact will do so only where it is "'clearly convinced the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.'" *State v. Summerville,* 948 P.2d 469 (1998) (invalidating legislative attempt to overrule a 1974 constitutional ruling prohibiting "reciprocal discovery" in criminal cases).

It is difficult to conceive of an argument for overruling *McDowell* and *Kenaitze* that would satisfy those standards. The result in *McDowell* was endorsed by four justices, with only Justice Rabinowitz dissenting. (In addition, Justice Moore supported the result on the alternative ground that the rural preference was a violation of equal protection under the Equal Rights Clause of the Alaska Constitution. 785 P.2d at 12-13.) The *McDowell* decision was the product of extensive deliberation and debate; as wrong-headed as some may believe it to have been, it nonetheless stands as the authoritative construction of the "equal access" clauses of Article VIII—as evidenced most prominently by its reinforcement in the *Kenaitze* decision five years later, in which all justices (including Justice Rabinowitz) joined. Although the loss of state management over the public lands may seem a harsh price to pay for "equal access" as construed in *McDowell,* the Court was fully aware of, and expressly evaluated, that certain consequence of its decision (785 P.2d at 3, 4, and 10 n.20), which in any event had become abundantly obvious by the time the Court reaffirmed *McDowell*

---

4 In the present context, moreover, there is an additional barrier to legislation by initiative. Although natural resource management generally may be a proper subject for the initiative process, *Brooks* v. *Wright,* 971 P.2d 1025 (Alaska 1999) (upholding wolf-snare-ban initiative), that process may not be used to make an "appropriation" of state "assets," such as by giving a wildlife-use preference to one user group as against another. *Pullen v. Ulmer,* 923 P.2d 54 (Alaska 1996) (invalidating proposed "F.I.S.H. initiative," which reserved a priority for salmon harvests by personal use, sport, and subsistence fisheries before allocating any portion to commercial fisheries).

five years later in *Kenaitze.* Public policy, public officials, regulators and legislators, and private expectations, moreover, have made primary adjustments to the Court's constitutional interpretation. The *McDowell-Kenaitze* rule, construing the State's organic law, simply does not appear vulnerable to reconsideration at this late date. The “impasse” is of constitutional dimension, and it must be addressed at that level.

The more difficult question is whether the necessary constitutional change can be accomplished merely by "amendment" (proposed to the people by a two-thirds vote of each house of the Legislature), or whether it entails a "revision" (which requires a constitutional convention). The distinction is "that a revision is a change which alters the substance and integrity of our Constitution in a manner measured both qualitatively and quantitatively," *Bess v. UImer,* 985 P.2d 979, 982 (Alaska 1999), whereas "[t]he process of amendment ... is proper for those changes which are "few, simple, independent, and of comparatively small importance.'" *Id.* at 987. The "core determination," we are told, "is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole." *Id.* Beyond that, the principles set out in *Bess* are rather illusive, especially as they might apply to the issue of amending the Constitution to legalize a rural-residency-based subsistence priority. One can envision formidable arguments on both sides of the question. For present purposes, it suffices to say that the Constitution must be altered in order for the State to satisfy the conditions for state management imposed by section 805(d) of ANILCA, but whether that change must be produced by a constitutional convention, or can be effectuated through the more expedient process of a constitutional amendment, is an open, and not easy, question.

Prescribing the necessary contours of the required constitutional change is also somewhat perplexing. In order to achieve the desired result—re-assumption of state management—the constitutional change will need to be specific enough to ensure that a statutory "rural" subsistence priority, consistent with

ANILCA, will pass state constitutional muster. As a rule, "a specific [constitutional] amendment controls other more general provisions with which it might conflict." *Bess v. Ulmer,* 985 P.2d at 988 n.57. But it is also "a well accepted principle of judicial construction that, whenever possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized." *Park v. State,* 528 P.2d 785, 786-87 (Alaska 1974). In the specific context of burdens on the "equal access" principles of Article VIII of the Alaska Constitution, our Supreme Court has repeatedly held that even legislation authorized by constitutional amendment, such as the 1972 Limited Entry Amendment to section 15 of Article VIII (the No Exclusive Right of Fishery Clause), must be narrowly drawn to accomplish a constitutionally important purpose, and "must be designed for the least possible infringement on Article VIII's open access values." *McDowell,* 785 P.2d at 30; *accord. Owsichek v. State,* 763 P.2d 488, 492 n.10 (1988); *Johns v. CFEC,* 758 P.2d 1256. 1266 (1988); *State v. Ostrosky,* 667 P.2d 1184. 1191 (1983).

Thus, the more explicit the constitutional language—in terms both of its purpose and its intended effect—the more likely that implementing legislation will be sustained against challenges based on other applicable constitutional provisions, like the equal-access and equal-protection clauses. A relatively specific constitutional amendment (or revision, if necessary) tracking ANILCA's key terms likely would validate any legislative scheme necessary to satisfy the requirements of section 805(d) of ANILCA. For example:

> Consistently with the sustained yield principle, customary and traditional subsistence uses[5] of fish and wildlife by rural Alaska residents shall be accorded priority over all other uses. Whenever restrictions on subsistence uses of a fish or wildlife resource are necessary for conservation purposes, preference shall be given to those rural residents with the greatest customary and direct dependence on the resource as the mainstay of livelihood, who reside closest to the

[5] As described at pages 8-10 below, however, the phrase "customary and traditional uses" has acquired distinct meanings under state statutory law that are inconsistent with ANILCA's intended meaning of the same words. To foreclose the possibility that these same words in a constitutional amendment will be interpreted as being inconsistent with ANILCA, it must be made manifest in the process of amending (or reusing) the Constitution that the "customary and traditional" standard being added to state constitutional law is intended to be at least as protective as the ANILCA standard.

resource, and who have the least availability of alternative resources.

The farther the constitutional language strays from that or a similar degree of specificity, the more problematic the constitutionality of any implementing legislation becomes.

Assuming an adequate change in the Alaska Constitution, what sort of implementing legislation is necessary for re-assumption of state management?

Section 805(d) of ANILCA, as well as the Secretary's regulation, 50 C.F.R. § 100.14(d), condition state subsistence management on the public lands on the "enactment] and implementation] of [state] laws of general applicability, which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805." Although the State's inability to provide the *rural* priority mandated by ANILCA caused the surrender of state management authority, there are a number of other critical issues that now would also need to be resolved in any implementing legislation in order for state law to be brought into harmony with sections 803-805. The "rural" issue itself, however, will continue to be a significant legislative challenge, even if the Constitution were amended to explicitly provide for a subsistence priority for rural residents. Following is a brief discussion of the major issues successful implementing legislation will need to resolve.

The "rural" issue. The State has yet to develop an approach to identifying "rural residents" that is consistent with ANILCA. The courts have held the current statutory definition of "rural area" (from the 1986 subsistence law)—"a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area," AS 16.05.940(27)—to be inconsistent with ANILCA. *Kenaitze Indian Tribe v. Alaska,* 860 F.2d 312 (9th Cir. 1988), *cert. denied,* 491 U.S. 905 (1989). Although the "rural area" definition has been moribund

since the McDowell decision, it remains on the books. And, in the 1992 subsistence law, the Legislature essentially adopted the inverse of the "rural area" definition to identify "nonsubsistence areas." AS 16.05.258(c) ("an area or community where dependence upon subsistence is *not* a principal characteristic of the economy, culture, and way of life of the area or community"). In other words, current non-subsistence areas are the state-law equivalent of non-rural areas. *See State v. Kenaitze Indian Tribe,* 894 P.2d 632, 634 (Alaska 1995).

This approach is incompatible with ANILCA, under which a number of communities are classified as "rural" which the state-law definition (previously invalidated by the Ninth Circuit's 1988 *Kenaitze* decision) would classify as non-rural, and hence ineligible for the subsistence priority. *See* 50 C.F.R. §§ 100.15, 100.23. As evidenced by the ever-changing approach of the Federal Subsistence Board to the Kenai Peninsula, furthermore, even the correct interpretation of "rural Alaska residents" under ANILCA remains unsettled. And the issue probably will continue to evade resolution so long as the traditional hunting and fishing grounds of Alaska Native tribes are deemed ineligible for the subsistence priority solely because of the "urbanizing" influx of the non-indigenous population. But the salient point here is that, in order to satisfy the requirements of section 805(d) of ANILCA and secure secretarial approval for the re-assumption of state management, implementing legislation will need to abandon previous attempts to define "rural'' in an uncommon way. Perhaps the surest way of proceeding would be for the legislation simply to direct the fish and game boards to accord the subsistence priority to “rural Alaska residents,” expressly delegating to the boards the task of determining eligibility; then for the boards, in turn, to identify the same communities and areas the Federal Subsistence Board has already designated as "rural." That, of course, won't be satisfactory to those who feel that they have been wrongly classified as urban, but it will likely satisfy the Secretary. Any future refinements to the "rural determination" process that might be required by the courts could be resolved easily enough by the boards through further rulemaking, since the statute (if it merely

mirrors the language of ANILCA) would not have been placed in jeopardy, as it was in the *Kenaitze* litigation in the 1980's.

"Customary and traditional uses" — who? In 1978, as ANILCA was making its way through Congress, the Legislature enacted a subsistence law that included a definition of "subsistence uses" adopted from a version of ANILCA that had already passed the House, but not yet the Senate. The 1978 state law defined subsistence uses as "customary and traditional uses in Alaska" for specified purposes. *See Madison v. Alaska Dept. of Fish & Game,* 696 P.2d 168, 170 (Alaska 1985). As finally enacted in 1980, section 803 of ANILCA also defines subsistence uses as "customary and traditional uses," though in the meantime Congress had substituted "by rural Alaska residents" for "in Alaska." Putting the "rural" issue aside, the bedrock standard—"customary and traditional uses"—was identical in both federal and state law. So it has remained: "Despite repeated legal challenges to and multiple revisions of the [state] subsistence laws, 'subsistence uses' have long been defined in terms of 'customary and traditional uses."' *Payton v. State,* 938 P.2d 1036, 1042 (Alaska 1997). Remarkably, however, these identical words have meanings under state law that are entirely different from their federal meanings. Perhaps the most significant difference is the way the customary-and-traditional-use standard operates under state law to determine eligibility for participation in particular subsistence hunts and fisheries.

Sandwiched between the *McDowell* (1989) and *Kenaitze* (1995) cases is the Alaska Supreme Court's decision in *State v. Morry* 836 P.2d 358, 365-368 (1992), which held, among other things, that "all Alaskans," no matter where they reside or what their circumstances, are eligible to travel anywhere in the State and participate in subsistence hunting and fishing on equal terms with local subsistence users. The Court held that the "customary and traditional uses" standard does not provide any basis for distinguishing among subsistence users.[6] This, of course, is contrary to the way in which ANILCA has always been interpreted.

[6] This holding derives largely from the Court's longstanding and consistent insistence that the customary-and-traditional standard refers exclusively to "uses," and cannot be applied to identify "users." *Payton,* 938 P.2d at 1042; *Morry,* 836 P.2d at 368: *McDowell,*

In other words, under ANILCA even a qualified rural subsistence user is not automatically eligible to travel to some distant part of the State, outside of the traditional hunting or fishing territory of his or her place of residence, and engage in *subsistence* hunting and fishing on the public lands. *See* 50 C.F.R. §§ 100.15 (describing the process) and 100.24 (specifying the subsistence hunts and fisheries and the rural residents (by place of residence) eligible to participate in them).

Since the "customary and traditional uses" standard has acquired a settled meaning under state law that is inconsistent with its established meaning under ANILCA, any implementing legislation designed to comply with section 805(d) will need to do more than simply parrot the section 803 definition of subsistence uses. This is because, when a legislature adopts a term from an existing statute, or a term which otherwise possesses an authoritative meaning, it is presumed that the lawmakers intended to incorporate that same meaning into the new statute, unless a contrary intent is made manifest.[7] In order to be consistent with, and provide for the definition and preference specified in, ANILCA, therefore, any definition of subsistence as "customary and traditional uses" must also make it clear that the definition makes eligible for participation only those rural residents of areas or communities which have customary and traditional use of the particular subsistence resources. Statutory language that is effective for this purpose will undoubtedly be awkward, perhaps even redundant, but it is necessary to achieve the consistency required by section 805(d).

"Customary and traditional uses"—what? The Alaska Supreme Court in *Morry* also held, quite astonishingly, that the "customary and traditional uses" standard affords legal protection only for "how fish and game are used [after they are taken], not how they are harvested." 836 P.2d at 370. The standard does not, in other words, protect "traditional patterns and methods of taking fish and game for subsistence purposes," or "traditional and customary

---

785 P.2d at 9 n.9; Madison, 696 P.2d at 174.

[7] *E.g.. Muller v. BP Exploration (Alaska) Inc.,* 923 P.2d 783, 788 (Alaska 1996); *State* v. *O'Neill Investigations. Inc.* 609 P.2d 520,532 (Alaska 1980).

methods of subsistence takings." *Id., see also Totemoff v. State,* 905 P.2d 954, 960-961 (Alaska 1995), *cert. denied,* 517 U.S. 1244 (1996). This implausible construction of the customary-and-traditional term conflicts with both ANILCA, *see generally Native Village of Quinhagak v. United States,* 35 F.3d 388 (9th Cir. 1994); *Bobby v. Alaska,* 718 F. Supp. 764 (D. Alaska 1989), and common sense. This dichotomy, too, must be eliminated in any implementing legislation designed to displace federal management (perhaps by defining "subsistence uses" as "customary and traditional *patterns, practices, methods and means of takings and* uses").

"Reasonable opportunity." The "reasonable opportunity" standard of the state-law subsistence priority (first adopted in the 1986 law, now appearing at AS 16.05.258(b) and (f)) is widely acknowledged to be inconsistent with ANILCA. *See Bobby v. Alaska,* 718 F. Supp. at 781.[8] That and any similar standard will need to be omitted from implementing legislation aimed at satisfying section 805(d).

"No subsistence defense." State law purports to strip subsistence users of "a defense [to a prosecution for a taking violation] that the taking was done for subsistence uses," AS 16.05.259, which the Alaska Supreme Court has construed as prohibiting substantive (though not procedural) defenses by subsistence users. *Totemoff,* 905 P.2d at 969-973. This, too, is inconsistent with ANILCA, *United States v. Alexander,* 938 F.2d 942 (9th Cir. 1991); *Bobby v. Alaska,* 718 F. Supp. at 783-788, and should be repealed in conjunction with any section 805(d) implementing legislation.

"Customary trade." Section 803 of ANILCA defines subsistence uses to include "for barter or for sharing for personal or family consumption; *and for customary) trade," see United States v. Alexander, supra,* whereas the state-law definition qualifies customary trade with "for personal or family consumption": "for the *customary trade,* barter, or sharing *for personal or family*

---

[8] One of the conditional, never-enacted ANILCA amendments procured by the State in the 1997 "*Katie John* moratorium" would have added "reasonable opportunity" as a qualification of the section 804 priority. Pub. L. No. 105-83, § 316(b)(5), Ill Stat. 1543, 1592-1593 (Nov. 14, 1997). That provision (along with the other conditional amendments) was repealed on December 1, 1998, without ever taking effect, because the Legislature

consumption." AS 16.05.940(32). This inconsistency—between the unqualified authorization for customary trade of subsistence resources in section 803 and the state-law limitation of such trade to resources taken "for personal or family consumption"—derives from the 1978 subsistence law, and existed at the time of ANILCA's passage. The inconsistency was solved to the Secretary's satisfaction at that time by regulatory action of the fish and game boards, *see* 5 AAC 99.010(b)(7),[9] but it will now need to be resolved by statute in any implementing legislation.

Geographic scope of the priority. The state-law subsistence priority has been interpreted as *not* applying to subsistence fish and wildlife resources throughout their migratory range. *Native Village of Elim v. State,* 990 P.2d 1, 12-13 (Alaska 1999). The ANILCA priority, in contrast, clearly attaches to such resources throughout their migratory travels. That is, the ANILCA priority prevents resources from being taken for non-subsistence uses in one part of their range if that would deprive rural residents in another part of the range of sufficient resources to satisfy subsistence uses. *See, e.g.,* 50 C.F.R. §§ 100.10(a) (the Secretary retains her "existing authority to restrict or eliminate hunting, fishing, or trapping activities [outside of the] public lands when such activities interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority"). The less protective scope of state law will need to be revised in any implementing legislation to make clear that the subsistence priority applies throughout the migratory range of all fish and wildlife that are customarily and traditionally taken for subsistence uses.

The regional advisory council system. State statutory law has never provided a system of regional advisory councils as required by sections 805(a)-(d) of ANILCA. This deficiency, as with several others mentioned above, was remedied in the early 1980's (in order to secure secretarial certification of compliance with ANILCA) by a regulation promulgated by the fish and game boards creating a

---

declined to accept the congressional conditions. *Id.* at 1595 (§ 316(d)).

[9] The same rulemaking process was employed to remedy the lack of a "rural" limitation in the 1978 law, but the Court invalidated that regulation (as unauthorized by statute) in

system of six regional councils. *See* 5 AAC 96.200, *et seq.* That state system, however, was never adequately staffed or funded, and it never empowered local rural residents with the "meaningful" management role envisioned by Congress. As soon as the State lost ANILCA management authority in the wake of the *McDowell* decision, the state regional council system, woefully inadequate though it was, was immediately de-funded and decommissioned. In view of that history, any implementing legislation aimed at reassuming state subsistence management on the public lands will need both to specifically create a regional council system as prescribed by sections 805(a)-(d) and guarantee adequate funding and staffing for it.

The above discussion is not intended to constitute an exhaustive listing of the issues that need to be addressed in any implementing legislation necessary for the State to comply with section 805(d) of ANILCA and displace federal subsistence management authority on the public lands. Nor does it purport to be an outline of the essential components of such legislation. This discussion, rather, is merely an attempt to highlight the more significant and obvious conflicts between the state and federal subsistence laws that have arisen over the years—conflicts that will of necessity require resolution in the course of any effort by the State to reassume full subsistence management authority.

---

its 1985 *Madison* decision.

A Catholic Perspective on Subsistence

Our Responsibility Toward Alaska's Bounty and Our Human Family
A Pastoral Letter of the Catholic Bishops of Alaska

God has blessed Alaska with an abundance of natural resources, which form the backbone of the life and economy of the people of Alaska. The harvest and sale of timber/fish, wildlife, oil, and minerals stimulate the cash economy, create jobs, and allow Alaskans to provide for their families.

The fish and wildlife resources must be allocated fairly and justly to promote the common good when they are insufficient to meet the needs of all. In recent years, Alaskans have engaged in a spirited dialogue over the allocation of these resources and the subsistence needs of Alaska's residents.[1]

We, the Catholic Bishops of Alaska, enter this dialogue to outline how Catholic social teaching can serve as a guide in analyzing the situation.[2] We write primarily to the Catholic people of the state, but we invite all Alaskans to reflect upon our contribution to the dialogue.

In articulating a biblical view of the Catholic faith, the Second Vatican Council in 1965 criticized the tragic separation between faith and everyday life. The council stated Catholics cannot "immerse themselves in earthly activities as if these latter were utterly foreign to religion, and religion were nothing more than the fulfillment of acts of worship and the observance of a few moral obligations."[3] In setting, forth that vision, the Council sought to return Catholics to a vision of a lived faith given to all Christians in the Sermon on the Mount where Jesus called us to be peacemakers in the world. (Matthew 5:1-12).

We are not politicians or lawyers, and our purpose in writing is not to take a political or legal position on the resolution of the issue. Rather, with this pastoral letter we provide a Catholic

analysis of subsistence that is not yet a part of the public debate. Catholic social principles can provide a perspective on social issues that will help Catholics to form their consciences, to engage in the public debate, and to take appropriate action.

Subsistence in Alaska — A Legal History

Understanding how the current impasse emerged is critical to resolving the subsistence issue. In 1971, in order to settle the land claims of Alaska Native peoples, Congress enacted the Alaska Native Claims Settlement Act (Settlement Act).[4] The Settlement Act extinguished aboriginal claims to hunting and fishing and gave Alaska Natives title to 44 million acres of land and $962.5 million. [5] When enacting the Settlement Act, Congress also promised to protect the subsistence needs of the Alaska Native peoples and directed the Secretary of Interior to take the necessary steps to provide that protection. The Congressional Conference Report was dear in its concern for Alaska Native subsistence protection, stating, "The conference committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary through exercise of his existing withdrawal authority." [6]

Nearly a decade later, in 1980, the Alaska National Interest Lands Conservation Act (Lands Act) was enacted for the designation and conservation of public lands in Alaska and to provide that those engaged in a subsistence lifestyle could continue that lifestyle.[7] The Lands Act fulfilled the promise Congress had made to the Alaska Native peoples when it enacted the Settlement Act. Using race-neutral language, Title VIII of the Lands Act provides that subsistence uses by *rural* Alaska residents be the priority consumptive use of fish and wildlife resources on federal public lands. [8] Subsistence uses by rural residents cannot be restricted until all other uses are curtailed and regulations of subsistence must be consistent with customary and traditional uses. [9] When populations are healthy, however, no limit on other consumptive uses is necessary, and all users have harvest opportunities.

The Lands Act recognizes the state's traditional role as manager of fish and wildlife on all federal lands in Alaska, but requires the state to manage these resources on federal lands according to the federal subsistence requirement[10] Initially, in response to the Lands Act, state law limited subsistence to rural residents and the state implemented Title VIII of the Lands Act from 1986 until 1989. However, in 1989 the Alaska Supreme Court ruled that the Alaska Constitution precluded the

state from granting priority access to fish and wildlife based on place of residence. [11]

As a consequence of the Alaska Supreme Court ruling, the state could no longer guarantee a subsistence priority for rural residents. In response, the federal government in 1990 began implementing Title VIII of the Lands Act on most federally owned lands in Alaska. In 1999, the federal government significantly expanded its management to include regulation of subsistence harvests in many navigable waters throughout Alaska. The state continues to regulate all uses in areas not subject to federal management, and in areas subject to federal subsistence management when not preempted by conflicting federal regulations. [12]

The State of Dialogue on Subsistence

Since the Alaska Supreme Court's 1989 ruling, Alaskans have searched for ways to recognize and provide for subsistence needs of residents while returning full authority for fish and wildlife management to the state. In recent years, the debate has crystallized into two primary questions:

Should the state amend its constitution to allow for a rural priority? Should Congress amend the Lands Act to eliminate the rural priority and allow equal access for all Alaskans?

While the particulars of the subsistence issue are unique to Alaska, similar debates have occurred throughout human history under similar circumstances. John Paul II has noted, "Delicate problems arise when a minority group puts forward claims which have particular political implications. ...In such delicate circumstances, dialogue and negotiation are the obligatory path to peace. The willingness of parties involved to meet and talk to one another is the indispensable condition for reaching an equitable solution to the complex problems that can seriously obstruct peace."[13]

Dialogue on the protection of subsistence rights began during the negotiation of the Settlement Act, and resulted nine years later in an apparent resolution in the Lands Act. What Congress envisioned at the time of the Settlement Act as a protection of *Alaska Native* subsistence rights was codified as a *rural* subsistence priority in the Lands Act. Some felt that the Alaska Natives had compromised their original claim to a "Native preference" and agreed to a rural subsistence priority. [14] The Lands Act statute resulted in a subsistence priority that included all rural residents, but did not include Alaska Natives living in urban areas.

For some Alaskans, a rural subsistence priority is seen as discriminatory, contradicting the state constitutional provisions that provide for equal access for all. This perspective upholds the notion of equal access and opportunity of all peoples. We recognize the rationale of this argument and acknowledge its place in the public debate.

We note at the onset, however, that "equal access" in itself does not guarantee a fair resolution. Due to the importance of the Alaska Constitution Article VIII equal access provisions in the subsistence debate, we address the moral implications of upholding equal access above all other values.

First, equal access is a means toward achieving the universal destination of goods, [15] not an end in and of itself. Public policy should strive to fulfill the Creator's intent of providing for the needs of God's children, but it is not difficult to envision scenarios in which "equal access" provides opportunity only to those most able to take advantage of the opportunity. [16] Pope Paul VI recognizes that equality can sometimes result in exploitation and discrimination. "Without a renewed education in solidarity, an overemphasis on equality can give rise to an individualism in which each one claims his own right without wishing to be answerable for the common good. "[17]

Second, equal treatment assumes that all citizens begin on equal footing with equal opportunity. Such is not the case in Alaska. The original inhabitants of Alaska had little say in the century of political events leading to statehood, and had to adapt to new economic, legal, and value systems. By enshrining equal access provisions at the time of statehood, the constitutions' authors may have created an injustice for the Alaska Native peoples. Perhaps this injustice should be part of the debate, addressed with compassion, honesty, creativity, and respect.

Finally, unequal treatment can result from recognition that the circumstances of all people's lives are not identical and sometimes those circumstances dictate disparate treatment. [18] We must distinguish between those policies that unjustly discriminate, and those that require recognition of differences among peoples. The former must be fought aggressively, while the latter must be crafted to ensure that justice is achieved. A system which provides subsistence opportunities for all Alaskans, but which affords a priority for some residents in time of limited resources, may achieve greater justice than simple equal access if it is created prudently and administered responsibly.

Justice has never required a mathematical equality among people. The Church describes

three dimensions of justice: commutative, distributive, and social.[19] Commutative justice demands fundamental fairness in agreements between individuals or private groups. Distributive justice speaks to the allocation of income, wealth, and power, and suggests that the allocation be viewed in light of the impact on those whose material needs are not met. Finally, social, or contributive, justice describes the duty of all members of a community to foster the welfare of the whole community.

Allowing equal access to fish and wildlife resources during times of resource scarcity does not assure a just resolution of the issue. Equal access does not always result in a practical fairness for those who may not have a means of access or for the community as a whole. Recognizing that no solution is simple, we ask our Catholics to enter the dialogue with a commitment to apply the social teachings of our Church and to reflect the love of Christ for all people.

Catholic Social Teaching

The social teachings of the Church, founded on the Gospel and developed extensively during the past century, provide principles and guidelines for developing a Christian perspective on the social and moral issues of our day. In attempting to understand subsistence and in creating a fish and wildlife allocation system that fairly determines harvest opportunities in times of shortage, the principles of solidarity, the preferential option for the poor and vulnerable, subsidiarity, care of creation, and the dignity of work are particularly relevant.

Solidarity

From the time of Genesis to today, we continue to ask, "Am I my brother's keeper?" The response of Christians, both then and now, is a definitive "Yes" - we are indeed our brothers' and sisters' keepers.[20] It is only through community that we fully realize our human dignity and together promote the common good. An injustice to any member of the human family is incompatible with the common good and with our own human dignity.

Solidarity allows us to see "others" as "neighbors" and impels us to love one another, share with one another, and recognize that we are one human family - regardless of geographic, racial, economic, or ideological differences. The failure to live in solidarity with one another can have dire consequences, as Jesus made clear in the parable of Lazarus and the rich man (Luke 16:19-31). It was the rich man's failure to recognize Lazarus' needs, to stand in solidarity with Lazarus, which led

to his eternal condemnation.

There are many valid interests at stake in the debate on subsistence, but finding the delicate balance among personal interests and the common good requires a commitment to solidarity. The solidarity to which Christians must aspire is an active one. "If a brother or sister has nothing to wear and has no food for the day, and one of you says to them, 'Go in peace, keep warm, and eat well,' but you do not give them the necessities of the body, what good is it?" (James 2:15-16). As John Paul II wrote, solidarity "is not a feeling of vague compassion or shallow distress at the misfortunes of so many people," but rather "a firm and persevering determination to commit oneself to the common good." [21]

Christians who dynamically live out the call to solidarity find themselves standing with their brothers and sisters. One aspect of solidarity that is of particular import in the subsistence dialogue is the requirement to show respect and honor for the culture and traditions of indigenous peoples. [22] In Alaska, where the indigenous peoples have become a minority population, it is incumbent on the larger society to protect and safeguard the right of the Alaska Native people to preserve their cultures.[23] Protecting subsistence rights is one of the most important issues facing Alaska Natives, due to the centrality of subsistence to the health of the cultures. [24] More than 10,000 years ago Alaska Natives' ancestors, Alaska's first subsistence gatherers, arrived in Alaska. For thousands of years, the Alaska Native peoples lived in a subsistence economy, drawing their human and spiritual values from the heritage of the land, the water, and the wildlife.

Today, the Alaska Native cultures contribute enormously to Alaskan society with traditional perspectives on respect for creation and the family, particularly elders; rich and diverse Native languages; and the creativity and emotional power of art and dance. All of these point to a dynamic, vibrant, and ultimately joyful expression of humanity's finest efforts and insights.

In spite of this cultural richness, there is today a collective vulnerability of Alaska Native peoples and their traditions. Much like the experience of the indigenous peoples in all of North America, Alaska Native peoples found mixed blessings in their encounter with the European and American ways of life. Much was gained from the encounter, but there also resulted many instances of cultural oppression and injustice. [25] While not placing blame, the Alaska Native Commission has documented a "long-term and concerted assault on Alaska Native cultures." [26]

We Catholic Bishops acknowledge that there have been times when Catholic leaders and

teachers contributed to that assault on the Alaska Native cultures or tailed to counter it. We must not bury that past. We are proud, however, of the missionaries who provided education and technical advancements to the indigenous people, along with the good news of the Gospel.

Today, as a consequence of the rapid transitions the Alaska Native peoples have undergone, particularly during the past century, they find themselves facing enormous difficulties. Alaska Natives as a group endure the highest poverty in the state. Several of the indigenous languages are threatened with extinction and many communities still suffer the consequences of decades of cultural suppression. Dismal statistics indicate the perilous situation of the Alaska Native cultures:

- The suicide rate of Native males 20 to 24 years old is more than 30 times the national suicide rate for all age groups.
- Natives are 16 percent of Alaska's population, but represent 32 percent of the prison population.
- The Native substance abuse mortality rate is 3.5 times the non-Native rate.[27]

This evidence suggests a degree of disintegration of the traditional culture and its values. The importance of subsistence to maintaining Alaska Native cultural health cannot be underestimated. According to the report of the Alaska Native Commission, "Subsistence, being integral to [Alaska Native] world view and among the strongest ties to their ancient cultures, is as much spiritual and ultural as it is physical. "[28] Subsistence has been described as *"the* main thread, in the overall fabric of Native culture."[29]

In developing a resolution to the subsistence question, Christians should stand in solidarity with those suffering an erosion of culture. Solidarity may begin with respecting past commitments to the Alaska Native peoples and making efforts to "satisfy their legitimate social, health and cultural requirements. "[30]

Preferential Option for the Poor and the Vulnerable

The Christian call to solidarity is also lived out in the preferential option for the poor and vulnerable. The option for the poor is not intended to pit people against one another; rather, it is a recognition that the afflictions of the poor and vulnerable wound the whole community. [31] In the life of families, it is often necessary to shower attention on one member of the family who is in need

— an infant, an aged grandparent, or one afflicted with an illness. This focus of attention on one family member does not diminish the family's love of other family members, but is a recognition that for the well being of the entire family, the focus is on the most vulnerable.

The Christian imperative to exhibit a preferential option for the poor and vulnerable is not limited to the private sphere. This love is often most effectively manifested in the promotion of justice. [32] Ultimately, the effectiveness of a community or political entity must be judged by how well it protects and promotes the interests of those most vulnerable in the society. [33] In this discussion on the future of subsistence in Alaska, it is therefore legitimate to ask, "Who are the poor and vulnerable among us?"

Those members of the community who struggle with the indignity of severe economic hardship merit our special care and attention. In Alaska's three major urban centers, 5-10 percent of the population live below the poverty level; in rural areas, the percentages are much higher, with some rural areas experiencing poverty rates as high as 39 percent. [34] Among ethnic groups, it is Alaska Natives who are most afflicted by poverty, having the lowest per capita income in the state and making up the largest group of Alaskans living in poverty.[35] Statewide, the percentage of Alaska Natives living below the poverty level exceeds 20 percent. [36]

The preferential option for the poor and vulnerable is central to any discussion on the just allocation of resources. When limitations are necessary to maintain sustainable fish and wildlife populations, these God-given resources must be available, as far as possible, to those in the greatest need. All Alaskans must recognize the legitimate needs of the economically disadvantaged.

In a recent poll, an overwhelming majority of Alaskans indicated their support for a rural subsistence priority.[37] This response speaks to the understanding of Alaskans that it is in rural areas where there is the greatest overlap between the economically poor and those whose culture is vulnerable, and that subsistence is necessary to the maintenance of that culture. Support for a rural subsistence priority reflects a just and generous impulse in so many Alaskans. In practice, implementation of a rural subsistence priority may be the single most important political step in moving toward a just resolution of the subsistence debate.

The subsistence debate, however, must also include a discussion of the poor, both Native and non-Native, no matter their place of residence, whether rural, suburban, or urban. Outside of rural areas, thousands of Alaskans live in poverty within the cities and along the road system. Many are

unemployed, and many more comprise the working poor who, despite employment, cannot earn enough to adequately support their families. For these, supplemental assistance is often necessary to make ends meet.

Maintaining subsistence opportunities whenever possible for the urban and suburban poor who rely on the fish and wildlife resources can simultaneously contribute to families' economic well-being, lessen dependence upon public assistance, and foster the sense of self-respect and dignity that comes from providing for one's family. Any effort to guarantee subsistence opportunities for the poor should be viewed, not as charity, but as justice.

Subsidiarity

Pope Pius XI first introduced the Catholic principle of subsidiarity in 1931, as an understanding that the people most directly affected by decisions should make those decisions. [38] The principle was most recently articulated by John Paul II, who wrote that under subsidiarity "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good" [39] Subsidiarity promotes decentralization, as well as responsibility at lower levels of social organization. John Paul II wrote, "...it would appear that needs are best understood and satisfied by people who are closest to them and who act as neighbors to those in need" [40] For instance, the family has specific responsibilities that it does not abrogate to local government, and the local community has duties that it does not abrogate to the state.

The state's interest in regaining its full management authority over fish and wildlife resources on federal land is consistent with the long-standing principle of subsidiarity. [41] The Catholic Church articulates this principle and understands it as a principle of both human society and American governance. The principle of subsidiarity and the prudential judgment of most Alaskans favor a return of management to state government with local participation.[42]

Stewardship

In the very act of creation, God gave humans the responsibility to be the stewards of God's creation for the good of the entire human family. Among all creatures, humans have a unique relationship with the Creator and creation. "God said: 'Let us make man in our image, after our

likeness. Let them have dominion over the fish of the *sea,* the birds of the air, and the cattle, over all the wild animals and all the creatures that crawl on the ground.'" (Gen 1:26).

Subsistence, by any definition, concerns the just stewardship of the fish and wildlife resources provided by the Creator. The resources are a gift from God, their stewardship being a fundamental human responsibility since the beginning of time.

From carving ivory for a spearhead to etching silicon chips for computers, people have always used the God-given resources. But the stewardship of creation is both a gift to use and a tremendous responsibility. Men and women must harvest the world's resources wisely, with prudence and respect, "conscious of our duties and obligations to future generations" [43]- Appropriate recognition of this gift requires an appreciation of and respect for both the Giver of gifts and all of those to whom they are given, that is, the entire human family.

Stewardship of Alaska's fish and wildlife resources occurs at many levels, including management by federal, state, and local governments, as well as by individuals. We consider, for instance, the role of recreational hunters and sport fishermen in the context of stewardship. As many will attest, much of the value found in hunting and fishing is experiencing and exploring the beauty of nature. The hunting tradition is often handed down from one generation to another, and indeed, many recreational hunters of today are only a few generations removed from the time when their ancestors lived a subsistence lifestyle. Hunting and fishing for recreational purposes is where some feel closest to God.

Those who live a subsistence lifestyle have a particularly unique relationship with nature. Through their daily natural connection with the land and the work, they experience creation and, with their Creator, proclaim, "It is good." The traditional belief in Alaska Native cultures that the animals offer themselves to the hunter, that they "sacrifice themselves,"' engenders a unique respect and reverence for the animals. This is manifested in rituals associated with the hunt - rituals that communicate honor and thanks to the animal, and through the animal, to its Creator.

It must be noted that the traditional subsistence lifestyle has changed dramatically over the past century, as the human relationship to creation has adapted to modem ways. [44] Increased populations and contemporary tools, machines and technology brought changes in the traditional methods of hunting and gathering, and gave rise to necessary regulations and laws to achieve a sustainable natural bounty. It must not be forgotten, however, that God endowed nature with a

wondrous power to communicate God's presence, power, and beauty. Future regulations must not deprive God's children the opportunity to learn and seek inspiration from creation.

The Dignity of Work

Having been placed on earth as stewards of God's creation, it is through human labor that we participate in this creation, expressing and increasing our human dignity. Transforming nature and adapting it to our human needs, the very essence of work, allows us to become more fully human.[45] Unlike the secular view of work simply as purely a matter of economics, Christians understand work as their role in being co-creators with God.

In the prolonged debate about subsistence in Alaska, the discussion is rarely couched in terms that recognize subsistence as a form of work.. Subsistence in traditional cultures cannot be labeled and dissected, yet the very act of harvesting fish and wildlife resources for personal or communal consumption can, in one sense, be understood as work. Preparing fishing nets and firearms, checking snow machine and outboard motors, hunting wild animals for food, cutting and drying fish, and picking berries and gathering firewood are all activities that physically sustain those residents practicing <u>subsistence.</u>

Measured solely in economic terms, subsistence activities have substantial value. In rural Alaska, subsistence activities supply about 375 pounds of food per person each year with a replacement value estimated at $131.1 - $218.6 million. [46] In urban areas, subsistence harvests supply 22 pounds of food per person valued at $48 million.[47] The subsistence food harvest in rural areas represents only two percent of the annual harvest in Alaska, but without these resources, many rural communities might not survive. [48]

The value of subsistence, from a spiritual viewpoint, far transcends its economic value. Work, while providing for the physical sustenance of oneself and one's family, has many other dimensions in the Catholic faith. Work corresponds to one's human dignity and expresses and increases that dignity. Work is a foundation for the formation of family life, and the condition making family life possible. It is work that allows one to contribute to the common good together with one's community.[49]

The Catholic understanding of work is mirrored in the culture of the Alaska Native peoples, who recognize that subsistence is more than economics, "in addition to supplying food and other

necessities, it provides people with productive labor, personal self-esteem, strong family and community relationships, and a cultural foundation that can never be replaced"[50] The seal hunter and the berry picker are fulfilling both the Creator's commands and their own identity at all social levels.

"Since work in its subjective aspect is always a personal action...it follows that the whole person, body and spirit, participates in it, whether it is manual or intellectual work.." [51] Alaska Native cultures have consistently described subsistence as more than a physical activity for the procurement of food. It is a spiritual endeavor, involving the whole person and the community, inspiring the art, dance, story telling, and festivals of indigenous cultures.

The Church recognizes the obligation of people to work and to meet the needs of the family and the community. Corresponding to this obligation is the right to have work opportunities available. In the context of subsistence, focused wildlife research, justly and wisely formulated regulations, and prudent law enforcement are all used to effectively manage fish and wildlife resources so that opportunities for subsistence use are maintained.

Conclusion

Although Alaska's subsistence dilemma is primarily perceived and reported as a political debate, it is ultimately a matter of Alaskans struggling to discern the right path to achieve peace and justice, and daring to move beyond the limits imposed by the past. The task is neither easy nor simple. There is an "urgent need to change the spiritual attitudes which define each individual's relationship with self, with neighbor, with even the remotest human communities, and with nature itself." [52] Such a conversion of heart has enormous implications in the public arena.

We, the Catholic Bishops of Alaska, offer these reflections not as a solution to the subsistence impasse, but out of a love for all people and a desire to promote human dignity and well being. We have brought to your attention various principles of Catholic social teaching, connecting them with the many elements of the subsistence debate. It is our hope that these principles will become a part of the dialogue that is taking place in our state.

We urge all parties to respectfully listen to and appreciate those who hold opinions different from their own. Discussions must continue between the sport hunter and the rural subsistence hunter, the commercial fisherman and the guide.

Old and young, rich and poor, newly arrived and long-time residents, Native and non-Native - the time is at hand for all to search out a common solution. We share with all a love of this great state and an appreciation of its beauties and opportunities. We pray in finding a solution to the subsistence impasse, we will also find solutions for other problems: poverty and the breakdown of family life; accessibility and the limited nature of resources; personal freedom and the need to protect nature.

In solidarity with one another and in gratitude for the treasure of creation we share, we must come to a just solution to the subsistence issue and emerge a stronger and more united people.

May the peace of the Lord Jesus, who came in love to set us free, be with you all.

Roger L. Schwietz, OMI
Archbishop of Anchorage
Francis T. Hurley
Archbishop Emeritus of Anchorage

Michael W. Warfel
Bishop of Juneau
Apostolic Administrator Diocese of Fairbanks

Richard D. Case, S.J.
Deputy to Apostolic Administrator
Diocese of Fairbanks

NOTES

———————————————————————

[1] "Subsistence uses" are the non-commercial, customary and traditional uses of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption. See Alaska National Interest Lands Conservation

Act, Sec. 803,16 U.S.C. Section 3114; Alaska Statute 15.05.940 (32).

[2] In preparation for this pastoral letter, the Alaska Catholic Conference sponsored a listening session, "Subsistence Through the Lens of Catholic Social Teaching/" at which individuals from many areas of Alaska and from a variety of perspectives addressed the subsistence issue. At the listening session, we bishops learned a great deal about the issue and saw the passion and conviction on many sides of the issue. There was a candid and honest sharing of points of view with an attempt on the part of the speakers to hear and understand one another.

[3] Second Vatican Council, Pastoral Constitution on the Church in the Modern World (1965) 43.

[4] The impetus for enacting the Alaska Native Claims Settlement Act came from several fronts. Alaskan and federal legislators did not want to postpone the aboriginal land claim settlements any longer. In addition, after the 1968 discovery of oil in Prudhoe Bay, it was clear that the lack of a land claims settlement might hinder gaining right-of-way for construction of the pipeline. Berger, Thomas R., Village Tourney: The Report of the Alaska Native Review Commission (Hill and Wang: New York, 1985) 23-24.

[5] Alaska Native Claims Settlement Act, 43 U.S.C. Section 1603.

[6] Alaska Natives Commission Final Report, Volume III, Part II, B, citing Conference Report 746,92nd Congress, 1st Session, 1971, p. 37.

[7] In the Alaska Statehood Act in 1958, the federal government transferred management of fish and wildlife in Alaska to the new state government. The Lands Act in 1980 is seen by some as a violation of the statehood agreement. This is a disputed legal issue, and while acknowledged, it is not addressed in this pastoral letter.

[8] Alaska National Interest Lands Conservation Act, Sec. 804,16 U.S.C. Section 3114

[9] Bobby v. State of Alaska, 718 F. Supp 764 (D. Alaska 1989)

[10] David S. Case, Alaska Natives and American Laws (University of Alaska Press, 1984) 300.

[11] McDowell v. Alaska, 785 P.2d 1 (Alaska 1989) The court stated:

> We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3,15, and 17 of article VIII of the Alaska Constitution.

[12] The existing system of federal-state "dual management" is complicated by issues like overlapping state and federal areas of jurisdiction, different eligibility criteria, permit and reporting requirements, and the complexities of coordinating management and harvests of migrating populations of fish and wildlife for users with different priority rights.

[13] Pope John Paul II, Message for.the.Celebration of the World Day of Peace (1989), "To Build Peace, Respect Minorities," 10.

[14] Robert W. Loescher, President/Chief Executive Officer of Sealaska Corp., in a speech presented to The Alaska Federation of Native Political Leadership Summit, February 16,1999, "Native Subsistence Rights - Where are we now in State and National Politics?" Loescher states:

> The Alaska Natives originally sought the inclusion of a "Native Preference" for the Title VIII priority and even today it is still the deeply held feeling of Alaska Native people everywhere that this should be the real purpose of the law. However, at the request and urging of the State of Alaska, the Natives agreed to compromise by accepting the application of the Title VIII priority to rural Alaska residents and dropping its application to a "Native Preference."

See also, Report of Conn, Stephen & Garber, Bart Kaloa, Moment of Truth: The Special Relationship of the Federal Government to Alaska Natives and Their Tribes - Update and Issue Analysis (1981) 27. The authors write:

> The state insisted on this language [rural] to avoid problems of equal protection challenges based on racial discrimination (i.e., protection of Native subsistence rights as opposed to rural residents).

[15] Catechism of the Catholic Church, 2402. The universal destination of goods is the Church's understanding that the goods of creation are destined for the entire human race.

[16] U.S. Conference of Catholic Bishops, Economic Justice for All, (1986) 74.

Catholic social teaching does not maintain that a flat, arithmetical equality of income and wealth is a demand of justice, but it does challenge economic arrangements that leave large numbers of people impoverished. Further, it sees extreme inequality as a threat to the solidarity of the human community, for great disparities lead to deep social divisions and conflict.

[17] Paul VI, A Call to Action, (1971) 23

[18] Prohibiting the sale of alcohol to minors, charging non-residents higher fees for fishing and hunting licenses, and limiting Permanent Fund Dividends to verifiable residents are all examples of

legally and socially acceptable disparate treatment. There are also, in our own nation's history, countless examples of wrenchingly unjust discrimination--denying women the right to vote, the denial of basic civil rights to people of color, and the arrest and incarceration of Japanese-Americans during World War II.

[19] Economic Justice for All, 69, 70, and 71.

[20] U.S. Conference of Catholic Bishops, Called to Global Solidarity/International Challenges for U.S. Parishes, 1997.

[21] John Paul II, On Social Concern (1987) 38.

[22] John Paul II, "A Meeting with Native Americans," Origins 17 (1987b) 297.

> Here too I wish to urge the local churches to be truly "catholic" in their outreach to native peoples and to show respect and honor for their culture and all their worthy traditions.

A Statement from The Bishop of Alaska (Episcopalian)

9/21/1999

The Episcopal Church in Alaska, a part of the 70 million-member worldwide Anglican Communion, recognizes and endorses the God given authority to self-determination, sovereignty, and subsistence priority of Alaska Natives. We note that these Rights are also enshrined in the many solemn agreements between Alaska Natives and The State of Alaska and The United States of America. We believe that the inherent authority of Alaska Natives, clearly articulated in the many people to people agreements that endorse it, are a matter of primary and fundamental moral commitment. Further, these God given Rights have been affirmed by many church councils over the past two centuries and the absolutely consistent moral teaching of virtually all the churches throughout the ages. We join with Alaska Natives in the basic and just request that the State of Alaska honor the authority to self-determination, sovereignty, and subsistence priority that belongs to Alaska Natives by Right and by law.!

We believe that peace, prosperity, and justice for all Alaskans is not possible unless the first rights of Alaska's first peoples are honored and observed.

The Rt. Rev. Mark MacDonald

The Seventh Bishop of Alaska

Analysis of Jerry Ward's Proposed Constitutional Amendment
May 18, 2002

The proposed amendment would amend Art. VIII of the Constitution by adding a new section to read as follows:

> The Legislature may provide a preference to residents to take a fish or wildlife population for subsistence use when the harvestable surplus of the fish or wildlife population is not sufficient to provide for all beneficial uses of the fish or wildlife population. The preference shall be accorded to residents who reside in the vicinity of the fish or wildlife population and have customarily and traditionally used the fish or wildlife population in a rural area for subsistence.

The proposal has the following problems:

1. . Although this amendment is being touted as providing for a "local" subsistence priority, the preference it authorizes would not be in place at all times - only in times of shortages. Until there is a shortage, there would be no means for the Boards of Fish and Game to provide special seasons or bag limits to local residents to accommodate their customary and traditional harvest practices. Thus, as written, the amendment does not establish a true "local priority," because local subsistence uses need not be recognized (and in fact may be proscribed) until there is a resource shortage.

2. The preference is not mandatory.

3. The term "in the vicinity" is vague - it will entail the drawing of boundaries and, without seeing an implementing statute, there is no way to know how those boundaries would be drawn. It is not worded in a way that suggests that the boundaries would follow customary and traditional harvest areas.

4. It appears that this priority would apply only to individuals who both (1) live "in the vicinity of the fish or wildlife" for which there is a shortage, and (2) have "customarily and traditionally used the fish or wildlife in [that] rural area for subsistence." This priority would therefore have to be based upon some set of individual characteristics that demonstrate a personal history of use of the resource for subsistence. To be eligible for the priority, one would have to show a personal history of use (how long? how frequent? each population?) of the particular fish stock or game population. Such an individual-permitting system would destroy the Native subsistence way of life.

5. The reference to "rural area" in the last sentence implies that there would continue to be non-subsistence or non-rural areas within the State where subsistence activities are not allowed. This amendment would not benefit those residents of such places as Eklutna, Ninilchik, Saxman, or the Kenaitze Indian Tribe, since their customary and traditional harvest areas are located, for the most part, within non-subsistence areas of the State.

6. One who "customarily and traditionally used the fish or wildlife population in a rural area for subsistence" is fundamentally different from a "rural Alaska resident."

ANILCA defines subsistence uses as the "customary and traditional uses of rural Alaska residents." The phrase "customarily and traditionally used" in the proposed amendment refers to the user whereas the federal law speaks in terms of the uses.

7. The proposal also lacks authorization for distinguishing among subsistence users when there is a shortage that prevents satisfaction of all subsistence uses.

There are a number of difficulties with the concept of framing a "local" priority that will fulfill the promise of ANILCA to protect the Native subsistence way of life. In one sense, ANILCA does embody the "local" concept, by defining subsistence uses as the "customary and traditional uses of rural Alaska residents." Thus, the rural priority has always been "local" in that it provides a priority for rural residents *of communities* that have customary and traditional uses of a particular resource. If the resource is not sufficient to provide for all the subsistence uses of those communities with recognized customary and traditional uses, the tier II factors come into play and the priority is extended only to those particular rural residents who are most dependent upon the resource (i.e., (1) "customary and direct dependence upon the population as the mainstay of livelihood; (2) local residency; and (3) availability of alternative resources").

The foremost difficulty with a local priority is ensuring that the "local area" are properly drawn. One need only look at the difficulty the State and the Federal agencies have had in defining "rural" - a much clearer concept than "local" - to see that the State will face a daunting task in establishing local boundaries. Over the years, a number of suggestions have surfaced. They have ranged from defining local as residency within a given game management unit (GMU) (Governor Hammond), to "subsistence harvest areas" similar to those used in the Migratory Bird Treaty Amendments (Sen. Stevens), to ANCSA regions or areas immediately surrounding each village within the ANCSA regions. The problem, of course, is that subsistence activities do not necessarily follow GMU boundaries, ANCSA regions or confine themselves to areas immediately surrounding each village. For example, Aniak is on the boarder of three GMUs. Under ANILCA's Tier II criteria, the term "local" has been interpreted to mean residency in a given customary and traditional uses area - that area may extend far beyond the boundaries of a given village.

Senator Stevens' suggestion to implement a "local" priority along the lines of the "subsistence harvest areas" contemplated in amendments to the Migratory Bird Treaty between the U.S. and Canada would at least retain the concept of customary and traditional harvest areas. Those amendments allow for the continuation of customary and traditional hunting of migratory birds by indigenous inhabitants of Alaska who use migratory birds and their eggs for their own nutritional and other essential needs. The term "indigenous inhabitants" is defined to mean Alaska Natives who are permanent residents of villages within designated areas of Alaska where subsistence hunting of migratory birds is customary and traditional, and includes non-Native permanent residents of these villages.

The Subsistence Harvest Areas are described as encompassing the customary and traditional hunting areas of villages with a customary and traditional pattern of migratory bird harvest. Under the Migratory Bird Treaty, these areas are designated through a deliberative process using co-management bodies that have tribal governments as co-equal partners with the State and federal governments. A "local" priority along these lines *might* be made to work, but it would open up Title VIII of ANILCA for amendments - a move that is strongly opposed by the Native community.

The question of who draws the lines is also critical. If it is the Alaska Boards of Fish and Game, dominated by urban, non-subsistence user groups, the local subsistence use area for a community like Anchorage would be extensive, and could seriously impact Copper Center, for example.