

**ALASKA STATE LEGISLATURE**  
**HOUSE SPECIAL COMMITTEE ON FISHERIES**

February 26, 2007  
8:55 a.m.

**MEMBERS PRESENT**

Representative Paul Seaton, Chair  
Representative Kyle Johansen  
Representative Peggy Wilson  
Representative Bryce Edgmon  
Representative Lindsey Holmes

**MEMBERS ABSENT**

Representative Craig Johnson  
Representative Gabrielle LeDoux

**COMMITTEE CALENDAR**

**HOUSE JOINT RESOLUTION NO. 4**

Requesting the Federal Subsistence Board to reconsider its decision regarding the subsistence fishery priority given to Ninilchik residents.

- HEARD AND HELD

**HOUSE BILL NO. 137**

"An Act amending the requirements for the identification card needed for sport fishing, hunting, and trapping without a license by residents who are 60 years of age or more."

- BILL HEARING CANCELED

**PREVIOUS COMMITTEE ACTION**

BILL: HJR 4

SHORT TITLE: KENAI/KASILOF SUBSISTENCE PRIORITY

SPONSOR(S): REPRESENTATIVE(S) OLSON

|          |     |                                 |
|----------|-----|---------------------------------|
| 01/16/07 | (H) | READ THE FIRST TIME - REFERRALS |
| 01/16/07 | (H) | FSH, RES                        |
| 02/23/07 | (H) | FSH AT 8:30 AM CAPITOL 124      |
| 02/23/07 | (H) | Scheduled But Not Heard         |
| 02/26/07 | (H) | FSH AT 8:30 AM BARNES 124       |

**WITNESS REGISTER**

KONRAD JACKSON, Staff  
to Representative Kurt Olson  
Alaska State Legislature  
Juneau, Alaska

POSITION STATEMENT: Presented HJR 4, on behalf of  
Representative Olson, sponsor.

SARAH GILBERTSON, Subsistence & Federal Issues Coordinator  
Office of the Commissioner  
Alaska Department of Fish & Game (ADF&G)  
Anchorage, Alaska

POSITION STATEMENT: Stated official support of HJR 4, presented  
the state's position, and responded to questions.

MICHAEL SEWRIGHT, Assistant Attorney General  
Natural Resources Section  
Civil Division  
Department of Law (DOL)  
Anchorage, Alaska

POSITION STATEMENT: Responded to questions on HJR 4.

ROD ARNO, Executive Director  
Alaska Outdoor Council (AOC)  
Wasilla, Alaska

POSITION STATEMENT: Testified in support of HJR 4.

RICKIE GEASE, Executive Director  
Kenai River Sport Fishing  
Kenai Alaska

POSITION STATEMENT: Testified in support of HJR 4 and responded  
to questions.

ANDY SZCZESNY  
Soldotna, Alaska

POSITION STATEMENT: Testified in support of HJR 4 and responded  
to questions.

RON RAINEY, past Chairman  
Kenai River Sport Fishing Association  
Kenai Alaska

POSITION STATEMENT: Testified in support of HJR 4.

DOUG BLOSSOM, Member  
South Central Regional Advisory Committee (RAC)  
Clam Gultch, Alaska

POSITION STATEMENT: Testified in opposition to HJR 4 and responded to questions.

#### **ACTION NARRATIVE**

**CHAIR PAUL SEATON** called the House Special Committee on Fisheries meeting to order at [8:55:32 AM](#). Representatives Johansen, Holmes, and Edgmon were present at the call to order. Representative Wilson arrived as the meeting was in progress.

#### HJR 4-KENAI/KASILOF SUBSISTENCE PRIORITY

[8:56:40 AM](#)

CHAIR SEATON announced that the only order of business would be HOUSE JOINT RESOLUTION NO. 4, Requesting the Federal Subsistence Board to reconsider its decision regarding the subsistence fishery priority given to Ninilchik residents.

[8:57:04 AM](#)

KONRAD JACKSON, Staff to Representative Kurt Olson, Alaska State Legislature, presented HJR 4, on behalf of Representative Olson, sponsor, stating that this resolution was drafted to address the customary and traditional (C&T) use determination by the Federal Subsistence Board (FSB), giving the residents of Ninilchik subsistence priority in the waters north, of and including, the Kenai River drainage, within the Kenai National Wildlife Refuge and Chugach National Forest.

[8:58:00 AM](#)

REPRESENTATIVE JOHANSEN moved to adopt CSHJR4, Version 25-LS0201\C, Kane, 2/23/07, as the working document. There being no objection, Version C was before the committee.

[8:58:09 AM](#)

MR. JACKSON continued, and said, "Alaska Department of Fish & Game (ADF&G) feels that ... that determination was flawed." Included in Version C, are additional C&T use determinations, applying to the Kenai Peninsula, not previously stipulated. Regarding the community of Ninilchik and the Kasilof River drainage, he paraphrased from a statement issued by ADF&G, as follows:

Reconsideration is required because, in adopting the final rule, "the Board's interpretation of information, applicable law, or regulation was in error or contrary to existing law." In regards to the ruling that included Hope and Cooper Landing, for the Kenai River drainage, and waters north of the drainage, [ADF&G] says: "Reconsideration is require because, in adopting the final rule, the Board's interpretation of information, applicable law, or regulation, was in error, or contrary to existing law, and because new information not previously considered by the Board, demonstrates that the Board's determination was based on incorrect information and assumptions. ... The ruling was in error, or contradictory, to existing law. In addition, reconsideration is required because, in making its determination, the Board assumed incorrect information including unsupported speculation regarding fish stocks resulting in a determination based on speculation. The Board must instead consider real, factual information, not previously considered by the Board." In short, ... we would like to see the Board take another look at these determinations, and ... follow their own rules and regulations. This is not intended to argue for against subsistence ... it's merely asking ... that the Board reconsider its actions, and ... play by the rules.

[9:02:19 AM](#)

CHAIR SEATON asked whether "rolling" the two areas together in this CS together might cause confusion.

MR. JACKSON stated:

Yes, I'm a little confused ... myself because you're actually dealing with three separate requests for reconsideration: one for Ninilchik ... residence pointing to the Kasilof River; Ninilchik residence pointing towards the Kenai River, Upper Kenai River; and ... Hope/Cooper Landing for the Kenai River and drainages.

[9:06:45 AM](#)

SARAH GILBERTSON, Subsistence & Federal Issues Coordinator, Office of the Commissioner, Alaska Department of Fish & Game, (ADF&G), stated official support of HJR 4, paraphrasing from a prepared statement, which read as follows [original punctuation provided]:

The State of Alaska is deeply troubled by recent Federal Subsistence Board decisions on the Kenai Peninsula to grant the communities of Ninilchik, Happy Valley, Hope, and Cooper Landing a subsistence priority in the Kenai and Kasilof River drainages.

The State has filed several Requests for Reconsideration over the last year - most recently in January of this year - appealing these decisions. The resolution you have before you is consistent with the State's appeals.

By way of background, under state law, these communities are regarded as non-rural in nature and are part of the Anchorage-Matsu-Kenai non-subsistence area.

The Federal Board regards these communities as rural (even though they are surrounded by non-rural communities) and has found that they have a customary and traditional use of the Kenai and Kasilof River drainages.

State argues that the Board did not base its decisions on evidence that fulfills the eight criteria required by federal regulation for making such customary and traditional use determinations.

For example, the regulations require demonstration of a long-term customary and traditional pattern of consistent use by a community of the fish resource on federal lands.

Instead, the Board ignored and misused the available data indicating that at most, a very small percentage (up to 7 percent) of Ninilchik residents had fished in the area of the proposed subsistence fishery in a study year. This data did not demonstrate the required long-term pattern of community use.

The Board also neglected to take several factors into consideration, such as: the changing demographics of Ninilchik; the impact that Ninilchik's connection to the available road system has on use levels and the type of use (sport fishing); Ninilchik's access to and more common use of local fisheries; historical tribal use areas, which did not include the upper Kenai River area; and the purposes of the Kenai National Wildlife Refuge.

Considered collectively, these factors do not appear to support a long-term consistent pattern of community use.

The State is concerned that the Cook Inlet fisheries are already fully allocated and the Board's decision will eventually result in unnecessary restriction of existing established uses (i.e., commercial, sport, and personal use fishing).

The State is also concerned that the Federal Board: Does not consistently apply the eight criteria with substantial evidence required by regulation before making customary and traditional use determinations; Does not consider impacts of its decisions on other beneficial uses as required by the Ninth Circuit Court; has not adopted and applied criteria in regulations that require substantial evidence before implementing restrictions or closures on state-authorized fisheries.

[9:13:06 AM](#)

MS. GILBERTSON relayed that the state supports the inclusion of Hope and Cooper Landing in HJR 4.

[9:15:18 AM](#)

REPRESENTATIVE EDGMON asked whether similar circumstances, regarding the FSB, have occurred in other state regions.

MS. GILBERTSON answered, "Yes, ... it's a troubling situation." Similar concerns have been raised since the inception of the FSB, and every year issues have arisen. The FSB has consistently not followed federal regulations, nor have they responded to state court directives to provide written policies and procedures to support the important decisions being made. She reported that this is not an isolated case, and that the

state has filed claims against the FSB, regarding other decisions.

[9:18:26 AM](#)

REPRESENTATIVE JOHANSEN inquired how the state decides which of these subsistence issues will be acted on.

MS. GILBERTSON responded that a departmental liaison team tracks these issues on a full time basis; monitoring the progress and working with the Department of Law (DOL). To a follow-up question, he explained that the state does not necessarily take up an issue of whether an area should be considered rural or non rural, but rather urges the FSB to follow federal regulations and to adherence to process; the board has not followed this advisement.

[9:22:41 AM](#)

CHAIR SEATON requested that the location of Happy Valley be clarified, particularly its relative location to Ninilchik.

MS. GILBERTSON stated that the FSB refers to Happy Valley and Ninilchik as the same area.

MICHAEL SEWRIGHT, Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law (DOL), stated that these two communities are in the same census area, and are treated essentially as one community by the FSB.

[9:25:37 AM](#)

ROD ARNO, Executive Director, Alaska Outdoor Council (AOC), stated support for HJR 4, and said that the council's membership has been in conflict with the FSB for 16 years, primarily regarding game management. He opined that the rural determination for the Kenai Peninsula is flawed, and the federal land managers adhere to that determination. He explained that the unique location, and priority uses, of the Kenai have fostered this lack of accord and stressed the need to "clear-up" the issues.

[9:29:04 AM](#)

RICKIE GEASE, Executive Director, Kenai River Sport Fishing, stated support for HJR 4, and provided information regarding the justification used by the FSB for the determinations in

question, as explained by the FSB chairman at a recent meeting. He opined that the interpretation was a novel concept, and a departure from what has been used to qualify areas/resources for C&T use. Additionally, he reported the FSB's apparent disregard for considering state evidence presented, or for the need to provide clear policies and procedures for making determinations. Describing other incongruities and scenarios he said:

When you play loose with ... policies and procedures, it encourages people to play loose with ... policies and procedures in other decisions. ... What's interesting ... is what the fed's said about the state's ability to file suit on behalf of its citizens. ... The federal argument ... for the Chena [wildlife/moose] case, says that ... the state doesn't have a substantive interest in that issue, and cannot sue on behalf of its citizens. ... That's the legal opinion that's driving some of these decisions from the federal level.

[9:33:46 AM](#)

MR. GEASE suggested three action steps, for the legislature to implement: approve HJR 4; encourage DOL to file a law suit, if this Request for Reconsideration (RFR) is denied; and create an action plan for Alaska's congressional delegation to clear up the Kenai Peninsula issue, and how it relates to the Alaska National Interest Lands Conservation Act.

[9:35:46 AM](#)

ANDY SZCZESNY stated support for HJR 4, and introduced himself as a fly fishing business owner on the upper Kenai River. He reported that the proposed subsistence area is a heavily used sport fishing local, supporting thousands of seasonal visitors. As a member of the Methods and Means sub committee, of the Cooper Landing Fish and Game Advisory Committee, he recently attended a three-day meeting to study the proposed subsistence areas. Given the current situation, he predicted grave problems in the future pending the passage of this resolution to clear up these issues.

CHAIR SEATON asked if his testimony covers the entire area as described in the CS.

MR. SZCZESNY stated that all of the communities should be included.

[9:37:45 AM](#)

RON RAINEY, past Chairman, Kenai River Sport Fishing Association, stated support for HJR 4, and said, "This is the greatest stretch of the imagination for C&T that I've observed." He opined that the FSB has flagrantly ignored the accepted federal guidelines. Further, he agreed with previous testimony that legal action needs to occur to correct some of the ills that have gone on in the past. He said, "We need to wake up to the fact that subsistence in some areas, including the Kenai Peninsula, is out of control."

[9:39:39 AM](#)

DOUG BLOSSOM, Member, South Central Regional Advisory Committee (RAC), stated opposition to HJR 4, and cautioned against handling the issue in this manner. Although he asserted that "the federal law is wrong, the state law is right," he stressed the need for the legislature to work with the federal government to come to accord rather than divide the communities over a subsistence issue. As a member of the federal RAC he is charged with managing the current situation, whether it is correct or not. The necessary changes will not occur by passing a resolution.

[9:42:31 AM](#)

CHAIR SEATON noted that the CS includes reconsideration for all of the communities.

MR. BLOSSOM reiterated the need for the subsistence issue to be addressed, on a statewide, legislative level. In response to a question, he explained that the RAC he sits on is similar to the state RACs that advise the ADF&G boards. The Federal South Central RAC receives proposals from the public, reviews the concerns, and advises the FSB.

[9:44:29 AM](#)

CHAIR SEATON suggested that the primary question is whether the FSB has been following federal guidelines and regulations.

MR. BLOSSOM explained the federal legal stance on determining a person's right for C&T harvest. He emphasized that, until the federal and state laws mirror each other, there will continue to be issues throughout the state.

[9:46:21 AM](#)

CHAIR SEATON stated that the purpose of this resolution is to raise questions. Testimony has indicated that three changes appear to have occurred in the FSB's interpretation for C&T status. One is how the consideration of historic vs. long-term use of a resource is determined, and he asked for a further explanation.

MR. BLOSSOM relayed that, since statehood, Alaska has eliminated subsistence use on the Kenai. However, federal anthropologists have done studies indicating the Kenai's historic use as a C&T area. In further response, he stated that the FSB considers this historic aspect, and does not require continuous use for an area to qualify.

[9:48:22 AM](#)

CHAIR SEATON requested additional information on how fish usage on state lands could qualify for federal subsistence priority.

[9:49:22 AM](#)

MR. BLOSSOM provided the example that, if subsistence users of federal lands on the Kasilof River could not harvest enough king salmon, they could curtail fishing downstream, in the state waters, to allow fish populations the possibility of arriving up-river for subsistence harvest.

CHAIR SEATON asked if the Ninilchik net fishery, intercepting Kenai River salmon, was the qualifier for the Kenai River watershed to be designated for C&T use.

MR. BLOSSOM confirmed that the determination for the C&T finding was that anthropologists ascertained that many years ago the Ninilchik community had fished the Kenai as far inland as Skilak Lake. The level of historic participation was not required to qualify the determination.

[9:51:54 AM](#)

CHAIR SEATON asked for a legal opinion on whether the CS could be handled as two issues: Ninilchik and Happy Valley as one concern, and a request to "further reconsider its [FSB's] decision regarding the subsistence fishing priority for Hope and Cooper Landing residents."

MS. GILBERTSON noted that the state previously filed a Request for Reconsideration (RFR) for Hope and Cooper Landing, and has officially been denied.

[9:54:21 AM](#)

MR. SEWRIGHT reiterated that the FSB "sidestepped the prior Requests for Reconsideration, regarding Cooper Landing and Hope." In the latest RFR, January 15, 2007, although the focus is on the Ninilchik and Happy Valley areas, the FSB was asked to directly address the prior RFRs. He pointed out that Hope is "fairly distant" from the Kenai River drainage, compared to Cooper Landing. The Cooper Landing issue has been addressed, and the residents have dissented the subsistence designation.

[9:56:02 AM](#)

CHAIR SEATON referred to previous testimony concerned with how the FSB interprets the federal regulations for granting C&T use of a federal watershed area, when C&T use was established on state land. He asked for confirmation of this understanding.

MR. SEWRIGHT confirmed the chair's understanding, and said that it is a novel approach. The RFR did address that proposition. He referred the committee to the RFR analysis on page 2, and the members rationalization statements quoted on page 9.

[10:01:00 AM](#)

CHAIR SEATON summarized that these rulings cause concern for migrating salmon, depending on where the fish are harvested en route to the headwater spawning grounds. A clear definition of how the FSB interprets C&T use regulations is important, and could have far reaching effects. Another concerns is for how C&T is qualified based on the traditional use timeline: has anyone ever fished the area vs. continuous use. He asked DOL if this is being challenged as the standard.

[10:02:46 AM](#)

MS. GILBERTSON stated that this issue is also addressed in the RFR, and pointed out that this will not be a concern if the 8 criteria are adhered to, in accordance with the state interpretation. However, the federal interpretation remains in contrasts with that of the state, and neither is the FSB interpretation inline with federal regulation. She assured the

committee that the state will continue to challenge FSB on this point.

[10:05:51 AM](#)

CHAIR SEATON announced that HJR 4 would be held for further discussion.

#### **ADJOURNMENT**

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 10:05 a.m..