

***SUBSISTENCE -
HOUSE WORK
SESSION
(6/20-21/90)***

STATE OF ALASKA
HOUSE WORK SESSION ON SUBSISTENCE

June 20-21, 1990

Anchorage Legislative Information Office
Anchorage, Alaska

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Transcription

Navarre: Work session called to order.

Status of Subsistence Management in Alaska:

Cohen: (Beginning of Norman Cohen's presentation omitted due to taping difficulties)...when the western Arctic caribou crashed. Responding to the problem, the Department and the board attempted to devise an ad hoc system that would give permits to hunt the remaining allowable harvest to residents that had the most reliance on the caribou. In fact, it is this regulation that the three criteria found in the Tier II portion of the state's and ANILCA's subsistence statutes were first promulgated. These criteria, customary and direct dependence, local residency, and availability of alternative resources were intended to allocate the caribou to rural Alaskans in the up northwest Arctic. This regulatory arrangement was challenged in Alaska courts by the Tanana Valley Sportsman's Association on the grounds that the board illegally delegated to local officials its authority to determine who was to receive permits to hunt the caribou and on the basis that the board did not have the authority to allocate to specific individuals. The Alaska Supreme Court ruled in favor of the Plaintiffs by finding that the delegation was illegal. The court did not rule on the ability of the board to allocate among individuals based on certain criteria. Had they done so, we probably would not have had to wait until 1989 to receive the McDowell Decision. It is difficult to speculate about what may have happened if the court had considered the issue 15 years ago. But with a different court there were indications in the opinion recognizing differences between urban and rural Alaska. Based on this challenge of board authority, upon the perception in rural Alaska that hunting opportunities would continue to be limited without a change in statute, and upon the interest in the Congress to address subsistence uses in its deliberations on ANILCA, the genesis

of Title 8 approach can be easily understood. It is during these negotiations over the final language to place into ANILCA that the Alaska legislature began in earnest the consideration of the State's subsistence law. Crafted mainly from language proposed in ANILCA, the 1978 Subsistence law was a compromise intended to put off greater federal management presence in Alaska. Since the state law was adopted in 1978 and ANILCA not adopted until 1980, during that two year period the circumstances changed which were the root of the need to amend the state law in 1986. At the time of the passage, the proposed ANILCA language did not limit the subsistence priority to rural Alaskans. This came later as a result of the consideration of the implication of the decision providing for subsistence of king salmon fishery at Tyonek. If all residents were qualified for this limited fishery, the people intended to benefit by the decision would not have received very much access to the King Salmon resource. So when Congress adopted the subsistence title in ANILCA in 1980, the two laws were inconsistent: the state law not having a rural priority, but the federal law having one. This was later corrected in 1986 with the inclusion of rural limitation on subsistence eligibility in state law to match that rural limitation in federal law. In addition to the amendment to the state law in 1986, to bring the state in compliance with ANILCA and forestall federal management of subsistence uses on public lands, the law was also challenged in 1982 through Initiative #7. While the law at this time does not restrict subsistence to rural residents, regulations adopted by the Joint Board of Fisheries and Game did so limit eligibility. Consequently, the law voted on by the public at that time was in essence the same law that was adopted by the legislature in 1986 and the same is found invalid in McDowell in 1989. These regulations were found invalid in 1986 in the Madison case where the court found that the legislature in 1978 did not intend to limit subsistence only to rural

residents. Here is another opportunity that the Supreme Court had to inform the legislature that limiting subsistence to rural residents was unconstitutional and another opportunity that they did not take. The vote on Initiative #7 in 1982 was 58% in retaining the state's subsistence law at the time, and 42% opposed. The basic structure of the subsistence laws enacted by the Congress and the Alaska legislature are the same. In order to understand how the subsistence laws work, some rudimentary understanding of the structure of the statutes is required. The structures of the laws can be summarized as follows:

1. That subsistence uses of fish and wildlife must be identified in regulations authorizing them promulgated by the boards.
2. That subsistence uses are limited to residents of rural Alaska communities or areas, but not to individual residents.
3. That when necessary to restrict subsistence uses below customary and traditional levels, non-subsistence uses should be eliminated, and that when it is necessary to further restrict subsistence uses in order to provide for sustained yield of fish stock or game population in question, criteria are to be used to pick and choose among the most dependent upon that stock or population.

This is the so-called Tier II criteria. The basic policy choice identified in this structure is that first it is necessary to provide regulation for subsistence uses for fish and game by rural residents, and that that subsistence use is qualitatively different from other uses of fish and wildlife to such a degree that when there is not enough to go around, subsistence use by rural residents should be given the first priority. In order to implement this

structure, the first responsibility of the board is to determine who qualifies. There are two tests which must be passed. The first is whether the community or area is a rural or non-rural community or area. The second is whether in regard to a specific fish stock or game population, the rural community or area in question has customary and traditional uses of that stock or population. A misconception that continues to be held is that any rural resident has a priority for the taking of fish and wildlife over a non-rural resident anywhere in the state. This is incorrect. Residents of the Angoon may have a priority over other residents for the taking of deer on Admiralty Island, but have no greater access to the Nelchina caribou herd, or to the Kenai River King Salmon than does any other residents. Rural communities and areas are limited in their subsistence opportunities to fish and game stocks and populations for which the boards have determined that they have customary and traditional uses. There are criteria in regulation to assist the boards in making these determinations.

The other major question to be asked and answered is when does the subsistence priority begin. While the boards are required to provide for subsistence uses, since these uses by rural residents only comprise 4% of the total amount of fish and game harvested in the state, it is obvious that in most cases there are sufficient resources available for subsistence, commercial, recreational and personal uses of fish and wildlife. However, in those cases where there are insufficient numbers to go around, subsistence users get an extra opportunity to hunt and fish, perhaps through longer seasons, higher bag limits, more fish and gear. Or, get the only opportunity to participate. There only a few instances where there is no other opportunity on a particular stock or population, except for subsistence, the Haines moose hunt being an example where it is limited only to subsistence use

in the Haines area. There is no question that these subsistence laws are complicated, cumbersome to implement, and fraught with controversy. This is because there are numerous determinations that must be made which have occupied a great deal of time by the boards of fishery and game. In addition, in very popular hunts and fisheries where use must be limited, a rural subsistence priority is going to become controversial. Further, many people are concerned with the fact that all users in the community are eligible for subsistence use rather than all the most dependent residents. This was a major policy choice by the Congress understanding the administrative burden of the individual determinations and a view that most people intended to be benefitted would fit within the program. Add to this the tendency of the courts to expand subsistence opportunities beyond regulations adopted by the boards, and you get an ongoing concern for the ultimate result of the subsistence laws. That concludes my opening comments concerning the status of where we are today.

Questions:

Taylor: Mr. Cohen, I assume that you prepared those remarks and have them typed out?.

Cohen: I did some editing on the plane this morning and it needs a little cleaning up but I'll have them available for Juneau.

Taylor: If you would. I'd really appreciate it if we could have those remarks. Thank you.

Koester: Thank you. We're going to transcribe the whole process. Rep. Boucher.

Boucher: Thank you Mr. Chairman. Now you said the magic words there. The definition of rural and urban. You kind of passed over

that like everybody agreed on what that definition was. Focus on that for a minute because that is constantly brought up. It appears to be a numbers game. Give your thoughts on that.

Cohen:

Certainly Rep. Boucher. As I said, the idea for a rural priority was - the genesis of the idea came about in 1979 with the Tyonek case where about 3,000 king salmon were allocated to a fishery in Tyonek when the king salmon runs in the Susitna and the drainage became strong enough to open up after a closure for the past 17 years or so. The resource had some big problems in the early 60's and it was not able to be open until the early, until the late 70's. The original federal law, the federal law on the books today talked in terms of rural and urban and gave only some indication of what they had in mind by saying Anchorage, Fairbanks, Juneau, and Ketchikan were definitely not rural, but sort of the border communities, the regional communities: Bethel, Barrow, Kotzebue, Dillingham were rural. And it was up to the boards or whoever was to implement the subsistence law to determine what that meant and which communities fell in and which communities fell out. After the boards adopted criteria to determine and to look at a community on a case-by-case basis, the 13 criteria that the boards of Fishery and Game came up with, in 1985 the Supreme Court decided in the Madison case that it was the legislature of 1978 did not mention rural at all and had not had rural in mind when they passed the 1978 subsistence law, which is consistent with where the HR39 and S9 or S8, or whatever the Senate bill was in Congress, which did not include a rural restriction until 1979. So, the boards adopted these regulations and they were thrown out in 1985, and then in 1986 the legislature passed a rule that the advice given to the legislature was that the Congress intended basically the importance of fish and wildlife and how the community works was the basis for determining

whether its rural or non-rural. The federal courts had an opportunity to review this in the Kenaitze case and the 9th Circuit determined that rural is more - its not that kind of judgment on whether fish and wildlife is an important use, but you have to do something more quantitative such as density or population based or whatever. So while in 1986 the legislature passed the statute which said rural is where customary and traditional uses of fish and wildlife are significant, a principle component of the economy or community, the 9th Circuit said that is not consistent with what we think that rural means in ANILCA, and we think it means something to do with the population, census base, something or other - generally what you think of as rural. So the state rule was found invalid in terms of being in compliance with ANILCA, and we now have another attempt at figuring out what rural means. And that is the federal definition that we find in the federal subsistence program, which is currently in draft form but will be adopted for the July 1st assumption of Fish & Game subsistence management by the federal government. They have a definition which is close and in practical terms will work very similar to the way that the 1986 state law worked, but it does contain at least some population figures in it that put the range on what the, at least the Fish & Wildlife Service and federal agencies mandated to implement the ANILCA and believe that they believe what rural means. And that is if you're in a community over 7,000, you more than likely are not rural. If you're in a community of 2,500, you probably are rural. And if you're between 2,500 and 7,000, we don't know one way or the other. But their criteria, sort of like the state's criteria, but a little different that we're to use and figure out whether they are rural or not. They also do something different than the state law did. They aggregate places that look like they belong together, so Eklutna or Girdwood are probably a part of Anchorage, then maybe being considered separately, and things like. Whether Kenai and

Soldotna and Nikiski and North Kenai get combined - they may likely get combined into one sort of area, and then you'd consider the population of that entire area rather than just considering them independently. But that's sort of the basis of the federal regulation which is the interpretation of ANILCA and will be, if the legislature adopts the constitutional amendment I approach, and reinstates the subsistence law except for these old state rural definition and shows its intent to include the federal definition as the one that the board should use. We would then have it the same rural definition in state law and federal law. So, it is possible without any change in ANILCA at this point, to interpret things in such a way as the state law and federal law would be the same in terms of a rural definition.

Boucher:

Really, this is the guts of the thing now. You take, well under 7,000, then you leave this gray area (2,500 to 7,000). Now is that what the federal government is proposing? In other words, they brought us no solution at all on the thing if that's the case because a lot of people fall within that particular area. And since by and large nobody looks at subsistence as a word, its a way of life. That's the way I have always felt. Its either the census numbers, or you come up with economic - but to some people its a religion. Its a way of life. And I never hear that word brought into this. But back to my point Mr. Chairman, it looks like we're leaving a gray area from 2,500 to 7,000 and that's a lot of numbers, if this is what the federal government is proposing.

Cohen:

What they're proposing is there are 14 communities between 2,500 and 7,000 in the state. And they plan, as I understand it, to take these criteria that they have to review this, and those include fish and wildlife use, transportation, communications, education, governmental institutions, and obviously if you look more like Anchorage, you're

non-rural, and if you look less like - you more like _____ or Angoon, you look more rural. But that's sort of - and then they plan to make individual determinations on those 14 communities. So that will be done at some point. I'm not sure what there plans are. If the state had this system, then the state boards would be required to make a determination on each of those 14 communities. So while it is definitely not black and white, it is - there is at least a process that is set up to make those determinations. Just to follow-up on your second point dealing with a way of life: people concentrate on the rural portion of the eligibility because it was, the definition was thrown out by the federal courts and we have to deal with that. But we should not lose sight that there is a second level of qualification and that is that the community or area has to have customary and traditional uses of a particular resource - a particular fish stock or game population. Those individual determinations limit first of all the range of where somebody qualifies for subsistence use or whether the community qualifies for subsistence use. But that customary and traditional monitor is the way of life that you're talking about. It is where has this community traditionally taken animals, fish or game for food and clothing and other uses for personal or family consumption. Where does that take place? And has it happened over a long period of time in that community? And that's the kind of place where way of life comes in in the customary and traditional determination as opposed to the rural determination. But there are two criteria and I just want to make sure that's clear and hope that answers your question.

Taylor:

Thank you Mr. Cohen. I realize I should hold this down, and I want to establish maybe a clearer understanding of what we're talking about. And maybe hopefully Tom might join in this answer. Its my understanding that we, the State of Alaska, because of, and this has been I believe

ratified or certified by court decision, that we the State of Alaska retain management of our fisheries resources in that we do control those navigable waters within this state, including lakes, and that we have jurisdiction recognized by the federal government and the federal courts out to the 3-mile limit. So when I hear people constantly in terms of our fish and game resources may somehow be jeopardized and that the federal government may be taking this over and people being paranoid and frightened of this all over the state - that's not accurate is it? In fact, we're only talking about game - we are not talking about fish, and I want that to be understood. If my understanding is incorrect on those decisions, then I want to be corrected now.

Koester:

Mr. Chairman, Rep. Taylor, I was going to get in to after Tom's presentation, into the federal program and what it includes and answer that question in more detail. But the gist of it is, you're right and you're wrong. If I could be presumptuous enough - in terms of the program as laid out now, fish in navigable waters are not covered. Now that does not mean that fish in non-navigable waters isn't covered, and in fact it is covered. So some fishery resources are now covered by the program.

Taylor:

Let me interrupt you. Under the Clean Water Act and others, the term "navigable" by the federal government itself has been dramatically expanded. I think navigable includes areas I would have a very difficult time taking the lightest weight canoe or kayak. It definitely includes the lakes. It definitely includes all of the stream and water systems in the state, which we retain jurisdiction over and have a court decision on this. I'm not talking about some federal regulators proposed program and whether or not we may be within or without it. I'm talking about federal court decisions that say we, the State of Alaska, has jurisdiction over fisheries in navigable waters and up to 3 miles off the

shores. If that's the case, its a complete misstatement in the press and by the administration to be talking in terms of "oh, we're going to have a real problem with our fisheries resource cause the feds are going to take it over." They can't take it over by federal law.

Koester:

I think we're sort of mixing somewhat apples and oranges here. First of all, the program as laid out now only deals with non-navigable waters and there are some fishery resources in non-navigable waters. But it is not the great majority of the fishing effort that takes place for subsistence uses and that's certainly most of the activity takes place in marine waters or in major rivers, and therefore those are navigable and are covered, retained by the state. And the state's position has been that it is to retain management to the extent possible to keep the federal program as narrow as possible and the state believes that it should retain its authorities over fisheries in navigable waters. That's the first issue. The second issue though is, it is not whether it is navigable or not in terms of whether the federal program can reach into navigable waters. The issue is the definition of public lands that's contained in ANILCA. Public lands and then lands include title - lands in which there is title in the federal government or interest therein. Now the question the federal government at this point has made its determination as to how far this program should reach has taken a narrow view, and that narrow view is that the federal government interest in navigable waters is not such to require a federal subsistence program under ANILCA. The question that remains is whether in litigation whether that will stand up. The federal government does not need title in navigable waters to be able to assert its jurisdiction under ANILCA. It is a definitional question of what public lands means under ANILCA. In the initial federal program they do not have authority over fish in navigable water. It will certainly

be litigated, and it is that question which the court will be asked to respond to and will determine on its own whether fish do apply within the federal program or not. But it is a long way from certain as to what the result of that will be.

Taylor: You don't believe the current cases that are on record establish that fact are relevant because the question of whether or not ANILCA overrides all of the navigable waters so to speak jurisdictional cases has yet to be tested. Is that what you're really saying?

Koester: The cases that have been established all are derived directly from what is called the equal footing doctrine. They basically involve title to the beds of the water bodies. Those cases may not be directly applicable to the question of what does ANILCA require with respect to management of fisheries, and the reason for that is that ANILCA describes its reach as covering all public lands. That is in ANILCA a subsistence preference for rural residents is established by the United States Congress on all "public lands". Public lands are defined as all lands belonging to the federal government. Lands, in turn, is defined in ANILCA as saying, "lands and waters in which the federal government has an interest." Now the navigability cases all hold that the state has the title to the bed of the water bodies, but they do not necessarily say that only the state and not the federal government, has any interest in the waters. And so the legal issue would be, does the federal government have a sufficient interest in the waters of navigable water bodies? That those water bodies come within ANILCA's definitions of public lands such that the subsistence preference for rural residents under federal law applies to them. The draft program that the Interior Department has published for public comment right now takes the position that under ANILCA the navigable waters are not public land. And in

that sense the state has, if you will prevail on that argument, in the draft program. That does not however mean that the federal courts will not be asked. I'm relatively confident they will be asked to overturn that decision. I'm sure the state will be a participant. And its consistently been our position that that should not be the result. That, in fact, the water bodies of the federal government does not have an interest in the waters. But that's a question that will be litigated. Just as a matter of information, if one looks at the Kenaitze decision, there are at least three judges on the 9th Circuit Court of Appeals who seemed, in that case at least, to very clearly think that ANILCA does in fact reach fishery resources because the precise questions at issue were fishery resources in the Kenai River in that case. So there is at least some pre-diliction it would seem on the part of three judges on the 9th Circuit Court of Appeals that ANILCA does reach fishery resources. Certainly under the draft federal program that has been published for public comment right now, that would not be the result. We would argue, or it can certainly be argued that Interior is the agency that is supposed to implement ANILCA. Its views are entitled to deference by the courts, and it may very well be that the courts ultimately will conclude that ANILCA does not reach fishery resources. But an argument can be made that ANILCA does reach fishery resources, particularly to the extent that the Courts will look at the legislative history of ANILCA. It seems relatively clear that at least a number of members of the United States Congress contemplated that ANILCA would, in fact, reach fishery resources because there's relatively substantial legislative history regarding the use of fishery resources for subsistence purposes by rural residents and so on. So, its not, we cannot say with certainty that the Equal Footing Doctrine case and the navigability cases preclude a judicial result that ANILCA does in fact reach fishery resources. That is not beyond the realm of possibility. So to say that they

may be in jeopardy is an accurate statement. One cannot say with certainty that they are not in jeopardy of a federal takeover. And to believe that would be a very serious mistake.

Taylor: It is accurate to state then that the question of management of the fisheries is going to be left up again in this case to the federal district court?

Koester: One of the things that the legislature I'm sure realizes is that the courts are the ultimate interpreters of statutes. ANILCA is a federal statute. The federal courts are going to be the ultimate interpreter of ANILCA. That's part of the federal system of government that we have. That's one of the realities of the way our society is developed. I know that no one particularly likes government by judiciary. Unfortunately, that's what happens when legislation is not as clear as it could be, because it does leave, in my view, much too much room for judicial interpretation. ANILCA is one of those statutes that as a result of negotiation and the process of compromise leaves a considerable amount of gray areas. And its those gray areas that the courts are called upon under our system of government to fill in. This is one of those gray areas, and that is the definition of public lands. By using the phrase "lands, waters, and interests therein" in effect the Congress invited the courts to fill in that gray area and determine what constitutes an interest in waters sufficient that those waters become public lands or not. That is a question that will in effect be answered by the courts.

Martin: Thank you Mr. Chairman. In light of your wrap up here on that particular point. I kind of agree with you that it will end up in court. I'm wondering why not does not the principle of ANILCA apply to all states of this nation, especially in consideration of the 14th Amendment. Also,

when we talk about navigable waters and also the equality of people, should a federal law not be equal in all states or is the absolute law that is equal to one state and not the citizens to other states. And as you say and the other gentlemen, all these ands, ifs, and buts are going to go to court. Why is that the governor's office and the department is always insisting that the legislature either change our constitution, especially the equality clause, would change legislation to comply with the federal law, when we're going to end up in court anyway? Why don't we have a friendly judiciary like other states and solve these difficult cases. You're telling us this "if" and this "if", this interpretation, and we're representing the common people. We are common people. You guys are the super lawyers and you can't give us an answer. So I don't know. I'm really frustrated these past 6 months sitting on the Judiciary committee when we've have at least 8 different bills presented to us and every time the lawyers say well you can't do this cause you got to do that. You can't do that cause you got to do that. You got to have the court bless you. Let's go there first. Is everything we do going to go to court? Is there anything we can do that won't go to court?

Koester:

Mr. Chairman, if I may. There's certainly some things that the legislature can do that will not go to court. I mean the legislature can put an amendment to the state constitution on the ballot and let the people vote. No one is going to contest the legislature's power to do that. The legislature has the power. Because its written in the constitution so no one is going to challenge the legislature's power to do that. If the legislature acts through statute, then it is always open to the people of this society to argue in front of a court that the legislature acted in a way in that statute that violates the constitution. Either the state constitution or the federal constitution. Its certainly open to the state at this point to

challenge ANILCA under the federal constitution and argue that the United States Congress acted in excess of its powers. We've looked at the legal issues and possibility of doing that, and have concluded as a legal matter, that its unlikely the state would prevail in that case. But there are a number of other reasons that go beyond the purely legal merits of that challenge that at least appear to be policy reasons not to take that course of action. The first of which is of the period of uncertainty, the time it takes to get a case through the federal district court, through the court of appeals, and then to the United States Supreme Court, assuming it would take review - leaves a vacuum, if you will, in the meantime without taking any kind of a

_____ so it doesn't even have to go through the district court and the court of appeals. It was filed in May of 1979, we still do not have a final resolution in that case because the court procedures takes so long. That's 11 years. I'm not sure people want to wait that long for an answer to this kind of question. The second policy reason is for not, or least thinking about not bringing a law suit. Weighing the alternatives - weighing the options. That this would appear at least to be a reversal of state policy. If we are not going to challenge the congressional established policy that rural residents of Alaska should have a subsistence preference in the use of fish and wildlife resources, that is a policy that has been the policy of this state since we negotiated ANILCA, since the Board of Fisheries and Board of Game established in 1982 in the regulations that rural residents would have a preference, and since this body enacted the 1986 subsistence law that rural residents should have a preference. So that would be a dramatic reversal of state policy, what's been state policy for a decade now. Congress thought the state agreed with this compromise in 1980. It was something that none of the parties that were negotiating that (sportsmen, the Native community, development interests, environmentalists and the state) none of the

parties to that compromise agreed with all provisions of ANILCA. But Congress, rightly or wrongly, had an expectation that at least these parties will live with this compromise. If we now say that we want to take the benefits that we got from ANILCA, but will challenge in court and will try to throw out those pieces of the compromise that we don't like, what does that do to the state's ability to negotiate meaningful with Congress in the future on issues like ANWR and other development issues that the state has before it? Is Congress going to give us the same kind of credibility and the same kind of standing in the negotiating process if Congress has the impression that we'll negotiate a deal, get it through Congress, and then try and through the parts we don't like, which is exactly what we'd be doing here if we challenged ANILCA. Finally, if we succeed, and if we throw out the rural preference in ANILCA, what's the alternative? What do we get in its place? Do we get nothing at all? I think if you look at the legislative history leading up to ANILCA, this part of the package trying to deal with the subsistence needs of Alaska residents was a very important part of Congress' consideration with respect to the use of fish and wildlife resources on federal land. In 1976 the U.S. Supreme Court held unanimously that Congress does have the power to regulate fish and wildlife resources on federal land. It has that constitutional authority under the United States Constitution. It also has power under the Indian Commerce Clause to legislate with respect to Native Americans. One possibility certainly would be for Congress to say that a Native preference for fish and wildlife on federal lands is an appropriate alternative. That's one possible alternative. Another one is no consumptive uses of fish and wildlife on federal lands. So in terms of looking at a lawsuit as an option, one has to look at okay, say you succeed, what are the alternatives? What might you get instead? And I think its for those policy reasons, as well as the reasons that its unlikely the state will prevail in

that litigation, even those that are advocating litigation agree it would be a difficult and a complex case to win. Still beyond the merits there are policy reasons to think twice before deciding that a lawsuit is the preferred option.

Martin:

I'm not going to think twice, I'm going to think ten dozen times before we prepare constitutional legislature. Well we had the perfect option a number of years ago on local hire. At least this state at least four different times legislature passed a constitutional amendment, we sold the people in believing that it was constitutional, red, white and blue, and then its found unconstitutional. I think the same thing is being jammed our throat now. To deny the people equality and say we are going to deny our right to equality, for usage of our natural resources. That is going to be thrown out. I don't want to come into a simple solution saying all we have to do is make a amendment to the constitution and let the people vote on it and our problems are over. That's not true, sir. Just because we enact legislation saying they can vote on it doesn't make it constitutional. And even if they vote on it doesn't make it constitutional. Is it not going to be challenged. Certainly, I feel Mr. Chairman, we're getting this fear of crisis developing too much. Fear of change. Change is inevitable. The Supreme Court has changed itself when the U.S. Constitution is questioned 228 times. So why shouldn't it change itself on this and other questions before the court? What I'm trying to say is I don't want to be doing action because of fear. If we're afraid of something, why did the founding fathers give up their life, you know. I don't want to use fear as a technique as to why we should actions is what I'm saying.

Cohen:

There's one point that Rep. Martin made and I think its probably the key question here and something that I sort of

mentioned in my presentation but probably was in an inappropriate place and people may have missed it, but there is a fundamental policy choice here. And the choices, is the use of fish and wildlife in rural Alaska qualitatively different than it is that use in urban Alaska such that when there were shortages people in Rural Alaska get the better opportunity for those resources? It is that simple question. Now, that can be viewed in terms of its not equal for everybody, therefore its something we shouldn't do and we shouldn't pass a constitutional amendment to allow that to happen. But, if the policy choice, which has been made at least by the Congress and by this legislature in the past is that there is a difference and that difference needs to be recognized when there's a shortage of fish and wildlife to meet those needs, then the choice is for a constitutional amendment. And its that simple question which is before you -- that policy choice.

Cohen:

If I may Mr. Chair, it may be appropriate as this is a work session and not a hearing, to try to at least get through to the extent we're able the background so that everyone has the same basis of information. Once that is done the policy questions begin to emerge and then it may be a more appropriate time to begin debating policy. Rep. Martin asked a specific question about litigation and there are obviously both advantages, policy advantages, to find litigation against the United States challenging the constitutionality of ANILCA. What I was trying to point out is that there may also be disadvantages. But all that I think is part of the informational base that will be necessary for this body really to approach in a meaningful manner an effort at resolving or at least deciding what the policy direction for this state ought to be with respect to this issue. And so rather than getting further embroiled in policy arguments at this point, it may be more appropriate to try to continue disseminating the information if that's appropriate.

Navarre: You want to go through your prepared testimony before we get to questions, is that the...?

Cohen: I think questions are appropriate, but some of the questions now are anticipating some of the information that not everyone may have. For example, what are the specific provisions of ANILCA? What did the 1986 law do? What have the various lawsuits that have been brought held with respect to a variety of these issues? And some of that information may make this kind of discussion more appropriate.

Wallis: Mr. Chair? This is Rep. Wallis in Juneau. We're losing track in the discussion of who was talking when. And could you also tell me what representatives are speaking, and could you also indicate the what the agenda is going to be.

Navarre: Yeah, you should have a copy of the agenda. If not, we'll fax a copy of the agenda down to you in Juneau. There should be one there. I will mention that Rep. Foster and and Rep. Cheri Davis joined us. Rep. Foster in Nome, Rep. Davison in Ketchikan. Also, Rep. Hoffman and Rep. Cotten have joined us here in addition. Rep. Boucher was here earlier. Rep. Taylor is here. Rep. Collins, Rep. Brown, Rep. soon to be Judy Salo, Rep. Menard, Rep. Ellis, Rep. Martin, Rep. Leman, and Rep. Hudson, also Rep. Hanley was here and has stepped out for a moment. And we'll try to identify as we speak about, as people are asking and answering questions, please identify yourself.

I have a question with respect to the definition of rural, back on the definition of rural. The federal definition and how it interacts with the decision in the Kenaitze decision. If they're going to try to, I guess, put the area together on the Kenai, Kenai-Soldotna, and say it is not rural, how does that work with the Kenaitze decision?

Cohen:

Mr. Chairman, the Kenaitze decision determined that the state law and implementing was not consistent with the federal term "rural" and what the court thought that it probably meant, which is at least something that has to do with population numbers. The District Court in Anchorage, Judge Holland, determined that the 9th Circuit, when it made that decision, was not saying that all of the Kenai Peninsula was rural, but was just saying that the state definition was not consistent with ANILCA. Therefore, it is up to either the federal court or the federal agencies at this point to make a definition of rural that would interpret what ANILCA means. Once that is done, the Kenaitze will be subject the definition of rural that is in federal law insofar as their claims are that they're entitled to a fishery under ANILCA. But their asserive affected by both the rural definition, which if Kenai, Soldotna, and North Kenai and Nikiski are considered one area are greater than 7,000 obviously and therefore would be non-rural, therefore most of the people in the Kenaitze tribe who live in those communities would then not be entitled to the right under ANILCA to a fishery, as well the determination that ANILCA doesn't reach into navigable waterways and it doesn't reach into where they conduct their fishery in the Kenai River, they would also not be entitled to that fishery under the geographical scope of the federal subsistence program implementing ANILCA. So there is, the Kenaitze at this point are subject to these rules that federal agency comes out with and those rules are further interpretation of the 9th Circuit opinion that just said that the state law was not what Congress meant when it adopted the rural in ANILCA.

Navarre:

Could the Gulkana decision be interpreted as nullifying the Kenaitze decision or overriding the Kenaitze decision?

Cohen:

I think that Tom is probably more up on this than me, but I think the gist of what was said earlier is that the Gulkana

decision has to do with what is navigable. The issue is whether the federal interest in navigable waters is enough to kick in ANILCA, not whether its navigable and therefore the state owns the bottom. We're really talking about who has right to regulate the fish which are in the river.

Rep. Hudson:

Thank you Mr. Chairman. For the line, Rep. Hudson. We're called upon to make some pretty strong policy decisions here pretty directly, and so I would urge you to indulge our ignorance of the law, and I want to get to back just a little bit to this question of navigable waters and the fisheries versus the game. Because, as I look at this whole issue from a policy perspective, if you were to lump them altogether and assume that you were going to say seriously lose the management of your fishery resources as well as your game, that would have a greater implication and require in my opinion at any rate, more consideration on the policy determinations we might come up with. And so I would hope as you make your presentation, Tom, that you'll kind of dig into that just a little bit. I am questioning whether or not it wouldn't be possible, feasible, and maybe even desirable for us to seek some sort of opinion from the court vis-a-vis that very issue. And if not, that subject wouldn't be, as we say, the issue be divided. The question, be divided, on the fisheries side as well as on the game side. If we were to go to court, what was your opinion would we have to _____ maybe help us sustain the fact that the state would _____ even though the _____ might be more clouded and _____. And so I think, I would hope at any rate that, you know, we went all the way back with the historical and social and those kind of definitions. It is really kind of difficult for us to understand because we had it back in '78 and everybody seemed to be satisfied with it. And ANILCA was passed and all of a sudden over a period of time and we 've had a lot of different things, so as we get into this thing I think

the impact on fish and game especially about rural preferences, and particularly the Kenaitze case _____. Also, I _____.

(Transcriptionist could not hear remarks on tape due to high pitched tone on tape. Missed remarks of L. Lemman, V. Collins, and R. Taylor).

Navarre:

Norm, I'd like to follow-up on your response to Rep. Taylor's question on regarding navigability versus non-navigability, and I'm not familiar with the Gulkana decision, so I can't speak to that. I guess my question is simple. Are the tests for that anything like the application of the Clean Water Act for navigability? If not, what are they, if you can give it in a short answer. And if we do have the answer, do we have a tabulation of what is non-navigable or some graphical presentation, or could we have that at least by Monday morning? Or, is that not possible? Is that also subject to court interpretations.

Koester:

If I may Mr. Chairman, the Clean Water Act definition of navigability is much more extensive than the...the Clean Water Act extends to all waters in the United States and that now includes even wetlands, which are not necessarily water, so you have your drudge and fill permits that the Corp of Engineers uses and so on. Its an exercise of Congress' Commerce Clause power which extends very very broadly. And, in fact, the courts have continuously expanded Congress' under the Commerce Clause Power. President Reagan's Commission on Federalism noted that that's been one of the basic erosions of states' rights over time through the United States Supreme Court's expansive interpretation of the Commerce Clause power. The navigability test on the other hand relates directly to navigation on waters. The test for total navigability is whether the waters were susceptible of use for trade and commerce on the date of statehood. In the Gulkana River case, the 9th Circuit Court

of Appeals affirmed the Federal District Court judgment that when in trying to apply that test, that language test, the word test, to actual water bodies in the State of Alaska, that it is legitimate to present evidence of a use of a water body by a variety of craft that many people think of as recreational: canoes, inflatable rafts and so on. The federal government was urging that the question be, can this magic mythical boat (the magic boat test as it became euphemistically referred to by the attorneys) in affect a boat capable of carrying a ton or two tons of cargo with a three draft keel and so on, whether that kind of a boat can navigate the water body. We were arguing for a much more liberal test. That in fact use by recreational use by kayaks, canoes, inflatable rafts, would suffice to demonstrate that this water body was susceptible of use in trade and commerce. We were successful in that case. The consequence of that is that a much larger number of water bodies in the state are navigable for this title determination purpose. Does the state or does the federal government or private parties own the bed of the water body? So as a consequence of that case, many more water bodies in Alaska will be found navigable. And as a consequence, the state will have title to the bed of those additional water bodies. Whether we can provide a map that will show all of the navigable water bodies by Monday, I don't know, but I will certainly check with the Department of Natural Resources and see if we can have that available.

Navarre:

Or at least perhaps a tabulation perhaps of non-navigable, if that list is much shorter. I'm not sure which list would be longer. And, maybe those non-navigable waters that have the support of fisheries. Even, you know, reduce that to a smaller substance, so we can determine what portion of the fishery are we talking about that possibly could come under these draft regulations.

Cohen: There are very few fisheries that will come under the draft program. We're only talking about non-navigable streams that are on federal lands, as opposed to all non-navigable streams in the state. Which we're talking about the upper regions. And at this point, it is our understanding that the federal programs have been vague on this, but it is our understanding that unless the activity place in that non-navigable area, then it would not apply. The question though is and where the state gets the bed of the river, if its navigable. But navigability also gives federal interest in that water such that the federal government can regulate it. And that's how they regulate under dredge and fill permits, wetlands, etc. So there are federal interests in navigable waters despite the fact that the state owns the bottom. And it is, the question is: is that interest of such a degree that ANILCA kicks in for purposes of fisheries? And, it probably, and this is going to be determined on the basis of whatever case comes up. If it looks like an egregious case, it probably, you know, those are the kinds of things that are going to get involved in this basically a legal question, but it probably will be - depend a lot on the type of sympathies the court has for the people who are pursuing the litigation.

Collins: I think my question has been answered, which similarly phrased differently, is what percentage of our fishery is in non-navigable waters, and I think if we had that answer that would maybe be the easiest way to get around it. If you could give us that off the top of your head. Less than 1%?

Cohen: Well virtually none of it takes place in non-navigable waters. There is some. I mean you'll find lake trout, brook trout, things - fisheries which take place on federal lands which we're talking about. But your major salmon, subsistence salmon fisheries are still going to be regulated

under this program at this time until litigated and something else comes out by the state.

Taylor:

No, the salmon fisheries of this state are going to continue to be regulated by the State of Alaska. The federal government has absolutely no jurisdiction over those salmon fisheries resources, and anybody telling the press that salmon fisheries resources are in jeopardy because of this "alleged federal takeover" is in complete disregard of the Gulkana case, unless the Attorney General's office is telling me that you want to fall over and surrender on that one too. Isn't that the bottom --- we've been at this half an hour for you to finally tell us there are no salmon involved, that navigable waters, yes we have jurisdiction over them. When the question was asked 20 minutes ago. And you actually said, oh, we do have a percentage of our fisheries resources that may be in this area. And when asked what is the percentage, zero.

Navarre:

I think what Mr. Koester mentioned earlier -- this is Rep. Navarre and I want to ask again that people, before they speak, since we're going to have this transcribed to please state who you are so that when we get it transcribed we can attribute it to the proper people. Thank you. I just want to mention that what Mr. Koester said earlier is that apparently the Gulkana decision does not address whether or not the federal government has an interest in the fisheries. That question has not been determined by the courts, so that therefore the fisheries resources should be considered in jeopardy. Not, maybe not right now, but that's going to be decided by the courts also. Whether or not the interest in fish that in the navigable streams, which is in that reference to it in ANILCA, whether or not that interest is such that the federal government therefore could go in and exercise some jurisdiction over the fisheries resources. Is that reasonably accurate.

Koester:

I think that's correct. And to specifically answer Rep. Taylor's question. We're not going to roll over on the Gulkana decision. We won the Gulkana decision. We litigated it and won it and we're not going to turn our back on it. We have supported other states in their equal footing doctrine claims. We supported Utah and got 33 other states to join in an amicus brief to the United States Supreme Court, which the Utah Lake case held that a pre-stated federal withdrawal does not defeat state title under the equal footing doctrine to the bed of the navigable waters within that federal withdrawal. The case was profound implications for the State of Alaska. We successfully supported in that case. We have no love for the federal government, and we're going to litigate and do whatever we need to do to continue to assert legitimate state claims to jurisdiction, particularly the equal footing doctrine. But to say that there is no jeopardy to the salmon resources is an incorrect statement, because there is in fact some jeopardy. Under the federal program, the draft federal program that has been published by the Department of the Interior, the federal takeover would not include salmon resources. The Interior Department has made a judgment call in interpreting ANILCA that ANILCA does not include navigable waters. Legal arguments to the contrary can be made, particularly if, as a result of the McDowell decision, and if the subsistence preference statewide is no longer part of state law, so that subsistence users do not have a preference for salmon resources. Because those are not on federal land and there's not subsistence preference in state law. It is likely that that question will be litigated. And legal arguments can be made under ANILCA that Interior's interpretation is incorrect. I am not advocating that Interior's interpretation be found incorrect. And certainly everything that the state has done in the past with respect to jurisdiction over waters and fisheries is that that is not part of federal land. And so they are not subject

federal regulation. But to say flatly that there is no jeopardy is an incorrect statement because legal arguments can be made that in fact ANILCA does reach those resources. The Interior Department has not taken that position in its draft plan. That's not to say though that the question might not be litigated and the Court reach a different conclusion. And again, the courts are the ultimate interpreters of statutes, not administrative agencies. Just so, there is some jeopardy.

Cohen: One interesting thing about the federal program is that they are going to adopt by reference all of the state's subsistence fishing regulations, or actually specifically adopt them. Asked why, if they're not asserting jurisdiction over navigable waters they would do this, is that well, if we lose the court case at least all of those regulations will be in place at the time we lose the court case. So, just, to give you an indication of sort of the confidence that the Interior Department at this point has in terms of whether it believes ultimately fishery resources will be subject to ANILCA.

Taylor: I understand that nothing is certain in this world, that some federal judge at some point may overturn almost anything. But as the Department seems want to make predictions about whether or not certain litigation might prevail or not prevail, you'd be willing Mr. Koester at this time to give the legislative body your prediction about whether or not this state will continue to retain its jurisdiction over the management of our natural fish resources in navigable waters and for up to 3 miles, or do you predict that we are going to lose this one?

Koester: I think the strongest legal argument is that ANILCA does not reach fishery resources.

Taylor: Good.

Koester: Thank you. I think the strongest legal argument. On the other hand I also thought the strongest legal argument was that the state's definition of rural was consistent with the use of the term "rural" in ANILCA, and we had three judges of the 9th Circuit Court of Appeals who, in the view of at least some analysts, decided that case, or at least their written opinion, seems to reflect more personal views and philosophies than a strict analysis and interpretation of the language of the federal statute. And I think that is at least something that we need to throw into the mix, if you will, in terms of trying to make predictions as to what courts will decide. And so while I feel very confident that the best legal analysis, strict construction if you will, of the terms of ANILCA is that ANILCA does not reach navigable waters; instead, only reaches uplands. I can not say with confidence that that's what the result would be if the question is litigated. Particularly and again in response to Rep. Hudson's question, right now the state is not in a position to bring a lawsuit. One of the prerequisites for a lawsuit to make that determination is that there be an actual case and controversy. So for us to sue the federal government, the federal government would have to announce that it was attempting to reach those waters. Then we would have a controversy. We would be taking one position, the federal government another position. That's what you need to get into court. You have to have an actual controversy. Right now the federal government has taken the position that we believe is legally correct. We don't have a controversy with the federal government under the draft plan, and if that's what ultimately adopted by the federal government, we won't have a controversy over that plan. So we won't have the jurisdictional prerequisite to getting into court to litigate on that issue. Who will have that controversy? The people who believe that ANILCA does in fact reach

navigable waters are the ones who will have the controversy with the federal government if that becomes the final plan - the federal government's final plan. They are the ones who will bring the lawsuit against the federal government. So, that was one of your questions Rep. Hudson. Can we bring a lawsuit right now and get a determination from the court? And the answer is, if the draft plan becomes the final plan, the answer is no.

Hoffman: Thank you Mr. Chairman. The Gulkana decision as it relates to management of fish I think is irrelevant. The Gulkana decision talks about the jurisdiction to manage the land underneath those navigable waters. The Gulkana decision does not talk about managing the water resource or manage the fish that pass through that resource. Is that correct?

Koester: That's correct.

Hoffman: The other issue regarding the federal plan for the management - federal takeover, you know, I participated in the proposed, the hearings in Bethel from 7:00 p.m. to close at 2:00 a.m. in the morning, and the issue of the position that the federal government is taking on management of fish, they told us is temporary, while the regulations are temporary and they are still further considering whether or not they will include management of fish. It is the position of the people at least that participated in the hearing in the Bethel region, that Title 8 of ANILCA does include a preference for fish and for game. And that was founding results at least of the testimony that the people of the region out in Bethel participated in. It was also expressed to the federal government at the hearing that when they informed the body that there were hearings in Juneau, in Anchorage, in Fairbanks and in the one semi-rural area in Bethel, that there was a lot of displeasure in at least the federal government's presentation in the hearing process for the

hearings and the people that are most affected by subsistence and the federal takeover are not participating at least in the hearings. And they had advised that at least the people in that hearing that these were emergency temporary regulations and that further regulations were going to come about to try to address the needs. It was presented by AVCP that if those regulations did not include the management or preference for fish, that there would be a legal action taken. It seems as though, I know that this will play a part in the decision process, but the question before the legislature I think is the one of whether or not we will retain management of our fish and game, and whether or not we will comply with the provisions of ANILCA in order to accomplish that.

Boyer: Excuse me, this is Mark Boyer in Fairbanks. Could I ask a question of Rep. Hoffman. Why would AVCP seek to sue on the question of whether or not the fisheries were managed under, by federal authority when they seem to be pushing for state regulation and control of the fisheries or the resource, and they seem to be happy with the state management. And if they end up with state management because it isn't managed by the feds, why would they sue on that question? I'm not sure I understand.

Hoffman: Well I don't know if I can speak for AVCP, but the Association of Village Council Presidents have had problems with the State of Alaska in that from appearances the fishery has been managed for commercial purposes and not for subsistence purposes as the first priority. Although there have not been a great deal of pressure placed upon many resources, fisheries resources, in that region, at least in the Kuskokwim. But there have been problems on the Yukon.

Boyer: Thanks.

- Hanley: Thank you Mr. Chairman. This is Rep. Hanley for the record. I had a question. If the draft regulations that we have seen now that the federal government put out, if they do not affect the navigable waters, does that nullify the Kenaitze decision. If we don't do anything between now and July 1st will the Kenaitze decision go away?
- Koester: If the regulations are upheld, then the Kenaitze decision would go away. There would be no federally mandated subsistence fishing in the Kenai River more than any other navigable water bodies in the state.
- Cohen: Just one slight variation on that is that the decision at this point is based upon a preliminary injunction and order. So you would have to go to court if you wanted to take immediate action. The order applies to this summer only. So its possible that even after July 1st the order could stay in place for the rest of the summer and the fishery could continue this summer, but that would be the end of the right to the fishery at that point. So it doesn't necessarily come to an end on July 1st. That's a decision that the people are going to have to make as to whether or not to seek to end it before the end of the fishing season.
- McLean: Excuse me, this is Rep. McLean from Barrow and i would like to ask a question with relation to the water. What if the federal government treats the water as a subsistence resource and it has been done I know in the central Yukon area. So what if its defined as that?
- Koester: I'm not aware -- this is Tom Koester -- I'm not aware that the federal government has treated water as a subsistence resource. I don't believe the draft plan addresses that and certainly the way the draft plan is put together, the federal government is not asserting that navigable waters are public lands within the meaning of ANILCA.

Finkelstein: This is Sen. Finkelstein. You might have mentioned this before, but in the conclusions on the chances of a lawsuit succeeding, is one of the key cases the Kleppe v. New Mexico case? Is that one still -- I remember 8 years ago it was -- is it still the most current case?

Koester: Kleppe v. New Mexico is a United States Supreme Case. In that case Congress enacted a statute called the Wild Horses and Burros Act. In that law Congress found that the continued free roaming of wild horses and burros on the federal lands of New Mexico was in the national interest. There were a number of ranchers in New Mexico who were using federal lands, had long-term grazing leases on federal lands, and the wild horses and burros were grazing on the same lands that the ranchers wanted to graze cattle on. The wild horses and burros were in effect rendering the lands valueless for grazing livestock, domesticated livestock. So New Mexico passed a law authorizing the ranchers to dispose of the wild horses and burros either through killing them or through removing them physically from the land. Congress passed a law saying no, free roaming wild horses and burros on public lands are in the public interest and this law supersedes the New Mexico law. New Mexico challenged arguing that wild horses and burros are game in effect, are wild animals subject to state regulation not federal regulation. United States Supreme Court held unanimously that a clause in the United States Constitution called the property clause gives the United States Congress the power to regulate wildlife on public lands. And since that was a legitimate exercise of Congress' power under the constitution, that it was not a violation of New Mexico's right to regulate wildlife under the supremacy clause, and that the federal law therefore prevailed. That's one of the clauses. The property clause is one of the clauses that Congress invoked in ANILCA in establishing that there is to be a

preference for rural residents for subsistence uses of fish and wildlife on federal land.

Finkelstein: I guess the question is, has anything occurred since then? Was that a '78 case? Is that right?

Koester: That was a 1978 case. There has been no United States Supreme Court case since then. There have been some lower federal cases that have under the Commerce Clause power concluded that Congress has the authority to regulate even off federal land. But not a United States Supreme Court decision.

Finkelstein: Right. I guess the part I was getting at was I remember the news stories when that case came down. And the stories in Alaska was that this was a strong statement against state's rights on wildlife issues. And basically we're saying nothing has occurred since then to overturn that decision.

Koester: That's correct.

Boucher: We started in '74 and I was with Gov. Egan when the state finally recognized that it had to come to grips with the issue because it tied into the Statehood Act, the construction of the pipeline and everything. You know, and quite often we start in '74 and we just talk about fish and game and we don't talk about land. We had come out, for those who may not be aware of it, the Secretary of Interior had frozen the land in the State of Alaska. And I'm just wondering if we can't come to grips with this problem that extends far more beyond just fish and game management. It talks about right of ways of pipelines and etc. And that's one of the things, Mr. Chairman, that I am concerned about. I said on the floor down there, and I - do you feel I have a legitimate concern? The reason there was a land freeze was we told rural Alaska, "hey the state can't solve the problem, go to Washington." And we've got to remember that.

And Washington was sympathetic to that. They still are today. So if we cannot have the solution and we tell rural Alaska to go to Washington again, I think we're going to come out on the short end of the stick, because there is not a constituency that tends to agree with us in the eastern United States. All we need is two hundred million Americans telling us how to manage our land and we'll be right back in it with the New York Times and the rest of it. I've expanded a bit and editorialized on it and excuse me Mr. Chairman, cause it is a deep concern of mine. I saw the struggle. Do you feel if we do not solve this problem --

Cohen:

You never know what the effects are going to be if no action is taken. And I think that you know, key to Rep. Taylor's concern about saying the sky is falling, when maybe the sky isn't totally falling or else all we're doing is guessing the sky is falling. And saying it is and it doesn't fall and we just look like we're a bunch of Chicken Littles running around. And I guess, I don't, its hard to say what will happen. We know what will happen if a constitutional amendment is passed. We go back to the system that we had in place before McDowell and if its passed by the voters, will go into the system we had before McDowell and the rural situation, the rural issue I believe taken care of by the federal regulation. And we'll basically know where we are. If we don't, we don't know where we're going to be. We know for sure that there will be lots of litigation. As Rep. Hoffman pointed out, people are going to litigate the issue of whether fishery resources come within ANILCA. The state may be successful on that and ANILCA may not apply. On the other hand it may apply and then the other fishery users in the state will be subject to federal decisions on fish are used. Its possible. We don't know whether it'll happen. As Tom pointed out earlier in talking about suing on federal laws that we have been part of the crafting of, whether it

will -- the state will be viewed as a _____ negotiating partner in terms of opening ANILCA, gasline, whatever...it is possible that that will happen. We don't know for sure. But these kinds of affects are possible. There's a course of action which you gives a fairly certain future, and there's one which leaves it up to courts, the will of Congress, and the way the state is viewed. The state in the federal regulations has done everything possible to maintain state jurisdiction to the maximum extent. That is primarily the way that the federal agencies have decided to go, but there are policy choices that they've made there, and if the state in the preface to the federal regulations, they said they're going in a very narrow manner. A very limited amount of work at this point to give the state a chance to get back into compliance and not disrupt things unnecessarily at this point if there is a possibility of the state coming into compliance by the end of the calendar year. So the federal government has said that. But whether they will expand the program greatly afterwards to address what they see as subsistence needs as opposed to what state residents see as what subsistence needs are out there, who knows. But, at least they've told us that you can expect a much more expanded and comprehensive program than we have now. What it will be, we can't tell you. But we just know that that's the case. We do know in the federal program that five career federal bureaucrats with a national constituency will be making these decisions. It won't be Alaskans. It will be people who are responsive to Washington D.C., responsive to non-Alaskan concerns. They were responsive to non-Alaska concerns in such things as wolf hunting in national preserves. You now, you get a bunch of letters from people in New Hampshire who think its a bad idea. And then you say, well by God, we got to take some action here, State of Alaska you'd better do something or we're going to do it ourselves. There are those kinds of things out there. We can stay in control of our destiny, or we can let go, roll

the dice and see how things work out. Its perfectly legitimate to roll the dice and see what happens, but that's basically the choice that we have in the next week or so.

Hoffman: Okay. I have a question for Mr. Koester. Then I guess if the federal government does not include fisheries as a subsistence resource, and the state does not have a subsistence program, particularly for salmon, historically there's been 60% of the take for subsistence has been salmon. And how from your viewpoint is this going to resolve an issue when the people are heavily dependent upon salmon in virtually region in the state?

Cohen: Rep. Hoffman, maybe I can take a shot at that one. You're correct. If there is no state subsistence law and ANILCA does not apply to fisheries, then there will not be a priority for subsistence over other uses and it'll be totally within the discretion of the Board of Fisheries how they deal with fisheries. They could make subsistence the lowest priority, middle priority, high priority - whatever they feel is appropriate. But in the limited situations with fish where there is not enough to go around - in those cases it will be very difficult to give a subsistence priority and still allow other uses to occur. We're talking about a small number of situations where the subsistence rules are more expansive than the personal use rules which apply to non-subsistence use. We're talking about king salmon on the Kuskokwim before July 1. We're talking about local use of the Copper River red salmon resource with the preference there. There are very few places, but in those what you'll see is that the people who rely on the resource either 1) will not be able to get as much as they're able to get now; 2) changes are going to have to be made on other users to reduce their opportunities. You may have to -- if the Copper River situation fishery which takes place primarily prior to July 4th, if that was going to take place

later in the summer we would probably, because the number of people who would be eligible for the expanded bag limits and expanded methods that local residents are eligible for now - if that situation was going to take place later in the summer, we would have to change, probably change the commercial fishery on the Copper River to respond to that expanded use. But basically its up to the Board, it'll be up to the Board to determine what kind of priority they want to make for what use.

Hoffman: You know, basically we're talking about millions and millions of pounds of resources here. And in many instances these resources go to many of the poorest people of the state. If this resource is taken away, you know, what type of impact - and I know that this may be straying from the issue, but then the more people are going to be applying for food stamps and other state and federal programs. It seems absurd to do something like this - and are we saying that if the federal government from Koester's comments, if the federal government says that they are going to include salmon as a federal plan as a subsistence resource, you say the State of Alaska is going to fight that - no the other way around.

Cohen: That's correct.

Hoffman: Under what basis?

Cohen: On the basis that the fishery resources are under the jurisdiction of the state, not subject to the jurisdiction of the federal government through ANILCA.

Taylor: I think Mr. Hoffman here has maybe confused, at least me. I'm sitting here today Rep. Hoffman doing everything I can to try to find a way to prevent the federal government from taking either a fisheries resource or a game management

resource in this state. That's what I'm trying to do here today, because I'm concerned about people living on the Kuskokwim and living in other areas that need those fish and need that game. But you're telling me that the village presidents are going to file suit to see to it that the federal government is given jurisdiction over salmon because they're not happy with the way our state has managed it regarding subsistence?

Hoffman: No, I don't believe that that was a fair statement. I think that that, and their attorney is in the audience and you might want to hear from him. I think he's - and Mr. Starkey correct me if I'm wrong. They're trying to insure that subsistence of fisheries will continue.

Starkey: My name is Sky Starkey. I'm the attorney for the Association of Village Council Presidents. There's two issues here. There's state management of fish and game, and then there's just subsistence priority for fish in the Kuskokwim River. People on the Kuskokwim are for the most part are fairly satisfied with state management and would like to see state management continue because they feel like there's more local input. As the regulations are currently are drafted the board, the federal board would be the regional supervisors of the various federal agencies, and we don't feel like we get a lot of local input. So we'd like to see the management stay within the local Board of Fish hands. On the other hand, if management of navigable waters remains within the state's control, there will be no priority for subsistence fishing...

Taylor: Unless the state sets one.

Starkey: ...unless the state sets one. But....

Taylor: That's what we're trying to do here.

Starkey:

...But, the problem with that is, from the view of the people on the Kuskokwim, the state has the chance to do that right now. They can do that through a constitutional amendment which brings them into compliance with ANILCA. Otherwise, all the people have is this legislature's word, this current legislature's word that they're willing to protect the priority. That doesn't mean that that can't change next session. It doesn't mean that the Board of Fish within their discretion can't change their mind and not allow priority. That's the reason why people back to Congress because they wanted that right guaranteed. Not for just the next ten years, but until their lifestyle changes, until they make the decision that they want to change. And that security is simply not within a state statute. Therefore, if there is not a priority guaranteed, a federal priority guaranteed the people on navigable waters to continue their lifestyle for fishing, everybody on the...almost everybody in the villages, there's a few people that are listening to this. Everybody's out in fish camp right now gathering those fish. And the Association of Village Council Presidents will seriously consider filing suit against these regulations to ensure that that priority continue on navigable waters. And contrary to Mr. Koester's opinion, I feel like the strongest legal arguments is within for the subsistence users. As Mr. Cohen mentioned, it will term largely on the facts. And there are villages in the AVCP region that depend almost exclusively on salmon for their nutritional needs. They don't have marine mammals. They don't have moose and caribou. But they go out early as soon as the Kings start to run and they stay on that river all summer river long at fish camp putting up fish. And if we bring suit on behalf of one of those villages that depends exclusively on fish, and we argue to the court that ANILCA says fish and game, and that if Congress didn't give us fish, they gave us an empty platter. I challenge you to ask the attorneys for the state what the equity arguments is

going to be on their side. And I also ask you to consider that if we lose that suit, and we go back to Congress and we say you said fish and game and you didn't give us fish, the State of Alaska is going to seem pretty small in a lot of people's eyes. And I think the sympathy is going to be for the native people that depend on those fish. So we feel pretty confident about prevailing on this argument. And be warned that we will continue this fight until we win it. I'll be glad to answer any questions, but that's where we stand.

Wallis: Mr. Chairman. This is Rep. Wallis in Juneau. I don't speak for our Tanana Chief Conference, however their indications are doing what Sky just indicated. For people's information. Thank you.

Cohen: We do have about 50 minutes left and we do have a fairly significant amounts of more information to provide. And if its possible just to continue on here. We have some comments on the federal program and some more of the legal cases that have molded this situation.

Navarre: Do you have an administrative proposal other than the talk of a constitutional amendment? Is there another proposal that administration is prepared to offer for our consideration?

Koester: Mr. Chairman, at this time there is not. I think the Governor, when he called this special session and subsequently has indicated first that a constitutional amendment is the preferred solution. There is continuing work looking for possible alternatives and continuing work in attempting to forge consensus and to contact different constituent groups to see what options might obtain the broadest base of support. But at this point there is nothing to advance as a concrete proposal. The

administration will be advancing a proposal when the session convenes, but there's nothing at this point.

Boucher: I don't mean to interrupt, but that's...you mean we're going to Juneau and there isn't a plan? We've got to have something in front of us. Now you're telling me there isn't a plan. And I think that's a question that he was asking. What are we going to do -- thrash around down there and play dart board approach to it. Now I'm very serious about this.

Navarre: This is Rep. Navarre. On the agenda it shows at noon tomorrow, there's nothing in the afternoon. I'm going to amend the agenda tomorrow afternoon beginning at 1:00, there'll be a discussion of the options and I would ask the administration and I will also forward to the Governor the request that if he has a proposal that he has prepared, to give us next Monday, we would like to have it tomorrow afternoon if possible. I'd like to have personally time to consider it and discuss it before we go to Juneau, otherwise it just makes a further delay. And I don't think that's a reflection on you sitting here. I will make that request to the governor. I have one questions with respect to a constitutional amendment - there was a comment that with respect to the Kenaitze decision which is of particular importance to me because its in my district, if the federal regs are implemented then the Kenaitze decision or the Kenaitze fishery goes away. What happens if we pass a constitutional amendment that ratifies the '86 law? Does that also result in a fishery, a resolution of the Kenaitze issue on the Kenai?

Cohen: Mr. Chairman. The federal definition of "rural", which we discussed earlier, if you're in aggregate, if the area is over 7,000, you're probably not rural. The probable implication of that is that the communities of Kenai, Soldotna, North Kenai and Nikiski, maybe down to Clam Gulch,

will be considered in the aggregate and are well in excess of 7,000 and there would have to be a finding by the board that it still is a rural area despite that. That is a probably difficult jump to make. So, in terms of resolving the issue it will be - the rules will be in place to enable the issue to be resolved with a constitutional amendment. If the legislature restates in its intent that it wants the 1986 law except for what is inconsistent with ANILCA to be reinstated and at least gives intent for adopts by statute, the federal subsistence rule definition found in the federal program. It would be obviously if the state adopted the exact federal definition it would be cleaner. If the legislature didn't it, but it showed its intent that that's what you mean by the term rural, then the boards could adopt that by regulation. So, it'd sort of be an option there, but at least the ability to deal with the Kenaitze case would be completed at that time.

Koester:

In terms of information of the next item on the agenda is sort of a history of the legal cases and I think it would perhaps be useful to address that in a very brief fashion and then perhaps a discussion of some of the options that were looked at early on following the McDowell case.

There are basically four tiers of legal cases, if you will. The first tier addresses specifically the state's power to enact legislation. Its really what does the state constitution allow the legislature to do. That's really McDowell, the McDowell case. And for information I'd like to go through the McDowell case in some detail. But first, let me outline the Tiers.

1. What does the constitution enable the legislature to do in terms of legislating on this subject? That's the first tier.

2. The second tier is what state legislation is consistent with federal legislation? Or inconsistent? And that's really the Kenaitze case - is the definition of rural consistent with ANILCA? There are other possible iterations of that. Is the preference the state is granting consistent with ANILCA and so on? But that's sort of a second tier. The first one is what is the state's constitution authority? The second is it consistent with federal law? What the state legislates consistent with federal law.

3. A third tier - once a state law is in place and state agencies start making decisions, like the Board of Fisheries - determining what are traditional and customary uses. Are those consistent with state and federal law? One of the big issues there or one of the cases is in Southeast Alaska a number of communities disagree with the Board of Fisheries' determinations with respect to traditional and customary use of fish. The Board of Fisheries in many instances found that certain communities did not have traditional and customary uses of fish. And issues in the legal case then are those administrative decisions consistent with state law and with ANILCA.

4. And then finally there are questions of individual management decisions. Is an opening of a certain length of time consistent with the requirement that subsistence have a priority over other uses? Or should it be a longer opening for subsistence? The sort of specific management decisions on the ground.

So there are these four tiers, four levels of subsistence cases. The legislature can most effectively deal only with the first two. Because the bottom two tiers relate basically to challenges to administrative decisions applying what this legislature can do. But the legislature does have

the authority to address the issue of what is the legislature's authority. It can do that through looking at McDowell and seeing whether there should or should not be a constitutional amendment. The second tier: is state law consistent with federal law? Assuming that state legislature has the power to enact a law that is consistent with federal law, then the legislature has the discretion to do that or not do that. So those are really the two levels where the legislature has the authority to deal. The other two, there may still be court cases, but they're basically court cases involving administrative application state statutes or federal law.

In the McDowell case which really is sort of the fundamental reason where here. We had thought in '86 that we enacted a law which was consistent with ANILCA would prevent a federal takeover. The Kenaitze decision held that the state statute was inconsistent but that was a matter that could be dealt with legislatively. Before we had an opportunity to do that though, the McDowell case came down and basically said you can do all you want trying to become consistent with federal law, but the constitution precludes you from making the basic policy decision in state law that is required in federal law to retain state management. And that is to prefer rural residents over urban residents for subsistence uses of fish and wildlife. In the McDowell case Justice Matthews wrote the plurality opinion for the court. Joining him in that decision was Justice Burke. Joining him in the first half of that decision was Justice Compton. Joining him in the second half of that decision was Justice Moore. And Justice Rabanowitz dissented. So we know that three justices agree with the first half of the opinion, three justices agree with the second half of the opinion, and one justice doesn't agree with either half of the opinion. The court held that the rural preference violates the Alaska constitution. The common use section, Article 8, Section 3;

the no exclusive right of fishery, Article 8, Section 15, and the equal application article, Article 8, Section 17. The cases brought in 1983 challenging the Tier II criteria in the 1978 subsistence law. The '78 law established a subsistence priority over all other uses and said when you have to cut back even on the subsistence uses, that you establish priorities by customary direct dependance upon the resource, local residency and availability of alternative resources. So that was the basic challenge brought in 1983. Before that decision came down, the Madison decision was handed down which invalidated the regulations the Board of Fish and the Board of Game had developed giving rural residents a priority for subsistence. That resulted in the 1986 Subsistence Law. Now the basic objection after a number of amendments to the complaint - following the '86 law the basic objection was that the rural preference excludes urban subsistence users and includes rural non-subsistence users. So it was under inclusive in that it shut out urban subsistence users. It was over-inclusive in that it included rural people who do not take advantage of subsistence. The court cited a study which in its view supported that conclusion that the plaintiffs were in fact right, held that the Article 8 provisions are designed to ensure the public the broadest possible access to wildlife; that the constitution authorized preferences among uses - that is you can say subsistence has a priority over commercial or vice versa - the constitution allows that. But it does not allow you, once you've established a use to start saying well you people here have a higher priority for this use than these other people. So that there's equal access, all Alaskans, if subsistence has a priority then all Alaskans are entitled to participate in subsistence. The court basically said that what this clearly does is give everyone an equal right to participate in hunting and fishing regardless of where they live. Where you live can not be used as a way of saying that someone has a preference

over someone else for a particular use. The court went on to say, Justice Matthews went on to say that this doesn't mean that everybody gets to participate. Only that using the location of where a person lives to decide who has a priority over someone else is unconstitutional. Now they said, we're not called on to say what might be constitutional. If in fact you even had to cut back on subsistence so you wanted to say that maybe some residents ought to have a preference over some other residents. But it did say that any system that classifies within a use and says one person has a preference over another person, would be subject to close scrutiny because preferring one person over another creates a tension with this equal access to the resources provision. So the court said demanding scrutiny is appropriate of any classification scheme. And any classification scheme must impose the least possible infringement on the open access clause. The court noted that the purpose of the '86 law was to ensure that those who need to hunt and fish for basic necessities are able to do so. It also noted that one purpose was to retain state management in fish and wildlife, but it basically dismissed that as not being important. I'm sure that came as a surprise to the people that were here during the statehood deliberation when state management of fish and wildlife was incredibly important. It was one of the primary motivating factors of statehood. But that's what the court said. The court did say that ensuring that those who rely on these resources have access to them is an important interest. But its a crude, using the word "urban" classification is too crude. It excludes too many people on the one hand and includes too many people on the other hand. Justice Compton agreed with the open access analysis. He thought the inclusion/exclusion was not necessary. Justice Moore agreed with the inclusion/exclusion, wasn't quite as certain about the open access analysis. And then Justice Rabanowitz of dissented. The Madison decision came out right before

Christmas of last year -- I mean the McDowell decision came out right before Christmas last year. Up until then I'd had very minimal involvement with subsistence and was quickly pressed into service to try to figure out if there was a way out.

We looked at a number of possible options as to how to respond or react to the Madison decision. I mean to the McDowell Decision. The McDowell decision basically said whatever the state does, you cannot enact a law which will be consistent with ANILCA and prevent a federal takeover of at least some management of fish and wildlife - the amount remaining to be seen. But the constitution currently doesn't allow you to do that. We started to look for options. What can the state do as a consequence? One was to ask the State Supreme Court to reconsider its decision and say that maybe the constitution will allow us to do this. We asked the Supreme court to reconsider. The Supreme court denied our reconsideration motion. Now what about amending ANILCA to prevent a federal takeover - to change the provisions of ANILCA. Three possible amendments were discussed: eliminate the subsistence priority for rural residents in ANILCA; amend ANILCA to totally pre-empt state management altogether; amend ANILCA to give a preference to Alaska Natives. Well, amending ANILCA first, the delegation said you can't amend ANILCA. Its not going to happen. If ANILCA proved anything in 1980 is that you're going to have to get some kind of a consensus anyway, and that certainly didn't seem possible to get a consensus as to how to amend ANILCA. The only agreement that had been reached up to that point at least as expressed through the political process, was the rural preference that the court had struck down in McDowell. In addition, we were warned that amending ANILCA might have a substantial cost in terms of amendments to other provisions of ANILCA. Certainly the debate over the Tongass has shown that anytime you open

ANILCA all the interest groups swoop in and try to extract their price for allowing legislation to go through. So who could tell what the additional price might be for amending ANILCA.

The other alternative we looked at was the statutory scheme based on giving a preference to those most dependent on the resource. After trying to walk it through, it was obvious that that would be very burdensome and intrusive on the public to file affidavits and so on. A large bureaucracy would be required. The Limited Entry Commission dealing with 10,000 commercial fishermen spawned at least a 1,000 lawsuits. If we're dealing with 500,000 Alaskans and we had a parallel amount of litigation it would be tremendous litigation. It would take a substantial time to gear up any kind of a bureaucratic system that was designed to try and measure individual dependence. No certainty that that would be constitutional because the plurality of opinions in the McDowell case. And finally it would be inconsistent with ANILCA. It would not prevent a federal takeover. Another alternative was to interpret ANILCA as pre-empting state management just as it was, or pre-empting the state constitution. I don't think anyone is isn't in simply rolling over to the federal government. So that option was not really given too much credence. Another option was to enter into a cooperative agreement with the federal government so that the state would administer most of the federal government's plan. Well the feds have made it clear, they want to do what they call a stand-alone program. They'll use the state to get information and coordinate with us, but they feel under the federal law they need to be in charge and they can't delegate to the state.

How about using current management tools to try to avoid the priority or the preference? Well it basically doesn't work on the ground. And, the use of the management tools that we

currently have were those that we had back when this whole process got started, and were leading to results that many people in Rural Alaska found insignificant as Rep. Boucher said, by doing that we sent them to Washington to get what they could get. What they got was ANILCA. So that's not a viable option at least in terms of addressing fundamental concerns.

Litigate. Challenge ANILCA. There has been substantial discussion of that. Our view is that its a difficult case to win. I've not heard anyone say it is an easy case to win. But the question is sure to be brought. And I think there are a number of policy reasons that counts for bringing such a lawsuit - vindicating state's rights; eliminating the threat of federal takeover. There are also policy reasons which counts against filing a lawsuit - it prolongs the uncertainty during which time the federal government gets a foothold at least with respect to management. Its a reversal of what has been the policy of the state at least to challenge the rural preference, what's been state policy for a decade. It makes it difficult for the state to go back to Congress to negotiate if Congress feels that we'll negotiate what we think is a good deal and then challenge the parts of it we don't like. It jeopardizes our negotiating position with Congress and success may lead to a worse result. We don't know what the alternative, the Congressional alternative will be if we're successful in throwing it out. We looked at other statutory schemes - possible statutory schemes. Like a preference for local residents with respect to resources within their area. First you need a constitutional amendment. Because in quoting in McDowell said, you can't establish a preference based on residence - period! That's what the open-access provisions provide. Its also not consistent with ANILCA, and you do have some practical problems on the ground of trying to say what is local for a given community and what

is not. How about a subsistence law that applies only to federal land? Well, its not consistent with ANILCA because you still have to have the real preference, and we can't have a real preference even on federal land. It also produces a split jurisdiction where you have one management regime on state lands with no preference for subsistence; a different one on federal land which creates difficult administrative problems in trying to accommodate different management regimes for resources that don't respect boundary lines.

Finally, how about a state-wide subsistence priority over all other uses. Clearly constitutional, but the Madison case established in effect a statewide subsistence priority. That's when the user conflicts between subsistence uses by all Alaskans and the other uses of fish and wildlife, particularly commercial and sport, caused a political problem in that the commercial and sport users felt they were being given too much of a back seat if they had to be lower in priority to subsistence uses by every Alaskan as opposed to the 20% or so that live in rural areas. That resulted in the 1986 law.

What about the option of just letting the feds have it? Nobody really liked that idea. That was what prompted statehood in the first place, was federal management of fish and wildlife. That brought the administration around ultimately during the session to the idea that a constitutional amendment allowing the legislature to enact a rural preference - not mandating it - but allowing the legislature to do that was the preferable solution. What that did is it allowed any lawsuit that someone wanted to bring to challenge ANILCA to go forward, even though the state may or may not want to bring that lawsuit. It does not require a preference. If someone were to sue to challenge ANILCA and was successful, then the legislature

could repeal the preference because it is not mandated. Coupled with the federal definition of rural, it would be consistent with ANILCA, prevent a federal take over. At the end of the session the idea that maybe a constitutional amendment with a sunset clause to allow a law suit to go forward perhaps, or some other kind of consensus to be developed within the state - maybe approach Congress with a statewide consensus saying "Amend ANILCA" to our new idea of what we think is the best way, best policy choice would be an approach. In the meantime the state would retain management because the state would have constitutional authority and statutory authority to administer a program consistent with ANILCA. Passage out of the legislature would give the people the right to vote. This is a statewide issue of statewide significance. People ought to be heard on this issue. And not passing a constitutional amendment virtually assures, at least for a short period, federal management. And without either an amendment to ANILCA or a constitutional amendment, a long-term federal management presence in the state.

So those were basically the options that we looked at including statutory proposals and constitutional amendments.

Rep. Sabo:

You said that you considered like a regional or local management and resource subsistence. And you said a constitutional amendment would be required to do that. Is the draft of this constitutional amendment broaden enough to allow the legislature by statute to do that sort of thing later?

Koester:

I don't believe so. None of the versions that were presented during the session would authorize the legislature to do that, although possibly the Senate Resource Committee version. But that would be another possibility. If it only authorized that though, it would be inconsistent with ANILCA

and an ANILCA change would be necessary. But certainly something could be done that would authorize initially a rural preference and then a local preference as well. That would be a possibility.

Rep. Hudson: Tom, you said that the Supreme Court said that the State of Alaska cannot under its constitution fashion any kind of a rural preference. Did they say that? Or did they simply say that the rural preference in existing laws are unconstitutional? Has every thought, every possibly conceived mechanism that we might be able to either through different means and methods - for example, are they all out? Are they absolutely precluded from happening because of the Supreme Court's findings on that? Or were they only dealing with the law that was on the books at that time?

Koester: They were dealing with the law that was on the books at that time, which basically established a preference on the basis of residence. The residence involved was rural residence versus urban residence. But what the court, and this is a quote from the opinion, the court stated that the equal access sections, Article 8, Sections 3, 15, and 17 "ensure an equal right to participate in hunting and fishing regardless of where one resides." So using residence of any kind whether it be rural/urban or local with relation to the resources, in my view has been precluded by the McDowell decision.

Hudson: Even local.

Koester: Equal access regardless of where one resides. That's the phrase the court used.

Hudson: Which would imply that someone from Southeast should have equal access to game resources regardless of where they're located in the State of Alaska.

Koester: That's what the language says, and the court cited with approval a number of cases from other states where, for example, people in one county were charged only a dollar for a hunting license, but people from another county were charged three dollars. And the court in that state threw that out as being a denial of equal access to the resource because it cost more for a non-county resident to go into the county to hunt. And the Alaska Supreme Court seemed to say, that's what we mean. Is that in this state the equal access clauses mean that someone from one county has just as much as right to go somewhere else in this state and hunt as a resident of that other area. I'm not sure you can read the McDowell decision as saying anything else than that.

Hudson: The federal regulations, proposed federal regulations might continue. Are they not setting up a differential, that is some gray areas as to where people will be determined upon their long-term customary and traditional uses? I mean, that is one of the in between the populations - the 2,500 and 7,000, aren't there some gray areas that the federal regulators and managers are now setting up.

Cohen: Rep. Hudson, yes. There are to be developed criteria for the federal subsistence board to determine which of the 14 communities are rural that fit within 2,500 to 7,000. But there will be a definitive decision at some point saying which ones are in and which ones are out. In terms of customary and traditional, even if the community is determined to be rural, then that community is only eligible for hunts for which there are customary and traditional uses of that game resource by people who live in that community. And again, hunts only within that area.

Hudson: Aren't the federal regulations going to preclude one from say moving from one region to the other region?

Cohen: Basically it will be the same system as we have now, where the community residents are eligible in the areas in which that community has customary and traditional uses, not in other areas for subsistence. So somebody from Angoon who has customary and traditional uses on Admiralty Island and the near islands to Admiralty - have customary and traditional uses there but they don't have them up in the Copper River Basin. So they are, by the federal program, similar to the state's program prior to McDowell, they will be limited in subsistence to those areas near to where they live.

Hudson: So residency in that area is the key criteria, right?

Cohen: And the term that - its basically a domiciliary idea instead of a residency idea. So if you look at the persons where the driver's license says where they live, where the kids go to school, where they own a home, where they pay taxes - all that kind of stuff, and you determine at that point whether someone resides in the community or whether they reside somewhere else. There's a lot of people live in two places. They may have a summer fishing operation and live somewhere during the summer, but they own a home in Anchorage. They send their kids to school in Anchorage, they get most of their mail in Anchorage. At that point whether you're a resident of that community or not is based upon those kind of individual determinations. And you really have to do - I mean pretty well know where they live and from time to time we do get people who want it to be checked out and so there is a form that we have that you fill in all the answers to these questions and then a determination is made as to whether they are domiciled in a rural area or urban area.

Hudson: So its domicile, not residence?

Cohen: I think they use the term in the federal program "residence" but the characteristics are a domicile type characteristics.

Hudson: The federal law of the U.S. constitution has been tried and challenged many times and residency is indicative of intent to remain or to make that residence in one particular area. And 30 days in most cases is all that it takes.

Cohen: And the issue is that you can move around from place to place and live somewhere else and your residency goes with you.

Hudson: The question is whether you're a resident at the particular time you're trying to participate in one of these hunts and....

Cohen:as opposed to if you want to move somewhere else as that community is eligible.

Hanley: When you were describing the options Mr. Koester you talked statutory scheme, litigate challenge ANILCA, and then you said something about that we could let the federal government have it, but that wasn't really a viable option because we didn't want federal management of our fish and wildlife. Once again are we talking about fish or are we talking simply about subsistence use of wildlife on public lands?

Koester: I think we're talking subsistence use of wildlife on public land and to the extent ANILCA may ultimately be construed to include waters and fish because waters then would be public land.

Hanley: Ultimately, but at the present we're talking about subsistence use on public land.

Koester: We're talking about subsistence use on public land. The difficulty is that once you begin to give one use a priority over other uses, its difficult to do that without impacting in some fashion remaining uses. In other words, if you have a harvestable surplus of a population, then the question is how do you divide up that harvestable surplus? And if the federal government is going to have the legal authority to establish a preference for a portion of that harvestable surplus, of necessity that dictates what remains of the harvestable surplus for other user groups. So in that sense, while its not total management, if you will, because the state would have discretion to make allocation decisions of the remaining portion of the harvestable surplus. In large part you're giving the first cut, as it were, to the federal government in terms of management because in order to ensure that that first portion of harvestable surplus that's subsistence preference is utilized appropriately, the federal government would be establishing or will at least have the power to establish the methods, the means, the seasons, the bag limits, and so on to accomplish that part of its, what it views as its responsibility under ANILCA. The state would then have residual management authority may be one way of looking at it because we would have discretion to manage the remainder of the harvestable surplus, if any. But the first management decisions would be made by the federal government because they would be making the first allocation.

Cohen: Mr. Chairman, we have a little time before 12:00 but I guess we haven't talked much about the federal program. And, there's a couple or examples that I think may be useful for people to think about over lunch time as to what this means in terms of wildlife. Basically, the program is irrational.

It doesn't make sense. It changes the way things are done now. And this is despite the fact that the federal program applies only to wildlife in that they are including, they are adopting by reference basically the state regulations. Even with that, this thing, the way its going to work does not make any sense. And I want to give you two examples on why it doesn't make any sense and why the people who are intended to be protected by ANILCA are the ones who are - actually the ones to get the worse deal out of the situation, and it is really counterproductive the way this work.

The first example is the Nelchina caribou. The state has over the past several years allocated a portion of the permits for the Nelchina caribou herb to people who live in the Copper River. They are rural residents who have customary and traditional uses of those resources. And some number (350-450) of the 1900 or so permits have been given out to people who live in the Copper River. So there's use by everybody but there is a set-aside for the local use. That has been the state's response to the subsistence priority in the area. You look at the map over here, you'll see, you've got to look at yellow lands within the area of the Copper River. You'll see that the yellow is the - very few yellow places here in the area where the herd is going to be hunted. In fact, if you have state-selected and native-selected lands not being considered to be public lands, what you'll find is that there is virtually no federal land within the Copper River area. The federal program is going to issue 1300 permits to the local residents, residents of the Copper River, but they don't have anyplace to hunt those. All of the other permits are going to go into a lottery. One of the problems that there was in the Copper River is that when there was a lottery only, and there wasn't a set-aside for residents of the area, none of the - very few of the local residents got any

permits because they were such a small population compared to all of the interest that there is in hunting Nilchina herd. So basically, and with the understanding in rural areas right now, that you are going to be protected by the federal program on federal land, people probably did not apply, or I think its still open now, but people have not been applying, I assume, for the state permits figuring they're going to get taken care of. The result is going to be those 1300 permits are probably going to be virtually worthless in the Copper River cause you're going to have to wait until see a Caribou on that little piece of federal land before you're going to be able to go hunting, and none of the permits are going to be, or very few of them, that are actually going to allow you to hunt on state or native corporation land are going to be available to people from the local area. In Unit 25-D West, which is up here in this big brown and pink area (Birch Creek, Beaver, and Stephens Village) and you'll see its all federal land except for some native land. The villages there where we see probably under the federal program the 60 moose permits that are available. Subsistence priority for rural residents, the state will probably not have a season there - won't have anything to allocate. The native corporation land will be closed. The only place they're going to be able to hunt, people from those villages is going to be able to hunt is going to be on federal lands in the Yukon Flats Refuge, and the lands that they selected for subsistence, among other reasons under the claims act, is going to be closed to them for hunting because of this jurisdictional problem between federal and state lands. And, I mean, there is no way that people can view this as having any rationality at all. And it is the problem that we are going to have because federal management is only going to apply to public lands in Alaska, and the state rules are going to be different on state land. We have not changed the state rules yet. We will be doing that as soon as we get a decision from the Superior Court on the

severability of the rural eligibility rules from the remainder of the state's subsistence law. Basically I think what you're going to find, and I'll really shortcut this discussion on the federal plan, where there is a lot of state land around, rural residents who were protected to some degree by state law are going to lose. Where there is a lot of federal land around, non-rural residents are going to lose opportunities. And I think that's going to be pretty much the breakdown that we're going to see in terms of use of wildlife. And obviously if this ever got applied to fish, all of the rules would be the federal rules for subsistence because all of the waters would be considered. But in terms of wildlife it is, it's basically going to be if there's a lot of state land opportunities for rural Alaskans that have been the mandate of the legislature and the policy of the boards is going to be reduced. And when there's more federal lands other residents will have their opportunities reduced.

Rep. McLean: Mr. Chairman, this is Rep. McLean again. I'd like to ask a question. Okay. Is this Norm?

Cohen: Yes it is.

McLean: Norm, on the state procedures and regulations, the federal government and the State of Alaska's relationship - I have a question. There's a statement has been written down by the temporary regulations by the federal government, and it says that if the board finds it necessary to promulgate regulations to supercede regulations in order to ensure the opportunity for subsistence to take official wildlife on public lands. Can they then just supercede any state regulations with regards to the state regulations?

Cohen: Rep. McLean, it's sort of a - as I understand how this will work. If there is a federal priority - implementing the

federal priority on federal lands will mean the federal agencies will allocate the subsistence use. If they determine that non-subsistence uses that have been allocated by the State of Alaska are inconsistent with what they view the rural priority is - in other words, if the State has allocated a 1,000 moose to non-subsistence use and the federal government has allocated 1,000 moose to subsistence use in the same area for the same herd, and there's only a 1,000 to go around, what happens? The situation that we're trying to work out with the federal government is that the federal government would request the Board of Game to take action to amend the state rule, and if they didn't then the federal agency probably would close the area to non-subsistence use, or use basically by non-local, non-rural residents of the local area. What we're trying to do is coordinate board meetings of the federal board and the state boards so that these things get worked out before they actually go into final regulations on both sides.

Taylor:

Thank you. I have a real brief question and hopefully you can give me a brief answer on this. When I asked you would you file suit against the federal government to challenge them, or someone else here did, on the question of fish - and I think we resolved the fact that you concluded that there was no case or controversy at this time on fish that the state could bring. Now you've told us that the federal governments intended regulation of our game population is ludicrous when actually applied on the map and that this is a travesty. Surely you're now going to file suit on behalf of the State of Alaska and surely there is a case or controversy right now on the question of game management in Alaska. Is that correct? Or are we not filing suit on that one either? I want to know what your department is going to do. We've got about three weeks here before you have to make a decision.

Koester:

We've not been directed to file a law suit. The federal plan as its currently drafted appears to be consistent with ANILCA. We've debated or looked at challenging ANILCA itself. Now the question is as I understand it, is whether we should challenge on narrow grounds the plan as it applies to game management because as a practical matter it leads to results that don't accomplish what we all believe is the ultimate goal and that is ensuring that those Alaska residents most relying on these resources have access to them. In ANILCA Congress appeared to make a judgement that it was not through exercise of Congress' constitutional authority under the United States' Constitution, attempting to satisfy all the subsistence needs of all Alaskans who rely on those resources. But what Congress was doing was directing the federal land managers in managing federal lands, to do what they could to satisfy the subsistence needs of Alaskans. So the federal land managers power is limited to federal lands. It wasn't trying to solve the whole problem. What Congress was expecting and anticipating was that the state (I think what everyone was anticipating) was that the state would enact laws of general applicability which would apply statewide that would in fact do what everyone wants to do. And that is to ensure that those Alaskans most reliant on fish and wildlife resources have access to those resources. Congress established a certain way of doing it on federal land to the extent the federal land managers were able to accomplish that end on federal end. Congress also said if Alaska enacts an law that does it the same way, then we'll call off the federal land managers. The Alaska Supreme Court has now said that the Alaska constitution does not allow the state to do it in the same way that Congress told the federal land managers to do it. Now the way that the federal land managers will do it, as Norm explained, is not going to solve the whole problem. But that doesn't make it arbitrary. Its going to solve a part of the problem. Its going to solve the part of the

problem that federal land managers have the legal authority to solve. They can only manage the federal lands, so they can only manage the resources on the federal lands. They'll manage those resources under ANILCA to give rural residents a preference. I think Norm was explaining is that while that may not be legally deficient as a practical matter when you look at what the goal was - and what everyone's goal is - it doesn't make sense. Because it doesn't hit the whole target. It only hits a part of the target. But that's all Congress told the federal managers to do. Hit part of the target. And if the state can hit the whole target, then federal managers don't even shoot. Now the Alaska Supreme Court has said State, you can't hit the whole target. So the federal land managers are going to have to take their shot at part of the target. But as a practical matter its not going to accomplish what we all want to. I think that's why, I think Norm's comment is its ludicrous. Because the situation that we're in is the federal managers can't accomplish the goal, the state can't accomplish the goal and we have to try and figure out a way to do that. And right now we're on both sides of the issue legally precluded from hitting the entire target.

Taylor: The answer is you're not going to bring a suit.

Koester: I take my direction from the Governor's office from the administration. I have not been asked to draft or file a law suit. Until the regulations are final there is no case or controversy. So that would be a first predicate, would be the final adoption of the regulations. That has to happen. So right now we don't have a case or controversy.

Navarre: This is Rep. Navarre. I would expect that the question on whether or not the legislative recommendation is that we file a lawsuit, pass a constitutional or whatever, will come tomorrow afternoon when we discuss some options, possible

options on it, and I'm sure that Mr. Koester and Mr. Cohen will be here tomorrow.

Hudson:

Thank you. Hudson for the record. If we change the constitution, we are committing to abide by the provisions of ANILCA as determined by those federal land managers who have just now told us what they think those ought to be. And we think that they're not complete, they are ludicrous, and aren't we, if we change the constitution and then essentially abiding by the what they believe, at any rate, are the requirements of ANILCA as determined or at least indicated by all of these regulations they are putting out, aren't we really essentially sort of consenting to going along with those same ludicrous regulations under the guise of somehow being still managing things. Aren't we really letting them determine what the management is? And haven't we already seen what their determination of the management is? And don't we believe that that's ludicrous? You just told me that.

Cohen:

Yes, I may not have been clear Rep. Hudson. The thing that makes this not work is the fact there are federal lands in Alaska, state lands, and private lands. That's what doesn't make it work. It can work, some people argue how well, some people say it works fine, some will say it doesn't work so fine. But you don't get into the situation if you don't have to worry about arbitrary ownership boundaries. That's the thing that makes it not work. The fact that a federal priority does not provide native residents the ability to hunt on native corporation land doesn't make sense. But if there is a state program which covers the field, then you don't have to worry about that kind of boundary. The rules in themselves make sense in terms of what it is they're trying to accomplish. It is the land ownership pattern in the state that doesn't make, doesn't lend itself to having

those rules make sense when different rules apply on federal land as apply on native corporation and state land.

Koester:

If I may also respond. This is Tom Koester again. It really is the different rules that currently apply to different lands that causes the problem. A constitutional amendment would enable the state, enable this body to pass one single law that would apply to all lands and make the rules uniform. And that would eliminate any question of hitting the whole target. And the ludicrous nature of the current plan where two different rules apply depending on an arbitrary line on the ground, whereas if the constitution was amended first to enable the legislature, not compel it, but enable it if it felt it was an appropriate policy choice to establish a single set of rules for all lands in the state, then you would eliminate the problem that what currently will be the alternative consequence is ludicrous as a practical result. But it would eliminate that arbitrariness of applying different sets of rules on different sides of a single line. Because the same rules would apply statewide and allow single uniform management system to make determinations with respect to a given harvestable surplus of a given population. Its not possible not.

Hudson:

Providing those same regulators approved or agreed upon our common plan. They would still would have, I assume at any rate, the right to tell us whether or not our single plan is now in their opinion, in compliance with their mandates. Is that correct?

Cohen:

The rules, the overall rules of the game, are what the federal government certifies, not the individual regulations on hunting seasons and bag limits and fish seasons and bag limits and that stuff. Those rules, as we have done for the last 12 years, are made by the boards, and they are not

reviewed individually by the federal regulators. The only thing that's reviewed is the fact, the definition of subsistence, the priority for rural residents, and the fact that the state has Fish & Game advisory committees and a regional council that meets the ANILCA mandate. Those are the only three things that the federal government would be reviewing in terms of the state program, not whether a particular hunting season here makes sense, or a particular fishing season there makes sense or whatever. Those are obviously eventually reviewed by a court, but they are not what the federal regulators would have to do. The federal regulators would have basically nothing to do.

Taylor:

That answer begs the question. The question that was asked is if we amend our constitution and we then proceed to pass laws in our feeble attempt to foresee what the federal government meant by these words "subsistence" and "rural" and "other preferences" are we not still subject to the review of the federal government as to whether or not we as a state are in compliance with their intent? And I think we are. And I think to answer in any other way is ludicrous. The only person that's going to make a decision is not my state supreme court, its not my board of fish and game, its not my regional boards of fish and game in their advisory opinions. Its the same thing that happened in March on the Kilbuck Caribou herd. Judge Holland will decide whether or not the laws we have passed, after we've amended our constitution for crying out loud, the laws that we have passed whether or not they comply with ANILCA. And if he finds they fail to comply with ANILCA, 4 days later you'll kill off half the Kilbuck Caribou herd whether my fish and game wants it done, my constitution wants it done, or anybody wants it done. That's the answer Mr. Cohen, and I think to suggest to this legislature that by amending our constitution and coming into to compliance with federal law and only having one omnipotent law, you forget to tell them

the omnipotent being that will determine the law and enforce the law is the federal government - not the State of Alaska.

Koester:

Mr. Chairman if I may respond just briefly. Again we're talking about the tiers here. There are different tiers of decision making and different tiers of lawsuits that have been filed. The legislature can deal with the first two. What does the Alaska constitution permit? What statutes of general applicability are consistent with ANILCA? Those are the two that trigger federal takeover by federal administrative agencies: The Department of Interior, the U.S. Forest Service, U.S. Fish & Wildlife Service, Parks Service, Bureau of Land Management. Those are the decisions that are going to trigger that takeover of management. Then you're going to have subsequent administrative decisions. You're going to have decisions relating to people, what's rural and what's not rural? What's traditional and customary? What's not traditional and customary? Those are going to be subject to challenge either in the state court or in a federal court - one or the other. You're going to have decisions relating to specific management decisions. Was this a legitimate management exercise or was it not? Now to say the Kilbuck herd case means that a constitutional amendment is meaningless mixes up those tiers. You're talking about the fourth tier in terms of lawsuits. You're also talking about a preliminary injunction motion, not a final judgement. You're talking about a balancing of equities by the court, where the court said on the one hand the Board of Game found a nutritional emergency in this community. It also found that there was a harvestable surplus of 100 animals to keep the herd at the same size. So the decision whether you don't harvest them and allow them to grow or not. But you can harvest a 100 and keep it at the same size. So nutritional emergency, harvestable surplus without jeopardizing sustained yield, and the board says, "no harvest." That was the record

before the court. The court said, if there's a nutritional emergency, the administrative agency found one. It also found that there was a harvestable surplus to preserve the herd at the same size, of a 100. Preliminary injunction motion to satisfy the nutritional emergency - I'm going to allow a harvest to 50 and we'll leave 50 back into the herd for continued growth. Then after we take care of this emergency then we'll decide whether the Board's decision was a proper one or not. But in the meantime I'm going to take care of the emergency because that's my job as a job. That's what the Kilbuck case was about. And to say that somehow that's simply a judge overriding an administrative determination really doesn't hit the mark because you're not being very candid about what was actually before the court. What the court basically said is, "I think its okay". If there had been a management plan that said this is what we're going to do for this herd, and there was no management plan. In the absence of a record indicating why that decision was made, I had no alternative but to find it arbitrary and capricious. At least at the preliminary injunction stage. Now maybe there'll be more, you know, more developed records. But a lot of the people are looking at Kwiethluk case and saying that proves that nothing that we do is going to make any different at all. And that's wrong. That's not what the Kwiethluk case said and its not what it calls for.

Taylor:

I think the only thing Rep. Hudson was referring to, the only think I'm referring to is not whether or not that negates our ability to do anything. All I said was the federal district court will continue to be the bottom line for any aggrieved party or group of people who wish to challenge our subsistence regulations, and they will do so in the federal courts and the federal judiciary will decide the issue - not the State of Alaska's judiciary or the people of the State of Alaska. And when you say the word,

using the generic term "the court" says we will decide, yes I think Judge Holland will hold further hearings on it and Judge Holland will make a decision based on the federal law. And I submit to you that whether we had amended our constitution, whether or not McDowell case had not happened, he would still be the final arbitrator. And if you don't believe Tom that we're going to see 50 bolt decisions like that across the State of Alaska on fish and game management over the next 5 years, just because of ANILCA and our failure to challenge it in the federal courts, then I submit you're incorrect, because I believe that the native village group who just talked to us, has told us, either give us exactly what we want in the state constitution, yield to the federal government on all parts of it, and make certain that we get all the fish we want, and disregard those commercial fishermen. You either do that or we are going to federal court and we are going to try to get federal management of fish in those streams so that we will then have the feds assuring us that we will always have subsistence. And I think this empty platter argument will be very persuasive in front of a federal court. And to suggest to this legislature that by amending our constitution or changing their laws that they are somehow going to change that pattern that has now developed and I think is fast developing, I think that is not a fair statement. I think that's an illusion at this point.

McLean:

This is Rep. McLean, I would disagree with you Rep. Taylor because I see just by the regulations that they have found that the federal agencies can go even further beyond. When you're talking about the access to lands I just see that they have a long arm and that they can go into the water and the wood harvest policies. Because there's going to be other agencies that are going to be working with the boards, and they will be in the board, as I have read through the federal interim regulations. But they are going to go into

everything. I see that. I can see where they're heading off. And its kind of scary to look at the management scheme and read the report that they have established because they already have policies and regulations which they have adopted with subsistence. Wood harvest policies, and they have treated water as a subsistence resource in the BLM's central Yukon Resource Management plan. These are already there and we're going to have to deal with them because we're going to be talking to access to land. And the other question that I wanted to ask Norm is that if the regional corporations decided to go with the federal management, and they would have to, could they close out their lands to the public along with the federal government?

Cohen: Rep. McLean, native corporations like any other private land owner have the ability to close their lands to who they please. So, obviously that is a possibility. I don't know if corporations are planning to do that or not, but that's sort of their choice as private land owners. I don't know of a way though that they could bring their lands within the terms of public lands for purposes of ANILCA. Whether the federal land bank gives native corporations the ability to do that or not, I just don't know. But unless that's an avenue, I don't see where the native corporations' lands will be dealt with differently than other state lands.

Koester: This is Tom Koester, if I may respond to Rep. Taylor. The Alaska Statehood Commission concluded that statehood was preferable to the alternatives. One of the pieces of the deal of statehood is agreeing to be bound by the supremacy clause in the U.S. States Constitution. In my judgement, as a legal matter, its likely that ANILCA is a constitutional exercise of Congress' power. In interpreting ANILCA, because its a federal statute, it will be the federal courts. So I think most likely the legal outcome is that the federal courts are in fact going to be making judgments

with respect to fish and wildlife use on federal land, and whether state laws adequately hit the target under the federal law. Now Judge Holland did make clear, however, in his preliminary injunction - now remember this is not a final judgment - preliminary injunction - he made clear that even in ruling on the preliminary injunction, had there been a management for the Kilbuck herd that he would have sustained the decision by the Board of Game. In his view there wasn't a management plan. That given the facts before him, a nutritional emergency, a harvestable surplus, and a board decision to allow no harvest, he authorized a harvest of half of the surplus, not the herd. So that half of the surplus would be rolled back into the herd to continue the growth. He did make clear that had there been a management plan, he would have deferred so long as the board's decision was consistent with that plan. So while it may well be true that aggrieved parties are going to be challenging any decision, that's no different than business as usual. We get aggrieved parties challenging decisions by the Board of Fish, by the Board of Game, constantly. Then you may be different depending whether its federal land and whether its under ANILCA or not. Those are other kinds of issues. So federal court versus state court is something that we are going to have to deal with. Certainly with federal management of certain parts of the resources on federal land, aggrieved people are going to be challenging in federal court trying to get the Secretary of Interior to modify or change the rules - harvests, bag limits, seasons and so on. I mean they're still going to be going into court. The difficulty is the state is not going to be a part of those lawsuits. So we're not even going to have an opportunity to fully litigate them. We can participate as an amicus, but we're not going to be a real party of interest. We will won't even be able to litigate those judgment calls. At least this way, we're the party. And if we make the proper record, federal judges have indicated

they would be willing to defer to our board, our board's judgments. But without a constitutional amendment, we can't do that.

Navarre:

Also the constitutional amendments that have been proposed aren't mandatory. They are permissive. They allow the legislature to adopt what maybe in compliance, or try to craft something that would be in compliance with federal law. It doesn't say specifically what we have to try to do. And as Mr. Koester mentioned, regardless of what we do, the courts are going to be involved either with what the state crafts within Alaska in order to pass a constitutional amendment to try to resolve the issue within Alaska, or what the federal crafts is going to be up also.

Taylor:

All I was trying to clarify was I think Rep. McLean may have misunderstood my comments earlier. I was only reiterating what the attorney on behalf of the village president's council had indicated, and I think the words he gave us were clear. I think Rep. Hoffman basically said the same thing. And that is unless they had some guarantee written within the constitution, they have little faith in us as a legislature or future legislators in abiding by the commitment to subsistence. I don't share that fear, but I can understand it. My comment only was that the federal government is exercising some rather far-reaching controls, which Rep. McLean also mentioned. That there is an ever expanding world that the federal government seems to be taking in Alaskan land management and water management now apparently and in other things. And that's the reason I was asking Mr. Koester and Mr. Cohen their opinion based on Mr. Hudson's question, and that was and I think you've now concluded that in essence we're probably in agreement on that. That as long as ANILCA remains unchallenged and remains a valid constitutional exercised by the U.S. Congress that final bottom line resort will be to the

federal courts wherever it can be made applicable. If he is successful in his efforts. It will be applicable on all fish. If it certainly is today going to be as of July 1 applicable on all game. It is obviously going to be applicable maybe for additional purposes beyond that depending on how the federal courts interpret the social economics of "subsistence" and the words rural and so on. In essence I think we're all in agreement here then. But we may try to manage it ourselves and to the extent any one in this state is disgruntled by our efforts, they have resort to the federal courts for a final decision and that is the decision that we will have to abide by. Kilbuck caribou herd may be a temporary injunction. Are the animals dead or alive today?

Cohen:

I guess I still see, I mean there's somewhat apples and oranges here. Yes, it is likely that federal courts, not likely maybe, but there is a good, you know, there is a possibility that the federal courts will expand the federal authority. The state regaining management, retaining management after November for subsistence of fish and wildlife use statewide through the constitutional amendment will preclude that kind of federal agency regulatory authority that you are concerned about. Yes there is of course, there will be a appeal of last resort to federal courts. That is a right that is guaranteed under ANILCA and people will use that if they feel they are aggrieved.

Koester:

One of the big questions I guess, from what decisions do you want the people appealing from? Should it be decisions from a state board or a federal board? Federal court has indicated it will defer to the board decision, the administrative decision. That's a typical exercise of judicial restraint of deferring to agencies with expertise. But if the federal government is making the decisions, the federal administrative agencies are making the decisions,

then its going to be aggrieved Alaskans challenging those federal administrative decisions. If the state boards are making decisions, its going to be aggrieved Alaskans challenging a state board decision. From a policy standpoint, my view is that its better that the federal courts give deference to a state board, which is responsible and accountable to Alaskans then giving deference to a federal board that's accountable and responsive to the needs of those in the Lower 48. That's really the choice that you're looking at.

Navarre: Isn't there a third choice? Either way absent a challenge to ANILCA, the federal administrators or the state administrators are going to have to comply with ANILCA. So what you have just articulated is takes place under federal or state unless a successful challenge to ANILCA is brought. Is that?

Koester: Or ANILCA is repealed.

Navarre: I'm going to break for lunch now. I want to mention that Rep. Grussendorf, Rep. Larson, and Rep. Mike Miller also joined us here during the work session this morning. So are there any other comments or questions before we break for lunch.

Wallis: Mr. Chairman, this is Rep. Wallis in Juneau. I'd just like to clarify for the record my sound disagreement even though with Rep. Taylor's remark regarding subsistence and commercial take. Even though he clarified it, he didn't clarify to my understanding that, he clearly said that subsistence were trying to take from commercial fishermen and that is not the case. They are just trying, I mean, with taking 4% of the harvest is not taking away from commercial people. And also to take into consideration the fact that subsistence people, some of the subsistence people

are also commercial fishermen. So I just wanted to make clear for the record my disagreement with Rep. Taylor's remarks in that area which he did not go into, with all respect Rep. Taylor.

Taylor:

Rep. Wallis, I appreciate that. Those were not my comments Rep. Wallis. I was only trying to characterize and repeat the comments that have been specifically made by the attorney on behalf of the Village President's Council and by Rep. Hoffman, both of whom indicated that they were dissatisfied with state management of fisheries. And forgive me if I'm misstating this, but were dissatisfied with state management of fisheries in that they felt there had been too much emphasis placed on assuring commercial fishermen their catch of salmon, and not enough emphasis placed upon the people who needed it the most, which were the subsistence users. And those were their words, Rep. Wallis, not mine. I was only repeating the fact that it appeared as though from their statements, that a legal suit would be brought to ask the federal government to enforce fisheries laws in our navigable waters of this state if in fact the state did not through an amendment of the constitution or other device assure them that subsistence would given priorities on that salmon resource management. If I've misstated that I'd sure allow someone to correct me and appreciate if they did. That isn't anything I'm trying to peddle, this is what I heard here and I'm repeating it only.

Navarre:

Okay, Rep. Taylor. ACVP will be part of the presentation this afternoon, so we'll allow them to address that specifically at that time. With that I'm going to recess the meeting until 1:15. I'm going to try and get started at 1:15.

TAPE 3, Side A

Navarre:by some of the interested parties from around the state, and I'd like to ask them, if they would, to join us up here at the front table. There's a note back there,..I'd just like to ask if we could just shift it down, have people sign and send it down...we have a sign-up sheet...participants. Unless any of you have any strong objections, what I would like to do is allow each of you to give a statement, an overview if you'd like. Take as long as you like, 10 or 15 minutes would be preferable, but if it takes longer, fine and then after we've gone through all of you we'll begin asking questions of the different groups. If anyone feels...any legislators feel that there is a question that needs to be addressed at a specific time, feel free, because the purpose of this is simply to try to gain as much knowledge as we can, so I'd like to begin with the Alaska Outdoor Council _____ Cherie, and please state your name before you speak, everytime before you speak because we're going to have this transcribed and we want to make sure we attribute it to the proper person.

Ed Grasser: Thank you Mr. Chairman. My name for the record is Ed Grasser and I'm here representing the Alaska Outdoor Council along with Cherie Jacobus who is on our counsel. Briefly, we went through this last session after the McDowell Case and tried to work towards a solution with the subsistence question and offered several suggestions to the administration early on, none of which were apparently acceptable or were worked upon. It is our position, still, that subsistence ought to be addressed in its statute form. We're really concerned, though, that a reasonable long-term solution statute may or may not be able to be reached in a special session at this juncture. We are totally opposed to a constitutional amendment that grants special privileges to one group of Alaskans over another. We think the people

protection clause and those other portions of the constitution for common use and access to the resources ought to be upheld by the state. We also believe it's a fallacy on the part of the administration to purport that we are preventing, or averting, a federal take-over by changing our constitution when in fact we're changing our constitution to comply with the federal law. It seems to us that that's in fact engraining federal directives into our constitution and we have a real problem with that. We're certainly willing to work with all groups in trying to come to a long term solution and, as I say, we believe that that long term solution probably has to come in statute form and I'm not sure if the ANILCA can be changed or not, but we feel strongly that ANILCA needs to be changed to address whatever the State of Alaska comes up with for a solution. We recognize that there are other groups that feel differently on that, but that's basically, I guess, part of what the legislature has to decide which way they want to go. If the legislature feels that the constitution is the place to protect subsistence, then that's what they'll do. I guess I'd like to revert back to the federal management concept one more time on that, and that's if the legislature is going to vote to change the constitution to protect subsistence, that's one thing, but if they're voting to avert federal management by changing the constitution, it's not doing it. You're engraining constitutionally federal management. You're taking the federal guidelines, basically in ANILCA or requirement center in ANILCA, and putting them into our constitution. And to us, that constitutes federal management. You're just allowing the state to do what the fed's are telling us to do. Thank you.

Cherie Jacobus: I'm Cherie Jacobus, I'm an attorney working with the Alaska Outdoor Counsel and _____ that we have passed.

Navarre:We can't hear, can you ask the person to come closer to the mike.

Cherie Jacobus: O.K., my name is Cherie Jacobus. I'm an attorney representing the Alaska Outdoor Counsel and a number of other people who are interested in this issue. And I should also point out that I am the attorney that handled the McDowell case before the Alaska Supreme Court when my client won that law suit in which the Alaska Supreme court said that the 1986 law violated several provision of the State Constitution and at least one justice thought it violated equal protection guarantees of the constitution. We are presently preparing a law suit which will be filed no later than Friday against the Federal Government, calling into question the constitutionality of the ANILCA, title 8. We've, just as an aside, would urge the legislature, since apparently the governor's office is not interest in pursuing litigation against the federal government, we urge the legislature to consider joining us in that law suit instead of forcing private citizens and private groups to carry the burden of protecting the Alaska's sovereignty in this area. I'd like to point out, I think all of you are legislators...yes?

Sam Cotten: I always hate to admit that I'm not a lawyer, but....it's not that I'm not proud of not being a lawyer, but.....

Cherie Jacobus: I think I'd be proud of not being a lawyer...personally.

Sam Cotten: You suggested that the governor had put aside the idea of suing and perhaps the legislature ought to consider that. I guess I was under the impression that until something happened, we couldn't sue. Is that true? Doesn't somebody have to do something before we can sue to get them to stop doing it?

Cherie Jacobus: Well, I think there's a number of things you ought to

consider. First, just by the very passage of the act they passed, an act which we believed to be unconstitutional. You don't have to wait any further than the fact they passed the act to challenge the act itself. In addition, they HAVE done something. They have passed interim regulations in which they are going to start regulating subsistence uses on federal lands. That, in and of itself is an action. So I don't think that that's any real problem. I'd like to point out a couple things, because everyone talks about federal control and that we're going to have federal takeover. I would suggest to you a number of things. Number one, when ANILCA was passed initially, we had federal control, and if you look at the provisions of ANILCA, there has been no real fish and game management within the state since ANILCA was passed. You have the illusion. Even with what has gone on for the past 10 years, you have the illusion of fish and game management in this state. And I'd like to point out a couple of reasons for that. I sent a letter to all of the legislators, I don't know whether it reached all of you since we used the addresses which were given to us by the LIO office and I know, some of you at least, did not receive them, but in that letter it points out the very real fact that fish and game management has really been under federal district court jurisdiction since ANILCA was passed. And in recent cases, you can really see the impact of that federal fish and game management. And I just want to give you one example in which I did talk about in my letter, and that's the Kweithluk case. It is a very good example of what can happen and what will continue to happen in this state so long as we attempt to comply with a very flawed law namely, ANILCA. Briefly, in Kweithluk what happened is that you had a village which depended on two caribou herds. One of those is called the Kilbuk Caribou herd. Back in 1985, the Fish and Game Department determined that the Kilbuk caribou herd had so few animals that it was in danger of not surviving. So they put a ban on continued hunting of the Kilbuk caribou

herd. There was another caribou herd in the same area. I believe it's pronounced Mul-chat-na caribou herd which had previously been identified by the Kwiethluk people as a subsistence caribou herd. A customary and traditionally subsistence caribou herd. This year the Fish and Game Department with the support of the Fish and Wildlife Department biologists, and also support of the other village councils, of which Kwiethluk is a member, decided to continue the ban on hunting, including subsistence hunting on the Kilbuk. And the reason for that is that they believed that it was necessary to continue that ban in order to make the herd a stronger herd. A biological reason, if you will. The Kwiethluk people decided they wanted to hunt that herd, even though there was another herd that was available to them. And they went to court and in a four or five day period the Federal District Court judge gave them 50 permits to _____ against hunting, over the objection of the biologist who believed that that was not good for the herd. Now whether you agree with that decision or not, it points out a real problem that ANILCA has created for the State of Alaska Fish and Game Management. And what that message is, is that Fish and Game Management is really not within the hands of the State at all, and even if you pass a state constitutional amendment, all you will be doing in constitutionalizing a flawed law. You will be constitutionalizing the right of the Federal District Court to continue to interfere with Fish and Game Management decisions that are for the good for the _____. And that's important that we think of the resource here, not just in terms of who gets to hunt, but the resource itself. Now, if you start applying that to fish decisions, we can really see a very real impact on the state. So my point is, that we have an illusion of state control, whether you pass a state constitutional amendment or not. Now, that brings me to my next point in a letter that I hand delivered to both Representative Navarre and Representative Sam Cotten and I have sent to all of the

other legislators. After reviewing the most recent interim rule that the federal government's proposing, if you look at those, the federal government is only proposing taking control over subsistence hunting on federal lands. They have not even attempted to extend jurisdiction over public lands, including public waters, of state public lands or private lands or state waters. It's very important. As a matter of fact, in the last hearing they had, the Fish and Wildlife representative indicated that they did not believe that they had the authority to extend jurisdiction over state waters, and indeed, I believe they are correct for several reasons. First, as you know, we recently had the United States Supreme court rule that we own the beds under the navigable waters, that we got that under the statehood act, and they confirmed the statehood act in that decision, and that means that the waters are ours. They belong to the State of Alaska. Second, and I think this is very important, is that the Department of Interior recognizes what I think most lawyers will recognize, is that unless the federal government explicitly extends control over any state lands, then the Department of Interior cannot take control over state lands. And there has been no such explicit grant of authority to the Department of the Interior. The Department of the Interior can only do what the congress has allowed them to do. And it has not given them jurisdiction over state waters, or state lands, or private lands. And if you don't think that's true, all you have to do is look at the definition of public lands in ANILCA. The definition is federal lands. No question about that. So the real question then becomes, if this body determines that it is going to pass a state constitutional amendment, or for that matter a state law in an attempt to conform with the requirements of ANILCA, what happens? You end up constitutionalizing all of the requirements that are in ANILCA. Which means, for example, that even on state waters you would arguably be allowing subsistence users to go into federal court and

interfere with management decisions that are being made by the Department of Fish and Game. It is the worst thing you could do, especially for the fisheries, which I think should be a primary concern for all of us. The Fisheries are important for the economy of our state, they are important to the people of this state, and therefore, I think it's important for you to avoid any attempt to comply with the requirements of ANILCA. In summary, I would like to suggest a couple of approaches. The first one is, as I said at the outset, the legislature ought to be considering joining in the lawsuit that we have filed. Why? Because there are important sovereignty issues that are at stake. Second, I think that the most you should do is repeal the 1986 law so that we stop the problems that we're having in the Superior Court with the judge deciding whether or not the preference for priority goes to everybody in the state of Alaska or whether there is no preference any longer. Third, you have to recognize that the boards of Fish and Game have the authority to allocate resources among users, just as they have always done, and you should confirm that authority and tell them that they are to continue doing it on the basis of methods, means, seasons, the traditional methods of regulating fish and game in the state of Alaska. I think that this is an important issue. I think that the state is at a real crossroads, and you can determine, do you want to continue under federal control, or do you want to break that bond that you've been tied to because of ANILCA? And I think that you ought to break the bond and not do it under the illusion and the magic act that we're talking about by changing the constitution. Thank you.

Navarre: Okay, United Fisherman of Alaska, Theo or Kent.

Theo Matthews: Thank you Mr. Chairman. My name is Theo Matthews. I reside in Kasillof, Alaska, on the Kenai Peninsula. I am the current president of the United Cook Inlet Drift Association

in the Peninsula area, and I'm also serving as the current president of the United Fishermen of Alaska. We got separated here at the table, but with me is Ken Castner our Interim Director. He's been working closely with you most of this session and I invited him to be here with me. Briefly I'd like to note UFA's composition, we have 23 regional groups like UCETA, statewide that belong to United Fishermen of Alaska. We also have three at large directors elected by the full membership. Basically UFA's goals is to work at the state and local levels to represent commercial fishermen in areas of common concern. We make a conscious effort not to address allocative issues between our members. The subsistence priority for rural Alaskans mandated by ANILCA, and I should say, including commercial fishermen whether they be native or non native commercial fishermen, is probably the toughest allocative issue anyone could ever take up. We're well aware of that. We also feel that since there is a preference over commercial fishermen, as I said, native or non-native. It's an issue of vital concern that the organization must address. UFA does not now, and I don't believe ever has, viewed the subsistence issue as a native or non-native issue. Indeed, we have many native fishermen represented by a member organizations. Some of our member organizations represent primarily native fishermen who live in areas which could be deemed rural under anyone's definition of the word rural. But, I'd like to make it clear that we do not do this as a native/non-native issue. Especially as it spells out in ANILCA. In the past, UFA's supported 1988 subsistence law passed by the Alaska State Legislature. Recent developments, however, made it very clear to us, that it is essentially the federal court that is managing subsistence under ANILCA. Two examples I'll give you, both came in the Kenaitze decision, by the 9th Circuit Court in San Francisco. One component of the decision was a statement that even the Secretary of the Interior no longer has the authority to

certify Alaska in compliance with ANILCA. Yet that opportunity, the first time around, after that point in time, the court made it clear, that the court itself would make that determination. To us this says that even with federal regulators and federal regulations, the federal regulators themselves and their regulations will be subject to court control. The court will recite. In the same case, the court decided that it was not happy with the state's definition of the term "rural". The legislature struggled long and hard to find a definition that fit Alaska, it was supported by the UFA and many other groups. However, it was found wanting by the court. So that says essentially that state regulators, like federal regulators, are going to be subject to court scrutiny. The UFA struggled long and hard with the issue. We're trying to get back where we thought we were in 1986 when we supported Alaska State Legislators subsistence law. One solution that we could see, was to insert definitions into ANILCA. We came up with the idea of a constitutional amendment that would allow a rule preference, however, the amendment would not become effective until the definition specified were inserted into ANILCA. And what that would do would be essentially insert the definitions that the legislature and people through its review process felt were appropriate for the situation and to federal law. Now that, ...the concept was essentially called an enactment clause that would say we would accept the state rural constitutional amendment that will become effective when these things have been done in ANILCA, and the governor certifies they have been done, an insertion of these definitions. The definitions we were primarily concerned with and there may be others, but what does rural mean? We proposed inserting the definition that the legislature came up with '86. A definition for what is customary and traditional, a definition for the priority, for the preference itself, and something that will deal with the issue of customary trade. Even with the definitions

inserted into ANILCA, it must be remembered the federal court will still oversee that law. At all times federal court is charged to oversee the law. The charge of the courts themselves is to review statutes, not to set policy, but charge the congress to set policy. And what we were trying to request is that congress establish a policy of what these words mean in their law. UFA understands that essentially, to date, three courses of action have been proposed. One, by the Outdoor Council and many others, to challenge the essential constitutionality of ANILCA. The second is the idea that UFA came up with was the rural amendment with an enactment clause. And the third is a rural amendment without definitions, or an enactment clause and essentially try to take care of the concerns that individual groups have later. That's essentially the administration's position. At the present time, now since the end of the session, we've had federal regulations proposed, we've had a lot of legal stratagems and thoughts thrown at us, from both sides of the issues, and there are some very good, (and you've heard some of them), legal arguments. It's a very complex issue. Very difficult time of the year for the commercial fishing industry, it's difficult to contact our directors. I have been able to determine that of our groups, some support the administration, we could pass the rural amendment now and take care of "the problems" later. Some feel that that is definitely NOT going to happen and they support nothing less than the enactment clause and basically a few see nothing on the table, or have seen nothing on the table that they can now support. It's my hope as president that this forum, and the teleconference will bring more information to all our groups and I certainly pledge to work with all of you in session when you go back to Juneau. At this time I can not give you a UFA position. This is my opinion, I cannot do that. But I wanted to let you know that the process whereby we

identify problems and how we attempted to address them and where we're at now. Thank you Mr. Chairman.

Navarre: Sen. Cotten

Sen. Cotten: Theo, tell me a little bit more about this enactment clause. Does it mean that before the legislature should ever offer a constitutional amendment that the federal government should take action to define the, I think you had four things, define rural, define priority, define customary, traditional and define customary trade. You see, when you talk about an enactment clause, you'd like to see those things defined to your satisfaction before the legislature would offer the voters a chance to vote on a constitutional amendment?

Theo Matthews: No, Mr. Chairman, the concept would be, the voters would vote on a rural constitutional amendment, part of that amendment, itself, would be the enactment clause. They know what they would be getting in other words. An enactment clause would read, if the amendment passes, it shall not become effective until the governor certifies that these definitions have been inserted into ANILCA. It's a legal stratagem that allows you to take care of your problems and at the same time address the outer compliance issue.

Sam Cotten: So the enactment clause would be satisfied regardless of how the federal government defined those items....

T. Matthews: The enactment clause itself.....

S. Cotten: ...as long as they defined them some way, then that would be good enough.

T. Matthews: Mr. Chairman, no, the enactment clause itself, should specify the definitions that the state would want inserted, and our idea was basically that we would insert the

definition of rural that the '86 legislature did come up with. We'd insert basically, something similar to what the boards of Fish and Game have come up with for customary and traditional, etc. So it would be clear to the voters, that they were voting on a rural amendment, they would know what the word rural meant, or would mean before it became effective, and that's the example.

Navarre: Thank you. Mr. Castner.

Ken Castner: My name is Ken Castner. I'm the Executive Director of United Fishermen of Alaska. Early on, I believe that United Fishermen identified that it would be very difficult for the state to unilaterally solve the problem of subsistence because it was a federal law that was driving the matter. And we also recognized that it would be very difficult to go to Washington D.C. and work for any meaningful change in ANILCA without the express cooperation and maybe even some sort of agreement of the groups that are represented here today at this table. We certainly have tried to keep the avenues of communications open and have worked with all the people who were seated here today. If the legislature decides that you cannot enact something that is going to prevent federal takeover or if you decide that federal takeover is already been accomplished before the McDowell decision, than I think that you would have to look to setting up some sort of a form to stage in Washington D.C. and while trying to maintain the state's control over the proceedings of that form. You could create a form in Washington D.C., but that leaves any position of state assertion out. And I think that United Fishermen of Alaska, and I believe the majority of the people sitting entirely around this table believe the state and it's citizens have a very large voice to play in the proceedings whether they are either in Juneau or in Washington. Preserving that place for Alaskan's is of key importance. I believe it's an issue

that has not been addressed very thoroughly through the subsistence thing. If you have any questions about UFA's position or how we worked or handled the issue in Juneau, then I'd be happy to answer that field of questions.

Sam Cotten: Anybody have any questions for Ken? Any other questions? Okay, then the next person that Mike's got on, he's just going to be out of the room for a few minutes. Tom Eliason the Sportfishing Association.....

Tom Eliason: Alaska Sportfishing Association. Thank you Mr. Chairman. I am Tom Eliason, the President of the Alaska Sportfishing Association. There's a lot of rhetoric that's going to be going around the table to comment on and there's a lot that's already passed, and I'm not going to spend a great deal of time rehashing a lot of the same things that a lot of my constituents have said before. A couple of questions I'd like to ask, I guess at the legislature and then to the people sitting in this room is, what are we acting on here? Are we acting on a protection of the resource? Are we acting on the so-called federal government which is Big Brother taking over? Are we acting on the state as Little Brother overseeing our resources? Or are we acting on a fear of all of these? A fear of all the Alaskan's that something is going to be taken away from them? We hear that....I guess I'm a little bit of a radical, to some extent. But, when it comes right down to it, what I hear everybody speaking here is our way of life being gone. I heard Mr. Hoffman say we're going to fight this to federal court to where we have to. That was earlier today. I heard some attorneys say that. The only ones that will benefit greatly from this are the attorneys. They will make a tremendous amount of money. Do the people in, say Stonyplain, Alaska, benefit from this? I don't think so. If that man or woman out there, whether he be native or non-native, wants to go out and catch a fish to eat it, or

shoot a caribou, he's going to do it whether you in Juneau, or the people in Washington say "No, you cannot", or we have a subsistence law that says this. They're going to do it. They've been doing it for hundreds of years, they're going to continue to do it for hundreds of years as long as the state of Alaska stays in the position it is in as far as what's rural or non-rural or whatever...urban areas and that. The idea of subsistence of something that the governor's going to come up with this grand plan that obviously from the talk here, no one seems to know what that is. We don't see...I know you don't have a copy of it, I sure don't have a copy of it. No one has any idea what this special session was called for. Obviously to spend more of the money that we supposedly don't have in the treasury anyway. But no one knows what that is, so we're discussing this "mythical" subsistence. Well, what is the mythical subsistence? What are we arguing about? Are we arguing about the conservation about the resource? Or are we arguing about whether Mr. Cotten gets to take ten moose. or Mr. Hoffman gets to take 50 fish, Miss Barnes gets to take 100 ducks. Is this what we're arguing about? The greed of man? The greed of the Alaskan people as to how who gets what and when? I guess I'd like some definition from this body as to what we are doing here arguing about. Are we arguing about a way of life or are we arguing about preservation of the resource? Are we arguing about a federal, so called federal, takeover that seems to have everyone extremely upset, which when it boils down to...they've had it in the first place and they've had it all along, it's just that some people didn't realize that they've had it. Are we worried about what the people in Juneau are going to do about the poor person in Deathwalk, or where ever? The customary and traditional values that are going to be brought forth here can be brought together on both sides. Obviously, Miss Kitka when she gets the envelope will, or should speak, if she doesn't...she should speak on the customary and

traditional rights of the Native People in the state of Alaska. Well, if you want to push that over onto the urban side, there are customary and traditional rights of urban people. People that have chosen an urban life style. And to give you kind of a ludicrous example of this whole thing, is I'm a sport fisherman. I do derive my income...also, I own Hunter-Fisher Taxidermy, I do derive my income from the resource, my livelihood from the resource. But how ridiculous would it be for me, as an urbanite, to say that I want a priority on sportfishing because it's a cultural and traditional part of my heritage of being an urbanite. You people would look at that and laugh. You'd laugh at me. I'm laughing at it myself. But, this is a point that can be made. It's just how stupid this is. I don't think anyone in this room wants to see another human being, in this state, be hurt... for any reason. Whether they be native or non-native, and I think because of our....excuse me, the illustrious members of our press, they've been playing this up as an issue of native and non-native or urban to rural and it sells papers, and it's good on the news, and it makes a few more dollars in advertising, but if you really get down to the basics of what's happening here, isn't it just that we all live together and share in the common property resource that this state has. It is the last great vastation of wildlife and fisheries left in the world. It really is. If it wasn't, why are so many high-seas interception people coming into the waters of Alaska to try to get our fish that we've raised here? I think we've done an admirable job. Despite all the fighting. Despite all the lawyers that have gotten into this. We've done an admirable job of maintaining the resources. Obviously by the federal government's own admission, they don't want to be here. I heard the man say it from the federal government, "we don't want to be here." and I asked him, what the hell you doing here, then, if you don't want to be here. He told us they don't have the funds to manage fish and game resources in

Alaska. He sat right up there and told us that. Then why are they taking it over? Is it because of a perception or a fear of what might happen to one group of individuals or a bunch of groups of individuals? I don't know, I'm kinda confused. The courts are ultimately going to decide this. That's what everyone has said, we're going to take it to court. When we have a problem, we don't solve the problem, we run to court. We pay lawyers a tremendous amount of money to go in there and battle for us, we have judges that sit up there, that frankly, some of them, again by their own admission, would think that Anchorage was rural. And...yet we're going to sit here and waste your valuable time, if you do something or you do nothing, it makes no difference. It's going to be challenged one way or the other. You all sit here or you go to Juneau on this special session and see the grand master plan, and you will decide one way or the other what to do. One group or another of us sitting here, or maybe all of us, will challenge that in court. Ultimately, it will be decided. You spend a great deal of the tax payers money. If you do nothing and go to Juneau and say "Well, Governor Steve, hi..., goodbye, we're leaving on the next plane. We don't want to talk about any of this stuff." Ultimately, somebody will take that to court and somebody will do something with that. But I'd like to give an example of one thing in closing of how groups can work together and work out their problems. Four years ago Cook Inlet was a battleground. Some of you are very familiar with that. It wasn't a native/non-native, it wasn't any...it was a sport/commercial battle. And we had some beauties. Some that would make people here cringe. A bunch of us got together....I shouldn't say a "bunch of us", a handful of us got together from all the user groups and decided that..why do we keep battling? We're not making any headway at all. We formed what is called the the Cook Inlet Fisheries Coalition. It's made up of all the user group in Cook Inlet. And we sat down and decided the first premise

of our organization was that all of us are going to be here and we are going to continued to co-exist together. Not one of us is here to try to get the other one out. We agreed on that. The next thing we did was agree to disagree on problems. Well, it took about...everyone told us that this wouldn't work, sport fishermen and commercial fishermen can't get in bed together, personal users can't get in bed with them. They said it would last six months. Two years ago at the Board of Fisheries meeting for Cook Inlet, since it's an every other year deal, it was the smoothest, by the Board's admission and by everyones admission, it was the smoothest board meeting they ever had. WHY? Because if we had problems, the coalition got together, we solved our problems, went into the Board and said, "Hey, this is what we can all live with." And the Board, "My God, yeah, that's great." Rubber stamp it and out it goes. I think if you got some really responsible people representative of these user groups, not the radicals, we all have them - sport fishermen, commercial fishermen, native groups, non-native groups, environmentalists - I mean there's radicals in everything - but some reasonable people together to deal with this problem reasonably, I think we could solve an awful lot and save an awful lot of time. Unfortunately, and this is maybe a cut at the legislature, you people do what is politically expedient and politically good for your own careers. And I'm not saying that's wrong, I'm just saying that's a fact of life. But yet if you would take a stand and say that we don't want to deal with, or we shouldn't have to deal with this, it should be dealt with by the people that are actually using it - using the resource and working on the resource - and stop getting the attorneys rich and stop making the courts crowded with cases that they really don't need to be crowded with - I think we could come a long way in developing a coalition of citizens of Alaska. And showing some other people just what Alaskans are and

what they always have been and what they could continue to be in the future. Thank you.

Collins: Thank you Mr. Chairman. We've had a lot of information this morning, and again a lot of information from the people representing the Outdoor Council. And what I want to do is just for my own edification just to make sure that I've summarized kind of what their statement is and I want to make sure that I am not off the wall. As I understand it I think there is basically three main things I got from your testimony. Number one, is that the federal takeover that is currently, appears - apparent - is really not going to in effect change anything. Is that correct.

Jacobus: Its not - what its going to do - it is going to implement what the federal government has been capable of doing and has in fact done in the park areas and some of these areas for the last ten years. Its not going to impact on commercial fishing. Its not going to - outside of federal lands, its not going to impact.

Collins: Basically it just reaffirms what's been going on.

Jacobus: What's been going on.

Collins: In a sense that's not really a change.

Jacobus: Right.

Collins: As long as ANILCA is in place, we will in a sense be having federal government where they have jurisdiction over our fish and game. Is that correct?

Jacobus: No. My contention is, and I believe its sound legally, is that the federal government has - under ANILCA - has not exercised control over fish and game throughout the State of

Alaska. It has only exercised control over subsistence uses on federal land and has not extended beyond that. But, as long as you attempt to comply with ANILCA, you will find yourself under the control of the federal court system. If you say, if you basically say to the feds, "I'm not interested in complying with ANILCA, we're going to solve our problems internally on state and public, private lands," at that point the federal government as far as the court system, is no longer involve.

Collins: Basically the thing that relates, in a sense concerns me the most, and that was your statement that in fact if we did have the constitutional amendment that we would, rather than removing ourselves from federal control, so to speak, that we would in a sense be confirming _____.

Jacobus: Yeah. I think that's the only conclusion that you come to. That once you pass a state constitutional amendment, in a very real sense you will have been confirming the control that the federal government was attempting to do back in 1980. You will say, you're right, here it is. Its yours. On state lands and private lands, which I think is the think you should be most concerned about.

Collins: I have another question. In looking at some of the really good statements made by you and I really appreciate it, but in looking at all of the issues that we're looking at, the bottom line really, as far as I see it, is resource management and preservation. If we were to develop a policy, whatever that is, that would say our goal is to manage and preserve our resource and we will do whatever that takes. In terms of looking at the priorities that are perceived to have been established by the federal government, how would that priority fare as opposed to say a subsistence priority or the sports priority? Would that have any greater impact in terms of maintaining a position, or a legal status if we

were to pass that type of legislation and had that as its goal and focus as opposed to.....

Jacobus:

First you have to start from the position that the Alaska state constitution, which I'd like to point out was approved and ratified by the federal government when we became a state - they specifically did that, has three provisions. One of those provisions - three important provisions for your purposes. Whether you pass a law or not, the state constitution specifically says that the goal of fish and game management is to promote sustained yield, which is the protection of the resource for the maximum use of all the people. So you really don't have to pass a law to that extent. But the problem you have with ANILCA - and this is the thing that concerns me - I'm not a hunter, I do a little fishing - but I'm concerned as a resource person. The thing that concerns me is that what ANILCA does is changes the focus from protecting the resource to protecting a particular user group. And when you do that you lose sight of what the bottom line of fish and game management is, which is the resource. And if you continue having decisions like Kwiethluk or some of these other ones that are currently winding their way through the courts - in particular for your commercial fishing area - you're going to see the destruction of the resource, because _____ an article in front of me that was written by Libby Huntington, who I think most people would recognize as I think a very great Alaskan and certainly an authority in this area. The thing that he points out I think so well is that Kwiethluk points the way in a direction that we - those of us who are concerned about the resource, in a frightening direction. And is that what we're doing is dividing up the management into individual hunts, individual fishing seasons, and that's not the way to manage the resource. The resource has to be managed across the board with some thought given to the long-term impacts of each decision. The federal judge isn't

going to make those kinds of decisions. And so that's why ANILCA is bad, very bad. We need to avoid at all costs coming underneath the provisions of ANILCA, and that does not mean - I didn't say this in my opening remarks, but I want to say it now - does not mean that you cannot protect subsistence use groups. There's no one here that you can't do that. The state supreme court has repeatedly said that the legislature has authority to grant preferences for one use over another. They've said that repeatedly. You don't need to change your constitution to do that. So that if the legislature wanted to give a preference or priority to subsistence users, especially during times of shortage, you certainly can do that. The problem you have is that with ANILCA driving us, all of the provisions of federal intervention, federal - and I'll have to use kind of a funny word - federal screw-ups, because that's really what you're talking about. They've never done a good job of managing the resource, and the federal court, in particular, doesn't do a good job of managing the resource. We've got to keep it here. And the way to keep it here is to basically thumb our nose at ANILCA, take them court, tell them we're not going to enact ANILCA on state land, and really manage our resource the way it should be managed. And, you can protect subsistence uses. That's not a problem. You can do that constitutionally. You just can't do it the way that ANILCA wants you to do it....

Tape 3B

Mike Davis: Yeah, I believe that was Cherie talking, but I'm not sure, but she said that we already have the provision, or provisions to give grant preferences. And where is that citing?

Jacobus: Okay, that's not found directly in the constitution - well it does - it talks in the constitution about that you can grant preferences among uses, among uses - and that's the big key word here. And the state supreme court has had

several cases and I just don't remember the names of them right off the top of my head, but several cases in which they have said that it is constitutional for the legislature to say in a particular case or for the Board of Fish and Game to say in a particular case, this use, commercial use versus sport use, will have a preference or priority. There's nothing that prevents you from doing that. You do that - and in fact the boards do that routinely.

Davis: They do that. But the citing which you have the Supreme Court decisions referenced in the constitution?

Jacobus: I can get that for you and give it to you, but I just don't have the constitution right in front of me right now, but I can get that for you.

Davis: We can get that too. But the other question I guess you know that we've had a lot of debate on it and I'm not sure if we should challenge the authority to - the authority _____ to regulate on state lands I believe - but are you, do you say that - is it your contention that they don't have the authority to regulate federal lands?

Jacobus: No, they have authority to regulate federal lands. They don't have authority to regulate state and private lands. By the way, I do have the cite for you if you want the cite in the state in constitution.

Davis: Sure.

Jacobus: Okay, its Article 8, Section 4. And its not very long. It just says, "...fish, forest, wildlife, grasslines, and other replenishable resources belonging to the state shall be utilized, developed and maintained on the sustained yield principle subject to preferences among beneficial uses."

Davis: Okay, that's fine. Okay, did you finish your second response?

Jacobus: I think so. Oh, and here's, you want the name of a case? Somebody just kindly handed it to me in the audience.

Davis: Yeah, that'd be great.

Jacobus: Just so you know, it's Mr. Robinson from Kenai, he's a very good lawyer as a matter of fact. The name of the case is Kenai Peninsula Fisherman's Assoc.

Davis: Okay. Alright thank you Cherie.

Cotten: Is that it Mike.

Davis: Yeah, that's all.

Leman: Thank you Mr. Chairman. Cherie, while you were responding it brought to my mind what was said this morning by either Mr. Koester or Mr. Cohen or perhaps both of them. They were saying that if the state challenges ANILCA, we will lose credibility with Congress in that we've been saying all along we support subsistence and now that, you know, they take that as an indication by the state that we don't. And what you're saying is different from that. And would you clarify that while they're here sitting behind you and the rest of us who maybe didn't hear it this morning, so we could see why you think that isn't true and indeed we wouldn't be making a statement in opposition to subsistence.

Jacobus: Well, in the first place, just that fact that you don't, that the state decides that it is a sovereign entity and has the right to make these determinations itself is not a statement that you don't support the concept behind. The reasons for Title 8 in ANILCA - I just don't see how it is.

Its kind of like telling someone - you know, I agree with your final intent I just don't agree with the way in which you've chosen to do that. And we are a sovereign entity, and we have the right to make those determinations ourselves and we have the authority to do that. And that's all that being said to the federal government, is...and in essence if you think about....I heard that this morning they indicated that for the last ten years they've been supporting it. Well they haven't really been supporting it. I mean I've been participating in these cases and in the last ten years what they've said repeatedly to the court, is we passed this law because we were afraid of federal takeover. They didn't say we passed this law because we agree with this. That we passed this law because we're afraid of federal takeover. I think that's very clear. And that's why a lot of the provisions of 1986 were put into law. We, there is nothing that prevents the state from protecting subsistence uses. They can do that. But the real issue is can you do it this way. And what you'd be saying to the federal government and to Congress is we are a state. We have equal footing with all the other states. We have the right to make these determinations ourselves, and we will do it. We are not a stepchild, we are not in kindergarten. We are full-fledged state with the ability to manage our resources properly. And that's all I think you'd be saying to them. And I think its about time that you said it.

Hanley: Let me follow up. Cherie, you talked about - I'm not clear about the constitutional amendment. If we pass them will we be talking about preference _____ versus subsistence on federal land. Is it your idea we might be talking about state, private, federal lands in the constitutional amendment?

Jacobus: I've seen several versions of the constitutional amendment. I have no idea what constitutional amendment is floating

around out there. And it, just as aside, its amazing to me that you talk about changing the constitution and you're spending in essence less time on that than you would on some other very important issues. And I think its important that you know what you're talking about. Cause I've seen at least five versions out there, and I don't if there's some other versions out there. But, no, the state constitutional amendments that I've seen talk in terms of allowing a rural discrimination on state and private, as well as federal lands. It applies to all lands in the State of Alaska.

Hanley:

And then would some of the other sections of ANILCA then come into play so that maybe we would be giving other preference on those lands, so that maybe a berry patch or something of that nature which was being used for subsistence and customary and traditional use of a berry patch, if there was coal or something else, would then the subsistence, the berry patch subsistence then take priority if we pass this constitutional amendment, would other sections of ANILCA besides Title 8 then also apply?

Jacobus:

Well, first, you pointed out something that's kind of interesting about ANILCA and it's kind of one of my pet projects. One of the things about ANILCA that's in some what related to what we're talking about and somewhat not related. Well first, let me first say one thing. All of the provisions that I've seen floating around for the change in the constitution apply not just to fish and wildlife, but all renewable resources. And I might be incorrect in that, but that's what I've been seeing, which would apply to berry patches and use of reeds, and a lot of other subsistence activity. The problem, one of the problems with ANILCA is that it also has a provision which, in essence, gives a something similar to a veto power to subsistence users over development on federal property in the State of Alaska, which is, as I've told some of you is a concern to me. I

don't think that that's appropriate since subsistence is one of those things that is taken into account under the National Environmental Policy Act, so they don't need something specific and special about it. I don't think that it would put those into place on state lands. I think it would still require an enactment of the legislature to put that kind of preference into place on state lands for the purposes of approving developing. But it would certainly trigger all the other parts of ANILCA.

Hanley:

Well one more question. I think we were talking this morning too about when the federal regulations come into play, assuming we did nothing, and the federal regulations then begin on July 1st, what happens to the Kenaitze decision? Does it end? Does it continue? Or, what would allow it to continue if doesn't end on July 1st?

Jacobus:

Well it'd be my position that the Kenaitze decision, since its based on the state's attempt to enact federal law and since at that point, if you do nothing and you don't pass a constitutional amendment and you don't make an attempt to comply with the requirements of ANILCA, it'd be my position that the state at that time should move to have it declared moved. Because it would no longer, because the federal government has not extended its jurisdiction over state waters. As matter of fact they have explicitly said on a number occasions they don't have authority to. So in my opinion it would be moved and if the Kenaitze's had any argument they would have to bring it to state court which would be entirely different complexion into the case.

Finkelstein:

I didn't have any questions, but I thought Tom raised some interesting questions himself in his testimony and I wanted to respond briefly that one question you asked, the overriding questions, you know what's our goal? What is it we're trying to do in this special session going done there? And

the answer each one of us would give is different and that's the reason we're sitting here today. If we all agreed on whatever we're trying to get, we'd probably be a lot further on. We don't agree on that, that's part of the problem. One of the other questions you asked was why is the federal government taking over management if they're complaint is they don't have the money? Why are they doing it? And I think when they testify tomorrow their answer, as I'm sure you know, is that they don't have a choice. That's the law and they're just following the law. And you also sort of the made the point that all the legislators do on this is sort of what's politically expedient. And I think that kind of complaint is you know applicable in a lot of issues that the legislature deals with, but actually I don't think it fits this one. The, you now, if it was just politically expediency, you know, dealing with an issue of rural preference, the rural legislator would just vote yes, every urban legislator would vote no. But actually it isn't that way at all. Its a big ideological split and it isn't clear at all. People I find are pretty open minded to other solutions, other issues going on, and if we all made up our mind on political expediency we probably wouldn't be sitting here today or tomorrow. I do think that there's still...although the charge may be true in some cases, I think most of what I hear going on are discussions over substance, over what are the best solutions for Alaskans, not just from one zone district but in the whole state.

Elias:

But also in playing the game of politics, if we know anything from past politicians and past governors and our own governor now, when he gets to a special session, myself as a layman, has seen it happen time and time again, he will corner a specific legislator and say this is what I will trade you for this. And trades go on all the time. We've seen them happen time and time again. And since we don't know what's happening down in Juneau, and by your own

admission you don't even know what's going on down there - what he's going to offer you - are we looking at the possibility of this master plan's going to come out and he will go to Loren Leman and say Loren if you vote this way in your district you need this, this, and this and we can make sure that you're going to get this, so trade this for that. Well, Loren doesn't have anything, but that's all right, I was just picking on him. But what I'm saying is that there are pet projects from legislators, there are pet projects that they want, there are pet projects that if they're Republican and the Democrats don't want to give it to them or vice versa, and there is this trading going on. And is it at the request of the Governor or is that a request of an interest group, or is it because of the genuine interest in saving the resource and in managing the resource for all Alaskans? That's the question I'm asking. And unfortunately I'm not a believer, cause I've seen it happen too many times is that you won't do what is good for the resource, you will want to do what is good for X, Y, Z community, alright. Because that's who you represent and they vote you in and therefore they can vote you out. And they say you didn't do this up there, so now you're out. And whether its good or bad. Are you as legislators willing to take the chance of doing something that is good for the entire state or are you just going to do something that is good for you politically?

Navarre:

David, I'll answer that. I think that the interest that's been shown by the legislators here today and the purpose of this meeting Mr. Elias is to try to reach a solution to the subsistence issue. Its something that I think everyone sitting around this table is interested in trying to resolve. Now to suggest, you suggestion that people sell their votes or trade their votes may be true in limited situations. It is not the modus operandi of the legislature. And I personally greatly resent that you seem to have

the impression that that is how the legislature operates. I think that legislators' votes are not for sale, regardless of what the governor holds over their head. And the governor has said a number of times that he does not intend to use the line item veto with respect to the capital projects in order to try to force votes on this issue. It wouldn't work in any event. And so I think that....

Elias: Well, we're talking about the same governor that when he got elected said all bets are off of what he said to get elected.

Navarre: Yes, we are.

Elias: Okay, I just want to know that.

Cotten: Let me try a shot at this too here Mr. Majority Leader. Yeah, I think that if you know, some governors have done that. This one hasn't done it much, at least I haven't noticed it. But yeah its happened before and you know a lot of things happen in Juneau that make a lot of us wished we waited till after lunch, anyway.....

Elias: Well, I'm not trying to say that you're bad.

Cotten: ...what we're up to here is, like none of us, I don't know anybody here that asked the governor to call a special session. I didn't ask him to do that. So, well we have to, the constitution requires us to show up, so we're trying to do the best we can to get prepared for it. I personally know that we had 20 votes yes and 20 votes no on the last proposal for the House of Representatives. I don't know of anybody that's changed their position on that. Now it could be that some have without me knowing about it. That's very possible. But, so I'm not sure that there's a good reason

to go to Juneau, personally. You have to go when the governor calls.

Elias: Well I, excuse me if I sounded a little bit ____ I apologize if I sounded like I was offending any of you. I didn't mean to say that I'm offending the people are here because obviously you're taking an interest in this, otherwise you wouldn't have called this. Mike wouldn't have called this session, you wouldn't have gotten everybody together. I understand that, you know.

Cotten: Here we got a group of people together that, I mean, you know you had one thought there that I kind of took some notes on and that was this business about the cooperative effort between the sport and commercial folks that took place in Cook Inlet. And I happened to fish commercially in Cook Inlet and I'm a sport fisherman in the area as well, so you know I think that the conflicts have kind of died down somewhat. So, do you feel like the legislature can do anything to enhance that? I mean one thing we've done is we've called a group of people here today to try to help us talk about this. But, you know the legislature can't pass or even come up with its own proposal that would have enough support. Maybe we can create a task force or assign it to a committee. Yeah, this is a committee right. Well I don't know, I mean that doesn't hold a promise to me. I don't think that these folks here would be able to, you know within a short period of time, produce some sort of solution that would be satisfactory to everybody sitting there, but boy I'm sure willing to try something like that if there is no other proposals put forward that's going to find support. So I, you know I think you were being constructive there. You might have something.

Elias: Well I'm more than willing and I know a lot of people are more than willing that are sitting here to get together and

do something. _____ I've sat on that committee in Cook Inlet and I think one of the biggest things is the fear of not knowing your so-called opponent, if you want to say opponent, use that word. Once we found out, once the sport fishermen found out what the commercial fisherman was about, what the drifter was about, what the setnetter was about, once the setnetter what the guide was all about and what the sport fisherman was all about, we found out we really didn't have that many things to fight about. And it was kind of a unique situation and I think it worked out real well for all the people in Cook Inlet. Not that we agree on everything, but at least now we can sit down and talk about it and don't have the fear. We're not motivated by fear, which I think is a lot of the motivation - well, we're not motivated by fear of each other or fear of losing something - we're just motivated to do what's right for the resource.

Hudson:

I think that we probably gained more from this meeting since the first of this day on this very important subject than all of the other debate and information we've ever had presented to us. And if there's any fault in this whole subject, its the fact that nobody took the leadership to bring this subject forward with this kind of debate well in advance of that fateful night. When we all voted, in our best judgment, and best judgment is directly involved with the information that you're presented with. If you're well informed you make a good judgment. If you're not well informed, you shoot from the hip, you do the best you can. But we're all motivated to the entire state's interest in this issue. I can guarantee you that. Guarantee it. There was, in my opinion, at least not on my part, there was no political and there was nobody pulling my strings wither way. I did the best I could with the information that I had at the time. But what I really want to do though is something hopefully constructive. So you brought up the one suggestion, you indicated that there essentially three

different proposals that had forward: one was to challenge the constitutionality of ANILCA. You brought up the rule amendment which intrigued quite frankly. The idea of creating a definition of rural customary and traditional, and customary trade and presenting to the public to vote on with the suspension of the Equal Access Clause subject to the adoption of those definitions. And what'd like is the others to comment on that. At least, including Julie and the rest of you would please. And as you make your presentations I'd like your comments on that because it seems to me like that is the only new thing that I've heard so.

Larson: Just in relation to a couple of the general remarks. I think we're here today to be part of the solution, not part of the problem. In relation to the governor's potential vetoes, I hope he makes some. I'd like to help him though. But, I think the comment that I would like to make in relation to the meeting today is, I came down here with very little knowledge and the more knowledge and more information you have on the subject, the better decision you can make. But my position hasn't changed, its just been reinforced.

Taylor: I think Sam put it very well and so did Mike and I really appreciated the comments of Rep. Finkelstein too. I've only been there 6 years and during that time I've seen a little.....

___? You're breaking out, we can't hear you up here.

Taylor: I said I've only been there about 6 years, but I've seen a little bit of horse trading going on, a little bit of a few offers being made and other things, and certainly have had some directed in my direction. But I don't think I've ever seen an issue that cut across party lines or that cut across even regional representational lines like this one does. And I want to assure you that the comments my colleagues

have made here I believe are very honest, genuine and in good faith. There is a strong desire on the part of everyone that I've talked with about this issue and Lord knows we've been talking about it mostly in the backroom and in the closet here _____ where in the world are we going and where are going to _____ the solution. I honestly believe there is a real sincere good-faith effort here to reach a solution at an accord, if one is possible. And many of us I think are coming to the realization that maybe we can't do very much in Juneau, and there may not be a solution in Juneau. The solution may very well be in the federal courts. But, if there is a solution we intend to be part of it. I mean we held a meeting just yesterday afternoon, an informal one, among members of the members of the minority just desperately seeking a solution. Have you heard of anything? Are you talking to other people? Yeah, we're talking. And even in Juneau towards of the session you'd find groups of 3,4,5 people advocating maybe one position, only to find out after some information might be had that parts of that group would move around and other people would start advocating another position. It was people desperately searching for a solution to what I think all of us see as a tremendous emotional problem, a tremendous resource problem, a problem that may impact development across this state for years yet to come. And a sacrifice, if you will, of probably the single greatest motivating factor that brought statehood to Alaska. And it was control over our own destiny and fish and game management. You look back at people like ___ Arno!d and other folks, my God, that was one of the main reasons that we fought for. And I guess the problem, to give you a quick aside, that I find more frustrating than anything else, is that I believe that we are a small enough community, that we care enough about one another and we care enough about the resources of this state not to abandon that great challenge to some omnipotent power in Washington D.C. And that we are offended as Alaskans

that someone should try and impose that sort of influence or power or pressure upon us. I served, and had the honor to serve for six years on the District Court Bench in this state. During that time I got to know a wonderful lady named Sadie Neakook, who was faced at one time in Barrow with a very difficult decision. The state fish and game officers had cited two gentlemen in that village for shooting ducks in the spring of the year. And of course that violates both our fish and game laws and federal laws. And she had to prosecute, or she had to act as the court, as the judge on that case. And the time was set for a trial and the two gentlemen appeared. And so did everyone else in the community, each person holding a dead duck in their hands. Sadie came forward out of her court room and she tore the complaints up in front of the community. She said those charges like that aren't going to be brought in this community anymore. You know something, they had subsistence on ducks in that community from that day until this and nobody's ever filed another charge. Nobody every really worried about it cause they didn't decimate the resource and didn't kill off every single duck in the world. They used them. They used them in a balance and the village council would decide whether or not they were hurting things or not. I think we are a small enough community where people like yourself and Chuck and other men of good faith and common sense can sit down and we can make these decisions on a regional basis and on a community basis and even on an area wide basis to assure people on the Kuskokwim they're going to get the fish they need and to assure people in Barrow that they're going to be able to kill a duck in the spring if they want to, and still manage our resources so as not to preclude an urban dweller from the opportunity that he lives in Alaska for - to maybe take his kid fishing and hunting once in a while. I think we can do that, working together. But I don't think we can do it if there's going to be a federal judge telling us. The people in this room, my

colleagues, I have a tremendous respect for on this issue and how hard they're trying to achieve a solution. And I want you to feel comfortable with that too, cause I do.

Matthews: Theo Matthews with UFA. Before Julie gets into her comments and on behalf of UFA, I'd very much like to thank the co-chairs, the participants here and the members of the House and in general for organizing this forum. Its something UFA has been requesting since February, and we very much appreciate it. I just want to pass that on before Julie got into it. Thank you.

Jacobus: Just a real quick comment and that is that I can tell you right now that I would not waste what I consider very valuable time at this time coming down here if I thought that it was just a question of trading votes. I do believe that this group is sincere in trying to find a solution. Hopefully they'll find the right solution and that's the reason I came here.

David: Mr. Majority Leader, this is Mike Davis. I can't stay until 4:00 so if we can get finished with the testimony and then..I would appreciate it.

Navarre: Thank you Mike. The next person is Sam McDowell from Soldotna.

McDowell: Can you hear me.

Navarre: Yes.

McDowell: For the record, my name is Sam McDowell, I'm a 42-year resident of Alaska and the plaintiff, one of the plaintiffs in the McDowell decision and I'm also a national director for _____ league of America which has between 50,000 and 60,000 members nationwide. I'm going to try to direct my

comments so that we're not repeating what's already been supplied today. My comments shall be directed primarily to federal act of navigable waters and past supreme court decisions. Under the Statehood Act, Alaska had a 104,000,000 _____ waters _____ and under the Alaska Native Claims Settlement Act, they received 44 million acres of land and approximately a billion dollars, which \$500 million of that was attributed from the resource base of the resources, the common property resources in the State of Alaska. Its very, very important to stick to the facts and refer to what we really agreed. And under the Settlement Act it says that all aboriginal title, if any, and claims and aboriginal title based on the use and occupancy included submerged land underneath all waters, both in and offshore, and included and aboriginal hunting and fishing rights that may exist are hereby extinguished. The reason I wanted to read that in there because there's been a considerable effort by some of the.....

Navarre: Sam...this is Mike Navarre. Could you get closer to the mike. We're having trouble picking you up.

McDowell: On February 18, 1982, the Nome Nugget _____ headlines, it says subsistence _____ control Alaska lands and resources. And in 1979 the Native claims..I mean the Alaska Subsistence law was passed in '78 and then in '79 there was a court case filed by the Eskimos claiming \$2.4 million as use of the ice field up in the Beaufort and Chukchi Sea, and the United States Supreme Court ruled against them. It says the government, in this decision, it said the government argued _____ claim to the ownership of the Beaufort and the Chukchi Sea ended when the United States acquired Alaska in 1867. Number two, the government appeals court ruling and your supreme court agreed that the Eskimos' claim said the 1971 Native Claims Act extinguished all aboriginal rights, both inside and out Alaska. Number 3, this decision said

that the Native's claim to federal waters were never established in any federal court and that navigable waters are not subject to private ownership. Now we were deeply involved in many of these issues. We were the ones that went and challenged the proposal to set up a timeframe for navigable waters, whether it be a one year, a five year, and a seven year trigger points. And had we not formed the Alaska Public Waters Defense Fund, and challenged this state and the native rights attorneys, today you wouldn't have had your navigable waters. And there is nothing in this state, I want to repeat to the commercial fishermen, there is absolutely nothing in this state that's more important going into this meeting for everyone to agree on one thing. The U.S. Fish and Wildlife, the Department of Interior, has made public statements under questions recently. I personally asked them the question to confirm it. And they confirm the State of Alaska controls all of the navigable waters and all of the resources in those waters. Now we all know that Salmon is one of the primary goals for subsistence resources. So under no circumstances should the commercial fishermen or the legislators go down to Juneau and even consider. That should be the first thing put on the table, we are not going to even consider nullifying or taking away the rights of the state of Alaska to manage all the resources under navigable waters. Its extremely important that the legislators realize there is concerned Alaskans like myself and others around that will take this issue to court. I think that is a complete serious, very serious mistake for the legislators to go to Juneau and even consider voting on this issue. We, ___ has testified, I was the plaintiff for the McDowell decision. I shall be a plaintiff and I think you will be surprised and hopefully pleased with the _____ this is going to come on our side of this court. There's one answer, and one answer to this issue and that's the State of Alaska to file to change ANILCA. I have in the past, and I shall always support people in true need under

the subsistence to have their resources available. But there's only one way to do that. And that's with professional resource managers, _____ biologists, just like the Kenai River now is closed to protect the King Salmon here, and rightfully so. But we have not advocated to take the control of the resource management in this state. We shall not take control. We will meet with anyone anywhere. But I want you to clearly understand. We went to court on the navigable waters. We went to court on the subsistence, and I'm quite confident we will win this court, this supreme court case. I have in front of me many, many, many supreme court decisions. And it might surprise you to learn that the first 13 states that George Washington could not even organize the first 13 states on account for the common property resources. He had 9 states and finally the 13 came in. But you look at the history of America. That's what the battle has been about. We can solve this problem. We will solve this problem. But if the legislators go to Juneau and vote to go along with Gov. Cowper's proposal to pass a mandate effect, that's not going to be there. And I do have respect for the legislators. I do think that you people are capable of solving this problem. There's one way and only way. Ladies and Gentlemen, and that there is to file suit against ANILCA. I'm sure that Sen. Stevens will be in Juneau and he will say that no, you can't do that, we should not do that. But for your information, and yeah I'm sure the Alaska natives and Alaska native attorneys, many of them, is going to say you can't do that. But they were in Juneau last week, within the last ten days, they are back there laying the ground work right now to try to get legislation passed to go in there to change the law so that they can take away the common property navigable rights of this state. And with that I'll close.

Navarre:

Thank you Mr. McDowell. Next we have AFN and Julie and John.

Kitka: Good afternoon, members of the House of Representatives. My name is Julie Kitka and I am the president of the Alaska Federation of Natives. I was asked to present an opening synopsis of the AFN's position and view of where things are that. And I'll go ahead and do that and be willing to answer questions and stay here as long as necessary to answer any concerns that you may like to raise.

Navarre: Could I ask you to try to speak up because those on teleconference, they're going to have a hard time hearing.

Kitka; On behalf of the Board of Directors and Native people with the state I'd like to thank you for inviting us to participate in this session. I speak today in support of an amendment to the Alaska constitution to protect subsistence uses and to allow single system of management for the state's fish and wildlife resources. For the record, AFN is a statewide native organization formed in 1966 to advocate on behalf of the native people on issues of critical importance to them. AFN's membership includes the 12 regional ANSLA corporations, 10 of the 12 regional non-profit associations and over 120 villages. Collectively we represent over 91,000 Alaska natives. I want to give you a little bit of a background about AFN because some of the things in the press recently have not been real accurate and it might be helpful for you if you understand a little bit about AFN and some of our objectives on that prior to us going into the discussion on subsistence. The AFN was formed and had its beginning in October of 1976. And while not named in our constitution as a specific objective of the federation, the protection of subsistence opportunities for native people and the continued health and well-being of our cultures was and continues to be the core of our reasons for agreeing to work together as diverse native peoples. In order for you to understand who we are, I'd like to cite a portion of our internal constitution. "We the Native people of Alaska, in

order to secure for ourselves and our descendants the rights and benefits to which we are entitled under the laws of the United States and the State of Alaska, to enlighten the public towards the better understanding of the Native people; to preserve the Native cultural values; to seek an equitable adjustment of Native affairs and Native claims; to seek and secure and to preserve our rights under existing laws of the United States; to promote the common welfare of the Natives of Alaska; and to foster the continued loyalty in the regions of the Natives of the Alaska, to the flag of the United States and the State of Alaska, do establish this organization." And this was the basis in 1966 when we were formed. We had several primary objectives of AFN in its constitution and by-laws and let me just briefly give them, cause like I said to get an understanding of who AFN is and what we're trying to accomplish in this state I think its important for those that are not familiar with AFN to understand this. The objectives of AFN, it's constitution and bylaws are to promote pride on behalf of the natives of Alaska and their heritage and tradition, to preserve the customs, folklore and art of the native races, to promote the physical, economic and social well-being of the natives of Alaska, to discourage and overcome racial prejudice and inequities in which such prejudice creates and to promote good government by reminding those who govern and those who are governed of their joint and mutual responsibilities. In our beginning, the land issue and need to press for satisfactory congressional resolution of our land claims is what brought our native people together in 1966 to format them. Today the subsistence issue is the catalyst that has welded culturally diverse native groups into a single federation and a single voice. As Alaska Natives we find ourselves at a critical juncture in our contemporary political history. Profound challenge confronts us. How to protect our subsistence lifestyles and practices from the damage wrought by the recent Alaska Supreme Court Decision in McDowell vs.. State.

In an effort to protect the cultures and economies of our villages, we, like all Alaskans, find ourselves caught between ANILCA, which guaranties a rural priority for subsistence hunting and fishing and the Alaska Constitution, which will not permit such a preference. This conflict between a narrow interpretation by the Alaska Supreme Court of our constitution and existing federal law is a legal policy issue which we are all struggling with today. If we do work collectively to fix what is broken rather than trying to reinvent the system, the options available to the state are very limited. As you know a wide variety of options about what should be done to solve this dilemma has arisen within the native community over the first four months in which this decision came down, right before Christmas. Some native people have favored amending both the state constitution and ANILCA to provide for a native subsistence priority. For a native plus rural priority or other alternatives. Other native people have advocated amending the state constitution, either to re-establish the rural priority, or to permit the legislature to keep fish and game management in state hands by complying with federal law. There are potentially many variations on these major themes. But one thing is certain, no issue in recent memory has so effectively galvanized the participation in native people in the political process has been the fallout of the McDowell case. As you know, in last April, AFN sponsored a statewide native subsistence conference in Anchorage over several days in which both the House and Senate Resources Committee kindly held hearings the evening of the last day. Out of that gathering a broad policy consensus from within the native community emerged. It contained many detailed sub-issues including the call for a thorough evaluation of the State's subsistence management system, a contingency position regarding federal management and several long range goals. But with regard to the issue being discussed today, the conference resolution was brief and to the point. It

directed all native organizations to act to gain approval of an amendment to the constitution of the State of Alaska, that allows the state to exercise management jurisdiction over all fish, wildlife, plant and other renewable natural resources within its boundaries and provides that the state shall exercise management of subsistence resources therein, in accordance with applicable federal law. That is the heart of the Native consensus and the statewide Native community is unanimously on record in favor of a constitutional amendment to keep fish and game management in the hands of the state government in compliance with federal law. While a limited _____ of dual management is now unavoidable, we do not (emphasize: NOT) wish to see it extended beyond the general election in November. Such a scenario could only be the result of the tragic political failure in Alaska. What natives want is for the Legislature and the people to fix issue here to comply with federal law and to keep fish and game management at home in Alaskan hands. AFN has several points we'd like to outline for your information. I know that you've all received material since the first of January as far as our assessment of the options available to the Legislature and I'd like to reiterate some of them just to highlight for your own understanding. The first point is that Alaska Natives are not asking for subsistence rights. What is at risk to the State of Alaska if no action is taken in the continuation of unified state management system and regulatory system over fish and game in the state. AFN is here today to provide our guidance to the Legislature on how we believe this conflict should be resolved. We are not here today to ask for subsistence rights. As a native people, we already possess these rights. The U.S. Government, as you are well aware, has a special trust responsibility to Alaskan Natives which has fundamental implications for our relationship with the State of Alaska. If the State of Alaska does not wish to take action to resolve the current conflict between our state

constitution and federal law in a way which is acceptable to the native people in this state, we, out of necessity, will be forced to turn more and more to the U.S. Congress, the Federal Government and the Federal Courts to ensure that the needs of our people are adequately addressed. This is not what we prefer to do, however, you must recognize our responsibilities as an organization, is to the native people in this state and to understand that we cannot, and will not walk away from this conflict. The second point I wanted to raise dealt with constitutional amendment language. I must clarify at this time, our position on the constitutional amendment. AFN will look carefully at the specific technical language of any constitutional amendment prior to agreeing to support such a bill. Our support of a constitutional amendment is not blanket support for just any piece of legislation. Third point. On a constitutional amendment vs. ANILCA, the AFN is opposed to an approach to amend the constitution which requires amending ANILCA in order for the approach to resolve the constitutional conflict with federal law. Our fourth point on amending ANILCA. We believe that it's highly unlikely that the United States Congress will open ANILCA. But if it does, I can promise you that its reconsideration of this enormous federal statute will not be limited to subsistence. Once you open up any part of it, all of its provisions become fair game. Some people in Alaska obviously do not believe that, but the political reality is that there is dozens of outside interests and their advocates in congress will make it come true. At best, in our judgement, any amending of ANILCA will take a three to five year process, during which time the federal government will be in Alaska anyway, managing most of our fish and game. Even if the congressional process starts with subsistence, dozens of oversight hearings, floor speeches, bills and amendments will eventually reach out and touch every federal land use question in Alaska. Sen. Stevens and other members of our congressional delegation

have described that scenario in stark language. How much does Alaska really want to pay to the rest of the country to get rid of the subsistence priority? How long will it take and what would be the permanent consequences be for the political, economic and social environment of our state? I have concluded that the real outcome of going down a path either in a constitutional amendment approach that requires amending ANILCA or passing a statute which requires amending ANILCA, will be so costly to the state government, to the statewide business community and to the general public that once they understand that and see that, that they will insist that the ANILCA Pandora's box remain closed. Fish and game is going to have to be dealt with here. And let me just use a couple of examples as far as our own political assessment, if this does not get resolved in the the state in the special session and ultimately.....

(End tape 3, side B)

Tape 4-A

Kitka:

...how its going to be resolved. A find example of the legislature goes on and doesn't address the situation and doesn't resolve this and subsistence goes back to the Congress, I can guarantee you it would become a part of the Tongass debate in the House and Senate conference. I can also guarantee you that if the decision to go back and solve that in the Congress rather than solving here, that there are many people in the Congress especially in this year and this election cycle, that look for each and every leverage that they can to further their own political interest and Alaska, to many people in the Congress, remains one of those states which are free environmental, _____ get a lot of votes from many people, and we have been told that the environmental community nationwide is looking at a vehicle somewhere, anywhere in the Congress in which to attach additional 13,000,000 acres of wilderness in Alaska. And those are very real political considerations you have to take into account. And we urge you very strongly to not go the route of seeking to amend ANILCA to resolve this situation. Not, you know, amend the constitution you know with the intent that you would come into compliance with ANILCA by amending ANILCA, because we think that once you take a look at what the political realities of opening that up is, nobody is going to like. People have to realize that there is many provisions in ANILCA as much in other federal laws or laws in general which are subject of compromise. There is never a federal law in which everybody is happy with and that suits everybody's purposes on that. And going back to the Congress to make changes on that would again be a subject of many compromises with many interests other than the State of Alaska which would weigh and exercise their will.

The last point that I just wanted to just briefly address has to do with the federal regulations and my concern as far

how you would interpret that and what that would mean. Our basic view of the federal regulations is that they're temporary and they are also inadequate the way that they are in regards to several points. In regard to the point of it being temporary, obviously the Secretary of Interior exercised his responsibility in a certain manner in these regulations. Some people are happy with it, other peoples are not. But I can assure you that his exercise with his responsibility even from his own assessment of the situation is temporary and a permanent solution as far as regulations will probably be much stiffer. In addition, people have been saying all along that if this goes down the route in which the federal government is required to exercise their responsibility under federal law that all the major policy decisions that are made by the secretary in his regulations are going to be the subject of litigation. There's just too many differences of views and legal analysis for them not to be so. And I would like to raise several points in regard to our assessment of the federal regulations so that you're aware that we're not happy with those federal regulations and why we feel that ultimately they will not stand, and the State of Alaska will be looking at a much different regime if they don't solve the situation. For example, the federal regulations outlined in Fish & Wildlife services plan for managing fish and wildlife, they only had a 10-day permit period. Those regulations are intended to implement an important Congressional policy that's expressed in Title 8 of ANILCA since the May 14th announcement in the federal register, there's been nothing disclosed of the federal intentions or thinking. They failed to provide a reasonable opportunity for the public to participate in the rule making process. And despite claims that these regulations were drafted on an emergency basis, this lack of public involvement violates not only the spirit of the letter of the Administrative Procedures Act.

My second point is ANILCA has been found by the federal courts in the 9th Circuit Court to be a an Indian legislation, and as a result the Fish & Wildlife Service, in carrying out their obligation to manage fish and wildlife resources, has exercised any permitted discretion and resolved any statutory ambiguity in favor of native interest. However, in drafting the proposed temporary rules, the Fish & Wildlife Service has refused to do this. Like I said, this is already a 9th Circuit decision that Title 8 is Indian legislation and gives broad discretion to the Secretary of Interior to implement his responsibilities. And the issue of jurisdiction of fish, whether or not that is planned under him, or whether or not that is compelled by the 9th Circuit Court when it goes there, I _____ as the situation as it being classified as Indian legislation. Of course, the Congressional policy protecting subsistence for both fish and game will be upheld.

The next point as far as a certain section of the temporary rules allows immediate funded subsistence board to supersede state hunting and fishing regulations on public lands. But it does not allow the same board to supersede state regulations outside public lands or highly mobile fish stocks and wildlife populations, which are subject to the subsistence preference while on public lands. This will be operationally unworkable creating an environment from enforcement nightmare, as well as potential over harvesting. This is the same message that we gave to the Secretary of Interior when we met with him last Wednesday, that the regulations in a practical sense, whether or not you disagree or agree with the policy decisions, will not work on the ground, and as a result of that will be tremendous confusion for people in this state, as well as for tremendous opportunity for litigation from people that very much want to do the right thing, that very much want to follow the right rules, but they will not understand what these are and they won't, --

like I said, the enforcement of these rules will basically be unenforceable and create a lot of confusion.

We've got a number of other specific concerns with the regulations, but in closing we don't feel that there are adequate reasons to walk away from not trying to solve this problem because people may not be worried about these regulations because they are temporary. There will be permanent regulations. And of course there will be federal court interpretation of these regulations. AFN consistently since January has done everything that we can to do to try to present a reasonable position of what we would like to see happen and to help the state regain management authority of fish & game. We do not want the federal courts. We do not want the federal government coming in and managing. But you've got to realize from our point of view, is to our Native people, this is their lifestyle and life ways at stake, and we are compelled to do everything that we can to protect their opportunities to continue subsistence hunting and fishing. And that means if the State of Alaska and the state legislature is unwilling to go to bat and do every that they can to protect that, that of course we're going to have to rely on the Congress and the federal government and the courts to do that. That is our requirement to our native people, and we can do nothing less than that. Like I said, that is not our choice of what we'd like to do. We'd like to resolve it in the state. We think a constitutional amendment which is permissive, which has a statute which enforces it implements that, makes a lot of sense. It allows plenty of time for people to talk about how this is working, and hopefully the constitutional amendment will be broad enough to allow flexibility in the system that as the needs of people change over time, with further deliberations or further discussions or different people come up with new schemes or if there's a better way to do things, that you'll have the flexibility in the constitution for the legislature

to enact an law. Like I say, we don't think that there's many options in front of the legislation. We think that the issues are very clear. That we are dealing with the very finite number of options that are available. And those briefly are 1) constitutional amendment to get greater flexibility to keep the legislature in the decision-making; 2) amended ANILCA, which like I said from our judgment we don't think is the best thing to do.. 3) is let the federal government come in and exercise whatever responsibility that they have and leave it to the courts to determine how broad or how narrow that jurisdiction is. Like I said, anything short of a constitutional amendment we think that would very much _____ the state and put people in the position where there wouldn't be a lot of good faith discussion about conflicts and other litigation that's going on because people would be so bottled in and protected in litigation that there would not be a lot of goodwill and willingness to resolve it in other ways. And therefore, we feel that the issue of a flexible constitutional amendment that's permissive, that allows the people of this state to make the decision is the best course of action and that's what our advice to you is and that's what we urge. Thank you.

Cotten:

Well, there's not a lot of things that are clear about all of this. But one thing that's clear is that the legislature or at least state government hasn't been able to come up with a solution to this question. And it's also clear that as it sits right now unresolved, nobody, no one, no group is pleased. Like you said yourself, you're not happy with what the federal government appears to be about to undertake. The other people involved aren't happy either. Ms. Jacobus recommends that we go to the federal government to get this thing resolved. I assume you meant a federal court.

Jacobus:

I think you need to try both federal court and also you need to put pressure on the Congressional delegation.

Cotten: Right, so let's go to the feds. Now you're saying let's go, use both sides, if you will, feel as if they are provided by the federal government on this issue, so we're obviously reaching out and no person has been able to get people together here and I'm not sure that its even the role of government or state government to be that person, but I guess that state government has to be involved because there's a lot of management responsibilities on the part of the state that can't be overlooked. And again, you know Tom mentioned this other business about another situation where groups got together. Have you like explored what they've had to say? They say, Cherie says, we can protect subsistence rights through other methods, and you say no, you can only do it with a constitutional amendment. Has there been an effort amongst the people sitting at this table here to to independently get together and maybe allow or invite some representatives from state government to get involved? Have you folks made an effort to get together? On you own, without the government being involved?

Kitka: I guess what the situation is is we've been trying to fix what's broken and what is broken is the supreme court judges interpretation that there isn't sufficient flexibility in the constitution to allow that. We have been going on the assumption that the general Alaskan public supports the continued policy direction that we've had for the last decade. So if you're going to try to fix what's broken, that there is just very limited things. We have not tried to redesign the whole thing because obviously if Alaska Natives were interested in trying to re-devise the whole thing, we do not think that, you know, we would be able to come up with something like that in the time, the tight timeframes that we're under, and that's July 1st in which the ____ expires.

Cotten: Neither has the legislature, obviously. The House voted on it, it was 20-20. The Senate didn't even vote. So that's about as close as it gets. And I'm not real optimistic that there's going to be some solution that's going to gather up 27 votes. I hate...I don't want to say that its impossible. Maybe there's some new ideas that we haven't been exposed to yet. It looks like, I'd suggest you have to start thinking in new terms. And instead of both of you running off to different branches of the federal government maybe there ought to be an internal direction attempted at least first.

Kitka: I think that its fair to say that we've analyzed virtually all the proposals that have been put on the table, and we've critiqued them. Whether or not we feel that they fix what the problem is, or whether or not they make sense and real practical sense on that. So we have not ignored what other people have put on the table.

Jacobus: At first, at least my partner have on numerous occasions met with various native leaders to try and talk about what is needed. My partner has also attended a number of subsistence seminars that put on by the native groups to talk about this issue. The bottom line, however, is that while we as a state have the ability to deal with protection of subsistence rights, subsistence uses for its people, we can't do it within the parameters of ANILCA. And, you know, I guess the bottom line that I'd like to say is that one thing that she just mentioned for example, we don't want to open ANILCA. Well the fact of the manner is that I believe it was last week that these very same people were saying that, have requested an amendment to Title 8 and its my understanding there's another one in the works for I believe some changes to Title 8. So Title 8 can be changed apparently when there's something that you want but can't be changed when its something you don't want. I'd also like to point out that if you, and I don't know how many of you have

actually looked at ANILCA, but ANILCA is very clear that the subsistence preference created: 1) as long as the federal government is the one implementing it, only applies to federal public lands. It does not apply to outside lands. They make it clear. They talk about public lands. They assign public lands in terms of being federal. The provision that gives me the most pause, which is the provision being able to go back into federal court and get a civil injunction, which to me is the interference with the management of our resources, that provision only kicks in for the state; only kicks in when the state as a general law of applicability to state and private lands. And that's what is in Section 807. Its very clear that the federal court does not get involved in our management decisions off of federal land unless we have a law of general applicability. And that's the reason that we're suggesting the way to change this is to 1) challenge the federal government of course, we don't think its constitution; 2) go back to Congress since obviously ANILCA can be amended without opening up all the list of problems, and 3) go ahead and we should, after its all done, enact an law that protects subsistence use. There's no problem with that. But define subsistence use in terms that are constitutional. We're not - we believe very strongly that our state, that people who wrote our constitution - and many of them are still alive today -- dida good job. We don't think its something that needs to be fixed. Our state constitution is a model state constitution. Its one that has done us a lot of good for all these years. We shouldn't be messing with it. The federal laws been enacted for 10 years. I don't think anybody in this room is going to argue that its not a flawed law. Then why are we going to constitutionalize some flawed law. Everybody agrees it hasn't worked. It hasn't _____, so instead of constitutionalizing it and ruining our state constitution, which many of, even the people of the legislature took part in writing - we ought to uphold

the state constitution and instead challenge the federal government and get the federal government to changes its position.

Mitchell:

Mr. Chairman. Before, I don't want to get into my remarks until obviously the committee is through with any questions it had for Julie, but just in response to Rep. Cotten. In addition to the normal debates that have gone on both within the legislature over the years and in Congress over the years, I'm sure that most of you will recall that Gov. Sheffield took basically Rep. Cotten's suggestion to heart after the initiative in 1982, and established a blue-ribbon commission that was chaired by Sen. Butrovich that assembled people, I think of good will, to sit down in a non-political environment and start at the beginning and go to the end and work through these problems, both in terms of the policy choices involved and in terms of the mechanics. And at the end of that process, everyone came up empty handed because ultimately this is a public policy choice and it is not something that people of good will sitting down can somehow come to a resolution of. They reflect, as I think one of you mentioned earlier, they reflect in terms of the various positions, some very fundamental differences about what you think our state is about, and about how all of us should relate to people who live out in the Bush. But I just wanted to put on the record that the suggestion that Rep. Cotten had made was good one and its been tried and unfortunately we didn't get very far.

Cotten:

Well, its obviously not a new idea. But right now you both, both lawyers, you as a lawyer for one side and you as a lawyer for the other side, feel that you've got protection by the federal government, and that's where you're going. And you're going to keep going there until you feel like that option isn't available to you anymore, then you're going to have to stay inside the state to fix it.

Wallis: Mr. Chairman, its Rep. Wallis in Juneau. Mike could you tell me who was talking right after AFN presentation please.

Navarre: Yeah, Sam asked a question. Cherie Jacobus answered it and then Don Mitchell replied to that.

Jacobus: I think Rep. Cotten's idea is a good one, but let me tell you why it didn't work before, and there's only one reason it didn't work in my opinion. I think people of good will can sit down and solve this problem as long as they get ANILCA off their backs. As long as its the driving force, the parameters it sets are impossible for you to implement and to protect the resource the way its supposed to be protected. If you could, in a vacuum, get rid of ANILCA and try to solve this problem, I think that all of us could come up with solutions that people could live with. But that's the problem. You've got this monkey on your back and its the driving force. If you look at the testimony back in 1985 and 1986 in front of the legislature, you will see repeatedly people say this is the proposal because we have to have it this way because of ANILCA. I am suggesting to you that you can't re-invent the wheel. You've got to say this isn't working. If its a square wheel it doesn't work, and this is a square wheel. You've got to start over again. You've got to say to the feds, ANILCA doesn't work. We're not going to comply with this because it doesn't work. The feds have no right to tell us how we're going to solve our problems. They don't understand Alaska.

Hudson: One of the things that's pretty evident to me is that as we we proposed at the end of last session to essentially vote the majority or two-thirds of ourselves to present to the public this complex issue. If this level of debate were to be articulated to the general public, I don't know where they would come down. If they heard on one side that there appears to be a tremendous amount of emotions that are

evoked simply by this debate. There are very strong trusts that certain groups have in the federal law and the federal protection of their interests. And there's certain groups that have this great trust in the constitution protecting their interest. And I don't know how, quite frankly, the public would have a vote on that. And I'm really curious if it was defeated where would we be then.

Jacobus: You'd be right back where you are today.

Taylor: Julie I was fascinated with your comment in particular regarding the Tongass. The Tongass legislation, for who's not aware of it, has made significant changes in ANILCA now. Both the House legislation and the Senate. Your comment was that if, in fact changes were not forthcoming as far as the amendment in our constitution, we might be very well facing in the conference committee additional amendments to ANILCA regarding the subsistence issue. Could you clarify that for me.

Kitka: Yeah. I guess I was using that as an example as far as the Tongass issue on that. Our assessment of the political situation back there, and we had meetings with the key staff on all the major committees that deal with Indian legislature back there, which on the Senate side is the Senate Energy and Natural Resources Committee and the Senate Indian Committee on Indian Affairs, and on the House side its the House and Interior ___ Affairs. They're involved in the House and Senate conference on that. And what we've been told by everybody is expect a blow-up in the next three weeks as they try to sort that whole thing out. If Subsistence goes back and is laid upon as an Alaska issue that people are asking the Congress to settle on that, the same players that are involved in the Tongass issue, for example Congressman Miller, for example our own delegation, for example Sen. Bennett Johnson from Louisiana who chairs the

Energy Committee - you're asking all these people to sit down and agree upon something on that. And they have many differences and many battles and many fronts on that, and I think subsistence is not an easy issue to ask them to resolve. I don't think it would be something that could get done in a very short period of time unless there was this really solid strong consensus in Alaska. I don't see that there's a strong solid consensus in Alaska to amend ANILCA. We're opposed to amending ANILCA as far as subsistence. And so I don't think that not trying to address it in the state level, and not trying to resolve it in the state on that, and saying we want to do X, Y and Z which ultimately cause its out of compliance with ANILCA, will require either it being resolved in the courts or going back and amending ANILCA. I think that you're opening a very dangerous door and putting yet another Alaska issue on the delegation try to win in a short period of time. Cause like I said, our assessment on amending ANILCA on major issue, which we think subsistence would be very controversial back there, is a three-five process. During that 3-5 year process, the federal government will be in there managing whatever jurisdiction that they claim, as well as all the different parties will be litigating the major policy choices that they think are wrong. We do not think that that is in Alaska's best interest is to allow the federal government to come in and manage during that 3-5 year period as this all gets hammered out and beaten back and forth in the Congress. We think that that is a very dangerous route to go, and we very much object to throwing this on as another issue for the Congress to resolve because we see that it would be a big battle back there. I was using the Tongass as an example.

Taylor:

You didn't mean though that something would happen during the conference committee involving subsistence that would somehow be added into the Tongass legislation.

Kitka:

Well, I don't see it becoming added right into Tongass legislation unless they felt that that was a conference-able issue. But I do know, as a fact, that the major players that hammering out and beating on each other are going to be the same people that dealing with subsistence. And if people don't think our congressional delegation have a tough time with some of these people on the other side of the table, that's exactly the same battleground that you'd be dropping this in in the Congress. And, you know if people are willing to take that chance and are willing to see what they would have to have on the table and what are the things that would be you know try to leveraged against on that just do away with doing what in our view is the right thing, which is making sure that the constitution is flexible enough to continue this policy. I think its a big gamble. And like I said, we are not willing to support that approach, however, if the legislature fails to do that, we'll have to whatever we need to do to protect out people's interest. Like I said, we're talking about very practical on the ground. We're talking about people that depend upon this; that feed their families; that will be impacted in August when whatever these rules, how they impact hunts and the fishing, the whole thing. And what one of the other speakers earlier said, well, it shouldn't be a problem because people are going to do it anyway. Well, we would prefer not to have our people be subject to citations and classified as criminals for continuing to do what they've done for centuries. And that's what's at stake is to try to make the subsistence fit in that whole thing so that this going forward if they do continue to fish and continue to hunt the way they traditionally do. We want them to be doing it legally.

Taylor:

Julie, its my understanding AFN in 1980 strongly supported and was one of the prime movers of seeing to it that this subsistence language was placed in ANILCA.

Kitka: Yes.

Taylor: You welcomed and sought and accomplished the forced federal intervention in our state of federal management of our resources. Now you're telling your people publicly, "have the legislature solve this problem, and keep those feds from interfering up here." Then you're telling the legislature, "solve the problem the way we want it solved, or else we'll take you to federal court and get federal management over fisheries, even." So that seems to be kind of a gun is at our head that you people help put there. Well now you're saying, if you don't do what we want you to do, we'll pull the trigger one way or we'll pull the trigger the other.

Navarre: I think what they are doing is advocating for a position that they support and also articulating at the same time some of the possible consequences with respect to what might happen if we don't. I have three other participants for the panel. Mr. Mitchell, Mr. Starkey and Mr. Wallery, and I'd like to get through them. If people have to ask questions, we could do that, but I would like to get through those three and then we can come back to the questions. Mr. Mitchell.

Mitchell: Thank you Mr. Chairman. For the record my name is Don Mitchell. I have, as the years have come and gone, great sympathy both for this committee and for the legislature as a whole because perhaps unlike other people that have testified, its been my experience that as the sessions have come and gone, that as a general rule the people that have election certificates around generally try and do the right thing. I think one of the reasons that doing the right thing is so difficult and I think you're going to hear it from me this afternoon is that it is very difficult for you as a legislator to come to common agreement as to what the facts are and what the law is. And various people who are

representing various points of view - various interest groups - obviously have their own interest in putting their own curve on the ball. With respect to, well with all due respect to Ms. Jacobus, many of the statements of fact, and many of the statements of law that you've been told about the situation this afternoon are in my judgement incorrect. And I think that the Department of Law, with respect to most of my judgments, would agree with me. It doesn't make any difference whether I'm right or Ms. Jacobus is right. Its unfortunate that under our legislative system that what we can't do is have some sort of special master who all of you would trust, sit down for hours on end and listen to us rattle on, and then issue some findings of fact about the situation really is. And I think that if everybody could then agree that that person had told you the truth I think we'd be a long day down the road past where we are right now. Unfortunately, that isn't the way it works, so I will give you my side of the story and I guess you're going to have to decide on your own which of us is right and which of us is wrong.

Now, with respect to Rep. Taylor, I think you're last question is actually my first comment. And that is, you know, for a state as young as we are, its amazing what a lack of history we have. And, there has been all of this rhetoric about how the ANILCA process for regulating hunting and fishing is unworkable; about how that has been forced down the throat of the State of Alaska by know-nothing federal government; about how somehow _____ went back there and did this mean thing to the fish and game boards. Well I think its important to understand what we're talking about here. This all started in in 1976. In 1976, for those of you that follow fish and game issues, the Western Arctic Caribou herd crashed. It disappeared. It went from like 200,000 animals overnight to less than 50. At that the governor of this state, Jay Hammond asked the federal

government to declare a federal disaster area in the northern Arctic for those villages. A federal disaster area as if the flood had occurred in Ohio that occurred up there - as if there had been a tornado. There were sides of beef being flown into those villages on hercs to prevent literal starvation - literal starvation. Now this was long before all of this started about subsistence.

What did our Board of Game do? The biologists said that it was possible, even with the poor condition of the herd, to take 3,000 bulls out of it. Well, 3,000 animals was far, far below what the normal hunting had been on the Western Arctic herd. So the Board of Game, which included Sydney Huntington, who we refer about as a leading expert on this subject, they sat down without any laws, no state subsistence law, no federal subsistence law, and they passed a regulation. Now what that regulation said was that the first thing is we're going stop all hunting on that herd except for the people that live in the villages. It wasn't a racial thing. It just said the people that live out in the villages. For the people who live in Fairbanks, I'm sorry, you know there just isn't enough to go around, you can't go hunting. The second thing they said was, "you know, there aren't even enough animals to satisfy the reasonable needs of even all the people out in the villages." So then they set up a process where they took all the village residents and they divided them up and they ranked them according to household based upon the individual dependents of that particular household on caribou. And also the folks in Barrow - there were a lot of people in Barrow - but heck you know they got walrus' and they got whales, so they didn't get so many permits, and people on Anitovik Pass, where its caribou you don't eat - they got a whole bunch.

Well, that was our state did to deal with this problem. And what happened? The Tanana Valley Sportsmen, who are member of the outdoor council went to state court and they filed a lawsuit to stop the board from doing that. On what grounds? Because they said it was unconstitutional even to hand out hunting opportunities in our states on the basis of economic need. Even when Gov. Hammond was up there declaring a federal disaster area. Now one of the arguments that they made in that lawsuit, which started in 1977, was that the legislature had, even if it was the policy, that the legislature had not delegated the Board of Game the authority to do that kind of thing. Well, while that lawsuit was working its way through the courts and the Alaska Supreme Court eventually dumped the whole case in a case called State v. Tanana Valley Sportsmen, which was issued in 1978. Well while that was working its way through, a number of your colleagues said, well you know if there is some misunderstanding about whether or not we think what the board did in that situation is good public policy, well let's fix it. Let's make it clear that the board did exactly the right thing. There's no federal intervention here. It was your colleagues saying, you know, if this is a legal question, well of course this is an appropriate response. Now, while all that was going on, you may recall that in 1977 the ANILCA process was just starting up and in August of 1977 the House Interior Committee came up to Alaska and they spent three weeks, traveling, holding hearings both in Anchorage and Fairbanks, and all throughout the Bush. And if you read that hearing record, that hearing record came away with that committee hearing from your constituents that live out in the villages saying that what had happened with the Western Arctic Caribou herd was an exception to the rule. Generally speaking if the Board of Game and the Board of Fisheries had to pick between Mr. Elias' people and people that live out in the villages, or Ms. Jacobus' people and people that live out in the villages - that the people

that live out in the villages would lose. And it was at that point, the result of that hearing, that they were told by Alaskans, how Alaskans were being treated; that the Congress in its judgment said that there was a national interest in this issue.

Now that leads me to my second point, and that is there has been a lot of talk again without a lot of historical fact about somehow this decision by Congress has somehow intruded into Alaska's management prerogative. Well with all due respect - I know the rhetoric - I know we're all proud to be a state - I know how hard we fought the administration of the territory by the federal government. But that's not true. The fact of the matter is that in the Statehood Bill, when the Statehood Bill was on the floor of the House of Representatives, there was an amendment added to Section 6E of the Statehood Act. And that amendment said, even at that time in 1958, that amendment said, even when Alaska becomes a state, Alaska will not get authority to regulate hunting and fishing within its borders until it can prove to the national legislature that his has a program for doing that that will be consistent with what the Congress viewed as the national interest.

Now if you'll read the congressional record of that debate, and you look at the reasons that Congress did that, you will see that the reason they did it was because your colleagues in establishing a fish and game board, established a process that even then acting Gov. Wade, remember Gov. Eagan was second. Gov. Wade, with a letter to the legislature, he said I cannot believe that you've come up with the statute to regulate hunting and fishing because it simply is not fair to Alaska natives who live out in the bush, who are half the population of this state and depend on its resources. That is in the congressional record. And Congress said, well you know, if that's what's going on up there,

wait a minute -hold it. Let's wait, and let's them go back and let's let them try it again if that's what the governor thinks, in a way that will advance what we believe is the public interest.

Now, the state did that and in 1960 got authority from the federal government to regulate hunting fishing. That has nothing to do with whether or not there is a legitimate national interest in that subject. You got authority to have the Board of Game regulate the hunting of marine mammals in 1960. In 1972 Congress, in its wisdom, came forward and said, you know, we think there is a national interest associated not only in Alaska, but throughout the United States in the way the states regulating marine mammals. We think they're doing a bad job, and we're going to assert our jurisdiction to stop the way they are doing it. Congress enacted the Marine Mammal Protection Act in 1972. What did it do? It took authority away from you and the Board and Game to regulate hunting of marine mammals. You don't have it today. No one ever said that was an inappropriate or unconstitutional act of the United States Congress. Whether it was Congress asserting the national interest in this very important subject matter. If you look at - Rep. Taylor mentioned migratory water fowl - the State of Alaska has never had authority to regulate migratory water fowl except to implement decisions that have been made annually by the federal government. You don't hear a bunch of commotion that somehow this is intruding into the management of our Board of Game. No one would ever think of such a thing, because obviously there is a national interest that everybody realizes is associated with these activities.

I could go on and on. The point is that Congress did not mark any new ground with respect to ANILCA. What Congress did was to respond to the interests of Alaskans, and responded to a failure, if I may blunt, on the part of the

Board of Fisheries and the Board of Game, over time to adequately respond to the legitimate interests of people who live out in the Bush. And that's the situation.

Now there has been a lot of talk about opening ANILCA. I get paid to know something about opening ANILCA. And I would say that, as I think Julie indicated, that nothing is impossible. ANILCA has been opened before and ANILCA will be opened again. But I think that what you need to know is what Julie's tried to tell you, is that it is a very difficult process, even under the best of circumstances. This would be under the worst of circumstances and there are a lot of people cut in the weeds who have to be dealt with. Even if we could all agree - a good example - as I'm sure some of you interested in resources know - John Katz and I spent over half a decade trying to open ANILCA to get title to the beds of navigable rivers and lakes conferred both to the State of Alaska and to the native community in terms of their land selections. It took us approximately six months to convince the members of Congress that had jurisdiction over all of this, that we were right and the staffs that handled the details that we were right. It took approximately 7 years to get that bill through Congress even though we were right all the time and had the deal in terms of the merits in six months. Why? Because even though they had no legitimate interest in the subject matter, the Sierra Club and the wilderness society sat out there for seven years with their hand out in the middle of the road and said they would not move until they were paid. And it wasn't until finally they were worn down after 7 years that that legislation got through. Now if you think that even if somehow Ms. Jacobus and I are going to sit down and we're going to work some magic and we're going to come up with some way to re-invent the wheel. That if we were all to take that back and you had Mr. McDowell and Ms. Kitka and everybody else in the world testify at a Congressional

hearing about let's open Title 8 of ANILCA and fix this minor problem, if you believe as legislators that that's going to happen in any time short of the time frame that went on with respect to the submerged lands effort. With all due respect, I think you're not well informed about what the situation is in Congress. And I don't agree with Don Young and Ted Stevens on a lot of things, but I think that they would agree with me and I don't think they're jiving you when they tell you what the situation is back there.

Now with respect to these regulations, there has been a lot of talk and you've heard a number of statements of _____ from Ms. Jacobus about there's no problem here because this doesn't apply to fish. I don't want to bore you with the details, but the fact of the matter is that there are a number of us that are most disappointed with respect to the way that the Secretary of the Interior has discharged his ANILCA obligations as they are expressed in those draft regulations. I don't want to get into the process that went on back there. I think the process itself is, legally suspect in terms of what the Secretary did. But I think that on the merits, what Ms. Jacobus has not told you is that the definition of public lands in Section 102 of ANILCA refers to lands. That lands is a term of _____ in ANILCA that includes the waters. That the federal government - that your ownership of the bed of a water column has got absolutely nothing whatsoever to do with the constitution of authority of the United States Congress to regulate the use of that water column and the resources in it. That's why you have to get a permit from the Corp of Engineers when you want to put a log dump in the Cube Cove down in Southeast. Its ridiculous to say that there is no federal interest. The only question here is whether or not with respect to ANILCA, Congress intended to assert that federal interest over fish. Without boring you any further, the record is replete with both committee reports and other materials, the

use of the word "fish" in the text of the statute itself and both Rep. Udall and also Sen. Stevens. If you read their remarks on the floor indicated to the members, that it was their view that the federal priority applied to all the waters of Alaska. Now that may get litigated - it may not. If it gets litigated, the point of view I just expressed to you may prevail, it may not. But to say as legislators you have no problem here that is broken that needs fixing, you assessment of our collective situation, that I would hope that you would rethink very, very carefully, other than just taking Ms. Jacobus' word for it.

The last thing is that I think that there's a lot of talk about somehow that if we could just get rid of ANILCA that we wouldn't have the federal courts involved in our business. And that's another way of saying that we won't have the courts involved in our business. It doesn't make any difference whether its a federal judge or a state. The fact of the matter is I've worked in front of the Board of Fisheries and the Board of Game for almost 15 years, and if there's anything those folks hate, is having a judge come and second guess their judgment about a deal that they made. I can understand that. I don't like having people telling me I'm wrong either. But the fact of the matter is that its through our court system that citizens of this country can resolve differences of opinion without having to physical force. That's why we invented judges - they perform a useful service. What our Board of Game and our Board of Fish is supposed to do is they are supposed to apply legal standards to factual circumstances and come up with fair results. If they don't do that, under our system of government there are judges that will review that decision is people think that they did it wrong. Now Mr. Starkey, I'm sure, will talk about the Kwiethluk caribou case. But it had nothing whatsoever to do with damage to the resource. The record indicated, the record I have seen, is that the

Board itself indicated that the folks out there had a need for those caribou and that the biology would have supported 50 animals being taken. And what did they do? They said the heck with that, let's go to lunch. That's what the record said and that's what the judge looked at. Now in that kind of a case I don't think there's anything irresponsible about a judge coming in and telling the Board of Game that they made the wrong decision. If there's anything irresponsible was the Board of Game going to lunch in that kind of a circumstance.

That's what this is about. And the final last thing that frosts my cake personally is that in terms of Rep. Hudson, you indicated how complex all of this is and what would the public think about all this if they had to vote on it. That's not what the public, if this amendment is passed, is to be asked to vote on. You know in 1982, the same people that are now telling you don't let the people vote, were the people that went out and got the signatures to require the people to vote about a decision that you had already made. At that time, while the subsistence priority under state law was not limited in the statute just to people who lived out in the Bush. The regulations that the Board of Game and the Board of Fisheries had adopted to implement that law, did limit the subsistence priority just to people that lived out in the villages. That set of regulations was invalidated by the courts in the Madison case, but that didn't occur until 1985, 3 years after the vote when Alaskans were asked their view on this. And I think any of you who were - and I know a lot of you were who were involved in all of that. I don't think that a reasonable person can say that Alaskans.....

Tape 4B

....to express a view on that issue again was that all the polling dated that I've seen and all of you folks went through the election have seen all the polling data as well, indicates that statewide, and even in this town, this very

town, by a substantial margin if you put that same question to people that live here in town here today, you'll get an even more overwhelming vote today than you did in 1982. They're going to say, well of course if there isn't enough to go around people out in the village should step to the front of the line. And I'm - its the most anti-democratic decision that I think that - and I'm personally offended by the cynicism of the people that put this on the ballot in 1982 coming up in front of you today and saying that people shouldn't be allowed to express their view again about this issue. And with that I've probably taken more than my share of time Mr. Chairman. And I'll be happy to answer any questions.

END TAPE 4, Side B.

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Rep. Barnes:

Thank you Mr. Chairman. Don, I have a great deal of respect for your ability because I'm one legislator at this table who's been around this issue almost as long as you have been. You've been around a couple years longer, but I think I have a good working knowledge of the issue and all the issues around it. And, I recall in the 1979-80 area when I served on the special committee on subsistence and you were the attorney for AFN and Mr. Cohen at that time wasn't working through the Dept. of Fish & Game, he was working for one of the native groups, I don't recall which one it was. And I at the time kept challenging the constitutionality of the subsistence law that took the Supreme Court _____ ten years to get around to agreeing with me that is was unconstitutional. I felt at that time as I feel now that we have no business through law or the constitution attempting to discriminate. And having said that, I like you believe the majority of the people in this state would feel that if, in a time of a shortage of a resource, that it should go to those people in the most dire need of those resources. It doesn't mean that I believe that everybody that lives in the rural areas is in dire need. I don't believe that those that are in charge of the corporation are in dire need.

They make a great amount of money and much more than many of the people that I represent in this town. So, while I feel a rural preference, as you call it, may be in the best interest of all, I believe that we can solve it on the state level through the usage category of the constitution, but not on a discriminatory basis. And I feel that what all of you are afraid of is that all the urbanites are going to rush out to the Bush to go subsistence hunting and fishing. And I flat don't believe that's true. Because most people that I represent and the people around this table represent, couldn't afford to fly out to the Bush to go hunting and fishing. They go hunting and fishing locally. Well, I think that yes we've had federal management in this state and the caribou case that you bought up is a good case in point. We've had federal management for a long time and it has not been based on the sustained yield principle. I think that we need to sit down together to work to solve the issue. We need to amend _____ inside the state and then go hand and hand back to the federal government and say that you're the ones that went back and said and after, it was after the law was put on the books that Gov. Hammond and AFN went back to Congress and convinced Congress that because we had a subsistence law on the books it should be written into to ANILCA. It was and it was then taken to court after the 1982 vote, found lacking, and then it was amended in 1986. So I think that what we need to do at this point is recognize to amend our constitution, to discriminate, and that's what you're asking us to do, against one segment of our population over another is the wrong approach. I think that we should sit down, and I liked your comments on it, on the usage section of the constitution and come up with a personal use category for the people that live in the rural areas. Work it out on a sustained yield principle, not a judge's ruling, and I happen to know the Fish & Game biologist that recommended that those caribou not be taken, and were most distraught when Judge Holland that the

sustained yield principle would not be looked favorably upon and caribou would be taken. I happen to know that because I was working real close with him to save the moose that time. Anyway, I didn't mean to sit here and go through all of that with you, but I really feel that I've been at this as long as you've been at it, almost. I know the arguments on both sides. I'm very aware of the 1982 votes. I think there are ways to reach this problem within the state - that we can pass a state law that allows us to address the subsistence of the rural areas that would not find the Board of Fisheries and the Board of Game in violation of the constitution. And that then we could go back to the federal government and say we're taking care of subsistence, as you went back when ANILCA was being passed and said we got this law on a state level, we'd now like to have it immortalized in federal law. So, your comments, please.

Mitchell:

Mr. Chairman if I could respond very briefly. First of all Rep. Barnes, while its a real priority in the view of both of your colleagues in 1985, or the majority of your colleagues in 1985 and 1986, and the opinion of the Congress in 1980 is the best public policy in their judgment. That is not to say that its only public policy. Obviously there are different ways to accomplish the same ends. But I think I can say, as we've had this discussion many times over the years, is that I _____ people of good faith, and why I don't question your good faith, I believe that there are many people I represent and myself personally, who don't agree with your assessment of the policy ramifications here. But we don't have to resolve that other than to say that reasonable minds can get to the bottom of this issue. Secondly, with respect to your chronology of the history, with all due respect its incorrect. When the Interior committee came up on August 20 of 1977, they held a hearing in Fairbanks. '77 - long long before all of the rest of this stuff started. Byron Mallott was then president of the

Alaska Federation of Natives, and you, if you'll consult the hearing the record, which is a written record, you will find that at that time that he suggested to Congress, for exactly the reasons that I just described to you, that Congress might want to consider getting involved in this issue. This pre-dated the 1978 law. Now it so happened that the legislature in 1978, since the Interior Committee did in fact take President Mallott up on that offer, in 1978 the legislature did look to the then current text of ANILCA for drafting help in terms of how they were going to have a statute. But to say that this got started in ANILCA first, or didn't get started - however you said it - is, I'm sorry, is incorrect. The last thing I'd say is this discrimination business, which I think is worth some discussion. And that is if there's anything you here from the other side, its always discrimination is terrible, how can you discriminate equal opportunity. The fact of the matter is you know as legislators, state government acting through the legislature and through the executive discriminates against and amongst state citizens all the time. There is nothing unconstitutional or unlawful about discrimination. What is unlawful about discrimination is if the classifications that you draw are unreasonable, or if those classifications do not further what a reasonable person would say was a legitimate purpose. If that's the case, then I think you can be called on the carpet. But to say that discrimination is per se somehow wrong - you know I have a good friend who is a dentist who lives in Bethel and makes a lot more money than I do. He went out and got a state loan to build a house and he paid in the heyday AHFC about 2 points less than I would pay in Anchorage. Why? Because you in your judgment said that people that live out in the Bush need special access to state resources. I was discriminated against. Did I care? Yeah, I did as a matter of a fact sitting in his house. But you know I could understand the legislature making and the executive making that judgment

that no matter how much that guy made out in Bethel, in terms of building a house he was dis-similarly situated from me sitting in the south addition. And in the same way to say that that same person, so he works for the village corporation in Tuntutliak, and you brought up somehow if he works for a corporation that means you shouldn't be part of the system. To say that that person is not dis-similarly situated from me in the South Addition with respect to hurting - with all due respect, at least I don't view that as being a correct statement of fact. Now the final thing about discrimination and about our constitution is that this is dissimilar to what we went through with limited entry. A number of people in this state including some of you and your former colleagues said you know we've got to do something about limited entry. You know resources are getting over-harvested on the one hand, and the people that depend on those resources for money aren't able to make a living. There are a number ways tried to implement that public policy, and what happened? The Alaska Supreme Court and the federal courts consistently said I'm sorry, our state constitution doesn't allow you to implement that policy. That didn't mean it wasn't the right policy. It just meant that at least three of the members of the Alaska Supreme Court weren't going to let you do it. So that was put up to the vote of the people. Do you want to change the constitution to allow the legislature the discretion to implement that police? And the people asked the question, and they said sure. And that's how you got limited entry. This is not an impressive as an act of walking off the cliff that the governor is suggesting that the legislature to consider next week. And I do think that it relates directly to this whole thing about we can't discriminate, we can't discrimination, and I don't think frankly that the debate, with all due respect, is helped by that kind of rhetoric. I think a better line of rhetoric would be of course government discriminates, but let's make sure that we do it

in a way that thoughtful and accomplishes some real important goals for our state.

Rep. Boucher: I think from a historical point of view and its been brought up, there's a lot of people that do need to get caught on the history and read it. I have tried to do that. But let's go back. There is a lot reference made to the constitution. They took away fish wheels, subsistence worked then. We ought to take a look at how it worked and why it worked. I think the major reason it doesn't work today is because of the pipeline boom and the urban pressure that's brought on and its magnified in other areas, alcoholism, and others to rural Alaska. And a good friend from Muldoon talks about economic need. It keeps, and I refer back to the Berger Committee when he traveled throughout. Its a way of life in some places. And we've got to get this in focus. To some parts its a spirit. Look at the culture. So stop just classifying as though you're ringing a cash register. It may be economic to us - its spiritual to them. And I do believe, and there is provision, maybe we are going to have in this state wake up and have that constitutional convention that we seem to keep shying away from for one reason or other, and I do believe that we have a constitutional convention that the people will say Alaska isn't New York or any place - there is no other place in our country. that this combination of circumstances exist. To say that we take it back to those people that don't even begin to understand Alaska much less the cross cultural that we have is to simply reduce it to an environment of emotional need and I think that's what Julie is talking about, and we'll lose out on that issue, you can just bet. We have never won the issue. I do believe that it should go to the voters. Some of the reasons I heard not, well somebody's going to mount a big campaign to do it. Well, so what. Let's have it in the arena of free debate, and I think one of the things that would happen and maybe

this isn't a perfect amendment, it would go for more debate such as we are having now. And the one thing that has concerned with me consistently, and I agree with what you say sir, to say the people of this state cannot make a decision for whatever reason on any subject, I resent. I don't care what subject it is, go to the people and you might not get the answer you want, but you will get an answer. And I think the only way that this is going to be solved is to place it in the public arena and raise the level of debate on it. And you mentioned the poll, I saw one last night. Its 62% in this city and not picked out in the other areas, in some of the urban areas. When the question of fairness comes up - and that appears to be the only thing they are voting on right now, I think sir, Mr. Chairman, and maybe this isn't a perfect approach, I think taking it into the public arena to the people of the State of Alaska will certainly improve the situation. And if somebody comes to me and said well I'm opposed to taking the issue to the people of Alaska, they've lost me right there. Because I do believe that that THE ISSUE CAN BE SOLVED.

Navarre:

Thank you Red. I'll also mention at this time just for the record, for those of you who don't know and I think most people here do know that the legislature cannot pass a constitutional amendment. We don't have that authority. What we can do is put the question before the voters on whether or not they want to pass a constitutional amendment. We can stop a constitutional amendment from happening, but we cannot in and of ourselves pass a constitutional amendment. Rep. Taylor.

Taylor:

I'd like to get back to the subject. Don, you didn't get a chance to answer the question I'd asked. You started right into your thing and then got talking to Ramona. The question that she had followed up on which I'd really like to have your comments on. Is it possible for us to

structure a statutory change under the Article Common Ownership provision within the constitution, defining it on the basis of uses as opposed to on the basis of users?

Mitchell:

Well, I think there are two separate parts of it. I'll try to get to that. One is that certainly you can, just like with commercial fishing versus sport fishing. Commercial fishing under Alaska law is viewed as fishing with a net basically for money and sportfishing is viewed under our laws as fishing with a hook and line. Now you can say that everybody on earth who wants to go fishing with a hook and line can fish during this time of the year which means that when these particular fish stocks are coming by and everybody who wants to fish with a net can fish at another time of the year. What you're doing is that you're allocating access to fishing opportunities on different fish stocks to different people engaged in certain uses. You do that all the time and that's what I think, there was reference made to Kenai Peninsula Cooperative, you stated the case where the Alaska Supreme Court said you could do that. Now what the court also said you could do, in at least the way I read the McDowell case, is that the court said you can discriminate in our judgment on the Common Use Clause, so long as you do it individually. So long as you take a clipboard out to somebody's house and you find out whether or not they make more or less money than the guy next door and you let that guy go to the head of the line behind the other guy. If you do that on an individual basis, we're not going to tell you no, but we're going to give you a hint that maybe you can do that.

Taylor:

This might in essence is what could have happened if they had implemented the caribou solution that you suggested earlier.

Mitchell: But the problem with that is that in the caribou situation you are down so far below just what the villages need that you're down literally to that level, and I don't think anybody either in the native community or most thought that people could have looked at it and said that when you get down to that level and there's that little amount of resource left, sure, that's a legitimate way to do it. I think that the policy debate is if you're in a situation where there's enough for the villages that there isn't enough for all of us who live in town and the villages. Do you really want to put all of us, all the people, all the thousands of people that live in town, and then all the people that live in the villages, do you want to spend state money. Do you think its a good expenditure of money that could be going to the intertie, or money that could be going to do something else to put up a state bureaucracy that's going to door to door with a clipboard to figure out whether people that live in the villages should be eligible at that point. Now most knowledgeable people would say that's ridiculous. That's not a good expenditure of money because if you go out there with that clipboard and you spend a million dollars, you're going to find that everybody that lives in the village, maybe with the exception of a school teacher, is going to qualify. So, why do it.

Taylor: Well aren't you addressing the word "users" at this point?

Mitchell: Well that's what I'm getting at.

Taylor: Users could be any of us.

Mitchell: Right. And the point is that while uses is attractive as a concept, alterationally it doesn't get you very far. The Nelchina caribou herd, I don't know what the numbers are but I'll make some up that I think are reasonable, you can probably take, the biologists say, about oh let's say 5,000

animals out of that herd without doing any biological harm. If you would pull up everyone who wanted to engage in that use - the use of going out and shooting a caribou and eating it, you would probably have between the people that live in the villages and Copper River and all of us that live in Anchorage or Fairbanks - I think the statistics are 20-30,000 people. So now you have at that point, government has two choices. Either you can allow those people to go hunting, in which case rather than taking 5,000 animals, you're taking 30,000. Or, somehow you've got to pick 5,000 people out of the 30,000 - take 5,000 users out of the 30,000 that would like to engage in the activity, and figure out who gets to be part of that 5,000. Now you can either do that with - Ms. Jacobus and her crowd would tell you is let's give everybody an equal chance. We'll get Donald Trump up here and he can put a wheel up and everybody bets on a number and whoosh and the people will have an equal chance to win and lose and what the heck.

_____:

I don't think that's what they're saying.

Mitchell:

That's exactly what they have said in the past. That's exactly how that hunt works. We have a lottery now on that hunt for everyone except the people that live in the surrounding villages because the subsistence law says that that's an irrational way to allocate access for them. For me, hey, you know put my name in a hopper, what the heck. Maybe one year I get to go hunting, maybe one year I don't. But for people that live out in the villages that's pretty irresponsible, and that's the way the system has worked until the McDowell case. Now what's going to happen and this is the one thing that I think that you should think about in your deliberations that we haven't hear from yet, is that Judge Cutler is sitting out in Palmer at this very moment, at least in my understanding, working on an opinion about whether or not the state subsistence laws what's

called severable, as a the result of the McDowell case. Now, if in fact, and this is one of the great ironies of this whole thing, is that if Judge Cutler decides that the subsistence law is severable, then it means that everyone - all the people who have been in that lottery in the past, plus all the people that live out in those Copper River villages - are all going to be subsistence people entitled to the priority. Now since you still have to get down to that 5,000 cutoff, under the subsistence law as some of you may remember from 1985 when we went through all of this, we're going to take all 20,000 of those people and we're going to line them up and we're going to do exactly what you and Rep. Barnes suggest, we're going to take a clipboard and we're going to house to house and we're going to see which of them have the greatest dependence upon those resources. And you know what's going to happen based on the 1985 experience? Nobody in Anchorage or Fairbanks in August, and September of 1990 is going to hunt the Nelchina caribou herd if that's what Judge Cutler does. Now people in Anchorage think that they're getting a free vote on this issue, that this is the Bush issue. If that happens, you're going to hear from a lot of people in Anchorage who are going to have a legitimate bitch, frankly. I mean all the subsistence law did was to give a reasonable allocation to people that lived out in the villages, and then let all the people that live in Anchorage have at it. But if they're going to prioritize everybody as part of the subsistence law based on 1985, there is nobody in Anchorage who is going to turn out to be more dependent for those 5,000 animals for people that live out in the villages.

Navarre:

We have to wrap this meeting up by about 10 minutes to 5 and I want to give Mr. Starkey and Mr. Wallery an opportunity. And then if we don't have a chance to answer, get our questions answered, I'd like to also to invite anyone who can come back tomorrow afternoon to please be here as a

resource because the morning from 10 till noon is taken up. My intention is to start at 1:00 again and do some more question and answer and then get into some of the option discussion. Rep. Barnes.

Barnes: I don't think I said anything about a clipboard, although I may have. I wanted to clear that up. And secondly I would like to point out that the largest native community in the state lives here in the area that I represent and under this law makes no difference how poor they are. They are precluded unless they happen to be moved in with one of their relatives for a period time, from going hunting or fishing, and I think its just as unfair for the urban Native as it is to the urban non-native.

Mitchell: Mr. Chairman, I would suggest that proves the fairness of the system, that's it not a racial system.

Starkey: Thank you Mr. Chair. Mr. name is Sky Starkey. I represent the Association of Village Council Presidents. The Association of Village Council Rresidents or AVCP represents 56 native villages out in the Yukon Kuskokwim Delta. This is the area where, which is most dependent upon subsistence resources, and as we speak in almost virtually every village people are in fish camps now harvesting fish for their winter supply and have no idea that you're sitting here making a judgment about their future, which is exactly what's happening. For some reason this debate has gotten carried to the point where people are talking about whether or not the federal government should be pushing the state government around, and has ignored the fact that all the federal government requires is that you treat subsistence users and give them a priority, which they deserve. If you can find something wrong with the principles and policies behind that, then the debate should focus on that. But if you're going to talk about just your fundamental principle

of not liking to be pushed around by the federal government, I suggest that that's not a worthy place to begin or carry this debate.

I have something prepared, but I feel compelled to respond to Ms. Jacobus at some length. I was the attorney that handled the Kwiethluk caribou case and I wish Rep. Barnes were here, because she seems to have some misunderstandings as well. Ms. Jacobus inferred that Kwiethluk just jumped into court. Well Kwiethluk tried to work through the Board of Game all throughout the fall and the winter of last year, and their proposals were deferred and turned down. Sydney Huntington, who she holds in such high esteem, voted for Kwiethluk and would have allowed them a hunt of those caribou, as did Ben Nagiak. The only two subsistence users on that board. If the rest of the board would have went along with that decision there would have never been a Kwiethluk case. But as it turns out, even the Board found out there was a dire emergency out there, that the fish had spoiled and the people needed that meat to get by, the Board turned down their request. The Board heard this issue over two days. At the end of the first day the board was talking about granting the priority, about granting permits. On the second day two biologists from the Department of Game came in and testified that they shouldn't allow the hunt because they were afraid that other villages would come in and would want to have emergency hunts as well and they didn't want to deal with that administratively, and also because they did not trust the other villages in the area and thought that there would be wide spread poaching. It had nothing to do with the harvestable surplus, and it had nothing to do with the health of that herd. The only two biologists who work in Bethel and work for the Dept. of Game told people out there that there was a harvestable surplus. On those facts, Judge Holland found that they should be allowed to hunt 50 animals. They only took 3%. There was no poaching. There

were no further requests for further emergencies. And its all on the record, and if you go ask any biologists throughout the state now whether there was any harm done to that herd because of that hunt, I suggest that the answer will be "no." There wasn't an option to go hunt the Mulchatna herd, which is another nearby caribou herd. Ms. Jacobus makes it sound like some irresponsible village decision to go hunt a herd that's smaller in favor of hunting an 80,000 strong herd. I suggest Ms. Jacobus doesn't know anything about the YK delta and the conditions in February. And that she doesn't know where the Multchatna herd is. Its about a 2-day snow machine ride across country that people that don't know. And if you read the papers you know that people get lost out there. Lost for days, and people die when they go out in those circumstances. The Board was aware of that. Sydney Huntington was aware of that. So it wasn't an irresponsible decision. The other thing that should be pointed about Ms. Jacobus' testimony is that she complains at length about the rights of subsistence users to go into court and enforce their rights, when the reason we're here today is because Ms. Jacobus went into court and reversed the decision of this legislature to allow a subsistence priority. She's the one that's managing fish and game through her court decision. And its hypocritical for her to come in here and make the big spiel that she goes through about management of fish and game through the courts, when we're here because of her court case. Ms. Jacobus, sports fishermen and the commercial fishermen all sat up here and wondered why we were here and gave alternatives. But did you hear any of them mention the needs of subsistence users out in Rural Alaska. That's why we're here and that's why Congress passed ANILCA. Our subsistence rights are protected through ANILCA and we're not here asking for them. But certainly you should all realize that you do have a responsibility to represent those constituents out there and those Alaskans and that they

depend on these resources. And by leaving this issue open as you do, you jeopardize those rights. I will stop my comments here due to lack of time and take questions if there are any.

Navarre: Ms. Jacobus before you get into your comments, I want to just say I appreciate all the variety of interests that have been here today and the different opinions that have been expressed, so...

Jacobus: I'm just going to make my comments real quick. I won't engage in personal attacks such as some of the other people have done. I don't think it really benefits anybody and I don't think that its appropriate for this body. But I would like to point out the reason the Kwiethluk case is an important case for your consideration. Its not because of the fact of the, what the individual members decided for the Fish & Game Board. What it dies, is an important precedent that we need to consider, and that is where a federal judge comes in and overrules and overrules the decision on the fish and game board - a fish and game board decision, which according to the fish and game board, was made because of biological principles. I'm not going to get into how many hours away a particular herd was or any of these other things. The issue here is where you have a fish board or a game board, looking at an issue and making a determination which they say is based on a biological decision. Not me, but what they have decided is based on a biological principle. That principle should be upheld. And the normal rule, and Mr. Mitchell talked about this, and said well what difference does it make whether they go to the federal court or the state court. It makes a big difference because if you are talking about going to state court, they give deference to the decisions of the administrative body. That's one of the normal rules of review when you look at an administrative body. In this case the judge decided to not

give deference to the decisions of the fish and game board. That is what is a concern to me and what should be a concern to anyone who is concerned about the resource. Not whether the Fish & Game Board was right, but normally they look to see was there some evidence to support the decision of the Fish & Game Board. If there was some evidence, then they should uphold the decision of the Game Board. And that's really the issue that needs to be talked about here and that's the thing that causes concern for me. And by the way it wasn't my court decision that caused all these problems. In my opinion, it was the decision of the federal government to place some of these onerous decisions on the state in the way in which it managed Fish & Game that has caused the majority of the problems. And I think that's what we need to keep focused on is whether or not we want to solve the subsistence issue within the state and solve it in a way which is best for the resource, best for the people, and fairest, or whether we want to continue to work under the onerous requirement of ANILCA. And that's the real issue.

Hoffman: I represent the community of Kwiethluk and I think the Kwiethluk decision is _____ too, and I think the Board of Game should take it as such. They should take special notice of subsistence needs, and the decisions that they make aren't sanctimonious, they are should be looking at the real needs and the real intent of the law, and I hope the Board of Game takes notice of this decision and weighs that subsistence needs more heavily in the future.

Navarre: Mr. Wallery I want to give you an opportunity to make your comments if you'd like now, or if you want you can defer them until tomorrow afternoon.

Wallery: Coming from Fairbanks, we're used to having hearings where nobody's at them, so...I would prefer to do it tomorrow if we could do that.

Navarre: I will do that. We'll begin tomorrow afternoon. Mr. Mitchell..

Mitchell: Mr. Chairman, just for the record, I think because there's been a lot of discussion about it it might be helpful knowing some _____, but I was wondering if Ms. Jacobus could say for the record whether she even attended the Board meeting at which the board debated the caribou case, or whether she's had a chance to read the transcript of the board proceedings.

Jacobus: Well in the first place, Mr. Mitchell, I don't know why you have to be so personal about all your attacks, but I would like to say I have reviewed the decision of the judge, in fact I have a copy of his preliminary decision. I have a copy of the hearings that were before the Fish & Game board and I still stand by my remarks which are the decision is a very bad precedent for Fish & Game management. Not whether the Fish & Game board was right, but the weight the federal judge gave to the biological findings of the board. Right or wrong is not the issue. The issue is what weight was given and it is a terrible precedent for Fish & Game management, and I stand by my remarks.

Mitchell: Mr. Chairman, the reason I bring that up Ms. Jacobus is not because its a personal attack on you, its because you're the person that has represented repeatedly all afternoon to this committee what the board and what the board didn't do. And I don't to pin you down on it, its really a minor point except to the extent that its preoccupied the committee's time. If you do not have personal knowledge about what in fact the Board did, and what factors the board considered, and you were sitting here through the whole thing - with all due respect I think its not helpful to give information about factual circumstance to this committee about which you don't know anything.

Jacobus: Well I have a copy of the transcript of the proceedings.

Mitchell: I asked whether you read them.

Jacobus: I have read them and said that twice, Mr. Mitchell.

Mitchell: You did not indicate that in your first response.

Jacobus: I didn't have to.

Starkey: Ms. Jacobus is in my opinion misinformed about the stated law and the amount of discretion that the board is given. If she will read and the legislators will ask their staffs or get legal opinions about - there's the Bobby decision, and also the Katy John decision in which Judge Holland makes it clear that when the record supports the board's findings, they will be deferred to. Just as they would statecourt. In the Kwiethluk decision there was no management plan. There were two biologists that were saying there was a harvestable surplus. And then two biologists came in who didn't have any direct knowledge, and said that there wasn't. Judge Holland merely found that the board's findings were not supported by the evidence on the record. And that's the same standard that a state court would use. And its not a dangerous precedent. In fact Ms. Jacobus's clients in the Outdoor Council will be before this committee harping about the only thing that we need to do is create management plans and increase Fish & Game _____ so that we will won't have and user conflicts. And if that would have been in the Kwiethluk case and the state would have lived up to their responsibilities, then there would never have been a case.

Castner: Ken Castner from United Fishermen. I just wanted to reply to one thing from Mr. Starkey where he said he didn't hear anything from the commercial fishermen about the needs of

subsistence users. I believe that Mr. Matthews was pretty thorough in his description of what our constituency is. And we well recognize that this issue effects the lives, and I mean the fundamental lives of many people. The people that you represent Sky, and the people that Julie represents, and of the other users that are here. It affects our lives. Where we depart is in coming to some decision on the size of the class, and we have always asked for some sort of definition: who are these rural people? I noticed that Mitchell very carefully never used the word rural. In his entire testimony he kept referring to the folks in the villages. If that's what you mean by rural, then all we're asking for is a definition. Who is the class that we're protecting? Who are the people that we're aiming these laws too. And that's entirely where we depart. We have tremendous empathy for the subsistence needs of the people in the villages. And I don't think that that's an issue. If that's an issue then I'd like to put it to rest. We simply want to know what the size of class is that we're discussing and come up with a decision and that is something that is not in ANILCA.

Elias:

Tom Elias, Alaska Sportfishing Assoc. I agree with Ken. I'd like to expound on that just a little bit. I don't think anyone here has said today that we don't recognize the need for subsistence and a subsistence lifestyle in some parts of the State of Alaska. I think what this thing is boiling down to is an allocative issue. Who gets what? The "I Want" syndrome. I want this, one group says I want this, the other group says I want this. Where do we draw the line? In other words - I guess I'm directing this to Julie more than anybody - are we, is this what we're talking about? If we all agree that there should be subsistence - at this table we all agree that there is a need for subsistence in the State of Alaska - are we then now talking about who gets that subsistence priority or preference and

how much they get? Is that the basic deal that we're getting down there.

Kitka:

I think that the fundamental issue that the legislator has got to focus on next week is what exactly is broken. You know I think that if you try to solve all the problems in the world in regard to hunting and fishing issues. I mean you could spend years doing it. But I think you really need to finely foc...very finitely focus on what exactly is broken and what is exactly broken is the supreme court justices interpreted the constitution, in our judgment, in a very narrow view in which state legislature isn't able to fulfill any responsibility to have a statute which could comply with existing law. And their choices are very clear on that. How do you resolve that problem. And like I said, one view is to expand and make the constitutional more flexible so the legislature can pass a law to come into compliance. The second one is to go down the direction of changing the federal level. AFN is not supportive of going down that direction because we see a lot of risks that are out there. But clearly that's one option that the state legislature can explore and look at the pros and cons and the risks and the likelihood of success on that. But in our judgment what's broken is the narrowness of the constitution versus the federal law. And what are the limited options that are available to the legislature if the people in this state want to resolve that in the state versus kicking it back to Congress and what can be done in the short timeframe that is allowed as far as the stay which expires July 1st. Are people willing to live with a period of federal management of fish & game no matter how wide or how narrow the jurisdiction for whatever period of time it takes to go down these other paths. And I think that if you look at in terms of not trying to solve all the problems in regard to subsistence and hunting, and fishing, and just narrow it down on what is broken? What are the ranges of options that

could be done to fix that? And what is the best judgment in your opinion would accomplish that in a doable political way on that. I think you'll go a long way to coming up with a resolution next week. I wish I could tell you that there was a whole lot more options that were available. In fact that's one of the frustrating parts, is the limited options and the very tight frames on doing something, and that frustrates us as well, I'm sure, frustrates you. Our recommendation anyway.

Elias: Julie, what is broken? Subsistence is not broken, is that correct? The subsistence concept is not broken.

Mitchell: Let me try that. I think that what's broken is part of what Ken sort of alluded to. But I think you have to take them as separate parts. The first thing that's broken is the ability of you and other members of the legislature to enact a statute that limits the subsistence priority just to people that live in Rural Alaska. Now even if we could all agree on where rural Alaska was, you don't have any authority to come up with a statute based on the McDowell case that would be able to implement our agreement. Now if the constitutional amendment is passed, then we'll get back the authority to enact that kind of a statute. Now certainly everyone here understands that with the Kenaitze case and whole variety of other things going on that the technical ability to describe with specificity where rural Alaska begins and ends. Where that line is. Is something about which there's going to have to be ongoing discussion and debate and changes. And I think at the end of the legislature we indicated that we were more than happy to sit down and talk about that. But that is separate from getting the legislature back in the game of having the constitutional authority.....