

SCOMM

81:3

SENATE COMMITTEE OF THE WHOLE
June 15, 1992
2:05 p.m.

(Meeting held in Senate Finance Committee Room)

MEMBERS PRESENT

Senator Jay Kerttula, Chairman
Senator Al Adams
Senator Virginia Collins,
Senator Sam Cotten
Senator Shirley Craft
Senator Jim Duncan
Senator Dick Eliason
Senator Paul Fischer
Senator Steve Frank
Senator Rick Halford
Senator Lyman Hoffman
Senator Curt Menard
Senator Drue Pearce
Senator Pat Pourchot
Senator Pat Rodey
Senator Dick Shultz
Senator Arliss Sturgulewski
Senator Robin Taylor
Senator Rick Uehling
Senator Fred Zharoff

COMMITTEE CALENDAR

SENATE BILL NO. 484

"An Act relating to the taking of fish and game; and providing for an effective date."

SENATE BILL NO. 485

"An Act relating to the taking of fish and game for subsistence; and providing for an effective date."

WITNESS REGISTER

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Senate Committee of the Whole

6/15/92

Tape 1

Side A

SENATOR KERTTULA:

The materials that you may wish, please request them and either the staff of this committee or other staff will be sure to provide them. Both the Finance Committee staff and the legal counsel staff are also here. They will try to answer specific questions or get answers to legal and other questions in as short a time as possible.

We will change the format tomorrow so you have new shaped tables. They just couldn't get it done today, so this is a hit-and-miss. Today we would ask the Administration to make a presentation on the legislation that's been introduced - the Attorney General, subsequently the AFN and their counsel to make a presentation. If the time permits we will allow, from the public at large, individual statements. But we want to get to the basic background pro and con of the Administration's legislation in this particular setting.

Again, under the provisions of this committee, every person around the table or every person will get to ask a question before you get to repeat. So ask your questions in tandem together and expect to wait until everybody else has had an opportunity. I will vary from that to one extent and, that is, I will vary that each person testifying we will allow questions to originate for. So if you have one person testifying and have exhausted questions around the table, but we've come half way, I won't start around the table. For instance, I will start again with whoever asks first--whoever raises their hand first and so on for the next witness in order.

I think we can come to order. The first witness -- if there are any questions. I will appoint a subcommittee during the day to contact the federal delegation Department of the Interior first thing tomorrow morning on finding out what input they may wish,

questions, and what they may offer us. I'd ask that subcommittee then to meet and call early tomorrow morning. They may well also want to meet with the Governor to get his assistance in producing any information that might be desirable. I ask that the Administration's person, I think Mr. Campbell -- if there is a chair -- the Attorney General, if he wishes to sit with you, is welcome. If he wishes to come separately

The bill before us is the Administration's legislation but we will allow pretty broad, far-reaching testimony from all sides. If there are any suggestions to the Chairman on how to conduct the meeting more expeditiously, bring out better answers, please bring it to my attention. We will have recesses at least on the hour and we'll meet as long as necessary. But we will certainly adjourn this evening by seven, probably by six or six-thirty.

Mr. Campbell, if you identify yourself, you may proceed.

McKIE CAMPBELL, SPECIAL STAFF ASSISTANT, OFFICE OF THE GOVERNOR:

Thank you, Mr. Chairman, Senators. My name is McKie Campbell and I'm a Special Assistant to the Governor focussing in the area of subsistence. I appreciate this opportunity to testify before you today. What I would like is to try to outline fairly briefly, and then later at whatever depth you wish is; one, why it is that we feel it is of the utmost importance that the Legislature pass the subsistence bill that is before you; what that will do; what it will not do; and then to whatever extent again you would wish, the details of the bill. We have the Attorney General, who is available here. If there are issues of constitutionality or legal questions, and if there are any other questions, we'd be glad to provide the answer.

I guess I'd like to start off first on simply the issue is, what is the problem we're trying to fix? What is the subsistence problem? The answer, unfortunately, is there is not one subsistence problem. Since the McDowell decision and Judge Cutler's decision not to sever the bill in state law, public attention, in general, is focused on the fact that the laws of the State of Alaska are not in compliance with Title 8 of the Alaska

National Interest Lands and Conservation Act. In fact, under the Alaska Constitution, the justices of the Supreme Court have said that a rural preference which is what in their ANILCA is generally interpreted to require is contrary to our Constitution. So public attention has generally focused almost exclusively on the issue of, are we or are we not in federal compliance? That, as we are all aware, is because if we are not, the federal government exerts management controls for subsistence on the federal lands and waters. I'd like to make the point very strongly that right now the federal government is exercising their control of their game on federal lands. The state continues to fully control all of the game on state and private lands. Very roughly, we're each controlling about half of the game. What the state -- because we have ownership of navigable waters regardless of where they are in the state, controls the vast majority of the fisheries resource. We do that regardless of whatever the federal government may or may not do. The problem that we are facing right now along with the federal controls -- and I in no way mean to diminish that problem or say it isn't important or we don't need to continue to do everything possible we can to fix it. But the problem we're facing right now that is giving us a crisis in the management of our fish and game is, right now, every single one of you here at this table under state law is a qualified subsistence user. I guess I would assert that that doesn't make much sense. It doesn't work. It doesn't work for protection of people who really are subsistence users, and it doesn't work for everybody else who would rather access the resource either through a sport fishery or a general hunt or have to access the resource through a commercial fishery for their livelihood. We're in a situation when the Supreme Court ruled that rural was inadmissible and then Judge Cutler ruled -- just plucked rural out and left the rest of the law, where in the past we've said subsistence is a very special way of life and it deserves protection and preference. That is something that I do believe, by the way, very strongly. But we are left with a situation where we tell the subsistence users,

"Your way of life is special. We're going to give you this special preference and protection. And, by the way, all five hundred and fifty thousand Alaskans also get it." There is no true protection for the subsistence user under that system. That applies to, as I said, almost all fish and about half of the game. So for the benefit of the person who is the subsistence user, we desperately need to fix this law.

It also results in a situation whereby because we're all subsistence users and because some of the parts of the criteria that were used to determine which fish stocks and which game populations are subject to subsistence have also been struck down, that potentially every fish stock and game population in the state can be subject to subsistence.

I'd like to just throw out some examples for you. The other day in throwing out some of these examples, somebody said, "Well, I think that's being alarmist." I want to tell you, as an Administration we are alarmed. And we think that you should be also. Let me give some specific examples. Just Saturday on the front page of the metro section of the Daily News, it reported that the Nilcheena moose hunt, because everybody in the state was qualifying as a subsistence user, that hunt had (a), gone subsistence only, and (b), been overwhelmed and they had to put it in a tier two hunt. Though in the past and under this bill, subsistence users could be protected, as well as protecting sports hunter -- in the past they've all managed to hunt the resource. The first paragraph of that article led off saying, "Thousands of Anchorage and Fairbanks moose hunters are going to have to find somewhere else to hunt." I would suggest that that is just one example. The Nilcheena caribou are certainly another example. Any game population that is invasive to a major population center is going to run into the same problems.

In fisheries, the problem is considerably worse. Because in hunting, whether a person hunts under subsistence hunt or general hunt regulation, you basically do it the same way, with a rifle. You use the same means. But in fisheries, we have very distinctly

different fisheries. We have sport fishery, which is done by a rod and reel. We have the commercial fisheries that depend upon the resource. I am absolutely convinced today, and I discussed this with our Department of Law at some length and with our Department of Fish and Game, that if today I wanted to walk into the court and say, "I want a subsistence fishery on the Kenai River for king salmon," that when the court worked its way through the law, they would find they had no choice but to establish that fishery. It wouldn't be just for me but it would again be for every Alaskan. Such a demand would lead to the elimination of the sport fishery. The elimination of any commercial fishery that targeted those species, and I think the reduction of fisheries that incidentally intercepted it too, depending on the degree to which they do intercept. The Southeast kings, I think, are in exactly the same situation. Anyplace you have a game population or a fish stock that is a fairly small resource compared to the potential number of users -- and we have a law that makes every single Alaskan a subsistence user -- we're going to run into this situation, because subsistence has an absolute preference over all other uses. We think subsistence should have a preference over all other uses. But we think we should have a law that is reasonable and determines who is and who is not.

Now, I know that there are many who say, "Let's just pass a constitutional amendment. That'll take care of it. We'll just make rural users subsistence users and no urban users." That is an option. In 1990 during the regular session and the special session, I was involved in this issue and I worked fairly hard for that option, because at that time I believed it was something that could solve our problems. What has become clear since that time through subsequent court decisions - through a whole host of subsequent court decisions - is through just a constitutional amendment it would be possible to comply with the federal law, and take back management of all fish and game throughout the state in name only. I want to emphasize that, in name only. If the only thing that we were to do is simply pass a constitutional amendment

and come into compliance with ANILCA, we're in a situation where the state again takes over the financial burden, the responsibility of all the day-to-day stuff. But any time there is a critical decision and somebody thinks, "Ah, we don't think you're really doing it the way ANILCA intended," then they have the right to go into federal court on any of our resources uses and say, "Federal court, order them to do it our way or you're out of compliance." The problem with ANILCA is not its intent. I think the intent of ANILCA is proper and it's honorable. In fact, the policy section of ANILCA says, and let me quote to you very briefly, "The purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so." The bill before you, without exception, provides the protection and the opportunity for every rural resident who is engaged in a subsistence way of life or, for that matter, wishes to go out and live a subsistence way of life, engage in a subsistence way of life, to do so. But what the bill before you does not do, or can it under our Constitution, is say every rural resident without exception, without regard to dependence or lack of dependence on subsistence, qualifies. We have with us today in this room many people who I think probably have come to this meeting because subsistence is very essential to the core of their lives. We think that that should be protected. To protect that we do not have to have a system that says everybody in rural Alaska without exception is; nobody in rural Alaska, even if you are a subsistence user, is not. That's precisely what the Supreme Court said did not work. So what we have before you is a bill that protects subsistence and provides a much better scheme of subsistence for subsistence users on state waters and on state land. And on federal land they would probably continue to be protected under the federal system. On state waters, which is, like I said, almost all the navigable waters for all fish, it provides a scheme where we do not put people who rely on commercial fishing for their livelihood out of business. Where we do not deny people who want to sport fish out of business just

because we've been left with a maimed law because of a variety of court decisions. I'd like to read you just one phrase of a letter -- I'd be happy to provide you with a copy of the entire letter -- that the Aleutian East Borough, a very heavily Native borough whose members generally are commercial fishermen, recently sent to their legislators. It said, "Subsistence should not be used by one group of Alaska Natives to annihilate another group of Alaska Natives." It was a letter of very strong opposition to an alternate bill, the AFN bill, that was introduced at the end of last session. I can provide them all with a copy of the letter. So what we've done to try to fix this mess we find ourselves in, is over a year ago the Governor formed a Subsistence Advisory Council. He put that together from people throughout the state representing all groups. It had nine members; it had nine Natives who were actively involved. It had one person representing the Commercial United Fishermen of Alaska and one person representing the Alaska Outdoor Council. It had one person formally nominated by AFN. It had Governor Hammond who was on it. It had a person here in Juneau not closely connected with any of the groups, who is a regent of the University of Alaska. That group labored for over a year to come up with the goal that Governor Hickel gave them. What that was is to come up with the best possible subsistence solution that you can for Alaska. Specifically, he told them when they went to it, he said, "Don't worry in your formulations about whether or not what you're doing complies with Alaska's Constitution. Don't worry about whether or not it complies with ANILCA. Simply come up with the best possible solution that you can." That group labored and I want to emphasize - because there's been a lot of talk and I'm sure you'll hear more talk about it, whether or not this bill is a consensus bill or not a consensus bill but I guess what I'd like to emphasize is that every single word of that bill, every phrase, every paragraph all the way through was drafted by the entire membership of that group by consensus. Very early on there was a tough issue. They faced a lot of tough issues. Somebody said,

you know, "Let's have a vote," because they were tired of going round and round. But we knew if we had a whole bunch of four to five votes, it wasn't going to do any good. So we stayed with it until every issue we worked out, with a little computer with a gizmo that projected the whole text up on the wall and we went through it. I would urge you if you happen to talk to anybody who sat in on those meetings -- let me rephrase that. Pick anyone you think may be impartial, there are a ton of reporters who sat in. Talk to some of them about the process. At the end when we came together when we had all finished, some of the members of that group told us, "We've done the best we can, but we cannot sign off on this bill unless our groups tell us we can sign off on the bill." That didn't happen. Very specifically, the Alaska Federation of Natives has chosen to be in strong opposition to that bill. The Alaska Outdoor Council went around and around about it internally because they sure didn't get everything they wanted either, and they were very upset. My understanding is that by a fairly close margin they finally said, "We won't endorse the bill. We have some problems with some of the notions of subsistence preference and other things, but because it contains a good bill they can work with to manage fish and game, it is infinitely better than what we have right now."

One other thing, Mr. Chairman, that I would urge -- I understand that you are going to have the AFN follow-up and I think that is very appropriate.

SENATOR KERTTULA:

We'll take of the other too.

MR. CAMBELL:

Thank you, I appreciate that because each one has a distinct point of view. The United Fishermen of Alaska met. They had their annual organizational or board meeting down here in Juneau shortly after the Council finished its work in late February. They met and the directors who were present--and they had well over a quorum present, they unanimously endorsed the bill and urged no amendments whatsoever. So what we have here before you is a bill

that will give us a good workable system for management of fish and game, for protection of subsistence, for allowing other users to also participate to the extent they don't jeopardize subsistence; and that will work for virtually all fish in the state, will work for about half the game in our state, and then will give us the very vital first step towards going on and trying to get a total resolution. But we're very concerned about what is going to happen if we don't do this. If you wish, sir, I'd be happy to go into the details of the bill or any direction that the committee would like for me.

SENATOR KERTTULA:

I think probably at this stage I'll entertain questions now. Again under the rules, everyone here will have to exhaust their particular question before you will be called upon twice. Senator Adams was seeking the floor, I believe, first. Please let me know and I'll try to work around in a some orderly fashion.

SENATOR ADAMS:

Mr. Chairman, thank you. One of the things I'd like to do is that the request, through the Chair, is a legal opinion on all the bills that will be introduced on their constitutionality, so we have those legal opinions done by our own legal office.

SENATOR KERTTULA:

I would ask that Tam Cook provide us that backup. I had a meeting with her earlier. She has staff here. I'm sure that they'll get together with Senator Adams and provide him -- I think the Attorney General's office will do the same.

SENATOR ADAMS:

All members. I'm not going to be here to debate the consensus on the Governor's bill. But the question I have, Mr. Chairman, if the Legislature were to enact it, would the Governor's bill bring the state back into compliance with Title 8 of ANILCA and return fish and game management to the State of Alaska? Does your bill need a constitutional amendment to go with that?

SENATOR KERTTULA:

You have the floor.

MR. CAMPBELL:

Thank you, Mr. Chairman, Senator Adams. I believe there were two questions. One is, does our bill need a constitutional amendment? The answer is no; our bill is constitutional and the Attorney General will be here later and I'll let him speak to that issue. The second issue is, I believe what you were saying, sir, is, does this bill comply with ANILCA? It is not, nor has it ever been our representation that this bill complies with ANILCA. What I would say is that the Department of Interior has yet to make a final decision on that. The case can certainly be argued and, as I said, you know I read you the purpose of it; that it provides an opportunity for every rural resident engaged in a subsistence way of life to continue to do so. Our bill without a doubt does that. If, however, it is the interpretation of the Department of Interior that every rural resident without exception, without regard to dependence, has to be taken care of and provided a preference over every urban resident with regards to subsistence, it will not comply.

SENATOR KERTTULA:

You have the floor. All right, continue.

SENATOR ADAMS:

It was just that does your bill return fish and game management to the State of Alaska -- the federal lands of two hundred and twenty million acres, yes or no?

MR. CAMPBELL:

Our bill does not -- I do not expect the federal government to change their regulations. I can expect them to continue to manage game on federal land if our bill passes, but that is something we will very actively pursue. It is a possibility, but we're not saying that is the reason we need to pass this bill.

SENATOR ADAMS:

Thank you, Mr. Campbell.

SENATOR KERTTULA:

Senator Cotten was seeking the floor and Senator Sturgelewski

- Senator Cotten.

SENATOR COTTEN:

Just a technical offering here, Mr. Chairman. During the regular session I requested and received from our legal department an answer to the same question Senator Adams just asked. That is, is the Administration bill constitutional? They provided me with an opinion in answer to that question. At this time I'd say that that's released or whatever has to happen for that opinion to be available to the rest of the Senate. The answer was it's not constitutional.

SENATOR KERTTULA:

Mr. Greany [ph], I see you here. Would you be sure that we get that opinion? Thank you. Senator Sturgelewski and then Senator Hoffman.

SENATOR STURGELEWSKI:

Through the Chair, thank you. Mr. Campbell, McKie, two questions, if I could. We heard both in the Governor's address and also from you, it indicates that there will be an evolutionary process; that you pointed out some examples that are really important to be addressed. We're all aware of the king salmon issue, I think, in a couple of areas of the state. If it's evolutionary and assuming that this process is accepted in somewhat similar form to what was proposed, what do you as a representative of the Administration see as the next steps that you would take or would need to be taken to see in fact that we do have total management of fish and game resources back within the state?

MR. CAMPBELL:

Mr. Chairman, Senator Sturgelewski, if this bill is passed, we expect the Governor to meet with the Secretary of Interior immediately following the close of this session. They will discuss this issue and they will discuss the issue of whether or not this bill may or may not comply. Or if the bill does not comply and if they maintain that every rural resident without exception has to qualify, they will discuss the option of the

federal government recognizing that this is a system that protects subsistence users, that does serve the purposes of ANILCA, that it is something that we can work with and perhaps talking about how, over the next year or two we can minimize the federal role and involvement on federal lands. I think eventually it is a system - I think after folks live with it for awhile, because there are a lot of horror stories from people who've never read the bill about what it may do to them. I think people are going to find that this system is much easier to live with and actually protects subsistence better for them in the villages than dealing with the federal government. It is a hope that eventually we will see a consensus to try to achieve a change that allows this bill to comply.

SENATOR STURGELEWSKI:

Mr. Chairman, as a follow-up to that and then I do have one additional question, has the Governor had those kinds of discussions to this point? Has he had communication with the Secretary of Interior?

MR. CAMPBELL:

Senator Sturgelewski, Mr. Chairman, the Governor has had an ongoing dialogue with the Secretary. The Secretary is extremely interested in working with us to whatever degree that he can to work it out. I want to be careful here. I am not making any representations, pass this bill that our federal problems are over. What I am saying, though, is if we don't pass this bill, we have tremendous problems in our fishery resources and in that portion of game that we do control.

SENATOR STURGELEWSKI:

Mr. Chairman, if I may, just one other question. The fish don't know many boundaries, and I understand the issue of the navigable waters, but what about the issue of the three-mile state limit vis-a-vis the two hundred-mile limit, which, of course, from three to two hundred gives about one hundred ninety seven miles where the fish can swim. How much work have you done in terms of looking at this bill and the potential for the feds to take over

the management of fish and game irrespective of the navigable waters?

McKIE CAMPBELL:

Senator Sturgelewski, right now there is in court a series of lawsuits which have been combined; one, is the State v. Lujan and one is the Katie John lawsuit that specifically protests the issue of the right of the state to control all navigable waters. Again, I refer to our Attorney General to address the issue, but I've been advised by them that they feel very positive about the chances of success for two of those court cases clearly establishing the right of the state to manage our fisheries resources throughout our entire navigable waters.

SENATOR STURGELEWSKI:

Does that speak to the fact that they go into federal waters?

MR. CAMPBELL:

Senator Sturgelewski, I believe that both of those cases, particularly the Katie John case, address those points.

SENATOR KERTTULA:

Further questions of this witness at this time? Senator Hoffman.

SENATOR HOFFMAN:

You continue to say that there are major problems with this subsistence law as it relates to commercial fisheries. I'd like to follow up on that. Isn't it true that the subsistence and personal use fisheries are open to all Alaskans and has been allowed continuously in Cook Inlet since statehood? The current Cook Inlet subsistence fishery has been in place for two seasons with subsistence allowed on the beaches but not on the Kenai River. In 1991, thirty eight thousand, five hundred salmon were harvested for subsistence of which thirty two thousand, three hundred were sockeye. In 1992, only five hundred salmon have thus far been harvested in three set nets and four dip net openings. I was wondering, if you say that there are major problems, what are the problems? The major problem area of the state seems to be the Kenai and there is subsistence fisheries happening there, so

where do you see the problem?

MR. CAMPBELL:

Mr. Chairman, Senator Hoffman, what we have seen so far in Cook Inlet is only the tip of the iceberg. Very specifically, our Board of Fish has been very open about the fact that they have been trying to avoid grappling with what for them is almost a totally unworkable solution. In Cook Inlet they did adopt some limited subsistence fisheries. Basically they did that -- and they were very frank and open about it -- in an attempt to forestall further action while they waited for the Legislature to act. One year ago -- excuse me, about a year and a half ago, the Board of Fish met here in Juneau to consider Southeast fisheries. During that time they started adopting subsistence fisheries for Southeast, and they got about a third or a half way through the process of adopting various fisheries for Southeast and they threw up their hands and they said, "This is never going to work." They repealed them all and they specifically said, "We're going to have to wait until the Legislature fixes this. This is unworkable." But what they've also very clearly said to us now is that they are out of running room. They are in a corner. They have - and I'm not saying that this is right at all - but they have been very seriously trying to evade the law for the last two years in terms of what somebody can mandate they do. But they have said if the Legislature fails to act now, that they are out of running room.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Just a statement then. The system seems to be working in one of the most controversial areas in the state. It doesn't seem to be a problem.

SENATOR KERTTULA:

Are there any other questions? You have the floor. Senator Zharoff first, excuse me.

SENATOR ZHAROFF:

Thank you, Mr. Chairman, Mr. Campbell. Just a clarification

there on a question that was asked earlier by Senator Adams. I don't know if I got the straight answer or maybe an understanding on it, is with the passage of this bill -- and remember this is supposed to be a yes or no answer and I don't think we got that. Does the state receive full management of fish and game?

MR. CAMPBELL:

With the passage of this bill, the state will not manage unless the Secretary says we comply -- and we're not thoroughly expecting that. But we will not manage game on federal lands and those very limited amount of fish that are on non-navigable waters on federal lands. The counter point, sir, that I would offer to that is we do fully retain management of almost all fisheries resources and about half the game. Were we to pass just a constitutional amendment by itself, what we would effectively do is give up the right to make the key policy decisions and management decisions ourselves on all fish and game, because at that point, all of those issues come under the issue of federal jurisdiction, that if someone feels our decisions are damaging subsistence, they can go into federal court.

SENATOR KERTTULA:

Senator Uehling.

SENATOR UEHLING:

Mr. Chairman, a follow-up to Senator Zharoff's question. I think that would be the concern possibly for the Committee of the Whole's information if we could have any correspondence that would assure the committee of the Department of Interior of the federal government's wishes in that direction in regard if there is written information or letters on this legislation before him so that we could get some sort of assurance that that would be the direction that they would take. I mean, it sounds still -- I really question what they're going to be able to do with that. I'm sure we're going to hear from them tomorrow as well. Maybe you could respond to that.

MR. CAMPBELL:

I could, Mr. Chairman, Senator Uehling. I will certainly

check. I'm not aware of any such written information. If there is anything, we will furnish it to you, but I don't believe there is. The one thing that I do know is on this issue there are no assurances of anything, but it's a matter of doing the best we can.

SENATOR UEHLING:

Mr. Chairman, also on that point then, so if this bill does not pass -- in just a few words, how much worse will it be?

MR. CAMPBELL:

Senator Uehling, if this bill does not pass, all five hundred and fifty thousand Alaskans will continue to be eligible to be subsistence users. The Boards of Fish and Boards of Game will continue, will have to face up to the problem of providing subsistence fisheries on any stock and population where folks can go in and show that that stock has ever been used for subsistence. They will have to start doing that, I think. It is the view of the Commissioner of Fish and Game -- and unfortunately he would be with us except that he's down at the House Committee right now testifying -- that over the next several years we would see increasing restrictions, particularly in areas near populated areas. That's where there would be the biggest damage. If I could also, sir, everybody wants a total solution here. There isn't anybody, I think, who probably wants a total solution to this more than the Governor. We have spent about a year and a half now trying to find such a solution. We have the problem that when you talk about a total solution some people feel it's just pass a constitutional amendment. Some people feel it's pass a constitutional amendment and maybe a statute change. Some people feel it's pass a constitutional amendment plus some minor modifications of ANILCA and fix the problems the ANILCA problems cause. Some people feel it's just amend ANILCA. Some people feel it's to repeal ANILCA. But despite our best efforts, we've been darned if we can get anything that approaches say a two third consensus on any of those solutions. So what we finally made the decision to do was quit focusing on what we couldn't do and focus

on what we could do, and focus on what we've had to fix or we were going to have some real problems.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Mr. Chairman, thank you. I'm sure that we are not all entirely happy to be here this time of year. I know that it is creating a lot of hardships for not only us but the people we represent in the districts we have. I would like to see something constructive come out of this. I don't know at this particular point how we're going to reach that point, but I don't believe, number one, is that we're going to have a constitutional amendment only. I'm not quite sure we're even going to address a constitutional amendment. That's going to be determined by the Legislature sometime in the near future. So I don't believe there's going to be -- there might be both. There might be just a statute. There might be nothing. I think nothing is probably the worst scenario of all. Number one, the first question would be, can we get anything constructive out of just a statute? How is that going to add to at least solving this problem, or even add to our image when we go home? Thank you.

MR. CAMPBELL:

I appreciate that question because what we can do is we can set up a good workable system under state law that protects subsistence users, that gives it the preference and protection it deserves, that does it in a way that will apply to almost all fish. By the way, fish, when you break it down, is actually by far the larger part of subsistence than game overall. So it protects subsistence users in those areas. It protects subsistence users on the half of the game that we do manage. That protects people who would rather access the resource under sport use, sport fishing; and protects people who have to access the resource under commercial fishing for their livelihood. What we can do is a major step down the road to having a good workable system of overall management for fish and game. One of the things

and I assume that at some later point or whenever you wish, we'll actually go into the details of the bill. But it has been my experience when we sit and go through the bill and what it does, one of the reactions is, what is it folks are opposing? So I do hope at some point I'll have that opportunity.

SENATOR KERTTULA:

You have the floor, Mr. President.

SENATOR ELIASON:

The next question would be, you made some reference that under present court ruling that everyone residing in Alaska is a subsistence user?

MR. CAMBELL:

Yes, sir.

SENATOR ELIASON:

And I assume they have to be Alaskan residents and I assume then that by a year's residency you would also qualify; you could be in from New York or California or wherever it might be. But they also reference that fact that we're going to protect the rural areas or the areas which were meant to be protected by ANILCA. They're already protected, it seems to me, at this point. There's no question that they are also eligible. However, the question I have is that under this bill, the Governor's bill, they have the same protection, except I live in a community that will be excluded by federal law or by the Governor's bill, unless there are certain things you do, which I don't have a lot of problems with that because we never had this problem until somebody came along and created it for us. Really I don't quite buy there being a major change in Southeast Alaska relative to whether it's subsistence use or whether it's personal use; they all seem to be the same. We never had that problem. I doubt if we're going to have it in the near future. However, there is a lot of concern out there that when this scenario changes in the future, it's going to be more people, more users, and at some point in time, subsistence is going to have to be triggered in. Those people that want that protection are going to receive it one way or the

other. But under the July 1, what is going to happen to the communities of Sitka, Juneau, Anchorage, Fairbanks, and Kodiak as it relates to those people who depend upon subsistence? How are they going to be treated under the federal law?

MR. CAMPBELL:

Under federal law, the communities of Anchorage, Fairbanks,
. . . [Tape ends midspeech]

Tape 1,

Side B

[Tape begins midspeech]

MR. CAMPBELL:

... Juneau, Ketchikan, at least a good portion of Southcentral surrounding Anchorage, will immediately go into urban status. They are already that way right now under the federal regs. That will continue. The federal EIS has specifically identified Sitka, Kodiak, and Unalaska as three communities that they expect within the next ten years will go into the urban status and, in fact, they specifically say they expect Kodiak and Sitka for it to happen almost immediately, and for Unalaska out towards the end of the ten years. They use a flat population figure of seven thousand. At that point, under federal subsistence laws nobody in that community is a subsistence user. Senator, I'm fairly familiar with your community and I know for a fact that there are community of people who live within Sitka whom I think by anybody's definition are subsistence users. Under this bill, those people, though they would have to go through an application process because they live in the urban area, would be able to continue subsistence activities. Under the federal law, when that gate slams shut, they are out never to be in again.

SENATOR ELIASON:

Mr. Chairman?

SENATOR KERTTULA:

You have the floor.

SENATOR ELIASON:

What you are saying, in effect then those people whether they

live in Sitka, Ketchikan, Unalaska, Kodiak, Juneau, Anchorage, Fairbanks, and other areas in the state with a population of seven thousand or more, at July 1 under federal regulations, even though they've been subsistence users ever since they've been able to do that method, they will be not qualified? How do they qualify under federal law?

MR. CAMPBELL:

Sir, under federal law the issue of qualification or not depends, at least as the Department of Interior is currently interpreting that law, depends totally and solely on your residency. If you live in an area that is under twenty five hundred, they present that area to be rural and you are qualified.

SENATOR ELIASON:

Across the board?

MR. CAMPBELL:

Across the board, everybody in the community. If you live in a community between twenty five hundred and seven thousand, they examine your community and make a determination whether your community is in rural status or urban status. If you're rural, everybody in the community qualifies. If you're urban, nobody does. If you're over seven thousand, they presume that you are urban. If they look at the community and that's true, they say nobody in that community is eligible for subsistence under any circumstances. I want to emphasize that both Kodiak and Sitka, while they identify it in the EIS as happening in the very near future, that will probably not happen as of July 1, but it will happen very quickly.

SENATOR KERTTULA:

You have the floor.

SENATOR ELIASON:

Just one follow-up. Believe me, I'm not really concerned totally about my particular community. I just wanted to sort of put this in perspective. What you're really saying then is if we do nothing, everyone in the State of Alaska at the present time is qualified for subsistence, right? Except when the feds come in,

and then they're going to say those people residing in those communities which we mentioned are not qualified even though they've been a qualified user for years; they are unqualified, they cannot be qualified.

MR. CAMPBELL:

Yes, sir.

SENATOR ELIASON:

So you're saying that's the option. Do something and qualify some of those people or do nothing and nobody does it.

MR. CAMPBELL:

Sir, we're stuck in this totally schizophrenic situation between the state law and the federal law right now. Under the state law everybody is, everybody in the whole state. Under the federal law nobody in those communities over seven thousand is. And I'm using your community, sir, only as an example, but actually the federal EIS talks about it because it is in a unique situation in that certainly all the waters around it are owned by the state. They are clearly navigable waters, no question. But almost all the land around it is controlled by the federal government. So your community will be in a situation where everybody would be a subsistence user for fish and nobody would be a subsistence user for game.

SENATOR KERTTULA:

Senator Duncan, you have the floor.

SENATOR DUNCAN:

Thank you, Mr. Chairman. Mr. Campbell, I think this question has been asked several times and I just want to re-ask it again because your last answer to Senator Zharoff confused me somewhat. The question that has been asked several times is, does the Governor's bill specifically forestall federal management of our fish and game resources, federal takeover?

MR. CAMPBELL:

Senator, the answer I've given is, we do not believe so. We will meet with the Secretary. We will try to sell that. But we're not saying that's the reason to do this.

SENATOR DUNCAN:

Mr. Chairman, as a follow-up, then you said to Senator Zharoff, "But on the other hand let me tell you what it does do is allows us to maintain almost complete control of fisheries resources and at least fifty percent of our game resource." Now explain to me if it does not forestall federal takeover, explain exactly what you mean when you say that it does allow us to maintain almost complete control of fisheries resources and fifty percent of our game resource.

MR. CAMPBELL:

I'd be delighted to, Senator. It seems that somehow this sort of myth has developed that what's going to happen on July 1 if we don't do something is all of a sudden the feds are going to come in and control everything in the state. All fish and all game; everything. That is simply not the case. The only thing that ANILCA does is it gives the federal government the right to control fish and game on federal public lands. And because the state controls navigable waters, even where they run through federal lands, we control almost all fish. There is some fish that are controlled by the feds, but a very, very small percentage. So basically the only thing the federal government -- and they're doing this right now. The only difference that happens on July 1 as opposed to what's happening right now is the regs that we're under change from temporary to permanent.

SENATOR DUNCAN:

Well then, Mr. Chairman, passage of this Governor's bill does not change what will happen if we don't pass it. The inference I got from you was that by passage of this bill then we would maintain almost complete management of our fisheries and fifty percent of our game resources. That will happen whether we pass anything or not, because those are non-federal areas, correct?

MR. CAMPBELL:

Senator, if I can, right now we're controlling almost all our fish and about half our game. But we're doing it with a maimed piece of law that is left after the court plucked its heart out,

and it doesn't work. So, yes, we're controlling it but it's like trying to drive a car that the alignment is totally skewed. You keep running off the road. We're saying we need to fix it for our own control, our state law.

SENATOR DUNCAN:

Mr. Chairman. I just want to make it clear that I'm not convinced yet, Mr. Campbell, that passage of this legislation does anything different than what would happen on July 1 anyway, if we don't have a constitutional amendment.

MR. CAMPBELL:

Sir, we're not disagreeing with you and we're urging that while that is something we feel is a real first step towards eventually regaining control, the overriding reason to pass this bill is for our own state management of our own resources because we're in a crisis there.

SENATOR DUNCAN:

Can I go just very quickly then to the Southeast game situation.

MR. CAMPBELL:

Yes, sir.

SENATOR DUNCAN:

And I want you to get into more detail and explain to me why you believe this piece of legislation forestalls a takeover in terms of disruption of that fishery to a great extent. Assuming we don't do anything, we have federal management that excludes subsistence uses for Ketchikan, Sitka, Juneau, and large communities in the state. It would allow subsistence use for communities below a certain population. I'm trying to get clear in my mind why you believe that that's going to seriously disrupt the Southeast king fishery. [Indisc. - simult. speech] actually a realistic assumption and skip the scare tactics.

MR. CAMPBELL:

I'd be happy to go through that for you, Senator. First of all, federal management, whether the feds take over or not or whatever, has almost nothing to do with the king salmon in

Southeast. Because we're talking almost entirely navigable waters and we're talking about state management whatever we do or don't do. What we are talking about though is right now in state law -- as in ANILCA but as a side note. There is no definition whatsoever for customary and traditional. There is a requirement right now in existing state law that the boards look at fish stocks and game populations and decide which ones have been customarily and traditionally subject to subsistence use. But Southeast kings have been excluded from subsistence use basically since statehood. Under the situation that we were in, we had criteria that defined what was a customary and traditional use and Southeast kings did not fall under that. Because parts of those regulations have been struck down in response to the McDowell decision, we're in a situation now where if there has been a fish stock and at some point back in the past it has been used for subsistence -- and, sir, there are very few fish stocks in the state that at one point or another have not been used for subsistence -- then it is subject to subsistence. Under state law everybody in Southeast, everybody in the state but we're talking Southeast here, is then eligible to a preference on those fish through subsistence above any sport use and above any commercial use. The specific way that our bill deals with that particular issue is we have what we think is a good workable definition of customary and traditional. Specifically, it says, "customary and traditional means non-commercial, long-term, consistent and ongoing dependence of the taking and use of fish and game in a specific area and the use patterns and harvest levels of that fish and game that have been established over at least one preceding generation of users." Under that definition, sir, Southeast kings are not subject. The Kenai kings have that problem but they have a little bit of additional problem in that they were formerly out because they were in an urban status. That's changed. Is that a response to your question? I'd be glad to provide more detail.

SENATOR DUNCAN:

I think that is a response. I guess I would say, though,

without this bill -- what you're saying is that without this bill Southeast kings would become subject to subsistence use which could cause some disruption. However, without this bill if they became subject to subsistence use, the major population areas of Southeast or residents of those major population areas, Juneau, Ketchikan, and Sitka, would not have subsistence priority on Southeast kings.

MR. CAMPBELL:

I apologize, I'm in a little trouble here.

SENATOR DUNCAN:

If I could repeat myself then. I think what you're saying is that Southeast kings could become a subsistence fishery. Is that what you're saying?

MR. CAMPBELL:

Right.

SENATOR CAMPBELL:

And your legislation would put a definition into it which would protect that fishery to some extent. What I'm saying, without this legislation, under federal management, residents of Sitka, Ketchikan and Juneau would not qualify for subsistence use anyway. So they would not be impacting that fishery, is that correct?

MR. CAMPBELL:

No, sir. Federal legislation is basically irrelevant to fishing use. The federal government does not have control of kings in Southeast or who is or isn't eligible. Without this bill, every Alaskan, everybody in Southeast, everybody anywhere in the state is eligible to be a subsistence user and go out for the kings. Let me just put it this way. The Governor does not feel that it makes sense for him to be able to be a subsistence user to go in and say, "I want a subsistence use of the kings. Shut down the commercial fishery so I can get mine."

SENATOR KERTTULA:

Are there further questions? Senator Eliason.

SENATOR ELIASON:

If I may, Mr. Chairman.

SENATOR KERTTULA:

Then Senator Adams and Senator Halford.

SENATOR ELIASON:

Pursue this just a little further now. You're saying on one hand that five hundred and fifty thousand people in the state of Alaska would be eligible for subsistence on that particular stock. But on the other hand you're saying with the exception of the people residing in these communities: Ketchikan, Sitka, and Juneau, plus Anchorage, Fairbanks, and the rest of them. They were excluded because they live in an area which the federal government says does not qualify for subsistence, right? Isn't that what you're saying?

MR. CAMPBELL:

Sir, if I can. We have three different things that we're talking about here. One is federal management, okay, and there the feds say if you're over seven thousand you're not a subsistence user.

SENATOR ELIASON:

Right.

MR. CAMPBELL:

Okay. But they only get to say that for the federal lands. Say here in Southeast, they can say it in the Tongass National Forest. You can't be a subsistence user and go in and hunt deer under subsistence in a subsistence hunt. They don't get to say it though for the fish out in the waters because we control the fish, regardless of what the feds do or don't do. So there, for the fish, we're stuck with this screwy system where all of us are subsistence users. I don't think all of us should be subsistence users. I know I shouldn't. So we're stuck with this crazy system where for the feds for the land, again using this potential example, get to say who is and who isn't; the state law controls for the waters, because they are navigable waters, and the state controls the waters. What our bill would do is our bill would allow everyone - and this is the third scheme - for all the

waters which we control and for the state lands and private lands which we get to regulate, it would allow anybody who is in ...

SENATOR ELIASON:

Mr. Chairman?

MR. CAMPBELL:

Go ahead.

SENATOR ELIASON:

The question wasn't what would happen under your bill. The question is what would happen without a bill as it relates to that specific subject. What happens?

MR. CAMPBELL:

Without a bill everybody in Southeast is eligible or is a subsistence user and eligible for whatever subsistence fisheries there may be. I think that without a bill, again using that example, Southeast kings would be subject to subsistence. So without a bill everybody is eligible to be a subsistence user, which damages the people who really are, damages the commercial users, damages the sportsmen.

SENATOR KERTTULA:

Senator Hoffman was asking and Senator Duncan, Senator Adams -- Senator Duncan, do you have anything on this particular point of view? If you do, why don't you ...

SENATOR DUNCAN:

No, actually I'll ask a question later on after we get the Attorney General's report, I have a question to ask about a constitutional amendment.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Thank you, Mr. Chairman. Sort of in line with Senator Sturgelewski's question earlier, you alluded to the fact that you have been negotiating with the Department of Interior and have at least communicated. In these discussions, have you discussed if the state is in compliance with ANILCA? And don't you believe that first of all that you should have been in negotiations on a

piece of legislation before calling a special session, so that hopefully there was some type of agreement so the state can retain federal management?

MR. CAMPBELL:

Sir, if I understand your question correctly--and correct me if I'm not getting this right. As I indicated earlier, the Governor has had an ongoing dialogue with the Secretary of Interior regarding this affair. If what you're asking is, should we have been negotiating on some piece of legislation that everybody could come to an agreement on before we got here, I'd say, sir, we did that for a year and a half. And we've probably gotten closer than anybody has ever gotten before, but we have not reached a point where everybody agrees on everything. I know basically where it broke down is there was an issue on the issue - - we talked for a while about a constitutional amendment, which was tied by effective date to a change in ANILCA. People have said, "Just let the people vote." We said, "Okay, we have compound problems here; we have problems in state law, state constitution; we have problems in federal law. Why don't we put it all on the ballot and make the constitutional amendment effective when we have the ANILCA change?" And folks said, "Oh no, we don't them to vote on that." So I think it was sort of a selective issue on what the people might want folks to vote on or not. Sir, we've done our best and we are continuing to do, and we emphasize we are continually open to try to work something out. But what we can't do is not do anything because we can't all agree on everything.

SENATOR ADAMS:

Mr. Chairman, a question.

SENATOR KERTTULA:

You have the floor.

SENATOR ADAMS:

I'm hoping, Mr. Chairman, that you'll rule at a later date that this piece of legislation is not trying to correct ongoing litigations in the State of Alaska. I'm hoping that that's not

what we're trying to do with this piece of legislation. What's going to happen if we pass the Hickel bill and then the plaintiffs win the Katie John lawsuit? Doesn't that mean federal management of our fisheries? Wouldn't we be worse off in that particular situation if you theorize what will occur if we don't pass the Governor's bill?

MR. CAMPBELL:

Sir, there is a wide spectrum of options where the Katie John and State v. Lujan case may come down. It could come down from total state control without exception on every speck of navigable waters to what the AFN has formally asked for in their brief, which is to ask the federal judge to order the federal agencies to assert control over the entire Alaska water column and manage it for the benefit of subsistence. That's the two ends. I don't think anybody thinks either of those ends are very likely. What we do think is very likely, we think is highly likely, and again I defer to the Attorney General's Office on this, is that the state will retain control on the vast majority of state waters. Really where the issue is in contest is in very selected places like Glacier Bay, where, for instance, we think subsistence should be allowed and it's the federal government who thinks subsistence should not. Or we think commercial fishing should be allowed and it's the federal government who thinks it's not.

SENATOR ADAMS:

Mr. Chairman, I will ask at a later time that we look at this piece of legislation so we're not trying to solve all ongoing lawsuits. Mr. Campbell, can you tell me, going through the criteria of the Governor's bill, that you ate one hundred twenty five pounds of fish? Have you eaten -- according to your bill ...

MR. CAMPBELL:

Sir, I have no problem saying that I easily exceed that, but I don't meet a number of the other criteria.

SENATOR ADAMS:

How are you going to prove that to our Attorney General?

MR. CAMPBELL:

Sir, one of the things that we wrestle with a great deal is what our Supreme Court said is it is entirely permissible to devise a set of criteria that qualify people for subsistence and not for subsistence. We've spent a great deal of time with people from throughout the state with the Subsistence Division and others trying to come up with a set of criteria that effectively described that way of life and made sure that people who are subsistence users--whether it be an elderly woman or a young person just coming in or whatever--did qualify and try to balance that against not setting a criteria up so we were going to get half of Anchorage or Juneau or Fairbanks qualifying. We went through it and we made no claims whatsoever that these criteria, or for that matter anything else in the bill, is perfect. What we do make the claim on is it is something that a very diverse group of people spent a tremendous amount of time on and it's the best that we've been able to come up with. And that when we actually went through and ran case studies through it--and there is an extensive series of case studies in history that we provided to all Senators and I urge you to look at them -- it worked.

SENATOR ADAMS:

Just a follow-up question just for you, Mr. Chairman. I would like to know if the Chair expects our Washington Governor's Office, John Katz, to testify on the fact of the chances of amending ANILCA, if we can have that.

SENATOR KERTTULA:

I had asked -- yes.

SENATOR ADAMS:

And the second one is, since this piece of legislation does not have a fiscal note attached to the cost of enforcing the criteria here, I would like the Administration or us to have at least a fiscal note which they will be asking for as supplemental when we return.

MR. CAMPBELL:

Mr. Chairman, fiscal notes are attached to the bill. We have indicated that they are there for your information and that we

intend to ask for the funding in a supplemental at the start of next session.

SENATOR KERTTULA:

Senator Zharoff, then I believe it was Senator Duncan again who was trying to get the floor. Senator Zharoff, do you wish the floor yet or do you waive?

SENATOR ZHAROFF:

Yes, Mr. Chairman, I just had one question but before I ask that, if I could just get a clarification on a statement there and maybe I'm misunderstanding, but in regards to the fisheries issue down here in Southeast. We're saying that we have, as a state, control over management for the fisheries here in Southeast Alaska over federal regulations or laws or whatever you want to call them?

MR. CAMPBELL:

Yes, sir, that is what I'm saying.

SENATOR ZHAROFF:

Could you answer the question then in regards to the U.S./Canada treaty and how that affects, you know ...

MR. CAMPBELL:

If I can, there are a number of federal issues--the U.S./Canada treaty; federal government's control over halibut; for instance, the federal government's control over marine mammals, et cetera -- that certainly affect our management of fisheries, but none of those have anything to do with the federal government's right to demand a particular result or qualify people or anything else in any connection with subsistence.

SENATOR ZHAROFF:

Well, it was just sort of a clarification there and I don't know if it was very clear but I'll follow up on that at a later time. Mr. Chairman, I'd like to ask a question and maybe make a statement afterwards. The Governor's bill--and I don't know if I'm really getting into the meat of the bill just yet or even parts of it, but you had made reference there to urban folks qualifying for fish and game. I guess the question is where do they get the

resources for their allocation of fish and game?

MR. CAMPBELL:

Sir, if I can, the issue there is the fact that urban residents can, through an application process, qualify for subsistence. In this bill, and I think you are aware, there are three levels of presumption. We're presuming everybody in communities under twenty five hundred is; we're presuming our communities between twenty five hundred and seven thousand they have to assert that they are but then they qualify; and in urban areas, there is a fairly detailed application process. The question then is, for instance, I'll use Juneau right here as an example. If a person in Juneau becomes a subsistence user where can they access those subsistence resources, because another specific provision of this bill closes those areas that are described as Type Three Communities to subsistence use within the communities. So in other words, what would happen if Juneau is clearly a Type Three Community, it's an urban community, the Gastineau Channel up would be closed. The back side of Douglas would be closed in particular. But if I'm a subsistence user here, if I qualify, which I wouldn't, I can go almost anywhere from almost up to Yakutat to almost down to Ketchikan with the exception of the immediate closed area here of metropolitan Juneau, the immediate road system. In this case, we're talking Point Retreat, Point Bishop, Echo Cove, bounded by those boundaries. I think anybody can get outside those boundaries relatively easily and I believe very cheaply and they could access subsistence resources throughout that very large part of Southeast, excepting that immediate closed area.

Sir, the reason we did that was a policy call for you is that we felt in those areas of the state that are the most densely populated and have the heaviest use of their resources, while it was important to provide to allow people there to be able to be a subsistence user, or they can also, by the way qualify, to go back to say a village of origin and subsist in that area, which now lots and lots of folks do but unfortunately it's all totally

illegal under existing law. But if we allow, for instance, subsistence nets in the Kenai River, I think you would have warfare on this issue. One of the things we have strived to do is provide something that over time would be judicially and politically stable.

SENATOR ZHAROFF:

Mr. Chairman, I just have one comment, one statement to make, it won't be a question. Several times it has been alluded to here that the group that put this together -- and I have the utmost respect for them and the work that they tried to do and accomplished to come with a solution -- but it has often been referred to that this was the best that they could do. Quite often we find here that often our best work has the worst results or consequences for our best intentions. In this case here, we may be in that situation.

SENATOR KERTTULA:

Senator Duncan has been seeking the floor for some time. In about ten minutes we'll have a five-minute recess and come back to finish with Mr. Campbell and go on with the Attorney General as soon as is possible. You have the floor.

SENATOR DUNCAN:

Thank you, Mr. Chairman. Mr. Campbell, I'd like to go back to the Southeast question again and ask about the present federal regulations or federal regulations that are presently in effect. The information I have is that the federal regulations that are presently in effect say that the waters of Southeast Alaska are legally non-navigable, but that these regulations define that the policy matter to exercise federal jurisdiction over Southeast Alaska waters at this time. And I guess the question would be what federal regulations say, doesn't that mean that the Secretary recognizes that he does have a legal obligation to manage Southeast Alaska fisheries right now?

MR. CAMPBELL:

No, sir, I don't concur that that's what the regulations say.

SENATOR DUNCAN:

Do you have a copy of the regulations?

MR. CAMPBELL:

I do in my office.

SENATOR DUNCAN:

Could you make those available then to the committee? I'd like to see them.

MR. CAMPBELL:

I'd be glad to.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

In response to a question that Senator Adams had, he said that this bill or nothing in it is purported to be perfect. The Governor stated that this bill would provide certainty to the subsistence issue. Now I find both of those comments to be contradictory, particularly when we all know that the people of this state can go to the state courts and file injunctions or suits on the subsistence question, and they could do the same thing in the federal courts. It seems to me that even the question that Senator Adams had about how do we prove eligibility, that whole thing is going to end up in a nightmare of lawsuits that are going to tie up our courts and confuse the people of the state even further -- just that one issue on the eligibility requirements. It seems to me the issue of the common use clause of the Constitution is always going to be there. Why, if everyone here says that there should be a subsistence preference, can't we just say, "Okay, let's see if the people want to make that change in the Constitution?" Let's put it before the people and let them decide. This issue has been divisive too long in this state, much too long, and we should be working to that end and let them speak. Why?

MR. CAMPBELL:

Sir, you've raised several issues. The first is the specter of continued litigation over this bill. One of the things that I will guarantee you - and I will guarantee you very few things in

this issue - but I will guarantee you that regardless of what the state does, anything we do will result in continued litigation. But one of the things that we took great pains to do in drafting this bill was try to look at the causes of litigation, look at the issue, what was it that was causing people to feel that they had to sue? What was it that was causing people to feel that the system was not responding to suit them? Then we've tried in a number of ways to adapt this bill and learn lessons from those issues of litigation to reassert the will of the Legislature in a manner that will at least reduce the chances of litigation and will strengthen the state's position in terms of winning that litigation.

The second question that you asked is why not then just a constitutional amendment to give us the preference if we all agreed. Sir, several answers. The first, as I've stated earlier, is simple passage of a constitutional amendment by itself, if it does restore the rural preference, would put us back in compliance with federal law. But actually what we feel what it would do is guarantee the continuation of that litigation because in federal law there are no definitions for many of the key terms. As I've said, nobody is quarreling with the intent of ANILCA, and it isn't that we're a lot smarter or anything else than the people that drafted it. It is just that we've been living with it now for over a dozen years and so we've found out what parts of it work well and what parts of it don't. If I can, simply saying we're in compliance then gives -- at any time people think any issue of management by the state Fish & Game is not in compliance with whatever somebody might think is the legislative history of ANILCA or a judge's interpretation of the undefined terms, it gives a federal judge the right to come in and overturn that decision.

SENATOR HOFFMAN:

But the question is why don't we give the people the chance to vote on rural preference? Regardless of what implications that may have, why can't we present that to the people and see if they want to choose that option as the resolution to this question that

has been around this state for decades?

MR. CAMPBELL:

Sir, if I can again as ...

SENATOR HOFFMAN:

Give them the choice. Are they not smart enough?

MR. CAMPBELL:

One of the things that we talked about was giving the people the choice, and giving the people the choice to vote on a constitutional amendment connected by effective date to an amendment to ANILCA, which would allow our bill to comply. People said no. I mean, people were fine, you know, let the people vote on one part of it, but don't let the people express their will or vote on the other part. What we're saying is if we're saying all we have to do is fix the whole thing, let's fix the whole thing. I mentioned earlier that there are least five different views of the way to a total solution, and one of the things that I found is I'll be darned if I've seen anything that gets to twothirds in this body or in the House on any of those solutions. That being the case, we're not arguing with you on what is or what isn't; we're just saying instead of focusing on what we can't do, let's focus on what we can.

SENATOR KERTTULA:

The Chairman is going to entertain one more question from Senator Sturgelewski. Then we're going to recess for five minutes and hopefully very quickly get to the Attorney General. You have the floor.

SENATOR STERGULEWSKI:

Mr. Chairman, very simply, let's let the Legislature worry about two thirds for a little while -- couple of days maybe. Will the Governor support a constitutional amendment if two thirds of the Legislature would support that, along with a bill that would meet the intent and concerns over the managing of subsistence?

MR. CAMPBELL:

Senator Sturgelewski, Mr. Chairman. The Governor himself would have to answer that, but it is my impression from him that

just a constitutional amendment and bill will not solve the other outstanding issues of compliance that are created by ANILCA. And I can go through those if you wish. They have to deal with issues such as customary trade, lack of definition of customary and traditional, issues of what is the standard for allocation whether it is reasonable opportunity or least adverse impact. All of those are outstanding open issues which basically are wreaking havoc with our management and that, without an attendant ANILCA amendment also, do not solve our problems in terms of management.

SENATOR STURGELEWSKI:

Mr. Chairman, if it would be appropriate through the Chair to ask for the presentation, when we get into the detail, a proposal or suggestion on behalf of the Governor that what are the things that are needed to "solve this issue" which may include an amendment to ANILCA, but if so, with some specificity so we know what we're talking about.

SENATOR KERTTULA:

I'd like Mr. Campbell and Mr. Attorney General to note that question now. I'm going to appoint a subcommittee before recess to contact the federal agencies and the United States Senators and Congressmen and Mr. Katz to set up periods in which they might testify and might contribute or any questions or answers they may have to the legislation that's before us. I appoint Senator Cotten, the Resource Chairman, as Chairman of the committee. I appoint Senator Duncan. I appoint Senator Sturgelewski as the committee of three to contact them early tomorrow morning bringing forth the questions of this committee and their own and hopefully to get some response. We'll recess for five minutes.

RECESS

3:31 - 4:00 p.m.

Tape 2

Side A

SENATOR KERTTULA:

I'd ask that you let the fan run as long as you can stand it for its noise because this place becomes unbearable real quickly.

I thank the group for not talking very much because it allows us to hear what's going on. The acoustics are not too good here -- solid surface.

Mr. Campbell, you have the floor. Are there further questions of Mr. Campbell? Certainly during the discussion of the legislation itself in detail. If not, Mr. Attorney General you are welcome to come forward for any presentation you wish and any questions that might be asked by the Senators. I know it was a good long session, Mr. Campbell, and we appreciate your candid and honest efforts here. Do you wish a glass of water or anything, Mr. Attorney General?

CHARLES COLE, ATTORNEY GENERAL, DEPARTMENT OF LAW:

Or anything, yes sir, if I may, but it is probably not available right now.

SENATOR KERTTULA:

I thought about that, too. You have the floor, Attorney General.

ATTORNEY GENERAL COLE:

Mr. Chairman, ladies and gentlemen of the committee. My remarks are brief. I simply say that in my view the Subsistence Advisory Council's proposed legislation is, in my considered view, constitutional. And that completes my remarks.

SENATOR KERTTULA:

We like those kind of responses. You have the floor, Senator Cotten.

SENATOR COTTEN:

Thank you, Mr. Chairman.

UNIDENTIFIED SPEAKER:

That's the kind of testimony we encourage.

SENATOR KERTTULA:

Yes, that will be long remembered.

SENATOR COTTEN:

I made some remarks earlier following up Senator Adams' remarks about people's opinions about the constitutionality of the legislation the Governor has introduced. I pointed out that our

legislative attorneys had given us an opinion that suggested that at least one part of it was not constitutional and wouldn't meet that test. I didn't suggest by that that I necessarily agreed with them. I find myself in agreement with the Attorney General and in disagreement with our own attorneys on several subjects. I'm not sure how I feel this time but I wanted to make that information available to the committee.

ATTORNEY GENERAL COLE:

Thank you.

SENATOR KERTTULA:

Are there further questions or statements? Senator Adams, Senator Menard, were you seeking -- Senator Adams, then Senator Menard. One time around the table again.

SENATOR ADAMS:

Thank you, Mr. Chair. As I stated earlier, I hope that this piece of legislation, the Governor's bill, is not one to solve litigations that are ongoing. The question I asked Mr. Campbell, what's going to happen if we pass the Hickel bill and then the plaintiffs win? I don't want to see the state lose, but if the plaintiffs win the Katie John lawsuit. Doesn't that mean federal management of our fisheries?

ATTORNEY GENERAL COLE:

Well, Senator, as you know at the outset, chose to refer to this bill as the Subsistence Advisory Commission's proposed legislation. I did that after thinking about it a bit because I think it is important that it be clear that this is indeed not Governor Hickel's bill, because he has said publicly on occasion after occasion if it were indeed his proposed legislation, it would not be as it is. But this bill is a composite of views of many people in Alaska that came together after lengthy discussions. Therefore, I think it is important to refer to the bill in that fashion. Now, I think that it's not possible for me to say what would happen "if the plaintiffs or the interveners in the Katie John prevail" because one would simply have to see what first the United States District Court and the lower court said,

and then what the appellate court says before I would be able to effectively evaluate the results.

SENATOR KERTTULA:

Further questions? Senator Menard.

SENATOR MENARD:

Thank you, Mr. Chairman. Mr. Attorney General, I guess we've heard the testimony of Mr. Campbell where he went through and said this piece is one of the pieces that would have solved the subsistence, though it's not the only part of the puzzle that has to come in there. Then at that point, he said that there would be, if this bill passed, then there would be negotiations between the Governor and the Interior and seeing if agreements could be reached in that. And you heard the rest of the testimony about the Southeast king issue. On all that statement, I just wanted to hear, are you in agreement with what Mr. Campbell stated? Is there any glaring disagreement that comes out or is something different?

ATTORNEY GENERAL COLE:

Well, there was a lot of testimony there and I'm not sure that I'm in a position to agree with everything which was said and not said. Let me see if I can state my position generally on some of those issues. One, this proposed legislation would not, in my view at this time, prevent the permanent regulations of the Secretary of Interior from going into effect on July 1. In my view, this proposed legislation does not comply with ANILCA. It just doesn't. It doesn't purport to, number one. I suspect that the Secretary of the Interior would agree with that.

I also believe that this proposed legislation would be helpful in the regulation of fish and game on the state and private lands in the State of Alaska. I agree with that. I've spoken at length with Commissioner Rosier about that and he feels very strongly that this legislation is needed to permit the proper regulation of fish and game in Alaska on state and private lands. I also think that ANILCA itself is flawed. I think as a matter of personal opinion it is bad public policy to make subsistence

depend on the place of one's residence. That's why ANILCA is basically flawed, in my opinion. Much better, in my view, is the granting of subsistence privileges, rights, if you will—to those who need subsistence. That is why the Subsistence Advisory Council's bill is far better than the solution to subsistence which Congress adopted in ANILCA.

Should we knuckle under again to the federal government and say, "All right, you win. We will change our Constitution to conform to the improvident solution to subsistence enacted by Congress"? I think not. That's the fundamental reason that I personally do not favor at this time a constitutional amendment. And as respect to the constitutional amendment, it's simply not so simple to say, "Oh, well, we'll just make some constitutional amendment and the problem will all go away." I mean, it becomes to what are the terms of that constitutional amendment. I say that I spent considerable time speaking with AFN representatives over what that constitutional amendment would say, and I must say we were considerably far apart when we decided that further discussions on that subject would not be fruitful. So, if that helps the statement as to what my views are in general, then it might have served its purpose.

SENATOR MENARD:

If I could follow up?

SENATOR KERTTULA:

You have the floor, Senator. You've waited a long time.

SENATOR MENARD:

If this bill passes, the consensus bill, if it passes then what do you perceive is the next step?

ATTORNEY GENERAL COLE:

Well, here's what I think. I think that this bill will work to address subsistence on the state and private lands, and I would hope that AFN true subsistence users would discover and conclude that they have nothing to fear from this bill. It is, in fact, a good bill. Indeed, this bill is more favorable to them, in my view, than is ANILCA. I mean, this bill provides that the true

subsistence users only have subsistence rights. You know, the lawyer, bush pilots, school teachers, and those people who live in rural Alaska and who are not true subsistence users, under ANILCA have subsistence rights. Under this bill, they do not. I would think in my view that the Native interests would say this is better, and furthermore, those Natives who have by, you might say, the pressures of modern civilization moved to the big city, have lost their subsistence rights. And if it's really true that that's part of their heritage and a part of their culture, then they should have those rights regardless of where they live. So I would say that in time, a year or two or three, when people find out from all groups of society that the bill really works, that there would not be this manic resistance to consensual amendment of ANILCA. That's worth, I think, discussing.

SENATOR RERTTULA:

Thank you, Senator Menard. Senator Duncan is next.

SENATOR DUNCAN:

Thank you, Mr. Chairman. Mr. Attorney General, I wanted to go back to the Southeast question that I'd asked Mr. Campbell and get your response on it. I think you've been provided with two pages of the federal register -- maybe you just received those. But anyway you've been provided with two pages. Is that your overtime slip?

UNIDENTIFIED SPEAKER:

This is my wife. She's signing her paycheck.

ATTORNEY GENERAL COLE:

Getting back to the Southeastern Alaska and the king salmon here and the regulations.

SENATOR DUNCAN:

Yes, I wanted to ask you a question first. I think what I asked Mr. Campbell was my point was that legally right now in Southeast Alaska the waters are legally non-navigable, and as I understand that goes back to this Submerged Lands Act that says that all coastal waters within federal reserves prior to statehood are legally non-navigable. In the Federal Register the language

that I was referring to on page 29356 in relationship to Southeast Alaska says that at this time the federal subsistence fishing regulations only apply to non-navigable waters on federal lands. However, based on the Submerged Lands Act for all Southeast Alaska waters are legally non-navigable, at any time the Secretary could apply federal subsistence regulations to all the waters of Southeast, because they are legally non-navigable.

ATTORNEY GENERAL COLE:

Senator, I can't answer that question. I've not made a definitive analysis of the "legally non-navigable waters" in Southeastern Alaska. Obviously, we know that in fact they are navigable; we know that by looking out the window. I'm sure now if for some reason because of some withdrawals or something back predating statehood there's somebody in the Department of Interior who claims that they are legally non-navigable, I can't say. But we can look it up, as Casey Stingam says.

SENATOR DUNCAN:

I guess, based upon my information, the Submerged Land Act does make those legally non-navigable. I'm just wondering, the language on page 29356 of the Federal Register seems to leave a lot of room for the Secretary to change the regulations and change their opinion on Southeast waters, because very clearly at this time there is not definitive. And I guess the point would be that at any time in the future the regs could be changed to make all of those waters and make federal subsistence regulations apply to all the Southeast waters. Do you disagree with that?

ATTORNEY GENERAL COLE:

I don't agree with it, except I would agree that this preparatory language is weasel-worded and done by some artful bureaucrat. There's no doubt about that.

SENATOR DUNCAN:

Probably an attorney.

ATTORNEY GENERAL COLE:

Well, there are bureaucrats who are attorneys too. We know that.

SENATOR DUNCAN:

Never mind.

ATTORNEY GENERAL COLE:

But it is weasel-worded and I don't know what they had in mind when they did it. Obviously, they had some sinister motive.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Could the sinister motive have been the Glacier Bay case that we're in court with considering and now arguing the very same issues? Certainly, I wouldn't expect them to publish in the Federal Register a position different than they're holding in court in the Glacier Bay case.

ATTORNEY GENERAL COLE:

Well, they noted there, Senator, "with the exception of Glacier Bay National Park" in that same sentence. So, who knows. I don't suppose you'd get a straight answer from them if you asked them what they have in mind either. So there's no use guessing.

SENATOR KERTTULA:

Senator Halford, you have the floor.

SENATOR HALFORD:

Going back to the current subsistence law. When the McDowell case was decided, there were ensuing cases that kind of led to the opinion that the subsistence law was in fact severable and that it should remain even without the rural preference. It seemed that that was supported by the state and went along with, and yet we've now had a couple of years of larger and larger problems coming from the assumption of severability in the whole preference. I wonder if the state might be advised that next time we see a case go forward, to take the opposite position with regard to the severability of the preference itself. If, in fact, the preference is applied across the board, as it has been applied by the courts following that Supreme Court case, it seems it makes it almost impossible to manage fisheries and game resources. And it may be that, in fact, without the rural preference, as I think Mr.

Campbell said, so much of the heart has been cut out of the law that the law is really ineffective and shouldn't be there. I wonder if the Department of Law would be inclined to review that whole question.

ATTORNEY GENERAL COLE:

Senator, it's too late to review that whole question. In the abstract, Judge Cutler in Palmer, as I recall, was the one who made the decision on severability. The state in a prior administration decided not to appeal that decision, so we're stuck with it. It is not now appealable. If the issue were to become ripe again, I would decide to appeal that decision on severability. I think it's wrong.

SENATOR HALFORD:

Could that come up through another case?

ATTORNEY GENERAL COLE:

Well, it could. There are doctrines of collateral estoppel which make the appealability somewhat more difficult than it was the first round. That means if you have a decision against you and you don't appeal on that same issue, you're bound by it in context of subsequent legislation.

SENATOR HALFORD:

It just seems that in the two years ...

ATTORNEY GENERAL COLE:

Did I say legislation? I meant to say litigation.

SENATOR HALFORD:

It seems that in the two years that we've had, we've had increasing examples of why it is a much bigger problem than was assumed at that time.

ATTORNEY GENERAL COLE:

In essence now the state subsistence legislation is a sieve. Everything passes through; everyone qualifies. So it is essentially ineffective. It is one of the reasons that Commissioner Rosier feels so strongly that this bill should be enacted and get some control over subsistence use.

SENATOR KERTTULA:

Other questions? You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. One of the major reasons the State of Alaska became a state was so that we could take management of our resources. I think that was fundamental. The Administration has said this statute is a step in the right direction. I don't see it a big enough step to get us back to managing our resources, and in a recent poll that was conducted there were over seventy-four percent of the people that also said that they wanted to vote on the issue. It is my understanding that they want to because they want management of the resources back. Why shouldn't the first step be what the people want? The people that we represent, the people that the Governor represents, and give them the opportunity to vote on a constitutional amendment, because I believe that would be a bigger step, resolve more questions than passing the Governor's or the Commission's or whatever you want to label Senate Bill 484. It seems to me that if we want to resolve the question or, at least attempt to resolve it, give the vote to the decision of people on this most divisive issue. That seems to be the way to go. Why shouldn't we do this?

ATTORNEY GENERAL COLE:

Well, of course, it is a policy decision for the Governor as respects the state administration. But, of course, it follows that if the proposed constitutional amendment fails, nothing is solved. That's a given, that's number one. Number two, as I remarked earlier, I mean what is what I call an ephemeral constitutional amendment going to say? I mean, that is so vitally important. People say, "Well, we want a constitutional amendment". But constitutional amendments are just not like hotcakes down at the greasy spoon restaurant. You just don't flip them out. They take a lot of time, a lot of study, a lot of legal analysis, and one must evaluate all of the ramifications of a constitutional amendment. So to say, "Well, we'll just solve this problem by a constitutional amendment," really doesn't get you there. That's number one. And number two, even if you have a

constitutional amendment out there that passes somehow that is acceptable to people, there must be legislation which follows up on that constitutional amendment. So, you know, it sounds like it's a panacea for this solution at first blush, but I think if you think about it a little bit, it's not necessarily so.

SENATOR HOFFMAN:

Well, to your first response saying that we don't know what the people would say on this question, many dictators have said that so they never put questions to the vote of the people on the question because they don't know what the vote of the people may decide. I, for one, don't want to second guess the people.

ATTORNEY GENERAL COLE:

Let me say this, Senator. I mean, I see the Legislature passing a lot of legislation that they don't submit to the vote of people either. So, it just depends on how far you want to carry this.

SENATOR HOFFMAN:

A constitutional amendment requires a vote of the people though. In this case, the Constitution requires a vote of the people and that's why this issue has been around for so long, so why be afraid of the vote of the people on the constitutional question that has divided this state for over a couple of decades? You ask about there are many versions of the Constitution. Well, I have proposed one that has been endorsed by AFN and that is one that I think would resolve the question. So why not put that constitutional question before the vote of the people and let them decide if they want to.

ATTORNEY GENERAL COLE:

What does your proposed amendment say?

SENATOR KERTTULA:

Please carry on to -- the Attorney General.

SENATOR HOFFMAN:

It has been on public record for many months since AFN has had their statewide hearings and this resolution has been endorsed by AFN, and I find it sort of incomprehensible that the

Administration hasn't even looked at that or has had an opinion on it.

ATTORNEY GENERAL COLE:

Oh, I've got an opinion on this, Senator. My opinion is that this constitutional amendment is unsatisfactory ...

SENATOR HOFFMAN:

To the people?

ATTORNEY GENERAL CHARLES COLE:

... from my standpoint. I think it is poorly, you know, ill-conceived [indisc. - simult. speech].

SENATOR HOFFMAN:

Well if it's ill-conceived, then maybe the Administration should put something else forward because the people should be deciding. The people should be given the opportunity to vote on this most divisive issue because we're skirting around the problem. It is going to be in court from day one if this bill gets passed the way that it is presented by the Governor. We do not have the time nor the effort to continue to have a divisive issue around. Let's let the people decide.

ATTORNEY GENERAL COLE:

This Legislature certainly has that right, Senator, and we will look forward to see that they do that in this session.

SENATOR KERTTULA:

Senator Cotten. Would you like a glass of water or anything?

ATTORNEY GENERAL COLE:

No, I'm fine, thank you.

SENATOR KERTTULA:

Okay. Senator Cotten has the floor.

SENATOR COTTEN:

We understand that there were discussions and meetings in an attempt to hammer out a constitutional amendment that might be acceptable to the Executive Branch and the AFN, and I know that Senator Hoffman and probably others in the Legislature were able to attend those meetings, and I suspect you were too. Most of us weren't though, and I'm curious as to what the Executive Branch

offered as their suggestion for a constitutional amendment. I think we've seen what may have been offered at least by Senator Hoffman and others. One alternative that I've heard--and I don't know whether anybody offered it--but it is the same language that Senator Hoffman has in his but the sentence would end on line nine after the word "uses." That would be another approach to it. I wondered what approach the Administration did feel was acceptable. I mean, if you get this whole thing resolved it seems to me that, I think a lot of people agreed that there are about three parts that we could do. We could offer a bill such as the Administration has. We could offer a constitutional amendment that would give preference to subsistence uses. And we could pass a resolution that would ask the United States Congress to amend ANILCA to yank the word "rural" out. That would be a three-part approach that would guarantee preference for subsistence uses in Alaska, and have legislation that would implement that, and remove the conflict between our Constitution and federal law. That, obviously, didn't rally a lot of enthusiasm on all sides of the issue, but I'm still curious about what the Administration's final proposal was that apparently didn't make it to the table.

ATTORNEY GENERAL COLE:

Thanks, Senator. We discussed it, although it was the Governor's view at this time not to consider the adoption of a constitutional amendment. But among the thoughts expressed during those discussions was the thought of a constitutional amendment which would say the Legislature shall provide for the allocation of fish and wildlife among subsistence users. That was not acceptable to groups with whom we were discussing the subject. That is an example. Another example was to draft an amendment somewhat similar to the limited entry provisions, making [indisc.] slight amendment to cover subsistence. You see, one must be careful in reviewing proposed amendments to make certain that the scope of that amendment does not become far broader than simply subsistence use. It essentially happens.

SENATOR KERTTULA:

Senator Sturgelewski is seeking the floor, then Senator Eliason.

SENATOR STURGELEWSKI:

Mr. Chairman, along the line of where Senator Cotten is going. It seems to me we can go back to kind of the original thing of subsistence and no subsistence, and it is getting to a place where we can get some kind of finality. What really is happening is we're fighting the original battle about whether we have it or don't have it. It seems to me that if we could adopt a set of assumptions -- you could sort of plug stuff in and pull things out -- that maybe we could get a clear picture of how to get somewhere. Personally, I think my decision is pretty well known, but what I don't have a very good feel about--and we've had a lot of lawyers going through a lot of lawsuits--is how to get somewhere. If I could be persuaded that, and I have had serious discussions with Commissioner Rosier, for whom I have a great deal of respect with others, that it was necessary to do a bill like this, and that if we had a constitutional amendment that could bring us into compliance or possibly would require some changes in ANILCA, then we'd have somewhere to go. It was pointed out by Mr. Campbell that we had some problems with certain terminology; customary, traditional, and so on. Now if we could solve those in some way, which could be a combination of constitutional amendment, a state law, and amendment to ANILCA, we'd have a way to get someplace that would have finality. We're coming back into this meeting with absolutely no way to get us to finality. Now, if we laid out a course -- we want to get here -- could we then come forward with saying, "You need to do A, B, C, D." We're trying to do that without knowing where we want to go. Do you agree that we would need to do things in -- let's assume that we have a constitutional amendment. That we do pass the bill that's before us, do you agree that we have nothing but problems out there and will be in federal court all over the place on specific issues, and if so, how do we cure those? What do we do? What do we need to do? What do we need to say to our congressional

delegation and to the Secretary of Interior?

ATTORNEY GENERAL COLE:

We have problems. I think we will have fewer problems than we now have if we pass this bill. The conflict is simple. It's straight forward. ANILCA says subsistence is governed by the place of residency, i.e., rural. Now the solution to regaining state control essentially of wildlife but I'll say fish and wildlife on federal lands, as well as state and private lands is to knuckle under to Congress and say we agree that subsistence users are those who live in rural areas of the state. That's the solution. The solution is really not difficult and complex. It's just a question of whether the people of Alaska want to say, we agree, rural residents govern subsistence use.

SENATOR STURGELEWSKI:

And you're also saying that this Administration does not support that end. Then is there an end that would protect subsistence but would be less than that, and how would we get there?

ATTORNEY GENERAL COLE:

That would protect subsistence, that would be less [indisc. - cough] amend ANILCA. That's one solution.

SENATOR STURGELEWSKI:

And specifically do what to ANILCA?

ATTORNEY GENERAL COLE:

To remove from ANILCA the determination that subsistence use is governed by place of residence. That is what the Alaska Supreme Court in McDowell said was not permissible under the Alaska Constitution. And for the life of me, I personally do not see why rural residency should be the touchstone of subsistence use.

SENATOR STURGELEWSKI:

Mr. Chairman, what about customary traditional?

ATTORNEY GENERAL COLE:

Well, that's essentially a technical legislative problem at this point. That's not what's really hanging up the solution to

subsistence. What hangs up the solution to subsistence is Congressional legislation that says rural preference. The Alaska Constitution says it can't grant subsistence privileges based upon place of residency. You must have a closer [indisc. - cough] to the ends sought that they achieve. To say as Justice Matthews said, it's just too [indisc.] to fit to accomplish subsistence by making the determination based on residency." It's just straightforward, it seems to me essentially ...

SENATOR STURGELEWSKI:

You don't see a major problem then if there's legislation and if there is a constitutional amendment, if it is the end of the line is a rural preference for subsistence? You don't see any big hangup about what is traditional and customary and all that jazz?

ATTORNEY GENERAL COLE:

I personally don't in that area, but you should talk to Commissioner Rosier and Mr. Campbell on those issues because they have a better feel for them.

SENATOR STURGELEWSKI:

Thank you, Mr. Chairman.

ATTORNEY GENERAL COLE:

But I think that is a legislative problem only.

SENATOR KERTTULA:

Next question, Mr. President, then Senator Adams.

SENATOR ELIASON:

Thank you, Mr. Chairman. I just have one question, Charlie. I've heard on a number of occasions that number one, of course, the feds are going to take over July one if we are not in compliance with ANILCA. But the next step would be -- we're certainly not going to be in compliance by July 1 no matter what we do in this particular meeting. However, if, in fact, at some later date we do comply with ANILCA, is there anything in that language that says that they will withdraw their management of fish and game on federal lands? Is there any guarantee they will back off?

ATTORNEY GENERAL COLE:

Is there a guarantee? No, but there is a procedure in the regulations which provides for the state - I'll just say loosely - to make an application to reacquire the subsistence management on federal lands. Is there a guarantee? No, but is it likely? Yes, depending upon, of course, what the state's constitutional legislation contains.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Pass, Mr. Chairman.

SENATOR KERTTULA:

I suppose it depends partly on what our federal delegation's direction is. What its competence is and so on too and the system that is there is particularly slow. Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

Anybody that wishes to talk or question, just please raise their hand and we'll try to proceed with this.

SENATOR ZHAROFF:

Attorney General, it kind of seems to me there that you- I understand maybe I'm wrong on this, but the Governor's proposed bill does not really get us where we want to go. The Administration does not support a constitutional amendment. Where do we go from here?

ATTORNEY GENERAL COLE:

Coast along in second gear for a couple of years until the people on all sides bleed a little more, suffer a little more, and say we really do have to solve this problem and everybody bend a little more to get there.

SENATOR ZHAROFF:

Is this the Administration's position? I mean, we're going in circles and what we're doing is we're tearing up the state in the meantime. I mean, we're getting absolutely no direction at all. In the meantime, there are people just sitting back and

saying, "Well, okay, let's let the rural people fight the urban people, urban people fight the rural people, and the sport fishermen oppose the subsistence fishermen." We've got to have some direction. The Governor says we didn't do anything for the last two years and especially nothing this last session. Well, what the heck came down from the Administration to give us some direction? We're trying to propose some ideas here and one possible solution was a constitutional amendment. First thing that happens, you throw your hands up and cover your face and say, "No way." What is your answer? Are you going to continue to let people run around in circles and say, "Well, you guys can't make a decision." You've got sixty people here trying to run the state which one person is charged to do. Where is the direction coming from the Administration on this? The bill that is before us does not resolve the problem. It does not answer the questions. It does not take care of problems with ANILCA. It doesn't take care of the problems there with our Constitution, and yet there is no resolve for us.

UNIDENTIFIED SPEAKER:

The answer is yes.

ATTORNEY GENERAL COLE:

Well, Senator, let me say I do think the Governor is providing direction by urging the passage of that bill formulated by the Subsistence Advisory Council. That is number one. Number two, is to pass legislation which solves the subsistence problems, as Mr. Campbell said, on state and private lands. It does not solve the problem of management of essentially game on federal lands. That's true, but it is, I think, a good solution at this time. And furthermore, I think it is the best one that is achievable on any side. I suspect it really is.

SENATOR KERTTULA:

Senator Duncan and then Senator Uehling.

SENATOR DUNCAN:

Well, I was going to follow up on Senator Zharoff's question but I thought the Attorney General's answer was not necessarily a

very good answer. I don't think that we should let the state wander for the next two years and bleed a little bit more until we resolve the question. We've been bleeding on this question for a number of years. I do think, Mr. Attorney General, that with some strong leadership a constitutional amendment is possible. Two years ago, the Governor of this state did provide strong leadership and came within one vote, as I recall, the Senate did pass a constitutional amendment and came within one vote in the House of Representatives of passing a constitutional amendment. I think there is an obligation to try to resolve this issue now and to do it correctly. Passing legislation that does not prohibit federal management of our resources, that does not solve our subsistence questions, just misleads the public. I don't think that we should let the people bleed for two years. I still don't understand why the Administration has not provided that strong leadership to say let's resolve the question once and for all and do it right. Now I am not convinced that there is not two thirds vote, with the Administration's strong support of a constitutional amendment, that there would be a two thirds vote to do that. It baffles me yet why the Administration is unwilling to consider a constitutional amendment.

SENATOR KERTTULA:

Senator Uehling.

SENATOR UEHLING:

Mr. Chairman, I remember the constitutional amendment we had two years ago practically to this month where there were eleven votes in the Senate through a constitutional amendment—

SENATOR STURGELEWSKI:

Fourteen.

SENATOR UEHLING:

Oh, there were fourteen, sorry. Anyway, there was two thirds. Going back to the question here regarding being able to handle the federal situation and whether we can really do that, this bill is just sort of a step in that direction. I think you testified and said, "Yes, this is one step in the direction."

But at the same time you can't really speak for the federal government and say that they're really going to buy into it. Do you think this is just essentially a situation where you're going to be buying time because the Governor will be ... [tape ends midspeech]

Tape 2

Side B

[Tape begins midspeech]

SENATOR UEHLING:

... talk to Secretary Lujan after this legislative session is over with and this bill passes and therefore you're just buying time out there, even though inevitably you know that it really doesn't solve the problem?

ATTORNEY GENERAL COLE:

Senator, I don't think it is a matter of just buying time. I think this legislation solves a present need in this state; it solves subsistence problems which are occurring on state and private lands and state waters. That much it does accomplish. The reason that I made reference to the parties bleeding a little bit is because I really doubt if there is a solution that is an overall final solution at this time which would solve the state constitutional problem and the ANILCA statutory problem. Maybe there is. I mean, that is a task which is committed to the Legislature at this special session, but I would have doubts whether the final solution is yet achievable politically.

SENATOR KERTTULA:

Senator Menard was seeking the floor, then Senator Duncan, I mean then Senator Halford, pardon me, and then Senator Hoffman.

SENATOR MENARD:

Thank you, Mr. Chairman. Mr. Attorney General, we talked on ANILCA and the way it's written and the problems that you perceive with the conflict with the state Constitution. Have you had serious discussion with the Governor on how to resolve that issue, and where does that fit into the timeframe of where we're at?

ATTORNEY GENERAL COLE:

I'm not sure that I understand fully your question. Could you help me a little bit?

SENATOR MENARD:

Well, I guess I would point out, if I'm not mistaken, when the Governor was campaigning at one of his campaign speeches that he felt that ANILCA was unconstitutional -- I don't know if he said that exact word. But he thought that the lawsuit that private individuals have been involved in on ANILCA, that the state should be joined in that. That would help resolve some of the conflicts that we have. Has there been discussion in that? Is that any part of the puzzle?

ATTORNEY GENERAL COLE:

Well, the Governor has decided not to participate in that lawsuit. You know, up until now being of the view that the solution is best sought in the legislative forum rather than in the litigation forum.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

The follow-up, of course, to that question is if the Legislature fails to address any kind of compromise legislation, does the Governor have to reassess his position with regard to a solution in the federal courts? The second part to that same question is what would happen if we, in fact, passed both a statute and a constitutional amendment and subsequent to that the private lawsuit that is in the federal courts was able to overturn provisions of ANILCA, what would our status be then?

ATTORNEY GENERAL COLE:

I'll try to answer the first question first. I'm having trouble with the second one. Would the Governor reconsider his decision not to proceed by way of litigation? I'll tell you he's apt to. Now, the answer to the second convoluted question.

SENATOR HALFORD:

What happens if we do all this and it is still found federally unconstitutional?

ATTORNEY GENERAL COLE:

Well, obviously, the state Constitution and the state statute would prevail -- I mean, what the state Legislature has done.

SENATOR STURGELEWSKI:

No, it's just the reverse.

ATTORNEY GENERAL CHARLES COLE:

Maybe it's the reverse.

SENATOR STURGELEWSKI:

Yes, but he lost.

SENATOR HALFORD:

If the current private lawsuit--I believe they are calling it McDowell II ...

ATTORNEY GENERAL COLE:

Yes.

SENATOR HALFORD:

... was successful in federal court in finding that the preference in some way violated some provision of the federal Constitution, be it equality of states or whatever it is, but we had already amended our Constitution to follow the provisions of the federal law, would we not be in a position then where we essentially had done to ourselves what they now could no longer force us to do?

ATTORNEY GENERAL COLE:

Yes.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

Many believe that ANILCA is Indian law, therefore it's a law that is an understanding between a government to government -- agreement between the United States Government and the Indian Nations. I guess, is that the opinion of the State of Alaska as well?

ATTORNEY GENERAL COLE:

No.

SENATOR HOFFMAN:

What grounds do you say you do not believe that ANILCA is not Indian law?

ATTORNEY GENERAL COLE:

I see nothing in ANILCA which gives the slightest indication that it's Indian law. It simply grants rights for subsistence use on federal lands based on residency, specifically rural residency. That doesn't signify to me that it is Indian law.

SENATOR HOFFMAN:

Well, as part of ANILCA that is deciding rights for -- I guess, I believe that it is Indian law and maybe there should be more research done on that because why would the State of Alaska be asking in a third party agreement prior to the end of the session, that we consider changes to ANILCA? That is not something that is before us at this time, but it was before us prior to the end of the session.

SENATOR KERTTULA:

Are there any further questions of the Attorney General? If there are not, we'll have a one-minute recess and then we'll bring on the representative of the AFN, Julie Kitka, first. One point five?

RECESS

4:55 - 5:05 p.m.

SENATOR KERTTULA:

Ms. Kitka, we appreciate your coming and any counsel or any other person to testify for AFN, including your most distinguished counsel, Mr. Mitchell, is welcome. You have the floor. If you'd like to introduce yourself for the record, we'd appreciate it because you are recorded.

JULIE KITKA, PRESIDENT, ALASKA FEDERATION OF NATIVES, INC.

Thank you, Mr. Chairman. My name is Julie Kitka and I am the President of the Alaska Federation of Natives. Accompanying me this afternoon is Norman Cohen, an attorney who is the former Deputy Commissioner of Fish and Game under the last Administration. He has a lot of expertise in fish and game management and he will be addressing some issues following my

presentation.

First of all, Mr. Chairman, prior to going into the testimony, if you would, I'd like to have our distinguished elders that have travelled from many areas of the state to stand up and be recognized on that. It has been a long day and they have been diligently paying attention to the issues. If we could just recognize them for one minute, that would be very much appreciated.

SENATOR KERTTULA:

We appreciate that and we also want them to know that we're trying to get through the introduction of the Administration's bill as quickly as possible, and then the AFN's presentation, and then other interested groups and individuals we will bring into the hearing process as quickly as is reasonable and is possible. We appreciate all the Alaskans coming and if you would please stand up, we just really appreciate it -- the elders group.

We know you're the Alaskans and thank you all for having us here, too. We will try to the best job we can. Thank you for coming. Many of them are close friends of mine. It's always good to see Henry here. He and I were both kids when we first knew each other. You have the floor.

MS. KITKA:

Thank you, Mr. Chair. For the record, my name is Julie Kitka. In order to put this special session of the Alaska Legislature into perspective, I'd like to ask you to consider an interesting event which happened last week. Despite eighteen months of effort by the Governor's Office to mold public opinion on the subsistence issue, and in direct response to Governor Hickel's call for this special session three weeks ago, seventy-four point three percent of Alaskans sampled in a statewide public opinion poll stated that subsistence should be solved by a vote of the people, not by legislative action in Juneau and Washington, D.C. Three-quarters of this state's electorate feel that none of us should have been required to be here today, and that they ought to be allowed into the process. Nonetheless, we are here because

Governor Hickel is determined not to listen to the people on this issue. And that fact, Mr. Chairman, is the real reason why thousands of Alaska Natives have recently become so concerned and so personally involved in the question now pending before the Legislature. We are convinced that our state under the current Administration is on the wrong track concerning subsistence, and the Governor's proposed solution, if enacted, will be a tragic error. Why? Because of the pervasive reach of the issue itself, its fundamental effect on human economics and cultures throughout the state. Subsistence is not just a sub-category of fish and game management. It is not primarily about animals and their habitats, or about efficiency of government actions affecting them. What the subsistence issue is really about is people. The people behind me here. The people back home in the villages and through the communities. And it is about the political allocation of limited resources among competing human user groups. Subsistence is social and economic policy on a grand scale in this state and it touches every person, every family. Thus, we have come to a watershed in the history of this state. How we deal with subsistence will determine more powerfully than any other issue of public policy the human character of this state and the state that we bequeath to our children and grandchildren.

More specifically, the survival of village Alaska turns on the question of subsistence. Despite large infusions of public capital during the past two decades, the economies of most rural villages remain underdeveloped, artificial dependencies of government. They offer few income-producing jobs, particularly for Alaska Natives. Most of the estimated one hundred ten thousand residents of the bush simply cannot make it through each year without the subsistence protein base. If it is taken away from them, whether by natural or political catastrophes, then most of the Native villages of this state are doomed, and the socioeconomic cost of that to all Alaskans will be overwhelming.

If that is the historical context in which the current subsistence issue arises, then what is the real problem that has

brought the Legislature back to Juneau in the middle of the summer? It is the conflict between the Alaska Constitution and the interpretation by the Supreme Court and the federal law and Congress's intent in Title 8 of ANILCA that protects subsistence. While Title 8 of the Alaska National Interest Lands Conservation Act requires that a subsistence preference be granted to rural residents on federal public lands, a majority of the State Supreme Court has ruled that our statute adopted by the Legislature to comply with ANILCA and to assure a unitary management of fish and game by the state was unconstitutional.

It is now in our view absolutely clear after more than a year denial by the Hickel Administration that ANILCA and the State Constitution are irreconcilable. Nothing will be solved simply by the passage of a new state law. Repeated failures to face the real issue, this legal impasse between the Constitution and Title 8 of ANILCA, has now produced a situation in which our fish and game resources are under dual management by the federal and state governments. Not only is this irrational from the point of view of fish and game management, it is also one of the basic issues which led to Alaska's statehood. We do not want federal control of our resources.

The only way to resolve the impasse and get back fish and game management to the State of Alaska without destroying the villages is to amend the Constitution and to adopt a statute which complies with the critical protections of the federal law. The people of Alaska, if presented with a constitutional amendment that protects village subsistence will pass it. The Hickel Administration knows that, but it has decided to resolve the federal state impasse only through a congressional amendment of ANILCA. The Alaska congressional delegation, as well as other committee leaders in Washington, D.C., have repeatedly told us that ANILCA cannot be amended because there is no consensus on it in Alaska or in the Congress, and that opening up any part of it would give extreme interest groups their long awaited opportunity to lock up even more of our lands and resources. The Governor's

strategy to amend ANILCA will not succeed, but it will take years of all of our time, a lot of money, a lot of effort back in Washington, D.C., and it will further divide this state and poison the state's politics and relations between people—rural, urban, Native, non-Native, federal and state people. And, in the end, it will fail, leaving the people of Alaska right where we are today with even worse climate in this state and that will affect many, many aspects of the state's future. Therefore, as you examine the effectiveness and project the consequences of the Governor's bill, please hold to the core issue. It does not comply with the federal law and will not get back fish and game management. Even though individual legislators might intend otherwise, a vote for the Governor's bill will be a vote for continued federal intervention in Alaska's business, and the people of Alaska deserve better than that.

The second major concern with the Governor's bill is its constitutionality. If enacted, it will almost certainly be struck down by the courts for many of the same reasons that underlay the McDowell case. Then we'll be right back where we are now operating in a policy vacuum with no subsistence statute or effective subsistence statute on the books. The Governor and his Department of Law will not admit this problem, but on March 16 the Legislature's own counsel in a letter to Senator Hoffman warned about the Hickel bill's chances of surviving judicial review. Given this, it is critical that the Legislature get into the constitutionality issue with all available professional resources. Don't believe just our lawyers. Take a look at it with your own lawyers. Because of its complexity, it deserves analysis and detailed testimony from legal experts. To do otherwise risks subjecting the state to an effort in futility.

Beyond the issues of ANILCA compliance, retrieval of state management authority, and constitutionality, there is the simple question of whether or not the Governor's bill constitutes good public policy for Alaska. I submit to you that it does not. It will not protect those Alaskans, Native and non-Native, urban and

rural, who really depend upon fish and game to feed their families. It will threaten the economic and cultural survival of our most traditional villages. It will unfairly discriminate against legitimate urban subsistence users. And it will base the subsistence eligibility of individual Alaskans on behavioral criteria which can neither be measured nor proved, thereby opening the system up to wholesale abuse.

Let us look closely at four basic weaknesses of the Governor's bill. First, it fails to provide an adequate guarantee of subsistence eligibility for people who live in Alaska's small villages. As originally considered by the Governor's Subsistence Advisory Council, the bill would have afforded such individuals an irrebuttable presumption of eligibility for the preference. But late in the process, the Attorney General urged that "irrebuttable" be removed on the theory that this would somehow strengthen the bill's shaky constitutionality. The only certain result, however, is the weakening of statutory protections for precisely those communities which are most dependent on fish and game, and that we are most concerned about in this state.

Second, the Governor's bill is not content to deal with the real post-McDowell problem of the federal state impasse. It goes far beyond that in its effort to curtail subsistence practices, by excluding whole fish stocks and game populations -- huge areas of the state -- from subsistence use, regardless of the individual subsistence eligibilities of the people who live there. It is now clear that the policy decisions which were made by the Governor's Office to exclude subsistence from certain areas because of intense user group competition. But if we're going to define subsistence eligibility by lifestyle, which is what the Governor's bill is attempting to do, then all Alaskans who live that lifestyle must be treated equally, no matter how difficult that makes it for fish and game boards. To do otherwise is not only unfair, but it's unconstitutional. Moreover, it is not necessary.

Third, if state law is going to define subsistence by lifestyle rather than residency, it must set workable standards of

individual eligibility. People must be able to use and to believe in the criteria by which we decide who is a subsistence user and who is not. Under the Governor's bill, if any Alaskan is required to prove his or her eligibility, seven behavioral standards are rated on a point system. The Legislature should examine these criteria and ask whether or not they're measurable and whether or not they're enforceable. We cannot imagine an emotionally charged issue on the honor system. From past experience, we know that self-enforcement will produce a tangle of bureaucracy, investigation, cost, and additional litigation.

Finally, the Governor's bill accords too much regulatory discretion to the Boards of Fish and Game. History shows that clear policy direction must be given by the Legislature when you pass a statute in order to prevent even the best statute from being effectively repealed in the regulatory process by powerful forces determined to reduce or eliminate subsistence protections.

I submit to you, Mr. Chairman, that even if the Governor's bill was constitutional, and even if there was not an issue of complying with federal law, the policies themselves would be wrong for the future of this state. Among all the other consequences, they would open up a whole new era of lawsuits and judicial intervention, as the Boards of Fisheries and Game try to implement this confusing and ill considered system. If we think that the present system has problems, I believe we have not seen anything yet.

If the Hickel Administration's bill is fatally flawed, is there an answer to our predicament, or are we destined to continue under this ridiculous system of dual management? The only fair and effective way to resolve the subsistence problem has three components.

Alaska must have a subsistence statute which complies with the federal law and returns management of fish and game to the state government. Two, that statute must protect legitimate subsistence users, while treating Alaskans fairly in the distribution of hunting and fishing opportunities. Three, in

order to have such a balanced statute, the Legislature must allow the people of Alaska to amend the Constitution.

Today, you are considering Senate Bill 485, a Bush Caucus alternative to the Governor's bill. Let me go briefly into what that legislative alternative to the Governor's bill will do. One, it complies with the federal law by retaining the ANILCA subsistence preference for residents of rural communities. It then adds a second subsistence preference for eligible urban subsistence users. It treats eligible urban subsistence users fairly. It creates a new subsistence board to work in cooperation with the Boards of Fish and Game, in order to ensure more attention to subsistence species and practices. It gives clear statutory directions to the Boards of Fish and Game regarding management standards and the protection of eligible subsistence users in both urban and rural areas. It provides ordinary citizens with a greater degree of participation in the regular process through an improved system of advisory committees and regional councils.

The Bush Caucus alternative is balanced and workable. It solves the legal conflict. It gets back fish and game management. And it does so by being fair to the people. The Bush Caucus bill, like any statute that will really solve the subsistence problem, will require a constitutional amendment. The question is, why? Because the Legislature does not now have the authority to define subsistence users in conformity with the federal law, and only the people of Alaska, speaking through their Constitution, can bestow that power. None of us, including the Governor, will help our state one bit by continuing to deny this reality.

In closing, Mr. Chairman, let me return to the way that the people of Alaska believe that the subsistence issue should be resolved. Fully three-quarters of our fellow citizens would prefer to vote on it in the form of a constitutional amendment. They do not think it should be dealt with only as legislation in Juneau and Washington, D.C. The average citizen knows that subsistence is one of those fundamental questions of history that

require, above all, legitimacy -- that kind of authenticity which in democratic systems comes only from the voting booth by the people. If they are asked, the people will know what to do. They will cut through this long and wearisome deadlock in a single day in November, and they will take healthy village economies and cultures with them into the twenty-first century.

With that, I'd like to state that while we have very strong positions on this issue, we very much support the Bush Caucus bill that is being introduced and the constitutional amendment that we have always been willing to work with this Administration on trying to resolve this. We are not the ones that pulled away from the table in the negotiations. The Governor's people called that off. We have always been working at trying to come up with a solution which all Alaskans of this Administration could support. It is only when that broke off and there was no further opportunities to work together in a solution, that we asked our legislators to introduce this solution and get that before you to try to resolve this issue. I'd like to, at this point, ask Norman Cohen, who is with me, to basically go into the Bush Caucus bill, the statute by itself, not the constitutional amendment, but the statute and how that would work, so you get an idea when we describe that as a balanced and workable solution, what that is all about.

SENATOR KERTTULA:

Ms. Kitka, there are a few questions the members would like to ask if you'd be willing to respond, you and your assistants first. Senator Halford, Senator Sturgelewski, and others have shown an interest. Senator Halford, I recognize you because you've requested before Arliss.

SENATOR HALFORD:

Thank you, Mr. Chairman. With regard to state management of fish and game, is that a goal of AFN?

MS> KITKA:

Helping the state regain management of a unitary system in the state is a goal of AFN, yes.

SENATOR HALFORD:

Would you support, for example, the return of management of marine mammals to the State of Alaska?

MS. KITKA:

I believe that in the federal law there is a process and there are standards that if the state wants to meet those standards, that they could regain them. I've been told that the state has just never wanted to meet those standards. But there is a process, and if the state wanted to get management of marine mammals, that they could meet certain federal standards and they could have that management.

SENATOR HALFORD:

And AFN would not oppose that?

MS. KITKA:

AFN wants, one, what's best for the resources. We want what's best to protect our people throughout the state. And two, we want to live in the state with other Alaskans, and if that means helping the state regain management so we can live together with other Alaskans, that is something that we would be supportive in.

SENATOR HALFORD:

But AFN is currently in federal court encouraging a federal takeover of essentially all fishery management in the State of Alaska, is that not correct?

MS. KITKA:

While I can't answer the exact legal things because I have counsel to answer that. We're in federal court to press for the federal government to implement the federal law - the existing law. All we're asking is the federal government to enforce and come into compliance with what existing federal law is, which any American citizen has that right to ask the federal government to obey their own laws. That's why we're in federal court right now.

SENATOR HALFORD:

But does that action contemplate the same level of action with regard to fisheries as is now occurring with regard to game?

It has been referred to as federal takeover. I don't think it is. I mean, I think the terminology of federal management of fish and game is overreaching and could be in terms of fisheries as well, because the federal statute only says management of subsistence. It doesn't say management of all fisheries or all game. But it seems inconsistent to be testifying in favor of state management and suing for federal management.

MS. KITKA:

What we are testifying is our willingness to help the state regain a unified management, as long as it protects our people that depend upon the resources throughout the state, as long as we have strong protections. We have currently a federal law which we believe should be implemented, because that's the existing federal law. We are interested in helping the state regain management, but not at the expense of the people that I represent; their way of life; their future; the future for their children and grandchildren.

SENATOR HALFORD:

So you believe then that the federal government would be better managing the fisheries of the State of Alaska today than the state government managing the fisheries of the state, as your court case [indisc.].

MS. KITKA:

We believe that the Secretary of Interior has incorrectly interpreted the federal law when he came up with the regulations, and that he did not extend and utilize all his jurisdiction that he has, otherwise he would have reached in and would have taken over jurisdiction of fish. That is an issue which is litigated in court. We feel that if the state is unable to or unwilling to come into compliance with subsistence protections in federal law, that we need the maximum protections by the federal government and the Congress, if the state is unwilling and unable to do that.

SENATOR KERTTULA:

The floor is yours, Senator Sturgelewski.

SENATOR STURGELEWSKI:

Mr. Chairman, before we go to Mr. Cohen, I have wondered why the break-off in discussions between the Administration and AFN on attempting to make a resolution, and you made a statement that it was not on your part. One of the things that I've heard a great deal of discussion about is problems that many people feel--apparently including the Administration--on the establishment of a subsistence board. I think I heard you say, but I think probably with purpose, that although that is contained in the legislation, am I correct that that is an area that is certainly negotiable from AFN's point of view? The idea of another board and another management regime is not very acceptable to a lot of people. I personally have some problems with it.

MS. KITKA:

I guess what you have to look at is the solution that we're advancing is basically a three-part solution. One, there is a conflict between the Constitution and the federal law. That can be fixed with a constitutional amendment and we have asked for and support a constitutional amendment that has been introduced. I guess it's advisory only at this point.

The second thing is once you've got a constitutional amendment and you have the authority to pass laws which would allow you to regain management, you need an effective state statute. A statute that has been introduced by Senator Adams we feel is an effective state statute.

On the issue of the subsistence board, our people have lived with state management and federal management for a number of years, and there is a lot of regulatory and management problems that even people of good will trying to make the system work are not able to do it, let alone the fact that often there is competing interests and people have not in good faith tried to make the system work. What we saw is that there needs in addition to fixing the Constitution and having an effective statute, we need to improve the management and regulatory system. We are suggesting the subsistence board as our solution to that management and regulatory problems. When we met with the Governor

and we introduced the concepts in our bill and the concepts in the subsistence board, we told the Governor this is not a take it or leave it idea. This is our best thoughts on a subsistence board and we urge your consideration. When we testified before the House Resources Committee in the last couple of days of the special session, we said the same thing. The subsistence board, we think, is a good idea and we think it will improve the management and regulatory system, but it is not a take it or leave it type thing. The constitutional amendment is essential to fix this problem. An effective state statute is effective, but we also need to pay attention to the management and regulatory system, because that's how people on the ground are affected on a daily basis, is that management and regulatory system. There are some very legitimate examples that can be given on how that system doesn't work today and has harmed true subsistence users across the state. Those are very much the people that government should be responsive to and try to help, and if the system doesn't work, that should be addressed also.

SENATOR STURGELEWSKI:

Mr. Chairman, I would like to just request that we, not at this time, be given information of those issues of regulatory and management concerns. See if they can be categorized ...

SENATOR KERTTULA:

Does counsel have -- have you -- I would also like to have a section on what -- you might call Tam Cook to go back over this with Senator Sturgelewski, but I'd like you to call Tam and ask her to give us a section on both of these major bills before us and have her have them prepared for tomorrow, if possible. You may want to inform her soon so that there are people there and continue to do this late tonight.

SENATOR STURGELEWSKI:

Thank you, Mr. Chairman, for that [indisc.].

SENATOR KERTTULA:

And you'll again touch with Senator Sturgelewski and make those requests and bring them to fruition. Are there questions of

Ms. Kitka? If not, we don't intend to go into a sectional analysis of legislation. We're still taking hearings, but we don't mind and would request that we're in the hearing process of getting positions of major interested groups at the moment, as you understand. Then we'll get into sectional analysis of legislation. I've called for a sectional analysis to be done by our staff. Mr. Cohen or Mr. Mitchell and any combination, if you want to sort of quickly rough over the bill and differences, or whatever you wish to do, we would accept that at this time, but subject to being brought back if you were available later when we get to the technical part of this bill. Does Senator Zharoff wish ...

SENATOR ZHAROFF:

Mr. Chairman, I just have a request there at some point there I'd like to bring the Administration back. There are some concerns that I have there and I'm in receipt of a couple of memos and I understand there is a letter that's in circulation here about different individuals that are now involved with the subsistence issue that the Governor had indicated at one time would not have any involvement with this whatsoever. And I would like to have the statements from the Administration regarding these issues. I would like to have the opportunity to review the memos and the letter myself. I'm very much concerned about the credibility and the questions there that are being now thrown about, and the statements that are coming forth. I think we need to get this resolved and make sure that everybody is playing on the same field here and that we don't have these undercurrents that are going on. If we're going to try to resolve the issue, then let's do it up front. Let's be fair and honest with everybody.

SENATOR KERTTULA:

That's Mr. Greany because he has staff and he has one specific person assigned here to get together with Senator Zharoff so you have before the evening is over we have the materials, have the responses, and have the Administration available. I think

some things need to be prepared, specifically a letter to the Administration on this subject. If you could handle that. I don't have sufficient staff representing Finance except for your staff, which [indisc.] represent Finance. Fred, would you get together with Mr. Greany to see to it that proper requests are drafted and the proper items, as again our other counsel in here will get together with the requests of Senator Sturgelewski and, of course, get us the sectional analysis of this legislation. Mr. Cohen, you have the floor.

NORMAN COHEN, LEGAL COUNSEL FOR ALASKA FEDERATION OF NATIVES:

Thank you, Mr. Chairman. I would like to try to be as brief as the Attorney General was, but I'm afraid it is impossible as I've already gone longer than he spoke.

SENATOR KERTTULA:

I hope you say more then, in the same amount of time.

MR. COHEN:

I'll attempt to do that, sir. The subsistence board was already discussed so I won't go into that. But the bill before you, I believe it is SB 485, provides the opportunity with a constitutional amendment for the Legislature to get into compliance with ANILCA. ANILCA requires three things. It requires that there be a definition of subsistence; that there be a priority for subsistence; and that there be a regional and advisory committee system for the state that is consistent with that contained in ANILCA. This bill provides that. In addition, it provides the opportunity for individuals who live in urban areas to also be able to participate in subsistence.

The Governor's bill, on the other hand, gives something to the urban residents and then immediately takes it right away from them. If you live in the Kenai Peninsula and you rely on fish and game and qualify for subsistence uses, you can't subsistence hunt or fish on the Kenai Peninsula. You've got to go somewhere else and compete with somebody else who has developed a dependence upon resources elsewhere in the state. This bill recognizes that if you are going to be fair to people, you have to allow them to be

able to participate where they have developed their eligibility, where they do actually depend on fish and game. You don't send them off to other places in the state to compete with other people who depend on resources there, because somehow you want to be fair to them and give them opportunities, and that you're not willing to take the heat and allow them to participate on resources that they actually have developed a dependence on. Basically, what the Governor's bill does -- and I think it's important that you're going to have a sectional analysis. The differences are very much in the details of the bill. Overall you've heard a lot of discussion about how the Governor's bill is intended to protect subsistence. It's intended to protect rural subsistence. It's intended to stop lawsuits. It's intended to fix the problem of customary trade. It's intended to fix this and it's intended to fix that. But it is in the details of how it intends to do all those things where the problem arises. It is where it tries to create subsistence as a lifestyle as opposed to a way of life. A very fundamental problem with the differences in the two bills. I guess I'm not going to go into any more detail in terms of the differences. Just to say that the bill that you have before you submitted by Senator Adams provides the opportunity for the Legislature, together with a constitutional amendment, to be consistent with ANILCA. It provides also the opportunity for urban residents to qualify on an individual basis to be able to have the protections of subsistence and have those protections on resources that they qualify on.

I guess just one more thing. We've talked a lot about rural and there has been a lot of discussion about the public policy decision surrounding rural. Rural is not the only filter that you have to go through in order to be able to qualify under ANILCA and under the pre-existing state law. You had to satisfy other conditions as well. Just because you lived in rural areas does not mean that you qualified or your community qualified. Your community had to have a history of customary and traditional use and has to have continued that. It is not a system that was

intended just to blanket everybody in rural areas. I think that's an important distinction, because it sounds like a naval base or an airforce base or a temporary camp, that just because it's in a rural area you would qualify. It doesn't work that way. It didn't work that way. And the bill that's presented before you today would not also. Thank you.

SENATOR KERTTULA:

Any questions of Mr. Cohen? Senator Halford, did you have a question?

SENATOR HALFORD:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

Raise your hands anybody who wishes ...

SENATOR HALFORD:

With regard to the question of customary trade, do you believe that resources taken under subsistence priority should be saleable for cash in commercial quantities?

MR. COHEN:

Mr. Chairman, Senator Halford. That question is not up to me to decide what it should be. The Board of Fisheries has got before it on its agenda for its winter meeting the issue of the Southeast herring roe on substrate customary trade. They're the people to answer that question. They have the issue before them and they should be allowed to make the decision as to what should be the proper use of the term "customary trade." That's where the Legislature set the authority, set it in the boards. The boards have it before them. We don't have to deal with it here, or you don't have to deal with it here. Let the boards decide what they believe is the proper use of the term "customary trade," what should be allowable.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR HALFORD:

Just continuing, do you believe that ANILCA requires that customary trade for cash be permitted in significant quantities?

MR. COHEN:

Mr. Chairman, Senator Halford. I don't believe that the federal law requires that result. I do believe that there is an opportunity, if that was the result of interpretations of federal law, to deal with that issue through the regulatory process on the state side and, if necessary, on the federal side.

SENATOR HALFORD:

So you believe that it is permissible for the state then to limit customary trade to non-commercial quantities of resources?

MR. COHEN:

Mr. Chairman, I think that the state and the Board of Fisheries or the Board of Game, depending on the specific situation, has the ability to limit customary trade, yes.

SENATOR KERTTULA:

Senator Pourchot.

SENATOR POURCHOT:

Thank you, Mr. Chairman. I want to follow up on that same question because I am somewhat confused by the answer that I think Mr. Campbell gave to Senator Sturgelewski in an earlier exchange today about their position in wanting to go back and amend ANILCA, not just for a rural compatibility definition, but also because of this other major problem. I think my reading of ANILCA is the same as yours, Mr. Cohen, that the absence of the definition from the bill -- I was back there at the time, I don't recall, maybe Mr. Mitchell or other people know, but it was probably just an oversight. Family was defined, barter was defined, and for some reason, trade wasn't. I don't know why there would be any reason why either federal implementation of ANILCA or the state boards' implementation of similar state statute couldn't further refine or limit that term. I mean, we do that all the time in statute. So I don't quite understand why the Administration has latched onto this as this driving reason to have to amend ANILCA. It doesn't seem to be of the same nature of the magnitude of the problem as everything else we've been discussing.

MS. KITKA:

Mr. Chairman?

SENATOR KERTTULA:

You have the floor.

MS. KITKA:

Senator Pourchot, let me attempt to answer that. You might want to request a copy of the Administration's testimony to the United States Senate Select Committee on Indian Affairs when they held an oversight hearing on Title 8 of ANILCA in Anchorage. They very clearly testified their concerns with ANILCA and what their goals in trying to get rid of federal oversight in ANILCA was. Commissioner Rosier of the Administration testified before the U.S. Senate hearing on the issue.

SENATOR KERTTULA:

Do you have that material readily available? We could get it faxed.

MS. KITKA:

I was going to suggest the Governor's Office would have that. I just don't have it with me, but Commissioner Rosier testified.

UNIDENTIFIED SPEAKER:

Mr. Chairman, just to answer ... [tape ends midspeech]

Tape 3

Side A

[Tape begins midspeech]

UNIDENTIFIED SPEAKER:

... the development in the state, I don't see that it would be a concern, but I'd certainly like to read the memo and be able to respond further to the committee.

SENATOR ADAMS:

Mr. Chairman, I would submit this memo to this committee for this body to review. I believe it's smoke and mirrors on stopping the constitutional amendment. I need twenty copies ...

SENATOR KERTTULA:

Sergeant-at-Arms, could you make copies? Thank you very much. Senator Duncan, then Mr. President.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I want to ask Mr. Cohen a question. Mr. Cohen has a lot of experience with the Department of Fish and Game as a former Deputy Commissioner and had been there for some time. One of the statements that has been made by the Administration, in fact, I have a copy of a letter from Carl Rosier, the Commissioner, to all limited entry permit holders, statements about the serious economic disruption in fisheries that would take place if the Governor's bill is not enacted. I was wondering, Mr. Cohen, based on your background and experience, have you seen this memo? Have you seen this letter?

MR. COHEN:

Yes, I have.

SENATOR DUNCAN:

I was wondering if you could give me your response as to how that ties together with the bill but also may tie to what the AFN is proposing as a way to resolve the issue, and if we do nothing, how powerful [indisc.] do you see as serious economic disruption?

MR. COHEN:

Mr. Chairman, Senator Duncan. I heard a lot of "the sky is falling, the sky is falling" earlier in the morning. After the McDowell decision, everybody thought that the sky was falling then. We've made it through. We've sort of muddled through two years now and the sky hasn't fallen yet. I think it's very dangerous to predict the future and predict that the sky will fall and disaster will happen. I don't particularly think that it's believable. There certainly are going to be individual situations that may cause problems, but by and large, it doesn't seem to me that the sky has fallen yet and I don't think the sky is going to fall in the near future.

I think there are some problems. I think those are trying to be addressed through the bill that Senator Adams put forward today. In terms of Southeast king salmon I believe is the issue, the Board of Fisheries had this issue before them several years ago under the then-existing subsistence law, under the then-existing criteria for customary and traditional use. I guess I

haven't followed the Board that closely since then, but I think it may be difficult for the Boards just to decide well, any customary and traditional use determination no longer applies and we're going to make a new one, and we're now going to include those stocks in as customary and traditional use. Now, I think part of the reason why people are saying that the boards just willy-nilly included a whole bunch of fish stocks or game populations in as having customary and traditional use, I believe if we look at those decisions, we'll find that those all happened in urban areas where the board had not made a previous determination. But in this case, Southeast king salmon has been before the boards because a whole lot of people in rural areas, I mean, a whole lot of Southeast is in a rural area. So it's not like this is something new that the board hasn't considered. They considered it before under the customary and traditional use criteria. And I don't know a reason why particularly it would get changed under the now existing customary and use criteria that's currently in the regulations. So I guess I haven't seen you change it, you know. I mean, yes, there were changes for fish stocks and game populations in urban areas, but that's because they were not to be considered because subsistence did not apply in urban areas. So I think there is a distinction there that people have not really been bringing up, and I don't see that there is going to, you know, unless the board made a wrong decision in 1988 or 1989 or whenever it was, and if they made a wrong decision then, well then, we'll find out. Maybe a court or something will deal with that issue. But the state of the law isn't what is driving Southeast king salmon. That's driving issues in other urban areas. I hope that answers your question.

SENATOR KERTTULA:

Senate President.

SENATOR ELIASON:

Mr. Chairman, I'd just like to pursue that a little further. I think the point being was that you're correct when you're talking about the fish board's actions, but the point he was

trying to bring up this morning, as I recall, that someone could take this position of the Fish and Game Board to court, and say, "We are entitled to subsistence on these stocks." That was the question, not whether they would be right or wrong. It has not been tested at this point. So the point being if the federal court system or the state court says, "Yes, that is subsistence, customary and traditional uses," then what happens? That is the point he was trying to make, I believe.

MR. COHEN:

Mr. Chairman, that was the situation when the board made its decision before, so nothing has changed. I mean, somebody could have brought that issue before a court then and said, "The board made a mistake and Southeast king salmon should have been considered as a subsistence species." So I don't see where we have changed any situation now from where we were under the 1986 law. There's just nothing different that I know of in regard to Southeast king salmon.

SENATOR ELIASON:

Of course that option is always available for any citizen who decides, for instance, that they should have subsistence use of those stocks. Now, just because it has not been tested does not necessarily mean that it might not happen tomorrow if we don't do anything with a constitutional amendment or a law, that this option is out there. That in itself could raise havoc with that specific species as it relates to sport fishing, commercial fishing, and even subsistence uses.

MR. COHEN:

Mr. Chairman, Mr. President. I guess I'm not sure what it is that the Governor's bill does that solves the problem of Southeast kings - not ever being able to be subject to subsistence uses by these people who live in the rural communities of Southeast. I don't know what it does to solve that theoretical problem. All I know is that there is nothing now that I know of that is different than in 1986, and then 1989 or 1988 when the board made that decision. There are maybe people in the room that could fill me

in and then we could talk about it some more, but I guess I just don't see it.

SENATOR ELIASON:

I guess, Mr. Chairman, we didn't foresee back in 1986 or 1988 what is happening to us today either.

SENATOR KERTTULA:

Senator Zharoff.

SENATOR ZHAROFF:

No comment.

SENATOR KERTTULA:

If there are individuals -- if there aren't more questions at this moment, there are some seniors that I understand may be going tonight, and I'm going to extend the hearing for a brief period to give some of them a chance to comment. I think it's the correct and right thing to do. They've come a long way and they have to return. We will have a period for limited testimony by individuals tomorrow, but in any event, if there are some seniors here -- I see Mr. Johns and some others who've come a long way. Mr. Theodore. There are some here, Henry, that wish to testify. Julie, could you kind of monitor so that they could come forward. Those that are leaving tonight -- there are a few that must leave or can't come back tomorrow, of course, they would be the ones that we should have first, regardless of the way they've signed up. I'd particularly like to hear the seniors on this issue at this time. We're going to bring a few forward.

One of our elders is before us. I thank you for coming. If you would introduce yourself and just please proceed. We'll try to restrict it to four or five minutes, three or four minutes, whatever. Please proceed.

WALTER CHARLEY, ELDER & BOARD MEMBER OF CRNA:

I'm Walter Charley.

SENATOR KERTTULA:

Hello, Walter.

MR. CHARLEY:

I am an elder and board member of CRNA. I have seen a few

days. I was born in a little place, a little village called Wood Camp down the river from Copper Center Village eighty-four years ago. So I've seen a few things in this world before up until today.

In the early years, the things that I saw was the people that came in, the miners that came into Alaska. They were wonderful people, some of them. Some of them were different. They would [indisc.]. They used to go out there over the villages and ask permission if they can go into some other place or someplace where there was gold mining or go trapping or build a cabin or something. These are the things that I was raised with.

Another thing that I have in my life, when I was growing up I was taught to respect the law and to respect how you handle the animals, how you handle the meat. If you've got meat, don't take more than you can use. This was one of the things the elders have taught their people in early years. And the trapping. We had traplines. These people that come in the country, they asked if they could please go in with their traplines. The Indian people in each village in Copper River [indisc.], each village had what they used to call a gentleman's agreement. This agreement had a lot to do to help the other people. You can cross their trail but don't go on their trail where their trapline is. This was one of the agreements that we had. Then the other things that we had in our life was that each village had their own agreement and their own laws. The law is that if you are going fishing, you have thirty days or forty days to fish and if you got your fish all limited to what do you need. Then we all just take what is used in the summer. And the other thing says that when they go hunting—I just said this again, but I'm going to repeat it. Say, if you need meat, if you've got enough meat, remember your relatives or your neighbors.

But, you know, today we're still doing these things. If we've got enough fish, we take it to some elders, we take it to some Native people that haven't got any. I've got relations, myself I couldn't run fish wheel anymore, so my nephews they bring

me fish, and if they went away, I'd ...

Yet, the thing today the law comes to our village and tells us what subsistence is, what you can't do. That you can't do. Then the people that come in our villages don't have respect for the elders or the villages. If they want a pile of wood, they go up in the woods someplace and they start cutting that wood without asking the village people. Now, we have a land, we have land up there, I've got 160 acres back of my place. Last winter when we didn't have a chance to go out fishing or to go out hunting, the people came in running right across to my village, my property with snowmachines and they go way beyond our places, back our places they shot caribou. Now last fall I had hunting, I hunted over in Denali. I couldn't walk very good. I can't pack anything, so two of my grandsons went along with me. We saw a caribou back on a ridge. I went back there. We went over one ridge, we looked at it with my binoculars, we saw these two caribou just down beyond the second ridge. While we were going down that ridge, one of those three-wheelers came along. [indisc.] I have lost my caribou. We left that part of the country but we went to another place and we got one. This is some of the stuff that should be looked at. One of these ten, fifteen thousand dollar big machines up in one place where it goes across the right place for the Indians. And they go beyond that and they tear up the roads and everything else. That should be looked into. Thank you.

SENATOR KERTTULA:

Walter, I appreciate you coming. Do you have any questions?
Senator Adams.

SENATOR ADAMS:

Walter, can you tell me how subsistence fishing was restricted for the Copper River people when state management took over after statehood in 1960? Can you recall that? Do you remember that?

MR. CHARLEY:

You mean the fish wheel?

SENATOR ADAMS:

Yes.

MR. CHARLEY:

Yes, I was working in Anchorage then. They set the date. We'd been getting fish on the fish wheel first of June. Then the state began a date. They changed the law, they said they were going to put it in the fifteenth of June. So, the village elders -- that's people that are a lot older than I am -- they all get together and there's four of them. They take that fish wheel and out in Anchorage they called me, they told me to tell everybody down there that's official that they were going to put that fish wheel in the first day of June. And if they want to come out and pick up, that's fine. So when the first of June came, Tony Jackson is the one I remember but there were three or more, they took the fish wheel on the first of the month and they started [indisc.] the fish wheel. But they didn't pick them up, but anyway they got the side. Then the Governor said, "Run the fish wheel." So that settled the whole thing. Still putting the fish wheel in on the first of June.

SENATOR KERTTULA:

I often wondered why you and I went to the Democratic Convention that fall. Are there any other questions? Thank you for coming. I'm honored to see you again, Walter. It's been a long time.

MR. CHARLEY:

Thank you for inviting me.

SENATOR KERTTULA:

Is there another elder who would like to testify at this time? Henry, come on forward, if you'd like. Oh, yes, thank you.

BETH JACKSON, REPRESENTING RURAL CAP:

I'm Beth Jackson. I'm from the Copper River. I wrote this myself listening to the elders and I feel that I should say something on a little bit of the history because I'm an Eskimo and I'm living with the Indians. For starters, we are against the Governor's bill because it's going against the ANILCA lands claim

settlement act. Years ago we had freedom to hunt, fish, pick berries, pick roots, without any laws or regulations. We as Natives, have the ability to know when to hunt, when the animals are going to mate so we don't kill them. We never wasted food. We learned to share a life. We respected the bears and animals God gave us. Caribou, moose and fish have been our mainstay since time immemorial and we have survived as cultural people. We used [indisc.] to bring our meat in. We walked and worked hard. We didn't have the equipment non-Natives have now -- fifty thousand dollar campers and off the road vehicles that scare the animals away. Unit thirteen if taken away from us will be a disaster. Every tribe going out to hunt when the season is open, it looks like a war zone. My main concern is the elderly people who are used to eating off the land. That is why we have to deal with cancer and other diseases due to chemicals that our systems cannot take. In conclusion, please give us a chance as Natives to enjoy the life we were used to. Be fair and let us not be huntourists, which means to hunt and be tourists. And if you go up to hunt, you see a lot of those, and we go up with our old cars and pickups that rattle, and it's a sight to behold. Let us amend the Constitution and look at the statutes and get this fighting over with. Give us our freedom back. I feel that it is about time that the Bush Caucus and the Legislature help us. Let's just finish all this so we can go out and hunt and fish and pick berries when we want to and not be afraid of somebody shooting our heads off. We can't even go out and pick berries unless we use a bright coat because they think we're little bears or something. And that is crazy. I would like to talk to some of you, Adams and some of those that I know. Give us a chance to work. I'm a young elder and some of them are old and they've gone through hardships. I've gone through hardships and this is our land. People come in and tell us what to do. We don't tell you what to do because that's not our place. But if you make solutions that are easy for us to learn and to take, we will take them if they are fair. Thank you for listening.

SENATOR KESTTULA:

I believe we have time for another at this time. Henry?

HENRY MAKARKE, REPRESENTING CHUGACH, INC.

Henry Makarke is my name. I'm from the Cordova area. I get a little nervous here, but I'm going to try to tell myself I'm not speaking to a bunch of cyclopes right here. The only difference may be that my skin is a little darker than yours. Okay?

December of 1971 was quite a while. I was kind of young then too at that time. That was the date of the Alaska Native Claims Settlement Act. As I recall, part of that time too us Natives were thrust with a document that hardly any of us understood. It was quite a task for all the Natives who are here now and today. We've tried our best to implement the Alaska Native Claims Settlement Act. I guess looking back at it in as far as how the certain laws that -- look, I'm no attorney or not that well educated. But I have tried to understand some of the laws that apply to us. Some of those laws that protect us as far as the subsistence, the National Marine Protection Act is one of them. The treaty of session also protects us in as far as our lifestyle and how we've lived since time immemorial. Title 8 also protects us, the federal law, which has been not too long ago. Now, there is kind of a controversy in as far as how I look at things myself and how I think that you are trying to look at us Natives. We were here. We've lived our lifestyle. Hopefully we think that maybe you the lawmakers will comply with ANILCA. I don't think that's very hard to do. If we look back in the history, and a lot of you were here while we were here also. We hunted and we fished all our lives. We didn't think anything of it. We didn't make an issue of it. We continue to live our lives the way we have. Now some of you have made an issue out of it. It hurts us, the real people. How do we try to cope with that situation? I guess we'll need how you want to live with us and how we want to live with you. I guess I would say that the Native people of Alaska are best looking at the laws of the land and how they have survived throughout these years. I look at that. I also believe

too with the Native people that there is no room for any type of compromise because they are survivors, the endurance that they have survived all this time. I guess I could end it briefly and shortly, is that if you can pass a limited entry law, why can't you pass a subsistence law? I think it's that simple. You passed a limited entry law. You can pass a subsistence law for the Natives. Thank you.

SENATOR KERTTULA:

We have time to hear from one more person now, and then we will try to come back about nine o'clock tomorrow morning to hear from other organizations and individuals.

MS. KITKA:

Mr. Chairman, I have Howard Luke who would be the final one for today, but I'd also like to extend an invitation to the Senate. We are having an open house at the ANB Hall and people from Southeast are having food and Native dancing. I'd like to welcome you. All of the villagers come in from all the other areas, so if you don't have anything in your schedule, from seven to nine we'll be at the ANB Hall. We'd like to welcome you to come, [indisc.].

HOWARD LUKE:

I'm Howard Luke and I'm from Fairbanks. I've got my own corporation and I'm building a meeting hall up there. I tried to get one of you [indisc.] and I didn't get the money. You turned me down. So I went and did it on my own and I'm doing it and we'll be done with it in about another couple of weeks. I invite you people up there and see what subsistence is. I live with subsistence a whole bunch. Myself, I don't believe you know what subsistence is. Subsistence is our livelihood. Like I cut my finger there not too long ago, about a couple of weeks ago, and I didn't have anything on it then, and I just got pitch on there and I wrapped it up on there and in a couple of days it's not even warm. Now you see, that's our right and I believe that some of you people are going to go back to what we are doing too. You'll be out there, you'll be surprised when [indisc.], you're going to

realize some of this stuff. We've been talking about this [indisc.] a whole bunch of people and it makes sense. Because I'm looking for the future. I'm looking for the kids. This is what I'm doing. I'm hoping the kids and the neighbors do it after me and I go to the night school there as much as I could. I tell the principal that I have just as much a right as you have to say what I want to say to kids, because you are using our [indisc.]. See, I didn't get to any school at all, hardly. I got schooling without getting there. I learned the hard way and I tell you I'm kind of happy I did it the right way. Now I know the both sides of it now. Where I learned -- why probably some of you guys heard me say that before too -- how I learned how to read and write. I was going to school and they had to pay board for me, my mother didn't have it, they couldn't afford it. See, I lost my Dad when I was really young. So I learned everything the subsistence way from my mother. My mother was a good teacher even though she couldn't talk either. She's [indisc.] and she told me to continue to carry on and this is what I'm doing. So I told my mother I wanted to get out and my mother say, "No, there'll be a lot of people around there and you won't understand them, and you'll probably learn how to read and write." Well I told her I could read my name, and she said, "Not only that, you need more. You need some education." I told her I'm going to try to learn while I stay out on the trapline. So she went down to my auntie and my auntie wrote everything down, you know, like moose and caribou and whatever, tea, coffee, and a picture underneath it. And most of the things I learned from catalogs. I tell you, the catalog comes in there and that's how I learned. I learned the hard way. This is what I'm saying about this subsistence. It's terrible. In seven generations right now, they're turning from us now. What I mean is this, it's too much. They're spoiling our people. Right now I'm trying to get some people to work down at my place down there. They ask me, "How much an hour do you pay?" Well, I can't. It's all volunteer what I'm doing right now. It's just too much. Like I'm saying, it's not only my people, it's too much

-- how do you say? Public assistance. It's just too much of that. And I blame the family for a lot of these things. I know I've got cousins in town. I'm all alone. I don't have any family. I want to share with people and this is what I was taught, to share with people. I don't care who they are. I will tell you I have traveled all over the world. I spent time in Russia and I went over to New Zealand. I tell you, I have heard a lot of things and I know how they work things. This is what I'm saying that we can solve this problem one more time be right now, but I'm pretty sure you're not listening to each other. My mother used to talk to me all the time and she said, "You're not listening." She'd say, "You put that piece of rock in your ear and leave it there until I get through talking." And I believe that's what we should try to do. Maybe you can solve some of those problems because we need that. That's our livelihood. We've got to have that. I stop and I start thinking about these things all the time. What are my nephew's kids going to do after this come up? It's too much of this handout and somebody's going to have to pay for these things later on. I believe at about the fifth generation it's the one that's going to have to pay for that, and how are they going to do that? This is what I say, the subsistence is our livelihood and we've got to work this together. I say in my language [indisc. - Native language]; it is what I name my corporation - [indisc. - Native language] camp. Oleeah is luck, it's a [indisc.]. If you take care of that oleeah, if you take care of your luck, whatever you want to do, that thing would come to you. Now right today, I don't have to go look for a job. People come ask me, they come after me. I'm sorry that I didn't start this thirty years ago. I used to be just like everybody else, but I finally talked to myself and told myself that the only time I had friends is when I had money, but now I have no money and now I'm just lost. I mean this thing that we're talking about, I just sit back and you just kick your feet back again, and make this [indisc.] about my generations. The young generation is coming up. What I was taught is if you take care of your luck,

that thing will give itself to you. And the wolf is not the only one that is [indisc.] along there, the moose. It's just like anybody else, if you had a bigger [indisc.], you would go back and go for your seconds or thirds, wouldn't you? Well, it's the same thing. It's the two-legged [indisc.] that's doing it. Look, if they left a bounty on the wolf, I think a Native could have got along a lot better too. Now they got the state to get the helicopters to kill the wolves. Look how much it costs them, hundreds of thousands of dollars now. What do you think of that? We could have that money in our pockets now if they just kept the bounty on stuff like that. So, I thank you all. [Applause]

SENATOR KERTTULA:

We have one other gentleman who sat down, and then we'll adjourn. Does he wish to testify? Does the elder wish to testify? Yes?

JON ANDREW FOR DAVID LEWIS (testified in Native language):

Mr. Chairman, my name is Jon Andrew translating for Dave Lewis. Mr. Chairman and the rest of the Senate staff, he is grateful for his opportunity to be in front of you right now. He said my name is David Lewis and I'm from Chefornak. Chefornak is located 480 miles west of Anchorage site. That means he came over one thousand miles just to testify because he is concerned about his subsistence lifestyle. He said his name is David Lewis, born on January 1, 1916. His people have sent him down to testify before this committee. Their main concern is their own subsistence lifestyle, their customary traditional subsistence lifestyle. It is the way of their elders before them that taught him how to live off the land and utilize the natural resources in their area. His people are concerned about preserving their way of life. that's the only way of life they have known for way before the white men came around. They said first thing is their respect for nature. Second keep the wilderness [indisc.]. Anything they use out there -- they use the area they'll try to keep it clean. That was the way of the people. [tape ends]

Tape 3

Side B

MR. ANDREW:

He said through this state he still believes in their own way of managing their own natural resources as far as where game is are concerned. He says the way of their people when they do go out hunting, they just try to take or caputre what they need in order to avoid waste. If they do go out hunting, they try to figure out how much they will need and they will try to go on getting. In their way, if they take too many the extras are just waste, waste of resource. He said to us i n the same ways in the early days with water [indisc.] they say they do go out and try and get what they need during the time when they do go out and harvest them, especially they have their own rules for not taking eggs fromthe time in spring from taking eggs to the time when they are molding. During the summer time they leave them alone. Their forefathers say if you touch the nest or the egss the mother will leave the nest and that resources is wasted. He said up to this day they always try to pass on their own hunting and fishing practices down to their children and their grandchildren so they don't lose it. Their way of lifestyle is what they are trying to preserve. When other people come and try to manage their natural resources, they don't do a good job of it because they don't live in the area. He came all the way down here to testify about his own subsistence lifestyle. His two main concerns right now are he is not in favor of the Governor's subsistence proposal, but he prefers the one drawn up by the Bush Caucus, and also he'd like to see people over here [indisc.] the needs of their own area. What he said is enough for now because he just wanted to keep on going longer. But his main concern is to preserve Native for the subsistence lifestyle. Thank you.

SENATOR KERTTULA:

I guess Mr. Johns is coming forward, but he'll be the last. We will recess then until 9:15 a.m. tomorrow. Apparently there will be a 9:00 a.m. joint session of the Senate and the President will speak to that. But 9:15 a.m. here we will take testimony

from other user and interest groups, and we'll start restricting the time for testimony, except for any answers to Senate questions. It would be my expectation that early tomorrow afternoon after finishing up this type of testimony, we'll have the sectional analysis, we'll have the bills and any suggested amendments available for debate so that we can go on and report progress as soon as possible to the Senate itself. At this time you have the floor, Mr. Johns.

JERRY JOHNS, REPRESENTING AHTA:

Mr. Chairman, my name is Jerry Johns and I'm from Copper River. I've lived all my life in the Copper River. I was born there. Today I came for the same purpose as the people who aren't here, the Native people from different villages, to support our subsistence rights. I would like to say that I used to hunt from my youth on up with my father and we have been living on subsistence for many years. To live on subsistence is something that you have to have fish and meat. I think right now I could still provide in the woods with just dried fish and some rice and go out there for about ten days; I could still survive on that. That's how my ancestors survived. They survived on meat, fish, muskrats, porcupines, anything they can get. And the way we used to keep meat is jerky dried, boned it way out about thirty miles from home, and they used to pack it in on their backs and had some dogs, too, to help pack in the meat. Right now the way things are, I've been sitting back here for four hours and listened to what's going on in here. It seems like that I can't get everything in my mind what's going on. I'd like to say this. I'd like to see that we have the subsistence rights, the Native people in Copper River and different areas. On unit thirteen where we hunt and fish there are people coming in from Anchorage and Fairbanks. When the season opens they get there about three days ahead of time, put up their camp, whatever they've got, their trailers, and they bring out their big machinery, and get ready to go out and hunt. They camp by the road where the trail goes out to different areas and they take these big vehicles and go right

out there just as soon as the season opens—that morning, they'd be out there ahead of people. We don't have a chance. Us Native people that don't have these big vehicles and stuff like that to have a chance to get out there and get our meat. We could probably go out there walking or something like that, but we won't get very far. By doing this, they chase the moose back about forty or fifty miles just off the highway and we don't have a chance. I'd like to see something done about this because it is ruining the country. I've lived in this country for eight-two years and I've lived in one place. And once the things that have been going on for the last twenty or thirty years, and I know that what I see is done up there is depleting everything for the people. And it won't be long the people will deplete all the moose, no matter if Fish and Game sets up a law and stuff like that. The people will get out there just when they open the season for ten days, they'll be out there for ten or forty miles with those big vehicles and destroy everything. I have seen in my time out there hunting, people go out there and shoot caribou and moose and just take the hindquarters and leave the rest of the meat out there where they killed it. That's been done many, many times and it's going to continue on if we don't have something to say about it. I live on a subsistence [indisc.] for years. We don't have the jobs in Copper River like different places. We used to have a state job with the Alaska Road Commission. When I was young I worked forty-five years for the Department of Highway and we had a job. We were trained as we went to work. Today you've got to be skilled to have any kind of a job in Copper River, and elsewhere too, I guess. I don't know about the other places, but I know, like I said, I have lived in this area for many years. That's what is going on. The people in Copper River don't have a chance of a government job or a state job. Some of them do but they don't last too long because they might get a job cutting wood or something like that, because they don't have the skills. They left high school and they can't get a job. There are young and old people in Copper River who are the same because

they have no way of surviving themselves. I'm here because I want to see that subsistence is done for the people, not only for the Native people. We can be wrong because I say this for everybody that will have food to provide for themselves, but not these people with the ten, fifteen thousand dollar vehicles to go out there and shoot moose and caribou. I want to thank you for listening to me tonight.

SENATOR KERTTULA:

Thank you.

[Applause]

We're in adjournment until quarter after nine tomorrow morning.

ADJOURN

6:35 p.m.

SENATE COMMITTEE OF THE WHOLE

June 16, 1992

9:45 a.m.

(Meeting held in Senate Finance Committee Room)

MEMBERS PRESENT

Senator Jay Kerttula, Chairman
Senator Al Adams
Senator Virginia Collins
Senator Sam Cotten
Senator Shirley Craft
Senator Jim Duncan
Senator Dick Eliason
Senator Paul Fischer
Senator Steve Frank
Senator Rick Halford
Senator Lyman Hoffman
Senator Curt Menard
Senator Drue Pearce
Senator Pat Pourchot
Senator Pat Rodey
Senator Dick Shultz
Senator Arliss Sturgulewski
Senator Robin Taylor
Senator Rick Uehling
Senator Fred Zharoff

COMMITTEE CALENDAR

SENATE BILL NO. 484

"An Act relating to the taking of fish and game; and providing for an effective date."

SENATE BILL NO. 485

"An Act relating to the taking of fish and game for subsistence; and providing for an effective date."

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6/16/92

Tape 92-4

Side A

[Tape begins midspeech]

SENATOR KERTTULA:

... to order in a continuation of the hearing process on the legislation that's now before us. We'll ask Carl Rosier, the Commissioner of Fish and Game to come forward at this time. We've been pretty broad and far reaching, Commissioner. And we would ask that you give us background, and specifically, the reasons and the merit of the legislation, why we need it, why it is desired. But anyway, however, you present the case, please proceed.

MR. CARL L. ROSIER, COMMISSIONER, DEPARTMENT OF FISH AND GAME:

Thank you very much, Mr. Chairman. I appreciate the opportunity to be here this morning. I realize it's summertime and people have a lot of things to do. We've got a extremely important issue before us here that [indisc.] to see if the Legislature can, in fact, take a look-see at the present time. Certainly, I'm in strong support of the bill that was developed through the consensus process of the Governor's Subsistence Council. I feel that this is a balanced bill that addresses a number of the management issues at the state level that are faced by departments here today.

Currently, we have a situation in the State in which the Boards of Fisheries and Game are struggling. They have significant problems with dealing with the allocation issues that go along with the court rulings and federal legislation and that they're faced with operating under today. Certainly, the Board of Fisheries has been essentially stalemated at the present time in dealing effectively with subsistence and the allocation of resources for subsistence because of the current state law. It is felt that the tools are simply not there to, in fact, define who and how and where and when, so to speak, subsistence within the State is, in fact, going to be provided for. As a result, we have

about two years of backlog of proposals that have been submitted by the public. The Board has been unable to, in fact, effectively deal with that group of proposals. The Game Board has done a little better job of allocating resources. But, again, they also have problems. They are, of course, -- we're beginning to see now a divergence between the state management program and the federal program, pretty much on a statewide basis. This is just the beginning on this in terms of some of the game populations. Nevertheless, it is beginning. My feeling that we need to, in fact, get the State law into line with something that the Boards can effectively deal with and kind of clean up the state's house and, at that point, then we can begin to deal with perhaps some of the other side issues that are affecting how we, in fact, manage our resources here in this State.

I believe that the consensus bill that the Governor has submitted here, in fact, does give the Boards the kind of authorities, the criteria to make the decisions that they need to make to, in fact, effectively implement subsistence within the State without adversely effecting the other user groups of the State. Certainly, at the present time, with essentially a scenario in which every citizen certainly has the right under some of the legal determinations -- this fact, places certain resources very much at risk in terms of historical uses of those resources. And I would speak specifically here to some of the commercial fisheries.

Certainly, we've got a scenario, for instance, in the Yukon River, where we have an upriver/downriver scenario. We have subsistence throughout that particular river. And it's a situation in which we almost get into a weak stock management policy scenario in terms of providing for the upriver subsistence and a lesser commercial operation up there versus a major commercial fishery on the lower river that's extremely important to the people on the lower river.

We have a scenario in Southeastern Alaska in which we're dealing with chinook salmon here. We've got a cap on the total

numbers of chinook we can, in fact, harvest under the [indisc. - paper shuffling] here in Southeastern Alaska. Two hundred and fifty three thousand fish. Those fish are currently allocated, basically, between recreational and commercial entities. Certainly, if the request was made at the present time as related to those stocks of fish, for subsistence fishery on these, under existing state law the Board would be, in fact, required to, in fact, provide for that. Basically, we've had, traditionally, a long term personal use type fishery that has gone on in Southeastern in which we've utilized those fish for our own consumption in many communities throughout Southeastern Alaska. But on the other hand, if we, in fact, have to manage for a significant subsistence fishery, that means a major reallocation to those resources here in Southeastern Alaska.

We have other scenarios that such as the small sockeye systems that we have scattered in many areas of the State, not only in Southeastern but in Prince William Sound as well. Many of these small stocks of fish have, in fact, been subjected to a personal use or subsistence type fishery in those areas. These fish, they are generally pretty small. Should we, in fact, make a mistake in terms of what we're harvest on this in order to meet the subsistence priority under current state law, we would, in fact, have to back away from commercial fisheries that have had a long standing use of those particular stocks. I think these are just a few of the examples of the types of issues that we're faced with here at the present time.

Granted, these are not necessarily issues that have, in fact, been brought forth in terms of a court case at the present time. It's my view that we are vulnerable in these particular areas in terms of how we deal with those under the current state law. Certainly, these types of scenarios in my mind are spoken to in the consensus bill that's been submitted to you by the Governor. And I feel that we need to begin to work and clarify and give the Boards the tools to, in fact, work with. Give us the tools to work with as the management entity to, in fact, effectively manage

those resources.

I'm extremely pleased to be able to sit here today and tell you that generally our resources are in pretty good shape. I think I've told many you this before in committee hearings. We've got a pretty good scenario as far as most of our game populations are concerned, as are most of our fisheries populations are concerned. This was not the condition that we inherited back in 1959. We had resources that were in a real mess in this state. And that speaks for the federal involvement in management of those resources. It's my belief that if we're going to effectively manage these for the future, it's going to have to be done under a state program that's proven to be very successfully and has effectively rebuilt most of the populations in this state over the last thirty years since statehood.

SENATOR KERTTULA:

If I may interject, wasn't the fishery the primary problem though under this schedule?

COMMISSIONER ROSIER:

Yes, it was, Mr. Chairman. That's correct. Mr. Chairman, with that, I think that I would say, I would be open to questions on this rather than going on at length and let the senators have at me here.

SENATOR KERTTULA:

Senator Sturgelewski, I'll go around and try to again, one per customer and then back again. Senator Sturgelewski.

SENATOR STURGELEWSKI:

Yes, Mr. Chairman, and perhaps this is a comment more than a question, Commissioner. But I would like, when we get into the specifics of the bill, to have testimony as to specific sections. For example, we can solve, by this bill, the Yukon problem of upriver and downriver. I'd consider that God's little miracle. But, I'd like to know how the bill will address that and also the stocks that are available for subsistence. Because I know that is a big issue. You made a comment, however, and I don't see getting into that right now, but you made a comment about you see a

divergence taking place between federal application law and the State. What exactly is happening? What do you mean there? And I would assume that that's primarily on game.

COMMISSIONER ROSIER:

That's correct. It is primarily on game. We had a situation, for instance, I believe it was on the Forty Mile caribou herd this year. In which basically we had harvested a full complement of the allowable harvest off of that particular herd. The feds came in and opened the season -- a subsistence season very late in the year and provided for a subsistence season on top of the allowable -- once the allowable harvest had already been taken in the general season.

SENATOR STURGELEWSKI:

And you see this bill correcting that?

COMMISSIONER ROSIER:

I don't see it correcting the divergence in the feds. I'm saying that basically we've got to be dealing with this as a state issue right now correcting the state law and the problems that we have with the state law. Then we'll get into, what I consider to be the other issues of the federal involvement here on this.

SENATOR STURGELEWSKI:

This doesn't solve that?

COMMISSIONER ROSIER:

This does not solve ...

SENATOR STURGELEWSKI:

This does not solve the dual management problems.

COMMISSIONER ROSIER:

It does not solve dual management. That's correct.

SENATOR STURGELEWSKI:

Fine. Thank you.

COMMISSIONER ROSIER:

The State needs to get its house in order. Then we can go to the feds.

SENATOR KERTTULA:

Senator Uehling.

SENATOR UEHLING:

Thank you, Mr. Chairman. You alluded to a couple things about some legal cases or pending lawsuits. Are those federal lawsuits that were discussed yesterday before the federal government or are these other kinds of lawsuits that you're speaking of? And how will this bill change the effect of what's going to happen in those courtrooms?

COMMISSIONER ROSIER:

Well, Mr. Chairman, I believe that right now what we have -- I was not here so I'm not sure what the court cases were that were that might have been alluded to here in yesterday's hearing. I was with the House Resources yesterday, so I'm not sure what transpired there. But in terms of the bill and now, basically, the courts are making the decisions. They're second guessing the Boards. Because the Boards do not have the tools to make reasonable decisions ... [tape suddenly ends]

SENATOR DUNCAN:

[begins midspeech] ... and you say you think we're extremely vulnerable to federal intervention and if federal intervention does happen to in Southeast waters, then your major urban areas are excluded from subsistence under federal management. Yesterday, McKie Campbell, I think, was saying just the opposite. The Federal Register, by the way, does indicate that federal management may be a reality in Southeast Alaska, entirely in Southeast Alaska. So I'm wondering why you believe there is such a significant impact on the fishery. My information is that right now Southeast Alaska is less than one percent of fish stock is subsistence use. Statewide basis, less than four percent is for subsistence use. And I guess I have a hard time believing that without your legislation, without the Governor's legislation we would see such a severe impact [indisc.] I really question that rationale. I was wondering if you could expand upon that a little bit. And also bring into your answer the U.S./Canada treaty and how that relates.

COMMISSIONER ROSIER:

That's quite a question. There's a lot of parts and pieces to it there on that, Senator. But, Mr. Chairman, if I might, I think -- let me put it in the context of Cook Inlet. And the reason I use Cook Inlet as an example of where we are at the present time, is that that's real. The letter that the Senator referenced here, went out to all the permit holders in the State. We felt that on this particular issue, all user groups are, in fact, being affected by this. There has been very little response in terms of the whole entire subsistence issue from the commercial fisherman as a group, on this. And it was a matter of bringing those people into the loop here, because certainly their future and their livelihoods were involved in the decisions that were going to be made here.

But using Cook Inlet as an example, as you know the Board of Fisheries early on, set up a subsistence fishery in the Cook Inlet area. It's been back and forth in the courts as to whether or not it was going to operate. But it is currently operating at the present time. The effects are not immediate in that particular scenario. But every person from Anchorage is eligible to participate under state law at the present time in that particular fishery on this. You might say, there's a bit of humor associated with, quote, "the subsistence fishery" that goes on down there at the present time. That's strictly a factor of the learning curve, though in terms of the people's ability to participate, develop the gear and the technology to, in fact, participate efficiently within that subsistence fishery. And they're going to do it in terms of harvesting both kings and sockeyes in Cook Inlet. Given time, basically that resource that is going to, basically, everybody that lives in Anchorage under the present state law, is going to be reallocated into the subsistence fishery. There's only one place that that can come from. It's got to come out of the commercial fishery.

The context of the chinooks that I mentioned earlier here, where we have a cap on the chinooks in Southeastern under the U.S./Canada salmon treaty on this. Basically, what we have is, as

I said allocation to two user groups. The Board has attempted to meet this subsistence personal use of allocation under the sport regulations here in Southeastern. But if you get down to it, I think that we're vulnerable from a legal challenge on setting up a subsistence fishery on chinooks in Southeastern Alaska. If we do that, basically, it's got to be a reallocation of resources from the commercial and the recreational fisheries in order to get to that allocation. We do not have it. I don't want to leave you with the impression that we have a court challenge on this at the present time. We do not. But I think we are, in fact, vulnerable.

SENATOR DUNCAN:

Commissioner, I have a follow-up.

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

If I could just ask a follow-up for the Commissioner.

SENATOR KERTTULA:

You may.

SENATOR DUNCAN:

Specifically on your statement -- at the end of your first statement before I asked a question, you indicated that you thought -- you were concerned that we were extremely vulnerable to federal intervention of federal management. That was the case with this legislation or without the legislation? But do you mean that you agree with what I was trying to get across yesterday that the federal government does have the legal authority to manage the waters in Southeast and Cook Inlet. Because those under the Submerged Lands Act are coastal waters, that could be classified non-navigable if they wanted to.

COMMISSIONER ROSIER:

Mr. Chairman, if I might. No, I do not for a minute think that the federal government has the right to intervene in management of fisheries resources in the navigable waters of Southeastern Alaska. We've challenged them, as I said, under the

Governor's suit on that particular issue. We were certainly challenging them in terms of the federal government's closure, for instance, of subsistence fishing. And their attempt to close subsistence fishing in the Glacier Bay area. And so, we are saying that, no, federal government. You don't have that authority at all.

SENATOR DUNCAN:

And I would concur that you would say that. I guess I was just wondering if you don't also agree though that under -- particularly they could [indisc.] management just take [indisc.] They could even take that management in the waters of Southeast and Cook Inlet could be classified legally is non-navigable waters.

COMMISSIONER ROSIER:

I can't answer the question as to whether they could or could not be legally designated as -- I think that that's a legal question and I'm not qualified. My feeling is that they are navigable waters and certainly the State's best interests is in keeping them navigable waters because that's where our authority is.

SENATOR DUNCAN:

There's just one other follow-up. Do you disagree with my percentages that I used that statewide less than four percent of the fisheries was taken for subsistence and in Southeast, less than one percent of the fisheries was taken for subsistence?

COMMISSIONER ROSIER:

You have to be careful of that particular figure, Mr. Chairman. In my view, because what you're talking about is that under present state law there is a priority for subsistence. And while that may be the case, as I mentioned before, the potential for growth is there on this. But that growth could be uncontrolled because the Board's lack the authorities to, in fact, deal with it. If there is a growth, the decision is made by the residents of Southeastern Alaska that they want growth in those subsistence fisheries, then they need the tools to do that through

the Board's system. And that's what the bill provides for.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Thank you, Mr. Chairman. Commissioner, you stated earlier that the Fish and Game Board are struggling to make good decisions around state unless we pass a piece of legislation. Can you tell us how they are going to go and make good decisions with the Governor's bill, which is unconstitutional according to our legal department?

COMMISSIONER ROSIER:

Well, Mr. Chairman, the legal advice that I have as Commissioner of the Department of Fish and Game, from the Attorney General, is that the bill is constitutional and they'll leave it to the lawyers to argue that, I guess.

SENATOR STURGELEWSKI:

If they will.

SENATOR ADAMS:

Follow-up.

COMMISSIONER ROSIER:

They will.

SENATOR ADAMS:

I would like to go and refer you back to a memo that you had received on May twelfth from Cheri Jacobus and I would like to refer you to page number three. And I'll just read it.

"There is a risk that a subsistence preference enshrined in the constitution would be interpreted or inhibit or prevent development of other resource since logging, mines, and so forth." Is this a scare tactic that is being used by the administration because of the support that is coming from groups such as Commonwealth. Would you respond to this please?

COMMISSIONER ROSIER:

No. Mr. Chairman, I don't believe that it is a scare tactic. And it's certainly not a scare tactic by the Administration on this. Again, the risk is there. Who knows what

may, in fact, happen within the Supreme Court on this. But as you put wording into the Constitution, it takes on a different connotation, than if it's in state law. And certainly, subsistence as a priority, say, within the constitution, the designation of that as subsistence takes on a different connotation. It gives it a priority that goes far beyond other resource uses. It's going to be part of the consideration, in my view, of the resource development throughout the state in all areas.

SENATOR ADAMS:

Mr. Chairman, and members, this particular memo here is a flawed idea. Each of the constitutional amendments that have been considered by the Legislature have applied for the taking of fish and game. None has mentioned or in any way affected the use of habitat that fish and game occupy. Or development activities that may take place on habitat. A constitutional amendment has nothing to do or in common with section A-10 of ANILCA. Congress specifically intended section A-10 to create a planning process that takes the potential effect of development activity on subsistence into consideration during the planning process. Neither sponsors, nor any members of the Legislature who supports a constitutional amendment intends the text of their memo to impose a land use planning requirement of any kind. The memo by Ms. Jacobus managed to convince legislators that the purpose of a constitutional amendment is, to any extent, ambiguous as to whether to affect land use decisions. The concern may easily remedy by the Legislature enacting a letter of intent. A letter of intent that describes what the amendment is intended not to do. Ms. Chukopus memorandum [indisc.] asserts that an amendment is a risk to development, but does not say how great Ms. Chukopus believes the risk is or the reasoning that lead to her reason of assessment. Can you tell me if this flawed idea is yours, or a member of this body?

COMMISSIONER ROSIER:

This, in my view, is not a flawed assumption. I believe that

certainly it was arrived at after substantial review and consideration by the staff of the Attorney General's office. And I would not, in any way, attempt to second guess them. I feel strongly that the decisions that -- the content of the memo is right on. It's something that I believe definitely has to be considered as you look at this whole issue of subsistence.

SENATOR KERTTULA:

Mr. President.

SENATOR ELIASON:

Thank you, Mr. [indisc.-coughing] I think that -- I would like to, more or less, focus on the question at hand as to whether where we are today relative to subsistence [indisc. -coughing] in terms of [indisc. - coughing] recent court case, much to the amazement of those of us who were watching closely through the subsistence users, themselves were very offensive, which in effect allowed, in my opinion, the commercial taking of herring roe on kelp. There's no question about it, it was a commercial venture. However, to subsistence and to the court's they were allowed to say it was subsistence and that totally offended the people that I associate with in my district who are subsistence users. In just that one step further. As a matter of fact, I think it's offended a lot of people in AFN. The question is, if nothing happens, if you do nothing, are we still vulnerable to that abuse by numerous people? In other words, can someone who happens to live out of the communities of Sitka, or Ketchikan, Juneau, go out to harvest herring roe on kelp which is a very, very expensive commodity in the Japanese market and sell that and still contend that they are a subsistence user. Are we still vulnerable for that type of action?

COMMISSIONER ROSIER:

Mr. Chairman, in my view, we are definitely still subject to that type of action. The scenario that the Senator has raised involves [indisc.] on kelp, a very expensive luxury item that's enjoyed by the Japanese. The quantity that was involved in the latest court decision was about \$25,000 worth. What the bill does

is define and gives the Board the authority to further define what customary trade is. That's not defined in the ANILCA. It's not defined in the current state law. So we are, in my view, unless we change it, we're still vulnerable.

SENATOR ELIASON:

Unless we do something, this bill or a constitutional amendment or something positive to deal with these issues and your suggestion that we go home doing nothing, that we're going to be vulnerable to these types of abuses until we do something. Is that correct?

COMMISSIONER ROSIER:

That's correct. I think that that comes back to the point that we need to get our own house in order before moving on. Under ANILCA provisions at the present time, on this 807, we would still continue to be vulnerable on this particular issue because we would be subject to federal court oversight. If we do the constitutional amendment, without changes in ANILCA, you still do not get the job done. Because ANILCA still continues to provide federal court oversight of the management programs on this and it's the federal courts that were making the decisions on what customary trade was. Two of them, I believe, one in Hydaburg involved about \$7000 worth of product, and the latest one that I was talking about is about \$25,000. You make that same application to some of the other commercial fisheries. I'll use the Yukon again, as an example, in which we have a major roe operation on the river. Certainly, \$7000 worth of roe as a byproduct of subsistence or commercial -- excuse me, not subsistence but commercial, on this. You're talking about putting a lot of dollars into the hands of individuals who are going to push the law.

SENATOR ELIASON:

Mr. Chairman, I just want to pursue this.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR ELIASON:

I just want to make a point. I'm not quite clear if this assumption is correct. But if you say someone came up from California, new to Alaska. Say they wanted to be [indisc.] to a logging camp in Southeastern and moved to Angoon or Kake or these villages that we have in Southeastern. Within a year they qualify as subsistence user, he's become a resident of Alaska and he'd never seen herring on kelp in his life before but he found through this process it was very valuable. And he was the type of person who would go out and harvest this and sell it on the open market for \$15,000. That would be all right, unless we do something. Is that correct?

COMMISSIONER ROSIER:

That's correct.

SENATOR ELIASON:

Thank you.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

On customary trade, the Board has never defined what customary trade is. But they do have the authority to do that. And, in fact, they can go ahead and address the concerns of Senator Eliason and it's my understanding that they do have that on the agenda for next winter. So, in fact, the whole issue can be addressed without the need for the Governor's legislation. And secondly, you refer to the bill as a consensus bill, but I've talked to many of the Native participants and they never signed off on the legislation. They might have participated and they've never signed off and I don't believe that it is a consensus bill, as you refer to it. The area that I would like to pursue though, is the question of dual management. And you and I spent several hours this last session going over the numerous problems that it would impose upon, not only the budget, the people, but the resources, as well. I would like maybe for us to go over that again. It seems to me that dual management problem, which we are not or the administration is not pursuing to get back at this

point causes the people of this State problems in dollars. It causes problems in conservation. Particularly say a hunter goes out and wants to hunt a moose. That moose does not know where the boundaries are. The hunter may have an idea where those boundaries are but it is very, very difficult and many times impossible to find out even when they're out there in game management units where those lines are. And now they're going to have to find out not only where the game management lines are but also where the federal and state lines are when they're hunting. The federal people are going to have their program and the state is going to have their program. The whole system that we're walking down seems to be setting up a complete mess for the people of this state. And I wonder if you may comment upon how you perceive the state handling the dual management question for the people of this state since you are not trying to resolve that question at this point.

COMMISSIONER ROSIER:

Mr. Chairman, if I might, make the one -- in regards to the consensus bill that I reference here, this is a consensus bill that came out of the Governor's Subsistence Council. I believe I made that clear at the beginning of my presentation here on this. Never indicating that it had been signed off by all user groups, although I would like to say that we have subsequently had sign-offs by the major commercial fishing groups in this state. And we've also had sign-off by major outdoor recreation groups in the state. So those people whose representatives did participate in the process, have come forth and supported, what I call the consensus bill. Not willingly, in all cases, but certainly they have come forth and supported this. Just to clear the air on that.

In terms of the dual management, as I say, it's going to be - it's tough but we've made very strong efforts to, in fact, interact with the feds, so to speak. And to influence and make their decisions and make our data available. We have joint data sharing, for instance, on wildlife populations. Currently, we

operate with a common data base as far as game populations are concerned. But again, over time, obviously, the federal government is probably going to go in a separate direction. And we're seeing signs of that at the present time. We saw -- I mentioned the situation on the Forty Mile caribou herd. Certainly, we've had other instances where the feds have gone their own way on this particular issue. I think it's going to continue to be a mess in terms of how we deal with the feds, until, again, we kind of get our own house in order. Give the Boards the tools to, in fact, deal effectively with the resources of state and private lands. At such time as we've got that house in order, and I think that people, in fact, support the state program. I think that at that point, maybe we can come together as a people within this state and deal with the federal issues that have to be dealt with. The feds are going to be here July 1. That's a fact of life. It's not significant -- it's not going to be any more significant though July 1 this year than it was a year ago on this. Regulations are basically the same. Other than the fact that the feds have pushed us on the issue of intervening in the navigable waters issue within the regulations, the regulations are basically the same at the present time than they were a year ago. Like I say, we're trying to make this thing work, with looking at the resources. But in the long term, the feds are going to be moving in their own direction. And you can depend on it. I think we've tried to deal fairly with the residents of the state on subsistence within this bill, in that, the concerns that were out there that are not addressed, for instance, in the federal [indisc.] subsistence being phased out when you reach certain population levels. There's no provisions for utilization of subsistence resources within the federal law for people that live in the urban areas. Certainly this bill addresses that type of thing. So if we can get our act together, I think we can deal effectively with the feds. Because I think the state as a whole has been very effective in doing that in the past and on an issue like this, let's get our own house in order and then go from

there.

SENATOR HOFFMAN:

Follow up. It's been said that seventy to eighty percent of the big game in the state are on federal land. The problem that I see is that the State of Alaska -- as you said, the feds are going in their own way. They're going to go and do their own thing very shortly. They are going to go ahead and set up their own subsistence guidelines and manage, for the most part, the resources. We in our constitution say that we have to manage our game under sustained yield basis. How are we going to be able to coordinate some of the ways that we manage the resource with the way the federal government is going to manage the resource? I see that there's going to be major problems there. And I think the resources are going to suffer in the long run.

COMMISSIONER ROSIER:

Mr. Chairman, the last statement by Senator Hoffman is probably pretty close to the truth. You are going to see some resources - certain stocks that will very definitely suffer over time. I guess my point is that we've got the federal law that's going to have to be ultimately dealt with, so the sooner we get on with getting our own house in order, the sooner we can begin to turn the attentions on the issues involving federal management program.

SENATOR KERTTULA:

Under the rules that I'm directed, I recognize anyone who hasn't spoken before someone else. Any further questions?

SENATOR HOFFMAN:

No, just a comment.

SENATOR KERTTULA:

Please comment.

SENATOR HOFFMAN:

My comment, I guess, is that that we need to get this house in order, we need to get it in order by getting control of the management of resources and the Governor's petition is not going to do that. And I would say the people of this State should be

ticked off if we lose management of this resource and we, as this body, should be trying to get that management back. And the way to get that back is to put the vote to the people and let them decide so we can get management back. We control the resources in this state.

SENATOR KERTTULA:

Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. Just before -- make a comment here. I did hand out to the members of the committee a letter that was addressed to me from the Aleutians East Borough which was read in part yesterday by Mr. McKie giving us the illusion that this whole thing is under the administration has been smoke and mirrors and illusions all the way through up to this point and probably will continue. They're giving us the illusion that the Aleutians East Borough and the Aleut [ph] corporations do not support the AFN proposal. And that they do support the Governor's bill. I would ask each of you to read the letter in its full context. They did express that they are concerned and they are in opposition to the AFN bill. But they also state that they do not support Governor Hickel's subsistence bill because it is weak on subsistence. Read the whole letter in its context. Not just the bits and pieces there that you want to hear or to have heard from the administration.

Going on then, Mr. Chairman, and I hope that the answers are not smoke and mirrors, Commissioner. My basic understanding is the Department of Fish and Game's basic goals and objectives is the perpetuation and preservation of the resources of this state. Is that pretty much correct?

COMMISSIONER ROSIER:

That's correct.

SENATOR ZHAROFF:

How does that relate in relationship to the people of the state? Who are we saving these resources for?

COMMISSIONER ROSIER:

Certainly, my charge, under Title 16 as Commissioner of the Department, is to manage, extend, enhance the resources in the interest of the people of this state. That's all the people.

SENATOR ZHAROFF:

You know, I think we've all heard, and read stories about survival in the wilderness. If you're in a situation and you have to get food to survive and if something comes along you take it. That's for basic survival, which I guess is, nobody has really come up with a definition of subsistence but that would be basically subsistence, wouldn't it, for survival?

COMMISSIONER ROSIER:

Well, that's certainly one definition and would certainly be part of the definition of subsistence, anyway.

SENATOR ZHAROFF:

Of all the uses, Mr. Chairman, and Commissioner, of the resources of the state, then and I'm thinking of all the different user groups. What user group would have the highest priority?

COMMISSIONER ROSIER:

Certainly the utilization of fish and game resources as the food items in the State, as a matter of policy and as a matter of law, that's been a priority in terms of use of those resources.

SENATOR ZHAROFF:

Which is basically subsistence.

COMMISSIONER ROSIER:

Subsistence, personal use, whatever you want to call it, yes.

SENATOR ZHAROFF:

And then the Legislature has gone ahead and identified subsistence as a priority use and we've done this through legislation. The courts have said that, well, it's not constitutional to do that.

COMMISSIONER ROSIER:

[Indisc.] constitutional.

SENATOR ZHAROFF:

Then what is wrong with putting into the constitution

subsistence as a priority use? I don't care how you word it. I mean you don't like the terminology that we come up with here as a Legislature. Well, let's see something from the administration, from the Department of Law, that says how we should phrase this in the constitution that the highest use of our resources should be subsistence. Do you disagree that we should not have it in the constitution under that premise?

COMMISSIONER ROSIER:

Mr. Chairman, at this time, the administration is not willing to get into a discussion or debate in regards to the constitutional amendment. I'm not going to sit here and get into that particular discussion.

SENATOR ZHAROFF:

Mr. Chairman, I think ...

SENATOR KERTTULA:

You have the floor.

SENATOR ZHAROFF:

I think the Commissioner had opened up the discussion by saying earlier that it would not fit into the constitution. Why put it into the constitution?

COMMISSIONER ROSIER:

Mr. Chairman, if I might ...

SENATOR ZHAROFF:

If you're not going to discuss constitution, well don't bring it up as part of your testimony.

COMMISSIONER ROSIER:

Mr. Chairman, I think, that comment was made in response to a question, if I recall, anyway. It was made in response to a question to me from one of the other senators. I think that that's ...

SENATOR KERTTULA:

Will someone get whoever is making noise out of here. We don't need that. Mr. Gruening, would you check it out. Run them off. Unbelievable, one day a year [indisc. - simult. speech]. What it is. They can quit us. Did you respond Mr. Rosier while

I was in my little diatribe here? Are there further questions of the Commissioner? If not, -- you have the floor.

SENATOR ZHAROFF:

Mr. Chairman, I don't know if I got a complete response to that. If I did, I guess I didn't hear it. I'm still a little bit concerned along those lines then. I think another comment that is probably more along the illusionary track would be perception that we're getting from the administration there, that if there are problems elsewhere around the state, and you have availability of resource in one area, let's say Southeast, Cook Inlet, Kodiak, Bristol Bay, wherever it might be, that all five hundred and twenty five thousand people in the state automatically are going to go that area and exercise their right ... [tape ends midspeech].

Tape 92-4

Side B

[Tape begins midspeech]

SENATOR ZHAROFF:

... present in this state for subsistence take. That was sort of the understanding that I had yesterday. And I was - kept throwing this figure, five hundred and twenty-five thousand people out and that we're going to go -- everybody is going to go into a certain area, take out that harvest, put the commercial fishermen out of business, put the sport fishermen out of business. Put the personal use people out of business and just use it for subsistence. That I don't think is a fair illusion to bring forth.

COMMISSIONER ROSIER:

Mr. Chairman, I would not pretend to sit here and say that all five hundred and twenty-five thousand residents of this state are going to converge on any given area. Certainly, the example that I gave you of Cook Inlet involves literally thousands of folks who travel on a daily basis, especially on the weekends during the summer months down to the enjoy Cook Inlet there. It

wouldn't take five hundred and twenty-five thousand. For the numbers of fish that are involved there given some efficiency measures at the subsistence activities at Cook Inlet, they could run real competition and cause reallocation of resources under the present state law of Cook Inlet.

SENATOR KERTTULA:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

Mr. Chairman, Commissioner. ANILCA, in section 803, defines "family" and it defines "barter". It does not define "customary trade". And that's been a real problem on the Yukon and beginning in Southeast. If we passed a subsistence law and a constitutional amendment and we went to our congressional delegation to get some amendments to ANILCA, it seems obvious to me that customary trade is one that we would benefit by having a federal definition. Although I agree with the comment made earlier by one of the Senator's that the Board -- I believe Senator Hoffman -- has that authority now to define customary trade. But then there's always -- you want to win a court suit. Other than customary trade, if there were to be amendments of ANILCA, what do you think they should be? What do you ...

COMMISSIONER ROSIER:

The key in my mind is, excuse me, section 807, Federal Court Oversight.

SENATOR STURGELEWSKI:

Okay, the Federal Court Oversight, customary trade then would be two issues.

COMMISSIONER ROSIER:

Those would be two issues that I could ...

SENATOR STURGELEWSKI:

That you think are the major issues?

COMMISSIONER ROSIER:

Yes.

SENATOR STURGELEWSKI:

The other issue -- could you briefly tell us the suit on the

navigable waters? How does that relate to -- was that brought about because of Glacier Bay or is it a perspective suit to clarify an issue? Could you just briefly tell us what that suit is about?

COMMISSIONER ROSIER:

Mr. Chairman, Glacier Bay is part of it. But basically in the draft regs that will go into effect July one under the federal system, the number of areas in various areas of the state were included as federal enclaves of state waters. There's a number of areas that stretches all the way from Glacier Bay all the way to the northwest coastal areas. The feds, are in fact, interjecting claiming jurisdiction over resources in those areas. There's areas around Kodiak. There's areas around Alaska [indisc.]. There's areas virtually all over the state that they are now claiming jurisdiction, because they are adjacent to federal withdrawal areas. That's what has stimulated the suit on the part of the Governor, here on this. That they had gone beyond the preliminary regs in terms of intervening in navigable waters.

SENATOR STURGELEWSKI:

Mr. Chairman, I appreciate that information. I really think that we should have at least the -- pointed out those sections in the Federal Register. I think we need to have that. But if I'm to understand that correctly, if they would prevail in this, we would then have an issue of the regulations, I would assume, of fishing in those areas which moves us more from fish and game into fishing. And what I'm wondering, if they're claiming that, is it a point to point basis or is it a three-mile or are we talking about taking over "state waters" by the feds for commercial fishing? If so, I think we've got a very serious, serious issue before us.

COMMISSIONER ROSIER:

At this point, Mr. Chairman, I believe that the challenge is really the management of those areas for subsistence purposes. Because we're talking about subsistence regs. They are not intervening - the feds are not coming in saying, commercial. But

certainly ...

SENATOR STURGELEWSKI:

Well, they certainly will impact commercial, if they do subsistence ...

COMMISSIONER ROSIER:

.. in terms of access to the resources of that area, they would, in fact, adopt regulations that would, in fact, impact the other users.

SENATOR STURGELEWSKI:

So, essentially, they're regulating commercial.

COMMISSIONER ROSIER:

They're regulating within those [indisc.]. That's correct.

SENATOR STURGELEWSKI:

Thank you.

SENATOR KERTTULA:

Before I recognize Senator Cotten, [indisc.] Senator Sturgelewski wanted those areas in the Federal Register pointed out ...

SENATOR STURGELEWSKI:

Mr. Chairman, I think also if we could ask the department ...

SENATOR KERTTULA:

... and I would ask you or you would work with Mr. Gruening who does have staff available. Go right ahead, Senator Sturgelewski.

SENATOR STURGELEWSKI:

Mr. Chairman. I was just going to say that, in addition, if we could through staff ask the Department of Natural Resource to prepare us a map that would show us the areas that would potentially be affected by the subsistence category of federal lands, offshore.

SENATOR KERTTULA:

Mr. Gruening, could you contact DNR and see what is possible to be done there working with fish and game. Maybe Mr. Rosier could be of some assistance to you in that. The next person is Senator Cotten. I think there's going to be some real difficulty

in doing some of these things in the timeframe. Some things can be done. Not all. Senator Cotten, you have the floor.

SENATOR COTTEN:

Thank you. Commissioner, I've got a couple copies of this letter to the permit holders. And obviously, I mean there are some risks here. And one of the other risks that have been talked about and already been discussed while I was out of the room. I apologize for bringing it up again, but it had to do with the Katie John and the Kluti-kaah. The assertion by some that the federal government must now assert jurisdiction over state waters. And I didn't know much about that until the last couple of days, and speaking with some officials in the Department of Interior, now they tell me that their lawyers figure it could go either way. And what are we going to do about that? Isn't that even a greater risk than what we're facing right now? If that is a real threat to state management of commercial fisheries, what's your back up plan in that event?

COMMISSIONER ROSIER:

Well, of course, the back-up plan has been challenged. If I'm not mistaken, I believe that there has been a consolidation of some of those cases on navigable waters. I'm not a lawyer, so I'm not sure what all that means. But as I understand it, ...

SENATOR COTTEN:

These two cases are in front of Judge Holland right now, isn't that true?

COMMISSIONER ROSIER:

Yes, that's correct. They are in front of Judge Holland at the present time. But in terms of what happens, I don't think in those terms, in terms of losing. The state has to prevail. Certainly, that's how we're proceeding here at the present time.

SENATOR COTTEN:

Aren't the suits filed against the federal government? I think it's ...

COMMISSIONER ROSIER:

No. The Kluti-kaah is at state court.

SENATOR COTTEN:

What about Katie John?

COMMISSIONER ROSIER:

Katie John is in federal court.

SENATOR COTTEN:

So we don't have a back-up plan. And if suddenly, if the state loses jurisdiction over commercial fisheries, we would just have to start over from there, is that what you're saying?

COMMISSIONER ROSIER:

The initial step has been the filing of our suit, of course, against the federal government that's related to this navigable waters issue.

SENATOR KERTTULA:

In our planning, if you wish, administration's legal counsel, Attorney General's office or others to be questioned about specifics, probably better let the whole committee know so we can immediately request them to appear at some timeframe. I'm just speaking to the whole committee when I say that. Or any other expert witness you might have. The Commissioner might not have the details. You have the floor, Senator Cotten.

SENATOR COTTEN:

That's all I had. Just while I've got the floor, I guess I could give you a quick summary of what the subcommittee appointed.

SENATOR KERTTULA:

Please do. I've heard and maybe I should have asked you that.

SENATOR COTTEN:

I spoke with Vern Wiggins a few minutes ago and he's going to ask the Secretary if he's willing to either make comments or appear before the committee for questions. He says it's not likely. But he and -- who's this other fellow? Marty Suberg, who's with the Department of Interior, would be willing to hook up with us on the phone. Kurt McVee and J.P. Tangent are here in Alaska and they would show up in front of the committee if you wanted them to. And that was one of the questions that I thought

was most important. These lawsuits that have been filed that are trying to get the federal government to assume control. So, if you want somebody from the Department of Interior, we should -- he will be available later today for your call. As to whether or not the Secretary would be available. And otherwise, the other people that I mentioned would be available.

SENATOR KERTTULA:

I suppose upon recess, we ought to make contact for them [indisc.] your committee setting up a system and setting up times that we will respond to since [indisc.] differences. To talk to whomever is available on given portions of this legislation.

SENATOR COTTEN:

All right, well I'll put together a memo for you. I talked to Senator Stevens and John Katz and a few others as well.

SENATOR KERTTULA:

A five-hour differential makes almost everything, more or less today. We haven't set that today. Even though we'll probably be working on the bill. We will be working on the bill by that time. Thank you, very much. Yes, Senator Halford, then Senator Duncan, unless somebody else hasn't spoken.

SENATOR HALFORD:

Just on the information, we [indisc.] session have a number of pieces of information from the Attorney General's office that were current on those dates with regards to ongoing lawsuits and the summary of all the cases that are out there. What's been consolidated and so forth? And I would ask that we get an update of that, dated right now, so that we know what happened in some of those cases. Essentially, I've got the one from April 15, that I had from the Judiciary Committee. But some of these things changed and I'd like to have us all to have in front of us a copy of all the lawsuits that are out there that are related to subsistence -- subsistence user resources, and all the back and forth. Which ones have been consolidated? Because I don't know who to ask sometimes and I don't think any one person knows all those cases.

SENATOR KERTTULA:

Is Virginia here working for Mr. Gruening? Perhaps she could pick up -- she knows her way around. Perhaps she could go to the Attorney General's and Fish and Game. Pick up that consolidation. Do that right now. I think it's something that should be done. The Senator will tell her specifically, if she hasn't heard what he wants. Is there -- do you wish the floor, Senator Halford?

SENATOR HALFORD:

No.

SENATOR KERTTULA:

Senator Duncan.

SENATOR DUNCAN:

Thank you, Mr. Chairman. Just one more time here, Commissioner, on this concern with commercial fisheries. I don't think [indisc.] I just want to be sure I understand it. Let's take a look at U.S./ Canada treaty for example which involves the allocation of salmon that enables the U.S. and the [indisc.]. This kind of treaty doesn't take subsistence into consideration, to my understanding. It doesn't take that allocation into consideration, because it's been insignificant. Subsistence use has been insignificant. So therefore, it's not part of the consideration. And the Board of Fish and Game have allowed king salmon, subsistence fishery Board for a number of years. Even under present law, for instance, statutes in the present regulations customary and traditional uses as a basis for allowing subsistence use. I'm trying to understand how all of the sudden we don't pass this piece of legislation there's a great increase in the allocation in Southeast king salmon fishery for subsistence when it hasn't been allowed in the past. It's not considered in the U.S./Canada treatate because it's insignificant. And it has nto been addressed under traditional use. I guess I don't follow that. I think that the tactics they're using is to raise [indisc. - coughing] that just isn't going to happen.

COMMISSIONER ROSIER:

Well, Mr. Chairman, if I might on this. Senator Duncan is

correct. The treaty does not deal with allocations among users. The treaty deals with guidelines of total harvest as related to interceptions on a coast wide basis. The internal allocation of those resources is entirely up to the Board of Fisheries. So they make the decisions on that, that was a decision, for instance, made here recently, in terms of the allocation of chinooks between the commercial and the recreational interests on this. My statement, I believe, indicates that should we be challenged on the subsistence priority in Southeastern Alaska, as far as chinooks are concerned, I believe that we are vulnerable to that particular area. Because it's been an important species in Southeastern Alaska for many, many years. At this time, the Board has not found customary and traditional use on that particular species here in Southeastern. But on the other hand, if they, in fact, do as a result of public involvement on this. And there's every chance that the Board would, under then present state law, have to, in fact, accommodate that use.

SENATOR DUNCAN:

Mr. Chairman, I think ...

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

I think the significant part of the Commissioner's statements was, should there be a challenge. There is no challenge. Is that correct?

COMMISSIONER ROSIER:

I said there was no challenge at the present time.

SENATOR DUNCAN:

If there's no challenge, your letter, of course, implies that that's imminent. It's going to happen and we're going to need [indisc.] I guess I don't buy that argument. If you haven't missed it yet because it's not been a customary and traditional use. It hasn't been allowed in the past. I don't see that happening July 1 all of the sudden. I think that we're perhaps incorrectly and wrongly bringing in some problems that really

aren't going to occur in doing that in trying to justify or support for the Governor's legislation.

COMMISSIONER ROSIER:

Mr. Chairman, if I might. In regards to the letter, one, I don't believe that we speak specifically to the chinooks in Southeastern Alaska on this. I think that we've got to utilize an example of the potential on this Cook Inlet is a real thing at the present time.

SENATOR KERTTULA:

Further questions for the Commissioner? There are no questions, Commissioner. We're going to ask that those people gathering legal materials - other materials that are appropriate and necessary for working out these bills, amendments, back-up - please figure that by three today that they have their house in order so that we can have those materials. That would be the deadline I've set so we can get some materials so we can start working on the bills. We're going to have a three to four minute recess then we'll come back and we'll meet with the [indisc.] the next organizations and then we'll go to individuals. They'll have ...

RECESS

10:47 - 11:05 a.m.

SENATOR KERTTULA:

We've got these organizations. I'm going to have to absolutely limit testimony because both witnesses and ourselves have to get down to work. The public generally expects us to get done before we come to order. We'll do what we can.

At this time, it's going to be my intention to have three different groups that have long requested. I'm going to have Mr. Don Harris, former member of Fish and Game Board, former legislator, members of the UFA and members of the Outdoor Council. There's all kinds of people that need a five minute conclusion here. Now, I might interrupt briefly for occasional person to be able to testify, but otherwise, it's going to be this afternoon for individuals to testify. I tried to meet with the

organizations this week broadly for a lot of people. UFA for one group. Outdoor Council for a group. AFN for another group. And we did have a meeting of some of the elders yesterday evening where they testified. But I'll do the best I can. I know I'm going to act pretty arrogantly, I suppose, in dealing with some people. But that's just the way it goes. I'll try to let you participate to the broadest extent possible. Mr. Harris, would you come forward and identify yourself.

UNIDENTIFIED SPEAKER:

Mr. Chairman, I think that we should probably have [indisc.]

MR. DON HARRIS:

My name is Don Harris.

SENATOR KERTTULA:

Would pages go out and get the members before Representative Harris starts? Just those that are in the hall, so they know ... [tape abruptly breaks off then begins again] ... but we must move along. Representative Harris, you have the floor.

REPRESENTATIVE HARRIS:

Thank you, Mr. Chairman. I'm Don Harris and my home is McGrath Alaska. I've been a resident of rural Alaska for forty years.

SENATOR KERTTULA:

Can we turn up the mikes? Is it possible. I guess you'll have to turn up your mike, Don, the best you can.

REPRESENTATIVE HARRIS:

I've been a resident of rural Alaska for forty years, served on the Fish and Game and Guide Board for about four and a half years and on the state Board for four years. And my experience on Fish and Game Board, I, of course, representing the area I did, I always -- I tried to look for complaints from the people of the rural areas of the state and pay attention to their requests and demands. I was always amazed at the proposals that came before the Board. Very, very seldom any proposals that had to do with subsistence taking. So I always felt that the needs were being met at the regulations in the law that was made and in the

regulations that were being made at the time. I've checked from time to time with the Department. There's just no history of people being deprived because of the state management. There's no history at all of that. So, in 1978 I was shocked. I was here in Juneau working at another job and very much involved in that and I was shocked one day when I read there'd been a bill passed that dealt with that subject. And a few days later I was in the Governor's office. I didn't know that the Governor was the prime sponsor of that legislation, I brought it up and he sort of passed it off. And I told him that I thought that probably set the management system that the state had instituted back thirty years. And left his office. I think that as a result that that legislation being taken back to Washington, used as a tool to get the legislation in ANILCA, the State of Alaska has been set back in its management program, in as much we'd ever had a problem. I've never seen the problem. I never had the problem brought up. At times I think in one meeting we had, four subsistence proposals out of hundreds that we dealt with. And we dealt with those in the same manner that all the other proposals that came before us. So I never, in my time in dealing very directly with it, I never saw that we had a problem. But we know, many of us know that in the battle for statehood, the battle cry was to get rid of the fish traps. The reason for that was primarily that the packers controlled most of the fish traps in the State of Alaska. The Bureau of Commercial Fisheries working with their people would make regulations for the taking of an annual harvest and then if a packer or packers didn't like that, they went back to Washington D.C. and got it changed more to their liking. And it ended up that when we came into statehood and at the time we took over the fish and game resources of the State of Alaska, we had a fishery that was in terrible shape. The federal management had managed to destroy the Karluk [ph] the largest red salmon fishery in the world. Now, after thirty years of work the state beginning to bring it back. But the state has done a tremendous job. The state management has done a tremendous job of bringing our

fisheries back - very low resource. The feds did a better job on game management, in my opinion, from what I observed through the years and work on the Board. But I believe ...

SENATOR KERTTULA:

Better job than what, Don?

REPRESENTATIVE HARRIS:

They did a better job than they did with the fisheries.

SENATOR KERTTULA:

Yeah, that's what I thought.

REPRESENTATIVE HARRIS:

Yes, much better job than they did with the fisheries. At least the resource at the time of statehood was in much better shape than the fisheries were. I don't think we should have a constitutional amendment to the state's constitution to accommodate ANILCA. I think that it could very well open the door more than it already is to the federal intervention. I would be very much opposed to that. Their management at no time, in my opinion, has ever exceeded -- been a better management program than the state's management program. And I think that no amount of legislation will change the number of fish in the water or game animals in the field which we need to do if we are to live off the wild stocks of this state -- or many people are going to live off the wild stocks of this state, and enjoy the benefit of that resource. We need to work very diligently to increase all of those stocks. I think that the division in the management could be the worst thing that could happen, between the federal government and the state. The people that decided to move for that kind of legislation have imposed a terrible burden on the fish and the game and the people that depend on it. That's all I have, Mr. Chairman.

SENATOR KERTTULA:

Are there questions of Mr. Harris? Senator Adams.

SENATOR ADAMS:

Thank you, Mr. Chairman, Mr. Harris, since the Governor's bill does not retain federal management. And have you read the

Alaska Federations of Native's and the Bush Caucus's bill?

REPRESENTATIVE HARRIS:

I have not, no.

SENATOR ADAMS:

Well, it contains federal management. Which one would you support, sir?

REPRESENTATIVE HARRIS:

Which bill?

SENATOR ADAMS:

Yes.

REPRESENTATIVE HARRIS:

You say the AFN bill would do away with federal management?

SENATOR ADAMS:

No. It would retain it. The Governor's bill does not retain federal management, Mr. Harris.

REPRESENTATIVE HARRIS:

I would get rid of federal management. It's the worst management we've ever seen in this state.

SENATOR ADAMS:

Then you would support the Bush Caucus's bill, by your testimony then?

SENATOR KERTTULA:

You probably haven't read the Bush Caucus's bill.

REPRESENTATIVE HARRIS:

I haven't read the bill. Do you get rid of federal management?

SENATOR ADAMS:

Yes, sir.

REPRESENTATIVE HARRIS:

I'd have to look at that very carefully. It sounds good.

SENATOR KERTTULA:

Mr. President.

SENATOR ELIASON:

Mr. Chairman. Don, there was some testimony yesterday, the elders were talking about their frustration of season opening and

their about ready to go out and subsistence hunt is what it amounted to. And about that time -- three days, I think, before the season open this plane come in and snowmobiles come in and all this heavy equipment to pursue the game and by the time the season is open, the game was forty miles away. And I can understand that frustration. I've experienced that on the ocean fishing for halibut. There's a thousand boats in square mile. However, it seems to me as a member of the Board of Fish and Game or a member of the Game Board, how did you deal with that without -- it seems to me that would be a ways and means problem rather than a subsistence problem.

REPRESENTATIVE HARRIS:

I know that there was -- during the time that I was on the Board, the snowmachine became a very popular item. And we were continually looking at that and the impacts that it would have. But it was also a very useful tool for the rural resident. You had to weigh all the factors that were involved there as to how to deal with it. As long as it wasn't seen as an abusive item, well, we tended to go along with it because it was a wonderful useful tool. But we also saw severe instances of abuse by the use of airplanes at times and snowmachines, and so on. In the case of the northwest arctic caribou herd, I think in the department records, that they found fifteen hundred -- they counted fifteen hundred caribou still in the feed rotting after. It's fair to assume that most of those -- because they were so far afield that they were probably -- the snowmachine was a vehicle of that abuse. But the fact just had to be weighed in every decision as far as the use of the equipment in the field with. It was our understanding on the Board that the Board always had the power to set priorities among uses. The state constitution states that priorities among the uses can be set. The law and the legislation enabling act allowed the Board to do that. We knew that we could set priorities if there was a demand to do so. What we did -- we essentially did that by the allocations and the management between commercial uses and sport uses. We didn't experience complaint

from the people in the State of Alaska because of the management system that was in place.

SENATOR KERTTULA:

You have the floor, Mr. President.

SENATOR ELIASON:

The point was that these type of activities, even today, are within the jurisdiction of the Board of Game and they can, in fact, say they can restrict the use of snowmachines. They can restrict the use of airplanes. They can cut down on that type of harassment of fish and game if the Board chooses to do so. I submit that that probably falls within a power of the Board of Game now. They can do that. Which would relieve some of those issues out in the bush. I can understand what they are.

REPRESENTATIVE HARRIS:

They can establish special use in areas that restrict the -- and then restrict access by various means within those areas. It's within their power. They've had the power -- I don't think that power has ever been challenged when its been used.

SENATOR KERTTULA:

Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. Mr. Harris, I'm just trying to maybe clarify [indisc.] in my mind here from a statement that you made. Maybe you're more aware of the impact of the constitutional amendment than I am at this point. You said something, that we don't need a constitutional amendment to accommodate ANILCA. At this point, I don't think that a constitutional amendment would necessarily accommodate ANILCA, but the reason we would need constitutional amendment for subsistence would be to accommodate any state statutes that we would have pertaining to rural use of subsistence.

REPRESENTATIVE HARRIS:

I don't think we should have a constitutional amendment. If anything needs amending, I believe it's ANILCA that needs amending.

SENATOR ZHAROFF:

But at the present time, I guess, we're sort of caught ...

REPRESENTATIVE HARRIS:

I know what you're dealing with here is the considerations of everybody in the state. But I don't think that the state should in any way -- the Legislature should in any way accommodate ANILCA.

SENATOR ZHAROFF:

I guess ...

REPRESENTATIVE HARRIS:

I think ANILCA is a terrible imposition on the State of Alaska.

SENATOR ZHAROFF:

Mr. Chairman, my understanding there is that it achieves what we were trying to secure on the beginning with use of subsistence and federal lands and also taking into account state lands and that was rural preference on the resource when you reached a critical stage. And at this point, we're reaching a point where we can't deal with the problems in ANILCA because we can't change ANILCA. That's up to the federal government. We can't deal with passing legislation because the course of determining our constitution prohibits us from doing that.

REPRESENTATIVE HARRIS:

Well, I think ..

SENATOR ZHAROFF:

So it seems to me, the only answer that we have at this point there is to try and deal with a constitutional amendment.

REPRESENTATIVE HARRIS:

Well, then I'd recommend that you send a resolution to the Governor and ask him to -- for the state to join in the lawsuit against the federal government on ANILCA.

SENATOR ZHAROFF:

About the problem we raised -- and I don't want to get into a debate here ...

REPRESENTATIVE HARRIS:

Resolve that question first. Resolve the lawsuit with ANILCA first.

SENATOR ZHAROFF:

But the problem we face here is that it's difficult for us to do that. It's difficult for the Governor to do that unless there is consensus within the state. And there is not the consensus within the state to do that.

REPRESENTATIVE HARRIS:

Well, you have the power to do it. You have the vote to do it and you have the power to send the Governor a resolution to put him on the spot. Then it's something that he indicated in his campaign that he would do. You have the power to put him on the spot and say, do it.

SENATOR ZHAROFF:

I would feel more comfortable in doing that if we had a Governor that was looking out for all the people of the state rather than special interest groups.

SENATOR KERTTULA:

Senator Duncan.

SENATOR DUNCAN:

Thank you, Mr. Chairman. Of course we could also put the Governor on the spot by saying a constitutional amendment that goes toward the people of the state that brings us into compliance. Let me ask you just briefly, Mr. Harris -- I was going to ask you a question about your statement that we won't need a constitutional amendment. You suggested that we amend ANILCA instead. ANILCA, as I understand it, is a rural preference for subsistence use. Do you support subsistence use for rural residents in the State?

REPRESENTATIVE HARRIS:

Yes. Where it's needed. You know at some point, all of our lives we have to subsist. That's the bottom line in all of our lives. And those people that are faced with it every day, provision needs to be made for them. My point is that it always has under state management, been made for them. I know of no

instance where people were deprived because of state management. And then I would be happy to acknowledge anyone that could show me where -- if people that would come forward and display that they were deprived because of state management.

SENATOR DUNCAN:

Mr. Chairman, therefore -- I don't have all the information -- maybe just this is an example where that may have happened [indisc.] really have the state subsistence law. The only question I have is that western arctic caribou herd in 1975 is located -- the Board of Game tried to give up permits to hunt to the villages. The Tanana Valley Sportmens Association opposed this four to one. At that time, [indisc.] the opposition to subsistence hunting of the caribou herd that really led to the state subsistence law we now have which is the state subsistence law. It seems to me that we need to be sure that protection is there continuously. And the constitutional amendment would do that. I'm wondering --

REPRESENTATIVE HARRIS:

I didn't hear all of it. But ...

SENATOR DUNCAN:

I think this is a legitimate concern. We need to be sure we protect subsistence rights for rural Alaskans. And I think there's been a case here in '75 where that was challenged and the courts ruled against that right and that's why we have a state subsistence law.

REPRESENTATIVE HARRIS:

Well, I don't think that the subsistence rights include the right to waste, was my point in bringing up the tally of animals they found actually counted in the northwest arctic herd. There were complaints coming in that it had disappeared or in a large part, it had really been taken down. When they began to look at that question, they found that there was a lot of waste. It had nothing to do with subsistence. It was pure unadulterated waste. Because animals were killed and left in the field. They weren't harvested. They were just killed. And when those things happen,

it has nothing to do with subsistence. It's just a killer instinct, I guess, that takes over. I can only [indisc. - coughing] because I've hunted all my life and I've tried to stay within the laws of the territory of Alaska and the state laws.

SENATOR KERTTULA:

Senator Hoffman, you have the floor.

SENATOR HOFFMAN:

So you stated that you support subsistence for urban hunters and you also stated that you wanted to see Title 8 of ANILCA changed. But Title 8 of ANILCA is exactly that, allowing subsistence for rural residents. So why do you say that you support subsistence for rural residents? Do you want -- how would you change ANILCA? If that's exactly what it says?

REPRESENTATIVE HARRIS:

I think until some animal population is down to the point where it will only provide for subsistence -- as long as you have good healthy animal populations, I think that anyone should be able to harvest them. At the point in time when you don't, then I believe that subsistence should come into play, which the Board has the power to do. And limit it to those people in a given area where you have an animal population - wild stock population that will only support the people of the area.

SENATOR HOFFMAN:

That's what ANILCA does. That's what ANILCA does the way that you're describing it. That's what we have to get back to, to retain state management.

REPRESENTATIVE HARRIS:

Well, ANILCA does ...

SENATOR HOFFMAN:

And the way to get back to it is to change the constitution to allow for us to give that rural preference. And then we will be in compliance. And then we will get back the management that you talked about to the State of Alaska.

REPRESENTATIVE HARRIS:

Well, Senator, Mr. Chairman, ANILCA proposes to divide the

management of wild stocks in the State of Alaska. It's going to do that and I think that's unnecessary. I think we'll have a better management program -- we've had a better -- the state's history in management has been better than the federal government's history in Alaska in wild stock management, in my opinion.

SENATOR HOFFMAN:

Well, prior to McDowell, do you feel that the state's management was working? Prior to McDowell.

REPRESENTATIVE HARRIS:

Yes.

SENATOR HOFFMAN:

Okay, then if prior -- if you say the answer is yes to that question, then we need to get back to the position before McDowell which allowed rural residents. And the way we do that is to make a little change in the constitution and then we will be back to prior to McDowell.

REPRESENTATIVE HARRIS:

I think that the state constitution already meets the provisions setting priorities. Anything else is unnecessary.

SENATOR KERTTULA:

If there's no further questions -- you have the floor Senator.

SENATOR HALFORD:

Thank you, Mr. Chairman. I think we're reading two different things into both the federal law and the McDowell decision. The McDowell decision overruled the rural preference. It did not overrule a local preference. In fact, the tier two preference is that our local preferences are still applied even after McDowell. And that's, I think, what you're saying and that's the kind of preference that really applies to people in the area who need the resource. Not the general rural preference.

REPRESENTATIVE HARRIS:

I know, I don't think we should be guided by a general rural preference. We should be guided by the wildlife stocks that are

available. And that's the way it should be managed. I don't know how else you can manage and do a good job of management.

SENATOR KERTTULA:

Are there further questions? Thank you, Representative Harris. I'm going to vary slightly from the script, because a man is leaving here and he may have a different point of view from a previous witness. I think in all fairness -- but we're generally to go to organizations. But Mr. Willie Goodwin, tells me he has to leave here and he's come from afar. He's here, I hope to the extent possible he will encapsulate his testimony because we have to get on with the major organizations that have been waiting and then we'll go back to the individual witnesses.

You have the floor, Mr. Goodwin. Please introduce yourself. Can page help him distribute? Just automatically, somebody ought to be up there helping.

MR. WILLIAM GOODWIN, JR., KIKIKTAGRUK INUPIAT:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

You have the floor, sir.

MR. GOODWIN:

Members of the committee, my name is Willie Goodwin, Jr. I am from Kotzebue and represent Kikiktagruk [ph] Corporation, a native village for-profit corporation. This corporation represents one thousand, eight hundred and fifty-two shareholders, most of whom are residents of northwest Alaska. I have three points I would like to impress upon the committee. First, our corporation considers subsistence it's highest priority. Second, we do not desire continued federal management of fish and game on state matters. Third, we view the need to achieve those goals through a constitutional amendment and not through the Governor proposed legislation. Our corporation conducts itself with the understanding that the protection of subsistence is our first order of business. This may seem to conflict with the usual corporate directive of profit making, but we involve the bottom line on our property and loss statements, means absolutely nothing

to our shareholders if they're not allowed to continue the lifestyle that's held our people intact for thousands of years. Kikiktagruk [ph] Corporation is a major landowner. As a line, it's policy to support the taking of fish and wildlife for subsistence uses. It drove our original land selection process and it drives how we currently set policies for land use. We have been an accommodating landlord, Mr. Chairman. Because of our cultural heritage of sharing resources, we have not enforced a policy to prohibit non-shareholders from hunting on our lands. However, there may come a ... [tape ends midspeech].

Tape 92-5

Side A

[Tape begins midspeech]

MR. GOODWIN:

... federal government has been a friend to us in many respects. We do not see it anyone's best interests for the federal government to manage federal land. It is not good for us. It is not good for the state. And it's not good for the feds. In our view the federal government is heavily influenced by interest groups whose ideals are diametrically opposed to ours. By this, I mean, the well intended, yet shortsighted objective of certain environmental groups. We see their fingerprints on how the federal government currently deals with four national parks and two national wildlife refuge systems used in this area for subsistence. If we are going to retain state management, it only makes sense to find a solution that truly gets us where we want to go. The Governor's bill does not satisfy ANILCA. Your own attorney's have advised you of this. Worse yet, the Governor's office has expressed its own doubts. Enough time has been wasted. Let the people of this state decide. Disregard the Governor's proposal which gets us nowhere and allow a constitutional amendment to come forward so that we can all solve this problem. Thank you.

Mr. Chairman, I'd like to also make one other additional comment. And that's regarding waste. When we had state management on marine mammals, I remember for a long time, the [indisc.] good friend over at Senator Halford, a guide, that only skins came back. Now tell me that that's not waste under state management. Thank you.

SENATOR KERTTULA:

Are there questions of Mr. Goodwin? Willie, we'd like to thank you very much. I'm going to allow one other elder [indisc. - sneeze] contain himself, before we go on to business. But Mr. Jensen has told me that he has just about a four or five minute at max. presentation. I guess we've got two of these. Marcus, and if there's another Jensen, I guess we will see him. Then we're going on our way.

MR. MARCUS JENSEN:

Thank you, Mr. Chairman. It's been a long time since I've been before your committee. I have hunted in Alaska every year for over sixty years and I think I understand the animals. I would like this body here, just forget the word subsistence for a minute and let's look at what we need. In my opinion, anything that can prove putting meat on your table is what we should be looking a little bit at. For fifty-five years, the state and the territory regulated by season, bag limit and restrictive travel. And during that fifty-five years, there was harmony. People were getting their meat and it was a good program. When this whole word subsistence started, I was amazed at what we were accomplishing. We're not putting more meat on the table by passing a bill. I think that's the important thing.

From the records I can get and the people I can talk to in the bush, they figure about twenty-five to thirty percent of the meat that should go on the table is taken by predators. The next thing is that most of the season where the village areas along the big rivers take their moose is when the snow is on the ground, probably in November. When the impact of urban people would be a little strong, they just stopped airplane travel. They were

taking care of your needs. But they weren't dividing people. They were all in harmony with one another. It wasn't that somebody had something better than somebody else. And I think that's important. That relates to the way our constitution was set up. It was set up treating everybody equally. All the social programs, all the benefit programs, they're equal. And I think if you start dividing on this issue when you can do it another way, then I think it's wrong.

I'm against the present bill. I'm for doing anything to get the federal government out of Alaska. They shouldn't be here. Because we fought fifty years for statehood for one thing. For the state to manage it's own resources. And they just moved in on us through ANILCA. And now they say, you can't amend ANILCA. The word that I got, I think, is very true, it's been amended twenty-one times. So don't say it can't be amended.

Now, what I would like to see is for you people to keep understanding that the bottom line is to better your condition and not keep relating to this word "subsistence". It's kind of a fantasy in my opinion. And I think that if you get down to the root of the thing, in the regulation, improving moose habitat. I've been in the field and seen what results happen when you have a big burn. A few years later you got moose all over the place for one reason. It's just like the birds or anything else. That want that choice willow. The choice willow. They have proven that you've taken the muskeg areas along the rivers when the frost is on the ground, you can take D8 CAT and wind-row that and smooth it out, plant willows there or they'll come up by themselves. But you have that choice feed right in front of your house. And those are things that I think that you should have help with and it'll put more meat in your hat. You should have some regulation allowing the village areas to take predators anyway, anytime because their taking meat off that table. There's plenty of wolves or whatever you call predators up in the Arctic following the big caribou herd. But down there you can get testimony from a lot of people that are just watching it happen. They take the

young. They take the old when the winters are heavy. That's about all I can say at this time. Thank you.

SENATOR KERTTULA:

Are there's no questions? Thank you very much, Marcus. There's one other, Mr. Jensen, who wanted to come forth. Come forward quickly, too, sir. And then we have to get on with the organized testimony. Please introduce yourself. Thank you for coming.

MR. ALFRED WELLS, NANA REGION:

Thank you, Mr. Senator. Senators, ladies and gentlemen, I can't talk that fast. [indisc. - laughter] but I can't. Do you know, I'm a subsistence. Ever since I was a kid my father died when I was only nine years old. Life was real hard for my mother and my youngest sister. And I had to try to find and work when I was about nine or ten years old and make fifty cents or one dollar at that time. While I'm from a Board of Senior Citizen Council of Alaska AFN in Anchorage. I'm one of those council members and I'm also a council member for our NANA regional members, Kotzebue area. On fishing, what we do in springtime - we have late spring and right after the ice go out and the water start moves on is when we start putting our nets out. My wife did when I came down again. Because we have grandchildren that we got to feed and we still have eight children ourselves. But they're all scattered all over in Alaska. And I'm quite a ways away from home now to try to give you some of the things we had been doing on our subsistence way of life. And if we do thing right, there's enough fish and game for everyone of us in Alaska. Eskimos and white people alike. I'm sure that many years ago, your parents or your grandparents find an opportunity -- heard about an opportunity. Come to Alaska to our big land here in Alaska to make some money, to improve life so they can go fishing and so they can go hunting also. And the last two years. It has been different. Things are really changing. I watch every time your meeting comes on T.V. and I see people talking and I've seen some of these people on T.V. a lot of time and see them talking.

We have two bills Governor's bills and let's say my bill. I'm an Eskimo. Okay. And when I go hunting or fishing, I don't weigh how much I'm going to eat in a year, just like that other big bill. And that bill is not for me because it's wrong. When I have a lot of grandchildren - I have about thirty grandchildren already and about six great-grandchildren. And I have to show them how they can get food from the land or sea. And for coming down here -- I came down here to oppose the Governor's bill. Now, I think some of you know Mike Scott [ph] who works with Ferguson when Ferguson was Senator here. Mike Scott is my son-in-law and you know he started to learn to live with us when he got up in our area. And when we go to Kotzebue from the villages like we live and we see some young men and young ladies start to move up into that area, they must be your sons or maybe your daughters and they start to go live with us. And they get married to Eskimo ladies, young ladies or young white ladies get married to Eskimo young men and we have to learn how to -- we used to work together. Now its starting to come apart, it seems like. And we have to be united. That's one of the reasons why I came down here is to oppose that bill because it's not right for me. I live in a village up north. When I was about nine or ten years old, after my dad died anyway, my mother bought be a .22 single shot and I started to learn how to use that to get muskrats or rabbits or ptarmigan. I'm down here at this time to shoot at that big bill that's opposing us. I want to kill that bill. Now, another thing I want to do is when I get home, Aladdins [ph] is my nephew. I'm going to ask him voting for or against our bill. Because like I said a while ago, I'm one of the Board of Senior Citizen Council and we have to make our agenda before the elder's conference in Anchorage this fall. And I have to try and get something into that agenda which will be a help to our people. And if it comes to a vote on that constitutional amendment, I'm going to do all I can to spread the word to elders of Alaska. I know who to send the letter to or who I can call because I have a list of those elders in twelve regions. Their phone numbers are also there. I'm going to ask

them to help us so life can be easier for our people. You know sometimes, it's real tough for us. A lot of times we run out [indisc.] and those we have to eat maybe fish or caribou or moose. We all know that Mr. Bush said, "Read my lips." Everybody knows that. He said, "No taxes." But now, read my lips, "I need your help to vote for my bill." Thank you.

SENATOR KERTTULA:

We're going to start off -- what we'll do is we'll have this witness and then we will adjourn for one hour. We have Senator Stevens, calling among others. Then we're going to start with UFA at that time. And then we'll have the Outdoor Council. You may introduce yourself and please proceed.

MS. MINNIE MORRIS, NANA REGION:

Mr. Chairman, members of the committee, for the record my name is Minnie Morris from Noorvik and I'm the chairperson of the NANA Region Elders Conference. I thank you for this opportunity to speak to your committee on this very important matter that concerns all Alaskans, Natives and non-Natives alike. We have travelled over twelve hundred miles from the north during a very important time in our area. It is now that we are fishing and hunting to meet our needs after a long winter. We, however, realize that what is happening in Juneau is more important since the laws are being considered that will have an impact on the way we live. So we have taken the time to be here to participate in finding a solution to the important subsistence issue. Native and non-Native people of Alaska are concerned with the direction of the politics which affects the way we live in village Alaska. First, the Governor's bill does not resolve the issue of dual management. Secondly, an Alaskan constitutional amendment is needed to fix the current problem. This fact is supported by a majority of the citizens of Alaska. We are also afraid that if a deal is made without adequate time for serious discussion by ourselves, we may wind up with a solution that maybe nobody wants. We urge the legislative committee to seriously consider the Governor's bill and not pass it. We also urge the legislators to

consider the bill introduced by the Bush Caucus and work towards a constitutional amendment by giving the people of the state their chance to fix the problem by voting on an amendment to the Alaska Constitution. I thank you for listening and comments. Since tells us that, let the people decide this issue. It is more than ever that Natives and non-Natives alike have to work together because we live together. God Bless you all. [indisc. -native tongue]

SENATOR KERTTULA:

We'll recess until ten minutes after one sharp.

RECESS

11:50 - 1:17 p.m

SENATOR KERTTULA:

We'll come to order. Materials are recorded. I see a senator or two in the front door here. We're going to have Dale Matthews [ph] of UFA next and the UFA group in order. Kind of move along -- Outdoor Council and then there's Eric Forrer, John Burns wish to -- we're going to move right along so that within three hours we'll get down to acting actually on the legislation. Staff's here. We have a quorum. Please proceed.

MR. GREG SEIDER, EXECUTIVE DIRECTOR, UNITED FISHERMAN OF ALASKA:

Thank you, Mr. Chairman. For the record, my name is Greg Seider. I'm the executive director of United Fisherman of Alaska. I'd like to start with a very brief opening statement and then move on to Ms. Kate Troll who is the vice chair of our subsistence committee and on to Mr. Theo Matthews our past president and a member who has been very active in this issue. UFA represents twenty-one commercial fishing groups from throughout the state as well as individual members. These members and member groups are representative of commercial fishermen and commercial fisherwomen throughout the state. UFA, if you will, represents the catcher portion of the industry which includes commercial fishermen who are also subsistence users. UFA has long been concerned with this issue. Even prior to the McDowell decision, the UFA Board believed that the lack of definitions within ANILCA created a very

difficult if not potentially disruptive threats to the commercial fishing industry. Since McDowell the situation has become even more difficult with the inability of the Board of Fish to deal with the allocative issues involving all Alaskans. UFA, through its members and member groups, has observed and participated in the Board process and seen first hand the problems that the McDowell decision has created, not only for commercial fishing industry, but for all user groups within the state. UFA and its members and member groups have participated in the Board process since 1989 and have actively sought to find a solution to this problem. Most recently, our Board has evaluated the proposal that is the result of the Governor's Subsistence Advisory Council. Although the bill that is the result of the Advisory Council, provides for a priority subsistence use over commercial fishing, we find that that priority is acceptable. UFA does not believe that this is a perfect bill. We do believe that it represents a reasonable solution for all of Alaska. United Fishermen of Alaska urge you to pass Senate Bill 484. This legislation represents a compromise, that in our opinion, equitably resolves the major problems facing all users of the Alaskan fishery resources.

SENATOR KERTTULA:

Do you have questions?

SENATOR HALFORD:

Well, my question, I guess is, would the position be the same if the federal government took over the management of resources as they are on federal lands? Would your position be the same? Because this does not resolve the question of the [indisc.] was found in favor -- not in favor [indisc.] federal government and took it's place. What would the position of UFA be then?

MR. SEIDER:

We believe, Senator, that this is the starting point in resolving those problems.

SENATOR HALFORD:

Wouldn't it be better to go ahead and resolve the problem by jumping forward and making a determination known that the state is

going to manage it? That can be the clearest step that you could take it seems to me and resolve and take that question off the table.

MR. SEIDER:

I'm sorry, Senator. I don't quite understand your question. Maybe perhaps one of the folks that's here with me could do better on that.

SENATOR HALFORD:

Well, the question is would it be more -- would it be better for the state and for the fisheries to go ahead and let the state take the management issue out of the hands of the federal people and make the decision that we will give a rural preference and get the management back. Let the state continue to manage the resources.

MR. SIEDER:

I think I'd like to defer to either Theo or Kate on that, if ..

SENATOR KERTTULA:

If you wish to answer this specific question, anybody from UFA may do so. I don't want to play musical chairs, you understand.

MS. KATE TROLL, UNITED FISHERMAN OF ALASKA AND SOUTHEAST ALASKA SEINERS:

I'll answer that and then go into my testimony then. Yes, we very much would like to solve the question of the dual management. We prefer state management. We don't want federal management. We're very concerned about the efforts that we see on behalf of the federal government to move into fisheries. With a rural constitutional amendment, however, you would still be out of compliance with ANILCA because ANILCA does not accept the state's definition of rural. We'd be right back into the Kenaitze decision. And we passed around some of our previous position papers on subsistence, and we felt that we'd like to have a total solution. And the total solution includes definitions of "rural", of "customary trade", of "customary and traditional", of

"reasonable opportunity". And then we need those, our definitions, definitions made by Alaskans, inserted into ANILCA. Technical amendments into ANILCA. That's what solves it for us all and assures us that we will have state management and perpetuity.

SENATOR STURGELEWSKI:

Mr. Chairman?

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR STURGELEWSKI:

Kate, before you ...

SENATOR KERTTULA:

Then Senator Halford is ...

SENATOR STURGELEWSKI:

Oh, I'm sorry ...

SENATOR KERTTULA:

Senator Halford was the one that -- and then ...

SENATOR HALFORD:

I'll wait. I think she just answered the question. She didn't get a chance to give her testimony yet.

SENATOR KERTTULA:

No, I realize ...

SENATOR HALFORD:

[Indisc.]

SENATOR KERTTULA:

Do you wish to ask ...

SENATOR STURGELEWSKI:

Mr. Chairman, just very specifically. The items you mentioned are ANILCA definitions that would meet the state's -- the state would define and then ANILCA would accept "reasonable opportunity", "customary trade"; what else?

MS. TROLL:

"Customary and traditional". We have to also define "subsistence users".

UNIDENTIFIED SPEAKER:

Barter.

MS. TROLL:

Barter.

SENATOR STURGELEWSKI:

Well, barter is defined but you do not feel it's adequate?

MS. TROLL:

Barter is defined. The real hangup that we have is definition of customary trade because there is no definition.

SENATOR STURGELEWSKI:

"Customary trade" seems to be the one that comes again and again. Are the others legitimate?

MS. TROLL:

The definition of "reasonable opportunity" is very legitimate.

SENATOR STURGELEWSKI:

And what else?

MS. TROLL:

"Customary and traditional".

SENATOR STURGELEWSKI:

All right. "Customary and traditional", "reasonable opportunity". Those are the two?

MS. TROLL:

And "customary trade".

SENATOR STURGELEWSKI:

Well, customary ...

MS. TROLL:

"Customary and traditional" because that's how we classify our stocks and that definition which is now in the Advisory Council's definition needs to be part of ANILCA. Customary trade, reasonable opportunity.

SENATOR STURGELEWSKI:

Okay. Thank you, Mr. Chairman.

SENATOR KERTTULA:

Are there questions based on the previous brief introduction? If not, if you wish to identify yourself, proceed. I realize

represents separate sections of varying fishery groups, trollers, et cetera. But..

MS. TROLL:

We're here to talk ...

SENATOR KERTTULA:

Prefer to have a major spokesman for each area because we have to get on with the bill. Very shortly I'm going to close testimony.

MS. TROLL:

Yes, we intend to do that ...

SENATOR KERTTULA:

But you have the right to speak.

MS. TROLL:

... to testify -- I'm also the vice chair of UFA subsistence committee as well as the executive director of Southeast Seiners. So I tend to make my testimony broader. Just in the rally, there was a sign outside that said Commercial Fisherman Support Subsistence. We were very glad to see that sign because that's absolutely true. Our whole dilemma is in trying to continue coexistence. Pre-McDowell, there was no problem with coexistence between subsistence and commercial fishermen. Many commercial fishermen obtain subsistence fish during the commercial activities. The two are very much linked. The best example I know of to give you about the linkage, is the past president of the seiners comes from a subsistence village, Angoon. Once a cold storage closed down in Angoon, he realized that he is the primary employer of that village, because he's such an avid fishermen and hires all his crew locally. So we see the two needs as very much linked. And unfortunately the opportunity to coexist is becoming more and more difficult and more and more challenging. Particularly, with the all Alaskans qualified as subsistence users on all stocks. We have to kind of just look around for a few examples of why the challenge has surprised us. Who would have guessed herring roe on kelp to Japan at the \$9000 was customary trade. Who would have guessed that rod and reel was going to be

subsistence gear. And that's what's going to come out in the federal regulation for subsistence. We never would have thought that yachts pulling up into Basket Bay and cleaning out the sockeyes was part of subsistence. Glacier Bay is another case where things have gone awry. We have the Hoonah and Sitka fleet now denied historical their subsistence in commercial fishing grounds. All these developments make what seem as farfetched scenarios somewhat more possible. Lots of questions came up earlier today about king salmon in Southeast. The Board of Fish in 1991 here dealt with the question of rod and reel being subsistence gear. They voted for that. And they went on to come up with proposals to make coho and king salmon customary and traditional. They were going down that path that would have closed down all of Southeast Alaska because of incidental chinook salmon and coho catch for all Alaskans. That's when the Board of Fish threw their hands up and said, we can no longer act on subsistence. They stopped their activities right there and then. We were going down that path of some very disturbing scenarios that Commissioner Rosier alluded to earlier. And they actually came forward and expressed their concerns before the Senate Fisheries Committee. Unfortunately, you got all wrapped up in hatchery issues. But the concerns are there about how if we don't get good definitions in place and get things back on track, it's the legal arguments that have us more concerned, to where we could end up having the subsistence stock become like an endangered species stock and close down every mixed stock fishery that has an incidental take of a subsistence stock. And prematurely close down a lot of fisheries. Fisheries that people in the villages come to have their economic mainstay on. It is because of these types of incidents, that subsistence is more than just a social and cultural issue. Subsistence as just subsistence may be seen as, rightly so, as a Native issue. But subsistence as a priority, with the definitions gone awry, becomes an economic resource management issue. That's where we've concentrated our efforts in trying to resolve that while being sensitive to the cultural and

social aspects. Every time we've addressed this issue, in the Board of Fish into special sessions, we always come back to definitions. And we have to have consistent definitions between state and federal statutes. And so we feel it's very important to start with making those definitions by Alaskans that fit here and that's what we see present in the Advisory's Council legislation.

There's been some talk about amending ANILCA. Can it be done? At one time the question of rural came up with the Kenaitze decision. And there was going to be a short and sweet amendment to ANILCA to allow for the state's definition of "rural". We had Senator George Miller, we had everybody on line. We were not opening up ANILCA for everybody to push their own agenda. It was about to happen until the Native leaders stopped that process. We've enclosed a letter from Senator Stevens that showed that that was what was indeed happening. For technical amendments, for definitions, we think it's important that we look at that option of amending ANILCA, because we want to resolve this completely. We don't want to just fix it for McDowell and be out of compliance for Kenaitze. And so we try to concentrate on looking at a complete solution.

And I just would like to close in saying we recognize that commercial fishing is the economic mainstay of many of the coastal communities and villages where subsistence is vital. So UFA felt we had an obligation to seek a reasonable and fair resolution to this issue. One of the questions we asked ourselves in committee, at great length, was does this legislation preclude legitimate subsistence users? And we asked that of several people very knowledgeable on this issue. Legitimate subsistence users -- where are they precluded from exercising their opportunities? And we didn't see where they were precluded. So that raised our comfort factor in -- when we were discussing this legislation in our committee work and it came before our Board and was voted on unanimously by all members present.

SENATOR KERTTULA:

How does this bill -- do you support this legislation as it

is?

MS. TROLL:

We support the Governor's Advisory Council legislation.

SENATOR KERTTULA:

And how do you again feel that it is of value?

MS. TROLL:

Because it defines terms that have been left undefined for many years. The Board of Fish could not grapple with resolving this issue because customary and traditional was not defined. Customary trade was not defined. Reasonable opportunity was not defined. They are there and Mr. Theo Matthews who is involved in drafting this legislation could probably be more specific on this than I can, if I could ...

SENATOR KERTTULA:

That's the major value, you see?

MS. TROLL:

And we see it as the first step in getting a complete solution. Once we as Alaskans understand and come to agreement on definitions, then we obviously to assure federal -- to maintain state management, we still see the need to make technical amendments to ANILCA. We'd like to avoid doing that but we do not see how we can get around doing that because the federal -- these terms are not defined. And we'd rather define it ourselves than have some federal court do it. The only way we can do it is by making these technical amendments to ANILCA.

SENATOR KERTTULA:

Are there questions of this witness? Senator Hoffman.

SENATOR HOFFMAN:

[Indisc.] Board of Fish can make those determinations. They are going to be making the determination this winter on customary trade and I don't see where making this -- they're prohibited from making the other determinations on the other definitions. And I for one feel that trying to resolve -- we have our congressional delegation saying that it is going to be virtually impossible to go back and change Title 8 of ANILCA, thereby leaving the problem

in front of us for years and years and we're going to get even further in a tangled web if we proceed along the method that your supporting. It seems to me that we should go ahead and let the people decide. Why are we afraid of letting the people vote on whether or not they want to change our constitution? The fisherman of this state will have the opportunity to vote on it, along with everyone else in this state. If you say that you support subsistence let's see if the rest of the state supports subsistence. And then if we get back to pre-McDowell, then we can deal with some of these other definitions that the Board of Fish does not want to do. That seems to me to be the quickest and the easiest solution. If we do not do that, in my opinion, we're going to end up in a web that we'll never be able to get out of.

MS. TROLL:

You raised two points there. One, the definition of "customary trade". It's my understanding that in the federal courts when they made their ruling to allow this herring roe on kelp to stand that part of that ruling was the absence of definition in state statute. Not the absence of definition in regulation. Therefore, I think we need it addressed in state statute. The other point dealing with to just vote on a constitutional amendment - UFA's position before in this special session and we've discussed it again, is we are very much open to a constitutional amendment as long as it's tied into ANILCA. Because if we don't make these definitional changes and insert them into ANILCA, we're going to be right back at the same place we are two years from now. And so there was at one time looked at having an effective date tied into -- that the constitutional amendment would be effective once these changes are made into ANILCA. And that was something we discussed two years ago when this question came up. And we've not changed from that position. We've only become stronger as we've learned more and more about the issue.

SENATOR HOFFMAN:

Well, I just wanted to point out that there is no regulation on customary trade. That is going to be taken up by the Board

this winter.

MS. TROLL:

Right, but what I'm saying from my brief reading of the judge's ruling, he quoted the absence of the definition of "customary trade" in the statute as to why he had to let this herring roe sell to Japan stand as customary trade. That's just putting a definition in regulation was not going to be good enough.

SENATOR KERTTULA:

President Eliason.

SENATOR ELIASON:

Thank you, Mr. Chairman. Obviously, of course, this session is not taking up the process of amending [indisc.] prohibits from discussing that. But it seems to me that a constitutional amendment takes many forms and shapes. We found out the last special session. So just to say that the people are going to support a constitutional amendment doesn't necessarily mean that's so. It depends totally upon what is written in that amendment. You alluded a minute ago.

MS. TROLL:

Yes.

SENATOR ELIASON:

And the question I have is that, of course, we know the AFN is also part of the suite for the feds to take over the state fisheries [indisc.] at present time and we don't know if that's ever going to go away. We don't have any guarantees if we do something now, or don't do anything now that that's not going to disappear. But the question that, of course, has UFA ever discussed specifically and have any suggestions relative to a constitutional amendment would pass muster with your particular group and might be in support of other groups in the state? Has this been discussed? You haven't out of hand discarded a constitutional amendment is my understanding?

MS. TROLL:

Right, we've not out of hand discarded it and informally

there's been some discussion about what form might be best. I'd actually would prefer if Theo, who has worked a little closer on that, could answer that question, Senator.

SENATOR ELIASON:

Under discussion of course, is relative to what the bills are before us today, but my impression of what you just said is that your organization is not opposed to a constitutional amendment of that section until they know exactly what it says.

MS. TROLL:

Right. We want to know what it says. But we also feel that the second part of it where the effective date is tied into ANILCA. We want a complete solution. And we don't see how we could get to that without making technical definitional changes to ANILCA. So we've always -- we've put the two together when we discussed this issue two years ago and we still see the two as linked now.

SENATOR ELIASON:

Well, it's very difficult to discuss a constitutional amendment unless you're found out about specifically what it says. So, it's in the eyes of the beholder.

MS. TROLL:

Right.

SENATOR ELIASON:

So, you can't say that anyone's opposed to it. You can't say that anyone supports it until they see what it says.

MS. TROLL:

Absolutely.

SENATOR ELIASON:

Of course, we're not in that arena yet, but you have an open mind on that question.

MS. TROLL:

Yes. Yes, Senator, we definitely have an open mind on that question.

SENATOR KERTTULA:

Senator Duncan. No. Yes, Senator Duncan.

SENATOR DUNCAN:

Thank you, Mr. Chairman. Just a couple questions -- an Alaskan problem an [indisc.] Board who are not Alaskans. How many permit holders are there in Southeast [indisc.] seiners?

MS. TROLL:

There are about four hundred and ten Southeast seine permits. Before the prices dropped at twelve cents, which I think is more a statement of membership, there were about one hundred and ninety skippers that were members of Southeast Alaska Seiners.

SENATOR DUNCAN:

How many of those -- what percentage of the permit holders were out-of-state residents?

MS. TROLL:

In Southeast Alaska, we have a historical relationship with Seattle. So we do have a lot of out-of-state Southeast seine permit holders. It's approximately fifty percent.

SENATOR DUNCAN:

About how many?

MS. TROLL:

Approximately fifty percent.

SENATOR DUNCAN:

Fifty percent? I would have guessed around sixty. Fifty percent. All right so, half of them out-of-state. How many of the Alaskan permit holders who are members of your organization are actually from rural Alaska including Juneau, Ketchikan and Sitka?

MS. TROLL:

Senator, I've not done an actual count of how many of my members come from all the rural areas. I do have active membership from Sitka, Angoon, Petersburg, Wrangell, Craig, Ketchikan, Saxman.

SENATOR DUNCAN:

I was just curious, Mr. Chairman. I was just curious. This is a problem of Alaskans [indisc.] wondering what type of influence under the seiners might have been made by out-of-state

users? At least 50 percent of the permit holders were out-of-state then probably a very small percentage of the permit holders are really from rural Alaska.

MS. TROLL:

I can be very honest about your question, that, yes, I do have a lot of out-of-state membership in my association. All the discussion on subsistence that's happened on our Board has taken - the leadership on there has been taken by Alaskans. Our past president came from Angoon. He is the one who initiated our interest and made it a priority concern for us. When it comes to this issue, all the non-Alaskan Board members that I have have been given way and let the Alaskan Board members have the say on this issue. And it's ...

SENATOR KERTTULA:

[Indisc.] Senator Sturgelewski.

SENATOR STURGELEWSKI:

Yes, Mr. Chairman, Kate, if you could take us back and refresh our memories or we could perhaps know enough to ask what we need from staff. What happens with the amendment proposed to ANILCA -- well I know what happened to it. But what was the proposal to change it and that was the support was withdrawn for that? There was an agreement to "fix" ANILCA?

MS. TROLL:

Yeah, it was generally a generic constitutional amendment that said the state's constitution can provide for subsistence. Then the ANILCA language just inserted "Alaska Session Law " blah, blah, blah.

SENATOR STURGELEWSKI:

I see. And that was the one that was actually proposed and withdrawn pretty much at the behest of Congressman Young? Are we talking about the same one?

MS. TROLL:

Oh, okay. No, I'm talking about recently when there were informal discussions.

SENATOR STURGELEWSKI:

Oh, I see.

MS. TROLL:

Back there with Congressman Young, all that was was to allow the state's definition of "rural", would be inserted into ANILCA.

SENATOR STURGELEWSKI:

So you were talking about subsequent discussions?

MS. TROLL:

Yes.

SENATOR STURGELEWSKI:

Mr. Chairman, just as an observation and perhaps Mr. Matthews can comment on this or Kate. We've had a number of speakers and it seems to me there's been a lot saying we need to do this and it starts then to get us into the next things we have to do. And we've got a number of suggestions for the next things that need to be done, such as the amendment of ANILCA for reasonable opportunity ... [tape ends midspeech]

Tape 92-5

Side B

[Tape begins midspeech]

SENATOR STURGELEWSKI:

... "customary and traditional" and "customary trade" being the ones. Constitutional amendment. And I guess, it's an interesting question, but why hasn't say, UFA, that is faced with a Federal Register with some very -- things that could take over a great deal of the control over commercial fishing in certain areas - why haven't you taken that next step? To say, okay, we need this type of law and you're suggesting the administration's law. Then we need a constitutional amendment. Then we need changes to ANILCA. Why hasn't anybody come forward with that approach? Because obviously, you've got a lot of concerns about what's going to happen or may potentially happen as a result of court cases and federal management, et cetera.

MS. TROLL:

[Indisc.]

SENATOR KERTTULA:

Quickly and most responsive as you can be.

MS. TROLL:

I just wanted Theo just to answer that.

SENATOR KERTTULA:

We've got to move along. After you respond, I intend to have Ms. McBurney up next. I don't care, what [indisc.] would you respond to this question.

MR. THEO MATTHEWS, UNITED FISHERMAN OF ALASKA AND UNITED COOK INLET DRIFT ASSOCIATION:

Theo Matthews, from Kasilof, Alaska. The process we engaged in at UFA was we made a thorough commitment to try and draft subsistence legislation with all the various interest groups and the Governor's committee. UFA, as a group, endorsed the results of that effort just in legislation. It included all the major concerns that Kate has enumerated in terms of definitions, identifying users, identifying the areas. The next step frankly, was discussions primarily between administration and the AFN on the bigger broader package. They simply broke down, is our understanding. We have no objections to a properly worded constitutional amendment that does not systematically jeopardize all other uses down the road, that's tied to technical changes in ANILCA that will limit the ability of the federal courts to define what subsistence means for the State of Alaska. In the past, specifically, the last special session, UFA endorsed a rural preference constitutional amendment.

SENATOR STURGELEWSKI:

Do you recall ...

MR. MATTHEWS:

Simply not on the table.

SENATOR STURGELEWSKI:

Do you recall, Theo, and I can certainly make that available to you, whether or not you had endorsed the actual proposal that passed the Senate? We passed it in the House weakened

considerably. Seems to me you did. I wonder if you could check your records.

MR. MATTHEWS:

Towards the end of the special session, based on some, we thought, fairly firm commitments ...

SENATOR STURGELEWSKI:

Uh-huh.

MR. MATTHEWS:

... AFN and Senator Stevens to work on ANILCA, we did change our position. It was rather risky. The full Board did not have time to ...

SENATOR STURGELEWSKI:

Yeah, it was a little -- that's right. Now it comes back.

MR. MATTHEWS:

We felt the attempts were genuine, but it fell through.

SENATOR STURGELEWSKI:

Okay, thank you. Thank you, Mr. Chairman.,

SENATOR KERTTULA:

Ms. McBurney, do you want to come forward and make your statements so that we have a cross-section here.

UNIDENTIFIED SPEAKER:

I think he had one question [indisc.]

SENATOR KERTTULA:

I know he does, but I want her and then I'll have him. I want a cross-section here before we lose our attention span.

MS. MARY MCBURNEY, UNITED FISHERMAN OF ALASKA AND CORDOVA DISTRICT FISHERMAN UNITED:

Thank you, I'll be very brief. My name is Mary McBurney. I'm executive director for Cordova District Fisherman United. I'm also personally a member of UFA and I'm here today to lend support to UFA's position on SB 484. And rather than taking the committee's time, the other members of our contingent can much better address your questions than I can at this moment.

SENATOR KERTTULA:

All right. Thank you, very much.

MS. MCBURNEY:

Thank you.

SENATOR KERTTULA:

Please come back if you'd like. I just want to get a geographic background.

MR. MATTHEWS:

Mr. Chairman, members of the Senate. My name is Theo Matthews. I reside in Kasilof, Alaska, Cook Inlet salmon drift permit holder. I've also fished in Prince William Sound, Cordova, Lower Cook Inlet, Togiak and Kodiak. I've been fishing in Cook Inlet since 1981 as a drifter. I'm appearing today and I'll speak -- Kate has admirably presented the UFA position. Her statements voiced the consensus of UFA not the trollers. She's been very active and we've communicated among the groups constantly on this issue. So I won't dwell too much more on that.

I'd like to stress that I really appreciate the effort of the Governor calling together a task force composed of disparate interest groups. It's clear to me that his goal at least is to try and with that group draft legislation that there larger groups would support as a whole and all of them together, then go back to Congress with an agreed bill. Something that's agreed. Simply take care of what needs to be done in ANILCA and it's over. That's really all that needed to be done and I think that's what the Governor had in mind. Unfortunately, we did not come out of that with the full agreement of all the interest groups. I must remind you that [indisc. - coughing] there were two subsistence advisory councils. The first council terminated its activities with a list of sixteen consensus points but no legislation whatsoever. The Governor then called, I think at the request of AFN, together the council again and appointed three new members. One was myself. I was nominated as an individual. Not to represent the UFA's position but to try and develop a position as an individual for UFA Byron Mallot [ph] was nominated by AFN and Dick Bishop nominated by Outdoor Council. I support the product of that session, personally. I think its a genuine attempt. I

think it solves a lot of problems. It certainly does not solve all the problems. I would like to note that this specially session is a little bit different than the last one where you were essentially dealing with the very divisive issue of a constitutional amendment, per se, the issue of a total fractured statute sort of got lost on the wayside. That is clearly before you. We do have, and I agree with Commissioner Rosier, we have a statute that is bound for chaos. It's not just that all Alaskans are now considered subsistence users. The requirement for McDowell that the customary and traditional criteria be amended, deleting references to rural area community, significant economic impacts. All these deletions seems to leave us with a bill that says that any consumptive use short of commercial use is going to be a subsistence use subject to use by all Alaskans under the current status of the state statutes. That simply cannot be allowed to stand. What happens in my opinion, as I have learned of this issue, that people tend to forget that subsistence, both at the federal level and the state level is a legal preference. Therefore no matter what the state law or the federal law says, the ultimate arbiter of the dispute is the courts. What the federal government and essentially what the state government did in good faith, is it created the law that demanded a rural preference, customary and traditional, subsistence users and for customary trade and did not define one of those terms. Further the federal law permits the appeal of each and every state statute and state regulation to the state courts up to the federal district court and up on the Ninth Circuit court. If we are in compliance with ANILCA this fact, this section 807-A, essentially means that we are managed by the federal court all the time. Every decision is made by the federal courts. And they are interpreting not the state statutes and not the state regulations but the state law. Federal law, excuse me. We saw this in the case of the Kenaitze rule definition. The state tried to make up for the federal government and defined rural. We were found to be holding a definition that was not satisfactory to the federal

government in San Francisco. So if we're in compliance with ANILCA, federal courts decide the ultimate decision, will look at the federal law, not the state law. If there is ambiguity in the federal law, federal courts will make the call for you. Now, for example, the lack of a definition for the very, very, important term that deals with subsistence, customary and traditional is used in several ways. But that lack a definition leads to claims for no season, no bag limits, no reporting requirements. That's my custom. That's my tradition. The lack of definition of customary trade as Kate has alluded to has led the federal court to say, \$9000 for the subsistence roe on kelp is not a significant commercial enterprise. It's a lot more than I made last year [indisc.]. The lack of a standard of reasonable opportunity and a definition for that standard is also leading to many court challenges. People just simply say, well, I don't think I had a reasonable opportunity. There's no definition for that. So my opinion of the lack of definition whether it's state or federal law, it simply leads to lawyers trying to find the meaning of these terms as they would have it. Now clearly, they win some. They lose some. And clearly what we've seen is they keep trying. It's a large issue.

So I would like to stress to this body that in my opinion, the best you can do, whether you're a state legislator or a federal legislator is to try to be very precise in your intents. Define as many important terms as possible and then in that way at least, you are helping Alaskans define what subsistence is and how the courts should deal with it.

I'd like to relate a little bit of a council experience. It was an honor to serve with these gentlemen. Certainly, everyone there made a genuine effort. I have not the slightest doubt, as individuals. The first thing that impressed me, as I said I was not on the first council. In the early discussions, everything seemed to revolve around game issues. And probably rightfully so, given the makeup of the first council. I think they simply were not that involved with fishing issues. And it seemed to lead most

discussions lead to the fact that we can solve the problems here too, i.e. we can limit users. And probably to their chagrin, I continually tried to remind them that tier two is a catastrophe in the fisheries. What it means is every other use of that resource has to be eliminated. That could include your own other use. For example, a mix economy of subsistence fisherman on the Yukon. I mean it may be more important to him that he make \$6000 commercial fishing than a lot of people who come in and subsistence fish. The point is, it's not -- you're limiting your own potential uses by having to go to tier two in the fisheries. And, of course, with fisheries, as opposed to game, we're talking about economics, both for the subsistence users, commercial fishermen, guides, tourism. So therefore, I sort of maintained throughout the council, that for this reason, subsistence is not just a Native issue -- the subsistence rights. When the priorities kicks in, it actually limits the opportunities the Native subsistence user has.

And I didn't only try to basically advance two goals. One was for the UFA standard position that the subsistence preference should be meaningful for those who qualify. But the statute should not be so construed that it systematically challenges other user groups. And also with the goal, as I've stressed several times and probably too much, define the important terms. To clearly define eligibility so that Alaskans can define this preference and not the courts. Our current statutes simply do not tell us who's the subsistence user, what stocks are subsistence stocks, where there subsistence are? There are no definitions. The rules of the game are not even defined. We don't know what customary trade means. We don't know what customary and traditional means.

And I'll conclude with the main reason that I think the Governor's Council bill goes a long way to solving the problems. First of all, the federal bill is evolutionary. It recognizes that Alaska can, has and must continue to evolve economically. And that there are areas of the state, the urban areas of the state where the cash economy is fully developed. The resources

are fully allocated. And there are major alternative sources of food and income if any particular harvest is not successful. It defines the terms. It tells us who. In terms of this bill, who is basically Alaskans who have an actual substantial ongoing dependence on fish and game resources. I'm just sort of paraphrasing. I'm not sure of the actual. It tells us where. It tells us in areas of the state where dependence on the use of fish and game is a principle part of the economy, way of life and culture. It tells us the rules of the game. It defines the key terms that I've mentioned. Customary and traditional. It limits customary trade and writes the definitions. Reasonable opportunity is defined. And one issue that I will raise for you, one of the members asked me about, it also defines sustained yield. I was very nervous about doing that, personally, because it was clear that the definition of "sustained yield" in this statute of subsistence will affect all Title 16. We went over and over and over it again, just to try to eliminate any allocative implications. Any concerns of the environmentalists. I think we got there, but I'm just flagging the issue for you. That's my comments, Mr. Chairman. Thank you.

SENATOR KERTTULA:

Questions? Senator Adams, then Senator Hoffman. And I'm not [indisc.] but let's try to keep our -- we're starting to get on the seventh hour of testimony. Keep our questions directed to the point of testimony, if possible. As I'm going to start moderating after Outdoor Council time of testimony. You have the floor, Senator Adams.

SENATOR ADAMS:

Thank you, Mr. Chairman. Subsistence is not just for Natives. Do you realize that over fifty percent are non-Natives that are subsistence users? I would like to ask you, if I can have the names and the home address of your membership because I truly believe that the majority of your membership are non-Alaskans. But have you had the opportunity to also look at the Bush Caucus bill which shows that the Hickel Bill is

unconstitutional. It does not bring federal management back. To see if it corrects and helps define some of your concerns.

MR. MATTHEWS:

The first question was my membership.

SENATOR ADAMS:

I just wanted to see if I could get it.

MR. MATTHEWS:

Your first statement, sir, was on do I understand that there are many non-Native subsistence users. I certainly do. The point was made by the many of the Native council members over and over again. And AFN itself said subsistence was a "Native issue". And that's what I was responding to. I certainly realize that others qualify. With respect to my membership. It's all on computer. We have about twenty-four percent outside membership. There are five hundred and eighty-five Cook Inlet drift permit holders. Our organization has been up to four hundred. We're sort of like seiners. We're down to about three hundred and twenty-five with the depression in the fishes. Statements about unconstitutionality of the Governor's bill, in my opinion, are that. I conferred to lawyers I fully respect. I have my own personal opinion. I don't think it is. I've heard Mr. Utermohle's brief, if I understood what he said, it was unconstitutional, but there are three areas that could be challenged, not that they would be defeated.

The other thing that I would mention on that. The areas that seem to perhaps be challengeable, just if someone wanted to challenge it, can be fixed very easily, once they are identified by the courts. The courts won't throw out your definitions you choose for Alaska. It won't throw out the subsistence priority for those as you defined it. So, and your final question I believe was ...

SENATOR ADAMS:

Just basically that you look up the Bush Caucus's bill.

MR. MATTHEWS:

Yes, I have and I wholeheartedly oppose it. I find it

presents a systematic threat to all other uses of the resources. It does not define any of the terms that I have mentioned. On top of that, it replaces some of them with legal terms like, "least adverse impact", that requires the subsistence uses must be satisfied. And we are talking a legal nightmare for the other users. So, I have looked at it though.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. Seventy-four percent of Alaskans want to [indisc.- cough] on a constitutional amendment. Do you or does your organization oppose the people voting on that question?

MR. MATTHEWS:

I guess the answer is, were the seventy-four percent of the people [indisc. - sneeze] exactly what it was going to say and what it was going to mean? As Mr. Eliason pointed out, the wording of that is critical. If they were just asked, do you support regaining state management through a constitutional amendment? I would think there would be hundred percent.

SENATOR HOFFMAN:

Do you or does your organization support ...

MR. MATTHEWS:

We supported the UFA position in the past that a constitutional amendment for rural preference tied to the identified changes in ANILCA was acceptable to my organization.

SENATOR HOFFMAN:

Do you or does your organization oppose the people voting on this question? The constitutional question?

MR. MATTHEWS:

As I say, it depends on the wording of the constitutional amendment. If it is going to lead through misinformation, in our opinion, to systematic jeopardizing of other users, we would not support it.

SENATOR HOFFMAN:

Thanks for not answering that.

SENATOR KERTTULA:

You have the floor.

UNIDENTIFIED SPEAKER:

Thank you, Mr. Chairman. Theo, I was trying to think here. On the Governor's Council on Subsistence, there were nine members?

MR. MATTHEWS:

Yes, sir.

UNIDENTIFIED SPEAKER:

Including the Governor?

MR. MATTHEWS:

No, I believe there were nine other members. I believe it was nine.

UNIDENTIFIED SPEAKER:

Nine, including the Governor?

MR. MATTHEWS:

You mean Governor Hammond?

UNIDENTIFIED SPEAKER:

Governor Hickel.

MR. MATTHEWS:

No, there were nine members including Governor Hammond.

UNIDENTIFIED SPEAKER:

Well, four of the members on there voted or opposed the recommendation agreed to by the Council.

MR. MATTHEWS:

When?

UNIDENTIFIED SPEAKER:

Well, how did you reach a consensus then that we've been hearing about ...

MR. MATTHEWS:

The message ...

UNIDENTIFIED SPEAKER:

... from all the administration there that says, well, there's all this work that's been labored over the last year is a consensus of everybody when you have a group of nine people and four of them don't agree with the results. How does that result

in a consensus?

MR. MATTHEWS:

Well, a consensus process that we embarked upon was first of all we agreed we weren't going to be taking votes. We realized that would be very divisive and we'd not get very far down the road. Then essentially what consensus meant was we discussed an issue and put it off and came back to it and put it off until either no one insisted on continuing or it was absolutely had to be taken off the table or someone was going home. At some point, we just moved on to the next issue. If you wanted to get up and walk out, consensus was dead. And that never happened. It was very difficult. I bit my lip on each and every page, and I'm sure most of the other members did for one reason or another. That's how it was arrived at. People just simply agreed not to disagree anymore and move on. Or agreed to agree.

UNIDENTIFIED SPEAKER:

Mr. Chairman, I don't know how the Legislature would operate there, if they operate it under a form of consensus or to reach a consensus under that scenario. But I'm looking -- you have what, twenty-four members in your member association? Isn't that ...

MR. MATTHEWS:

I believe there is twenty-one and three at large.

UNIDENTIFIED SPEAKER:

Was there any -- do you have resolutions from each group supporting the Governor's Council's or Governor Hickel's bill?

MR. MATTHEWS:

No, as usual we took a vote at the annual meeting.

UNIDENTIFIED SPEAKER:

Did you have all members there?

MR. MATTHEWS:

To my recollection, two of the Aquaculture associations were not there. I believe WACMA [ph] Kate Jackson their representative was in the office and I believe Bering Sea was not there. the rest were there.

UNIDENTIFIED SPEAKER:

Everybody else voted for it?

MR. MATTHEWS:

Unanimous vote of those present.

UNIDENTIFIED SPEAKER:

Of every organization that was there?

MR. MATTHEWS:

[indisc] Yes, sir.

UNIDENTIFIED SPEAKER:

Could I have a list? Is that information available?

MR. MATTHEWS:

Assuming its in the minutes.

SENATOR KERTTULA:

Are there further questions? Does legal counsel have the section analyses of this bills? It's my intention in about one hour -- are there copies available for everybody? They should be passed out at this time, just because it tends to sometimes [indisc.] go long. If there's no questions of this witness, I'm going to bring a member of the Outdoor Council. I think the four members of the fishing group wish to testify that we listed, have testified.

I intend to continue on sometime into the -- please have a seat, Dick. About one more hour of testimony and then we will carry on for some errors and oversights either late tonight or tomorrow. But we'll pick up -- we'll have a brief recess and then we'll pick up the bill and have a good look at the first -- at the administration's bill first. And have an explanation of it and go to work. Again, we'll invite testimony as we can, but we're going to have gone through eight or nine hours here now and we have to move on. We have a three or four day deadline. Senator Fisher, you had a statement.

SENATOR FISHER:

A statement, Mr. Chairman. I don't if this would be possible but, could we somehow or somebody draft a comparison column for column, so you can look and see, in this area, this bill does this, this does this. Instead of having -- I mean, it's good to

go through them all separately, but somewhere we need a compilation to see a comparison and say section for section, or something. If that's at all possible, I would ...

SENATOR KERTTULA:

The President says he thinks there is something that ...

UNIDENTIFIED SPEAKER:

Mr. Chairman, I think I've seen a comparison between the AFN bill and the Governor's bill somewhere in the papers -- sectional analysis.

SENATOR FISHER:

Okay.

SENATOR KERTTULA:

We'll pick up the [indisc.] section analysis. Obviously, if this is desired, it will happen. I don't know if it will happen in a timeframe to be available for the introduction of the first bill and its study. You may introduce yourself and please proceed.

MR. DICK BISHOP, ALASKA OUTDOOR COUNCIL:

Thank you, Mr. Chairman, members of the Senate. My name is Dick Bishop. I'm with the Alaska Outdoor Council testifying on their behalf today. The Council is a statewide coalition of outdoor user groups and conservation groups. About fifty groups, somewhere around ten thousand members and growing, especially after the court announcements about seasons in the Nelchina yesterday. I've had a long term involvement in the outdoor use of subsistence and related matters that I would briefly like to mention.

One of the reasons I'm in Alaska is that as a young person in northern Minnesota, I was strongly attracted to the subsistence lifestyle as I was aware of it either in that part of the country or in Alaska. And I resolved to move as soon as I could get away from home, to Alaska to pursue that lifestyle. I got here and found out that there were easier ways to make a living and decided maybe I'd better go to school and learn something else too, just in case. So I kind of got sidetracked for quite awhile and didn't

get around to it. And I wound up being in the wildlife management profession for over twenty years with the State of Alaska and as a researcher with the University. I did finally get around to the subsistence lifestyle for a couple of years when I resigned from the Department in 1975 and took my family to a remote part of the interior. We lived on a subsistence basis. At that area for a couple of years and finally moved back to Fairbanks when it became apparent that the trapline that we were using there, we hunted, might very well go into McKinley Park and we might be without means of livelihood. I was very concerned with the elimination of subsistence uses by ANILCA. That was a dire threat the park service and the supporters of park establishment had no perception of the importance of it or the existence of it in some areas, including the north side of Denali National Park. And I did do a study on that to document that so that there was at least a reason to have included. So I've had some experience. I've worked in various parts of the state as a biologist. I was an area biologist in McGrath. I've worked over most of the northern two thirds of the state in rural and urban areas on various kinds of wildlife work. I give you that background simply to let you know that the issue -- or I'm no stranger to the issue.

With regard to the Outdoor Council, the Outdoor Council supports the Governor's bill and the Outdoor Council opposes any constitutional amendment. Before I get into to some of the details, let me give you a little background on that and then address some related questions. The Alaska Outdoor Council's policy for years has been that they support a subsistence lifestyle, but that a subsistence priority law is unnecessary to accommodate subsistence uses. However, if in recognition of the times, we believe that a priority is virtually certain. That being the case, it should be based on individual criteria that are related to resource dependencies. That is a subsistence lifestyle that must be consistent with the Alaska Constitution. So that's the Outdoor Council's policy and within that, we find that we can and should support the Governor's bill on subsistence.

There are several sort of general issues that you've addressed here today that I'd like to comment on. First of all, I think there's a feeling of urgency that perhaps you would like to find a quick fix, an easy solution, to the subject. There is no quick fix. There is no single piece of legislative action that you can take that is going to resolve the various problems related to subsistence. That's one phantom I guess.

A myth that has been perpetuated by advertisements in the public by members of this committee, by members of the Legislature, by people who have testified to you is that by passing a constitutional amendment to conform to ANILCA, the state can regain state management. That is an absolute myth. It is not possible, for a couple reasons. A technical reason the feds would have to agree with it. And second, if the state conforms to ANILCA, we do not regain state management. You get hired cheap to implement and carry out of federal law. If you don't do it right, the federal courts will make you do it right. What you get is federal delegation of their authority to carry out fish and game management within all of the state according to federal rules. Not just on federal lands like it is now. But on federal lands, all state lands, all navigable waters and all private lands. All of those lands will be included under the jurisdiction of the terms of ANILCA and the federal court oversight. So a myth that you can change state constitution to conform to ANILCA and get state management back is exactly that. It's a myth. Furthermore, I think that it's a myth to assume that that's what seventy-four percent of the people in Alaska fought and meant when they said, yeah, we'd better do something. That question says, do you favor or oppose a state constitutional amendment transferring federal control over subsistence to the State of Alaska? And I guess it's a fair question to the Senate if you think that by passing a constitutional amendment you have the authority to transfer federal control over subsistence to the State of Alaska? If the answer to that is yes, I stand corrected.

Subsistence is an extremely, extremely, important value for

the people of Alaska. That was verified in the McDowell case by the Supreme Court. They said it was too valuable, too important to either overinclude people in receiving that value or underinclude them. In my opinion, this is my personal opinion, not the opinion of the Alaska Outdoor Council. But I think it may be close. As important as that value is the other value that you're dealing with in discussing a constitutional amendment is even more valuable. And that's the basic civil rights of each and every one of us. We are talking about -- if you're talking about a rural amendment, you are talking about -- or some other amendments. Either the actual or the potential infringement on equal rights, equal protection and common use of fish and game of every Alaskan. Those are basic civil rights guaranteed by the constitution. If you abridge those or infringe upon them by amending the constitution to change the wording of it, then you're not dealing with simply a subsistence -- or rather a fish and game management allocation issue. You're dealing with a concept that relates to everyone's basic civil rights. For that reason, the Alaska Outdoor Council and related reasons, is very opposed to a constitutional amendment. We do not see, at this time, any alternatives that have been proposed that can accommodate a guarantee of some sort or the continuation of a subsistence priority without potential of infringing on those even more important basic civil rights. If there is such -- and there may be, such a proposed amendment. There perhaps could be devised such an amendment to the constitution. We haven't seen it yet. If we saw one that did not compromise equal rights, equal protection of common use, we would be very interested in looking at it. But we have not seen one yet.

Another myth, that I think has been perpetuated and exploited is that it's absolutely taboo to mess with ANILCA. To attempt to amend ANILCA. And frankly, I think that's bologna. ANILCA has been amended at least 10 or 12 times. I don't believe that there's any more opportunity for anti-hunting or animal protection groups to seize on an opening over a subsistence related question

in ANILCA changes related to that than there is any other excuse. There is no reason for environmental groups to be at all reluctant about proposing changes to ANILCA at any time. And they have. And so have other people as need be. So that's another myth that's used to discourage people from trying to undertake positive action.

The Outdoor Council believes that it is possible to have a subsistence priority and that it is possible to have it within the constitutional domain of Alaska's constitution. We believe this bill does it. We do not believe -- we do believe that it's unconstitutional and we recognize there are differences of opinion on that. And we have two comments on that. One, is it may be constitutional. The other is that if it is not or if the Legislature is uncomfortable with the assurances relating to the constitutionality, there are very easy technical amendments that can be made that move most of the problems related to that. We support a priority that is intended to do what everybody's bottom line is. And that is insure that people who depend on the resources -- personal use of the resource for their livelihood will receive the priority. In other words, a subsistence lifestyle based on need for the resource. And the Governor's bill is written that way. And we believe, although we have reservations about it, we support it. It's right in principle. It can and will work. We support that idea that those who live that lifestyle can continue to do so. That the resources will be protected and their use of it will be protected. And that's another point. Is that -- another very strong thing of importance to the Outdoor Council, is good resource management. Good, sound, scientific resource management to make sure there's resources there for people to use. And this bill has helped greatly in terms of state law with regard to resource management. It's plugged a number of holes. It's provided definitions where they are needed and it precludes a lot of the potential abuses that exist in existing state law that are basically inherited from ANILCA. That's where they came from.

Theo Matthews talked a lot about the Subsistence Advisory Council. I'll just comment on that very briefly. I really agree that I think everyone did their very best to develop a good scheme for accommodating subsistence and making sure that resources were well managed and that other uses were not unduly harmed. I believe it is a consensus bill in this sense. That every member of that committee agreed to work on that bill and come up with the best possible bill we could agree would be a workable bill. No one was compelled to agree with as an individual or certainly not with regard to their group of which they were from or area of interest. But all of them -- we all were in a position of saying, yes, that's the best bill that we can come up with, period. And when it was over, then I might not agree with it or someone else on the committee might not agree with it, but the consensus was that was the best possible treatment we could come up with under the circumstances. And the circumstances were that we were asked to come up with the best possible bill to accommodate subsistence and take their resource management, regardless of state or federal law existing at the time. As it turned out, there was very strong interest in the Council to insure that the bill we came up with stuck within the bounds of the Alaska State Constitution. And I think it did. It does define terms. One of the biggest difficulties with federal and existing state law is the lack of definition of terms. It provides for the identification of stocks and populations subject to subsistence uses. Instead of all of them, potentially at any time, priority does not necessarily exist at all times. And the significant change from existing state law and ANILCA is that in this law which is in the fish and game law, it only relates to fish and game resources. Title 16 right now says, all wild renewable resources. And strictly speaking, it's going to say that. The issue of criteria for qualifying for subsistence priority was a tough one. We wanted to do two things. We wanted to make sure people who were dependant on that lifestyle and who either chose it or were obligated to follow it by their circumstances would be able to meet those criteria. In the course

of the discussion it became apparent that there was concern for not only the very clear cases where people had very few or no alternatives to people who lived in small towns, who might have a steady job, a steady income and had the ability to provide the equipment and so on to help their neighbors, and friends and relatives do some hunting and fishing and gather their subsistence resources. Those people virtually everyone felt they should not be excluded. Similarly, we definitely did not want to exclude the people who pursued a similar lifestyle that lived elsewhere like urban areas. And so in order to make sure that all those people were caught and frankly, large at the urging of representatives of AFN and others, those criteria to qualify were made very modest. My comment when we got done with it, was I think they will include people who can and do themselves consider themselves subsistence users. Or would be by most people. In fact, they are so modest that I can qualify for them at my present lifestyle. And that's a fact. I did a self test and I would qualify. Which maybe means that it's over inclusive. I don't know. But the idea was that it certainly does not preclude people who have a commitment and a connection to that if they show a strong use and investment in time.

I think, Mr. Chairman, I'll leave it at that. I have had a chance to look at AFN's bill. I agree with Theo. I wholeheartedly oppose it or don't support it. It would return us to all the pitfalls of ANILCA plus some new ones, that somebody thought up. So it does not do a good job of resource management. It does not do a good job of subsistence allocation, but I think it would do something. I think it would enhance the new vocation that somebody mentioned here, I think yesterday, of subsistence lawyers. It definitely gives benefit to that profession. Mr. Chairman, with that I'll stop and let you ask questions.

SENATOR KERTTULA:

There are questions. Have ... [tape ends midspeech]

Tape 92-6

Side A

[Tape begins midsentence]

SENATOR ADAMS:

... still friends. But I just have a few quick questions. Do you, after having a chance to review the different legal opinions, in your mind, do you think that the Governor's bill is constitutionally fit?

MR. BISHOP:

Well, Mr. Chairman, Senator Adams, as near as we've been able to tell, it is. I recognize there are opposing opinions to that. As I mentioned, I think our view is, that although we are persuaded that it is constitutional, if the Legislature is uncomfortable with the verification of that, there are technical changes that can be made in the bill to virtually make it certain that is constitutional.

SENATOR ADAMS:

In your mind does the Governor's bill return federal management to Alaskans, sixty percent of the federal lands or two hundred and twenty million acres?

MR. BISHOP:

Mr. Chairman, I don't think -- I guess I should ask you about what you mean by that question.

SENATOR ADAMS:

Does the Governor's bill retain federal management? State management over federal lands?

MR. BISHOP:

Okay, that's what I was wondering. I don't think we want federal management, I guess, is what I was worried about. The Governor's bill does not ...

SENATOR ADAMS:

Pardon me.

MR. BISHOP:

The Governor's bill does not provide a way for enabling state management on federal lands at the present time. Now, the reason

I'm saying that is that there obviously is no way that state legislation can regain state management because you would have to comply, number one, with the federal law before there is consideration of that. And depending on the terms of the federal law, you might not get it anyway. And that's what I was saying before. If the state complies with ANILCA as it presently is written, then the state will not get state management back. You can amend the constitution. You can comply with ANILCA. You can stoop and bow and meet the terms of ANILCA and they will say thank you for signing up to manage Alaska's resource, not just on federal lands, but on federal lands, state lands, navigable waters, private lands, according to federal mandates. And make sure you don't screw up or we'll have you in federal court at our first opportunity. That's what you will get by conforming to ANILCA.

SENATOR ADAMS:

Mr. President, Mr. Chairman, then perhaps this piece of legislation does not get state management again, what would happen if restrictive federal management is maintained on sixty percent or two hundred and twenty million acres of land plus the possibility - now, it just says the possibility of Native or private lands of forty million acres of land being closed to the public. Wouldn't this place a tremendous burden on hunting and fishing pressures on state land?

MR. BISHOP:

Mr. Chairman.

SENATOR ADAMS:

What in your sense would be the potential impact in areas that if I represent Anchorage or Fairbanks?

MR. BISHOP:

Mr. Chairman, if all that transpired, it would certainly reduce hunting opportunity a great deal. While all that was going on, however, the greatest quantity of Alaska's resources could still be taken under state regulation because they come from the waters - state navigable waters.

SENATOR ADAMS:

The final question I would put to you ...

MR. BISHOP:

Which includes commercial, sport, subsistence, personal use fishing and that's where the bulk of the wild renewable resources taken by Alaskan's comes from. And as the Governor's Office indicated and others have indicated, the Department of Fish and Game, that is under state management, state navigable waters and presently they are in court to make darn sure it stays that way.

SENATOR ADAMS:

You brought up the three subjects of commercial, subsistence and sports. What percentage of our fish resource does each of these uses use? You and I know the answer of that.

MR. BISHOP:

Well, Mr. Chairman, I don't know the answer to that. I know that ...

SENATOR ADAMS:

Ninety-five percent for commercial, four percent for subsistence, one percent for sports fisherman. And if the Outdoor Council believes in equal treatment, why don't we divide these resources to a third, third, third between the three groups. Would you support something like that?

MR. BISHOP:

Well, you know, Senator Adams, and Mr. Chairman. Mark Twain said, "There's lies, damn lies and there's statistics." You just used some statistics about the breakdown of the catch of resources for the various kinds of uses. And they may very well be right. I don't remember. I've seen them before and there are different ways to figure what the proportions are. But one thing I would say, is that there's no question but what the bulk of the fisheries resources come from commercial fisheries. And there's no question what the minority of them come from, I mean, are used by sport fisheries. But I guess one of the things that has bothered me since I've heard this set of statistics being thrown around lately, is I wonder how much of that is fisheries that may

not have been subject to either sport or subsistence fisheries. I'm thinking off-shore fisheries, and so on, that really aren't subject to commercial. I have since learned the proportion of the take of salmon for subsistence purposes, at least to the extent that it's identified, has been fairly small also. So, the point is, yeah, commercial does take the majority, but that's understandable. I guess the other part of that is there's a heck of a lot of commercial fishermen that use a part of their commercial catch for their own use, which essentially is their subsistence use. Lots of fisherman do.

SENATOR ADAMS:

You mentioned ANILCA. Do you believe that ANILCA will be changed over the objections of the Native communities and your thoughts on the congressional delegations thoughts on this?

MR. BISHOP:

I guess, right now, I don't think it would be. I guess, I would agree that unless the Native community was, at least not in opposition to a change, it would probably have a very difficult time in Congress. As far as what the Congressional delegation is thinking about, that's always been a little hard for me to figure out. It may be a little clearer in an election year than other times.

SENATOR ADAMS:

Then if that's the case, that you would not change ANILCA, then we should -- by your statements, we cannot get where you want to go -- we cannot do that. But would the Outdoor Council be available or to consider to give the people a vote on a constitutional amendment? It basically says, would you vote for a constitutional amendment, yes or no? If you said yes, go to page number two and the constitutional amendment can have the Outdoor Council or the Governor's language. The second one would be the Bush Caucus language. And would you give that opportunity to the people to vote on an option?

MR. BISHOP:

Well, let's see. Let me answer that somewhat indirectly, and

I don't do that to try to dodge the issues. But just because I can't think of a real direct way to answer it. I'd like to go back and repeat what I said earlier with regard to what's in the constitution. It's very, very difficult to imagine wording of the constitution that could be any better in terms of protecting the most basic civil rights of each and every Alaskan than what we have presently. So right off, it's a little hard to imagine that it could be changed without compromising that to some degree. I guess if it came down to, is there an amendment that could be voted on that if the question were that did not and was certain that it did not compromise equal rights and protection of common use, then I think that would be a fair question. And I'd say, yes if it did, then that was certain. But it's very difficult to be certain about that. We are certain about the present content of the constitution.

SENATOR ADAMS:

Thank you, Mr. Bishop. Mr. Chairman, I just threw that proposal out for food for thought for a later discussion.

SENATOR KERTTULA:

Yeah, I saw you got two for one, there Senator. Sometimes sells a dead horse a couple of times, too. That's very good. Senator Duncan. Thank you.

Then Senator Hoffman.

SENATOR DUNCAN:

Thank you, Mr. Chairman. Mr. Bishop, I just had one question for you. You, of course have read the Governor's bill. You were involved, I'm sure in putting that together. As I've been reading the sustained yield definitions, [indisc.] the sustained yield definition in the Governor's Bill it seems that definition always requires the Boards to give priority to hunting and fishing for non-consumptive use of fish and game. Some of those non-consumptive uses, for example, might be [indisc.] It seems to me that this sustained yield definition always give that priority and therefore might prohibit the Board from setting aside certain stocks for non-consumptive uses. Do you think the Board should be

able to set aside certain stocks for non-consumptive uses?

MR. BISHOP:

Well, Mr. Chairman, Senator Duncan, yes, I do. In fact, the Board does. And, as far as I know, there has never been any dispute that that is consistent with the principle of sustained yield. The populations are managed to provide for ongoing benefits, generally regarded in consumptive terms. That does not preclude within that framework allocation of parts of those resources for non-consumptive uses. And that seems to have worked pretty well.

SENATOR DUNCAN:

Have you read the definitions of sustained yield in the Governor's bill?

MR. BISHOP:

No, I haven't read it for a couple of weeks or something like that Mr. Chairman. I have read it.

SENATOR DUNCAN:

As I read it, I think maybe it does cause some difficulty. I don't -- I'm sure from your position on several items on those non-consumptive uses [indisc.] how you support that. This provision in the Governor's bill might prohibit the Board from being able to set aside certain stocks for non-consumptive uses, contrary to your Council's position. I'm just wondering if everybody has looked at all perspectives of the Governor's bill to [indisc. - cough] support it.

MR. BISHOP:

Mr. Chairman, the concept of sustained yield is in the constitution and I don't think that the definition certainly was not intended to be inconsistent with the idea behind that. Nor with general practice, as far as wildlife management. I guess, it completely escapes me what point in our policy or review maybe you're referring to you. I don't understand your question in that regard. May be you could clarify.

SENATOR DUNCAN:

Well, I just on the paper handed out to me where you support

[indisc.] bill for one and you support the need to make [indisc.] subsistence in other uses should be provided for in [indisc.] recovered, et cetera. The absence of support [indisc.]

MR. BISHOP:

Oh, absolutely.

SENATOR DUNCAN:

Yes.

MR. BISHOP:

Yes, all the time.

SENATOR DUNCAN:

Yes, you do. And I guess my concern was the sustained yield, just to make you aware of that. You might want to look at that. The definition of sustained yield in the Governor's bill may prohibit the Board from setting aside certain stocks for non-consumptive uses and that may not be what you want to support. I just wanted to be sure you're clearly supporting what you want to support.

MR. BISHOP:

Mr. Chairman, Senator Duncan, I really appreciate your concern. I think it is consistent with our policy. I think it is consistent with the definition of "sustained yield". I do not think that there will be a problem there. Thanks for bringing it to my attention.

SENATOR KERTTULA:

Senator Hoffman, then Senator Eliason.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. How would you describe Governor Hammonds' input to the task force?

MR. BISHOP:

I'm sorry. I couldn't hear the first part of that?

SENATOR HOFFMAN:

How would you describe Governor Hammonds' input to the task force on [indisc. - cough] legislation that you described?

MR. BISHOP:

I think, Mr. Chairman, Senator Hoffman, I think Governor

Hammond was very constructive.

SENATOR HOFFMAN:

Given that, did you get the opportunity to read Governor Hammonds' article in May thirt- first Sunday paper?

MR. BISHOP:

Mr. Chairman, this past Sunday?

SENATOR HOFFMAN:

May thirty- first. On subsistence and the special session.

MR. BISHOP:

Mr. Chairman, Senator Hoffman, I don't believe I did.

SENATOR HOFFMAN:

Let me read something out of that to you that he had stated. He states, "Three things must be done if this special session is not to self destruct. First, to satisfy the Native concerns, a constitutional amendment to grant the highest priority to subsistence use must be placed on the ballot." That's the first one. The second one he says, "Amend the Governor's bill to eliminate the non-rebuttal presumption qualified of all those communities of two thousand or less for subsistence" And the third one, he states, "That the establishment of a subsistence Board is proposed by AFN". Those are the three things that Governor Hammond said must be done. And I wonder if you agree with those three.

MR. BISHOP:

Well, Mr. Chairman, Senator Hoffman, I guess my first reaction is I'm sure glad he waited until after we finished meeting before he brought those up, or we'd still be there. My second comment is, no, I do not agree with those. I do not think that those are either necessary. I don't think any of them are necessary. And I certainly do not think that the constitutional amendment, I think you said rural priority, nor the subsistence bill are desirable.

SENATOR HOFFMAN:

No further questions.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Thank you, Mr. Chairman. Senator Hoffman alluded to one of the questions I had as to what took place at these meetings. I don't know if the article said two thousand people. I think the plateau was twenty-five hundred. But it's my understanding that there has to be some type of criteria set for each one of these population factors in order to give some type of constitutional strength to the bill. That's my understanding. You just couldn't say any community with three thousand or less people is automatically into subsistence lifestyle, period. Somewhere in that legislation has to be some type of criteria set, even though it is very minimal. The question I have is in relationship to those communities with less than twemnty-five hundrend -- of course, yesterday we had an impression -- at least I had an impression from many people, elders from different remote ares of Alaska came to testify against this bill in favor of the AFN bill. But what puzzles me is why, in fact, they would be -- they came from those areas which really are affected minimally. The Governor's bill is in my estimation doesn't affect them whatsoever if they continue on what they've always done and on into the future. So I guess, the question would be that with twenty-five hundrend or less, they are presumed to meet the requirements. Which is sort of a blanket presumption. However, there has to be some type of criteria in order to just get out of the problem we had with rural. So it goes on to say, "The state has to -- can be rebutted only by the state, by the clear and convincing evidence". What degree of evidence is that? It seems to me quite [indisc. - cough] that they have to be in effect, really not subsistence users. So what -- there's different categories of evidence. How high would that be?

MR. BISHOP:

Mr. Chairman, Senator Eliason, I really don't know, because I don't know the legal terms. My understanding is that that's -- if it isn't the highest, it's close to the highest level of

standard approved for whatever it's called that the state has to use and, if for example, they were to rebut somebody's eligibility. And that's all I know about it. Supposedly, that's the highest or close to the highest standard approved.

SENATOR ELIASON:

I assume that rebuttal would take place only because of a complaint filed by others in that area saying this particular person is certainly not eligible for subsistence. They would have to build a case, with convincing evidence that he wasn't before he'd be disqualified. Is that right?

MR. BISHOP:

Mr. Chairman, Senator Eliason, when we discussed that I think that was really a point of discussion of how much difficulty that would cause among friends, neighbors, folks in the same community and so on. Basically, what was intended was that, if necessary, the state could challenge somebody's priority right. If for example, for whatever the reason, there was a high probability that that person really didn't meet the individual criteria which are the guts of the bill. Everybody, no matter where they are or where they live, are supposed to meet the same individual criteria. If the person in this rural area didn't meet them or didn't appear to meet them, the state could say, this doesn't look quite right. And proceed to develop some evidence as to whether the person met them. If they met them, there would be no problem. If they didn't meet them, then they could withdraw that priority privilege. The state.

SENATOR ELIASON:

Mr. Chairman, I believe I have the answer here. There's three levels. One is three levels. One is beyond reasonable doubt. Lowest level [indisc.] clear and convincing and the high plateau is preponderance of evidence which is very difficult in most cases to reach. So I would presume that under that criteria that these people testified yesterday who live in these small remote areas, would have no concern whatsoever. They'd all be entitled to subsistence under the Governor's bill. Can you tell

me any different?

MR. BISHOP:

Mr. Chairman, Senator Eliason, that's exactly right. In those areas, under the Governor's bill, all of the people in those areas would be assumed to meet the individual criteria at the outset.

SENATOR KERTTULA:

Further questions. If there's no -- Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. Just one, Dick, in your view, have lost basically management of our game resources or will we lose management of our game resources after July 1 on federal lands?

MR. BISHOP:

Mr. Chairman, let me restate it in case I didn't hear you correctly. I think the question is will we lose after July 1 the management of our game resources on federal lands. Is that correct?

SENATOR ZHAROFF:

[indisc.]

MR. BISHOP:

I think there's -- yes for sure in part and that relates to subsistence management and subsistence allocation and it's probably with regard to other aspects of management. There really is still a legal question of whether the feds have the authority to do anything more than manage subsistence allocations. It may vary -- there is an argument made for the state still having authority for other aspects of management and allocation of wildlife game on federal lands. I don't think there is an answer to that yet. So the first part is, yes, we'll lose it with regard to subsistence allocation. The second part is, I think, probably or maybe with regard to management and allocation of other uses of game.

SENATOR ZHAROFF:

You think then, that the Governor's bill is going to thwart that action?

MR. BISHOP:

Mr. Chairman, Senator Zharoff, no, it will not thwart that action. In fact, there's nothing this Legislature can do before July 1 that will thwart that action, in my opinion. That's set by the procedure the feds are going by. They're going to complete that procedure one way or another. There's nothing in the purview of the state to interrupt it.

SENATOR ZHAROFF:

Do you think than ...

MR. BISHOP:

... other possibly ..

SENATOR ZHAROFF:

Do you think possibly then if the Legislature during this special session were to adopt the constitutional amendment which would go the people that there could be an argument made to the Department of Interior to hold off and see whether the state does adopt it or not?

MR. BISHOP:

Mr. Chairman, Senator Zharoff, that argument could certainly be made. I guess I'm dubious that it would have any effect.

SENATOR ZHAROFF:

Do you think that there would have more of an effect there than passing a bill that we haven't determined whether its constitutional now or not?

MR. BISHOP:

Mr. Chairman, Senator Zharoff, I think it would about a wash.

SENATOR ZHAROFF:

[indisc.] Thank you.

SENATOR KERTTULA:

If there's no questions. The intent of the chair recess for ten minutes, but subsequent to that we'll cross the face of the state have three to five minute testimony from the people for about one hour. Then tomorrow we'll continue testimony and give them time. But we'll start with Sam Demientieff, probably go to Eric Forrer. But I'm going to go across the face of the state

geography for brief testimony. And in about one hour after we come back to order we will bring the bill up. So I ask the staff, attorney's and so on, and the administration have their materials ready to start explaining the first bill before us which is 484. We'll go right on into it.

RECESS

2:55 - 3:32 P.M

SENATOR KERTTULA:

Well, now that we only have rural legislators here, we'll start bringing in the rural group. Come back to order. And it's our intention to have relatively brief testimony by individuals. Some of you will be representing organizations. And we'll do that for about an hour today. Then we'll go into the body of the bill and we'll take testimony again tomorrow. At 1:15 tomorrow, Vern Wiggins, Marty Suberg, Department of Interior will be on teleconference we have set up here. And Lance Nelson will be available in the morning to update the committee with subsistence litigation about 9:30 at the beginning of our meeting. We want to put in an hour of initiating ourselves to the administration's bill this late afternoon on concluding this part of the testimony. I'm going to hopefully be half fair, and that is I'm going to try to bring people from across the state into testify on the face of it. At this time, Sam Demientieff is here. I'll ask him to come forward and -- those people who will be showing up, you are recorded. Others will be here shortly. I distressed that more aren't here at the moment. But I think we probably have at least a reasonable cross-section of people and attitudes on legislation. Sam, please introduce yourself and get started.

MR. SAM DEMIENTIEFF, EXECUTIVE DIRECTOR, FAIRBANKS NATIVE ASSOCIATION:

Yes, My name is Sam Demientieff. I am the executive director of the Fairbanks Native Association. I'm a member of the Tanana Chiefs conference subsistence task force. I'm also a member of the [indisc.] Board of directors. I'm opposed to the Governor's bill. I support the Bush Caucus bill. I was [indisc.] on Sunday

afternoon on business and I talked to five people up there. Red [indisc.] Wilson Sam, who is the chief of the village, Franklin Simon, Bill Derendorf [ph] and Cue Byfelt [ph]. Our discussions were around subsistence and what is going on down here in Juneau. They expressed to me a real concern that this subsistence question is being brought up now without any real input from the people in the rural areas that are affected by that subsistence question because it is their life. I told them that there's a reason for this special session and that the Governor called this special session, which really has disrupted a lot of our lives, a lot of our schedules. He thinks in his mind that he can get this question answered. I told them that I'll tell you that of their concerns. That they don't have a chance except for the people that are down here now. But the true subsistence users, there are lot of them here, the elders. Some of those people are not going to be able to testify before you. I just wanted to let you know that. We have an elder in the Tanana Chief Conference area. His name is Peter John. And he's the traditional chief there.

SENATOR KERTTULA:

I know Peter.

MR. DEMIENTIEFF:

Peter John, I think would say, along with the elders, what is subsistence? What is subsistence? He would say, what is subsistence to you? I think that he would say subsistence is the use of Alaska, its natural resources, earth, air and water by its people. Well, how would you include the air and water to use for subsistence? The air is used for -- it supports life. It produces the water cycle where you can see and read the weather. The elders use that to predict how to hunt and where to fish. The water supports life, the animals, the plant, fish to spawn in, to drink and the earth supports everything else. I think he would explain it that way.

Where is subsistence located? In the Governor's bill, according to the Attorney General, he says that its need. No, it's not need. It is where the subsistence is. Where is the fish

and game? Where is the natural resource? Is it around the cities and villages? No, it's out in the rural areas. Rural preference, natural, something that is out there. That's where the people will get it. Who knows about subsistence?

Who knows about subsistence? Is it you? Is it me? Is it people here that are not born here? Is it anyone of the news media or is those elders? It's those elders there. They live it. They explain it as life. It is life. Subsistence is life. They are the ones who know about it.

The Outdoor Council, they changed their name from Alaska Sportsmen to the Outdoor Council. There's a connotation there. They were sportsmen people in the beginning but now they're saying the Outdoor Council. There's a misperception right there. United Fishermen of Alaska. What is that? The elders or anybody would say that's a commercial fishing operation. That's a commercial fishing interest. The true subsistence users are the elders. And if anyone needs any guidance on subsistence including this committee and the rest of us who live here, we get that guidance from the elders. You ask, Will or anyone here, how do we treat the elders? We treat them with respect. We all should treat them with respect. If anyone knows about subsistence, and is a true subsistence user, it is the elders. They are right there. Just look at them. They are right there. I think they're are the ones that should be guiding this. They're the ones that should have been the experts in the testimony before this committee in the beginning. The Attorney General says put it in second gear, let it ride for two years. No, the subsistence question is a life question. McKie Campbell says, I'm not really a true subsistence user. He isn't. What is he doing? There's the elders. Ask them what about subsistence is? They'll tell you. My dad is the boat operator, and if hires the people that works on that boat, anybody -- he hires the people that knows about boat operation. He tick them guys right off. Ask a pilot about piloting. They ask other pilots. Ask subsistence about subsistence and who was questioned? Who was asked? Who gives guidance? It should be those elders.

Definitions on subsistence could be use and occupancy. What is use and occupancy? Use of the resources. Occupancy of the land. That's the way that should be defined. Things can happen. Things are happening all over the world now, in this state, because of the economic conditions, the oil revenue declines. People are going to start losing their jobs, and when they do, if they already aren't doing it now, they're going to start wondering, where am I going to support myself? That includes anybody here, especially in the urban areas. Where are they going to go? They're going to start looking to subsistence. The real dollars are going to be of value. The dollar that we deal with today. The dollar the greenback - it's not going to have value in a time like that. The value is subsistence because it supports life. Where would we be right now? Where would Bishop, the other fellows here or Harris -- fifty-five years telling us how long they've been here. Where would they be if it wasn't for Native elders teaching them about subsistence? And that's life. That's survival. That's survival of people. And it isn't just Native people. It's all Alaska's people. And that's what the Bush Caucus bill does. I support the Bush Caucus. And I believe that the State of Alaska's people would like to vote on that. Would they support -- who would they support? They would support themselves. They believe in survival. They're supporting themselves and they'd vote to give themselves a chance to vote on this issue. And I believe they should be given a chance on it -- to vote on this issue.

SENATOR KERTTULA:

Are there questions?

MR. DEMIENTIEFF:

I'm not done yet.

SENATOR KERTTULA:

You just hesitated so I thought you were.

MR. DEMIENTIEFF:

I know. There's a reason why the Native people believe in the Bush Caucus bill. Because it's a way of life in sharing

things with people. They are not saying, save this for the Native people. The elders are saying its for all people. The Bush Caucus bill says that and I support that. I'm done.

SENATOR KERTTULA:

Questions? Thanks, Eric. I recognize that some whho wish to provide greater testimony, I ask Eric to go, but I ask that you condense any amount you can. Proceed.

MR. ERIC FORRER, GOVERNOR'S SUBSISTENCE ADVISORY COUNCIL:

My name is Eric Forrer. I live in Juneau. I was on the Governor's Subsistence Task Force. As I understood the structure of the force, there were six public members who did not represent anything other than their own experience in the state of which I was one. Subsequently three more members were appointed who did represent groups. It was a very healthy structure in the end, because the representatives of the groups could speak clearly from their groups position and the individuals could speak -- align themselves as the arguments persuaded them. I have a written statement which I have chopped down to some extent in the interest of time. So if something doesn't quite connect, it's because there's been a page that's been thrown out.

SENATOR KERTTULA:

Please use the necessary time, Eric.

MR. FORRER:

Thank you. In the beginning was the land, then came the fish, the game and the intricate biosphere. Then came the aboriginal inhabitants who have been in Alaska so long that their tribal memories do not record their arrival. Then from the west came Russians and from the east, Europeans. Then came technologies which broke the age old relationship between human population and locally available energy and prey species and then with the rising population came the social pressures with which we are wrestling today.

One reason for controversy is the practical problem of allocation. Who gets to harvest and who doesn't is the business of regulation. And this must be worked out because this state

constitution requires management of renewable resources for sustained yield. The available harvest levels of fish and game in the state are not close to the quantities that would be necessary to feed the population in the precontext sense of one hundred percent dependency upon the land. Available harvest levels cannot support even the Native population alone. It is a squeeze between the available harvest of wild stocks and an increasing human population that heats up the controversy. Attempts to structure the regulation of fish and game lead directly to the thorny tangle of defining groups who might be awarded or denied special rights. One is then lead further to the definition of the beneficial uses themselves, to definitions for many terms used in the history of the subsistence management and to a definition for subsistence. There are few clear uncontested definitions in this entire enterprise, although some are less troubled than others.

In order to understand the subsistence issue, it is helpful to take a look at the uses of fish and game as arguments made by competitors for the resources tend to be classified along the lines of the type of use in which they participate. Individuals, of course, most often participate in more than one type of use and not infrequently in all types. There are four generally recognized camps or groups in contention over the human use of other species. Three of these are known by the names by which they are regulated and they are commercial, sport and subsistence. These three are called beneficial uses, from a term that occurs in the Alaska State Constitution. The fourth group is the general public or national interest.

The national interest is a surreal conglomerate which includes all three beneficial uses as well as preservationists, conservationists, developers and others. Consequently, in terms of a definition, it is a shifting target. As different and even contradictory values are proposed to be in the national interest. The inability to know or predict what sensibilities will be in the ascendancy of the camp called national interest, makes spokesman for the three beneficial uses in Alaska uneasy about federal

regulation. Different arms of the federal government show no tendency toward mutually consistent policy. For instance, Alaska is faced with federal takeover of fish and game management on nearly half the state, in order to protect the subsistence rights of rural residents. However, federal law also prevents the taking of fish or game in the national parks. Thus, one of the first consequences of federal protection of subsistence rights is the prevention of subsistence and commercial harvest in Glacier Bay. Because of the growing strength of preservationist philosophy, I am among those who fear that the parks prohibition may eventually be extended to include all federal land. Thus what starts as a protection for subsistence may become a blanket prohibition.

McDowell versus the State was argued on the basis of equal rights and equal access to public resources. And I agree that we should not be dragged back from this constitutional position, for only this position will enable us to make progress toward equality. However, this argument does not imply that there is currently a level playing field. A source of frustration for Native subsistence users and others is that arguments for the equality of all are used without regard to the current state of spiritual annihilation and deep inequality that presently exists between the dominant cultural of European origin and American aboriginal inhabitants. One cultures defining activities, in effect, a religious structure, are another cultures' avocation. And the gulf between these two meanings for the same term is at the core of the difficulty. If those who make the most shrill arguments for equality in the subsistence debate were ever heard to make the same arguments when it was not directly in their interest to do so, considerable distance between a protagonist might be closed. On the other hand, I believe that those Native leaders know honor to argue for special rights based on racial grouping and that it does not Native population no favor to grant such rights in law. Special rights are inconsistent with the ideal of equality and they are a source of trouble because they set the enabled group aside and encourage harassment, non-

cooperation, and alienation between peoples who must ultimately go down the same road. I do believe that it is possible to establish regulation within which Native cultures can practice those sicklic [ph] rituals of harvest that define their lives in the past which we know as subsistence use. This must be a regulation under which all users can operate without resorting to overt and clumsy reliance on racial or residence criteria. I believe that the Governor's proposed legislation satisfies these conditions. Although it was quite unpopular and has resulted in turmoil for fish and game management for the interim, I think that the McDowell decision making rural resident criteria unconstitutional was a correct decision. The term rural is and will remain beyond the reach of the usable definition. That stage of development to which it refers in the contiguous forty-eight states is nearly non-existent in Alaska. Urban and rural are not the only two possible alternatives on the path of development. In Alaska there is also wilderness. Villages set in the middle of wilderness are not rural. This is made clear when it turns out that those communities known as the regional hubs, many of whom inhabitants are people with deep ties to the bush and to subsistence, do not fall within the federal definition of rural. Residents of Bethel, for instance, would be probably denied subsistence rights under the language and definitions of ANILCA. Conversely, a resident of a smaller town, that could be anybody from a high line fisherman to a bank president, might be eligible for subsistence rights. Native citizens of the largest Native community in the state, namely Anchorage, would not be eligible. School superintendents and air taxi operators based in villages would be. Reliance on the concept of rural versus urban is hopelessly flawed and this understanding helps clarify the problem the state faces in any attempt to comply the letter of the law of ANILCA and simultaneously provide a regulatory scheme that is a fair one.

Mr. McDowell is an urban sportsman. The McDowell decision is associated with the beneficial use called sport. Sport is a troubled designation. The spectrum of use and behavior to be

found under the umbrella of field sports, ranges from the barbaric to the uplifting. Possible because of the barbaric end of the scale, sportsmen groups tend toward a defensive tone when making arguments in their behalf to the public. On the face of it, they have a difficult argument to make in defending sport, read entertainment against ... [tape ends midspeech].

Tape 92-6

Side B

[Tape begins midspeech]

MR. FORRER:

... subsistence, read livelihood and food for the family. The age of the sportsmen challenging subsistence criteria is that of the fully engaged middle or upper class caucasian residing in an urban center throwing his, definitely his, weight against less advantaged Native citizens. It is equal treatment under the law on which legal challenge has been based, and the image of the powerful making this argument against people suffering considerable cultural stress, is the reason that the call for equal treatment has been so poorly received.

The popularity of sport uses and the reason so many are drawn to them is that they make an elemental connection to the land or a building block in the sense of identity of the participants. On one end of the scale, as the activity of sport use has become further removed from its direct connection to a food source, the motivations and forms for sport activities have become confused. The lore of urban sportsmen is no longer connected in the main to the realities of the field. If their publications are to be believed, they entertain themselves with all sorts of sensationalism in promoting trade and equipment and weapons of all sorts in order to protect themselves if they ever get to the wilderness. Meanwhile, out in that same wilderness, all kinds of activities occur, including the activities of older Native ladies who move about unarmed in the pursuit of various grasses and fish.

At the other end of the scale there are many individuals who have never killed anything for sport, yet hold sport licenses. Philosophically and spiritually, they are essentially subsistence users and if they do their harvesting under the designation of sport, it is a matter of circumstance. Sport licensing being the only regulatory form provided. This essential connection between subsistence and sport is one of the arguments made against the regulatory elimination of sport use in order to continue to allow a subsistence harvest on diminishing resources. It is a good argument and illustrates the difficulty of thinking and regulating in the absence of clarifying definitions. The connection between sport use and subsistence and sustenance or protein for the home freezer is a nearly universal one for resident Alaskans. But Alaskans who harvest under any rule are up against a growing strength of numbers of people opposed to hunting and fishing on moral and ecological grounds. Numbers of bird watchers are beginning to challenge the tradition of bird hunters. I think that sportsmen, subsistence users, and game management personnel nearly all agree that bird hunting is more directly connected to bird conservation than is bird watching. There is an apparent irony here and this is a difficult argument to make against urban residents who have no cultural or personal knowledge of the act of harvesting proteins for their own dinner.

There are a few clues about the kind of thinking that is beginning to be in the majority and will have increasing influence on national policy. One such clue is a question that is occasionally asked by tourists of the park service personnel at Denali National Park. The question is, what do you do with the animals in the winter time? A startling number of bird watchers and their ecologically sensitive urban brethren of all stripes are in fact, entirely removed from substantive knowledge of fish and game. That this question is not atypical is a reflection that federal policy is driven, at least in part, by citizens who have lost all real connections to the land. The notion that the world is some sort of zoo and that unnamed government agencies do

something with all the animals out there in the winter time is so far removed from reality that it is quite frightening to realize that this thinking is driving the creation of federal management policy.

While subsistence use came first in some sense, commercial use followed immediately as part and parcel of human contact. Commerce between individuals and groups is as old as man's tread upon the continent. Once Soviets and Europeans showed up in Alaska, they came as commercial users, sea mammal or the fur traders. An argument is made by subsistence users that customary barter and trade, a recognized part of subsistence practice, shades imperceptibly into commercial use. This argument is used to defend the practice of selling part of the subsistence caught fish and game. This may include non-edible parts such as bone and fur which are used in crafts. And edibles such as salmon roe. The whole picture of commercial fishing in Alaska is complex and has nationwide and worldwide aspects. Commercial fisheries, issues and manipulation by outside interests were one of the main considerations in the fight for statehood. Over capitalization, offshore draggers with company headquarters in Louisiana, factory trawlers harvesting tens of millions of pounds, a king crab fleet presiding over a decimated species, heavy foreign investment, this is alienation within the very ranks of commercial use. But these monster fisheries have not run afoul of conflict with subsistence regulation. It is the locally based skiff and small boat fisheries harvested by Alaskans that are threatened by the state's inability to fight a mechanism for the management of subsistence.

For village residents, commercial fishing in their local rivers is a major or sole source for cash income and the subsistence priority of which they are the beneficiaries works against their own interests in the economy. This situation has resulted in Native groups being pitted against each other in allocation fights. And once again we are drawn back to the pressure of population levels in a finite world. In spite of the

complexities, commercial fisheries help provide local populations all over the state with their sense of identity, their economic base and indeed their sustenance. This last begins to sound like a description of subsistence use to which I have finally drawn.

In 1963 and 1964 it was my privilege to be the only caucasian fishing commercially on the Lower Yukon river. I was able to succeed because two Eskimo fishermen acted as my guardians and made it their business to see me through to the ends of the seasons. They and their contemporaries taught me about fishing and about the big river. This way of life close to the water and the country provide me with the spiritual framework from which I have drawn strength ever since. I call this framework a sense of place and on various occasions I have argued for the importance of a sense of place to the health of individuals and the strength and diversity of the national spirit. Mr. Chairman, it is the erosion of the physical relationships of a place and the dilution and loss of knowledge about methods of sustaining life that constitute the main ingredients of culture shock. Certainly, with that generation of Native subsistence users that show up at public meetings in order to testify as they do with forthright eloquence subsistence is not something in which they engage occasionally nor is it a structure to be found in state fish and game regulations. Subsistence is who and what they were for all the generations of the past. The power of subsistence over the identity of the practitioners is the power of symbolism. The physical realities of twentieth century life and the structure of the symbol of subsistence do not coincide. It is a symptom of the relentless tide of technologies and events that sweeps down upon us all. I come to this argument from the roots of my youth. I am forced to a bitter conclusion. All ready for some years and as far into the future as we can see, subsistence as it exists in the memories of those eloquent elders is no more. For subsistence to work, an elementary and ruthless biological balance is necessary. There is no such balance. In biology this is known as [indisc.] When our very species is so reduced as to be unable to support a predator

species. The predators have three alternatives. They can move. They can seek other prey. Or they can starve to the point that their own numbers can be supported by the diminished prey. Now and for many years past, there is a fourth alternative. This is the delivery of alternative energy by modern transport. This has already changed the form of life for all the former subsistence cultures from a nomadic existence balanced on a knife edge of available resources to a network of permanent villages which are recipients of imported energies from cash to [indisc.] crackers. Worldwide, nationwide and statewide, the powers of science and civilization have eliminated the balance in human development. At the top of this complex situation is human population. By numbers alone, the Alaskan land and wild species cannot sustain the Native population much less the total population. In spite of devastation by introduced diseases in the last century, modern medicine and outside food supplies have enabled populations to survive many times then to double and double again. Even special privileges will not solve the problem of excessive pressure on hunted species. The starving time has been eliminated from the cycle of subsistence. A hunter carrying a weapon made of tool, steel wearing rubber boots, driving and outboard powered plywood skiff and wearing sunglasses may well be a subsistence hunter in spirit, but his effectiveness is that of a technological man and his responsibility to regulate himself must reflect this reality.

In the beginning was the land. At the very core of the subsistence issue, at the core of the beneficial uses when all else is stripped away is the question of the meaning of life. Life in terms of food, in terms of connections, in terms of an activity involving time and knowledge about other forms of life. One of the mental tools for wrestling with this essentially un noble mystery is a sense of place. For myself and others, a crucial part of this sense is involvement with sport, commercial and subsistence use on grounds we know well. Alaskan fishermen return year after year to their customary grounds and the reason they do is not to be found in the harvest poundage or mindless

habit. If you doubt this, look at the emotional response of the fishermen in Prince William Sound to the loss of their grounds after the big spill. Rock hard toughies were seen sobbing on national television. It is my opinion that the depth of their emotion was a surprise even to themselves. Their tears did not fall because of lost money. It was the loss of their own identities and the loss of the possibility of that identity for their children. Losing rights to commercial harvest inside national parks or on federal lands, losing subsistence rights to national [indisc. - cough] sensibilities. These are steps down the road of alienation. In years to come when sociologists are standing around scratching their heads about high alcohol consumption and social violence, we will be lucky indeed if they even remember those activities that used to provide a spiritual framework but which has ceased to exist.

In order to survive we must evolve mentally or nature will impose upon us the fate of evolving physically. It falls that compromise and adaption to our technologies and population levels is necessary. This is a painful process and so challenging that far more species than currently exist have failed this ultimate test of a face off with changing conditions. Rapidly changing conditions are what subsistence users and everybody else are up against. So the subsistence controversy is far more than an allocation battle or a clarification of constitutional principle. It is in fact a struggle about paths which the human race may take and it is part of the century old search for the meaning of life.

Mr. Chairman, of all the purposes, pursuits and issues contained within the subsistence controversy, there is one overriding item at the top of the list and that is the loss of the state's right to manage the harvest. The activities associated with the beneficial uses are part and parcel of our identity. And we have the right and responsibility to be our own management. The idea that there is a lasting federal commitment to protect subsistence rights is a chimera [ph] The feds manage the fur seal harvest and there is no more harvest. The feds offer to protect

subsistence and this protection includes a blanket prohibition against all harvest in Glacier Bay and the other parks. Including harvest activities on the outside coast. The Governor's legislation that is before you was drafted at a table at which all major pieces of the puzzle were ably represented. To the surprise of the members of the council, they left the process with a new understanding and respect for the size of the question against which they were historically aligned. We worked on this legislation word by word. It has a good sense of balance and fairness and it protects the beneficial use called subsistence. I urge you to adopt the Governor's proposal. It is a substantial piece of the structure needed to rescue dearly held rights to fish and game use. The Governor's legislation is fair and workable and it will stand us in good stead as the future brings changing conditions to us all. Thank you very much for hearing me out.

SENATOR KERTTULA:

Any questions? Senator Adams.

SENATOR ADAMS:

Eric, McKie Campbell said during Council meetings that Colonel Jordan of the Fish and Wildlife Protection office had told him that the bill [indisc.] work if it is supported and agreed to by the greater majority of residents. What do you think about that statement at this particular time, sir?

MR. FORRER:

Well, I think that the issue is so complex and I think that because subsistence forms a nearly religious structure, that arguments based on logical sequences have a tendency to fail. I think that the legislation does need the majority of broad support. And I think that when it is understood, if it is given a chance to work, that it will get that support.

SENATOR ADAMS:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

If there are no further questions, I'd ask Donnie Fleagle [ph] to come up.

SENATOR COTTEN:

Mr. Chairman.

SENATOR KERTTULA:

Is there a question?

SENATOR COTTEN:

No, I would just like to ask if you could make those comments available to committee members.

SENATOR KERTTULA:

Yes. Can that be xeroxed?

MR. FORRER:

Yes, probably McKie Campbell's office could make copies available.

SENATOR KERTTULA:

Okay, that's fine. Now, if we will...

MR. FORRER:

Thank you.

SENATOR KERTTULA:

I'm trying to go across the state to McGrath, Ms. Fleagle. Then we're going to go with the central area.

MS. DONNIE FLEAGLE:

Thank you for the opportunity to testify today. My name is Donnie Fleagle and I live in McGrath. My father testified earlier. I represent four villages in rural Alaska located in the upper Kuskokwim River area within the Tyonek Tananushe [ph] region. I sit on the village corporation Board and a tribal government council. The Governor's legislation in many people's opinions will not return fish and game management on federal lands to the State of Alaska should it become law. I think it was Senator Eliason that asked what the people from rural areas -- what are they worried about? It's federal management. We already understand state regulation? It's a little more difficult when you have two systems operating. At least we can come to Juneau. We can find people. We can get answers. Washington, D.C. is a long ways away. In my area, its already proving to be both confusing and frustrating because the rules are not the same. For

rural Alaskans, and more particularly Alaskan Natives, use and dependence on the renewable resources is a given and so integrated that we find it hard to deal as a separate from our way of life. However, it is one of the major issues that is polarizing the state and its people. It's probably more to the point in my family. I fully support a resolution to the matter. By insuring that subsistence rights are protected, thereby bringing the state into compliance with ANILCA and returning fish and game management on federal lands to the State. We all have to live in the state, and I'd like us all to get along and share those renewable resources. In the McGrath area, we're seeing more and more people from outside, from the Lower river areas coming up to hunt on the lands that we're used to using. I expect that we'll probably see more of that as lands are closed to certain hunts. If the state Legislature and Governor cannot pass a bill perhaps our state's governing body can envision a solution that will include putting this issue before the great people of the State of Alaska at the November election in the form of a constitutional amendment. Perhaps, only then can a direction be truly forthcoming. Thank you, Mr. Chairman.

SENATOR KERTTULA:

Are there questions of Ms. Fleagle? Thank you for appearing. It's good to see. Is Clare Swan in?

MS. CLARE SWAN, KENAITZE INDIAN TRIBE:

Mr. Chairman, members of the committee and ladies and gentlemen, my name is Clare Swan and I'm here today to testify in my capacity as chairperson of the Kenaitze Indian tribe on the Kenai Peninsula. I like most of the members of the tribe live on the Kenai Peninsula. So most of our history we have relied upon the bounty of the sea and the land for our continued physical and cultural well being. Yet, since the late 1970's we have been forced to fight to preserve our cultural right to hunt and fish. We have made proposal after proposal to the various Boards of fishery. We have lobbied our legislators. And as a last resort, we have sued the state in both the state and federal courts. We

don't relish this continual struggle. We like virtually all other Native groups in Alaska, long for [indisc. - cough] a solution that will allow us to continue to engage in subsistence uses and the guarantee our long term survival as a people. Unfortunately, the Governor's bill does not provide that solution. And for that reason, I urge you to reject it. If enacted, the Governor's bill would with or without a constitutional amendment prohibit those of us who live on the Kenai Peninsula from full participation. Although the Governor has stated that his bill will allow all Alaska residents who rely on subsistence, whether by choice, necessity or heritage to continue to do so, the structure of his bill makes that impossible for people who live on the Kenai Peninsula. And this is because the Governor's bill exempts every fish stock and game population found on the Kenai Peninsula from subsistence uses, yet those are the very fish stocks and game populations that we have customarily and traditionally used for centuries. It is quite clear that the Governor's bill was designed to exempt the Kenai Peninsula from the reach of the subsistence priority. Not because there are no customary and traditional subsistence uses taking place on the Peninsula, but because other user groups compete for the same resources. Rather than draft legislation that would protect legitimate subsistence users on the Kenai Peninsula, the state has elected to once again, favor sport and commercial interests over legitimate subsistence users. It should be painfully obvious to all of us that the state cannot and will not solve the subsistence problems as long as it continues to favor commercial and sport interests over the needs of subsistence users in places like the Peninsula. After all, refusal to deal fairly with legitimate subsistence users led to the Madison decision. It also caused the federal courts to invalidate state's definition and rural in the Kenaitze case and it led to the invalidation of the state's 1986 subsistence law in McDowell. Every one of those cases arose as a result of the state's policy decision to exclude subsistence users who live on the Kenai Peninsula from eligibility for the priority. Our Supreme

Court has said that all Alaskans who are eligible by lifestyle for the subsistence preference must be treated equally, no matter how hard that may be for the state's management. The Governor's proposed bill ignores that advice and continues the same failed policy. It makes it difficult if not impossible for legitimate subsistence users on the Kenai Peninsula to qualify for the subsistence priority.

Now, I know that proponents of the Governor's bill have loudly proclaimed that the bill guarantees the right to subsistence hunt and fish to all Alaska residents who are legitimate subsistence users. According to the Governor, all we have to do is meet detailed individual criteria. But I fail to see how we will qualify, the Kenaitze [indisc.] subsistence priority under those criteria, because one is eligible for the subsistence preference only if he or she meets certain standards measured on the cumulative point system. You receive points only if during the preceding twelve months you demonstrate that you consumed a minimum of one hundred twenty-five pounds of a mandatory minimum of species of fish and game, taken from a given subsistence use area. You must prove that you engaged in the taking of that fish and game in a give subsistence use area over a minimum of thirty days and those days must have occurred in a minimum of four months. Now since the Kenaitze have customarily and traditionally harvested, processed and shared fish and game located near their homes on the eastern coast of Cook Inlet and not in one of the Governor's subsistence use areas, they are not going to be able to meet these individual criteria. Subsistence remains an absolute necessity for the cultural survival of the Kenaitze people. It is part of who we are and without it we are lost. The Governor's bill ignores our needs and continues a policy choice in favor of sport and commercial users over subsistence users by once again excluding residents of the Kenai Peninsula from eligibility for the subsistence priority. The irony of this policy is that historically, the Cook Inlet subsistence salmon harvest have consisted of less than one half of

one percent of the total average annual Kenai Peninsula harvest of over four million salmon. There is simply no reason to exclude legitimate subsistence uses of fish and game found on the Kenai Peninsula. You have the opportunity to resolve this controversy fairly, once and for all and you can do that by rejecting the Governor's bill and giving the people of the state the right to vote on a constitutional amendment that will allow the Legislature to enact a fair and balanced subsistence statute. One that treats all subsistence users fairly, including those who live on the Kenai Peninsula. Thank you.

SENATOR KERTTULA:

Are there questions? You have the floor, Senator Cotten.

SENATOR COTTEN:

For quite a while I thought some friends of mine were getting subsistence permits to set nets out around Homer to catch silvers. I think you could get twenty-five for the head of household and an additional ten for each other member of the family. I found out later, after I paid a little closer attention, that they weren't subsistence fishing after all. It was personal use. And they were -- we were allowed to harvest fish in that fashion. And so if a family was allowed -- say a family of five was allowed something like fifty fish or something like that, how would that differ in the amount of fish you would take as a subsistence user on the Kenai Peninsula? Is it close?

MS. SWAN:

Well, ...

SENATOR COTTEN:

You seem to have left personal use out when you talked about opportunities on the Kenai Peninsula.

MS. SWAN:

Well, because everybody here has talked about there's so many labels we have, so I just not sticking that in there. But personal use is called by many people who use it on the Peninsula as subsistence. It's subsistence but it really is very confusing because at this time, you can get five kings and twenty-five

sockeye in a subsistence net for personal use fishing. The sport people are allowed to keep king salmon that are fifty-two inches in length or over. You probably know that Kenaitze has an educational net. We have a sixty foot educational net with a permit. We are not able to fish because we have to put the king salmon back and we don't what in the world we do with a drowned king salmon so we just don't put our net out. I can't tell you what people use at home or how many fish they would, because I don't live there and because subsistence fishing -- the uses are very personal. Right at the moment I would not need nearly that much.

SENATOR COTTEN:

So could you -- again, I'm trying to get an understanding of the difference between personal use fishing on the Kenai Peninsula and what you would like to do as a subsistence fisherman on the Kenai Peninsula.

MS. SWAN:

What I would like to do?

SENATOR COTTEN:

Uh-huh.

MS. SWAN:

Well, okay, there used to be a time when there wasn't a problem and people and just went after the seasons and fished for what they needed, put them up and went home. And then nobody yelled about it because everybody was done fishing. The escapement had presumably been taken care of and everything was healthy. And everybody just took their fish and went home. But wasn't that much fun. Subsistence fishing is just to take what you need and put it away for the winter and for you and your family to go home. And the sooner you can do it without -- with the least fuss, the better.

SENATOR KERTTULA:

Question. Thank you. Mr. Jonathan Solomon.

MR. JONATHAN SOLOMON, TANANA CHIEFS CONFERENCE:

Thank you, Mr. Chairman, members of the Senate. My name is

Jonathan Solomon and I come from the Yukon Flats. I'm an Athabascan Kuchin [ph] and I'm a member of the Kuchin Steering committee that was created in 1988 to defend the subsistence rights of the Kuchin people in the Yukon Flats and parts of Canada. I'll make two statements. One is the Kuchin people of Yukon flats and [indisc.] was in the Yukon flats oppose the Governor's bill. The second is that we support a constitutional amendment. The record will show the Kuchin people of the Yukon Flat are one hundred percent true subsistence users. When I came, the first thirty years of my life - I'm sixty years old, the first thirty years of my life living with my uncles and my dad without interference from nobody in the harmony with the animals and the land. Then some types of legislators who were in territorial government come to rural Alaska and have a campaign in 1958 by types of people like Coghill and Peratovich [ph] them type of people and lie to the rural Alaskan people telling us that if we go to statehood that we would be voting to elect a president. What they failed to inform us that the State of Alaska only has three or some vote to elect a president. We no chance to elect a president. They didn't tell us that the State of Alaska would regulate us on the subsistence issues of fish and game. In 1958, my father and I when we trap and hunt and fish -- when we fish for our subsistence rights we fish for two weeks out of each year for our meat for the coming winter. Alaska became a state in 59' or so. In 1960, we had to fish one month. Somebody said that we were managing the fish more better than the federal government. To me it's not true. Because today, last year my family had to fish over ninety days to get their meat for the winter.

We are a subsistence users in the Yukon Flat Kuchin people. Even when the commercial license were issued we qualified for limited entry on the Yukon River. The Kuchin people met and decided that we were not going to be commercial users. We're subsistence users as our forefathers were. But there was only limited entry fishing licenses issued in Fort Yukon, that's in Yukon Flats, at the request of the elders. That was only reason

that we wanted to be law abiding citizens that when the elders can't fish that this limited entry fishing permit would sell them their fish. That was the only reason that that one limited entry permit was issued in the Yukon Flats.

We in the Yukon Flats, Kuchin people, enjoy the federal oversight right now. I grew up under federal government's jurisdiction, in the territorial government, and we lived our life without interference from nobody. Right now, with the [indisc.] coming around, with the fish and the ducks and the geese and the caribou and the moose, the tribal government within the nine villages meet with the fish and wildlife people and decide how we're going to handle this coming season on hunting and fishing. Tribal government is finally back in power. They're meeting right now in [indisc.] Alaska where I should be enjoying my culture and talking about what's going on. At the request of the elders, I'm here because this is very important to us. We don't need any amendments. We don't need any law, because we have federal jurisdiction because we live in the Yukon Flat. It's all federal land. Where we can talk to the federal agency on a one to one basis. We know [indisc.] of fellow Alaskans are not in that same fix. Therefore, the Kuchin people send me down here to say we're willing to give it up if we can get a constitutional amendment to deal with the issues of subsistence. Tomorrow when I call them, and we need to know before -- not very long, what the Senate and House is going to do. Because before July 1 of this year, we have what was known as Public Law 93638 [ph]. Kuchin People of Yukon Flats their tribal government is going to put before the Secretary about contracting the fish and game -- fish and wildlife enforcement in the Yukon Flats. But we are giving -- if we can come up with a constitutional amendment, we will not do that. We would go with what the people of the State of Alaska say to do. We need to hear from the people of the State of Alaska on this issue. Hear each individual voter from this great state. Thank you.

SENATOR STURGELEWSKI:

Mr. Chairman.

MR. SOLOMON:

If there's any question, I'm willing to answer.

SENATOR KERTTULA:

Senator Sturgelewski has the floor.

SENATOR STURGELEWSKI:

Mr. Chairman, Jonathan, that's a Public Law #93 ...

MR. SOLOMON:

93638, which says that any tribe can contract with the federal government on all programs that they serve to the Native group.

SENATOR STURGELEWSKI:

Do you -- is it very broad and it's not limited to health and education or so on?

MR. SOLOMON:

No.

SENATOR STURGELEWSKI:

Has there ever been any definition or court cases to determine what that would include?

MR. SOLOMON:

No.

SENATOR KERTTULA:

Are there questions? Thank you. Mr. David O. David.

SENATOR STURGELEWSKI:

Thank you, Jonathan.

SENATOR KERTTULA:

Next on the list is Mr. David O. David. You have the floor.

MR. DAVID O. DAVID, AVCP, INC.:

Mr. Chairman, good afternoon.

SENATOR KERTTULA:

Hello.

MR. DAVID:

My name is David O. David from Kwigillingok and I represent my village and I had a meeting just before I left with our elders, which told me to pass the message on to the Governor and I was

disappointed when I found out that it was Finance Committee that I was going to testify to. But ...

SENATOR KERTTULA:

This is the whole Senate.

MR. DAVID:

I feel a little better now since I already had time with the Governor and I gave him the message that was sent from our elders. And if you need to know -- want to know what the message was, you might -- since you're working on the subsistence, you might as well hear the message to. The message was from my elders, we don't want to be bothered in your subsistence way of -- whatever subsistence is. We don't want anyone to tell them how to live their life and how to get their food and how not and to limit them in getting their food because they say that they are living in their land, our land. Especially from the people, they don't want to be told how to live their life. Especially from the people who moved into their land and tell them how to live their life and how to get resources from the land. That was the message from my elders back in the village. But you might as well know, too, that I am one poor Eskimo to be here in representing my people and talk for them, for their benefit and me my family and my grandchildren and my great-children and beyond that to come. We want to live our lives using the laws of our land, using the laws of the sea where we get our meat. We don't get caribou where I live. We use sea mammals for food as well as water. We don't want to be limited in getting [indisc.] but I know that you are trying to make things better for people that live here because you are -- you have been voted to work and you're work is your -- as far as I'm concerned is your subsistence. My subsistence is my rifle, shotgun, boat, net. That's my subsistence. I don't work -- I don't have a job. That's how come I told you I am one poor Eskimo. I don't have money to my name and I don't have money to leave my family, after I'm gone. But I hope you have enough money to buy coffin when I die. Since I said that I don't have money, I have to ask McKie Campbell to donate some money to me to pay for my

room at the hotel. But he's so damn tight that he wouldn't do it. The only thing he said was that he offered to have me move to his daughters' bedroom. And I'm not in the move [indisc.] for daughter's bedroom. cause I already have a room in the hotel. And I'm satisfied with what sleep I'm getting there. Another thing that if I move into McKie's room, he may keep awake til the night -- late night asking me questions of what subsistence -- how I subsist. And get me in the morning before I want to. Okay.

I have said that we live by the laws of our land. We don't get more than we need but if we do, by any chance, get more than we need we share it with our people in the village who aren't able to go out for themselves. And another thing I'd like you to know -- I am an independent Eskimo and I don't -- Upik Eskimo and I don't depend on handouts since food stamps. That's because when I was a kid, there were older people that used to tell me, you poor thing when you grow up and get married, you're going to starve your wife to death because you're so darn lazy and won't be able to -- you're not going to be able to support your wife. We've been married thirty-some years and my wife's still alive. So in that case, I'd like to urge you Senate committee to do your best in making our life in the village as best you can as well as the people in cities like Juneau who -- McKie there to tell me that those ...

UNIDENTIFIED SPEAKER:

He's not here right at the moment.

MR. DAVID:

Okay. Anchorage. But those people that are living in -- those areas are people. They're indigenous people. They're god-made people. Like you. They have red blood. They have may darker skin than you. And black hair but their still human beings. And we can think -- we Natives, we may be Natives, but we are indigenous people of Alaska and we can make decisions. We should be able to make decisions for ourselves and think for ourselves. If we can't do that, Al Adams wouldn't be sitting over there who learned how to live your way life. If he can do it, I

can do it too but I'm so damn lazy to be cooped up in a house and not do nothing. I look at the papers. I'd like to be out free to do anything and not have anybody tell me what to do and hunt food for my family and for my grandchildren -- great grandchildren. But my grandkids. I have a big family and I do my best to hunt in feeding them. And whatever little money I get, I use the money to buy things that I could go out hunting with, such as gas, ammunition, and those things. But I will not -- I don't intend to ask the state for food stamps. I don't like that. Because I am - some people said that I was too independent to depend on somebody, and I guess I am. But I'd like to again, urge you Senate committee to do your best and look at Governor's bill, and pass it if you have to. But whatever constitutional amendment is ... [tape ends midspeech]

Tape 92-7

Tape A

SENATOR KERTTULA:

You have the floor, Paul.

MR. PAUL THEODORE, KWIK AIC:

I'm going to try and be brief and cover a few things, I hope I can get. What I see happening in Knik [ph] where I live, sportsmen take over, fishing all over the country. They destroyed some of my cultural sites, along the creeks and streams, of my past ancestors peoples. And they take off and they put picnic grounds, recreation grounds on my people's old harvesting place. And I worry they're going to start digging them up and selling them for artifacts and stuff. They opened up Ship Creek in Anchorage to sport fishing. They opened up the mouth of Fish Creek to sport fishing. I put in request for fifteen years trying to get subsistence fishing for one family. I support probably ten to fifteen elders when I go fishing. I get commercial fishing license and I go with my nephew way out to sea. Go halibut fishing, bring them back fish. I try to get moose in the mountains. All the sport hunters chase the game away so far, I

can't get them. I can't get caribou. I can't get moose no more. I can't even -- traditional foods that my people have used for generations and have survived -- my people built the first road from Anchorage to Eklutna [ph] in the 1920's. They built the Alaska railroad. They work thirty years on railroad up in this state. Our people made the state's economy through the fishery. And then the state came and took it away. They said they would take care of us. They took care of us all right. They're trying to starve us out of our land. I talked to my friend Chief Isaac [ph] before he died. What do you think about subsistence? He say, it's like the white man [indisc.] to us Native people. We pray for game to come to us and they take care of us. The furs we get for our clothes. The meat we use we eat to feed our people. The fish we put up to get through the winter. And we don't have those to enjoy no more. We started out -- there's twenty-eight of us left. There's twenty-four of us original people. Slowly we're getting grandchildren back up to ffity-eight. I'm worried about their future. Is the state going to take care of them the way they take care of our past people? I don't know. There laws have tied us up, extinguished our culture. I am the grandson of two chiefs, Chief Stupan [ph] Chief Raslik [ph] - the town named after. I don't know which way you guys decision going to go. But you got the laws that you made. Country's close the door when too many people come in. You guys are bringing too many tourists to use our resources up. You're bringing too many factory ships into our seas to harvest our food so that we don't get nothing. You got to change them to help the people rather than be killing us. Jobs. The Department of Labor has not said nothing here. Why are you just sitting or what? Us people in this state need jobs. They're given to outsiders, brought in from the United States to build the roads, to build the construction sites. We don't get nothing. You put us to work at minimum wage, \$3 an hour to be your slaves. We're not treated equal. Those kinds of things need to be changed. Maybe it should come into this factor. Too much airplanes, pollution, disease. I've seen permits to commercial

fisherman from outsiders coming into the state. I got regulated out of our ancestral fishing grounds. We no longer have that. I'm here to just say that maybe you people know how to change the law to help people. Maybe you don't. People in twons are starving. They should have a right whether they be one. A lot of them people are older and can't do for themselves. Including the village next to me is having a hard time too. That was my great-grandfather's brother. They tell me stories before white man comes, before everybody come, the Russian [indisc.] -- and the last chief tells me all the things about the interior people. His story [indisc.] -- the late chief, he tell me his sad story. And the last living history from that area that's been passed down from all the elders to me. I've been listening to you people. You all sound like you're good. And everybody agrees with each other. But I don't know if you're going to agree on what to do about that. Some kind of ways, countries, overseas I hear news. The Taiwanese [ph], the [indisc.] they start making boundaries around their countries. No other countries can fish there. I don't see why it can't be used for protection for Native people's resources.

I think that's all I've got to say. I hope I got my words to the right people that make the laws to make it better. I know some kind of ways other people they move out to country. They got to make a living. Even white people because they're out there with no jobs, too. Everybody knows this country is seasonal on work. Everybody knows you ain't going to be able to sustain so might as well start cutting back where it needs to be to help the people the most. I know we've been here. I don't think we ever planned to leave this country since we've been in this country. And I sure don't believe in no land bridge. I always tell them I crawled out from under a rock. Thank you.

SENATOR KERTTULA:

We're going to have two more today and then we'll check with the committee from the Arctic, because I understand he has to leave tomorrow. A lot of the northern people want to testify at

this time. Elder Joe Kokochuruk [ph]. Please come forward.

ELDER JOE KOKOCHURUK:

Mr. Chairman, and the members of the Legislature and those listening. It is an honor for me to be in your presence. My name is Joe Kokochuruk. I am here on behalf of the Setinsof [ph] Advisory Committee in Nome. Setinsof is a Native village profit corporation for the community of Nome. Our elders wanted me to speak on behalf of their subsistence issue.

In time past, we have a great joy that the Alaska Native Claims Settlement Act had passed in Washington D. C., in a conference in part that combined the act in states and I quote, "Conference committee expects the Secretary and the State to take an action necessary to protect the subsistence of the Natives." This resulted in the passage of ANILCA in 1980. ANILCA is a good federal law that needs to be followed. For I know the one that prepared the documents in his old age and had often talked with me in order that the issues that he was writing of would be for the benefit after he died. He died already. And he stated that he had worked hard, putting long hours to really make sure that our descendants will be protected from the agreement with the government.

President Lincoln, in the last paragraph of the Gettysburg Address, stated, "That a government by the people, and for the people, ..." I believe they have established the foundation on which the legislators and senators and many authorities should follow as their guidelines in resolving the subsistence issue. When you were voted into office we put -- we believed your promises, that you will obey us once you sit here in Juneau. Just recently a poll was conducted here in Alaska by Juneau -- pardon. Just recently a poll was conducted here in Alaska by policy analysts which showed that fully seventy-four percent of those polled wanted the opportunity to vote on the constitutional amendment on the subsistence. A constitutional amendment would result in the State of Alaska regaining fish and game management over federal lands in Alaska. Governor Hickel's bill does not

resolve in a single management system.

Therefore, I am sorry to state, I do not support that management system that he have arranged. Thank you very much for giving me attention, and I hope you will think on these issues as you talk among yourselves. Remember, when we voted you remember to use that foundation whereby President Lincoln has stated, "... a government by the people and for the people..." We feel, we the Eskimos, are the people.

SENATOR KERTTULA:

Cecilia Kunz. Is she -- I think she's at the door. Is she here? She wishes to testify.

CECILIA KUNZ:

[Indisc. - native language] I'm an FBI, a full blooded Indian. Only just really upsets me what's going on. Ever since -- like what the school children said when they were asked if they know about Columbus. One Indian boy said -- he raised his hand and he said, the Indians found Columbus on the beach. And ever since they found Columbus on the beach, things been happening to us Indian people. He even called us Indians when he was looking for India and we're stuck with that name. Name of [indisc.] supposed to call Tlingit. Our culture. I was one of the victims of the [indisc.]. Every time I say Indian word, they tie my hair with a white rag so you can see I've been talking Tlingit. My mother took me out of that school. She didn't like it. I got my little bit of education right here, in Juneau. Then after that, you know, I wonder about the constitution and freedom of speech and freedom of religion. They overlook us Indians. There are so many things they try to change us then they start having signs on the window on the Juneau general stores beauty shop [indisc.] took the Alaska Native Brotherhood to fight the racial discrimination right here. I came to the meetings to just like what I'm doing. Moral support. And now, what we eat -- [indisc.] us Indian people. Everything is -- they're making everything so difficult. I've grown up on Indian food. My mother - I didn't grow up on a milk bottle. My mother's milk. She gave me her food. Therefore,

I have it in my blood too. The time depression, some of you will remember that. Us Indian people didn't know there was a depression. We live off the fat of the land. We were wondering why the government were passing our moose meat around and a sack of flour. Well, if he's going to [indisc.] to the people, we'll take some too. Time we live off the fat of the land. We can go down to the beach pick cockles, plants and go into the woods get meat, deer meat, pure meat. They don't get shots like the cows get today. I'm just wondering about all the things that are going on. Pretty soon they'll be charging us for breathing the air. If it comes to that, well I'll have lots of bills to pay.

I think everybody said what has to be said, and I sure would like to remind the lawmakers -- think on both sides. Think of Native people too. Don't make cain all the time. Be your brother's keeper. Read the Bible. That's what it says in the good book. Be your brother's keeper. Don't think about yourself too much. That's all, before I say something I shouldn't. Thank you for listening.

SENATOR KERTTULA:

Yes, thank you, Cecilia. We're going to have a quick recess for three or four minutes. Then we're going to bring staff in and look at this legislation so at least we get a cursory introduction to it this late afternoon or evening. We will adjourn not later than seven. Lance Nelson will be in the morning to update the committee on subsistence litigation about 9:30. Vern Wiggins and the Department of Interior will be on teleconference at 1:15. We will have some testimony from as many individuals as we have time for starting about 10:30 for about an hour tomorrow. But we will come back as soon as the President of the Senate calls us to order tomorrow morning. What time would you suggest?

SENATOR ELIASON:

Nine o'clock.

SENATOR KERTTULA:

Nine o'clock. We'll be here about 9:15, not later than 9:30 tomorrow morning.

SENATOR ADAMS:

Which ...

SENATOR KERTTULA:

Excuse me?

SENATOR ADAMS:

May I ask a question?

SENATOR KERTTULA:

Yes.

SENATOR ADAMS:

If the Department of Interior is going to testify, will have they have both bills before them to testify on [indisc.] of state management over federal lands, the Governor's bill questions, the Bush Caucus bill before us. Will they testify on both?

SENATOR KERTTULA:

I'll have to get response from the Chairman subcommittee.

SENATOR COTTEN:

Mr. Chairman, I asked the Department of Interior what their preference was and they offered that they had no testimony. That they would make themselves available for question and answer only.

SENATOR KERTTULA:

So be it would be specifics.

SENATOR STURGELEWSKI:

Well, Mr. Chairman ...

SENATOR KERTTULA:

You have the floor.

SENATOR STURGELEWSKI:

We still should see their fax copies of the bill.

SENATOR KERTTULA:

Yes. Probably ask them to do that.

SENATOR STURGELEWSKI:

They probably have them.

RECESS

5:00 - 5:42 p.m.

SENATOR KERTTULA:

Various comparisons have been put out. I think by [indisc.]

office, one by the Governor's office and then one on specifically on 484, we have a sectional summary. I ask that all suggested amendments to 484, and then we'll go on to the subsequent legislation and we'll probably spend less than hour tonight getting this. I ask all amendments to be submitted in written form. Then we will produce them and hand them back as quickly as is feasible. So any suggested amendments come out, I'll announce to those who are not here when they show up or in the morning. That's a suggested way to me, the presiding officer, suggested that and I think he's right. Others just have also. In any event, I thought we could go quickly over the sectional chapter and verse of 484. McKie Campbell has gone through this exercise. Bill drafters and counsel is here to answer any technical questions, et cetera. Arliss, you have the floor.

SENATOR STURGELEWSKI:

Yeah, Mr. Chairman, I'm wondering. I think it's important for us -- I wish we had more people here. But I think it's important to go through this in some detail. And I wonder if we go through, if it might -- it would be very useful to me if we could know when a section would not comply with ANILCA. Which are those ones that ...

SENATOR KERTTULA:

Those three areas they're talking about.

SENATOR STURGELEWSKI:

Well, we've talked about a number of things, the terms, of language and so on. But I think that would be useful if McKie could do that.

SENATOR KERTTULA:

I would -- please get my attention ...

SENATOR STURGELEWSKI:

Or your, you know, our legal or whatever.

UNIDENTIFIED SPEAKER:

Do you have this document, Senator?

SENATOR STURGELEWSKI:

Pardon me?

UNIDENTIFIED SPEAKER:

Do you have this document, here?

SENATOR STURGELEWSKI:

I probably do, but they've been slipping so many things in I didn't know it.

SENATOR COTTEN:

It's in the front. The very front.

UNIDENTIFIED SPEAKER:

Well, it does -- Mr. Chairman?

SENATOR KERTTULA:

Yes. [indisc.] you have the floor.

UNIDENTIFIED SPEAKER:

It does say ...

SENATOR STURGELEWSKI:

Thank you very much.

SENATOR KERTTULA:

Except for a bit of order, if there's anything for the information of these senators for making their job a hair easier, please get our attention as quickly as possible so you can chime in and we don't have to go back and forth and back and forth. Just bring it up as we go along. McKie, why don't you start out and just start through the very beginning and give us a running blow by blow and then we'll take over from there.

UNIDENTIFIED SPEAKER:

Sir, are you going to go through just an explanation first or you going to entertain questions?

SENATOR KERTTULA:

Well, I think we ought to go through complete explanation then we'll go back into it one time for suggested amendments and so on. Today and tonight, I think it's just the introduction to the bill gone through it. Any questions, though, you have, please bring up. I think we can go back and prepare amendments. I, for one, have some thoughts but I don't have even a location or idea where to place it. So, I think we'll just go through this and mark it off where suggested amendments could go along. If that's

all rights. Consensus. This doesn't have to go through Rules. It's okay. [indisc. - simult. speech] I don't know. You have the floor.

MR. CAMPBELL:

Thank you, Mr. Chairman and senators. for the record I'm McKie Campbell, serving as Special Assistant to the Governor and we're doing the issue of subsistence. I will attempt to go through the bill as quickly as I can. And what I will attempt to do is talk about (a) what the bills says, how it would work and in some instances that are not self evident, why we put that particular language in. If there are going to -- and I certainly, will be happy to answer any and all questions about the workings of the bill. And I will make a shot at most legal questions. But if there may be some legal or drafting questions that come up that we may have to pull in our counsel who currently in the House, but we can get him at any time.

SENATOR KERTTULA:

Yes, we have people that can do sectionals and can help us over it, too. Please proceed.

MR. CAMPBELL:

Thank you very much. The first thing I would like to start off with is what this bill is trying to do. Because there's been a lot of talk in this committee and everywhere else. And I've participated in about does this bill or does it not comply with ANILCA or will it restore federal management? The parameters that the Governor gave the Subsistence Advisory Council when he asked them to do this, is he said, don't worry about whether the bill does nor does not comply with the constitution. And don't worry about whether the bill does or does not comply with ANILCA. Just simply work to create the best possible system for protecting subsistence and managing the fish and game. Because subsistence and the management of all other fish and game is inevitably interwoven. You cannot separate just the one use or the other. So the Council did that. And in our discussion, talking real briefly now about ...

SENATOR KERTTULA:

Commissioner of Fish and Game too, would you grab a chair at this table here or either where you are. Because we're going to want you at our fingertips. Excuse me for interrupting. And to the extent possible, we want you to relate to the technical and not too much to the background.

MR. CAMPBELL:

Yes, sir.

SENATOR KERTTULA:

Just because of the time of day.

MR. CAMPBELL:

Just briefly, the reason the findings section is in here, is the Council felt -- many members of the Council felt a frustration in that then while we were trying to deal with statutory and mechanical terms of who is a subsistence user and who isn't and how you do allocations, they felt that subsistence was a spiritual issue and it was very difficult to put spiritual values into a statutory language. And so we've tried to layout -- and I won't read them for you. But I really would urge you to read the findings and the purpose and the intent. And in the purpose section, we lay out some of the legal background in terms of why certain presumptions are reasonable. Why we have the factual data to support the use of some presumptions. Because without this data that would not be available. All of that data is included in the books that we've given to every legislator. And those books were given to the Senate Secretary and the House clerk when we introduced it. It's mentioned in the journal so they will be part of the legislative record. Let me go -- again, I won't go any more into the findings and purpose unless there's a particular wish.

I would like to mention real quickly just the brief purposes of the bill. One is the -- it's the intent of the Legislature that one, that subsistence uses of Alaska fish and game resources are given the highest preference in order to accommodate and perpetuate those uses. Two, to clarify the statutory protection

for actual substantial dependence on fish and game for subsistence. And three, that this act not result in significant reallocations of fish and game in Alaska. And just briefly on what that -- on why we were talking about that on the last one. We're in a situation where some of the alternate proposals or other variations that have been discussed certainly would have resulted or would result in very significant reallocation of fish and game. And if we do nothing - if we continue with the status quo, we are going to see a very significant reallocation of fish and game.

Section two is the start of the actual statutory language of the amendment. And this parallels -- AS 16.05.268, parallels fairly closely with AS.16.05.258, the existing subsistence statute. And one of the hallmarks -- or one of the things we've tried to do throughout in drafting this is if there was existing language that was working pretty well, even if maybe we thought we had some better ideas. If there hadn't been a problem, that the Boards were used to it and knew how it was working, we tried to keep that basic language.

So 268(a), starting on line seven of page three, very closely parallels the existing language of the statute. It requires the Boards of Fish and Game to identify the fish stocks and game populations or portions that are customarily and traditionally taken for subsistence in the areas of the state identified under (f)(1) and (f)(2). And those are areas where -- (f)(1) is areas where all the communities are under twenty-five hundred and (f)(2) is an area or community between twenty-five hundred and seven thousand. This in effect, very very closely parallels the result that stocks and populations in urban areas are not available for subsistence. And I will get down in just a little later when we get into the bill, about where an urban user gets their subsistence stocks and populations.

On page three, subsection (b), line 14, we did require the appropriate Board to determine whether a portion of a stock or population maybe that is identified under it can be harvested

consistence with sustained yield. And the only change there from existing law is we changed, it used to say, "what portion." And some judges have interpreted that as meaning, you got to tell us exactly how many moose can be harvested consistent with sustained yield. I think Commissioner Rosier confirmed that is a very difficult, if not impossible, task again. So we simply changed it, the Board has to determine whether it can be harvested consistent with sustained yield.

Then subsection (1) on line 16, is what some folks refer to as pure [indisc.] This is the situation of such game abundance that there is enough for everybody without any question. It says, "If the harvestable portion is sufficient to provide for all consumptive uses." Let me give an example of what I'm talking about here. The northwest Arctic caribou herd - the limit for that herd is five caribou a day, three hundred, sixty-five days a year. I think most people, though I've had some people tell me that's not enough. I think most people would say, that's more than enough caribou for anybody. There's not a need at that point to provide a separate hunt for subsistence and a separate reduced hunt for sport or general hunting. So we say in that situation that, (a) the Board shall adopt regulations to provide a reasonable opportunity to participate in subsistence uses of the stocks and populations. They have to provide for subsistence first before they do anything else.

Then (b), they adopt regulations to provide for the other consumptive uses, subject to preferences among the beneficiaries. Subsistence has the preference over that second allocation. And then (c) may, but is not required, adopt regulations to differentiate among consumptive uses. You can have, say a different season for sport and subsistence if you know, it would be helpful to the subsistence users, but at that level, you're not required to.

The next case, number two, starting on line twenty-three, is tier one. And that is the situation that most of the hunts in the state generally tend to exist in. This is the situation where the

harvested portion is sufficient to provide for subsistence uses and some, but not all, of other consumptive uses. Let me give two quick examples of the extremes. Here in Southeast, deer are fairly plentiful. But you do have to reduce the deer very slightly from the harvest because you want to make sure that everybody's subsistence is taken care of. So then I think, we all get six deer. And if you didn't have to have a separate subsistence allocation, maybe we'd all get seven or eight. But really six is plenty for most everybody. But in some other places, once you take care of -- first they're required to provide for subsistence up front. Then there may be only a very small number of animals left. And maybe you have to do a lot of redrawing and maybe only ten general hunters get to hunt animals. But that range includes the tier one hunt. You take care of subsistence first, and provide for it. And then whatever is left over is harvestable, you provide for the other uses. In this we require, again in (a) that you shall adopt regs that provide reasonable opportunity, (b) on line twenty-seven, the Boards may adopt regs to provide for other uses. And tier one, the Board's are not required to provide for anything but subsistence. They may. But if they do (c) on line twenty-nine, they are required to provide regulations which differentiate among the uses and provide an additional preference for subsistence through regulations.

Let me give you an example of what we're talking about here. For instance, talking about subsistence having three distinct preferences. One, you always take care of the subsistence allocation first. Two, if there's not enough, you restrict the other uses. Excuse me. Here (c) at this level, you are required to provide additional, whether it be bag limit, seasons, method and means, whatever, additional preferences for subsistence. Let me give an example. It may be that there are a fair number of moose. And you take care of subsistence pretty readily and you can also provide pretty much enough for the sports hunters. But if you let the sports hunters and the subsistence hunters all hunt at the same time, and everybody runs up and down the river in

their boats, well, there's plenty of moose, they go back away from the river and they're very hard to hunt and it hurts the subsistence hunters. And so there, you would say, okay, let's figure out when the subsistence hunt needs the season and provide it. And then provide a separate sport season and time that doesn't conflict or interfere. Then you let additional preference that's provided for subsistence is if that there's not enough for anything but subsistence. And I'm now turning to the top of page four, number three. You eliminate all other consumptive uses and you still provide for all subsistence users. All tier one. Everybody that's involved is subsistence users. Then you're dealing with a situation where there's even still less game or less fish. And there's not even enough fish or game to provide for the people who are subsistence users. Then at that stage, the Boards go into tier two and differentiate among subsistence users and say who is most qualified, Who is going to get the hunt or get the fish and who is not. And we made -- I would say this whole regime so far is very, very similar -- it's basically what the Boards were required to do under 258. However, under 258, which I think was a good bill in itself, but it was not laid out step by step. There were a lot of times that when the Boards' went through the process and the Boards, more than anybody else have asked for this additional guidance. That they didn't go through step by step. And they wound up perhaps not following the process or not providing the amount that really was a reasonable opportunity for the game or not providing -- taking care of it. So we've laid this out very, very carefully, step by step by step, where the Boards have to follow the process.

In tier two, we've made three slight changes here. Again, you distinguish among subsistence users based on, and I am on line ten, page four, customary and direct dependence of the fish stock and game populations by the subsistence users for ..." and we inserted the word "human" consumption as the mainstay of life. The reason we did that, we wanted to make it very clear that if you're in a tier two level, sorting out one subsistence user

against another, you're making sure you're actually -- what is needed for human life. And this was engendered by a lot of conversation about a law case, called the Coy case where a couple who moved up here in 1984 from Montana. They homesteaded out on the Kantishna River and they were on a big dog lot out there and I think a lot of Toklat chums that swim up the Yukon and up the Kantishna and up the Toklat that's a weak stock. And they get those chums for their dogs and they've gone to Alaska Legal Services and said we want you to help us restrict those small downstream uses on the Yukon because they're taking our subsistence fish. Even though those downstream users are much more subsistence users, in my opinion anyway, than the folks up the stream taking fish for their dogs. So anyway, we've inserted "human" there.

Next in number two, on line twelve, it used to say, "local residents". That has always been basically administered by the Department of Fish and Game as how far do you live from the resources, so we just said that very specifically. "Proximity of the domicile of the subsistence user to the stock and population."

The next in three, line fourteen, this used to say, "availability of alternative resources." And this was not changed because of a court case. It was actually changed because of a newspaper column. The outdoor columnist for the Anchorage Daily news wrote a column last fall sort of explaining or bragging, or whatever, how he qualified for a tier two caribou hunt and he said that no under no available alternative resources, that he didn't have anyplace else he could get a caribou, so he scored himself one hundred percent on that category and qualified. And I don't think clearly that's what anybody meant. So here we made it very plain. We're measuring -- and this is the time where you really getting down to it -- really have to deal between subsistence users. [Indisc.] the worst if they don't get it. It says, "the ability of the subsistence user to obtain food and subsistence use is restricted or eliminated" And I think there had been a question that it wasn't plain whether that meant obtained food for

other subsistence uses or obtained food through any other source. And it means both. It means obtaining food any way you can get it. Because when it really comes down to the bare nubbin, whoever needs food to survive, should have it.

Next on subsection (c) line 16, everybody said we always talk about how you slice up the pie. And we never talk about how to make the pie any bigger. And everybody on the Council agreed we need to do more of that. So what we talked about here is we said, if the harvestable portion is not enough to provide for subsistence and other consumptive uses, the Department needs to prepare a plan and make recommendation to the Board of Fish or the Board of Game for how we can build that stock or that population back up. So eventually we can have enough for everybody.

The next line, actually, if I could. What I'd like to do is talk about the next line - I'll come back to it when I get to the definition of "sustained yield". Because it ties in directly to that and I think it would be better explained at that point.

I would then go down to subsections (d) and (e) and that says "the subsistence use area for the stock or population is the subunit of a game management unit in which you live and the contiguous units." If I can, I think these are my maps over here. Let me grab a map real quickly. One of the things that the rural residents who are members of the Council were very concerned about is they said, if you're going to have a provision that some people in urban Alaska may qualify as subsistence users, we're worried about all of them descending out here on us and competing with us for our resource. They said we want some way to limit that. So the state right now is divided up already into existing game management units and subunits. And so we said, let's qualify folks by game management unit or sub unit and we avoid the problem of being one foot over the line that we have with rural/urban. You know if you're one foot over the line don't hunt or do hunt. By using subsistence use area and all the areas around it. And if you're one foot over the line, it's just all the other areas that are around it. And we would do that [indisc.] subsistence fishing

and that pretty well takes in -- those are big areas. That pretty well takes in anywhere anybody goes for harvest. But there may be an exception. There may be that we've cut somebody off from a fish camp or places they harvest caribou or whatever. So we put in subsection (e) that said each Board shall consider the subsistence use boundaries and if they find that they've cut somebody off from a traditional apttern of harvest, they have to, they are required to draw a different boundary for that particular stock or species to make sure that they're taken care of. We also said that they may, this is not an option, but they may reduce the size of an area if they find it does not interfere with a traditional pattern of harvest. For instance, folks from St. Michaels ... [tape ends midspeech].

Tape 92-7

Side B

[Tape begins midspeech]

MR. CAMPBELL:

... or I think [indisc.] never normally go down beyond plat number or whatever [tape stops] I'm not an attorney so I won't debate the constitutionality of the issue but this is an issue that has been raised as a potential constitutional problem. Whatever you want, we'll have the attorney's to discuss why we think it is entirely constitutional to do that. But what I would say is in the worst case scenario, if we're wrong, and that particular provision gets struck down, the law still works pretty darn well. In fact of the three issues, there maybe some potential question on, just strike all three of them, it would still be about two hundred percent better than the existing law that we have right now.

SENATOR STURGELEWSKI:

And that's section (e)?

MR. CAMPBELL:

That's section (d) and (e). Both. Actually just (d) is the constitutional question. (e) I don't think is related.

Next on page five, I'll go basically to all of page five. And this is where we divide the state up into areas. And let me talk about this if I can for just a moment. The Council agreed fairly early on that what we wanted to do is sort of define what is a subsistence way of life. One of the things that ANILCA talks about, and again we were not trying to be consistent with ANILCA. We're not making that claim. But in ANILCA it says the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so. And actually the purpose of our bill was to provide the opportunity for any Alaska resident engaged in a subsistence way of life to continue to do so. And to do that, we looked around and we said, okay, the Supreme Court one thing they said we can clearly do, we can do it by individual criteria. But folks on the Council, some folks pointed out and I totally agree with them, is that the individual criteria and the application process and stuff may work well in the city. It doesn't work out in the village. People are not used to coping with those forms. This is something that they believe is an inherent right. You're not going to have people doing it. And so what we did is we decided to apply the individual criteria with three levels of presumption. And I'm on the following page. I'm going to come back -- with the three levels of presumption. We say in the villages, in a community, and this is line seven through nine, page five, subsection one, "in a community or an area where the human population of each community is less than twenty-five hundred and is not part of an urban area and where dependence upon subsistence is the principle characteristic of the economy and cultural way of life." And I should mention right now in existing law, the definition of "rural" is "rural is where subsistence is the principle element of the economy." That was the definition that was proposed by AFN in 1986. It was the definition that the Kenaitze court in the Ninth Circuit in Kenaitze found was not consistent is that that's not rural. We know what rural -- but anyway. We wanted to keep some element of that - principle element of the economy. People said

subsistence is in part an economical thing. But they also said it's just not economy. It's also culture. It's also way of life. And so we've put that in there to determine so any community under twenty-five hundred that has this dependence qualifies for a presumption that if you are living in that community, we're going to presume that you meet the criteria. Because we have very substantial statistical documentation and lot of [indisc.] reports that we can say when you go up in a community like that, we have a very, very, high percentage of people who are going to meet the criteria who live there. And therefore it makes sense instead of going in and requiring every single person to prove by individual application. It simply to makes sense to use the states resources in a manner that says, we're going to presume you qualify. I'll continue on with presumption, but what I'm doing right now is going just a little bit back and forth, because we described size of community and presumptions here and here.

Next, we deal with the category two communities, twenty-five hundred to seven thousand and then we set out category three communities, the urban areas for single communities where at seven thousand or greater or where dependence on subsistence is not a principle characteristic of the economy, culture and way of life. And in category three, in the books we've handed out to you, there are lists where the Boards will make the actual determinations where we have lists of the two hundred, fifty-six communities that we feel would be in category one. The seven communities we feel would be in category two and the --no, it looks like about twenty that would be in category three. In category three, again, we have the urban areas, we have the communities over seven thousand and then we also have those little places under that don't have any dependence on subsistence. Prudhoe Bay, for instance, we don't have the presumption the people there that are subsistence users. Shimya [ph] Galena [ph] Air Base and those places you don't get the presumption you're a subsistence user.

UNIDENTIFIED SPEAKER:

Kotzebue.

MR. CAMPBELL:

Kotzebue we have in level two, sir. Well, we're working on it. We also put a set of criteria here for determining how do you determine whether a subsistence is a principle element of the economy, culture and way of life? And the ancestor of this list though it's gone through a good bit of modification was I think thirteen criteria that are in regulation by the Boards of Fish and Game for determining what was and was not rural. But we tried to make we feel, improve the list a little bit.

Let me go now and talk a little bit more about the presumptions. And I'm now on page six, starting on line eleven. Here we say, "Participate in limited to people who meet the requirements for qualification with the following presumptions." If you live in the level one community we're going to presume you qualify. We put it in very specifically. The state may not require any paperwork from you. No additional permits. No anything else. There are some existing already requirements, like hunting license. We don't affect that one way or the other. But nothing additional for this requirement. We also put in that the state has the right to rebut this presumption. And we purposely built in a fairly difficult and awkward procedure for rebuttal. This is not something we envision going around doing wholesale rebuttals. But the Attorney General felt that it was important, because certainly the facts don't show that one hundred percent of people in these communities are subsistence users. That the state should retain that. Basically have a good legal underpinning for the presumptions. And so, what we require, is if the state wants to prove somebody is not a subsistence user in a community, the state has to go into state Superior Court, file an action in that court and then prove by clear and convincing evidence -- and that is a higher than normal standard of proof -- that the person doesn't meet the criteria. If we manage to prove that, what happens is the court simply says, you're not a subsistence user. And then as long as they don't go out and continue to engage in subsistence activities. That's the end of it. If they do, then

they're liable to criminal prosecution. I would also note for the record that the state only has one attorney who deals with these particular type of matters - civil enforcement of fish and game issues. Lance Nelson, who's been involved with us on this. His time is pretty fully taken doing things like seizing factory trawlers off the offshore of the Gulf or other places. He's up there on a case right now where if he wins the state is going to get sixteen million dollars. So in general, we're going to think things like that are a lot better use of his time than going out and trying to prove folks aren't subsistence users in the villages.

Next is in the level of the midsize communities, twenty-five hundred to seven thousand. An actually, there's only seven communities in this size. And they are: Bethel, Nome, Kotzebue, Barrow, Cordova, Petersburg and Unalaska. In those seven communities, we can show, through a lot of information, that the majority of those communities are subsistence users. But not the vast majority. And so what we require them to do is simply sign a piece of paper, a statement asserting that they meet the criteria. When they make that signature, then there is a presumption that they qualify. Again the state has the ability to go in and rebut through court -- at this time, it just requires the normal preponderance of the evidence.

And then the urban areas. One of the things, again, our research shows is that its actually only a very small percentage of the urban residents who would qualify for subsistence use. So there, and because we're dealing with enforcement problem and how do you sort through all those people, we put the burden of proof on the applicants. And they can apply through an application process through the Department of Fish and Game. The department will review it and they'll either accept it or reject it. If it looks like simply the person needs some help, they'll give them the help. but then and if they

SENATOR KERTTULA:

Or from the IRS, if they want help.

MR. CAMPBELL:

That's right, sir. But and then they get to make that distinction. We feel that a fairly small percentage of urban residents would choose to live their life in a way that would qualify them. But they would have that. And here, let me mention just a couple things about the population breaks that we use. We very purposely and intentionally used the same population breaks that the federal government has used. The federal government says under twenty-five hundred they presume to be rural. Twenty-five hundred to seven thousand they make no presumption about and over seven thousand they presume to be urban. So we used those same breaks. And we use them a little bit different way. But we were trying not to be too far away. We're not saying that complies or matches, we're just trying to be as consistent as possible.

We also, through this use of the application process and allowing urban residents to qualify, when we deal with the issue that we discussed here a little bit yesterday. Where for instance, under the federal system, Sitka or Kodiak or others moving to out of rural status into urban status under the federal system, no one in those communities would then be eligible for the same [indisc.] that our group of people who are subsistence users.

Next, let's see. We come to the criteria. And these actually start pretty much on the top of page seven. The Council probably wrestled with the criteria more than any other section of this bill. And the problem we were trying to face with these criteria was getting a set of criteria that describe subsistence users throughout the state. That we're not going to exclude somebody but at the same time aren't going to qualify half of Anchorage. And we wrestled around a lot with what things can you say about subsistence users? What things could we think are hallmarks of a person who actually engages in subsistence use? And I'll just run down through them real quickly. And the first four of these I would mention, each have a mandatory minimum. Because the Council agreed there's a minimum figure. If you're not exceeding this figure, you're not a subsistence user. So if you

miss any one mandatory minimum, you're out. But if all you do is hit the four mandatory minimums, we specifically say that the scoring system has to be that if all you do is hit the four mandatory minimums, you're not going to qualify. It requires more than that. I should mention, we finally settled on a point scoring system in combination with criteria and we require the Boards to set up the points scoring system. But we give them at least a very detailed thing of something we think works well on a one hundred point scoring system. And again, here in your book, are a lot of case studies on actual people on how this would work and would apply. It's Appendix E. And what we then did after we set all this up was the scoring system, is the Council sat around the table and we ran just about everybody -- all the extremes we could think of through this system. The health aid in Tanana. The people in Bethel. Folks in Anchorage and Sitka, and all over the state. And what we found is it tended to sort folks out. Not tended. Actually, almost without exception did the folks who we were saying, yes, they should be subsistence users were qualifying. And the folks we were all very intuitively know that a person should not be a subsistence user were not.

So again, I'll just run through the criteria quickly. You get points for the number of pounds -- page seven -- the quantity of fish and game consumed by the person and the preceding twelve months with a mandatory minimum of one hundred and twenty-five pounds. Next you would get points for the number of species or groups of species of fish and game from the use area which you used in the last twelve months with the mandatory minimum -- here we told the Board to set the mandatory minimum. Set it by regulation based by region by species diversity. Because we were in a situation where we tried three and we tried six and we tried a whole bunch of stuff. But the problem was down here in Southeast or in Southcentral and the marine coast, there's a tremendous abundance of species. When you get up in the Arctic and Interior and there are many fewer species available. So we said the Boards to set the minimum number by region. And then we

also instructed them -- we thought it would be useful in setting that to group species. And we suggested a grouping of species that would run along the lines of all saltwater fish except salmon. All freshwater fish except salmon. All upland birds, all water fowl, all small game, all fur bearers, each individual big game species, each individual marine mammal species, and each one of those would count. And we realized and we talked about the fact that by including marine mammals, that you'd be able to get points for each individual marine mammals, that that does provide some inherent advantages for Alaska Natives because they can hunt marine mammals where as non-Natives can't. And I think the whole Council felt good about that. Felt that that was okay.

Next is the issue of the number of days in which you've spent either taking or processing in the subsistence use area. And to qualify here, we're talk about this in detail in the section, don't have to spend eight hours or the whole day, you just have to spend a portion of that day and we came down to that you have a mandatory minimum of thirt days that you can get extra points for as many days. And we said, you know, somebody hasn't spent at least a portion of thirty days harvesting or processing or whatever we didn't think that they were probably engaged in a subsistence way of life.

And the next, number four, we said subsistence tends to occur not just somebody who goes out and does it for a month. But it's something that's year long and it has a seasonal cycle, and availability of resources. So to try to attempt to get at that, we gave points for how many months was your activity spread over. And we require a mandatory minimum of four months.

And then the next was the issue of -- those who -- by the way, that's the end of the ones with the mandatory minimums. Next you can score points for, but if you don't get any points in, you're still okay. The number of weeks in the preceding twelve months during which the taking or processing of fish and game was your principle work effort, with a maximum consideration of twenty-six weeks. The number of weeks that that was the main

thing that you did. You did that more than you did anything else. And there's a lot of talk in the Council, and we all agreed, that subsistence has value as a economic system. That it has worth. There was a lot of talk that went round and round about economic need or sort of subsistence as welfare. The Council rejected that notion. But they said they do want to give credit that if somebody's put in the time and spending time on subsistence more than anything else, they ought to get credit for it. So we included points for that. The maximum of twenty-six weeks is simply that if we allowed more than that we get overpowered in the point system and throw it out of whack.

Next, item six, line twenty-five, is the number of households other than yours with which you share or which share with you. Because we al' talked about the fact that one of the hallmarks of subsistence is sharing. Sharing between households. And we also -- this helps us -- it's not just not how many households you give resources to but how many households give resources to you. So if we have, you know, an older man or woman who no longer gets out and actively hunts and fishes but a number of families help, give them a little as often happens. That helps them qualify for a subsistence users.

And then the last one, number seven, was whether the persons taking of fish and game occurred solely in the subsistence use area. And again, this isn't a mandatory requirement. You can have fished and hunted all over the state, and still qualify. But you can get points if all of your fishing and hunting occurred right there in your area. Because again, one of the hallmarks that members, particularly rural members, talked about was that subsistence is something you're doing as efficiently and effectively as you can. It's not flying all over the map for the thrill of it. Just going only as far as you need to to harvest. So we give some minimum points for that.

Next in (j) on the bottom of page seven, we say if you don't meet all the mandatory minimums, you don't qualify. On (k) on top of line eight -- I mean on page eight, we specify that you qualify

for this. That you're taking, processing and use must have been legal. You don't qualify by, yes, I got it, but I got it through poaching. It would have had to have been non-commercial. It would have to been characterized by efficiency and economy of effort cost and transportation. Let me speak to that just real quickly. We talked about, should we put on limits about you can or you can't use airplanes. Or you can or can't do this. And the application that an urban resident will fill out and again, there's a sample of that in your book as well. Ask questions about was this taken with a plane or not. But we didn't make it an outright prohibition because if you have an old Taylor [ph] craft and you park it in your yard and you fly it on regular gas and you take off and land on the highway in front of your road, that's a pretty darn efficient way to get around. But if you're chartering all over the map it is certainly not. So we asked that kind of questions. Same thing with fishing. Fishing with rod and reel, say I'm out fishing halibut or whatever, can be pretty efficient. I also fly fish. But at least my fly fishing is neither efficient nor economical. And so what we're saying is you can qualify if you've been doing stuff through subsistence you can qualify under that. Anybody anywhere in the state wherever they are located can qualify by harvesting what's available to them under sport fishing, personal use fishing or general hunting regulations. So this is very definitely not a closed class. Anybody who suddenly decides I really want to live the subsistence way of life and is willing to live their way of life can do so. I just think that's important, that under this bill there will not be a single person in this state who wants to live a subsistence way of life, who is denied that right or opportunity.

Next ...

SENATOR KERTTULA:

He wishes to ...

UNIDENTIFIED SPEAKER:

What about the people that are in the park preserve?

MR. CAMPBELL:

Sir, we actually looked at that and if you happen to live in a national park, they will make it more difficult for you without a doubt. But still the resources that will be available to you we think you can qualify if you apply yourself without any that problem.

Next just on line five, we simply included a provision that if a person has say, been in the hospital or been in military service or has been at full time attendance at an educational institution outside the subsistence use area, that does not qualify them. They can go back to whatever twelve months was immediately preceding that terms. We wanted a situation where a young man grows up in a village, Bethel, or wherever and decides to join the Navy and see the world, does that for a couple of years, comes back and moves into his community, that there's no question that he can return to the subsistence way of life. Same thing if a person is in the hospital or goes to college. Mr. Demientieff uses the example of daughter. He has a very lovely, bright daughter. And to get the program she needs she's going to school outside of the state. But I think she is a subsistence user by anybody's definition. So when she returns, she continues to be eligible.

Next, page eight, line nine, subsection (1) the commissioner has to provide for expedited review procedures for people that the department says don't meet the qualifications. The department reviews somebody's qualifications and says, we're sorry, you don't qualify. There's a review procedures where ultimately Carl winds up saying, yes or no. And then, if that person still is not satisfied, they can appeal that to the court system.

Going down to (m) line twelve, fish stocks and game populations or portions of fish stock and game populations not identified under (a) may be taken only under non-subsistence regulations. This has two effects or two impacts. One is if a fish stock or game population has not been identified as being customarily and traditionally used for subsistence, then it's exempt from subsistence. Let me give at least some specific

examples. Bison in this state has been an introduced species that have never been used for subsistence. They would continue to be available under general hunting but the subsistence preference would not apply to them. So anybody who wants to hunt bison under the general hunt but subsistence wouldn't come in and have a preference.

The other effect that this has is under old rural urban the stocks and populations in the urban areas were not subject to subsistence. And we provided that people in urban areas can be a subsistence user. But we've also -- we talked about it a great deal and the Council finally said, but if we have a situation where people are going down and putting subsistence nets in the Kenai, we are not going to meet what was -- actually it was the state goal of the AFN but it was one that every single member agreed with totally, and that is that we need to achieve long term political and traditional stability in whatever we do. And we said if we wind up with subsistence nets in the Kenai, that is not going to give us either long term political or traditional stability. So we excluded the stocks and populations in the urban areas. So then folks say, wait a minute, then. It's a hoax. If an urban resident qualified for subsistence with the stocks and populations that are there, you can't get them. I would like to just use an example. Since we're sitting here in Juneau, let me use an example of Juneau. [indisc.] The urban area that's closed -- I don't know if you all can see from there, this tiny little pink dot right around Juneau. For those who can't see it, that's a dot that's prescribed as roughly [indsic - cough] south of Point Bishop, west of about Point Retreat and north to about Echo Cove. Just a little bigger than the Juneau road system. But a person who is a subsistence user in Juneau who is qualified, the subsistence area they are qualified to participate, they can go this far north, almost all the way to Yakutat. They can go all the way west to the outer coast. They can far south almost all the way to Ketchikan. Anywhere in that area. They don't have to travel that far. They can just go right around here to Taku River

and participate in a [indisc.] harvest. Those are places easily reachable where they can participate in subsistence activity. But what they cannot do is go out and stretch a subsistence net out here by the DIPAC hatchery. Unless Senator Duncan wants to offer an amendment to make that possible.

Then going back -- now the next section is subsection (n), line fourteen, and this simply states that fish and game taken under subsistence is subject to these various things, open and closed seasons, limitations on methods and means, marking and identification requirements. The list that is here is exactly the list that is the list of regulatory measures that the Board of Fish and Game have at their disposal. So we said, yes, you could use those measures to regulation subsistence was appropriate.

Then we go in -- we are starting to get into the definition section here. Some of the definitions are actually integral to the bill, some are contained in 268 and some are back in 940. But the next definition -- the first definition is the issue of "reasonable opportunity". And this is one we also spent a great deal of time on. In 1986 this Legislature debated at great length the issue of subsistence. You passed the subsistence statute. And one of the things that this Legislature did was adopt the standard of "reasonable opportunity" and provide for subsistence. Because there was -- how much do you have to provide? You have to provide everything that anybody wants? Do the Boards have the power not to provide enough. So they adopted the standard. And in most cases in the state, it's worked well. But there have been a lot -- a number of cases, too many, where it hasn't worked too well. In general, the problem is it hasn't been a good -- there hasn't been any definition of what "reasonable opportunity" is. And the Board of Fish and Game, as much or more than anyone else, said we want better guidelines. We want better guidelines of what you're talking about. So what we've laid out is we've said, reasonable opportunity is an opportunity determined by the Board allowing the subsistence user to participate in the hunt or fishery that provides a normally diligent participant. And the

Council put that in because they said we don't folks saying I have to have the opportunity that I can sit in my yard until a goose comes by [indisc.] season opens and a goose walks through my yard. But we said, "a normally diligent participant with a reasonable expectation of success of taking of fish and game." But then we also talked about what reasonable opportunity is not. We said it's not a guarantee of the taking of fish and game. It's not a guarantee of the hunt or the conditions of the hunt or fishery. It's not a guarantee that you will get everything that you may want or need. Because fishing and hunting you cannot provide that kind of guarantee though I've run into some folks who would like to try to have the courts mandate where that kind of guarantee is provided. But we also said there have been a number of problems caused and a number of suits and things caused by the Board provided under the guise of reasonable opportunity provided what was actually substantially less than a reasonable opportunity. They really didn't provide an adequate opportunity to go out and get what they needed. And in general we felt that that was because the Board had not looked at the proper things. And so what we've put in here is a list of things that each one of the Board must consider and make findings on. They must consider and make findings on resource population and management objectives, on the estimated harvest per unit effort by the participants. They must make findings on the record on the patterns and the levels of customary and traditional taking and use of the fish, stock or game population. On the migratory patterns and availability of fish and game. We don't give a curve for the seasons or the time the caribou weren't there. On the competition for fish and game from other subsistence and non-subsistence users. And I should mention, originally, we just had that they should consider, you know, here what we're providing reasonable opportunity for subsistence. We just had that you should consider competition from non-subsistence users. But actually it was the rural members of our panel who said wait a minute. We also have big problems with competition from other subsistence users. We have problems

with people up river who are very mad folks from down river because they're coming up and taking all the moose. And so we told the Board you got to factor that into your decision when you provide reasonable opportunity. And then we allowed the Board to also consider other relevant factors. We are almost through this. I apologize for being so long, but I've been trying to go as fast as I can.

The next sections three and four are just straight conforming sections moving numbers around. I'd be glad to go into them if anybody has any question. Otherwise I would go to section five which is the definition of "subsistence fishing". And here we set out that it has to be by a qualified resident. Because in the past it has been just by a resident. One of the things if you're not qualified, it's not subsistence fishing. We make sure that it has to be in accordance with the regulations that are set out for the subsistence fishery. And we also specify on the tail end of this on line twenty-eight, "except for rod and reel". Let me talk about that for just a minute as to why the Council did that.

Since time of statehood, rod and reel, though it's used by many, many of us to catch fish for consumption, has never been legally permitted by regulation as a means for taking subsistence fish. In 1986 when this Legislature debated this subsistence bill there was a great debate about specifically including rod and reel as a subsistence method. In fact, here is a gentleman named Tom Brown, I think, he went by the name of Tom Zebco [ph] Brown who spent a tremendous amount of time during the time of that debate talking to people. And his answer for subsistence [indsics. - cough] was to make everybody a subsistence user, make rod and reel a subsistence and then just let it go. And the commercial fishermen were very, very active in this because they said we have a tremendous problem with that. Because then every single person in the state who fishes with a rod and reel is going to have a clear and outright preference over any commercial fishing. And our enforcement people have also had a substantial preference - excuse me, difference with that because they said right now and

the way it's always been, the definition of sport fishing in 16.05.940 is fishing with a rod and reel. So if they see somebody out on the stream fishing with a rod and reel they know that person is supposed to have a sport fishing license. And so they wanted it in there. So we have put it there. And I do understand that there's some feelings about this. Because I had a discussion with a gentlemen here in town who said, what do you mean? He said, I catch all my subsistence fish with a rod and reel. No, Bob, you do exactly like I do. You catch an awful lot of fish that you eat with a rod and reel and you'll continue to do it. But you'll catch them under the sport regs. So simply we're setting that out as the status quo. It is a policy for this body.

SENATOR COTTEN:

Point, Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR COTTEN:

Why do you take out "fishing for"?

MR. CAMPBELL:

Excuse me. What the Attorney General pointed out that the term "taking" includes both fishing and fishing for. And that was simply technical drafting. That "taking" is defined in the law as both -- it sounds silly -- but both taking and also attempting to take.

SENATOR COTTEN:

Where is that defined?

MR. CAMPBELL:

I would get the --

SENATOR COTTEN:

I'd like to have it.

MR. CAMPBELL:

I will get that to you.

SENATOR COTTEN:

This is essentially the same definition we wrote in 1978.

MR. CAMPBELL:

Right.

SENATOR COTTEN:

With the exception of the residency requirements.

MR. UTERMOHLE:

Mr. Chairman, yes that definition is in 16.05.940, definition of "taking".

MR. CAMPBELL:

That's exactly the same question.

SENATOR COTTEN:

That's good enough.

MR. CAMPBELL:

The definition of subsistence hunting, again, we just made it by a qualified resident. The same question about hunting or hunting for [indisc.]

The next substantive definition issue is on page ten, line four, number thirty-one, the definition of "subsistence". And this used to be the definition of "subsistence uses". But in the Council and discussion with the legal folks, we said, really what we're talking about here is both subsistence taking and use. And it's the taking much more than the use that we're really attempting to regulate. So we simply made it the definition of subsistence, to include both taking and use. So we said, "it is non-commercial, customary and traditional in a use areas of the state". We specified that it has to be non-commercial. We deleted "shelter, fuel and tools" on line eight. And the reason we did that is those three in general on the past definition it referred to the use generally of firewood, berries, things like that. And again, our legal counsel advised us, guys, you're in Title 16. You're dealing with fish and game and if you want to be consistent, then deal with fish and game. And so we did that. That's the only reason there.

Then we also specified about non-commercial sharing and barter, customary trade and kept the existing definition of "family".

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

UNIDENTIFIED SPEAKER:

What is non-commercial sharing? How do you define that? What's that mean?

MR. CAMPBELL:

Sir, there had been in the discussion -- I think that that's maybe a touch of paranoia on our part. That we're recently been dealing with a lot of customary trade issues and talking about -- that I'll talk about as soon as we get down to that customary trade definition. There was a lot of talk about various ways and loopholes in the law. And we simply wanted to be real plain that we were talking about the small scale family to family - what we all think of as sharing.

Then, the next thing is the definition of "customary and traditional". And here customary and traditional is an absolutely key phrase in this bill, in existing law and in ANILCA. But unfortunately in both ANILCA and in existing law, we didn't have a definition of it. And that has led to a good deal of confusion and problems. The Boards of Fisheries and Boards of Game adopted a set of eight criteria to determine what was and wasn't customary and traditional and they've used those over time. The portion of that that had proved to be the most used talked about multi-generational use. Because what happened is in the wake of McDowell and subsequent court decisions, some of the most useful parts of those regulations have been struck down or at least our Department of Law has implied they are no longer applicable and useable. And we would up in the situation where our Department of Law at least advised us that we were in a situation that any fish stock or game population anywhere in the state that has been used for food over time regardless of back when that time was, can be subject to subsistence.

SENATOR KERTTULA:

Senator Adams are you trying to seek the floor, or are you

going to wait?

SENATOR ADAMS:

Going to wait

SENATOR KERTTULA:

Please proceed.

MR. CAMPBELL:

I would just say there are very few fish stocks and game populations that at least some point in the state have not been used over time for food. So what we did is we put in a definition and we said, it means the non commercial, the long term consistence and ongoing dependence on the taking and use of fish and game in a specific area and the use patterns and the harvest levels that have been established over at least one preceding generation of users. And the reason we use that term "over at least one preceding generation of users" the old term was "multi-generational use" and back two years ago when Cook Inlet first went subsistence and the Board was floundering around about what to do and what is multi-generational. We had folks come in and say, my father and my son and I were all out last week and used the resource and we got a multi-generational use and clearly nobody believed that. And they spent way too much time talking about it. So here we say "it's an ongoing use that has been that's been consistent over time for at least one preceding generation."

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

I'm trying to understand that point. So this is dealing with stock versus the usage. In other words, you're not saying that in order to meet the customary and traditional standard the individual has to prove that a member of a preceding generation had use. Or are you saying that?

MR. CAMPBELL:

No, sir. What we are strictly talking about -- we're talking about two things in this bill. One is whether or not the stock or

population is subject to subsistence. And two, when the Board goes to make allocations and provide reasonable opportunity, one of the things they have to make a finding on is what has been the customary and traditional patterns and levels of harvest. And they have to make sure that they're adequately providing for that. But anyone who is qualified and in that area can participate.

SENATOR COTTEN:

Mr. Chair.

SENATOR KERTTULA:

Yes, sir.

SENATOR COTTEN:

Will you try to give us an example on that? For instance, how about as an example, hatchery chum salmon on the, I don't know, Noatak River.

MR. CAMPBELL:

Actually, let me throw out a number of examples, if I can and I'll use fish. If there has been, in general, if there is a new hatchery stock that is created, there will not be a customary and traditional use for that stock. If that stock, though, is intermingled with natural stocks, you're going to have to provide a subsistence fishery on that mixed fishery. We also specifically talked about if you had a strain where you had a very weak stock but you had a customary traditional use of that weak stock and you went in and enhanced it, you need to provide subsistence use on the whole enhanced stock. But you create a brand new [indisc.] it's all separate by itself.

SENATOR COTTEN:

That answered my question. Thank you.

MR. CAMPBELL:

Next is the issue of customary trade. And again, this is a key term. It is a term that is in ANILCA. It's a term that is in existing law. In neither case does it have a definition. Everybody on the Council supported customary trade in the context of the small scale sale for cash from one subsistence user to another of subsistence resources. But nobody on the Council,

without exception, supported the interpretation that reasonably two federal courts have held that is that has to be the federal interpretation of customary trade where we have very large scale sale of fishery resources that are harvested exclusively for sale and sold through commercial channels. In this case, to the Japanese. Nobody thought that was right. That's commercial fishing. And it's fine for folks to do it but they shouldn't be doing it and then having a preference over other people who are legitimately commercial fisherman. So what we said, is we suggested customary trade means the "limited non-commercial exchange for minimal mounts of cash as restricted by the appropriate Board". Because we've had folks tell us, the Boards could go ahead and restrict it. And I think and I kind of hope that they could but not it's not clear in existing law. So we made it clear to the Boards can. "As restricted by the appropriate Board of Fish and Game resources harvested primarily for personal or family consumption". In other words, if I'm a subsistence users and I live up in Haines and I take a bunch of hooligan [ph] for my family and I have some extra hooligan, I can come down here and sell it to a friend or somebody in Juneau. That's fine. But what I can't do is just fish exclusively for sale. And then we say, "customary trade does not include sales in commercial channels". The definition of commercial fishing, according to definition in 16.05.940, is "sales through commercial channels". So we draw that line there.

Then we talked about furs. Let me mention furs in just a minute. We say customary trade does not include -- excuse me. The terms of this paragraph do not restrict money sales of furs or furbearers. And it has been said, and fairly and accurately, that it's real hard to tell what that means. And I have to tell you that was exactly the intent of the Council. And the reason we made that hard to understand exactly what it means and is sale of furs customary trade or not trade, is unfortunately we are dealing with the national park service in this state that would just love to kick every single trapper they could out of the national parks

and is making a real effort to do so. And anybody they can identify as a commercial trapper, they're going to kick out or sport trapper, they're going to kick out. But they got to let the subsistence trappers stay. But in this state, we've never had subsistence or sport trapper or commercial trapping. It's just trapping. And so we developed this after a lot of talk and work with people that are working day to day on this issue. And actually we had some of the folks from the federal government who are involved in the legal process but aren't sympathetic to what they're doing tell us under these terms, they cannot decide whether it is or isn't subsistence, and therefore they're not going to be able to kick the trappers out of the parks. First time, I've ever said, yeah, here's a deliberate ambiguity in the law.

Next is the definition of "game management unit". I think that that's pretty much self evident. Next is the definition of "sustained yield". And that's worth a little bit of discussion. But we're almost through. [Tape ends]

Tape 92-8

Side A

[Tape begins midspeech]

MR. CAMPBELL:

... Unfortunately, we're also dealing some of the time with federal courts. And we have had at least some problems in the past with federal judges offering their own interpretations of sustained yield. And what we did is we went back and we looked at all the minutes of the constitutional convention when they talked about this. And they were very explicit that when they put the sustained yield provision in the constitution that they expected the Legislature to adopt the definition of "sustained yield". And they talked a good bit about what they thought it meant. And we believe we've been very true to that. So let me run through real quickly how we put it together. And it's been suggested it is overcomplicated and it may be. But I will just

say that every part in there is something that meant a great deal to somebody.

It means "the management principle of utilization, development and maintenance". Those three terms, utilize, develop and maintain are directly out of the constitution in sustained yield. "Applied to naturally occurring fish and game resources". Naturally occurring and healthy, down on the bottom line, line 30, are federal terms [indisc.] that the feds are required to manage for. And in our discussion with the federal government and their solicitors, we've been advised that, by this inclusion, the feds can't come in and say, we're sorry. But naturally occurring or healthy are somehow higher standards than sustained yield and therefore we got to do it, you can't. We put those in for those purposes.

"That provide beneficial". Again, right out of the constitution. "Consumptive uses". And there's a lot of debate over consumptive uses. There were folks who were concerned about it. Many of the rural members, Native members of the Council wanted that in. There were some Native members who didn't want it in. I think the AFC wanted it in. And there was also a real concern does this somehow mean that you cannot manage, for say, bears to be used in McNeal Park or bears to be viewed at McNeal River. Or bears to be viewed at Pack Creek or some species you [indisc.] The Attorney General's office has said, no, it clearly does not mean that. I've asked them to provide us with a memo which I hope to have by tomorrow, an opinion from the AG that it does not mean that. But again, I would have your own folks look at it. It was an issue that caused a lot of people a lot of nervousness. And I want to flag it for you. That's the word "consumptive".

"Uses in perpetuity". That's again, just the essence of sustained yield. "Subject to preferences among such uses". Again, right out of the constitution. "And seeks to provide for desired population increases and prevent undesired declines." Here we're getting to the heart of the matter. We're trying to

address -- with the federal court, because we have a situation with the caribou herd where we had a very seriously depressed herd. And You had a few caribou that you could harvest, but you were in a sort of permanent tier two subsistence situation where you couldn't even provide enough for all the subsistence users. And the Boards wanted to close any hunting to that herd and let it build back up a little bit, so that you could provide for more of the subsistence users. And then eventually, they could provide for other users. And I think the judge said no. He had some qualms about that. And we also were real concerned about, as long as we're at it, "prevent undesired decline". Because he might have a herd that is substantially too big for its range. It's overgrazing range. You can't maintain it at that size. You need, through hunting or other means, to reduce the size of it for its own health. Not just wait until it crashes through natural causes. So we put both of those in there specifically. And the constitutional framers, if you go back and look at the minutes, are extremely explicit. They talk in some detail about they certainly intend for people to provide for increases and declines and management in that. And so we've done that.

And then -- in just one second, I'm going to go back to that sentence that I said I'd come back to. "For the purposes of maintaining healthy". I've already talked about that. "Self perpetuating" Again, just the essence of sustained yield. "Stocks and populations."

Now, I promised that I would come back to page four, line twenty-nine. And that says, "If the subsistence use of a stock or population has been eliminated to achieve sustained yield, the appropriate Board will adopt regs to allow subsistence uses when the Board determines the stock or population has recovered sufficiently to allow the taking for any consumptive use consistent with sustained yield." The reason we put that in there is everybody agreed that, yes, if a herd is really so seriously depressed, even if you could take two animals aa year and get by with it, you need to be able to close it to build it

back up. But they were worried, that say, the Boards might enter into collusion ...

UNIDENTIFIED SPEAKER:

[indisc.]

MR. CAMPBELL:

I [indisc.]

SENATOR COTTEN:

I think it's line sixteen -- page four, line sixteen.

SENATOR KERTTULA:

Yeah. I didn't find it myself.

MR. CAMPBELL:

I'm sorry. I was saying page four, line twenty-nine. subsection (c).

SENATOR COTTEN:

You got the wrong. (c) is on line sixteen.

MR. CAMPBELL:

Perhaps the drafters numbered it differently than [indisc.] Anyway, it is, let me say it is subsection (c), the third full sentence that starts out, "If subsistence use of a stock or populations has been eliminated to achieve sustained yield ..." Okay. The concern there was the Boards might somehow enter into collusion and say, well, we have a seriously depressed herd. And we're going to have to shut it down to build it back up. But we're going to keep it shut until not only is it taken care of subsistence and we can take care of all the general hunters and sports hunters also. And so what we wanted to say here, is that if the Board is going to shut something down for sustained yield, as soon as they can start allowing any harvest again, they have to provide that to the subsistence users. Probably first in a restrictive tier two hunt. Then maybe you take care of all the subsistence users. Then maybe over time if the herd goes up and provide some additional animals for the general hunters. You have management [indisc.] to make that happen. So that's all, that's what that sentence is about and why we're doing it.

The only last thing I mentioned about the bill, are simply

that while the majority of it becomes effective July one, the transition into effectiveness through the normal Board cycle. And then we have also included on the last page, section twelve, Review. Byron Mallot suggested and I think everybody on the Council voted as an outstanding idea, that we put together a review Council. Because on something such as this, we think we've done a good job. But we also know that you never get it absolutely all right. There may be some problems. And so what we said is we mandate that the Governor pulls together a group to review this and then make recommendations back to the Governor and the Legislature, and say, this part's working fine. This part needs some fine tuning. Maybe they'd even say this part's a total spunker [ph]. So I think if we do that part, we'll do [indisc.] But to take this back to it. There was discussion in the group of making this an actual sunset. And I think as soon as the group thought about what that may mean, we might have to come back and go through this again. We all recoiled with horror. If you all want to go through it again, then [indisc.]. That's it. I'd be happy to take questions.

SENATOR KERTTULA:

Questions? Senator Sturgelewski. Then Eliason, Halford and Adams. You have the floor.

SENATOR STURGELEWSKI:

Okay. McKie, you said you would point out for us the areas and we don't need to get into debate, but the areas of potential constitutional conflict. One had been on page four, section (d). Were there other areas?

MR. CAMPBELL:

[indisc.] quickly. Senator, the three areas that I have heard anyone mention and there may be other areas I haven't heard anyone mention, of possible constitutional problem are, number one, the use of differing presumptions. You know, the presumption for the rural or for the little ones. You assert your right and then you're presumed in mid-size and have to go through an application process. And so that has been questioned. And the

Attorney General, very, very quickly, said basically, because anybody in the state has the -- who is engaged in subsistence living can participate, you are not talking here about equal right about the right to hunt and fish. We are talking about the right to equal paperwork is not a protected right under the constitution.

SENATOR STURGELEWSKI:

Okay, so that is the area. Yeah, we don't need to get into debate.

MR. CAMPBELL:

That's one. Number two, is the use of different standards of proof for the state to use to rebut. In the communities under twenty-five hundred, the state would have to prove by clear and convincing evidence that a person does not comply. In the other area, they can prove by preponderance of doubt. But again I'll let the attorneys later talk about that.

And the third is the use of the subsistence use area. Making persons that qualify in a specific area and then restricting their use to that subsistence area. And that is the third level. And one of the things -- and I mentioned, I think, why we did all the things. The other thing that I would mention, not only do we feel it is constitutional -- even if these three things had been struck out, they could easily come back and fix and even what was left was be three hundred percent better than what we have right now.

SENATOR STURGELEWSKI:

Mr. Chairman. The other thing would be -- and if this is too much time involved here I could -- you could personally get that to me. Have you identified the specific parts of the bill that would be in direct conflict with ANILCA the way the bill is written?

MR. CAMPBELL:

Yes, ma'am. I would be happy to do that. And again, I offer a very quick version. The part that is most likely in conflict with ANILCA is the fact that we do not guarantee that every person

who lives in rural Alaska without exception and regardless of their dependence or lack of dependence on the resource, is a subsistence user. In my discussions -- now I read you the stated purpose of ANILCA. To provide the persons engaged in a subsistence -- or excuse me, rural residents engaged in a subsistence way of life making sure their uses are protected. We think our bill very clearly meets that purpose. But it probably does not meet the letter of the law that every single residents. In informal discussions with Interior, I said, I just want to make sure I understand. My wife is down on vacation in Ohio to see her folks. If she happens to play the lottery and win twenty million and comes back up and we move out to Bristol Bay and I spend the rest of my life catching or at least fly fishing and eating frozen dinners, do I have to have that preference over any urban user, no matter how qualified that urban user may be or how much that person really lives the subsistence way of life. And they said, yes.

SENATOR STURGELEWSKI:

So that's a major area. Are there others?

MR. CAMPBELL:

That is the major area. You know, I think you can quibble about issues. For instance, like customary trade. But that certainly would not render the bill -- I would strongly urge you to pass this and see what happens.

SENATOR STURGELEWSKI:

Thank you.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Thank you, Mr. Chairman. Just two questions. One is you explained pretty well the rural perspective. But to qualify for those areas that do not fall within a rural definition, that [indisc.] at the Council. Everybody hates the to fill out paperwork. Is this an annual event? Or once you qualify you continue to qualify? Or do you have to go through this like

income tax every year?

MR. CAMPBELL:

Sir, unfortunately, it is an annual event. Though we have talked within the department a great deal about how the process ...

SENATOR ELIASON:

That's a good enough answer. Under the federal regs, would that type of annual event, take care of those people in the urban areas? Or are they not even qualified, period?

MR. CAMPBELL:

Under the federal regs, no one in urban Alaska is a subsistence user, period. Without exception. Without regard to how dependent or not they may be.

SENATOR ELIASON:

Okay. Thanks.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Thank you Mr. Chair. Just as an education, I'm trying to figure out this "sales through commercial channels". If you can't use sales through commercial channels, I wonder is, for example, the roadside pickup truck with the freezer in the back of it selling fishery resources, is that a commercial channel?

MR. CAMPBELL:

No, sir. I don't think it is. And in discussion, we discussed, not that particular example, but we discussed for instance, somebody taking down a whole bunch of dried fish strips to a ANB convention and selling them in a booth. And they felt that was not a commercial channel. What we're talking about here is exactly what the federal court said that was protected which is where these folks sold to a middle person, a fish broker, who turned around and sold to the Japanese, a fish buyer. That's sales through commercial channels.

SENATOR HALFORD:

But there is still the room then for substantial commercial

sales of fishery resources through just roadside sales in large communities.

MR. CAMPBELL:

If I ..

SENATOR HALFORD:

You can sell a lot of fish and a lot of shrimp on the road between the airport and town here. You can sell a lot of salmon. You could sell a freezer full every weekend and make a pretty good living at it. That's what I'm curious about.

MR. CAMPBELL:

If the only restriction were sales through commercial channels, I certainly agree with you. The other restrictions though, that are in there, are that it is a "limited non commercial exchange for minimal amounts of cash". We give the Boards the power to restrict the amounts or prohibit if there are violations. And we also specify that the resource has to be have been harvested primarily for your personal use or your family's use and then you have some extra for selling. It isn't going out and harvesting for sale itself.

SENATOR HALFORD:

Okay.

SENATOR KERTTULA:

Senator Adams, then Senator Taylor.

SENATOR ADAMS:

Thank you. How long are we going? I've got a number of questions for the administration.

SENATOR KERTTULA:

I figure probably you want to recess pretty shortly until -- Senator Taylor. Is yours brief?

SENATOR TAYLOR:

Very brief.

SENATOR ADAMS:

Well, I'll just ask one question and then I've got a bunch of questions tomorrow, if you don't mind Senator Taylor.

SENATOR KERTTULA:

SENATOR ADAMS:

The only question I have at this particular time and then I'll reserve the rest of my questions -- is the administration going to provide any amendments to the Governor's bill?

MR. CAMPBELL:

No, sir. I would say that we make no claims, this is a perfect bill. We do make the claim that every word and line and paragraph we spent hours and hours on, and we've gotten it out the best we can.

SENATOR ADAMS:

Mr. Chairman, I do have additional questions, but I'll hold until tomorrow.

SENATOR KERTTULA:

All right. Tomorrow at 9:30 we'll come back to order. We'll listen to Lance Nelson briefly. Subsistence [indisc.] Senator Taylor.

SENATOR TAYLOR:

Thank you. My only question was if Senator Eliason and Sturgelewski both raised questions I found very interesting. I wondered if when you come back you could give us a brief review and comparison of this legislation as it compares to ANILCA and [indisc.] population sizes and what's available to a person under ANILCA and what's available to us under [indisc.] I think each of them raised questions that I have.

MR. CAMPBELL:

I'd be happy to do that Senator.

SENATOR KERTTULA:

Senator Cotten.

SENATOR COTTEN:

Well, I'll warn him about what my questions going to be, too. I'm going to want to know what you -- what change you think is going to be necessary to ANILCA in order to make this bill comply?

SENATOR STURGELEWSKI:

Or vice versa. What this needs to change to conform.

Yes. Shirley. Senator Craft.

SENATOR CRAFT:

Just quick. I think I heard you say that no one in an urban area would qualify for subsistence fishing. Did I hear that?

MR. CAMPBELL:

No, ma'am.

SENATOR CRAFT:

Well, I'm thinking about somebody in Fairbanks.

MR. CAMPBELL:

Oh. Anyone in the state regardless of where they live, if they've lived their way of life -- lived the subsistence way of life [indisc.] they qualify.

SENATOR COTTEN:

That's what you said, but you were talking about federal regulations.

MR. CAMPBELL:

Oh, I'm sorry. Senator Craft. I would answer your question about, under federal law, no one in Fairbanks would qualify for either subsistence fishing or subsistence hunting. Under our bill, they could.

SENATOR KERTTULA:

Senator Eliason then Senator Fischer. Senator Fischer. Senator Fischer.

SENATOR FISCHER:

Thank you. I guess the question I have is back to Senator Halford's question. In the case of a borough that if these roadside people who come in and sell fish or whatever, they have to get a business license. They also have to get a sales tax license. Does that run counter to what you're saying? If these people say, no, I'm subsistence, so therefore I don't have to get a borough ...

MR. CAMPBELL:

I believe sir, if they're doing -- if they're actually engaged in a business [indisc.].

SENATOR FISCHER:

The first sales commercial.

MR. CAMPBELL:

Well, we talked a lot about the fact that the what is a non commercial sale for cash. But that was and used in the history [indsic] of 1986 [indisc. - simult. speech] regards to commercial enterprise.

SENATOR KERTTULA:

Do you have copies of the proposed federal regs.

MR. CAMPBELL:

I could bring those. I don't have multiple copies but I do have two copies.

SENATOR KERTTULA:

Why don't you bring them. We're going to adjourn until 9:30 a.m.

ADJOURN

7:15 p.m.

SENATE COMMITTEE OF THE WHOLE

June 17, 1992

9:45 a.m.

(Meeting held in Senate Finance Committee Room)

MEMBERS PRESENT

Senator Jay Kerttula, Chairman
Senator Al Adams
Senator Virginia Collins
Senator Sam Cotten
Senator Shirley Craft
Senator Jim Duncan
Senator Dick Eliason
Senator Paul Fischer
Senator Steve Frank
Senator Rick Halford
Senator Lyman Hoffman
Senator Curt Menard
Senator Drue Pearce
Senator Pat Pourchot
Senator Pat Rodey
Senator Dick Shultz
Senator Arliss Sturgulewski
Senator Robin Taylor
Senator Rick Uehling
Senator Fred Zharoff

COMMITTEE CALENDAR

SENATE BILL NO. 484

"An Act relating to the taking of fish and game; and providing for an effective date."

SENATE BILL NO. 485

"An Act relating to the taking of fish and game for subsistence; and providing for an effective date."

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6/17/92

Tape 92-9

Side A

SENATOR KERTTULA:

If we can come back to order, I understand there's twelve people here. We have a quorum. Although we will go on to continuing work to suggesting amendments and questions prepared and available last night. But we thought we would adjourn by seven p.m. Certainly, by seven p.m. tonight, we want to adjourn, no later. It's kind of a Senate tradition. And I think it's a good tradition. We'll be working away with the full hour for lunch and other brief times off. I have been informed that the AG's opinions and the legal opinions now separate from legislative affairs are separated in your three-ring folder. All the proposed constitutional amendments -- many of them are informational at this time. Some of them have not been introduced. I don't know maybe if any of them have been. One, I think, has. In any event, they're also now an addendum to the book.

Al Adams was prepared to ask some questions of McKie Campbell at the time we adjourned. But I'm going to ask Mr. Lance Nelson, if he's available to sit here and bring us up to date on the subsistence litigation. In briefing us, there may be a few questions. But if you could just sort of roll along with it and give us the highlights. And into any depth, the committee would desire from the individual. If you will just identify yourself for the record and proceed. I know you've been very busy and you are distinguished public servant and we appreciate your work down there at the fishery area. Please proceed.

MR. NELSON, ASSISTANT ATTORNEY GENERAL:

Mr. Chairman, my name is Lance Nelson, Assistant Attorney General, Natural Resources section of the Attorney General's office in Anchorage. My normal assignment is to do fish and game enforcement work for the Department of Public Safety, Division of

Fish and Wildlife Protection. Although a couple of years before I started this assignment, I advised the Department of Fish and Game, including the Boards of Fisheries and Game, for over a period of a year and a half to two years and I continue to be involved in subsistence litigation to some extent. Although I give you the proviso that very few of these cases on the list of current subsistence litigation are my cases. They are spread between four and five attorneys in our office who are Liza Gay [ph], Rob Nalheim [ph], Jeff Kellum [ph], Henry Wilson, Steve White [ph] in Juneau and other attorneys from time to time, as need requires. So I'm not intimately familiar with every case. I think I do have a basic understanding of what's happening, and I do probably have the best understanding of the proposed legislation proposed by the Governor, because of my assignment of the last six months of advising the Subsistence Advisory Council in drafting the proposed legislation.

Most problems with the present subsistence law can be directly traced to a lack of criteria for identifying subsistence users and fish stocks or game populations subject to subsistence uses. Likewise, the present law has failed to clearly give the Boards direction in how to make those allocations. The new proposed law, in many ways, minimizes the Boards discretion and should therefore reduce litigation.

As a general matter, under the new subsection, which would be AS 16.05.268(a), the Board of Fisheries and the Board of Game are to identify fish stocks and game populations that have been subject to customary and traditional subsistence use just as before. However, because this process was not well defined in the old law, the new law would attempt to give the Boards greater guidance. This process of giving better direction to the Boards, we believe, reducing the amount of litigation. In addition, because the term "customary and traditional" is defined under the proposed AS 16.05.940(36), section six of the bill, the Boards job should be easier and their decisions more defensible. There are definitions of "fish stock and game populations" in existing law

and those definitions are left unchanged. Existing law also already requires the Boards to identify the stocks and populations used for subsistence. The identification of fish stocks and game populations subject to subsistence regulations is a situation where all groups can potentially win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that subsistence preference is protected. In the long run, it should make everyone's job easier. In addition, the new law would clearly impact any case in which the all Alaska policy is at issue. The new law gives the Boards clear authority and guidance by creating criteria for the Boards to apply to determine who is actually a subsistence user. Defining the new law would eliminate those clearly commercial activities from the subsistence debate.

In defining "customary trade", under section six of the new law, to include only non-commercial trade for small amounts of money, there is several, probably, more critical cases on the list of our cases, that I'm sure that the members of the Senate have more concern about. I guess I would address a few of them and then turn the time over to questions about other specific cases, rather than go through every case, which would probably be a waste of this body's time.

SENATOR KERTTULA:

Questions at any time, will you be willing to respond. Thank you. [indisc.] continuity. But on the other hand, there may be some questions.

MR. NELSON:

I don't mind questions, any time.

SENATOR KERTTULA:

Thank you.

MR. NELSON:

One of the cases that has been used a lot both, I think, to as a bill runner for plaintiff's groups and also as, I guess, a mark of paranoia, in a way by the people who would like to see a

more restrictive subsistence law, is the Bobby case.

SENATOR STURGELEWSKI:

Bobby?

MR. NELSON:

Bobby. It's the Lime Village case. Judge Holland made a decision in that case. And in that case, he decided that since reasonable opportunity wasn't defined in the statutes, he tried to decide what, under the influence of ANILCA and looking at state law, what should be required when the Board makes decisions about setting seasons and bag limits in a rural area. And ...

SENATOR ADAMS:

Mr. Chairman.

SENATOR KERTTULA:

Mr. Adams. Senator Adams.

SENATOR ADAMS:

Lance, I wonder if you can, while you're giving your presentation on these different cases, will you cite precisely in the piece of legislation where those lines and items ...

MR. NELSON:

Sure.

SENATOR ADAMS:

... and these court cases that were overturned or making a decision for them. Please.

MR. NELSON:

Let me state right off, I don't think this new bill overturns the Bobby decision. As far as the Bobby decision dwells on the allocation of proper season and bag limits for customary and traditional subsistence uses. I don't think the new statute does that. It does have the effect of -- the Bobby decision -- part of it was deciding what do the Boards need to do in matching bag limits of seasons to customary and traditional patterns. And another part of the decision was whether or not a criminal defendant can use the validity of a subsistence regulation as a defence in a criminal defence when he or she violates a hunting or a fishing regulation.

SENATOR ADAMS:

I would like the right to reserve to rebuttal that ...

MR. NELSON:

Sure.

SENATOR ADAMS:

... at a different times of what the ongoing cases.

SENATOR KERTTULA:

Yes, in front of or at any time, it's now problem.

UNIDENTIFIED SPEAKER:

Thank you.

SENATOR KERTTULA:

McKie, do you have something you would add here?

MR. CAMPBELL:

On that point here, if I could add very quickly.

SENATOR KERTTULA:

You can.

MR. CAMPBELL:

The thrust in drafting this bill was not to pick a particular case and reverse that case. But again to pick up the common threads that ran through a series of court cases that caused problems. Made it difficult for the Boards to act in a way and cause people to feel they needed to sue or cause the state's action to be vulnerable. And try to improve that situation. But it was not a "here is the case. What line do we change to fix or reverse this case."

SENATOR KERTTULA:

Thank you.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir. Senator Halford.

SENATOR HALFORD:

As we go through these cases, I think in three sentences, you can summarize, for example, the Bobby case. What happened? What was charged? What the outcome was?

SENATOR KERTTULA:

Yeah. That's a good point.

SENATOR HALFORD:

So we know -- other than referring to it that we know everything [indisc.] except the attorney fees, what's the case? What happened? What was charged? What happened?

SENATOR KERTTULA:

And kind of figure people like me know very little.

MR. NELSON:

The Bobby case -- it was brought by residents of Lime Village, challenging the validity of the seasons and bag limits, primarily and the regulations that the Board of Game had made on caribou and moose. The plaintiffs felt like the seasons weren't sufficient to give them a reasonable opportunity to take moose and caribou. They also felt like the way the bag limit was set up and the tradition of hunting in Lime Village was such that a relative few hunters took quite a few animals to share with the rest of the village. And they didn't feel like the bag limit as it stood took that pattern into consideration. And that was basically what -- they said that the state's law interpreted under ANILCA would require cultural mesh between customary and traditional patterns. The regulations themselves, seasons and bag limits, had to be more closely matched.

Judge Holland went through that. That's one aspect of the Bobby case. That's the one I think we need to talk about the most. The other aspect was whether or not you can raise a criminal defense -- in subsistence as a criminal defense in the prosecution. And that's a separate issue from the one I'm talking about now. Judge Holland went through the Board of Game record and decided that record wasn't sufficient to show how the Board reached a conclusion. In the decision he said, "For all I know, the season and bag limits are sufficient, but I can't see how the Board got there. I need to see a better record." And when you go through this process, he said, "You need to be very careful that the season and bag limits you do come up with are consistent with

customary and traditional patterns of use. And provide for those." After that decision, the Board of Game went back and went on the record again at a Board meeting and made findings and, I think, as far as I know, came up with seasons and bag limits which were much closer to what the plaintiffs wanted. We didn't appeal that case in the Ninth Circuit. The Board of Game responded. And as far as I know, no lawsuit has come out of that Board decision after that at the present time.

SENATOR KERTTULA:

Senator Halford, you had a question.

SENATOR HALFORD:

Just so we understand that, Judge Holland's ruling dealt with state land or federal land, or private land or all lands? How did it do it?

MR. NELSON:

That actually dealt with all lands. There was not ...

SENATOR HALFORD:

So the federal judge's ruling interpreting ...

MR. NELSON:

State law.

SENATOR HALFORD:

... state law on state, private and federal lands.

MR. NELSON:

That's right.

SENATOR HALFORD:

Could you explain how that works?

MR. NELSON:

Under section 807 of ANILCA, the federal district court is given authority to rule on the validity of state regulations. As long as we're in compliance with ANILCA and the federal government is withholding their management [indisc.] under ANILCA, then we're subjected to suits in federal court and the federal district court judge would make a ruling on interpreting state law, deciding whether or not the regulations were valid under state law. When they do that, every time they do that, they look at ANILCA to

guide them in their interpretations of state law. And the look at ANILCA legislation history to do -- at least the district court judges do, to make their -- reach their own conclusions. Once they've reached their conclusion, our recourse is to appeal to the Ninth Circuit. It is not to go back and seek some kind of different ruling in a state court. We're bound by that law, even though we might have a similar suit in state court which reached different conclusions, under, say, section 807 of ANILCA; we still have to obey the federal court directions and judgment.

SENATOR KERTTULA:

You have the floor.

SENATOR MENARD:

I think this gives us, kind of the idea of what one of our biggest problems is. If the Bobby case had occurred after the McDowell case [indisc.- cough] on to federal court in a way it did [indisc.] only complying to state and private lands?

MR. NELSON:

No, it would not. Since the McDowell decision, Judge Holland has dismissed challenges based simply on consistency with state law and has limited himself to federal subsistence management decisions.

SENATOR KERTTULA:

[Indisc.] please proceed.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

To pursue this point, help me. If 807 allows for in a sense suits I would imagine almost simultaneously both in state and federal court -- in a normal way of dealing with federal law, am I correct or incorrect? Would it be totally out of consideration to limit the access first to state court and then to pursue through the federal courts but not to go forward simultaneously? What are some examples that you may be aware of how federal law is

handled where there could be primacy first by the state and then by the federal law? What are some possibilities? Because this has created a continuing problem of having so much uncertainty. Where would we best take this case? Where can I get the best answer? Are there some solutions out there that are possible based on how we handle other laws, for example?

MR. NELSON:

Let me make a couple of comments here. First of all, I think there's generally -- I think it's a well accepted rule of thumb that subsistence plaintiffs believe they will get ...

SENATOR STURGELEWSKI:

Better treatment.

MR. NELSON:

... more favorable treatment in the federal court than state court. And I think they are justified in that from the rulings. At the time, before McDowell, we only had one or two subsistence cases in state court and the rest of them are all in federal district court. They could have been brought in state court, but it is obvious that they were making a well reasoned, well advised decision for the pursuit of cases in federal district court. Because of the record that had been established by court decision there.

There are options that you have open to you to amend ANILCA. The Department of Law, I'm sure, all the attorneys that I know, would much prefer to see federal district courts jurisdiction limited to deciding whether or not state law was in compliance with ANILCA, and not getting into particulars of exactly what was required of the Boards of Fisheries and Boards of Game under state law. Rather than getting involved in the details. And that would be the preferable way as far as attorneys that handle the state's action. And I'm sure other people would think differently about that. At least, that would drop the inconsistency, I think, between state and federal courts. The federal courts would still have power to declare the state out of compliance with ANILCA and we would lose state management on federal public lands. So there

would be quite a bit of influence on the state to try and satisfy the concerns of the federal district court. At least they wouldn't be getting involved in everyday day-to-day management.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR STURGELEWSKI:

What you're suggesting then, Mr. Nelson, is that there might be possibility of having the broad question -- I mean they would have to rule on that broad question. But the particular cases, such as Lime Village or others that have come, would actually because of that with our regulatory Boards, go through the state.

MR. NELSON:

Yes.

SENATOR STURGELEWSKI:

But then the broader question would still be available through the federal courts. But that would take, as you say, an amendment to 807.

MR. NELSON:

It would.

SENATOR STURGELEWSKI:

Yeah.

SENATOR KERTTULA:

Senator Menard.

SENATOR MENARD:

Thank you, Mr. Chairman. In the federal court rulings are they dealing just with rulings on federal lands, or are they including state and private lands?

MR. NELSON:

Before McDowell, they were including -- they dealt with regulations on any land in the state. After McDowell, they are limited to federal, public lands as defined under ANILCA. The definition of which is being litigated right now.

SENATOR KERTTULA:

What was your last comment and answer? Before McDowell and after? Just please state that again.

MR. NELSON:

Before McDowell, when we were considering in compliance with Title 8 of ANILCA, the federal districts courts were maintained -- would accept jurisdiction in any issue subsistence on any land in Alaska. Federal, state or private. After McDowell, Judge Holland ruled that federal district court jurisdiction only extended to federal public lands. That's what -- the definition of that is still an open question.

SENATOR ELIASON:

Mr. Chairman.

SENATOR KERTTULA:

Yes, you have the floor, Senator Eliason.

SENATOR ELIASON:

In fact there is a constitutional amendment which goes back to the issue that was under debate. What would happen in courts then? Would they pursue federal -- would they go back into jurisdiction on all lands in Alaska?

MR. NELSON:

Yes. Land and water. If the Department of Interior agreed that we were once again in compliance and if that decision was upheld in the courts, then we would be in The same situation as pre-McDowell. And the federal district courts would continue -- would once again have jurisdiction over all subsistence disputes in Alaska.

SENATOR ELIASON:

In essence that means that the feds would be control of fish and game in Alaska.

MR. NELSON:

Yes.

UNIDENTIFIED SPEAKER:

The federal courts would be.

SENATOR KERTTULA:

Senator Menard, did you have further questions?

SENATOR MENARD:

[Indisc. - cough].

SENATOR ADAMS:

That's a big if, huh?

MR. NELSON:

Which if?

SENATOR ADAMS:

If you're in compliance.

MR. NELSON:

I don't know, probably. We're not in compliance now, obviously.

SENATOR ADAMS:

And this bill doesn't do it.

SENATOR KERTTULA:

I think the President of the Senate had further questions.

SENATOR ELIASON:

The question is if we amend the constitution and that would put us back into the situation where we would be subject to federal control -- through the court system, federal courts ...

MR. NELSON:

Yes.

SENATOR ELIASON:

The fish and game in Alaska ...

MR. NELSON:

Yes.

SENATOR ELIASON:

Including navigable waters in Alaska?

MR. NELSON:

Right.

SENATOR ELIASON:

Which also means the commercial fishing.

MR. NELSON:

Let me make one comment about that. It does mean commercial fishing.

SENATOR ELIASON:

It does or doesn't?

MR. NELSON:

Well, it does to the extent that commercial fishing might impact subsistence. The federal government will not -- the federal courts won't be [indisc.] regulating commercial fishing. That's not their role. But they will be to the extent that it might maybe have some impact on commercial fishing -- or on subsistence that the federal district court feels is proper under ANILCA.

SENATOR ELIASON:

One further question, Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR ELIASON:

How do we get out of that scenario? By amending ANILCA?

MR. NELSON:

You mean getting -- if you want to be in compliance and not have that detailed oversight?

SENATOR ELIASON:

Correct.

MR. NELSON:

Yeah, you'd have to amend ANILCA.

SENATOR ELIASON:

And that's the only way we can truly get back to state management of fish and game?

MR. NELSON:

Yeah, I don't know any other way.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Just to offer, maybe an example of Senator Eliason's question. If there were a lawsuit with regard to proper impound fish availability versus False Pass fishery - commercial fishery. If we were in compliance with ANILCA, that lawsuit would go directly to federal court and be decided by a federal judge in

spite of the fact that we're dealing with state waters. Is that correct?

MR. NELSON:

That's correct.

SENATOR HALFORD:

And if we're not in compliance, that decision would be made in the state court?

MR. NELSON:

That's right. With the warning, I guess that ...

SENATOR HALFORD:

And the appeals.

MR. NELSON:

... public lands is not then -- is finally be defined by the courts.

SENATOR HALFORD:

Going back to the Bobby decision, what was -- the Bobby conclusion from the federal courts seem to indicate that essentially you had to have eliminated virtually all other use before you can have any restriction, season, bag limit or almost anything. That, in fact, that subsistence unless you had a very, very strong record in the state history, right?

MR. NELSON:

Yeah. I don't believe the Bobby decision goes that far. But cases since then in state court, since McDowell, in fact, seem to use Bobby for that conclusion. No where in Bobby does it say that subsistence regulation of fish and game must cause the least adverse impact. Those three words -- those terms on subsistence uses. Bobby doesn't say that. Yet, it's been cited I guess, as authority for that proposition in the Morry decision, for example, and the Sleetmute decision. And some other cases too. But I don't think Bobby goes that far. I don't think Judge Holland intended it to go that far. But that was what got the ball rolling. That idea that we may be able to get a more -- what we believe in the Department of Law, is a more reasonable interpretation through the Supreme Court and Morry. But we don't

have that decision yet.

SENATOR COTTEN:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. The reason for federal oversight and, correct me if I'm wrong, is that the state of Alaska has consistently failed to provide for subsistence.

MR. NELSON:

The reasons for that being in ANILCA, you're asking me?

SENATOR HOFFMAN:

No. The reason for federal oversight.

MR. NELSON:

The reasons for federal oversight is because section 807 provides for it. I wasn't involved during ANILCA. I'm not sure what the reasoning was for Congress putting that in there. But somebody else might be able to better address that.

MR. CAMPBELL:

Sir, Mr. Chairman. If I could address that question?

SENATOR KERTTULA:

Yes, if the Senator is satisfied. Please do.

MR. CAMPBELL:

I believe that Senator Hoffman is correct that the inclusion of 807 was spurred by a fear that the state would not provide properly for subsistence and they wanted to make sure that there was the federal hammer, as it were, to force the state to provide for subsistence. I would point out, however, that was done before there was any state subsistence -- excuse me. Before some of the later versions of our state subsistence law and state subsistence bill that we have before you right now offers a very detailed, step-by-step protection for subsistence and actually provides for -- they treat several part preference for subsistence that even goes beyond that required in ANILCA.

SENATOR HOFFMAN:

If I might pursue that a little bit. You know, I think that is one of the reason why Lujan and others have been watching to see what the state is going to do with this big question. They may go even further and take control of waters. Because one of the biggest subsistence uses by the Native people in the state of Alaska is salmon.

SENATOR KERTTULA:

At 1:15, we are meeting with, via teleconference, [indisc.] some of your questions may well be [indisc. -cough]. Please proceed. Senator Cotten.

SENATOR COTTEN:

I just wanted to make sure I understood this business about when and how the federal government may decide to manage fish in Alaska and water. And you suggested that if we passed a constitutional amendment and didn't change ANILCA then all these decisions would be made in a federal district court. Therefore, there would be the obvious opportunity for the courts to manage fish. Do I understand that correctly?

MR. NELSON:

That's basically. If we were back in compliance with ANILCA, plaintiffs would still have the option of going into state court and getting judicial remedy there. If past history is any proof of things or prediction of things, then I think you'd expect most of the cases continuing by the federal district court.

SENATOR COTTEN:

But now is it possible to get there another way? I mean aren't there other cases -- the Katie John -- aren't there other cases and other opportunities for the federal courts to manage fish in Alaska? Aren't there other scenarios where that might happen anyway?

MR. NELSON:

That's one thing I pointed out. The definition of public land right now -- federal public land defines its federal court jurisdiction is somewhat unsettled. The state believes that navigable waters are off limits to federal jurisdiction. So does

the federal government according to their position in the lawsuit. But the question has been briefed to the federal district court and so we're awaiting a decision on that issue.

SENATOR COTTEN:

And which case is this?

MR. NELSON:

That's in the Lime, Katie John ...

SENATOR COTTEN:

Kluti-kaah.

MR. NELSON:

Well State v Lujan brings that issue up too. But I don't think it's been briefed in that case here. But in the Kluti-kaah also, the federal Kluti-kaah decision, [indisc.] navigable waters but it's asking the question as far as activities that might off federal lands and influence subsistence -- the availability of subsistence resource on federal land, what is the federal court jurisdiction in those situations? That's up for grabs, too.

SENATOR COTTEN:

In order to prevent that, I mean, if you had a constant goal out in front of you of trying to eliminate any possibility of the federal executive or judicial managing fish in Alaska, again, would we have to -- in order to prevent that, what course of action would we have to take in that case? Again, would we have to amend ANILCA to satisfy that? Would that get you there?

MR. NELSON:

What ...

SENATOR COTTEN:

Eliminate the possibility of the federal government, either courts or judicial, managing fish in Alaska.

MR. CAMPBELL:

Mr. Chairman, Senator Cotten, if I can interject for just a moment. The amendment of ANILCA is what could solve that problem for sure. And again, we are not talking in any way when we talk when we talk about amending ANILCA, about taking out the preference for subsistence or protection. But that's what could

solve the problem. In the court cases that Mr. Nelson has been mentioning, some of that in terms of which waters the state is going to manage, is precisely at the point. We have been in discussions with the Department of Interior and the Secretary and I know the Secretary has indicated he wishes to get the most minimally possible involved in navigable waters of the state. In fact, in the decision whether to proceed with State v Lujan, which is on our control all of our navigable waters, it came down to a tiny fraction of what we consider navigable waters in Alaska, but the federal government thinks the terms of the specific withdrawal, such as Glacier Bay and there are a few others. Nunavak [ph] Island has been mentioned. That whether or not we retain control or [indisc.]. But I would emphasize, at least in our discussions between the state and the Department of Interior, we are only arguing over tiny fractions of the total state's navigable waters. However, in State v Lujan one of the things the Alaska Federation of Natives has joined that in one of the things their brief asks for is they ask that the federal judge order the Secretary of Interior and the Secretary of Agriculture to assume permanent control over the entire Alaska water column for compliance with ANILCA.

SENATOR KERTTULA:

Senator Sturgelewski, then Senator Adams.

SENATOR STURGELEWSKI:

Yes, Mr. Chairman. I just -- I don't know if this has been made available to anybody. But on the Federal Register published in June 26, 1991, it does state in the Kuskokwim area federal subsistence regulations for the subsistence harvest fish are in effect for all waters on Nunavak Island and within a mile of all the shorelines -- waters of the old Kuskokwim Wildlife Refuge. It seems to me that this is just a time bomb out there. If I were a commercial fisherman, I'd be scared to death if this issue was not resolved. And I would hope that -- you say that pleadings have not yet been made by the state in this case? In the case that you brought against the Secretary of Interior?

MR. NELSON:

To my knowledge, they have not yet. To a certain extent the issue has already been briefed. Well, it doesn't match exactly the facts. The issue of federal jurisdiction over navigable waters in the state has been briefed and is now awaiting decision from federal district court on the Katie John case.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Mr. Chairman, this is very important that we need to ask the Department of Interior. But the question is, how does the Governor's bill solve the federal court oversight? And personally, I say, it doesn't do that. And basically, what I'd like to see the easiest way to solve it is with a constitutional amendment. And the second approach, the other route this is what you would attempt -- this is the second alternative is change ANILCA. Mr. Chairman, we are only getting this administration's side of this particular problem. I would also like to interject that there is the right side and perhaps have an AFN attorney up there debating the issue because we are being misled by this particular approach. When we have a one-sided ...

SENATOR KERTTULA:

I don't want to sit like a court. I'd like to have this played out. Senator Hoffman has requested that we also have an AFN attorney available for a presentation -- and I will do that. That means there will be less testimony from the public, because there's is only so much you can take. But we will do that. And I think what I tried to do here and what we collectively tried to do is present the administration's side on the legislation, on the program and then we brought in from the Attorney General's representative. Then we brought in the AFN for it's original presentation and redirect. We'll do the same thing now, at the sufferance of the committee. I think that's probably the wisest approach.

SENATOR ADAMS:

Can we hear the answer again, how does the Governor's bill solve the federal court oversight? In real language please. This particular bill that I have before me.

MR. NELSON:

Well, right now federal court oversight is limited to federal public lands. The Governor's bill -- our best estimate is that it would not bring the state into compliance with ANILCA without -- ANILCA amendment that's the knowledge by most people who have looked at it. But on the other hand, a constitutional amendment would not solve the federal oversight problem. If you define federal oversight problem by federal court decisions on lands all through the state on detailed decisions about subsistence.

SENATOR KERTTULA:

Does anybody want to question this point only, now? First.

SENATOR ELIASON:

That point ...

SENATOR KERTTULA:

President of the Senate, then Senator -- I'm going to try to go, incidentally, before I start. If somebody hasn't asked a question yet then I'll recognize them in advance. Senator Eliason, then Senator Hoffman, then Senator Halford.

SENATOR ELIASON:

Let's pursue to this point further. Let's turn that question around a little and I think you already answered it by amending the constitution, that does not remove federal oversight? Correct? The only way you're going to remove federal oversight is by changing ANILCA. Is that correct?

MR. NELSON:

That's correct.

SENATOR ELIASON:

Okay.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

Federal oversight is viewed differently by different people.

I don't see it as a problem. I see it as the average where people of the state, their rights to subsistence are being protected. We stated earlier that it was put there because the federal government felt the state of Alaska was not adequately providing for the subsistence needs of the people of this state. And I would say that that is why the federal oversight is there and for that matter, that is why the Native people have been going to court because this state has not been providing for subsistence. And the Native people have continually won on the merits of their rights for subsistence. And that is why, I believe, the federal government put the oversight there and I would say, that that is good and that oversight should continue to stay there for the protection of the subsistence needs of the people.

SENATOR KERTTULA:

Senator Halford. Do you wish to comment?

MR. CAMPBELL:

Mr. Chairman.

SENATOR KERTTULA:

And I don't want a lot.

MR. CAMPBELL:

No, I was just going to make sure the senators are aware that we also have with us here today, Paul Lenzini. Paul is under contract to the Department of Law. He's been under a long term contract. His entire career is directly related to fish and game resources, state versus federal throughout the entire United States. He is available also for any questions on this issue.

SENATOR KERTTULA:

Do you wish to make a statement now?

MR. PAUL LENZINI, ATTORNEY:

I would like to add just one thing, Mr. Chairman. That one of the problems with federal oversight ...

SENATOR ADAMS:

For the record, who is he?

MR. LENZINI:

Paul Lenzini.

SENATOR KERTTULA:

Excuse me, and thank you, Senator Adams.

MR. LENZINI:

Senator Adams, one of the problems.

MR. CAMPBELL:

Perhaps it would be useful for Senator Adams if you gave a brief background on yourself.

MR. LENZINI:

Senator, I have represented the 50 state fish and game agencies since about 1967. I have litigated in defense of recreational hunting and fish and wildlife management in almost all the circuits of United States -- federal circuits. And in many states, I have represented the states in the Supreme Court in behalf of state authority.

One of the problems with federal oversight in section 807, is that the statute delegates no authority to the State of Alaska to manage its fish and wildlife on the public lands. What it says is that if the state will manage in a certain way, the federal government will stay it's hand. The Ninth Circuit has ruled that when the state is brought before the federal court and was brought before the federal court, the decisions of the state Boards were not entitled to any particular deference. Federal agencies when they make decisions and issue regulations, have for the last nearly two hundred years, since an early case of Supreme Court written by Chief Justice Marshall in 1810 have been entitled to the presumption of regularity or deference as they call it. Which means that an agency need not continually defend itself on the basis of a de novo [ph] review from the scratch of the decisions it made. One of the problems is that the way 807 is set up, the state is entitled to no deference. And it has become kind of an administrative meat grinder through which its had to journey.

SENATOR KERTTULA:

You have the floor, Senator Halford. You were seeking the floor.

SENATOR HALFORD:

I'm trying to come to some conclusions as to whether this bill does not bring back the federal oversight through the court system of state lands or private lands in Alaska. However, a constitutional amendment without a change in ANILCA would, in fact, bring back all state decisions on state lands and waters to direct access to the federal court. Is that the situation?

MR. NELSON:

That's correct.

SENATOR HALFORD:

Thank you.

SENATOR KERTTULA:

If there are no -- yes, Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chair. And I don't know which one of the three of you can answer this here. What is the likelihood that ANILCA could be changed without a consensus of the state?

MR. NELSON:

I really am not in a position to help.

MR. CAMPBELL:

Mr. Chairman, Senator Zharoff. We do not anticipate that ANILCA is going to be changed without a consensus in this state. But one of the things that we do anticipate is that if people lived with the system of state management on almost all waters and state management for game on all the state and private lands, under this bill, we feel that people are very quickly going to find out that state management is a lot more responsive to their needs. In the end, more protective of subsistence as well as hunting, sports fishing and commercial fishing. It's been the federal system. And we feel that that consensus will develop. We are not anticipating forcing that upon anyone.

SENATOR KERTTULA:

Senator Duncan, has a question. Were you through, Senator Zharoff? Please proceed.

SENATOR ZHAROFF:

Well, I'm just trying to think then. How do you develop the

consensus? What we're trying to do right now or I should say what the Governor's trying to do right now is to cram his bill through the Legislature to impose his views or his objectives here onto the subsistence users of the state. And you expect them, in a short period of time, medium period of time, long period of time, to embrace the idea and say we concur that there ought to be changes in ANILCA and that we want those changes now.

MR. CAMPBELL:

Mr. Chairman, Senator Zharoff, what we are trying to do with this bill is fix the desperate problems we are going to be in in our own management of fish and game because of a desperately flawed state law. That is the main purpose of this bill right now and the urgency in passing this bill right now. The only problems we have right here in our own state law. In a longer term issue though of compliance there are two possible ways that they can be reached. One I mentioned is simply people live with this for awhile. And I am convinced that people are going to find out, for instance at a village level, with the exception of having better bag limits and better seasons and things like that, this bill will be totally transparent. And they will find that federal management is not transparent a bit, but very intrusive.

The other way if you so choose, and we discussed this for a long time coming up to this issue, is put an issue on the ballot that combines some form of constitutional amendment tied by a effective date to changes in ANILCA, to remove the issue of judicial enforcement and to state that our bill is in compliance. Not in any way to reduce the preference for subsistence. We could put that in. And we proposed that. And what we were told by the same folks who said let the people vote on the constitutional amendment, was, no, they did not want the people to vote - excuse me - on such an effective date. I think that if such an issue were put on the ballot, combined, then I think there would be overwhelming support. I want to make a point. I'm not advocating that from the Department ...

[tape ends midspeech].

Tape 92-9

Side B

[Tape begins midspeech].

MR. CAMPBELL:

... from the point of view of the administration.

SENATOR KERTTULA:

Senator Zharoff, are you [indisc. - cough] -- to the extent possible, I'd like to debate between the legal counsel who's here for a limited time and if it's necessary, of course, we'll have others that studied the bill, like Mr. Campbell, participate.

SENATOR ZHAROFF:

Mr. Chairman, I guess I'm ...

SENATOR KERTTULA:

I'm not speaking to you. I'm speaking to the group up front.

SENATOR ZHAROFF:

I guess I'm still not convinced here that we're going to take a look at some sort of short term solution here and Mr. Lenzini can may have his response in his professional opinion [indisc.] based on his background. What is the short term action there that the Legislature can take now that puts us into compliance? I think the same thing as Senator Adams, that the only thing that really puts us into compliance within our own statutes is a constitutional amendment to our constitution that recognizes subsistence as a way of life here to comply with ANILCA.

MR. LENZINI:

Senator, I think -- the Advisory Council bill goes a very long way to solve an existing problem that you have in state management. It does not go all the way. There's no doubt about that. There's more to be done. But the fact you can't [indisc.] ball of wax lacks immediately it seems to be not to [indisc.] against trying to get a good chunk of it now.

SENATOR KERTTULA:

Senator Duncan.

SENATOR DUNCAN:

Mr. Chairman. It seems to me that we've done a good job here

of confusing the issue of management versus oversight. What we really need to do is separate those issues so they are separate issues and one question is -- the question of management is, do you want federal management of our fishery or do you want state management of our fishery? State Board of Fisheries managing our fisheries or do we want federal management? Quite obviously the Governor's bill does not resolve that problem. The Governor's bill does not provide for state management. I think the Governor's Office has recognized that. It does not provide for state management. Nor does the Governor's bill resolve the problem of federal oversight. It doesn't do either one of those two things. What will resolve the problem of federal versus state management is a constitutional amendment. That will resolve the management problem. If we come into compliance with ANILCA with a constitutional amendment we will then have state management. You still have the federal oversight though, that you're now talking about. But that's different than management. You still have federal oversight problems and if you want to solve your oversight. You're suggesting the only way to resolve the federal oversight problem is to amend ANILCA, that's what you're really after -- if that's what you truly want, you're at the wrong table. You should be talking to the feds. They're the ones who can amend ANILCA, not us. What we're trying to do is to avoid federal management. And that's what your first step should be is to avoid federal management of our fisheries and that requires either amend ANILCA or we go somewhere else to do that. Or it requires a constitutional amendment which should be before us. So let's don't confuse the management and oversight. They are two different -- there are differences here. Management versus oversight. The Governor's bill does not resolve the oversight problem. The way, as I understand it, the oversight problems you go get ANILCA amended. I'm not recommending that. But that's if the Governor's office wants to do, that's where you should be.

SENATOR KERTULLA:

[Indisc.] Does legal counsel wish to respond? I'm not trying

to blindfold you, but we want to hear from them and in time we'll be hearing from ...

MR. NELSON:

The only thing I would say, I guess, is I think that information on this is in response to questions from the members of the Senate here and I'm not here to push any approach. I've been responding to questions and I think accurately to them.

SENATOR KERTTULA:

I'm satisfied that you are. I think the committee is. And we'll walk any other federal questions that are underway, too. Senator Duncan has the floor.

SENATOR DUNCAN:

Mr. Chairman. I think it's important to differentiate between management versus oversight. Because you've gotten that confusion in the discussion. Go on to the question of managing, which is really the short term question, to the question of oversight. Maybe we didn't answer the question. That's where we've evolved to. All of the sudden start talking about oversight and I think it's fair to admit that Mr. Campbell or Mr. Nelson or Mr. Utermohle but the Governor's bill doesn't resolve the oversight question. Correct?

SENATOR KERTTULA:

McKie, do you wish to briefly comment?

MR. CAMPBELL:

Yes, sir, I do. What we have said from the beginning the reason that is vital that this bill pass now, is because of the problems we have with state law. Regardless of what happens with the federal government one way or another, we have a crisis in fish and game management developing with state law that has nothing to do for the moment with the federal government.

The second issue and that is what we are saying is the main reason is vital that this bill pass. The second issue that is being raised is management versus oversight and internally I think I believe that each senator has drawn the distinction about if we make the management decision that paid for them ourselves but

every decision can be appealed through a federal court what the decision is. I do know that in many cases throughout our state system, we have had cases where the lawyers have tried their best to come up with a decision and in the federal courts they've said no, that's not it. Do this instead. To me that's not state management.

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

It's not just a yes or no answer then. Does the Governor's bill resolve the question of federal oversight in the federal courts?

MR. CAMPBELL:

Senator Duncan, we've said, no, it does not from the beginning. We've said [indisc.] state problems and state law.

SENATOR DUNCAN:

How do you resolve -- the Governor's bill resolve the question of federal management of fisheries?

MR. CAMPBELL:

Yes, sir, it does.

SENATOR DUNCAN:

Pardon?

MR. CAMPBELL:

Yes, sir, it does.

SENATOR HALFORD:

How does it do that?

MR. CAMPBELL:

It does that -- we took one half we manage about ninety-eight percent of our fisheries without the federal government coming in and being able to interfere, of people being able to appeal our decisions of our state Board of Fisheries to the federal courts. If we go into simple compliance and do nothing else, at that point, we potentially subject every decision on fisheries to federal court review.

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR DUNCAN:

That's a different story from what I've been hearing for the past few days. I've had people sit before me yesterday state's that the Governor's bill does not bring us into compliance. It does not resolve the problem of federal management and that there are two ways of coming into compliance with ANILCA. One a constitutional amendment which gives the rural preference for our state constitution. Or secondly to amend ANILCA. And this Governor's bill does neither.

MR. CAMPBELL:

Mr. Chairman, if I may, briefly, and I'll try to be very clear about this. The reason and what I say about this bill it prefers state management fisheries is if we are not in compliance with ANILCA, the federal courts do not have the right to come in and change decisions. If we were to simply pass a constitutional amendment in the statutes that put us into compliance with ANILCA, without other changes, at that point it makes every fisheries decision that has anything to do with subsistence potentially appealable to a federal court. So the distinction that I am making is by being out of compliance Alaska fisheries are to a much greater extent right now, free from federal court interference.

SENATOR KERTTULA:

I'm under rules here so those that haven't spoken. Now Senator Halford -- that's just a brief interject. I'll allow that this one time. But then Uehling, Taylor and Cotten.

UNIDENTIFIED SPEAKER:

[Indisc.] when in fact the court is setting seasons, bag limits, methods and means. I mean is it -- what is that but management? I mean the choice seems to be management by federal judge. He's probably less informed than a federal agency which we may disagree with but at least have a biological, data base and everything else from which they're dealing. It seems like we don't have a choice. At least the bill doesn't get us back into giving state land and state waters over to federal oversight. And

federal oversight in this state by the cases we have in front of us have been exercised as federal management with [indisc.].

SENATOR KERTTULA:

Senator Uehling.

SENATOR UEHLING:

Thank you, Mr. Chairman. I'm trying to just kind of pursue the long question as we've been going along here. I guess what I -- McKie, did you want to respond to that?

MR. CAMPBELL:

Yes, sir, I was just going to ...

SENATOR UEHLING:

Well, I was just trying to see where you go from here. Everybody keeps saying well this is one first step going in that direction. What I'd like to do is get some input there from Mr. Lenzini and how the interface is going to be with the federal government once this is tried out as a trial balloon. Where does it go from there? You kept talking about an administrative review and that's kind of the thing that we're up against as we go down this road. What are the chances on this being able to be sustained or are we just -- I mean how much further along down the road does this really get us?

MR. LENZINI:

Senator, I think it's certainly true that ANILCA will not be amended without consensus in the state. But I think if this bill were to pass it seems to me -- and I've seen a number of bills -- it seems to me this is a very conscientious bill. This is a very earnest effort to try and tailor something to the end in view. Now the end in view for this Legislature in the bill, is to identify and protect the subsistence way of life. That's one sentence and that's the whole objective. And the rest of the bill is designed to establish the means to the end. Now in the case of ANILCA, the means to the end, the end is the same. But the means to the end is very, very blunt instrument. And the Supreme Court of Alaska said, it was not closely related to the objective of the bill. It seems to me, Senator, that this bill is very

conscientious and a very closely tailored attempt to fit the means to the end. I think if this were to sit side by side with Title 8 of ANILCA it would soon become evident to the members of Congress if they thought much about it that this is a far superior effort to do the job. Now that doesn't mean that just because it's superior, it's going to prevail. It's going to take some time do. But I think this is clearly a superior effort.

SENATOR UEHLING:

So, Mr. Chairman, what you're saying is that in essence if this bill passes, it's really a good faith effort as far as the state trying to get it's own house in order as far as their management plans. And even though it doesn't comply by the letter of the law exactly, at least it's one step in that direction. But you still foresee problems going down further with federal Department of Interior?

MR. LENZINI:

I think there has to be some experience under it. But the fact is that the State of Alaska through it's Legislature will have established in law, in statutory law -- in 1982 or '81 when Secretary Watt certified the state as being in compliance with ANILCA, it was necessary to patch the thing up a little bit with opinion that turned out to be off the mark. But this is a statute. This is a very precise statute. Many of the principle elements in ANILCA, customary and traditional, customary trade, opportunity for subsistence way of life, are not defined. They are often left to courts. This bill identifies these principle elements.

SENATOR KERTTULA:

Senator Taylor has been seeking the floor. Thank you.

UNIDENTIFIED SPEAKER:

Do you pass?

SENATOR TAYLOR:

Yes. My question has been asked and answered. Thank you very much.

SENATOR KERTTULA:

Thank you very much. Then Senator Cotten.

SENATOR COTTEN:

Thanks for your indulgence, Mr. Chairman. I'm trying to understand -- 807 says that a civil action filed against the state, the court shall provide relief by requiring the state to submit regs that satisfy the requirements of section 804. Right? 804 is where the subsistence uses are accorded priority on public lands. And then we define subsistence uses to say that that's the rural Alaska residents. How -- I'm trying to understand the effect then of the -- when you suggest that the constitutional amendment should we pass one, would then give the courts the ability to manage or have oversight depending on how you want to do it on state lands as well? When do state lands become public lands? I don't understand that transition. That was your logic, right? If we passed a constitutional amendment, didn't change ANILCA, the courts would then have direct oversight on state lands. And I don't understand how you get there from there.

MR. NELSON:

The way ANILCA works is -- you start at 805 (d) of ANILCA which says that [indisc.] implement subsection (a), (b), and (c) of these sections if within one year from the date of enactment of this act, the state enacts and implements -- and there's the key thing, I think, laws of general applicability which are consistent with and which provide for the definition preference and participation specified in these other sections. So in order to be in compliance with ANILCA, we have to provide a statutory scheme that's consistent with those preferences spelled out in ANILCA. That apply statewide, not just on federal public lands.

SENATOR COTTEN:

Well, that puts us in compliance. I understand that.

MR. NELSON:

Right, and then once we're in compliance, if you are dissatisfied with a subsistence regulation that impacts you and you don't think that it lives up to the ANILCA preference or the

state law the way it should be interpreted, you sue in federal district court. The federal district court looks at 807 and says I have the power to order the state upon this person's claim, yours, to ...

SENATOR COTTEN:

To satisfy 804.

MR. NELSON:

To provide regulations that I think satisfy 804. And if you disagree with that then you appeal to the Ninth Circuit. Very rarely would it ever go beyond the Ninth Circuit. The Ninth circuit is usually the final determines in what satisfies ANILCA.

SENATOR COTTEN:

I still don't understand how they get the state lands on that. But I won't take the question here, but I'd like maybe give me one more ...

MR. NELSON:

[Indisc.] do it, because that phrase, "laws of general applicability", in order to comply with ANILCA we don't just have to provide that same preference that ANILCA provides. ANILCA just says there's a preference for subsistence taken by rural residents on federal public lands in Alaska. And then it goes on to say, if we won't enact that management, that scheme with a preference, if the state enacts the law and not only provides that same preference on federal public lands, but on a law that applies to every piece of land in the state. "The laws general applicability", that's what it means. It means it has to apply generally throughout the state. So ANILCA was, in effect, a tool to get a federal preference spread throughout the state. Congress may not have generally or chose not to directly require preference on lands throughout the state, but it held out a carrot and said, but if you do it state, then we'll -- you can also manage federal public lands as well as state and private land.

SENATOR KERTTULA:

Senator -- do you have ...

SENATOR COTTEN:

I'll ...

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

I just -- I'd like to pursue what Senator Duncan was talking about a moment ago. As I recall, he said the only way to solve this issue is a constitutional amendment. In a way, I agree. Because we are living in Southeast Alaska surrounded by federal lands. So matter what we do here today to the statutes, we're not going to be able to participate in hunting and fishing and those types -- hunting on those federal lands except for some private lands here in Southeastern. However, it seems to me that if, in fact, we say, okay, the only way to solve this is to pass a constitutional amendment, that in effect -- and correct or not when I say that, that in effect, will eliminate those people who live here in Juneau who use subsistence as a livelihood, those people who live in my community in Sitka who use subsistence as a livelihood, and those people living in Ketchikan who use subsistence as a livelihood would be prohibited from that subsistence use. Is that correct? [indisc.] another factor involved and that is the criteria to set up so they can be allowed a part of that process which I believe contained in this bill.

MR. NELSON:

It is.

SENATOR ELIASON:

But that's a constitution only. We're not doing anything for the people in my community who live in Southeast under subsistence. We're not doing anything for people in Juneau who live here and subside in Southeast or Ketchikan unless we take another step. And that step could well be contained in the legislation before us. Is that right?

MR. NELSON:

That's right. That's a constitutional amendment would be a solution. The question is, is it the solution you want to live with? [indisc. - simult. speech].

SENATOR KERTTULA:

The next person seeking -- Halford, Adams, Uehling is the way it is. Now if there's any person that hasn't spoken I'm directed to interject and recognize you. Senator Halford.

SENATOR HALFORD:

Mr. Chairman, just for the Washington Council [indisc.] state attorney for Mr. Campbell. Is it in the state's best interest to wholly and technically comply today with an unamended ANILCA?

MR. LENZINI:

No, sir, I don't think it is. Do you want the reasons why?

SENATOR HALFORD:

I think we've gone through the ...

MR. LENZINI:

My answer sir, is no, because it's only a very partial solution to a larger problem. And to enact a statute that you have before you addresses a very large portion of the problem. It doesn't address the whole problem [indisc.]. But if you -- the constitutional amendment without more simply brings you under the federal yoke.

SENATOR HALFORD:

I'd like to answer. Paul [indisc.].

MR. NELSON:

Okay. I've going to have to be off a little bit because I don't speak for the administration. I'm a lawyer. I advise on legal issues. From a litigator's perspective - a person who has been involved in subsistence lawsuits for quite awhile and felt some frustration and sometimes probably deservedly, but frustration at dealing with the federal district courts, I would much prefer to see these issues being handled by state courts who are responsive to the citizens of the state. Who stand for confirmation periodically in the state rather than by ending up being decided by judges from California and Arizona in the Ninth Circuit.

MR. CAMPBELL:

Senator, Mr. Chairman. I do not think it is in the state's

best interest, and I would like to talk about two reasons why I feel that is not in the best interest to simply go into compliance without additional change.

One is the situation we're in right now, the state controls and will continue to control the vast majority of our fish and game resources. And I say that because fisheries in terms of poundage and value and economic importance to the state without in any way downplaying the importance of game. But has a tremendous effect on this state. And the fisheries we virtually control without federal oversight [indisc.] such a very, very limited extent. The game - we still control about slightly less than half of the game. The same thing without federal involvement. So what we would be doing is saying for that limited portion to gain management in name of that limited portion the feds do control, we are going to give up management in actual final result on all our resources.

The second reason I think it is not in the state's best interests is the problems over and over have come up from ANILCA, that I think -- I don't think any of these federal judges have had equal intent. But they are faced with interpretations based on a whole series of key phrases in ANILCA that simply have no definitions. In ANILCA, for instance, I'll just use the problems we've had in customary trade. In ANILCA, there is no definition of "customary trade". That's something we have to provide for them. We talked about the problems and have come up with that. I think its much better to have a state law where we have good working definitions that the policy making bodies of this state, the Senate and the House, have decided this is what makes sense for Alaska and protects subsistence and is not going to result in strange rulings I think none of us would agree with. And so that's the second reason.

SENATOR KERTTULA:

Senator Adams.

SENATOR HALFORD:

I had one more question. This goes back to the cases that

you have a summary of before us. I wonder if and I guess [indisc.] Mr. Nelson, but could you just give us a quick list of which cases have been dismissed or effectively made inactive or moot because of the McDowell case. You got a long list that was set out I think the fourteenth. But a number of these have simply been made moot or dismissed because of McDowell case. and I think that's an illustration of how many times we got out of court when we, in fact, went out of compliance with ANILCA.

MR. NELSON:

Senator, I'm sorry. I don't have that at my fingertips. I've been working off the cases that are either still pending or recently dismissed. There are a number of them. I know some of them already. The Kluti-kaah decision at federal court was thrust of that case I think was dismissed. The only issue that's left now, there is the impact that off federal public land -- activity might have off federal public land as subsistence is still alive. But generally, it's a lot narrower issue because of that. The Bobby decision would have been. The Morry decision that was in state court anyway. The John v State would have been except for the issue of the navigable waters and the definition of federal public lands. Kitka v State was originally brought -- was also brought in federal district court but that was dismissed as I understand it. Clevlika [ph] IRA Council versus State would not have happened. I think the Dog Lake moose case. The Thunder Strait [ph] Advisory Committee case was originally brought I believe in federal court. That would have -- that was dismissed and refiled in state court.

SENATOR HALFORD:

Mr. Chairman, I think that illustrates [indisc.] go through a list of a huge number of cases that have made moot by not being in compliance other than [indisc.] question.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Thank you. But doesn't section 807 of ANILCA specifically

limit judicial relief to directing the Alaska Board of Fisheries and the Board of Game to develop new regulations?

MR. NELSON:

The new regulations that, in effect, well that finally that district court are satisfied with that it approves, right.

UNIDENTIFIED SPEAKER:

That's correct.

MR. NELSON:

Although it's also gives it authority to issue preliminary injunctive relief -- preliminary and other kind of relief, too. And the district court has ordered hunts and fisheries to take place under guidelines that it approves of.

SENATOR ADAMS:

What federal court decision has ever had a judge setting up a hunting or fishing season?

MR. NELSON:

The Kwethluk council - Kwethluk IRA council for example, was exactly that. The Kenaitze decision was, in effect, that requiring that. The Bobby case was -- in effect, what it boils down to is that the power of the court is you go back and work on those regulations until you get one that I approve of.

SENATOR ADAMS:

Somebody ...

MR. NELSON:

They have that power in every case. They've done it in several.

SENATOR ADAMS:

Someone used the word "tailor." Did you help tailor this bill so it would not comply with ANILCA?

MR. NELSON:

I did not. Me, personally? No, I did not.

SENATOR KERTTULA:

We have Senator Uehling seeking the floor. Senator Taylor, will you take the floor.

SENATOR TAYLOR:

[Indisc.].

SENATOR KERTTULA:

Thanks. Senator Uehling.

SENATOR UEHLING:

Yesterday we got a line by line, paragraph by paragraph sectional analysis of the bill which allowed me to understand probably a lot more than I have in the past on subsistence issues. And I was wondering in this Citizen's Advisory -- Subsistence Advisory Committee, you know, obviously there's a lot of compromise and a lot of work [indisc. - paper shuffling] if you had a perfect [indisc.] or perfect kind of bill where do you feel the greatest weaknesses in this bill are and how would you make it better if you could?

MR. NELSON:

You're going get me fired. I'm an enforcement attorney and I like everything to be more enforceable. That's just my [indisc.] I guess. So you know I would like all the standards to be higher and more objective and that's my personal thing. There was -- and those issues -- I've raised issues and the Council didn't agree with me, frankly.

SENATOR UEHLING:

Sort of a second question, I think, Mr. Chairman. But when I went through the bill yesterday we went through that sort of elaborate point system. Do you feel that would be too cumbersome, too bureaucratic for that to be administered on people? To me it seemed very complicated [indisc.] one of many things. Could you comment on that?

MR. NELSON:

No, I don't think it's too cumbersome. I think it could be administered. I think you're going to find, as I told the Council, that the challenges to rural residents are going to be relatively few in number because of the state resources and the difficulty that we'll have challenging individuals. But I think that's -- I think it's a system that can be handled without too much of a burden. It's going to be -- the first year too is going

to be difficult. Any system is going to be difficult when you get down to individual qualifications. I suspect that in a year or two you're going to want it fine tuned so they -- we're going to find problems with certain factors. I suspect that will be true even if it was written exactly as I wanted it to be written.

SENATOR UEHLING:

Okay. Thank you.

SENATOR KERTTULA:

Senator Sturgelewski seeks the floor.

SENATOR STURGELEWSKI:

Yeah, Mr. Chairman, I realize I've spoken before.

SENATOR KERTTULA:

That's okay.

SENATOR STURGELEWSKI:

What's very difficult now is to keep from all the [indisc.] in saying you know, I'm right here and I'm not going to go this way or that. But I personally see a way I feel that we could bring about a solution here. I think the seeds of it are there if we just kind of keep cool and keep looking. I was impressed yesterday with a number of things. I was impressed with the bill. And I have to admit it's the first time I really sat down and took a look but I think it does answer a lot of questions. I was impressed with the testimony of many people, but including the Outdoor Council. Because I think people have come a long way in kind of focusing on what subsistence is.

So we have the bill here. And it may be whatever. There are many of us that have favored for along time a constitutional amendment but I think it's also become obvious that we do have some flaws and we need to go -- and I'd like to go to that next step. And I've been trying to listen very carefully. And it seems like there's five areas that may need attention. And if there are more, just for purpose of discussion I would like to have some response.

The question of definition seems to be very critical and one definition that is lacking is reasonable opportunity. The

Governor's bills speaks to that in page eight, line twenty. We don't need to go into that now. But I'm just going to make a statement and then a question. It also speaks to customary and tradition on page ten, line fifteen. And to customary trade, which has been a big problem on page ten, line nineteen. Now I believe I'm correct that instead of defining rural, it sets up another hierarchy and includes access to subsistence based on some other standards. And I guess one question I would have, if we had a constitutional amendment and that constitutional amendment would lead us toward acceptance of, in a sense, new definition of what subsistence is. What would that require in terms of amendments to ANILCA? In a way it seems to me an expansion of rural as opposed to -- you know, I don't know if that would need a new definition, but certainly some expansion if we were to meet what maybe a new consensus that could emerge from the state. So that's a question.

The second question would be on some change in the method of appeals so that again, the federal court would be available to compliance but not to get into the regulatory method and the carrying out. So that I see is an area. The basic question I ask is, are there other areas that would have to be amended if we could develop a package, if we could get consensus, if we could move ahead? The reason I think it's necessary to try to keep an open mind and not just find the thing and say, this is where I am. Is that I see just in the court cases, some real problems. I mean we'll fight the Glacier Bay and we might fight off the Kuskokwim waters and all the rest of it. But I see a peril there for other users of the resource. It's an ongoing firing line. And I appreciate the administration saying, golly, you know, this is a first step. And it is. But it's that second step and how we get there that worries me. Because at this very tenuous -- at this time, I think there's some real opportunity. What additional things have to be changed in order for us to fix the whole problem?

MR. CAMPBELL:

Senator Sturgelewski, Mr. Chairman, We believe that there are

two specific amendments in ANILCA which would fix the whole problem. The first would be an amendment to section 805 (d) of ANILCA. Right now that section starts out with some old outdated language that they put in there where -- and they said, "the Secretary shall not implement subsections (a), (b), and (c) of this section within one year of the date of the enactment of this act. The state could act some implements." And then it goes on to talk about laws of general applicability which are consistent, et cetera. And what we believe is you can simply delete the section - the outdated language I think everyone would agree that no longer need it, that says, "Within one year of passage of this act". And then instead insert simply, "Alaska session law xx" Whatever it's going to be, you know, whatever this bill number winds up and then continue on with the existing language. Which says, "is a law [indisc.]" Change the verb to "is a law of general applicability which is consistent with and will provide for the definition preference" et cetera. Also in that section, you would put the sentence that said, "If your Legislature -- or excuse me, if the Alaska Session Law xx is amended, the Secretary then shall examine amended state law for compliance with the Title." And if the Secretary finds that we are not in compliance, then he implements the ANILCA section. What that would do is it would put -- allow our state law to comply. And I mentioned yesterday that we tried to keep as close as possible -- for instance, we used the same population breaks, et cetera, that the feds used. We're very, very close but we are not exactly in compliance with the letter of the law. But this then would bless the state's use of the various definitions and other terms.

The second thing that we could do is amend section 807 initial compliance, either to remove state actions from review or to set up some sort of graduated system with deference to state agencies. I'd like to turn it over to Mr. Lenzini, or Mr. Nelson.

MR. LENZINI:

Concerning 807, every federal agency unless Congress specifically says not, is entitled to running room, some

discretion. And its called deference. This is not accorded to the State of Alaska in carrying out the subsistence requirements. So if 807 were amended simply to treat the state decisions like federal decisions that that would be extremely [indisc.] helpful.

MR. NELSON:

It's interesting, if you look at the Bobby decision, for example, they're testing the procedural validity of a state Board regulation. The cases cited by the federal district court are not cases that deal with the state administrative procedure act. The cases deal with the federal administrative procedure act. That seems to be very consistent. They don't recognize -- they fail to recognize and test the state regulations under the state rules but go to the federal cases and proceed regulatory validity as opposed to looking at state law.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR STURGELEWSKI:

I would hope that we might -- I'll pursue this further. There have been questions raised about the constitutional issue. And I'm wondering, Mr. Campbell, if those amendments were made -- but you also see a constitutional amendment that could give subsistence the highest priority as being a useful thing to have, plus the amendments to ANILCA. Is that not correct?

MR. CAMPBELL:

Senator Sturgelewski, Mr. Chairman. What we have said is that one way to demonstrate a consensus within the state for a desire to an amendment to ANILCA is to include the effect within the effective date of the constitutional amendment. However, I would like to clarify that we have very grave concerns -- I want to make a point. The Governor has no philosophical trouble with the subsistence having a higher priority. That's what our bill does very plainly. Some very serious legal concerns have been raised about the effect of giving subsistence a priority above

other natural resources in the constitution. Because the courts have to construct that differently and more strictly. I'd like to defer to our attorney on [indisc.] on that issue. It matters tremendously what it says and how its drafted.

SENATOR KERTTULA:

We have legal counsel for any reason necessary to committee but also to report on cases and what is going on. Do you wish to respond to that door that was opened, by the Senator responded in part by McKie at this moment or not? Do you have some more to say about that.

MR. NELSON:

I guess I would wait for specific questions.

SENATOR STURGELEWSKI:

Mr. Chairman, that's fine at this time.

SENATOR KERTTULA:

Okay. Senator Duncan was seeking the floor and, of course, I'm not going to attempt to bridle anybody to important issues, but I'm going to try to move to further reports by the counsel. You have the floor, Senator Duncan.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I want to go back to where I was before about the difference between federal management and federal oversight and reemphasize that there is a difference there and that the Governor's bill does not resolve the problem of federal management nor federal oversight, either one. We should not confuse the difference between those two issues. But then I want to respond to Senator Eliason's comment and I suggested that the way to really resolve this issue is to bring us into compliance with ANILCA by a constitutional amendment -- bring us into compliance - that resolves the federal management problem. It doesn't resolve the oversight problem because you need an amendment to ANILCA to agree with that. Senator Eliason then said but if you do a constitutional amendment that brings us into compliance with ANILCA, that gives a rural preference which means all the residents of Juneau who, of course, are subsistence users,

the residents of Juneau, Ketchikan and Sitka would lose that right. I just wanted to pursue that a little bit more. I disagree with that blanket statement. I think that by bringing us into compliance with ANILCA would do would bring management to the state and allow the Board of Fish to continue to allow subsistence use by [indisc. - road noise] passed legislation [indisc.] but to continue to allow subsistence use by residents of Juneau, Ketchikan, and Sitka just as they now are. But if there ever became a real crunch as to how much was available for subsistence, the rural folks would have priority and at that point urban people may be cut out. It would not just blanket prohibition against continued use of the resources for subsistence purposes by the urban residents. In fact right now, the urban residents who are using them subsistence fisheries for [indisc.]. I want your response to that. I don't believe bringing us into compliance with ANILCA with a rural preference just means that Juneau, Ketchikan and Sitka are automatically out - their residents are automatically out. The Board of fish can still allow subsistence use by those individuals. You may have to pass statutes, they have criteria that can still be allowed, but when it comes crunch time, preference goes to rural residents. And is that correct?

MR. NELSON:

I think your last statement maybe clarified it a little bit.

SENATOR DUNCAN:

Did what?

MR. NELSON:

Clarified it a little bit. If you just had a constitutional amendment that said rural preference is okay. We plug back into the '86 bill, subsistence statute -- at that point, Sitka, Juneau, Ketchikan, Fairbanks, Anchorage residents would still be excluded. You would then have to pass new legislation not Board regulation. Because they couldn't do it. You'd have to pass new legislation allowing a tiered, it sounds like a graduated preference.

SENATOR DUNCAN:

Sure, and I think that's the point of this whole discussion is that what we really should be doing is trying to resolve the issue completely -- constitutional amendment, legislation that would set criteria. I think, by the way, if you haven't gotten to that yet, I think the bill's been introduced by Senator Adams does do that and will allow the Board of fish the means to set criteria to allow urban residents who are presently using subsistence to continue to do that. I just wanted to make that clear. Senator Eliason's statement left us kind of hanging. I think that the implication that all Juneau residents who are using subsistence right now atomically are going to be out the door if we pass the constitutional amendment. Not true if we pass legislation that sets criteria.

SENATOR ELIASON:

The point I was trying to bring out the fact that Senator Duncan said the fact the only solution is to pass a constitutional amendment period. I said, no, that's not necessarily the full story. You also have to trigger that with something that takes care of my community, and his community and the Ketchikan community. You can't solve it by just a constitutional amendment. That is [indisc. - cough].

SENATOR DUNCAN:

But we can do that and bring us ourselves into compliance with ANILCA. And the only way to bring ourselves in compliance with ANILCA, Senator, is to do the constitutional amendment, pass criteria that goes ahead and protects the subsistence user ...

SENATOR ELIASON:

Yes, in other words, more than a constitutional amendment to solve the problem.

SENATOR DUNCAN:

Right.

SENATOR ELIASON:

That's the point.

SENATOR DUNCAN:

Well, where's it end?

SENATOR ELIASON:

Oh, you didn't say that.

SENATOR DUNCAN:

Well, I did now.

SENATOR KERTTULA:

Is there -- just a moment. Is Senator Duncan's [indisc. - cough] -- are you satisfied, Senator Duncan? I just don't -- we've had a three-four way trip here.

SENATOR DUNCAN:

I didn't mean to get into an argument with Senator Eliason. I'm satisfied that the response is that bringing us into compliance with ANILCA by constitutional amendment that gives a rural preference. If we then give the state the authority to manage the fisheries and they could manage those fisheries to allow urban residents to continue to have subsistence use. That could be done by statutes we pass or any number of regulations. I am satisfied that that's the correct answer that doesn't automatically eliminate [indisc. - cough] individuals.

SENATOR KERTTULA:

Briefly and then Senator Halford wants a response. Then I must recognize Senator Pourchot. He's been long suffering here.

MR. CAMPBELL:

Thank you, sir.

SENATOR KERTTULA:

And he should be recognized right now.

MR. CAMPBELL:

Directly on the point of urban residents -- subsistence by urban residents and ANILCA compliance. As long as rural residents have a preference in the use of fish and game for subsistence over every other resident in this state, then if the state wishes to within the urban areas set up some other ... [tape ends midspeech]

Tape 92-10

Side A

[Tape begins midspeech]

MR. CAMPBELL:

... over all other residents at all times. The second point that I would like to make is the Senator used the term "in the crunch". And I think one of the most common myths that goes around is that the subsistence preference is only a preference in times of shortage or whatever. The subsistence preference exists at all times. In existing state law and our proposed state law. And what is in times of crunch, has unfortunately been interpreted many different ways by a lot of different courts. And I guess, that's just the one point that I would like to make.

SENATOR KERTTULA:

Senator Halford, do you wish to [indisc.] yes. Senator Duncan has the floor and then ...

SENATOR DUNCAN:

I didn't want the implication to be left that I thought that once you have a subsistence priority that didn't always exist. It does. I agree with that. I meant by [indisc.] that if you came to a decision between rural and urban residents, the rural residents would have a preference over urban because [indisc. - cough] constitutional amendment to rural priority. It seems to me with -- if we can bring ourselves into compliance and get the management back, which is the bottom line here. We can pass statutes that will benefit urban residents for subsistence users.

MR. LENZINI:

Mr. Chairman.

SENATOR KERTTULA:

Quickly and then please.

MR. LENZINI:

The final result is still that unless you get an amendment to ANILCA, that scheme is going to be administered by federal judges sitting in California at the appeal level with not very much information or knowledge about the area and the circumstance. That's the other side of the thing is a [indisc.].

SENATOR DUNCAN:

[Indisc.] oversight and management ...

MR. LENZINI:

And they have to apply oversight to management. Opens and closes seasons and they've done the whole thing.

UNIDENTIFIED SPEAKER:

That's right.

MR. CAMPBELL:

Mr. Chairman.

SENATOR KERTTULA:

Do you wish to respond?

MR. CAMPBELL:

Very briefly.

SENATOR KERTTULA:

Yeah.

MR. CAMPBELL:

Would either of you Senators to do sort of debating this question of oversight versus management or whatever in the federal courts, is that we will try to obtain copies -- we will furnish you with copies of the Alexander decision by Judge Kasinski [ph]. And I think what you will find when you read that decision and that's a decision on customary trade, is for whatever reason, that judge devoted a lot more time to making fish puns throughout the entire decision. And there's a lot of good puns. I like puns. They're great. But the whole thing was filled with fish puns and jokes and the decision is terrible for Alaska. And if that's what we want to go under we have that choice.

SENATOR KERTTULA:

Senator Pourchot. Thank you, McKie.

SENATOR POURCHOT:

Thank you, Mr. Chairman [indisc.] is on the issue of constitutional amendment I would hope that after we deal with these pieces of legislation, of course, I assume that at some point we're going to have conversations or look at constitutional amendments and language. And I would just make a couple of observations. First is, in the packets [indisc. - paper shuffling] constitutional amendments and even though need to learn from things in the past, the constitutional amendment that passed

the body two years ago -- passed the Senate, bears rereading. I mean it's a little [indisc.] but the constitutional amendment per se doesn't put us into compliance with ANILCA. But it allows us to do lots of things. And if you reread that paragraph you'll see that it can allow us to do the Governor's bill. It can allow us to do something that maybe the Secretary of Interior says we're in compliance with ANILCA, but it in itself is just the allowance for the Legislature to pass legislation. And we can choose to pass legislation that's in compliance with ANILCA or not. But it's a lot more open and flexible than I think some of the conversations have been directed here.

And also in some response with the administration, it talks about making that a preference to and among Alaska residents in the taking of fish and game for subsistence uses. It didn't talk about DNR land management. It didn't talk about ANWAR oil and gas development. You know, I think it's clear here we're talking about the taking of fish and game. So you know, some of this conversation maybe is a little premature. We do need to have a revisiting of the constitutional language. But I think it's important that even the Governor's bill may not be constitutional. In fact, our legal people say it's not. And a constitutional amendment, even if it doesn't comply -- lead us to compliance with ANILCA, may allow the Governor's bill to be enacted as a constitutional piece of legislation.

SENATOR KERTTULA:

We're going to recess and I'm going to represent -- everybody come back [indisc.] We're going to try and exhaust this. We'll probably have some testimony and questions answered by counsel of AFN. But I want the other counsel to remain here as they have remained here. And then we're going to go on to the body of this bill as quickly as is feasible towards getting amendments, getting this particular bill exhausted. And then proceed from there to other legislation that will be before us. Anyway, we'll recess for about five minutes.

RECESS

11:25 - 11:50 a.m.

[Tape begins midspeech]

SENATOR ZHAROFF:

... resident of the state as a result of those. But there is a memo that was sent to Commissioner Rosier from yourself and Cheri Jacobus and I assume under your opening remarks you listed a number of attorneys that were working on this in behalf of the Governor in the Department of Law. And you listed other attorneys. Is Cheri listed as one of the others?

MR. NELSON:

If I could comment. Cheri, Senator, is the office chief of the Anchorage office of the Attorney General's office. She supervises every section, including the Natural Resources section in Anchorage. She also handles personal litigation dealing with natural resources as part of her own case load. She is my boss two levels up. Liza Gay is my immediate supervisor and Cheri is Liza's supervisor. She is a person, because of her background and strong experience in natural resources law, she consults with us a lot and we consult with her about litigation decisions that we have. She is not one -- because of her job, she doesn't have the ability to handle a lot of litigation cases, but she has some including State v Lujan, that deal with subsistence issues and federal state issues especially. That's where her strength is.

SENATOR ZHAROFF:

Okay. So is she basically involved with the subsistence issue?

MR. NELSON:

Well, not on a day-to-day basis, like the attorneys. She's not handling the litigation and directing the litigation. She's there as a consulting -- yeah, we consult with her. She doesn't -- she did not ...

SENATOR ZHAROFF:

Either she is or she isn't.

MR. NELSON:

It isn't that easy, unfortunately. It isn't that clear cut. She is not a member of the natural resource section. She does not represent the state in subsistence litigation except for to the extent in the State v. Lujan, she's involved. She does not play any part at all in advising the Subsistence Advisory Council where I was involved as the Department of Law representative. She was not consulted about the drafting of the bill, and didn't play a role in that at all. I understood that the Governor had decided that she would not participate with the Subsistence Advisory Council and that did not occur. I never understood that she would not be involved in subsistence litigation as a consultant. Never mind.

SENATOR ZHAROFF:

Then you're taking sole responsibility then for the memo that was written June twelfth then to Commissioner Rosier?

MR. NELSON:

Sole responsibility? No, Cheri helped draft the memo.

SENATOR ZHAROFF:

So then she's involved in subsistence?

MR. NELSON:

Yes, to that extent, she is. As I explained, yes.

SENATOR ZHAROFF:

And the Governor told the people of Bethel that no way would she be involved with subsistence.

MR. NELSON:

That was not my understanding of what he said.

SENATOR ZHAROFF:

People of Bethel seem to have a different idea. I don't have any ...

MR. NELSON:

Let me just say something about Cheri. Cheri is probably the brightest, most hardest working definitely attorney I've ever known. And for us not to talk to her about some of these issues and get advice on how to proceed, would be an absolute waste of an important state resource. I make no apologies for

Cheri or my consulting her.

SENATOR ZHAROFF:

Mr. Chairman, I don't have any problems with the credentials of Ms. Jacobus and her ability to do certain things. I think she's probably a very fine, capable person there to handle any task that confronts here. But I'm looking at an article that's appearing in this morning's Daily News. And I'm looking at the memo on page three which was sent to Commissioner Rosier which says, in addition to the development of other resources, and it says, "There is a risk that a subsistence preference enshrined in the constitution would be interpreted to prohibit or prevent development of other resources, such as logging, mining, oil, et cetera". And this article in the paper goes on through to pretty much substantiate that. And we've had a subsistence law on the books before it was challenged. And I can't remember a time there that it has never [indisc.] these developments. Now this -- there may be an instance or two, but for the most part there, this has basically a scare tactic and it's the smoke and mirrors that's been alluded to by myself and others there about the administration's position on this bill. Other instances there, which I guess there was news on the radio this morning that verified what I said yesterday. There's just this illusion -- there's fear being put out there that a subsistence constitutional amendment is going to bring this state down to its knees. That we're not going to have development. We're not going to have commercial fishing. We're not going to have sport fishing. We're not going to be able to have guided sport fishing operations anymore. And then everything is going to go totally subsistence. That's the impression there that is being portrayed by the Governor to get support for his bill and its doing nothing more than polarizing this state which should be united, not divided.

MR. NELSON:

Would you like me to comment?

SENATOR KERTTULA:

Yes, counsel wishes to comment.

MR. NELSON:

Thank you. I do. The language that you quoted from that memorandum was my language that I wrote. Cheri didn't write that. I wrote that after getting comments from every attorney in our office in Anchorage in the natural resources section who did subsistence litigation. And I found no disagreement with the content of that memorandum among those attorneys.

The other thing is that what we're addressing in that memorandum is a constitutional amendment that enshrines subsistence, in effect, for ever as preferential use of these natural resources. Now, that was not what the 1990 proposed amendments would do. The 1990 amendments that were proposed and were subject to pass by this body, in fact, did not enshrine subsistence as a preference. It authorized the Legislature to allocate to subsistence uses fish and game on the basis of rural residency and criteria. But it did not enshrine subsistence as the preferential use of all fish and game in the state. And it created no constitutional subsistence right. The amendments that we're addressing, as noted in the memo, are different from that. They would create an individual constitutional right to preferential right to subsistence uses of fish and game. And that is the portion of those amendments that we're addressing in that memorandum. Those are not scare tactics. Those are not smoke and mirrors. Those are what we believe to be genuine risk based on our experience defending state actions as part of the Attorney General's office. I was not instructed by anybody in the administration to write that -- to come up with that kind of opinion. We were responding to Commissioner Rosier's concerns and we stand -- I stand behind that completely. I wrote probably ninety percent of that memorandum and Cheri Jacobus also contributed. I really should have included every name of the person that made comments. That would have been only fair. I included Cheri's name because she was my supervisor. And felt I should attribute some of it, to her at least. Give her credit.

for something. But I make no apologies for those opinions in that memorandum and I stand by them.

SENATOR ZHAROFF:

Mr. Chairman.

SENATOR KERTTULA:

Do we have that memorandum?

SENATOR ZHAROFF:

It's in your file. I'm not going to argue with the attorney. I know better than that. But it seems to me there that Cheri is your supervisor twice removed according to what you said before. That you've got a couple others. Well, I don't know why you didn't give credit to another person there that's somewhere in between.

MR. NELSON:

It's because -- I can answer that if you want?

SENATOR ZHAROFF:

[Indisc.] But I think its very noble of you to let her take full responsibility in that particular section of the memorandum here. But regardless though, it still is a memorandum that comes out and hits us at a time there that is very critical for having good positive open unbiased debate on the legislation and other proposed legislation there that are available. Senator Pouchot had brought up the constitutional amendment that was before us a couple years ago that did pass the Senate, did not pass the house. Is there anything wrong with that terminology? And I've also asked the Commissioner of Fish and Game yesterday, give us some language. What is acceptable as a constitutional amendment in terms of language? Can you do that?

MR. NELSON:

For the policy side of it I can't. What that memorandum was doing was advising you about legal concerns, legal risks that we saw -- the impact of that particular language. I think McKie could probably speak for what the administration finds acceptable or not. I don't have that authority.

6
SENATOR ZHAROFF:

Can you give us language as to what would be acceptable or what language could be used for drafting a constitutional amendment that would be acceptable?

MR. NELSON:

In this instance, I don't have the authority to give you that language.

SENATOR ZHAROFF:

[Indisc.].

MR. NELSON:

I could work with you to on that language.

MR. CAMPBELL:

Mr. Chair.

SENATOR KERTTULA:

You can contribute to it with our counsel being lead. Presumably the Governor will say, yes, if we asked him also. You have the floor briefly, again.

MR. CAMPBELL:

Thank you, sir, I can answer that question. And first briefly I'd just like to speak to the timing of the release of this memo. The reason that this memo was released is in the House Judiciary Committee meeting last Wednesday, Representative Gruenberg put in a request to me for the release of all Attorney General's opinions, internal memorandums, whatever on the Subsistence Advisory Council for this issue. [indisc. - cough] as well. And as full response to that request, we furnished this to the House Judiciary Committee. That's why this memo came out, other than that it was simply an internal memo.

The second point is the question on language on constitutional amendments. And I think that I have made plain here that it is the administration's position that there is no legal ground for a constitutional amendment. The least dangerous constitutional amendment language would be the same which would accomplish that task is language that would almost exactly parallel that language in Title 8, section fifteen of

the Alaska Constitution and that is limited entry provision. And what that specific language says is this section does not restrict the power -- excuse me. What that section would say if you simply change the words "fisheries" to "subsistence" and "fishing groups" to "subsistence users", "This section does not restrict the power of the state to limit participation in the subsistence taking of fish and wildlife for purposes of resource conservation and to prevent economic distress among subsistence users and those dependent upon it."

I want it to be plain that what I answering is simply direct question, in order to be least dangerous language, but I'd also like to say that would -- that is probably the least dangerous language that you could put it in. That again, does not solve any of the problems that we've been talking about all morning of federal judicial oversight and compliance with -- through ANILCA compliance.

SENATOR KERTTULA:

Are there questions of these gentlemen at this time?

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Sturgelewski.

SENATOR STURGELEWSKI:

Just to get a little clarification -- the amendment that was passed by the senate in 1990. I thought I heard two different things. What did I hear? It seemed to me that you felt that would not have the problems that were pointed out in your memorandum. Am I correct?

MR. NELSON:

The problems that were pointed out in our memorandum were addressed -- those provisions in some of the sample amendments that have been introduced or discussed recently that deal with enshrining subsistence ...

SENATOR STURGELEWSKI:

I don't want to talk about them. I want to talk about the

one that was passed. It would not meet -- it would not bring about those problems that you cited in the memo?

MR. NELSON:

Yeah. No. Our memo doesn't address that kind of language.

SENATOR STURGELEWSKI:

That kind of language would not create the problems laid out in your memorandum?

MR. NELSON:

That's correct.

SENATOR STURGELEWSKI:

That's what I needed to know. Thank you.

SENATOR KERTTULA:

Senator Duncan, Senator Zharoff.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I'm not going to on this line again. But Mr. Campbell finished up his conversation by saying that the language that Senator Zharoff was talking about wouldn't solve the problem of federal oversight. Neither does the Governor's bill solve the problem of federal oversight. The federal oversight problem is only solved by amending ANILCA. Is that correct?

MR. CAMPBELL:

Sir, amending ANILCA solves the problem of federal oversight but simply complying with ANILCA expands greatly the problem of oversight onto all our fisheries resources and a good portion of our game that currently do not have that problem.

SENATOR DUNCAN:

The answer to your question is it solved the problem of federal oversight [indisc. - cough] amendment to ANILCA.

MR. CAMPBELL:

[Indisc.].

SENATOR DUNCAN:

It didn't supply anything that Senator Zharoff was talking about doesn't work because it solves federal oversight problems. Yours doesn't work [indisc.] federal oversight also. Correct?

MR. CAMPBELL:

It's just that ours does not expand the problem.

SENATOR DUNCAN:

And I'm not convinced that this would expand the problem either if you do this correctly with the proper statutory law. Correct?

MR. CAMPBELL:

[Indisc.]

SENATOR DUNCAN:

[Indisc.] constitutional amendment that brings you compliance with ANILCA and the statute that helps address the criteria, et cetera. You probably haven't expanded the problem ...

MR. CAMPBELL:

Yes, sir, we have greatly expanded the problem. Right now, by not being in compliance, the federal courts have no oversight over state management decisions on the vast majority of our fisheries and perhaps slightly under half of our game. If we simply go into compliance and do not totally solve the problem in ANILCA as you indicated, we've expanded that problem to all our fishery resources and all our game resources.

SENATOR DUNCAN:

One more.

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

Then the Governor's proposal, as I understand it, we still have federal management [indisc. - paper shuffling].

MR. CAMPBELL:

Under the Governor's proposal, I believe federal management of game on federal lands for purposes of subsistence and fish in those waters, very limited waters controlled by the federal government, federal oversight and federal management would continue.

SENATOR KERTTULA:

Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. I guess, I'm confused there in whatever the Department of Law says that subsistence amendment to the constitution is going to have these adverse affects on the resource development of our state. And then I have a memo here from the Resource Development Council and let me read most of it in it's entirety so that we don't take things out of context so that we just don't let people hear what we want them to hear. And it says, "As you are aware, RDC has been involved in the subsistence issues since the special session of 1990. At that time, RDC's executive committee voted to support whatever means necessary to resolve the issue. Including the concept of a constitutional amendment. RDC took the position because it was felt that the resolution of the issue via an amendment or other means was the best option for resource development. The Board members were concerned that the lack of a concisive, conclusion to this issue would, in fact, have a negative impact on the future economics of resource development." And I didn't paraphrase anything out of there. There's still other sections [indisc.] ANILCA.

UNIDENTIFIED SPEAKER:

Is there a date on that, sir?

SENATOR ZHAROFF:

It's April seventeenth, this year. And I'll make the memo available to you. But it doesn't seem to be a consistency there in terms of what this administration is saying in terms of resource development and what the people that are closest to the resource development of this state are actually saying themselves.

SENATOR KERTTULA:

Do you wish to ...

MR. CAMPBELL:

I'd be happy to respond if you want, Mr. Chairman.

SENATOR KERTTULA:

Please respond if you wish to.

UNIDENTIFIED SPEAKER:

I guess it's in your file.

SENATOR KERTTULA:

Okay. Senator Eliason quickly and then Senator Collins.

SENATOR ELIASON:

Mr. Chairman, maybe this is going to bring this to some type -- back onto [indisc.] focus. The total issue, as I see it, a vehicle, statute, presumably the Governor's which does the job as far as I'm concerned about setting a criteria where you can deal with those people in my community, in the community of Juneau, and Ketchikan and other large areas in Alaska -- sets a criteria where they'll be able to participate in subsistence. Right.

Number two, pass a constitutional amendment. Along with that make some changes in ANILCA and by those three legs of the so-called stool, we could number one, we could provide for subsistence which is all we're trying to do. We can provide the least oversight by the feds who we want to get away from, at least the majority of the people I work for would like to get out of that arena. Number three, we can accomplish something for everyone in Alaska. Is that essentially what it takes to do the whole job?

MR. CAMPBELL:

Sir, if I may, legally the first and third accomplish the job. Changing statutes and a change in ANILCA. Whether or not a constitutional amendment is necessary politically to help accomplish that package ultimately comes down to a decision from this body. And what we have attempted to do is point out, one, the specific legal problems that exist with some wordings of constitutional amendment. Two, point out the fact that constitutional amendment by itself is not the answer or even a statute is not the answer. But if this body and the house has two thirds to [indisc.] constitutional amendment as you aware, that neither comes to the Governor for signature nor veto. We

are not out lobbying against this. We are just trying to make sure everybody understands what it totally takes.

SENATOR ELIASON:

I guess your answer is yes, then.

MR. CAMPBELL:

The answer was yes at first ... [indisc. - simult. speech].

SENATOR ELIASON:

... we could do that. Accomplish a total program with those three items. Maybe we could do it with two, but that could take maybe a considerable length of time. We can't do it in one obviously.

MR. LENZINI:

Senator, might I add that ANILCA does not require that Alaska in a constitutional amendment mandate subsistence. It does not require a constitutional amendment. It permits or authorizes subsistence. It requires laws of general applicability, namely statutes are adequate.

SENATOR KERTTULA:

Senator ...

SENATOR ELIASON:

Do the statutes comply with our state constitution? They don't.

MR. LENZINI:

Sir, we believe that this bill of the Advisory Council complies with the state constitution.

SENATOR ELIASON:

Mr. Chairman, may I pursue it a little further?

SENATOR KERTTULA:

[Indisc.].

SENATOR ELIASON:

I have a communication here from Senator Murkowski which says in effect that what we're doing here the Governor's bill will not comply with ANILCA.

UNIDENTIFIED SPEAKER:

That's true.

SENATOR ELIASON:

That's right.

MR. LENZINI:

That's correct.

SENATOR ELIASON:

So, it's my understanding that in order to comply with ANILCA, you have to get total preference to rural, right? Which is not contained in this bill because there are some strings attached to it. Everyone not in rural Alaska is not eligible. ANILCA says everyone should be. Our courts say we can't allow everyone because it's a preference. [indisc] criteria some could be and some couldn't be. [indisc.].

MR. LENZINI:

Well, Senator, your first and third points would solve the problem. The second point you made [indisc.] to solve the problem.

MR. CAMPBELL:

If I could interject, again. The question of whether or not that is politically necessary is a decision for this body and for the House. The thing though that I would like to emphasize again, if I may, is whether we take the second and third steps and solve the whole solution because nobody is more interested in a total solution than the Governor. But whether we do, we desperately need this bill for the management of our own fisheries resources and game resources. State law.

SENATOR KERTTULA:

You have the floor yet.

SENATOR ELIASON:

My remarks are made combine only to a constitutional amendment vehicle that passed the Senate two years ago. Beyond that I can't -- we can't say for sure [indisc.] But this one, in my opinion, would. And that's not enshrined subsistence in this constitution. And that passed the Senate so I assume this would do the [indisc.] in trying it and bringing into play some of the things that Senator Zharoff was taking about development

of Alaska lands. This would not trigger that.

SENATOR KERTTULA:

Senator Collins.

SENATOR COLLINS:

Thank you, Mr. Chairman. I guess it's going back to the Governor's [indisc] a couple of times, because its been asked differently, each time the answer has gotten different. I guess, what I'm interested in is consequences and I'm trying to understand what the consequences would be of the [indisc.] I want to be sure that I understand where you're coming from on that. It's my understanding that based on this whole issue of federal oversight and federal management, based on what I've heard you say, that the three different times that you've been asked, I seem to hear you saying that if we pass a constitutional amendment alone then we're in compliance. We will have one hundred percent federal management - federal. Is that a yes or a no?

UNIDENTIFIED SPEAKER:

Yes.

SENATOR COLLINS:

The second part of that if we have the bill as proposed by the administration, that the consequences of that action are that we will have a percentage of the federal management and federal oversight and a percentage of state authority. Is that correct?

MR. CAMPBELL:

That's correct.

SENATOR COLLINS:

What are those percentages?

MR. CAMPBELL:

Let me lay this out and there are two different ways we've been -- if you simply say we have almost all the fish and about half the game, you might say we have three fourths total state control. If you want to do it on a per pound or dollar value basis, then the fish overwhelms the game and it becomes a much,

much higher percentage. Whichever way you prefer to look at it. But in any case, -- yeah -- but in any case it's three fourths.

SENATOR KERTTULA:

You have the floor.

SENATOR COLLINS:

Lastly, what is the consequence of taking no action, that is passing neither the Governor's bill nor a constitutional amendment?

MR. CAMPBELL:

The consequence of taking no action is the federal government will continue management of their fish and wildlife resources on their own land. That the state will continue management of its resources and almost all the waters but we will continue to do it under a desperately flawed bill that is going to -- is a severe impediment to our ability to manage.

SENATOR KERTTULA:

I would like to proceed. You had some other areas -- when we first brought you in, some other areas of federal litigation. Senator Duncan, did you have a question?

SENATOR DUNCAN:

No, Mr. Chairman. I just strongly disagree with the answer that Mr. Campbell gave and I think that you need to get other attorneys that can differentiate between management and the oversight to do that. Because he mentioned two together and he only said once in compliance to ANILCA you'll have one hundred percent federal management. You'll have one hundred percent oversight of management decisions made by the state Board. Right?

MR. CAMPBELL:

Sir, with compliance with ANILCA we will have one hundred percent oversight by federal courts of all management decisions made the state Board of Fish and Board of Game.

SENATOR DUNCAN:

Management decisions made by state Board are subject to review by the federal court. I think we need to keep that

differentiated. You brought that together in one specific answer to Senator Collins' question.

SENATOR KERTTULA:

Senator Taylor, were you seeking the floor? Senator Halford.

SENATOR HALFORD:

Is a decision to open a season on a [indisc.] specific for a specific species a management decision or an oversight decision?

MR. CAMPBELL:

We believe it's a management decision.

SENATOR HALFORD:

Thank you.

SENATOR KERTTULA:

Please proceed. Do we wish to continue this? We'll proceed, Mr. ...

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR KERTTULA:

Yes, Senator.

UNIDENTIFIED SPEAKER:

Can I request some information from Mr. Nelson or from the Department of Law. I would like to have hopefully by the end of the day other parts of our constitution whatever they might be. Whether its the civil rights section or the ...

SENATOR KERTTULA:

Virginia, would you kind of put this together for them, if possible.

UNIDENTIFIED SPEAKER:

... freedom of speech section, whatever other sections you feel that are enshrined in the constitution that are adverse to any type of development to the state or adverse to any type of activity in the state there where other people may be involved. Anything that you feel that is negative in our constitution. Something there that -- I mean, you're saying that which is --

and nobody disagrees that subsistence is the highest use of our resources. And yet you say it is enshrined within our constitution, it is going to have an adverse impact on our state. I would like a legal opinion from the Department of Law stating what other parts of our constitution that are enshrined that are going to have a negative impact on whatever in the state. And I'd like to have it by the end of the day.

SENATOR KERTTULA:

Counselor Jacobus will go right to work on that for you. Mr. Nelson, if you could proceed for other areas, if possible, because I know you have yet a meeting taking place almost at this moment. So please rush through those if possible.

MR. NELSON:

I wasn't aware of that other meeting so ...

SENATOR KERTTULA:

Well, maybe you don't have then.

MR. NELSON:

If I might go directly in to point that I think I was brought here for.

SENATOR KERTTULA:

Yes.

MR. NELSON:

I thought I was. I think that the big question is how is this subsistence bill going to impact on the basic body of court rulings out there so far interpreting state subsistence law? What effect is it going to have? I can tell you a few concrete things it's going to have. If you are looking at your standard to be least adverse impact, in other words, that state regulation of fish and game, subsistence use of fish and game must also have the least adverse impact on subsistence use of fish and game, this bill is not going to make you happy. It's not going to allow that kind of interpretation. And there's very good reasons why not. Even in ANILCA, least adverse impact, was if you read it closely, it's not in there to regulate how we manage subsistence uses of fish and game. It's

a land use regulation -- if you read it, it's a land -- federal public lands will be utilized in a way that will cause least adverse effect on fish and game. It does not say federal or state management of fish and game must be done in such a way as to cause least adverse impact on subsistence uses. That's a critical difference. Least adverse impact as a management standard is impossible. Because what it means - least adverse impact, is obviously no regulation. Is always going to be the standard. Least adverse impact means you don't regulate it. Because that will always be the least adverse impact. Now the Bobby decision did not say least adverse impact was the standard. Later cases seem to incorporate that from looking at Bobby. But Bobby didn't say that.

This bill will require the Boards to look at customary and traditional harvest patterns and conform as much as is reasonably possible and it gives some description to the Board, to those patterns. If the subsistence division goes out and finds that moose had been taken twelve months of the year historically in this particular area, that will not -- with that information the Board will not be required to have a twelve-month season. They'll be able to just look at more closely the facts and say maybe only six moose were taken in the months of April through July or something. And they will be able to disregard that and the opportunity that they give will still have to be reasonable but it won't have to match exactly historically every pattern of traditional subsistence use. I want to make it very clear. The bill was designed to give the Boards more reasonable approach than least adverse impact. So if least adverse impact is critically important to you, you won't like this bill.

Also customary trade. If you liked the decision coming out of Alexander in the Ninth Circuit, the Dedrickson [ph] jury decision in the federal district court, allowing commercial sale of fish or game to the tune of \$1700 or \$5100 or \$10,000 or \$11,000 you won't like this bill either. Because it's going to

limit it to non-commercial sales. There won't be any sales that go into the commercial channels. You won't be allowed to take some of your subsistence fish, go down to a tender and sell some of your fish to him. It won't be allowed. You will be allowed to help other subsistence users or neighbors round out their diets. If they feel embarrassed about asking you for fish without paying something, insist on paying you something, you'll legally be able to do that. You'll legally be able to pay each other for meat and game like that. But if you go put it in a grocery store, if you market it, if you give it to a commercial wholesalers or buyers, then that will be illegal. Those are two real clear areas. Least adverse effect and customary trade. I think there was an intent by the Council to eliminate that kind of standard.

Now on least adverse impact, we went -- I think the Council went a lot further than the current law does. I know it did. It went a lot further in setting out guidelines for the Boards, what they had to examine, not just by their own discretion, not just by their own regulation, but by statute. They have to look and make a good faith assessment and provide a reasonable opportunity. And they will be subject to challenge if they don't do that. And there have been Board decisions in the past that probably did not -- that don't meet that test. I can say that.

SENATOR KERTTULA:

I'm going to have to bring this to an end because we have a 1:15 scheduled teleconference to the Department of Interior. That only gives you forty-five minutes or less. I will, if the committee wants, allow for a half hour subsequent time off to do business in the office. But we have a 1:15 meeting right back here. Those that wish to participate in questions with the Interior, we have faxed this legislation, these bills to Interior this morning. So we just better recess now so you can get a cup of coffee. Senator Duncan.

SENATOR DUNCAN:

Senator, [indisc.] couple individuals here that [indisc.] long to testify.

SENATOR KERTTULA:

Yes. I apologize to you.

SENATOR DUNCAN:

When will they be able to [indisc.].

SENATOR KERTTULA:

I would ask Al Kookesh, another individual -- I'll ask them to testify after the interior meeting, which I would guess would be about two p.m. I apologize.

MR. CAMPBELL:

Mr. Chairman.

SENATOR KERTTULA:

Yes.

MR. CAMPBELL:

Yesterday at the end of the meeting, we were asked to prepare an analysis or comparison with the [indisc] ANILCA...

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Before we leave, we're having a [indisc.] council meeting at 12:30 [indisc.] and I hope we can have a quorum.

SENATOR KERTTULA:

McKie, please distribute these.

MR. CAMPBELL:

Yes, sir. This is what you requested yesterday.

SENATOR KERTTULA:

Yeah. I appreciate that. Will someone help him?

RECESS

12:30 - 1:25 p.m.

SENATOR KERTTULA:

If you have questions, please be prepared, including the Attorney General to help assist and Carl too,

SENATOR ADAMS:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

SENATOR ADAMS:

While we're waiting for the call to be placed there are some members that have come from all over Alaska that have written testimony. Who do we give this written testimony so they can be in a packet?

SENATOR KERTTULA:

If you'll hand them to the chairman, we will see to it that they're distributed right at the moment. If they can go to her, she'll make certain.

SENATOR ADAMS:

Thank you.

UNIDENTIFIED SPEAKER:

Mr. Chairman, is Senator Duncan going to be here?

SENATOR KERTTULA:

He'll hopefully be here in a moment. He will be here. The problem is that there's a lot of bookkeeping over [indisc.] trying to tell me for three days there. And I let him get out of hand here for a few minutes. And now they're out of sight. On to the next issue. [Simult. speech].

MR. VERN WIGGINS:

I was told you could hear that, could you?

SENATOR KERTTULA:

We can hear it, barely, but we can hear it, Mr. Wiggins or Mr. Suberg.

MR. WIGGINS:

You can hear us?

SENATOR KERTTULA:

Can you hear the Interior at this time? Can everybody hear him or not? Please speak one more time to us?

MR. WIGGINS:

This is Vern Wiggins speaking. Marty Suberg is also here. Senator Kerttula, how are you?

SENATOR KERTTULA:

Just fine, thank you, very much. It's good to talk to you Mr. Wiggins, Mr. Suberg. We have the whole Senate convened in the Committee of the Whole. About half the members are here and the others are on their way up the stairs. We also have the Attorney General, other legal counsel and the Commissioner of Fish and Game. There are some questions they want to ask you. I'm really pleased and thank you that you've responded in this way, Vern. Senator Adams, I think you have the first question. Is there anything you'd like to impart to use before we start? I hope I'm not shouting.

MR. WIGGINS:

No, you're not shouting. You're coming through loud and clear here. One comment and that is that we do appreciate the problem the Legislature can cope with. Certainly the Secretary indicated to Representative Grussendorf, I believe use the word ... [tape ends midspeech]

Tape 92-10

Side B

[Tape begins midspeech]

MR. WIGGINS:

... that we fully appreciate that. I will as we proceeded here to try to help in whatever way we can given the instruction that we're operating under. We're prepared to answer questions.

SENATOR KERTTULA:

You have received a copy -- we faxed a copy to your offices of legislation that's been proposed.

MR. WIGGINS:

We received a copy of both pieces of legislation. I believe it's 484 and 485. That is correct.

SENATOR KERTTULA:

We'll speak first to 484 but we may ask pertinent questions that are an aside to the legislation. Senator Adams, he has requested to speak first and he does have the floor, then. Thank you, Mr. Wiggins.

SENATOR ADAMS:

Thank you, Mr. Chairman, Mr. Wiggins and Mr. Suberg. This is Senator Al Adams representing district [indisc] in the State of Alaska. I've got a series of questions and we'll see if we can get some answers. What would it take for the federal government to relinquish management? Is it an administrative act or a congressional action?

MR. WIGGINS:

The phone is breaking up Senator Adams. It's awfully loud. Maybe you could repeat the question again. [indisc.] speaker is breaking up. We heard part of the question. What would it take something - and it broke up after that.

SENATOR ADAMS:

Thank you, Mr. Wiggins. What would it take for the federal government to relinquish management? Is it an administrative act or a congressional action?

MR. SUBERG:

Senator, this is Marty Suberg. I'm going to answer first. It's agreed that Mr. Wiggins wants to expand or supply an answer, he'll jump in and do so. With respect to your question, the obvious goal of return of state control of the subsistence program, so called federal public lands, first and foremost requires compliance with Title 8 of the Alaska National Interest Land Consolidation Act, what we call ANILCA, for shorthand. ANILCA talks about the laws of general applicability in the state that are consistent with Title 8 of ANILCA. I'm sure the entire -- the people of Alaska are well aware of the bind that that proposition was put in when the McDowell decision was rendered in 1989 holding that a preference [indisc.] administered under the state law was unconstitutional under the state constitution. So we are now left with the proposition of having to get the program back, if you will, whereas the federal government has been administering the preference on public lands since 1990. The answers are -- I don't believe, and again I'm not going to seek for state [indisc]. You have your own

Attorney General that can answer what state measures would be required. The test we have to meet is laws of general applicability that are consistent with Title 8 of ANILCA. So, I would defer to your own Attorney General and your own legislative counsel as to whether or not you think we could do something administratively to solve your constitutional problem. I will say that what we need at the federal level is a law of general applicability in the State of Alaska that is consistent with Title 8 of ANILCA.

MR. WIGGINS:

Senator Adams, this is Vern Wiggins. I do not see an administrative action that the state could take which would enable the Department of Interior to recertify and allow state to resume management. Mr. Suberg's comment about -- I think he quoted verbatim from the act [indisc.] regulations of laws of general applicability. If the State of Alaska were to have legislation and regulation which complied with the requirements of ANILCA, the state could then petition to the Department of Interior and there is a provision in the regulations for a petition to the Department of Interior. That petition would be subjected to compliance with the Administrative Procedures Act. Some of the comments here would be helpful and then the Department would make a judgement, yes or no, it did or did not comply with ANILCA. And if the program did presented comply with ANILCA, then we would step down if you will off the existing federal regulation, certify the state program and the state would return to management. There'd be no more dual management. So, the first act is a legislative act on the state part and then ours is an administrative action.

SENATOR ADAMS:

Mr. Chairman, I believe that the federal interior has gotten copies of both bills. The next question is, does the Governor's bill comply with ANILCA? Does the bill that I have submitted on behalf of the Bush Caucus comply with ANILCA? Which one of those two is closer to complying with ANILCA?

MR. SUBERG:

Okay, Senator, this is Marty Suberg again. I am going to answer them in reverse order. We got Senate bill number 484 by the Senate Rules Committee but I went through the Governor's -- the so-called Governor's bill and then 485 introduced by Senators Adams and Hoffman. I'll answer them in that order. Number 484 the administration bill. The question you posed in a letter to the Secretary some days back, we are in the process of sending you a written response over my signature. It is consistent with what I believe the Attorney General testified yesterday. The bill number 484 as drafted would in our view not be a law of general applicability sufficient to comply with Title 8 of ANILCA.

With respect to 485, I've had less opportunity to review it. We got it this afternoon our time. I have had a chance to read it. I might ask, having the benefit of the sponsor there, if I might ask some questions to make sure I fully understand the bill. I see that the bill offers a rural preference and it also talks about an urban preference for urban subsistence users. If I might, I'd ask a few questions just to make sure that we in the Department have a clear understanding of it.

SENATOR ADAMS:

Then, Mr. Chairman, you cannot say if the Adams bill 485, complies with ANILCA at this time. Am I reading you correct?

MR. SUBERG:

What I'm trying to say is I'm prepared to give you, based on my quick reading, a tentative view of how it does with respect to Title 8. But I just want to make sure I understand a few things in the bill [indisc.] So if I could indulge the Committee of the Whole by asking a few questions, I'd like to do that.

SENATOR KERTTULA:

Yes, please do that. I'll interfere for just this moment. Please do that. I also ask the Attorney General be allowed by the Committee of the Whole to participate if it becomes

necessary. We will, of course, recognize senators. Please proceed to do that, then Senator Adams will chime in again.

SENATOR ADAMS:

Perhaps to help things along, you had a copy of House Bill 592 and it's the same bill that you were given. So if you had that, and you analyzed that bill, those would be the -- it's the same as that one.

MR. SUBERG:

Okay, Senator, I'm going to rely on the fact that House Bill 592 is identical word for word for Senate Bill 485. If that is the case, and it is identical then obviously what we say with respect to 485 would also be true for 592.

SENATOR ADAMS:

That is correct.

MR. SUBERG:

All right. The one clarifying question I'd like to ask, maybe it would be two questions at most. The bill 485 has both rural and urban subsistence context in it. Is it the understanding of the authors of the bill that the rural preference, if you will, would be among the competing rural urban preferences -- the first preference. I'm not saying that very artfully but what I'm trying to determine is we are -- this bill would create two categories of subsistence, rural and urban. In times of shortage, or the way the bill is drafted, it's generally speaking would a priority go first to rural users and second to urban subsistence users the way you interpret this bill as drafted?

SENATOR ADAMS:

That is correct.

MR. SUBERG:

Okay, so, it would be a system in which the priority would be first to accommodate the needs of rural subsistence users. Secondly, that the remainder would be divided up first going to urban subsistence users as you've defined it under the act, and then the remaining and I guess in times of shortage, the

remaining resource would be going to other types of uses. Is that a fair reading of your bill?

SENATOR ADAMS:

That is correct.

MR. SUBERG:

In our view, that particular aspect of the bill with respect to 485 as opposed to 484 appears closer to the concept of Title 8 of ANILCA. Again, the way we have interpreted ANILCA consistently here in the Department of the Interior is that the priority must first and foremost go to rural communities. And obviously there's -- dividing rural communities is a task that many people are aware it would take some doing. But nevertheless, with agreed upon definitions of "rural", the preference goes first to rural communities whose people rely on subsistence. So in that regard, a [indisc.] like what your proposing and 485, based on community principle subsistence uses by a community disposed by individuals appears closer to what we believe the spirit of Title 8 of ANILCA is. Again, I have not had the opportunity to give a line by line inspection of 485, but paramount in the Secretary's review of this section, is making sure that rural users, again, however rural is defined ultimately, rural users in rural communities get to use the preference, get the preference for subsistence uses and that that regime be in place. So with respect to that, I am prepared to say that the concept of rural preference first is -- I believe [indisc.] consistent with ANILCA. I would obviously like some more time to go over the detail of this bill, but I am comfortable that it is -- at least on it's face consistent with ANILCA.

SENATOR ADAMS:

Thank you very much. I appreciate that answer and I was hoping that perhaps we could get a faxed answer so all members of the Senate could just read what you have stated. But my question is why haven't you been more helpful or forthright in the advice to the State of Alaska?

MR. SUBERG:

I'm not sure I understand the question. Why have we not been more forthright and helpful? Can you explain what you mean?

SENATOR ADAMS:

Just to say what the two bills does to show that one bill does not comply with ANILCA, and one bill does. Which direction that the State of Alaska should be going to help with the relinquishment of federal management.

MR. WIGGINS:

Senator Adams, this is Vern Wiggins. I guess [indisc.] like Marty is perplexed by your question. I am not aware that there has been less than forthright with the State of Alaska. I am aware, in fact, that we have repeatedly advised members of the administration that we've talked to that the situation Marty just outlined is the case. Your previous bill, when I was personally asked if it complied, my response after consultation with our solicitors office was in the affirmative. So I guess I'm perplexed by your question. If someone says we've been less than forthright, I guess that's an issue we need to deal with.

MR. SUBERG:

I might add, we've had the benefit of your the bill for about four hours here, Senator. I think we tried to give you an affirmative reading. So I'm a little bit bewildered by -- we're on the phone with you. What more -- we're trying our best. So given four hours to review. Your previous letter only asked about the Governor's bill, for example. It didn't even raise 485. I get a fax of this. I drop everything to review it. I'd be happy to do it. I am a little perplexed by your allegation that we're not doing anything.

SENATOR ADAMS:

Well, I need to apologize to you then, because the fact there's a lack of communications between the administration and the legislators and I apologize for that. But this is the first time that the department had opened up and gave us some

opinions. But I appreciate that and I apologize for that insinuation.

My next question is what are your fears in opening ANILCA to such amendments? Others here have asserted that ANILCA has been subject to many amendments. And this would be no big deal. Do you agree with this opinion?

MR. WIGGINS:

Senator, this is Vern Wiggins speaking. My comments will be mine personally and if I'm afforded the luxury of stepping out of my role as Assistant to the Secretary. I don't know if I've ever had the luxury, but let's assume I do for this purpose. It is my personal opinion that attempts to amend ANILCA with a major amendment, would expose the existing legislation to substantial risks that there would be an attempt to add other amendments. It is no secret in this circle back here in Washington, D.C., that there is [indisc.] desire by many to reopen ANILCA to classify more lands, to change some of the provisions that were included in ANILCA with respect to access and things like that. I believe, personally, that there is some risk, yes.

With respect to whether or not ANILCA has been amended since it was adopted in December of 1980. Yes it has been. There has been a succession of what are generally referred to as minor and/or technical amendments that have been instituted by either the Department of Interior or the Alaska congressional delegation to deal with minor or technical amendments. I believe, the record is clear that all the major attempts to modify ANILCA with substantive change have been initiated by other parties. Specifically, the Tongass legislation, et cetera. Those are my personal observations. There is a risk, yes.

SENATOR ADAMS:

Thank you, Mr. Chairman. I need to give other members of the Senate a chance to ask questions of you. But just tell me, when did you notify the Governor's office that it did not comply

with ANILCA and the latest communications and with whom in the administration, please?

MR. WIGGINS:

The conversation with respect to this matter in the current administration has been going on since the current administration took office. Prior to that time, conversations with the previous administration were ongoing on an equally regular basis. What is the first time that I made such an observation or anyone else that I know of, I can't tell you the specific date to the best of my recollection. It would have been sometime around a point in time, the Commission completed work and we expressed in discussion our concerns and our apprehension. The last time probably as recent as today in conversation with [indisc.] I can't be any more specific than that because I don't keep that kind of record.

SENATOR KERTTULA:

I'm going to recognize ...

MR. WIGGINS:

I would like to add that it should come as no surprise I expect it comes as no surprise to most of you if not all of you in that room, about that certainly. I know and appreciate that my good friend the Attorney General is there. I think he is even on record [indisc.].

SENATOR KERTTULA:

I'm going to ask Attorney General to comment briefly and then I'm going to ask Senator Halford. I'll recognize Senator Halford. But I'll ask Attorney General if he has something. It seems like he did and I did ask him to come to this table. At the time we didn't have a very full component either of people. But I'd like the Attorney General to have this opportunity.

MR. WIGGINS:

Charlie Cole?

ATTORNEY GENERAL COLE:

Yes. Mr. Wiggins and Mr. Suberg, I think you should be told that you're on the speaker phone in the Senate Finance

Committee chambers. Essentially, the entire Senate membership is here. There are approximately fifty or other people who are present. So I think you should have the privilege of knowing that. I want to confirm that we have been in communication with the solicitors office with respect to whether the Subsistence Advisory Commission's view complies with the requirements of ANILCA for the assumption of state management of fish and game on federal lands. And that I and other members of the administration have flatly said repeatedly that it is our view that that piece of legislation does not satisfy the requirements of ANILCA for state assumption of management. About that there has been no dispute. But I wonder, Mr. Wiggins, if I would be at liberty to disclose the nature and extent of those communications in detail or rather you would want me to keep them confidential?

MR. WIGGINS:

That's no problem, Charlie. By the way, we are aware of the nature of the conference call. We appreciate that.

ATTORNEY GENERAL COLE:

Well, it's clear isn't it that the reason that the Subsistence Advisory Commission's proposed legislation does not comply with ANILCA because it does not grant flat rural preference.

MR. WIGGINS:

I think that's correct.

ATTORNEY GENERAL COLE:

And it's also true, is it not, that ANILCA grants subsistence preference privileges to people in rural communities of less than twenty-five hundred regardless of whether they are and have been historic subsistence users?

MR. WIGGINS:

[Indisc.] in the law as I recall. But it's does grant to communities with that historic, yes.

ATTORNEY GENERAL COLE:

And so that there are in fact, subsistence preference

privileges granted under ANILCA to those who are not historic subsistence users?

MR. WIGGINS:

State your question again? Did you say to those who are not historic users?

ATTORNEY GENERAL COLE:

Yes.

MR. WIGGINS:

If you live in a rural community -- Mr. Suberg, I think the essence of what you're saying is, yes, it's a community based preference as opposed to an individual based preference. I suppose the possibility is there. Again ANILCA appears to deal with communities as opposed to individuals.

ATTORNEY GENERAL COLE:

And it's also true that ANILCA does not grant to historic subsistence users and those who are, in fact, current users a subsistence preference if they live in a so-called urban communities?

MR. SUBERG:

That's true. And in fact, there's recognition of that in some of the legislative history, merchant marine committee report of the ninety-sixth. Congress expressly dealt with that situation. That's correct.

ATTORNEY GENERAL COLE:

And how many Native Alaskans, according to statistics developed by the Department of the Interior live in urban communities?

MR. WIGGINS:

Charlie, I don't have those figures in front of me. If I can't respond specifically. I think you're referring to the census data. And as I recall that census data there is a substantial number, and without having those figures in front of me I won't dare to quote them or even reference them. My understanding - my belief is that those figures show that there is a substantial Native population in urban centers in Alaska.

I guess I will also add that ANILCA does not differentiate Native/non-Native. It differentiates urban/rural.

ATTORNEY GENERAL COLE:

Of course. Could you enlighten me, Mr. Wiggins, as to why ANILCA disenfranchised those people with historic cultural tradition of subsistence who happen to live in the urban communities?

MR. WIGGINS:

Mr. Suberg referenced a moment ago merchant marine fisheries committee congressional record. Again, I don't have a copy of that in front of me from the 1980 Congress, but you have that ...

MR. SUBERG:

I don't specifically as to what the -- remember generally that the policy behind that section that leads as far as the merchant marine committee was concerned was to recognize that rural Alaskans depend on the harvest of wild renewable resources and maintain their lifestyles as a significant supplement their income. It is a more detailed discussion of the policy considerations as to why they chose that particular definition of rural to speak to. But I do know it was a very conscious decision on the part of the Congress.

MR. WIGGINS:

It's my recollection, Mr. Cole, it's [indisc.] correct the Congress made a very conscious decision. I believe there are words in that Congressional Record to the effect that Congress recognized it would be an unpopular in some quarters, unlimited [indisc.] decision unless Congress was making that policy governed on the basis of their judgement. They adopted the rural preference and as you described it, one of the consequences was -- I believe you used the word "disenfranchisement" of certain individuals. It was a conscious decision clearly as I recall being directed.

ATTORNEY GENERAL COLE:

Just one more question, Mr. Chairman, if you would please.

From your reading of your Subsistence Advisory Commission's summation's proposed legislation, it's true, isn't it, that under that legislation the true subsistence user would be granted a subsistence preference over those people who happen to live in rural villages who, however, are not in fact subsistence users. That's the case, isn't it?

MR. SUBERG:

I think I had a hard time using the word "true subsistence user" or terms like that. But I think that 484 the bill the administration has introduced as I understand it, it is individually based [indisc.] It does make some recognition of rural characteristics, I believe, for under twenty-five hundred -- areas of under twenty-five hundred people for population. And the presumption is favored a subsistence for numbers that can be rebutted upon clear and convincing evidence for numbers above that. And the production [indisc.] So in short, if you do have a system that if you appear to make inquiries at least at some level about who actually uses the subsistence resource and who doesn't -- that's my understanding of the Governor's bill.

ATTORNEY GENERAL COLE:

Would you therefore, agree that it's truly ANILCA which is flawed?

MR. SUBERG:

I'm going to let Mr. Wiggins answer that one.

ATTORNEY GENERAL COLE:

That's all, Mr. Chairman. Thank you.

MR. WIGGINS:

That's what you got attorney's for, right, Charlie. I don't think I have the luxury of telling you whether or not the federal law is flawed.

SENATOR KERTTULA:

Senator Halford will be at the microphone next. Senator Halford, you have the floor.

SENATOR HALFORD:

Thank you, Mr. Chairman. We've had some discussion on the dual management question. I wonder what it would take to stop the federal courts from making management decisions in Alaska under Title 8 through the court intervention and direction of seasons, openings, closing and so forth? What action would that take at the state level and what action would it take at a federal level?

MR. SUBERG:

Again, you're putting your finger on a problem that vexes us here at the federal level, as well as you. Being in that we're managing -- the federal government is managing on public lands that means that there is recourse through the federal court because this is a federal program. At least right now it's a federal program that's administered by the federal government. We're not [indisc.] being challenged on the scope of what is the federal program. We've been challenged on the definition of public lands are in federal court. We've been challenged on the scope of the federal jurisdiction. It is very much a factor when you have federal government managing a program on federal lands that people will go to federal court when they disagree with decisions or feel that they've been adversely affected by decisions. To the degree that we can restore state management to the subsistence on public lands, it might lessen the pressure. It wouldn't reduce it completely. I know there have been federal challenges even under state management regime. But certainly at a time when the federal government is managing the resource on federal land, we're going to have obviously people going to federal court to vindicate what they believe their rights and possessions are.

MR. WIGGINS:

Senator Halford, this is Vern Wiggins, speaking by the way. How are you sir?

SENATOR HALFORD:

Fine, thank you.

MR. WIGGINS:

A good lawyer gave you a good lawyerly answer. My answer is I don't know how you seek finality in this thing. Congress passed this law in 1980. It was unpopular when they passed it. It's been litigated I don't know how many times. I would guess fifteen or twenty or more. The track record is dismal for both of us. Three different schemes -- scheme is used in a polite way not in an ugly way -- have been put in place. All three of them have been successfully challenged in state and/or federal court. I don't know how you stop anybody from going to court. Maybe if we can ever get a program that will pass the collective courts judgement maybe that will be the end of it. But I don't know if there's an answer to your question, Senator.

SENATOR HALFORD:

If we just go to state lands and state waters, can we then at least limit the federal judiciary's interaction in management of state fish and game by specifically not complying with ANILCA with regard to state lands and waters?

MR. SUBERG:

It's a hard question again. We are receiving challenges right now over the scope of federal jurisdiction in Alaska. There are people that maintain that in some of these cases that we shouldn't be limited exclusively to public lands. I guess I can't give you any real certainty in that. I'm afraid we're facing challenges on that very issue right now.

SENATOR HALFORD:

But it seems that we're caught in a Catch-22 in that if we comply with ANILCA to try to, quote, "achieve a unified management structure" we then put all of the lands and waters within the area of Alaska under the controls of the federal judiciary on appeal. Where if we don't comply, at least the state is in control until a court decides that the federal land jurisdiction goes further. At least the state is in control of all state waters and all state lands which currently encompass the majority of the resource harvest.

MR. SUBERG:

We do recognize that there are currently challenges in federal court asserting that a federal program is not sufficiently broad enough and does not take in state lands and waters, whereas the allegation are that it should. The risk of that decision remains there. You understand that I assume.

SENATOR HALFORD:

I think we've gone around the table on that. I was trying to reach some type of a conclusion. But it doesn't appear there is a federal legal opinion that's different than the state legal opinion. We, in fact, are caught between those two extremes.

MR. SUBERG:

I think that's fair. You asked a difficult and thought-provoking question.

SENATOR KERTTULA:

Senator Duncan, you're seeking the floor. And then Senator Cotten.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I want to go back to the question -- skipping back to the judicial review question. State versus federal management. The management decisions whether they're made by state Board of Fish and game or the a federal Board. Mr. Wiggins, you put yourself in a personal position said you don't believe it's possible to amend ANILCA and to amend it to bring us into compliance with ANILCA. Taking that as the -- assuming that's the case. And I think our congressional delegation even expressed concerns about doing that, what state action then is necessary for us to bring ourselves into compliance with ANILCA without amending ANILCA?

MR. WIGGINS:

Senator Duncan, how are you? Since I know both of you personally, I have to say hello to each one of you. Two responses. One, I believe what I said with response to the question on amending ANILCA was that in my personal opinion there was substantial risk. I don't believe I offered opinions as to whether or not it could be done.

Secondly, what -- and I understand the second part of your question -- what does the state have to do to bring itself into compliance with ANILCA. That's as much legal, I guess, question as it is a policy question. Let me try to tackle part of it and then ask Marty to address it.

ANILCA, for better or worse, in the stark division with respect to who is eligible for subsistence. And that division as I said is very stark and our lawyers tell us very absolute. Urban, dash, rural. That's the division. It's not on any other basis. It's urban, dash, rural. The federal government -- if you read the statute carefully and I've read it so much I'd like to forget some of it. But what it does is it imposes that standard, urban-rural, on the federal government. And it says the federal government shall manage subsistence accordingly along that line. Urban rural. Then it says and the only exception to that is that the Secretary may not administer the program if he chooses not to administer the program if the state adopts laws and regulations of general applicability which meet that same standard. Now it doesn't use those exact words, but the fact is that the state would be held -- is held as the manager to the same standard that we the federal government are held to. To answer your question, against that background, if you can comply with that same standard that we're held to, then the Secretary can certify the state management program. That's a layman's response. It's not a lawyers response. I'd ask Marty to elaborate on it.

MR. SUBERG:

I think Vern fairly stated the issue. There's got to be laws of general applicability, which are consistent with and provide a program that ANILCA establishes in Title 8.

SENATOR DUNCAN:

Then, Mr. Chairman, just then to follow through, you are not looking at our state constitution. I guess the problem we run into then very clearly is that we can pass those laws except they're in conflict with the state constitution as presently

written. So we need to amend the constitution to allow us to bring -- to pass the laws to bring us into compliance. Let me ask just one other question, if I might, Mr. Chair.

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

Could you just very clearly and succinctly state to me what the federal role would be in management, one, if we -- for example, if we passed the Governor's bill and don't bring ourselves into compliance with ANILCA. Or as an alternative, secondly pass legislation that would set criteria and so on and also pass a constitutional amendment that would bring us into compliance with ANILCA?

MR. SUBERG:

[Indisc.] burden if you pass legislation that's not in compliance with Title 8 of ANILCA, we have what we have today, continuing dual management for what we call the federal public lands which is in turn found in the ANILCA law. Basically, lands for which the United States holds title under which -- to which the United States owns titles. We continue to administer the preference. The asterisk I put next to that statement is again, that as we have interpreted that section, there are challenges to our administration which argue that we should take a broader view and administer the federal regime beyond that, particularly in the case of fish. Those are ongoing challenges, they're litigation and I'm not going to get into too much more detail, but there -- we need to be conscious of the fact that federal control may change over time with certain court rulings. So you would have the dual management system with the state on the one hand and administering everything but the public federal lands and then the federal government administering those public lands to the degree to which there can be coordination given mandate of Title 8 is obviously still up for discussion. To the degree that you [indisc.] constitutional amendment, again, we haven't reviewed any specific proposals for that. But to the

degree that a constitutional amendment which I'll defer to Charlie Cole on but I guess that would address the so-called McDowell problem resulting from the 1989 state Supreme Court decision and I suppose if there was -- we're implementing a further step with consistent with ANILCA then we could begin the process of recertifying or at least considering the recertification of state control of subsistence resources on public federal lands. The final regulations which were published by the federal subsistence Board on May 28 that go into effect on July first, that section fourteen of subpart (a) for those of us who like to read these regulations well into the night, contains a provision that talks about how recertification [indisc.] under way. I guess one test that has to be met in any recertification effort is that there's laws of general applicability that are consistent with Title 8 of ANILCA that provide that subsistence preference. That is sort of a general answer as to how that would work.

SENATOR KERTTULA:

Senator Cotten, do you wish to continue?

SENATOR COTTEN:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

Senator -- yes.

SENATOR COTTEN:

I have a couple of points I was going to cover have been covered but I had a couple more. I think it's been covered. I'd like to just make sure I understand it though. The Governor's bill, in order for it to comply with ANILCA, ANILCA would have to be changed and primarily the definition of subsistence uses would have to be changed. Isn't that right? Taking the word "rural" out or something similar to that. Would you agree with that?

MR. SUBERG:

Senator, the difference as I understand it and I reviewed this situation, ANILCA provides for rural subsistence preference

based on communities as opposed to individuals -- criteria of the individuals who live in the community.

SENATOR COTTEN:

Right and, Vern, for you, you're discussion of what it would take politically to change ANILCA, you suggested that there would be some risks involved with any major changes. It has been suggested to me that this would be considered a technical change. Do you have an opinion on that?

MR. WIGGINS:

Well, Sam, excuse me, Senator Cotten, you're far more conversant than I am on what's a technical and what's a major change before a legislative body. You've been doing that a long time. I'm suggesting to you that any time you go to try to change ANILCA there are people who want to add more changes. And in my personal view, there is a risk and anytime you go to try to change ANILCA. If you can convince enough people and the legislative body that it's a technical amendment and nobody takes issue with you, the risk is probably much less and it's probably a greater likelihood that it can pass. If there are those who disagree with you that it's a technical amendment or if there are those who take issue with the amendment, it suddenly ceases to be technical and becomes very sensitive, dash -- or sensitive, parentheses, very political, very emotional. Maybe that's my criteria of the difference. Given the nature of this controversy, I believe it would be fair to say that this subject would draw an awful lot of attention. Again, these are my personal observations, Sam.

SENATOR COTTEN:

I had a couple more questions but I'll yield for the moment and catch me on the second round.

SENATOR KERTTULA:

All right. Senator Sturgelewski, you were seeking the floor.

SENATOR STURGELEWSKI:

I'd be happy to follow Senator Cotten. A couple of

questions. Vern, you've made a couple of -- alluded a couple of times to the issue regarding expansion of federal control -- potential expansion of federal control to fisheries. Could you comment a little further? Are you talking about -- give as many specifics on that as you can.

MR. SUBERG:

We have a couple of changes -- this is Marty Suberg. Vern asked me to take the first stab at this. There are a couple of cases. The Katie John case and particular another case known as Kluti-kaah, that raised the question of whether or not federal management should stop at the edges of federal lands. We were again, interpreted our control to extend to those lands for which we hold title, be they [indisc.] land or submerged land. Where the United States has title to the land, we say that's where we have control. We are then challenged on that on the theory that the control ought to be extended beyond that in recognition of the fact that resources move, that there are other theories of the federal government to assert control and so are limited. The challenge that we believe -- the position that we believe is proper under ANILCA and its definitions is being challenged and we are being urged -- we are being challenged in court to take a broader view. [tape ends midspeech].

Tape 92-11

Side A

[Tape begins midspeech]

MR. SUBERG:

... areas if we were to get a position contrary to what we've said in court.

SENATOR STURGELEWSKI:

Thank you very much for that, so you can't add an opinion, apparently at this time as to your view. I understand that Kurt McVee is listening by teleconference and he was kind enough in response to an earlier question that I had raised and I'm having it copied for all of the members, to make available -- it's

either in the Register but I believe as of the date of the end of May 1992, additional language -- could you explain to me whether the jurisdiction of the federal government is extended prior -- or in addition to what was in the June 26 Register which dealt with subsistence regulations for subsistence harvest in Nunavut and all Kuskokwim wildlife. Are you going beyond that in the current -- or proposed Register in the taking over management?

MR. WIGGINS:

Senator Sturgelewski and hello to you, too ma'am. My understanding that the answer to your question is, no. Let me further elaborate on another aspect of issue of extension of federal jurisdiction. I suspect that none of you have the copy of the letter but there was a communication on June 20, 1990 to Governor Cowper from Secretary Lujan. Let me read you two sections out of that letter. And I think it will help to enlighten you a little bit about another aspect of this concern. I'll read from that letter. Quote "As [indisc.] entities that may harvest allocations on non-public lands, the Boards of Fishery and Game obviously play a crucial role in determine whether sufficient wildlife resources will be available to meet subsistence needs on public lands. The subsistence regulations proposed by the Department of Interior are temporary. They are predicated on a high degree of cooperation between the Boards of Fishery and Game and the federal land managers in setting harvest limits and other management decisions. The regulations represent the minimal extension of federal authority necessary to fulfill those statutory obligations federal government has in this matter. Absent the high degree of cooperation described above we would be faced with the prospect of either closing public lands to non-subsistence use of fish and wildlife or further extending federal authority to comply with the mandate of the law. One of the things I must consider is the possibility that federal authority has to be extended predicated on the federal government's constitutional mandate to protect

Native American interests and our fish, wildlife and other natural resources." That's the end of the paragraph. That letter was dated January 20, 1990. The only thing that is different today is that we are about to implement current regulations whereas in June of 1990 we were on the threshold of implementing temporary regulations. So the situation has not changed with respect to that prospect dealing out there. I think its fortunate that in the intervening period, the past two years, there's has been a successful degree of cooperation and we've not had to consult that question.

SENATOR STURGELEWSKI:

Thank you, Mr. Chairman. May I proceed with one further question? Thank you. There's a number of issues that have been raised that might fit into major or minor amendments to ANILCA. But assuming that we've had the [indisc.] approach to this which would be a constitutional amendment, the Governor's bill with or without modification and some changes to ANILCA, the things that have most often come up have been discussions of needing definitions of certain things, such as included in the Governor's bill, for instance, the reasonable opportunity, the customary and traditional, the customary trade. And we've had discussion here today over the issue of the definition of rural. But one thing that keeps coming up time and time again is the section 807(a) which calls for the appeal to both federal and state courts. And the difficulty of, in a sense, what amounts almost to micro-management of the resource by the federal court. And I'd like to pose a question as to what do you feel about the idea, if agreement could be reached by Alaskans, in allowing due deference to the state for the initial appeals as opposed to having access to both courts? Could we have some discussion on that please?

MR. SUBERG:

I'll answer that question. We're both having a little bit of trouble. The phone line broke up a little bit there. Could we ask you to repeat the last part of your question, please?

SENATOR STURGELEWSKI:

Okay, on 807(A) allows for an appeal to both the state and the federal courts, which in the opinion of some, means almost micro-management by the federal government. If there were an agreement on the behalf of the parties what would your feeling be toward allowing due deference to the state court, prior, then of course to be able to go on to federal court? Is there history of that type of approach allowing the state courts to first hear the issues?

MR. SUBERG:

[Indisc.] I've got section 807(a) in front of me, Senator, first of all I think if the situation you're posing is met, in other words, we state presumption of management of subsistence on federal lands and the question is could you go to state court before permitting a challenge in federal court. As a practical matter, I think you correctly identified that that would take an amendment of ANILCA to accomplish because 807(a) does recognize access to federal court for failure of state and federal government to provide the priority for subsistence uses depending on who is administering the program. I would tell you though if you had a comprehensive state management program restored it in that probably would give the plaintiff the ability to challenge at the state courts and state law. It wouldn't preclude asking a change to ANILCA access to the federal court. I don't know if given the fact that we're talking about federal lands and a federal preference on federal lands that you could entirely do away with that. It's frankly getting into an area of state federal relations legally speaking, that I'm not comfortable offering an opinion on. I am comfortable this much that to a degree it were to become you would probably need a change to ANILCA. I'm not sure [indisc.] rule federal court jurisdiction entirely. But secondly, more importantly to the degree that you had state management and I would ask General Cole to provide whatever thought he had that to the extent that you did have a unified state management that

obviously that would set a limit on the state Boards again if people chose to litigate in state as opposed to federal courts.

SENATOR STURGELEWSKI:

Maybe the Attorney General would like to comment on that.

SENATOR KERTTULA:

You might briefly, Charlie.

ATTORNEY GENERAL COLE:

That is the subject, Senator, of which I have no opinion.

SENATOR STURGELEWSKI:

Thank you.

MR. WIGGINS:

That's a good answer, Charlie.

SENATOR KERTTULA:

Senator Hoffman was seeking the floor. He hasn't spoken yet, then Senator Adams, then Senator Cotten, unless someone hasn't spoken.

SENATOR HOFFMAN:

Thank you, Mr. Chairman, I have a couple of questions. The first one, since subsistence is so important to many of the Alaska Native people that I represent, I was wondering if you could give opinion on if the Alaska Native people were violently opposed to any changes in ANILCA what are the chances of ANILCA being amended?

MR. WIGGINS:

Senator Hoffman, I'll have to do what Mr. Cole did. I have no opinion. I wouldn't begin to answer. I don't know. I just don't know.

SENATOR HOFFMAN:

What about the other party?

MR. SUBERG:

I know the law of ANILCA a lot better than I know what the prospect for a particular change would be. Obviously I'm going to defer to Mr. Wiggins on how he would interpret what the chances of particular amendments or changes passing or not passing based on opposition. I really would be even less

qualified to offer an opinion than Mr. Wiggins on this.

SENATOR HOFFMAN:

Okay, my second question is was the Indian Commerce clause a basis for the enactment of ANILCA?

MR. SUBERG:

Yes, it was one of the clauses cited. The property clause of the Constitution and the interstate commerce clause were also cited. But I believe that the Indian Commerce clause was one of clauses those cited for authority in the enactment of ANILCA.

SENATOR HOFFMAN:

And in your opinion, is ANILCA considered Indian law?

MR. SUBERG:

That's a difficult question. I know that it's been raised from time to time. I'm aware of one opinion that the gentlemen in the Ninth Circuit -- I'm aware that different people read the opinion differently. But I'm aware of the issue with respect to -- I'm at least aware of what's taking in the Ninth Circuit does say it's Indian legislation. I'm also aware of the fact that Title 8 refers to rural residents.

SENATOR HOFFMAN:

So there is one opinion the Ninth Circuit that does say that does say that it is Indian Law?

MR. SUBERG:

That is my understanding. It's been awhile since I've read the opinion. I'm not even sure I could give you the tape. But yes, I believe there is one opinion -- that opinion in the Ninth Circuit.

SENATOR HOFFMAN:

And for the body's information, I wonder if you could give your definition of Indian law?

MR. SUBERG:

I'm not sure that's the meaning that I understand your question. Can you rephrase it? What's my definition of Indian Law?

SENATOR HOFFMAN:

Is Indian law a relationship between the federal government and the indigenous people on a government to government basis?

MR. SUBERG:

I'm still not tracking you, Senator. I'm sorry. I apologize but if you could spell it out a little more for me please.

SENATOR HOFFMAN:

Well, Indian law has to have a definition and the definition that I've been referring to is that Indian law is an agreement between the federal government and the Indian people on a government to government basis. Is that a fair definition or do you have a different definition?

MR. SUBERG:

Senator, I have no reason to disagree with anything you've said. With respect to the previous question you had whether or not, I guess, Title 8 of ANILCA is Indian legislation, yes. I was aware of the Ninth Circuit that it appeared at least some years back that suggested it was to the degree that it is, that does provide for certain rules of statutory construction that we here in the Department would follow. For example, there's an ambiguity in the legislation. One would construe it in favor of the Native plaintiff or defendants, depending on what the case is. And so, yeah, I have no reason to disagree with it. And again, I'm giving you the law the best I understand it.

SENATOR HOFFMAN:

Okay, then if we assume that ANILCA is Indian law then it could be only the Native people and the government that could change that agreement? Is that correct?

MR. SUBERG:

No, sir, I think I understand the premise of your question. Let me say, though, again, Title 8 of ANILCA refers to a rural preference. Simply a Native preference. That raises some interesting issues about how we work through this problem.

SENATOR HOFFMAN:

I understand that, but I said given the fact that we're

going to assume that ANILCA is Indian Law and there is precedent for that. Given that as a basis and if it were Indian law, only an agreement between the Native people and the federal government could change that law. Is that correct?

MR. SUBERG:

Now you're talking about the ability of Congress to amend it's own legislation. Obviously, I think Congress, given the fact that it cited the Indian Commerce clause as one of it's authorities for passing ANILCA, I'm certain that Congress would want to make sure they do -- was aware of what the Native concerns and preferences were on this issue. But to the extent that you're asking can Congress change this law, can Congress change Title 8 of ANILCA, it certainly has the power to do that. The question that you're asking I think is, [indisc.] do it, and that's a policy issue, that's a policy question that I really can't speak to.

SENATOR HOFFMAN:

Well, I'm asking if it's Indian law, and the Indian people say that they're dealing with the State of Alaska on a government to government basis, can Congress change that law without the consent of the Native people?

MR. SUBERG:

Sir, Congress can change the law [indisc.] Title 8 of ANILCA, Congress can change. What role the Native voice would play in this is obviously up for discussion. You're really asking a variation of your first question. Would Congress pass a law that the Native people in Alaska were against? And again, I don't know that. That's for the Congress to determine. That's for the Congress to decide. Congress has the authority to change Title 8 of ANILCA. That I do know. Would they? I don't know.

SENATOR HOFFMAN:

Thank you.

SENATOR KERTTULA:

We'll wrap it up shortly, but we have Senator Adams then

Senator Cotten. Senator Adams.

SENATOR ADAMS:

Senator Cotten, referred to some of the risk of opening up ANILCA. And someone said you've got to be very careful. Is it a possibility that once you opened up ANILCA, it's an open agenda, that perhaps the environmental groups would be looking at it and this could go against the Hickel Administration and it's economic development projects such as the water pipeline to California? Or perhaps or groups such as anti-hunting and trapping would be looking to close this and perhaps I might go hand-in-hand and holding the hand of the Alaska Outdoor Council to close this gap here. Or perhaps that groups that look at access rights to in holding. Or perhaps in mining. Mining is plays a great part in Alaska. Are these possibilities of some of the risks that we face by trying to look at opening up ANILCA?

MR. SUBERG:

Senator, I get about seven or eight or nine questions there. I guess if you could [indisc.] a risk, I wouldn't disagree with you. On the other hand, I don't know what the agenda of others might be so I don't know. Whether or not [indisc.] in relation to other projects I can't comment.

SENATOR ADAMS:

Thank you. Is it not true that the reason that we ended up with a rural priority was because the chairman of the interior committee considered a Native preference first of all and because he could not achieve this that Congress moved forward with the highest level of protection with a rural priority. Is that not correct?

MR. WIGGINS:

Again, I can't comment specifically. I would want to sit down and read and someone should sit down and read the Congressional record in its entirety.

MR. SUBERG:

Vern, I believe that preference in the question is correct

or where other versions of the bill my understanding towards the [indisc.] passage of the bill the term "rural" was substituted in Title 8. I think was a recognition that there was a good size Native population in the rural areas. I think there was a desire to protect the traditional subsistence uses. So, I guess, as far as that goes, I would agree with the characterization of the question the way you characterized it.

SENATOR ADAMS:

Thank you. I think the Governor and perhaps the Attorney General is going to make a trip down to Washington D.C. on the twenty-second and twenty-third of this month and they're planning coming down with Senate bill number 484 unamended. If that was the case, would your response be to them, and I repeat again, that it does not retain state management of federal lands?

MR. SUBERG:

I think General Cole has been forthwith in saying that he and I share the view that the bill as currently written would not leave the -- it would not meet the requirements of Title 8. So I presume that we share our views on that and so I don't see there being any disagreement or any changes in the position that I've given you here or in the letter that we have forwarded to Senator Adams. Yes.

SENATOR ADAMS:

Thank you very much. Then I can get on my bandwagon around the State of Alaska and say that a vote for the Governor's bill is a vote for federal management. Is that not correct?

MR. SUBERG:

I would not presume to ...

SENATOR ADAMS:

My final question, Mr. Chairman, would be since we're talking over two hundred million acres of land, would the federal government be receptive to contracting out management under some of the federal laws and regulations that we have in place today such as PLA 638 contracts, Native American and

federal contracts, also the Corporate Management sections in Title 8, that this is a possibility?

MR. SUBERG:

Senator, I think we even have some limited experience and we don't even go beyond Title 8 to find the authority for cooperative arrangements. I believe last year we were successful -- the fish and wildlife efforts were successful in engaging in a relationship with one of the Native contractors for a 809 cooperative [indisc.] under which we got the benefit of some biological and anthropological information. It would be a relationship based on what I've heard was very successful. I'd like to think that it would be repeated this year. So there's authority under the [indisc.] under Title 8, the Cooperative Management Authority that we have already utilized in engaging in arrangements with Native groups.

SENATOR ADAMS:

Thank you, and thank you, Mr. Chairman.

SENATOR KERTTULA:

Yes, Senator -- Senate President Eliason wishes to have the floor.

SENATOR ELIASON:

I just wanted -- it appears that from everyone speaking there is some type of something there that seems to hold the key to ANILCA. That if we should open that door we create a lot of problems. But it appears to me that if Congress had the will to open up ANILCA and lock up another million acres of Alaska land to wilderness, we don't have to give them the key. They have the key themselves. They can open up ANILCA anytime they choose to do so. Isn't that correct?

MR. WIGGINS:

I believe Mr. Suberg's answer a while ago was that Congress can amend the law on its own initiative, yes.

SENATOR ELIASON:

So I mean, so we as a state cannot prohibit them from tinkering with ANILCA? They can do it with or without our help.

So it seems to me it's sort of a red herring out there that we're the one's that hold the key to that door. I think Congress holds the key to that door. Is that correct?

MR. WIGGINS:

Senator, my comments are not meant to imply that the state holds the key to that door, as you say. I think it is correct that the state cannot probably permit the Congress from passing a statute. I think that's probably correct.

SENATOR KERTTULA:

The Attorney General wishes to make a brief comment.

ATTORNEY GENERAL COLE:

I have a quick question or two. Mr. Suberg, yesterday I was asked in a House committee hearing whether the waters of Southeastern Alaska are navigable. Do you have an opinion on that subject? Are they navigable?

MR. SUBERG:

Which ones, General Cole? Generally, speaking, I don't like to offer opinions unless I'm sure that we hold title to the [indisc.] of waters of which we're making claims.

ATTORNEY GENERAL COLE:

Well, how about the Gastineau Channel for starters?

MR. SUBERG:

Would be happy to review that situation. [indisc. - laughter] wanted me to. At this point, the United States will always open to start a claim to [indisc.] the navigable waters to which it believes it holds title and to the degree of historical information that suggests that we hold title to the [indisc.] to a particular body of water we will not be shy about asserting it. To the degree that we don't, in those cases, we would not say we hold title to [indisc.]. It's very much a case-by-case determination based on what kind of federal reservation was made? Did it include the [indisc.] of navigable waters. Was there a specific act of Congress? Those sorts of factors that you and I have discussed before when the federal government needs to retain land. So, on that particular one,

I'm not sure I could give a titled opinion today, but to the degree of significance we could talk about it further. But we do that on a case-by-case basis.

ATTORNEY GENERAL COLE:

Let me see if I can follow up a little bit more then. Has the United States claimed title to the lands beneath the navigable water of Southeastern Alaska?

MR. SUBERG:

In our regulations which we have claimed title to some of the navigable waters, for example, Glacier Bay we claimed title to because again some of the factors I've indicated. I know it's been controversial. I know that your Governor [indisc.] excuse me, General Cole has challenged that assertion in court.

ATTORNEY GENERAL COLE:

Well let's exclude the water at Glacier Bay and put that aside for the moment. And then can you answer that question if we exclude the lands beneath Glacier Bay.

MR. SUBERG:

I am not prepared -- I'm sorry Charlie, I'm just not prepared to answer that right now.

ATTORNEY GENERAL COLE:

You're saying that you don't know whether the United States has ever claimed and now claims title to the lands beneath the navigable waters in Southeastern Alaska, excluding Glacier Bay. Is that what you're saying?

MR. SUBERG:

I'm saying I'd be happy to inquire and go to my legal experts who will have a better understanding of it and get you an answer tomorrow.

ATTORNEY GENERAL COLE:

All right, thanks.

SENATOR KERTTULA:

Senator Halford, we're going to bring this to a head in a moment. Senator Halford wishes and then Senator Cotten.

SENATOR HALFORD:

Just to follow this same question, is the United States defending itself against the claim brought by AFN to take over all waters. Obviously it is.

MR. SUBERG:

Are we defending ourselves against the claim by AFN to take over all waters? Are you referring to the Katie John litigation?

SENATOR HALFORD:

Yes.

MR. SUBERG:

Okay, I'll tell you what we've done in the affirmative instead of the negative. We have based our claim of jurisdiction based on where we think we have title to land. Whether it's dry land, that's easy. We know whether we have title to it. And in the case of navigable waters or otherwise where we feel we have title to the defense of those navigable waters. That is our current posture. Anything that the United States has fee simple ownership in -- we have title to and we assert jurisdiction over it because that's how we read ANILCA. We've been challenged on that. There are others. I don't know [indisc.] characterization about the AFN [indisc.] There are others that have challenged us taken a broad view with respect to certain resources. Obviously we're going to see how we do in the court on that. There's at least a couple of cases that are pending on that. But our position is that if we have title to it. We assert jurisdiction over it. Because our primary goal under Title 8, as Vern indicated in the letter from the Secretary two years, is to make sure that the preference for subsistence on a public federal land is meaningful.

SENATOR HALFORD:

So you're defending yourselves against the action to force you to take over management on state waters on the basis that you do not own the underlying lands of state waters with regard to -- and I'm excepting Glacier Bay, Nunavak Island -- the arguments that the state's already having. But you aren't

making any case that you own any of the waters or having management authority but are making the opposite case. Are you not?

MR. SUBERG:

We're making the case -- we've identified in the regulations those areas that we think we got pretty good claim to them. Yes, and I know that that provoked the somewhat -- provoked the challenge and the litigation right now. We have limited our jurisdictional scope to making sure that the preference is good on public lands, yes.

SENATOR HALFORD:

Which does not include the waters except Glacier Bay or other federal reserves that preceded statehood?

MR. SUBERG:

I am not sure that we are prepared to say that our definition on what we think is in the federal jurisdiction [indisc.] In other words, what we've asserted as of May 28, 1992 is all we're going to assert. Frankly, there may be other lands we claim title to.

SENATOR STURGELEWSKI:

Mr. Chairman. It might be interesting to tell us what those lands are. I mean as far as -- apparently Kenai National Wildlife Refuge, the Kodiak National Wildlife Refuge, I believe, the waters within fifteen hundred feet of the shoreline of Afognak. Am I correct, those are the waters we're talking about? There's quite a list there and that's in the information that was submitted by Mr. McVee.

MR. SUBERG:

That is, I believe, the partially representative list, Senator. They are in our May 28 regulation. Those areas are there and we have made claim on them.

SENATOR STURGELEWSKI:

Yes, I think ...

MR. SUBERG:

They are in the regulation. That's correct.

SENATOR STURGELEWSKI:

That's correct. I did not read all of the ones in the Aleutian Islands and certain other areas of the state. Women's Bay, [indisc.] Cove, et cetera.

SENATOR KERTTULA:

Senator Cotten was seeking the floor and the Attorney General has one quick comment. We're going to try to wind this up. Thank you.

SENATOR COTTEN:

On this subject, there's something in Alaska, the Legislature or the executive branch to do to avoid the risk of the government losing the Katie John case?

MR. SUBERG:

Well, again, the reason we're in this situation is because we now have dual management. And to the degree that dual management remains, the question of who regulates becomes more important. When we had unified management, it wasn't so important for the federal government, at least for subsistence purposes, to specifically set out jurisdictional areas. Because we have one scheme a state program that was in compliance with ANILCA. However, as long as we have dual management, as long as we have a federal program and a state program administering subsistence preference, I would submit that the federal government has the duty to identify those areas for which it claims jurisdiction. And our regulations have made some effort to already identify some areas. And frankly it's an ongoing task that we're gong to have to keep doing. We've made reference to that in our regulation.

SENATOR COTTEN:

What's your assessment of the outcome? Is the government going to prevail or not?

MR. SUBERG:

Again, we have been challenged strongly. I'm not going to judge [indisc.] -- the judges involved in this case. We put forward our best defense but even defending those cases, the

federal government over the next few months, next few years is going to have to very clearly define where its jurisdiction is as long as we have dual management.

SENATOR KERTTULA:

As long as we're sitting right here and I'm interfering slightly, but does Senator -- do you Commissioner Rosier or General Cole have a comment in this area?

ATTORNEY GENERAL COLE:

Yes, sir, I do. And the question is this, Mr. Suberg. Yesterday when I was furnished with a copy of the permanent regulations with respect to the assertion of jurisdiction, I noticed that the beginning of the sentence there was this language which said, quote, "At this time", comma, dot, dot, dot, close quote. Could you explain to me the meaning of that qualification or why it was inserted into the regs?

MR. SUBERG:

General Cole, with all due respect, we're in litigation over this. So I think just about all I'm going to say on this.

ATTORNEY GENERAL COLE:

All right. Thank you.

SENATOR KERTTULA:

Senator Cotten, did you have further ...

SENATOR COTTEN:

Yes, I did, I wanted to just follow up with my original question was going to be on the history of ANILCA there and I guess Marty Suberg appears to be the expert within the Department of Interior. And the logic that was used to make the determination that those residents of Alaska who ought to be given preference would be defined as rural residents. I'm just trying to figure out whether if you make a change to that it wouldn't -- I'm trying to get to an easy conclusion that would be a technical amendment to change that, to describe it differently. And you said that the individual criteria basis was rejected and instead a residency basis was used. Can you tell us why that happened? Or why this other approach wasn't

considered? Or if it was why was it rejected?

MR. SUBERG:

I think I'll answer this way. What I believe the Congress did was to say that it preferred community basis versus urban criteria as opposed to an individual criteria, that you look at each individual to determine whether or not he was a subsistence users. Hence the difficulty we're in. I think one of your colleagues provided a relatively good overview of some of this history leading up to ANILCA and that is as conversant on all this as I should be. And I know there was a great interest in protecting that traditional lifestyle for those folks who wanted to engage in it. There was the recognition that it was rural Native subsistence users who uses it that Congress was trying protect. So ultimately Congress settled again for a number of reasons. I'm not sure I'm cognizant of all of them. But in the final analysis, Congress settled on the word "rural" to describe that category of people. I'm relatively clear about saying that it is based on community characteristics - community versus individual characteristics. I can't really shed any more light on it than that. But that is again, is based on the reading we've done here. That appears to be the deliberate choice of Congress.

SENATOR KERTTULA:

Are there further questions? There's no further request at this end. We thank you, Mr. Wiggins and Mr. Suberg and we thank the Secretary for providing the opportunity for us. We're hoping to see you before long up here in very pleasant surroundings. Thank you again, very, very, much on behalf of the whole Senate.

MR. SUBERG:

Sir, we thank you and hopefully we've been helpful.

SENATOR KERTTULA:

Yes, we'll recess for ten minutes then we'll come back for some brief testimony then we'll go to the body of the bill for action.

RECESS

3:00 - 3:10 p.m.

[Tape begins midspeech]

SENATOR KERTTULA:

... intensely on achieving the opportunity to acquire the Alaska Railroad at one time and I think I got to speak twice on the subject of five attempts. That's a distance and they were so busy and this is what's happening here too, attempting to accommodate legislation. We'll hear from a few more people. I don't know whether to have a permanent subcommittee to record and listen. Those that wish to submit written testimony, I ask that they do so. But I'll try to get a cross section of people now. We will as is possible, bring people to table. We are recorded. And there's a gentlemen here from, yes the back of the room, from the Council. I'll ask if he'll come forward at this time. Because we are recorded, even though we are not in any number here. But at least you'll have your opportunity to testify and as people show up. Then we'll bring Mr. Kookesh [ph] and others to the table. Please identify yourself for the record. This is recorded. This will be transcribed and record will be available to all legislators and the public. You may proceed.

MR. JOHN JAMES BURNS, GOVERNOR'S SUBSISTENCE ADVISORY COUNCIL:

Thank you, Mr. Chairman. I will purposely make my comments very brief.

SENATOR KERTTULA:

Thank you for waiting for us.

MR. BURNS:

I'll make my comments very brief, because there are many people who wish to comment. My name is John Burns. I was a member of the Governor's Subsistence Task Force as not representing any particular vested interest group. I am a biologist still. I work as an independent. I do believe that the issue before us, of course, is at a point where it can no longer continue to be just passed off. That's not to say that

it has been in the past. But we see the implementation of regulations. We see growing programs. I'd like to give you a little bit of my perception of what the Council tried to do. Whether we succeeded or not remains to be seen.

Clearly, as an ecologist I recognize that resources will always continue to rise and fall. And that one time or another one or more is going to be in short supply. And conversely, at one time or another others will be in great abundance. When important resources to subsistence users are not abundant enough to meet the demands of all state residents, we should have a scheme in place to provide maximum benefit to those people who depend upon it most as an important component of their culture, lifestyle, way of life. Conversely, and I haven't heard much talk about this so far. When the resources are abundant to withstand the harvesting by all of the potential users that choose to harvest it, they should have maximum access. So the point is that we're dealing with trying to award a preference, in fact, to users who have a great dependence on it during periods when the resources are in short supply. Recognizing that there are a variety of reasons that people have and different dependence on it. It might be choice of lifestyle, traditional dependence, areas where they live, economic limitations or alternatives. How much significance do we as Alaskans, you as the leaders of our state place on the issues of choice and the exercise of options. Because any limitations to those exercise of choice and limitations of options and they must occur, should in fact be based upon the resource status and the priorities of preferences to the people who, in fact, depend upon those resources. I'm sorry to be redundant now.

We asked many questions about federal versus state management. All of you have been around a long time. I have not been around as long as many of you, I came as a student thirty-three years ago. We now have a record of federal management. Since statehood. And I think you want to look at it very, very closely. And that record, for instance, deals

with the federal fisheries management. It is not particularly a good record. It's a mixed record. I note that the ground fish fisheries in the Gulf of Alaska reached essential commercial extinction. We're struggling greatly to rebuild them. That's in the Gulf of Alaska. In the Bering Sea, under federal management regime, we are now witnessing the precipitous decline in ground fish, particularly pollock and Pacific cod. On land, it's going to be interesting. And I think as a matter of historical record, we will see that federal management does not offer the options to protect our own subsistence utilization. If you start to look at management decisions made in Washington D.C. and you start to look at questions of maintaining or enhancing moose populations and the options that exist for them, many options will be foreclosed based on conflict of philosophies and what Washington may accept or what Alaska may accept.

I've gone beyond the time I wanted to use, Mr. Chairman. As I said, there are others who wish to speak. I would entertain a question if you have any. But in conclusions, what we tried to do is lay out a blueprint. The council tried to lay out a blueprint to, in fact, guarantee to the maximum extent that we could that people dependent and choosing to live a subsistence lifestyle may do so. We raised the issue of amendments to the constitution. I personally have no strong feeling one way or the other. By that I mean, giving it mention in the constitution certainly is important, but you would still need a blueprint and this is an example of a blueprint of how Alaskans would choose to protect, enhance and maintain a very important lifestyle. To dilute it to say everybody regardless of their lifestyle and need in rural Alaska depends on it is in fact, in my opinion, continuing population increases death knell to truly maintaining a meaningful subsistence lifestyle because it cannot be done. Unless some protections are [indisc.] Thank you.

SENATOR KERTTULA:

Thank you for appearing. Is John Schaefer [ph] here? Mr. Al Kookesh, is he here?

MR. AL KOOKESH, GRAND PRESIDENT, ALASKA NATIVE BROTHERHOOD:

Mr. Chairman, we have copies of our testimony. Would you like to have us distribute them before our testimony?

SENATOR KERTTULA:

Yes, I would. And I would ask, yes, Virginia, if you could pick it up. This is recorded and this will be permanent record. All members of the Legislature and the public will have it.

MR. ALBERT KOOKESH:

Thank you, Mr. Chairman. I'd like to introduce to you Ms. Selina Everson, who is the Grand President of Alaska Native Sisterhood; Mr. Ronald Williams, who is a member of the Executive committee of the Alaska Native Brotherhood. My name is Albert Kookesh. I'm the grand president of Alaska Native Brotherhood. We'll start today with Selina Everson.

MS. SELINA EVERSON, GRANT PRESIDENT, ALASKA NATIVE SISTERHOOD:

As Al said, my name is Selina Everson. I was born in Angoon, Alaska on Admiralty Island. I have resided in Alaska most of my life, but I know when I was absent from Alaska I missed my Native food. We are here today taking part ... [tape ends midspeech].

Tape 92-11

Side B

[Tape begins midspeech]

MS. EVERSON:

... busy schedules to tell you how we feel about our soul food, if you will. Also known by subsistence, subsistence lifestyle, it is important that these terms be understood in relation to our very existence as a people of this great State of Alaska. Subsistence food. We were born into our foods, learned from our grandparents, our great-grandparents the preservation of these foods. Our people were healthy and strong. They lived to be very old because our foods were prepared not with preservatives or additives or artificial

coloring or flavor. They were preserved in their natural state. Our system did not abide foods that you bought from the local stores. Dairy foods. Our systems were accustomed to our food preserved by our grandparents, our mothers, our fathers. Today we're here again, it seems like we are always fighting one issue or another. Our backs are to the walls. We have nothing else to give. We can't go home and tell our children that Governor Hickel killed their culture. It is a very emotional bill -- issue this subsistence. We have heard comments made where we can hear it directly. There's food on the shelves in the grocery stores. What are they fighting for? We are fighting for our very existence as a people of the state. We have resided here for thousands of years. And to us this issue is very touching to our hearts, to our physical and emotional well-being. Please resolve this once and for all. So that everyone can benefit that we can stay in this great state and live side-by-side with our white brothers and sisters. The paper has called our customs and traditions a myth. It is not a myth to us. It is us. It is our very soul. Our very existence, our very survival. Thank you very much for this time.

MR. KOOKESH:

Thank you. Can we hear from Mr. Williams.

MR. RONALD WILLIAMS, EXECUTIVE COMMITTEE MEMBER, ALASKA NATIVE BROTHERHOOD:

Thank you very much, Mr. Chairman and committee members. My name is Ron Williams the executive committee member of the grand camp of the Alaska Native Brotherhood. I appreciate the opportunity of saying a few words today. I understand that there is some thoughts of continuation of dual management between the federal and state of the subsistence program. And frankly, that makes us very nervous. For about ninety percent of the land in Southeast where we reside is under the federal management now.

During the territorial days of Alaska, the salmon industry was a very [indisc.] industry in Washington D.C.

They have fish traps that fish twenty-four-hours a day, seven days a week. In Icy Straits [ph] alone, where I come from, there were twenty-three of these fish traps. In 1921, the Alaska Native Brotherhood decided that these traps were damaging the salmon stock in Southeast. So they went to Washington, D.C. to see what could be done about eliminating or decreasing the number of fish traps. They ran into a stone wall. And every year after that, until statehood the ANB did everything possible to eliminate the traps. The only concession they got was to move some of these traps that were closer to the salmon stream, a little bit further from the mouth of the stream itself. When the cry came to make Alaska a state, along came the word that we could eliminate those fish traps so the Alaska Native Brotherhood supported that effort. We felt that it was in the best interests of the citizens of Alaska to manage their own resources. Of course we know that the fish traps were finally eliminated but not before salmon stocks became very depressed. Also during the same period, the federal government offered a bounty on harbor seals. These seals were the main source of food for our people. Literally thousands of these seals were slaughtered. This is federal management. To top everything off, the federal government put a bounty on the bald eagle for \$2 for a pair of claws. Thousands of these birds were killed. The bald eagle, as you are aware, is our national bird and appears on our national emblem. This is federal management. The Alaska Native Brotherhood favors state management. We do not want to go through another period like I just described. We urge you to start the process with the constitutional amendment for subsistence for protection of subsistence or to support the AFN subsistence bill. Thank you very much.

MR. KOOKESH:

Mr. Chairman, everybody seems so tense. I wanted to tell you a little story before I get started on my testimony. I remember the story of two gentlemen in the hospital. One was a Native and one was a non-Native. And they both had the same

illness. When the food was brought to them everyday, the non-Native couldn't eat. He was so sick, he couldn't eat. But the Native ate everything on his tray and even proceeded to eat the food on the other tray. After a couple of days, the non-Native looked at the Native and said, "Boy, I wish I had your appetite." As soon as he said that, the Native put his fork down and he stood up and he looked at the non-Native and said, "When you first came to this land, you took our timber. Then you took our women. Then you took our fish. I'll be damned if I'm going to give you my appetite."

Now that you're a little bit relaxed, I'm the grand president of the Alaska Native Brotherhood. The Alaska Native Brotherhood speaks for at least sixteen thousand people in Southeast Alaska and we have members up in Anchorage. I want to, before I get started also, mention that I'm a commercial fisherman. I have a Southeast gillnet permit and a United Fishermen of Alaska has never come to me and asked me for my opinion on either of the bills. I do support the Alaska Federation of Natives bill. We appreciate this opportunity to speak on an issue that could mean the end of a way of life for Alaska Natives if not handled properly. The Alaska Department of Fish and Game provided us with the following figures: We asked for this information on the total number of salmon caught in Southeast Alaska last summer which was 1991. They indicated that their records show the following by user groups: 44,355 by subsistence users; 257,595 by sports fisherman; 68,986,295 by commercial fisherman. Compared to the commercial fishing numbers, 44,355 seems hardly anything to worry about. It amazes us that the State of Alaska and the federal government spends so much time and money to satisfy a few people who say that subsistence users deplete the salmon stock and that it is only for Native people. It also amazes us that some of the commercial fisherman organizations are opposing subsistence. I'd like to repeat those numbers. 68,986,295 fish caught by commercial fisherman; 44,355 used by subsistence persons. In

order for the State of Alaska to regain the subsistence management we feel that the state Legislature should do two things while they are in special session. They are, number one, adopt the resolution that would request the Secretary of Interior to hold off pursuing the management of subsistence on a permanent basis.

Second, to start the process for a subsistence constitutional amendment to allow the vote in November using the wording that is already proposed to you. Article eight, section fifteen, is entitled, "No exclusive right of fishery". And it states, "no exclusive right or special privilege of fishing shall be created or authorized in the natural waters of the state. This section does not restrict the power of the state to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fisherman and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in this state." As you can see precedents have already been set in this article. In the early 1970's a proposal was advanced to limit the number of fisherman that could participate in a fishery primarily as a way of increasing a fisherman's income. This is sixth system of limited entry we have today. And because it creates a special privilege of fishery, a constitutional amendment was necessary to allow its adoption. Our guess, at this time, is that more than half of those permits now belong to people who do not reside in Alaska. In addition, aquaculture is also mentioned in amendments so private associations may possess the right to harvest the fish the produce. With this document I have also included a document from the State of Alaska, Division of Subsistence, which shows the numbers that I just read to you. It was a surprise to us to note that the department told us that nobody in Alaska has ever asked for those numbers. It's interesting to me to look at the numbers that the state has proposed and wondering where they got their figures from. This is the first time this document has been produced. It's

available now for your information. We hope you'll consider the two recommendations we're making to you and we thank you again for your time.

SENATOR KERTTULA:

Mr. Kookesh, thank you and your party for coming. I apologize for the time it takes. Mr. John Schaefer, I would ask that you come forward. Well General Schaefer, it's nice to see you today.

MR. JOHN SCHAEFER, CHAIRMAN OF THE BOARD, ALASKA FEDERATION OF NATIVES:

Good afternoon, Mr. Chairman. I'm not sure why you asked me up here, so I better ask.

SENATOR KERTTULA:

You are located on the list of people that said they might wish to testify so I thought I'd bring you up if you have anything to say, because you might want to lose the opportunity to hear from you. That's the reason, John.

MR. SCHAEFER:

Thank you, Mr. Chairman. Ladies and gentlemen, my name is John Schaefer. I'm the chairman of the Board of the Alaska Federation of Natives. I've held back testifying because I think there are many more Alaskans that can get their points across to you much better and you listened to them. So I'll make my comments very brief.

Essentially, I think I would speak for most Alaskans in saying that it's time the Legislature solved this problem. And as we looked at the problem, currently, and I want to point out the problems that we're creating is one we look at as long term, not short term in that if you allow federal management of our resources in the state, we're going to have a long term problem. And I think it's important that the Legislature insures that the State of Alaska has the opportunity to manage all the resources in the state. It's surprising to me that the Native people are making this pitch to the State of Alaska and the State of Alaska doesn't seem to give a damn. We fought for statehood, I

thought, for this very reason. To get control of Alaska's resources for Alaskans. And here we are the state and federal government is taking over management of some of these resources and we're sitting by [indisc.] I don't think we should do that. I think we owe the people of Alaska the opportunity for Alaskans to be able to manage our own resources. And for this, the Native people in Alaska are saying please guarantee that things won't get so bad that we have to start stopping people from using some of these resources. Give us a chance to use these resources for own sustenance. And this is what we're asking. Not a lot. We're not asking for ninety percent of the resources. We're asking for two things, for as little as one percent of those resources, when those resources are available for everybody. We're assuming that those resources are being depleted, that we'll ask for something less than one percent. We'll ask for whatever we can get. And that's all. I don't think that's too much to ask for. Why should people be so fearful of Alaska Natives and other Alaskans who utilize subsistence resources for their livelihood. To get such a small percentage of this state's great resource wealth. And on top of that, I think it's been made very clear by the people of this state, that if you can't handle the job, give them the option and they'll decide for you how to manage the resources of this state with a constitutional amendment. I think that's not asking too much. Mr. Chairman, I'd be happy to answer any questions.

SENATOR KERTTULA:

Any questions of John Schaefer? Thank you for coming, John.

MR. SCHAEFER:

Thank you, Mr. Chairman for [indisc.].

SENATOR KERTTULA:

It's my understanding that Dave Katzeek [ph] been here very, very, appropriately dressed and probably pretty warm waiting. We'll ask that you identify yourself and please come

forward.

MR. DAVE KATZEEK:

[indisc. - Native language] - Translation: Greetings honorable people of the land. My name is King Gesta [ph]. I am of the Shandu Katie [ph] family from the Chilkat Valley. I'm from the Thunderbird House in the Chilkat Valley. It is very, very good the way that we are all sitting together to look at the resolving of an issue that affects every person within the State of Alaska."

Honorable people, It's with a real, real deep feeling of emotion that I come here. What I am wearing today is not for public relations. It's not for me to make a show of what my ancestors have. What you see upon me today is truly the grandest art of management that you can ever believe. This blanket is woven with the hair and the wool of the mountain goat from the Chilkat Valley. When any of you men that have gone mountain goat hunting, go into the mountains to hunt these wonderful grand creatures that God has given to us. To come out of the mountains with the wool, the blankets that eventually resulted in what you see upon my neck, back. The abalone, that shell that you see on this hand, proper use of the resource. Not for necessarily of game that my people shot just so they could have a trophy or went and harvested just so they could have a trophy.

I'm going to read something out of your big book and a big book that I choose as well. It's called the Bible. And I want to read something here that hopefully will bring us to a place where we can get to a common ground of understanding. Now, you can take this as a myth or you can take it as the word of God. It's your choice. [indisc. - Native language] You are a human being. You have the power to choose. And it says in -- it's found in Genesis first chapter in the twenty-ninth verse, if anybody has it in your bible. Maybe you can just go ahead and open it up and read it. If you don't I'll read it for you anyway. It says, "Then God said, see I have given you every

herb that you see, which is on the face of all the earth and every tree whose fruit yields seed. To you it shall be for food. Also to every beast of the earth, to every bird of the air and to everything that creeps on the earth and which there is life, I have given every herb for food and it was so. Then God saw everything that He made. And indeed it was very good"

Our people look upon the land [indisc. -Native language] our Lord, our God, our higher power [indisc. - Native language] He is the one that brought us to this land that gave us a land that literally flowed with milk and honey. Not for the purpose of capitalizing upon the resource for the benefit or the expense of other people, but so that we can have truly the blessing that God had actually given to us. Now when we begin to try and manage other peoples lives, usually there's a problem that we're trying to reach out to other people. And I'm here to say this, let's deal with what we need to deal with here. Right here. We can resolve this probable. We made need to lay aside our differences and our opinions but we can resolve a real important issue. It is for a day like this day that my grandfather, James Slenot [ph] spoke to me in his Native tongue so some of the things that you're hearing me say is James Slenot. His name is in the history books when the U.S. government came into the United States, my grandfather James Slenot from the Sukaki [ph] house worked with the federal government. You have an Alcan road that you're going to be celebrating in this next year, my people, my family, our people worked in that area and helping. Working cooperatively, not so things can be taken from us but so that you would have the blessing of the land such as we had. Not hoarding it to ourselves. Not keeping it to ourselves. So I encourage this day to take heed with respect to what you're dealing with. You're not just dealing with Indian type of food. The resource comes from a source greater than you or myself. And it's important to deal with it in that fashion. And I would say this, regarding the government, I think -- I say this humbly and I say it with pride. Look to the Native people. We still

believe in the spirit that effects everything that we do. We still believe in the spirit. We have it within our hearts so we respect the rivers and the streams, the mountains, the ocean the sea. We respect all those particular resources that have been given to use by our god. [indisc. - Native language] The Holy Spirit. Don't look at me as a person who's paganistic because you don't understand my regalia that I have. We have a management system that in my personal opinion exceeds a lot of management systems of today. When you're bailing out S&L company's at one billion dollars. When you're dealing with housing authorities where a lot of money has been ripped off, let me tell you this. We Native people have survived here for thousands of years and the reason we have has been because we never ripped each other off. We helped one another. And I apologize for saying what I am saying to this extent. I do not want to judge. This is not my intent. But I believe we have a management structure. I don't know how many mountain goats died for this. But you know what. A lot of the mountain goats that died for this blanket, the people ate. It was smoked and all the other things. So with all due respect, Senators, I appreciate this time. I may not have the time to say what I feel but I think we need to look to a higher power to resolve this problem. A power that's greater than ourselves. A power that can lead us an direct us in such a way that your forefathers talked about in the settling of this nation. We need to return to that and we need to look at it with love and compassion for on another. Not letting the newspapers dictate our lives. Not letting the newspapers destroy an opportunity to resolve a problem. When you talk about special interests. I'll finish this. We see the large vessels going into the Glacier Bay area. It isn't that special interest. We see the things that are happening. I don't need to carry it any further than that. There's a lot of special interests. Don't let it -- just because we're talking about the subsistence as you say, that's just a special interest for the Native people. We are a people

of Alaska just like you. And God brought us here and we settled here. And so I personally believe that you can resolve this problem. I personally do not stand with the Governor on legislation. That doesn't mean that you can't resolve those differences. They can be resolved [indisc. - Native language]. I know I took a lot of your time, but I took a lot of time sitting out there too. Thank you.

SENATOR ELIASON:

Thank you, Dave. The chairman is going to be absent for a few minutes so he asked me to preside. Flore Lekanof. [ph] Senior. Welcome.

MR. FLORE LEKANOF, ALEUTIAN-PRIBILOF ISLANDS ASSOCIATION, INC.:

Thank you distinguished president of the Senate and distinguished members of the Alaska State Senate. I am Flore Lekanof. I was born and raised on St. George Island out in the Pribilofs. For many years I lived under the wardship of the federal government. And since I guess it was a good idea but we became a state. But I grew up in the territorial days, even taught school for the territory upon a time and spent a little time doing World War II over at Funter Bay not too far from here. So there quite a bit of history that I have in the State of Alaska. I've been around a long time. I do have a few comments that I'd like to pass on, if I may. And before I do that I would like to also say that I was one of the organizers of the Alaska Federation of Natives, it's first chairman. I was also the organizer of the Aleut league which is now known as the Aleutian/Pribilof Islands Association of which I am an employee. I get to travel quite a bit in the Aleutians and the Pribilofs. We do serve 12 tribes just like the 12 tribes of Israel. And there are twelve Salani [ph] tribes, you know and there were twelve disciples. There are twelve cards in a suit in a poker deck. There are many twelves, you know, and I just thought I would mention that. Twelve months in the calendar. I don't have twelve children.

Let me just mention a few things. The Aleutian Pribilof

Island Association supports the Bush Caucus bill to solve our subsistence problems. I think there needs to be said a couple of things here. Many statistics have been thrown at you and I'm sure it's difficult with all of the information that has come by, in a few days, to decipher all of the important aspects of it to make a fair decision for all concerned in the State of Alaska which is your important duty, for which you have been elected.

The area fisheries have been talked about quite a bit. I think someone said that it is probably the largest area in which subsistence is taken by our indigenous people of Alaska. I think it is true. Keep in mind this that these figures have been given to you before but they are worth repeating. Ninety-five percent of all species of fish taken in Alaska are taken by commercial fisherman. One percent by the sports people and four percent by subsistence users. And of that four percent, fifty percent of them are non-Native. So were not talking strictly about Native people here. Going back to the ninety-five percent taken by the commercial fisherman, I think our state needs to look very carefully at the people we permit to fish in Alaska who are not Alaskan residents. This needs to be examined very carefully. I heard yesterday someone said that maybe fifty percent of permit holders in Southeastern may very well be non-residents of Alaska. We heard that maybe twenty-five percent of those holding permits in Cook Inlet may very well be non residents of Alaska. I did not hear figures about Bristol Bay. And having worked for the Borough of Bristol Bay, I suspect at least fifty percent of those permit holders are not Alaskans. So I think we need to look very carefully, not only at the aspects of the permit holders but the processing of fish. The fish processors themselves. I think we need to take a look at that. And if you look very carefully, I think you will find down through the history and even to this day, much of that operation is owned from outside of Alaska. Even to the extent that much of the interest is owned international from outside of

the United States. So I think there is quite a bit to say here. So what are we talking about? A very small percentage of fish, for example, that is taken for subsistence that is used by Alaskan people. I think it is that problem that has brought you all together. All of us together. And I hope we will come out with a solution that would be satisfactory to all.

And in closing, I would like to say this. That I think it is becoming clear to some of you and for those who had worked and lobbied hard for the Alaska Native Claims Settlement Act, know this for a fact. That if you read the conference committee reports of the Alaska Native Claims Settlement Act, you will read in there that there was a great deal of concern for the subsistence way of life of the Alaska Native people. And this is what I'm interested in, because I deal with the tribes. As I mentioned twelve tribes. And they are concerned about their subsistence way of life. There are two things, and I'll close with this.

One, we want to preserve our language. The Native languages should be preserved. We are working towards that. Secondly, we must preserve the Native cultures. It makes us that much more rich in Alaska to have the Native cultures as part of our state and preserve them. To preserve the Native culture we must also preserve their use of the natural resources, particularly those things with which they eat, their lifestyle as it pertains to food they use. I think we must be careful of those things. Those things are preserved for them, for us, because if we lose the language and the culture we will lose the indigenous people of Alaska. I don't think anyone here wants to see that happen. Thank you very much Mr. Chairman.

SENATOR KERTTULA:

Thank you. It's good to see you again. Is Martha Vlasoff here? I'm trying to get a cross-section here.

MR. WILLIAM THOMAS:

Mr. Chairman, my name is ...

SENATOR KERTTULA:

Introduce yourself, please.

MR. THOMAS:

My name is William Thomas. I'm a Board member of Kitna Native Corporation [ph]. Honorable Board members, elders and also member of Kitna Village Council and I want to tell you about my education. Fourth grade. One month in fifth grade September thirtieth at our school because of the depression -- I was sixteen years old when I got out of school. I was forced to get out to make my living. And I live all my life a subsistence life depending upon it. And I began to work for wages back in early, I mean latter part of thirties. I live in the city here. I work for the government during that time -- for twenty-one years I live in the city. I usually take one month off every year to go get my meat and my fish and berries. Berry picking. That I've been doing up till that very day, I'm been doing that. So you can say I'm very dependent on subsistence living. I have known our Governor Hickel for quite a while. I live in Anchorage for twenty-four years and I remember him when he was first elected and I do like Mr. Hickel and I'm a born again Christian. My Bible teach me that we must pray for our leaders. Our president, our Governor, our senators, down to police folks. That the way the bible teaches and that's part of my life. So I come here to tell you part of my life and how I live upon subsistence. One thing I'm sorry to say today that I won't support the Governor's bill. I got it down to a [indisc.] because why I don't support it. I do not support the Governor's bill because it doesn't solve the problems. I support the bill introduced by the Bush Caucus. I support that bill. And now I have two ways about amending the bill. I'm a little bit confused on it. That will be my testimony. I'm very dependent on my subsistence life.

SENATOR KERTTULA:

Thank you for coming. Are AFN attorney's fairly handy here? Thank you for bringing that in now. You may proceed. You are recorded for the record. We've got to try to find other

ways for everybody to get a chance to submit testimony one way or another.

MS. MARTHA VLASOFF, RURAL CAP:

My name is Martha Vlasoff and I'm from Tatitlek, Alaska and I'm originally from Cordova. My family are all commercial fisherman. That is the same out in the village. Most families depend on the income from commercial fishing but at the same time we are subsistence users. Each time we go out fishing, we make sure there is enough put up for winter use. We smoke fish, salt it and freeze it for all of our subsistence use. But it isn't just the salmon that we use for subsistence. I don't see how that some commercial fisherman can say that they wouldn't support the Bush Caucus bill when this is the bill that I believe will protect the Native subsistence rights and the non-Native subsistence users. Our village is only seven miles away from where the Exxon Valdez went aground. Subsistence for our village was gravely disrupted by that preventable disaster. There are people not only in our village but in the villages around the Prince William Sound and beyond that still don't eat traditional Native foods because they don't know if it's really safe to eat. I'm glad that Senator Kerttula has given us a chance to a piece in this puzzle that we are all trying to put together. Not everything that is being said is true so we must beware of that and make sure that our words and our testimony aren't being used against us. Which is the case in the Governor's speech the other day when he said, "The elders are pleading to us and praying for our help." While this statement is true in itself, it does not clarify what the elders are praying for. Clearly, you must see that from the testimony of our elders here that they are not in favor of the Governor's bill. God has clearly blessed the Native people with the wonderful understanding of this land and the fish and game and berries and fowl that are provided that He provided. But it isn't that Native subsistence that is the pleading resources [indisc. -cough]. Native people traditionally only take what

they use. The Native subsistence users and other non-Native subsistence users are no threat to the commercial fisherman of our state the way many components of the Governor's bill have stated. I don't know why many of the Native commercial fisherman have had a time to compare the Bush Caucus bill to the Governor's bill to see which best protects their interests. Especially now when they're all out fishing or preparing to go out fishing. But I do know that not all commercial fishermen are represented the United Fisherman of Alaska.

My husband Norman, everyone calls him Minnie [ph] was taught by his dad Big Paul [ph] to hunt and fish. He tells everyone he has a college degree in hunting. That handing down of traditional knowledge is what the people in our land depend on because he doesn't just bring enough seal home for our family. He brings home enough seal for everyone who is hungry for it. In trying to regulate subsistence take, people in offices and cities don't have an understanding of the traditional culture. And so many types of regulations say we are allowed to harvest, doesn't match up with how much the villages need to provide for their depending families. Often the traditional harvest of some fish and game is considered out of season by the people who regulate the harvest. That means the hunters must be torn between what is right in the eyes of someone who doesn't understand our way of life and what the people in the village have been providing for their families for centuries. What would you do? If you compared the taking of sixty black ducks for villagers to eat in our villages to the useless slaughter of one hundred thousand black ducks in the Valdez oil spill, I think you can get a picture of how unfair this subsistence battle really is. On one hand the village hunter has to fear the taking of traditional foods and on the other hand a corporate giant can afford to pay three billion dollars for the problem to disappear. But the oil spill was just another blow for our people. Just another part of our culture that keeps [indisc.] We always knew before the oil

spill that we had the blessing of living off the land, like Eleanor McMullen in [indisc.] said, "When the tide was out the table was set." Now there is doubt in everyone's mind how safe the subsistence food really is. This whole question of subsistence is vastly misunderstood by a lot of people.

I hope our testimony has helped you better understand the real concerns for the subsistence users. To me it is a question of dignity. The question of if people will qualify as a subsistence user, this really upsets me because it further erodes the dignity of the Native subsistence user. Just as people who elected you are dependent on your representation, so are we dependent on the Alaska Federation of Natives to represent how we feel on the subsistence issues. We trust them and believe they best represent our views. Please, we are asking that you treat our concerns with dignity. We are the people of the land and we need your support to make sure we are treated with dignity. In conclusion, I would just like to repeat what others hear have said. We are not in support of the Governor's bill, House Bill number 599. But we do support the House bill number 600 and a constitutional amendment. We want to resolve this issue so that it benefits all people of Alaska, the same as you do. Natives and non-Natives alike.

When we sat down to the table, when I was young, we ate the subsistence foods. My mother is non-Native and my father is Aleut. But all of us enjoyed God's bountiful provisions. I have learned from my husband and his family even more about our people's traditional ways. And I am proud to live this way of life in the village of Tatitlek. All the ... [tape ends midspeech]

Tape 92-12

Side A

[Tape begins midspeech]

MS. VLASOFF:

... put up fish before you finish this issue, we want you to remember that we are Christian people and our elders are

praying for you. God bless you and thank you, for your time.

SENATOR KERTTULA:

Thank you very much. Is Mr. Joe Demmert here? A former member of the Chairman's Board of Fish. It's good to see you today.

MR. JOE DEMMERT, JR., SEALASKA CORPORATION:

Good afternoon, Mr. Chairman, Senate President Eliason, members of the state Senate. My name is Joe Demmert, Junior. I am from Ketchikan. I was born in the village of Klawock and resided in the Klawock/Craig area on Prince of Wales until 1952. During that time I had an opportunity to utilize the various fish and game resources in that region. I still utilize those resources today. I've been a commercial fisherman for fifty-four years and forty-two of those years as a boat owner. My parents, my grandparents all utilized the same resources that they taught me to utilize while I was growing up. I've had an opportunity to serve on the state Board of Fish and Game in the early 1970's when it was a joint Board. There were ten members on that Board. I served as Chairman the last three years I was on there in the 1970's. That was a very trying time for the state. The stocks throughout the entire state were depressed at that time. The Board had to take many actions that were not favorable to a lot of the user groups but it was something that we had to do to restore those stocks to what they had been in the past. I think the stocks that you see throughout the state today, were because of the action that we took at that time and the management that had to implement those regulations that we adopted. I also had an opportunity to serve on the North Pacific Management council as a holding member in the early '80's. From 1980 to 1983. And I served on the state Board of Fisheries from 1987, '88 and '89. During this last term on the Board of Fish that we had the responsibility to adopt the regulations to implement 1986 Alaska Subsistence Law. That law was mandated by provisions in ANILCA. That came into being in May of 1986. The Board of Fish and the Board of Game in a joint

meeting in Anchorage, had to put the various communities in rural and non-rural categories since state law did not have any designation of rural or non-rural community. So we had to do the best we could with that part of it. To give you an example of what we did in Southeast, the only two communities that were non-rural in ANILCA were Ketchikan and Juneau. The Board put all the other communities in a rural category. For thirty-one communities that we made findings for, only ten qualified under the criteria that we had to apply in making those findings. So simply being in a rural category didn't assure any community of being customary and traditional user of various fish and game resources in the region. The Board of Fisheries spent endless hours and days coming up with the regulations. We conducted hearings throughout all of Alaska to adopt the regulations, to implement that 1986 law. I sincerely feel that had that law had an opportunity to be utilized by the State that we wouldn't be in the dilemma that we are in at the present time. The example I gave you of Southeast of thirty-one communities, only ten qualified for the customary and traditional use under the criteria that we had to use in making those determinations. The statistics that you hear time and again about three or four percent of the resource being utilized statewide would have been reduced further had that 1986 law with the regulations the Boards of fish and game adopted been able to be used. However, the courts struck that down before we were able to get it into place. I'm looking at where we are today, we have many people that are concerned about the outcome of the state's subsistence law.

I think one of the major concerns should be in providing for the needs of our Alaska residents. And above all, I think we should do everything we can to regain management of our fish and game resources. This is one of the major issues when Alaska pushed for statehood. And to see us jeopardize that today as we have by taking no action, I think is really sad. If you have any doubt about how to accomplish that, then I think it would be

in our best interests if you would vote to get this before the voters of Alaska. I think they should have the final say in how we deal with the subsistence issue. For some, it's a means to an end and a lot of people reside where they do because of the availability of those resources. For others it's tied directly to their culture, the customary and traditional use of the resources that's been handed down for generations.

When you look at where we are today, as far as the state is concerned, we can see our oil resources diminishing. The fisheries industry is probably the largest as far as the employment opportunities are concerned. But in the future, I could see where tourism could surpass even the fishing industry. The big attraction in the state today as far as tourism is concerned is the culture, the lifestyle of the Native residents of the state, is the big attraction. And I think we should do everything we can to sustain that. If it means setting aside a portion of the resources by putting a priority on it to sustain those lifestyles, then I think it's something we should all consider. I think over time, everything will fall in place. I know there's no magic number as to how you could achieve this. But I think if you get it before the residents of Alaska to vote on I'm sure you'll find that a vast majority of them would be willing to put a priority on the resources that are being utilized for subsistence today.

I've been involved with the Native community all my adult life. I've served as a Sergeant at Arms, as a treasurer, as a vice president, as a president of the Ketchikan ANB. I've served on the Tlingit and Haida Central Council for over twenty-five years. I'm just completing my third term on the Sealaska Board of Directors. So I've been involved with people for a lot of years and I know the resources that are available to them are very important to their lifestyle. It's something that we should assure that they will always have available to them. And I know it's a very difficult subject to deal with, however, you have a lot of input from various people throughout the state.

You can see it here. And we'd be glad to help you in any way we can. But I think the main issue is to get it out before the residents of Alaska to vote on. Thank you very much.

SENATOR KERTTULA:

Thank you very much, Mr. Demmert. Mr. Don Mitchell, can you come forward. There's been a request among the senators for an opportunity to ask a few questions of counsel and I think Mr. Cohen's here someplace too. But anyway, counsel to AFN about legislation. Subsequent to this which we will try to unfortunately control the time of just because we got to get along with the show. We'll bring back the bill then before you. If you have amendments, we'd ask that you have them ready so we can get them typed up and we'll take up the bill. I am concerned about providing for some method of hearing or for introduction of statements by every member that has come so far. As I've said, I've had your experiences when I went back to Congress. You wait for days, and sometimes you don't get to testify. Tomorrow we'll take up some testimony. If possible, I'll do it later this evening for those that can remain here among the senate. Mr. Mitchell, I think there are some questions. If you have an introductory statement, you're welcome to take the floor at this time. [indisc.] Chair if for questions of counsel. He's distinguished, knowledgeable and certainly an expert in this whole area. You have the floor.

MR. DONALD MITCHELL, ALASKA FEDERATION OF NATIVES LEGAL COUNSEL:

Thank you, Mr. Chairman. For the record, my name is Donald Mitchell. I'm accompanied this afternoon by Eric Smith who is another lawyer who's been actively involved in recent years litigating a number of cases that were discussed by the administration this morning. I do have a brief statement. For the last three days, the committee has spent considerable time attempting to determine what the facts are here and what the law is here. And how various policy decisions that they might or might not make during the balance of this week, might affect the law and the facts. There has been some confusion about all of

this and I - with all due respect to the administration, I would question whether or not the administration's performance this morning necessarily helped clarify just what the law is. It is difficult to discuss this issue quickly, as you know. It is a very complicated factual and legal situation with a long history. But I would make two or three brief observations. And Mr. Smith might have something to say then we're certainly available for questions.

SENATOR KERTTULA:

Thank you.

MR. MITCHELL:

The first observation I would have is that in 1990 when the Legislature first addressed this issue, the policy problem that this Legislature identified was the loss of state management. That was the major issue in the 1990 regular session. The major issue in the 1990 special session during the last gubernatorial election the Governor, when he was a candidate, when he talked about this issue, he said the major problem was the loss of state management. When the Governor's Advisory Committee was formed the issue was defined for the public as the public policy issue was the loss of state management. And now we find at the end of that process that suddenly the loss of state management is not the public policy issue at all. And in fact, the virtue of the Governor's bill is that we were told this morning that it does not return state management. I would just point out for the record that that may or may not be the policy goal, but I would like to note that the theme keeps shifting under the shell as to what the objective of this endeavor is.

Now in that regard you have been told by a number of people, including the Department of the Interior most recently, that the actual likelihood of Congress being going to substantively amend Title 8 of ANILCA is precisely for the present time absolute zero. There has been nothing in the record that has contradicted that assumption all week. Nevertheless, there has been a variety of discussion talking

about how terrible ANILCA is and why it is therefore the Governor's bill is a virtue because it does not comply with ANILCA and return state management. Those arguments having been made, it appears to me that we are electively drawn into at least a brief discussion of why ANILCA exists and the issue of whether or not as a matter of state policy would be the end of the world if the state were to again come back into compliance with ANILCA.

There was a lot of discussion by the Attorney General, that to comply with ANILCA would be knuckling under to the federal government. Mr. Lenzini represented to the Senate that ANILCA compliance would put the state back into the yoke of federal control. And those are all, with all due respect, illogical arguments. The fact is that while the State of Alaska doesn't like it and all of the other forty-nine states don't like it any better than this state does, federal government speaking through the Congress since, as early as 1913, has been able when it feels like it, when it thinks that the national interest requires it doing so, to supersede state regulation of fish and game and to lay down the rules pursuant to which state regulation will occur.

When Alaska became a state, federal government had been managing the taking of migratory water fowl since the early 1900's. This state did not get authority to regulation hunting of ducks and geese at statehood. The Alaska Board of Game for the last quarter century does nothing except implement the rules the federal managers decide upon. The federal government sets the seasons. The federal government sets the bag limits. And the Alaska Board of Game takes those instructions and in Alaska adopts regulations and implements them. I'm not saying that all the federal regulations are a great thing. In fact, we've been working for years to get some of them changed. But no one has ever alleged that the federal government did not have the authority to create that arrangements. Or that that is somehow an unfair takeover.

Prior to 1972, the Alaska Board of Fish and Game and the Board of Game, managed all hunting of marine mammals in Alaska. If you wanted to hunt seals, if you were a villager, you had to do it pursuant to state regulation. In 1972, Congress exercising it's judgement of public interest, took that over and said we think that there is a federal interest in marine mammal regulation. And they took away from the State of Alaska the authority to manage marine mammals. They set the rules. They did that only for Alaska, but for every other state in the union. There is no discussion that Congress did not have that authority or that somehow this is a terrible result with respect to state rights. If the State of Alaska is ever going to get back regulatory authority of marine mammals it will do so only by coming up with a management program that is consistent with federal guidelines that I, representing AFN and the state administration, assisted Congress in negotiating back in 1981. There has never been any discussion that that is knuckling under to the federal government or being in the yoke.

I could go on and on. But the point is is that if what this debate is about, is whether or not somehow the State of Alaska is going to knuckle under to the federal government with respect to fish and game management, that is an issue for better or for worse that has passed us by in legal history. It is over.

Now with respect to why we have ANILCA. From January 1960 until the passage of ANILCA -- I'm sorry, until 1978 when the state subsistence law passed, for eighteen years, the Alaska Board of Fish and Game and later the Board of Game, the Board of Fisheries were authorized by you and the House to adopt whatever regulations that did in it's discretion thought necessary to take care of everyone. Whether it was subsistence people, whether it was commercial fisherman or it was sport fisherman. And as you know without going into the record, many people who lived out in the villages thought that after over a decade of completely unfettered authority that the state regulatory bodies

were not treating them fairly. And I will not go back into the long bloody history of that but that was basically the situation. After the Native Claims Settlement Act passed, it was the federal state land use planning commission of which this state government was an active member, if you look at their early reports to Congress about ANILCA that first suggested that maybe Congress should visit this area in national interest. It was not the environmentalists. It was the federal state land use planning commission. Now when Congress decided that maybe this was an appropriate subject to include in ANILCA, it didn't ask Moses from the sky to bring out the rural subsistence priority. Where did that come from? The rural subsistence priority that we were told is such a terrible public policy was invented by the Alaska Board of Game in 1976. When the West Arctic caribou herd crashed in 1976, it was the Alaska Board of Game that adopted, for the first time in state history as an act of its discretion, a system for allocating the animals that were available up there. That system is set out in a regulation that is printed, this is a lawsuit that ended up being called State v Tanana Valley Sportsmen, it's downstairs in public and Pacific second and in that opinion it was published the regulations that were at issue in that lawsuit. Those regulations in terms of the way they worked are nearly identical to what Congress codified in ANILCA. Congress looked to the Alaska Board of Game and said as public policy what would be the way to handle this very difficult issue? And they took the Board of Game regulations. So to say that somehow ANILCA is bad public policy or is unfair, if people do not like it, with all due respect, the bone they have to pick is with the Alaska Board of Game. It is not with United States Congress.

Now the next to last point is that when ANILCA was adopted, when the process for ANILCA was ongoing there was considerable discussion in Congress about how would this priority be enforced. And the House of Representatives set up a bill that said that at any time that the Secretary of the Interior in his

judgement thought that the state Board of Game or the state Board of Fish was not implementing the law in good faith that he could unilaterally just take that over. Senator Stevens objected to that and there was a provision in the Senate bill that said that the gentlemen that you talked to today would do that job. That if the state Board of Game and the state Board of Fish was not adequately implementing the law, the federal subsistence law, then Mr. Suberg would basically go sue the Alaska Board of Game. And that was viewed by the Senate as the best way to do it. When ANILCA was being brought to closure, there were a variety of people for a variety of reasons that are too long to go into, who thought that neither of those approaches were very good. And so what they did, is they said, well look. If the state is going to comply with ANILCA, then let's have a federal forum in addition to the state forum for people who think they got a raw deal to be able to make that case. Now, Senator Sturgelewski, I know has expressed a lot of concern about that and has talked about the micro-management of our fish and game resources by the courts. But to a certain extent, it overstates the issue in my legal judgement. All of these lawsuits, Mr. Starkey and Mr. McNeil will join me as well. Mr. Starkey, like Mr. Smith, has also been involved in actually litigating this thing. All of these cases have come up where people rightly or wrongly believe that either the Board of Game or the Board of Fisheries has purposely not obeyed the law with respect to making a particular decision. Or that they tried to obey the law but the facts on which they made their decision, just simply weren't there to support the decision that they made. Now if ANILCA did not exist, they would be willing -- they would be able to right now to go into state court to get a state court judge to see what he or she thinks about that. There is no way you are ever going to stop lawsuits or judgments having that kind of review. The only issue is whether or not it was appropriate for Congress to [indisc.] in addition to asking Judge Katz or the judge up in Kotzebue if you can also go into

the federal courts, if you think that is appropriate, to ask them to review the same record. That's the only thing that's really going on with this purported federal management by the courts. Now that is not an unprecedented thing to do. I'm not an expert employment lawyer. For example, the federal government has come in and said, that if you believe that you have been discriminated against in employment, you can either file a lawsuit in state court [indisc.] or we will create a federal cause of action for you and you can go into federal court at your discretion. You decide. You're the person that's been [indisc.] You think which is best for you. But what has gotten mixed up this morning in my judgement is that the administration attorney's I think perhaps unintentionally confused when they used the term federal management, the issue of would you rather have the Alaska Board of Fisheries making decisions about our fishery resources and then having those decisions reviewed by judges when Alaskans -- these aren't people from out of state -- when Alaskans believe that maybe a mistake has been made. If you'd rather have that happen by judges that would include potentially federal judges that in the first instance have most of these decisions made by our state regulatory Board. Or would you rather keep on with the present system we have now, but having a bunch of federal bureaucrats become the Alaska Board of Fisheries. And then you can take comfort in the fact that supposedly the jurisdiction that these bureaucrats would exercise is so narrow as to be inconsequential. Which is frankly is startling. Pardon me.

But that is the public policy issue and that's why I think it's worth repeating here in some way. The issue is not the issue of how you feel about federal management. It is the choice, for better or worse, between having the regulatory activity performed by our state Boards subject to judicial review that would include that at the option of grieved Alaskans a federal judge looking at that record or would you rather have, because you feel so strongly that that's just such horrible

public policy you'd rather have the present situation that we have with federal bureaucrats taking the place of our fish and game Boards. And that, of course, to judge that question leads me to really my last major area.

And that is the whole business about fisheries. You were told this morning that not complying with ANILCA was a great deal because, what the heck, we still have unfettered, -- in other words, we don't have to obey - we don't have to have these federal judges exercising oversight over our decisions related to the game we have left plus all these fisheries. Wouldn't it be terrible if we had to submit to ANILCA and have federal judicial review of Board of Fisheries decisions again with all of our fisheries. While that presupposes, there is an assumption in that representation that there was a request [indisc.] by Senator Duncan. And that assumption was that that's true. That the federal jurisdiction does not reach to a lot more fishing activity than the present reach as we now sit here this afternoon. Now, that is a very complicated issue. I could testify on that issue for an hour and I'm sure probably half the committee is already tired of listening to me. But I will say this, that both Senator Duncan and Attorney General Cole and a number of other members of the Senate tried to pin Marty Suberg, the chief lawyer for the Department of the Interior down, just on the issue of Southeast Alaska. And he was like a, with all due respect to my old friend Marty, a trout frying in a campfire skillet, in terms of attempting not to definitively answer that question. And we believe, and again, I won't go into our legal reason as to why it's true, but we believe that both this whole, who owns the land thing is a complete mistake which is what we're litigating in Katie John right now. But what Congress really intended was just that all the waters regardless of who owns the ground is really the proper result. And that even given Mr. Suberg's best case, that assuming that he is correct, that Congress only intended the ANILCA regulation to fly to

water that flows over land that is owned by the federal government. That even under that scenario, giving him his best case, that areas like all the inland waters of Southeast Alaska, like all of Prince William Sound and areas where Senator Duncan has correctly indicated that the regulations say that they're not asserting jurisdiction, quote, "at this time", close quote, that there is nothing in the text of ANILCA that Mr. Suberg can assert jurisdiction over some areas when he feels like it and not others. That is a misimplementation of the statute.

Now, I've already gone much longer than I intended. As I indicated -- as you are well aware, these are very complex and difficult questions and certainly I would be willing to answer any questions. And I'm sure that Mr. Smith and Mr. Starkey and Mr. McNeil may have other ...

SENATOR KERTTULA:

I have one question and I have not abused this privilege. Then Senator Adams and Senator Halford. The administration through Mr. Campbell has characterized their bill as being two hundred percent at one time and another time it's 300 percent better than the present. Also they have strongly stated -- state strongly that definitions are a major problem and the definition are currently defined or at least better defined in the proposed legislation of administration. Would you care to briefly comment on, first the definitions as an improvement that it's a valuable tool. And two, why in your opinion they might see it as two hundred or three hundred percent better than the present situation. And I realize, maybe somebody does [indisc.] interior. I mean that's a whole.

MR. MITCHELL:

Yes, Mr. Chairman. As you know in developing statutes for the state Legislature that legal drafting and the meaning of words -- every word really has no meaning except in context of what the Legislature has intended through it's use of words and what Congress has intended through it's use of words, get's to be a very complicated business. In enacting ANILCA, Congress

used terms like "rural resident", "customary trade", "customary and traditional", all those kinds of terms. And did not define many of them. "Subsistence uses" was defined as a term at large [ph] "Family" was defined was a term at large. "Barter" was defined as a term at large. But not of all of the important terms were defined.

Now at the time that that was done, there was a section of ANILCA that was specifically put into ANILCA -- I'm sorry I don't have ANILCA in front of me. But I believe it is section 814, that specifically authorized the Secretary of the Interior and the Secretary of Agriculture to adopt regulations to implement Congress's [indisc. - paper shuffling] title. And that -- the assumption was at the time, that the Secretary's would have a rule making and terms like "customary trade" that assume [indisc. - paper shuffling] legitimate concern, would be defined. That the term "rural" would be defined, and other of the operative terms. That was never done, frankly. What happened was that the federal administration was involved in ANILCA which was the Carter administration, as you know left office immediately after the signing of ANILCA in January of 1981. The new administration for a variety of reasons never wanted to get involved the messy business of engaging in that kind of rule making. And we all know today, I think it would be a fair legal statement to say that they were penny wise and pound foolish. And so as a result, in terms of for example the Kenaitze decision. Regardless of how you feel about the result of the Kenaitze decision, the reason that the court had to decide what it thought the word "rural" meant was because it had had no guidance from the federal agency that had been charged by Congress with responsibility for guiding them.

It's the same situation with "customary trade". As a result of all this federal takeover business, sort of kicking and screaming if you will, the federal departments have had through the federal rule making process, to finally engage in that kind of rule making and define these terms. And now we

have in the federal regulations some terms about what they believe Congress intended the word "rural" to mean. What they believe Congress intended the phrase "customary trade" to mean. If you get management back, those kinds of regulations would still be helpful to keep on the books. And I'm not saying there is a lot of room for improvement with respect to the kinds of regulations that would relate fairly and describe "customary trade", for example. And you do not need to amend ANILCA to do that. You can have in a less heated environment, people of good will revisiting these issues. You do not have to go through the committee process that we've been told by Mr. Suberg is impossible.

With respect to your second question, Mr. Chairman, about why the administration bill would be viewed by administration spokes-advocates for that legislation as two or three hundred percent or whatever the percentage was better than either, I guess, the present situation or the Bush Caucus bill or whatever is, I am at a loss to know the basis upon which they reasoned to that result. Obviously, all of us here represent clients whose policy goals are really quite adverse to the Governor's at this time and so therefore, we certainly -- it would be legitimate for many members not to view us as fair brokers on this. But to the extent you would like to indulge us that presumption, we have looked at all of this legislation long and hard and we certainly do not see any basis for representing to either you or to the House, that that is in fact the level of improvement you would get from the Governor's bill. And we believe, frankly, that the Governor's bill, for a variety of reasons that again are just too long to go into, would be a step back in a technical level on a whole variety of grounds. And again, if someone is interested in exploring our reasoning, I'm sure we'd all be happy to do that. But that would be a very ambitious endeavor at this particular time.

SENATOR KERTTULA:

Thank you. Senator Adams.

SENATOR ADAMS:

Just a couple of questions, Mr. Chairman. In my opinion, this bill does not comply with ANILCA and it does not solve the problem of subsistence. But reading the piece of legislation, does this bill in any way affect ongoing litigations or lawsuits that have to do with fish and game Boards at this present time? And if so, which ones?

MR. MITCHELL:

I would like to, in terms of the present ongoing litigation, I'd like if I could to defer that question to Mr. Smith and Mr. Starkey, if I could. Because they've been involved in lawsuits.

SENATOR KERTTULA:

To the chair, please proceed.

MR. ERIC SMITH, ATTORNEY:

Thank you, Mr. Chairman. In a direct way, I believe that this legislation would affect the Morry case in two respects. The Morry case was a case brought on behalf of an individual in Anutuvik [ph] Pass who was cited for taking a bear and not returning the skull of the bear to the village for tagging and sealing by Department of Fish and Game. There is a Inupiat custom that has been extensively written about by the Department of Fish and Game, subsistence division that it is culturally inappropriate and disrespectful to the bear to bring the skull back to town. That the skull is to be left in the field. This is a custom that is also used in the Upik area. Mr. Starkey represented some interveners in that case. Two principle issues in the case were, number one, the so-called all Alaskans policy which I know you've heard a lot about. And number two, whether the state regulations were required to be in some manner consistent with Eskimo customs and have the least adverse impact upon those customs. Obviously if the Governor's bill will answer the first issue as to the all Alaskans issue. But it will also address the second issue. The least adverse impact consistent with village customs issue. And what it will do is

it will overrule Judge Jeffery's decision. Because Judge Jeffery stated that as far as under his interpretation of the state statute and under his interpretation of the federal statute, that least adverse impact consistency with village customs and traditions is an integral part of the statute. The current -- you might distinguish it by saying that the ANILCA and the '86 law mandated respect for those customs and traditions. The Governor's bill makes them a relevant factor, which means it's within the Boards discretion to essentially not follow them if they felt it appropriate. That is probably one of the most important cases that this bill would change.

All of the all Alaskan policy cases of course will be affected by this legislation. I think Mr. Campbell and the state administration made it very clear that they seek to overrule the cases involving customary trade. The other case that comes to mind for me and I'll turn it over to Mr. Starkey because I'm sure he can think of others, are the Kluti-kaah and Sleetmute cases which involve what the phrase "reasonable opportunity" means. And in those cases, again, the courts have been struggling to tailor season to meet village customs. In other words, what the Board of game, in the case of Kluti-kaah imposed a seven day moose hunting season for subsistence hunters in the Copper River area. And Judge Katz recently issued an opinion extending that to thirty days as more consistent with the customs in that area. Again, this bill would weaken the ability of subsistence users to make the argument that the state Board of Game regulations should be consistent with what traditional hunting practices are. And this all goes back, frankly, to the Bobby case which I'm sure you've all heard a great deal about. I think there is no doubt, and I think Mr. Nelson testified as such that the Governor's bill would diminish the central role of village culture and make it a relevant factor and in that respect the bill does seek to overturn the Bobby case to some extent by increasing the level of discretion that the Board would have.

And I'd just like to add, Mr. Chairman, that it has been an irony in my practice in this field -- I have done a lot of administrative law in the years that I've been practicing as well as -- beyond just subsistence law. And what we have discovered in litigating subsistence cases in the state and federal courts is that the federal courts have employed the usual highly deferential standard of review in reviewing administrative agency decisions. They are very deferential. the state courts do not employ as deferential a standard of administrative review. Maybe, I know it gets complicated but the concrete example would be Judge Holland in the Katie John and the Lime Village cases made it very clear that he was going to review the regulation on the record developed by the Board of Game, and the Board of Fisheries. The state courts under a case entitled State v Ebert which was decided by Judge Singleton in the Alaska Court of Appeals, he's now a federal court judge. Stated that the Board of Fisheries was not confined to the administrative record. And that's a very important distinction in administrative law because essentially it enables the judge to step outside what the Board did and to evaluate factors extrinsic to that and therefore is a less deferential manner of administrative review.

**MR. CHRIS MCNEIL, CHAIRMAN, ALASKA FEDERATION OF NATIVES
LEGISLATIVE COMMITTEE:**

Mr. Chairman, I'm Chris McNeil. I'm Chairman of AFN legislative committee and I had a couple remarks, if I could, on the same subject.

SENATOR KERTTULA:

Please make them brief, because time is [indisc.].
Proceed.

MR. MCNEIL:

Yes sir, I do understand. I just wanted to follow up on these remarks to the extent that while there may be an attempt to reverse some of these cases through legislation, I think the fact is, it will create just more elements of existing

litigation and cause more uncertainty in each of these areas. We weren't here to say our lawyers are better than their lawyers or anything. I think our message here in the litigation is to explain them just as clearly as we know how and secondly just to make a point that even the Native perspective, policy making by litigation is a very uncertain business. There have been cases that have come up and argued favorably to the subsistence users and some that have not. It is our belief that with the Governor's bill alone, that this method of dealing with public policy will just continue and will cause us further difficulty down the line. In respect to both the navigable waters issue and the customary trade issue, neither of those issues are closed today and as those issues are disputed in the courts, they will come down one way or the other. What we have seen is that when they come down, there's a tendency to solidify those positions and parties tend to go to their corners and say exactly where they are. That's public policy by chance. I think that our reason for being here is really to make our point of view that we think that it's better for the state Legislature to be making this policy and recognize that it would have to be on some kind of compromise basis in order to get the. But we're prepared to do that. But we think that the alternatives may work out for the Native community and subsistence users in some cases, recognize that will not always be the case.

One of the other things that I think is also ironic about the poking at the federal courts and the federal oversight is that, at least I find it ironic, that this poking is at many judges who were appointed by a very conservative, at least in my view, a very conservative executor. These are the people, that I think are by and large, are take a very particular view of statutes and constitution and yet they have come down in their decisions in many different directions. Thank you, I do appreciate the time.

SENATOR KERTTULA:

Thank you, Senator Adams.

SENATOR ADAMS:

One question. Would you tell us about the different between the two bills -- between the Governor's bill and the Bush Caucus bill regarding hunting and fishing for subsistence use, and I'm going to use a couple of the urban areas, Fairbanks, and Anchorage and maybe Kenai. Tell me the differences between the Governor's bill versus the Bush Caucus bill so we have an understanding of the urban.

MR. SMITH:

Thank you, Mr. Chairman. Fairbanks and Kenai, Senator Adams?

SENATOR ADAMS:

And Anchorage.

MR. SMITH:

And Anchorage. Under the Governor's bill, a person in Anchorage, Fairbanks or Kenai who met the seven criteria in the bill, each would have to prove to the department that they met those criteria. If they did meet those criteria then they would be eligible to go subsistence hunting or fishing in what -- I can't really describe it other than to say rural areas of the state. So, for example, an Anchorage hunter would be authorized to go hunting moose or caribou in unit thirteen if he or she qualified as a subsistence user in that unit. [tape ends.]

Tape 92-12

Side B

[Tape begins]

MR. SMITH:

A Kenai hunter or a Kenai fisher person who qualified as a subsistence user would not be eligible to hunt or fish on the Kenai Peninsula. But rather would have to go somewhere else. For example, they would have to go across the inlet and take a moose in Tyonek in competition with the hunters there. I should add that it may be difficult under the Governor's bill for an urban person in Anchorage or Fairbanks, actually to qualify because one of the criteria is use in a particular subsistence

unit -- subsistence use area. And it may be very difficult for a person to do all of the activities over the time period required in that particular subsistence use area.

Under the Bush Caucus bill, a person living in Anchorage, Fairbanks, or Kenai again would have to follow some kind of -- would have to meet some kind of eligibility criteria. Those are defined in the bill as either membership in a group with the custom and tradition or a person with the criteria developed by the Boards. Should a person be so qualified, if they live on the Kenai Peninsula, they would be authorized to engage in subsistence uses on the Kenai Peninsula because the Bush Caucus does not contain that limitation. A person in Anchorage or Fairbanks, would be authorized to engage in subsistence uses in other areas but it would be secondary priority to rural uses.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chairman, I'm just trying to figure out. One of the things we'd heard from the state's attorneys was this concept -- the same concept involved in the case of the Bobby case of least adverse impact. I wonder if either Eric or Don would kind of comment on just exactly where you think is going and how it applies and then I've got another question.

MR. MITCHELL:

Certainly, Senator Halford, section 802(1) of Title 8 of ANILCA states as a policy as Congress's policy that the quote, "utilization" close quote of public lands to cause the least adverse impact possible on rural people. It was interesting today that Mr. Nelson indicated that he did not think that Congress intended that language that I've just described to you to deal with the utilization of fish stocks and game populations on those public lands. A terrible mistake by the judiciary had been made in that regard. Shortly I think that I can speak with some certainty in terms of the intent of the drafters and certainly most of the members of Congress who were involved in

developing that concept that they certainly believe that within the subject of utilization of public lands was implicitly utilization of the fish and game that inhabit those lands. That being the case, then the least adverse impact direction with respect to the exercise of administrative discretion would apply to decisions associated with hunting and fishing. And I would suggest without launching into an impassioned defense of that policy, that it is not necessarily outrageous. So long as we know biologically that you can only take one hundred moose in the Lime Village area by the people of Lime Village, isn't it more appropriate for those citizens who do not have the money out there to have refrigerators where they can hunt in the fall and they have to have a \$2000 refrigerator to store that meat to be able to hunt at a time that least adversely affects their way of life where they can hunt during winter after freeze-up and they can store that meat. I mean isn't that good public policy. And that's all -- it doesn't say least adverse impact regardless of the biological damage of the resources. It just says be reasonable. You look at these people that the statute was intended to benefit and you say, all things being equal, give them a break. And that's what the Bobby case basically said. It wasn't saying, you know, that the people of Lime Village could do whatever they want. It is an instruction to the regulators to say find out how these people live. And if it's a reasonable to accommodate them, then we think its appropriate that you do so. The Board didn't do it in that situation.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR HALFORD:

How long did the courts say the season had to be open in Lime Village.

MR. MITCHELL:

I'll let Mr. Smith respond to that.

MR. SMITH:

Senator Halford, in the case of Lime Village, the court

didn't say one way or the other. And I can read what the court win, piece of the courts direction. Then you'll get a sense of its thinking. I'm quoting from page 777 of the opinion. "On their face, these regulations do not conflict with Alaska's second subsistence law. That law expressly authorizes utilization of seasonal and bag limitations up on subsistence hunting. It is neither impossible or necessarily unlikely that the seasons or bag limits as presently constituted would fail to accommodate the customary and traditional uses of moose and caribou by Lime Village residents. Both in terms of the time in taking and the quantities of meat taken. If the required analyses were performed and with a supporting record, the season and bag limit regulations now enforced would survive plaintiffs challenge" The judge then goes on, and I think this is an important part -- equally important part of the opinion. "However, the court feels constrained as a result of its review of the transcripts of the Board of Game hearings which are part of the record, to observe that the Board of Game must in the future proceed with scrupulous care and caution in imposing seasons and bag limits on subsistence hunting. Bag limits and seasons are game management tools which have seen extensive use in Alaska and nationally. These restrictions have typically if not universally, been used to regulate sport hunting. In this case, bag limits and seasons are being applied to a very different type of game use. In its purest form the subsistence lifestyle is quite literally the gaining of one's sustenance off the land. Typically the sport hunter does not go hungry if the season ends without his taking any game or if he has taken and eaten his bag limit. The subsistence hunter who is without meat during a closed season or who has with his family consumed a fixed bag limit, will go hungry unless some other game or fish are available and in season. Hunger knows nothing of seasons nor is it satisfied for long after one's bag limit has been consumed".

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

Just following that. The conclusions that seems to come out of that -- concern out of that was that if you adopted a policy of least adverse impact that you essentially had to virtually eliminate any other use before you applied seasons or bag limits to subsistence.

MR. MITCHELL:

Well, I have an observation on that but then I think Mr. Smith has an observation as well. There is a lot of, I think, analytical confusion between the issue of having to eliminate other uses of a particular game population on the one hand. With respect to the authorization of Alaskans who engage in subsistence uses with that same population, the rules that they would be required to follow in terms of exercising their harvest opportunity. Now back to my -- game is easier than fish if you think about it. If you have one hundred moose that the biologist say are all the moose that you can take in the area safely, then if the people of Lime Village reasonably -- a reasonable person would say they need all hundred hunted moose then isn't that good safe policy as opposed to giving four of those moose to guides to give to trophy hunters from Texas. I mean, you can exercise your own judgement about whether that's a good or bad policy choice but that's the choice involved in cutting out other uses before you restrict Lime Village from those hundred moose. Now once you decide that the Lime Village people are entitled to those one hundred moose, whether or not those are the only moose available or whether or not there are other moose available for other user groups, then you're left with the question that I've just responded to. About what are the fair rules that the people of Lime Village should be asked to observe in terms of going about their harvest activities. And then the least adverse impact standard says that with respect to those particular rules applied to that group of Alaskans, let's look at what the situation is and if you can do

it within a biologically acceptable parameters, well, then let's give them a break. And that's basically the difference there. But I know that Mr. Smith had something to say about it.

SENATOR KERTTULA:

Please ...

MR. SMITH:

I'll be as brief as I can, Mr. Chairman.

SENATOR KERTTULA:

Okay.

MR. SMITH:

As part of some of the work I've done, I have travelled -- we had a project where we went to ten villages in ten different regions of the state and those ranged from Angoon in the Southeast to Koktovik in the north eastern corner of the state. And we held village meetings and asked the people in the villages how they would like to implement what we perceived to be the holding line village. And I can represent -- since I went to all ten of these meetings, I can represent to the committee that in each case the people there discussed with their elders what they felt to be their traditional seasons for example. And the defined times of the year when they do not hunt. They also defined times of the year or species that they felt were inappropriate to hunt for various reasons. Such as pregnant cows. So I think that while the Lime Village case is often called the no season, no bag limit case, in fact the people who are most directly involved with how it would be implemented don't view it that way. But they view it rather as a means to accommodate the way they live as I think the elders have tried to explain to you in these public hearings.

SENATOR KERTTULA:

You have the floor, Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chairman. Going on to some of the specific cases and the information that I have is several months old on some of these, but cases that Mr. Mitchell and Mr. Smith are

directly involved in -- the Peninsula Marketing case seems to be combined with the Elim case and I kind of like to know from your perspective because you're both involved in either one of the other of those, exactly what you're arguing there?

MR. SMITH:

The Peninsula Marketing case was brought -- is finished pretty much, Senator. The Elim case involves the issue of whether or not the taking of chum salmon bound for Norton Sound by commercial fisherman of the False Pass area is consistent with the sustained yield subsistence clauses in subsistence priority given the depressed stocks in the Norton Sound area. The case is ongoing. A principle issue on the merits is the significance of the take at False Pass and the extent to which, if that take is significant, the sustained yield clause or the subsistence priority constrained the ability of commercial fisherman to take chum salmon which are heading for Norton Sound. What generated the litigation was that subsistence users in the Nome area have been substantially restricted and in many cases eliminated.

SENATOR HALFORD:

Are you claiming that False Pass fishery for chums must be eliminated before restrictions can be allowed on chum fishing in Norton Sound?

MR. SMITH:

We requested a preliminary injunction that requested the court to halt the interception. However, the department felt it was required to do so. We recognized that that might have forced the department to close the fishery. I think for long term relief, our clients are looking for some way to eliminate the impact of that interception that protects their interests. The streams in Nome are currently in their second generation of decline. The chums have been low for eight years.

SENATOR HALFORD:

But you're asking the court to do ...

MR. SMITH:

We are asking the court -- well, I think ultimately what the relief -- the permanent relief would be a remand to the Board of fisheries to sort this one out, having first ordered to take the allegation to the plaintiff seriously. That there is a significant impact and that that impact has to be ameliorated.

MR. JOHN STARKEY, ATTORNEY FOR ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS:

Senator Halford, I would just like to respond a little bit in that case because I'm also involved in that litigation for a different party.

SENATOR KERTTULA:

First introduce yourself to them. Go through the chair

MR. STARKEY:

Excuse me.

SENATOR KERTTULA:

And three, I don't want four and five answers to a question hear because the timing. I'm going to allow you the privilege of answering, but let's have as limited response as possible because the time the senators is getting critical. I'm under a lot of pressure to get a piece of legislation going here. Please introduce yourself and respond.

MR. STARKEY:

Thank you, Mr. Chair. My name is John Starkey. I'm also an attorney who has litigated some of these issues. On the Elim case, I think it's real important to understand that the judge recently ruled and he, in his ruling said, that he did not believe the subsistence law was the significant issue here. Instead he identified the sustained yield clause in the constitution. And so I think that's just a policy call for the Legislature of course. How to define -- how to understand that term, but to wrap subsistence up in it totally without understanding sustained yield principle would be misunderstanding how that litigation has proceeded.

SENATOR HALFORD:

Just one other question for Mr. Mitchell. The Tanana fish

and game case on sale of subsistence roe. What kind of quantities are being dealt with there in terms of value? What are you claiming?

MR. MITCHELL:

I represent not AFN in that case, I represent the villages of Amonik and Alukinuk [ph] and those villages are not claiming anything. They are claiming that in fact customary trade as it was intended both by Congress and by the Alaska Legislature when it employed that term in it's state law did not include using subsistence caught roe and putting it into commerce [indisc.] quantities that the plaintiffs who are the Tanana Fish and Game Association have requested the state court, not the federal court, the state court to order the Board of Fisheries to allow them to do.

SENATOR HALFORD:

What kind of quantities are they talking about?

MR. MITCHELL:

Senator, without revisiting that record, it's tough for me to do that off the top of my head. I believe that in they were talking about what amounted to several thousands of dollars. Let's be conservative. Let's say \$1000 in way of commercial roe per fisherman. that when you aggregate that to the processor it comes up being a lot of money. And that is why I indicated this is obviously a very difficult issue. Certainly AFN has not taken any position on the merits with respect to what the correct approach is other than to say, I think, that we have identified it as a legitimate subject of discussion. But certainly in that particular lawsuit, my -- the clients that I represent I think are arguing for what I believe would be a definition of customary trade that you would be quite comfortable with.

SENATOR HALFORD:

Which would be consistent with the Governor's bill meaning non-commercial channels or something of this nature?

MR. MITCHELL:

Well, you're opening up, Senator Halford, an opportunity for another half an hour discussion about what Congress and the legislative history would indicate customary trade means. I think I will regretfully but hopefully decline the opportunity. Unless the committee really wants to hear the answer to that question.

SENATOR HALFORD:

No.

SENATOR KERTTULA:

We have some questions. After Senator Hoffman, we'll have a brief recess then come back to order for another quarter hour or so necessarily with AFN attorney's. Then we're going to have a look at the legislation as we left it yesterday evening. Please proceed, Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. I have three questions. First one in regard to the ABCP Cooperative management agreement with the federal -- with the feds under ANILCA. I wonder if someone might explain that agreement.

MR. STARKEY:

Mr. Chair, Senator Hoffman. Earlier today when Mr. Suberg was on the line, he spoke about a successful cooperative management agreement that had been fostered through ANILCA with a Native organization, that was ABCP. I guess one of the most disheartening things about this constant subsistence struggle is all the energy that it takes up to litigate issues and those kinds of things. This cooperative management effort that we've been involved in as a result of one of these cases that was brought -- basically what's happened, it was the Kilbuck [ph] caribou herd which was in a depressed state. Through the cooperative management agreement, ABCP has worked with the state biologist, the federal biologists and the villages to develop a cooperative management plan which allows subsistence needs to be met gradually on a permit basis and allows the herd to grow to appoint where all users should be able to bent. ABCP did some

of the cultural and anthropological data gathering and the state biologist and the federal biologist provided all the sustained yield and biological information necessary to ensure that the plan was good for the species and good for subsistence users. And all together it was a very successful effort which is ongoing and being funded currently by the federal government.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR HOFFMAN:

Second question is, what would the federal courts do in the navigable waters case?

MR. STARKEY:

Senator, I'm not sure -- Mr. Chair and Senator Hoffman, on that issue I've noticed that throughout this debate and I don't know if the senators have a copy of Judge Holland's from the bench ruling, the transcript. But I think that all the senators are certainly capable of drawing their own conclusions from that in that transcript. And I have copies for all the senators here which I'll ask the staff to distribute if they would. And I think a fair reading of the transcripts would indicate that there are certainly reasons for both sides to take heart in their arguments and what the success of those arguments might be.

SENATOR KERTTULA:

Thank you, very much.

SENATOR STURGELEWSKI:

So who's going to win?

MR. STARKEY:

Senator, I guess when you ask an attorney that, he always thinks his sides going to win. Or hopes that's the case.

MR. MITCHELL:

Mr. Chairman, I'd like to ...

SENATOR KERTTULA:

Never ask a question, he'll have the answer.

MR. MITCHELL:

Mr. Chairman, I'd like to take the debate just briefly on that.

SENATOR KERTTULA:

Yes.

MR. MITCHELL:

Senator Sturgelewski, I'll tell you exactly who's going to win the Katie John case. All of us sitting at this table, plus all of the lawyers who work for the Department of Law. If this is not settled whoever loses that case is taking it to the Ninth Circuit. Whoever loses there undoubtedly will file [indisc.] somebody's paying us. The people of Alaska are paying the Department of Law. It is this whole subject, to that extent we all have a conflict of interest. The worst thing that we could do for the bar interested in this matter is to not repair this problem.

SENATOR KERTTULA:

Very good. He made his point. You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Now that the Bobby case has been brought up, I wonder if we could have a comparison of the similarities of that case versus the state court cases?

MR. STARKEY:

Senator, on the -- Mr. Chair and Senator Hoffman. On that case, certainly I suppose the best place to look with the Bobby case is the decision itself. Again I've got some copies of the relevant section of that decision which goes into the standard that Judge Holland applied. It was a very deferential standard to the Board of Game. Actually the decision which followed that, the Morry case, was brought solely in state court. After McDowell ANILCA had absolutely nothing to do with the judge's ruling and the state court judge found that standards even stricter than ANILCA applied to the state law. So I think at least fair and reasonable to say that the forum state versus federal court, is not necessarily any guarantee of one outcome

or the other. Each cases turns on its merits in the law involved and certainly the Morry case is now under appeal at the Supreme Court. And we'll find out eventually what our Supreme Court thinks of that. But at the Superior Court level, the Morry case is more protected than the Bobby case.

SENATOR KERTTULA:

This young man would like to take the copies which I appreciate you're doing our work for us. Thank you. If you need to xerox some, please do.

MR. STARKEY:

Mr. Chairman, I've also got a copy of the Katie John decision. Would you like. And it also on page five talks about the deference that Judge Holland pays to the Board of Fish in recognizing their expertise. So I'd offer this to the Senators if I would.

SENATOR KERTTULA:

Be sure if you run out, just xerox more.

SENATOR HOFFMAN:

The final question, I guess, and I know that there is a lot of problems that we have with the Governor's legislation. But on page six, it talks about establishing the rebuttable presumptions. I was wondering if anyone would like to explain why the inclusion of this rebuttable presumptions is caused problems for many of the communities and individuals in Alaska?

MR. STARKEY:

The rebuttable presumption, as I understand your question, Mr. Chair and Senator Hoffman, would be applied to what we refer to as our regional centers, those populations between twenty-five hundred and seven thousand. I suspect there are several problems with how that presumption might work in the regional centers. Being a rebuttable presumption it could be challenged of course by any person at any time. The ways things work in the regional centers, people transfer in and out of the villages and from Anchorage and although their roots are in the villages in Bethel, at times they go out for either family matters or

employment matters, which may make it difficult for them to meet the criteria which are based on the prior twelve months in time. I think the other thing you'll find in the regional centers that I myself lived in Bethel for the past six years, is that often times the persons who are -- subsistence is a group and a family activity and people who are not directly involved in the gathering, so to speak, harvesting are intimately involved in other aspects of the harvest. And being that it's an individual permit system based on criteria relating to harvesting, et cetera, it may be difficult in family dynamics for another person to qualify as the gatherer. It just doesn't actively reflect how things actually work out there. I guess would be the short answer to that.

MR. MITCHELL:

At the risk of double answers, I would like to make one observation about that.

SENATOR KERTTULA:

Please do.

MR. MITCHELL:

At a policy level, the trouble with this whole rebuttable presumption situation is setting aside the fact of how -- what is the process through which it would be rebutted. Mr. Campbell indicated how there's was going to be Superior Court involved in this. Yet nothing in the text of the Governor's bill that talks about the Superior Court. But more importantly, from the very beginning of the whole ANILCA effort, the issue was not to use regulation to disrupt community village life. We've heard a lot of talk already this morning about how the administration wants to protect, quote, "real", close quote, subsistence users. And we've heard a lot of that kind of rhetoric in the last ten years. And the trouble, of course, is that "real" is in the eye of the beholder. And if all of the sudden you have this rebuttable business, you have people running around in the communities tattling to the state whoever that is. That is not defined in the Governor's bill, that they believe that their

neighbor is not a real subsistence person. You know, I mean, this is a very -- in terms of a policy approach. stands for everything that I know that the Alaska village community on policy grounds has opposed since I first got involved in this whole subject area in the late 70's. It's a very bad and divisive way to divide Alaskans within very small communities.

SENATOR KERTTULA:

If we recess for about five minutes, does anybody else wish to question [indisc.].

SENATOR STURGELEWSKI:

Mr. Chairman, after recess, I would have ...

SENATOR KERTTULA:

We'll take them up then. In about five or six minutes and then if you have amendments to the existing legislation that we went through with McKie Campbell yesterday afternoon, perhaps you ought to have those ready to present in writing.

RECESS

5:20 - 5:30 p.m.

SENATOR KERTTULA:

If there are further questions -- I saw Senator Taylor here. I know he had a question. I think Arliss had a question, Senator Sturgelewski. We are on record and because of the time of day and senators may take more time getting back up here it's going to ask that we proceed. It is being recorded and those members that are here will probably be as much a part of the decision making basis as any group. Senator Taylor, would you proceed. Direct your questions. Thank you very much.

SENATOR TAYLOR:

Thank you, Mr. Chairman. I guess I direct it to [indisc. and Eric. My dear friend, Joe Demmert and I were talking the other day -- twenty-five almost [indisc.] I guess, I know he lives the lifestyle of this subsistence in Ketchikan and I've been very concerned because people in Ketchikan under ANILCA are excluded. [indisc.] these federal regulations become permanent and that weighs heavily. I'm concerned with who is going to

manage fish and game in Alaska. And so I guess my only question really is who does AFN want to manage fish and game in Alaska?

MR. MCNEIL:

Mr. Chairman, I don't think there's any question that AFN would prefer to have the State of Alaska manage all of the fish and game resources in Alaska. We very clearly would like to see a subsistence preference, but there's no question that we want to have the state to be the manager, recognizing that there would still be some room for federal oversight for those standards.

MR. MITCHELL:

Senator, I would just say that, again, without going through the whole presentation all over again, that there is a major difference between what is the administrative agency that actually makes our regulatory decisions and what are the legal standards, of you know as an attorney, that that regulatory agency would use as the basis for making those decisions. I think it's always been the position of the [indisc.] that in the first instance, it is the State of Alaska and it's Boards of Fisheries and Boards of Game that are best equipped to make those decisions. But in terms of the legal standards that would be employed, it is not unreasonable both to have the kind of standards that were in the 1986 Alaska Subsistence statute and also the kinds of standards that Congress thought were in the national interest, with respect to exercising what everybody understands is a very important responsibility.

SENATOR KERTTULA:

Further questions? Arliss, Senator Sturgelewski, you have a questions as were recessing.

SENATOR STURGELEWSKI:

Yes, Mr. Chairman, just a simple question. As you and many people are aware, we're working very hard to try and find a way that we can get a real solution to this and not just part. At least certainly, that's my aim. Mr. Mitchell, you pointed out the section 814 which allows the Secretary to prescribe

regulations. My perusing of certain definitions and the possible amendment of ANILCA was to add some additional, say, direction on that, so that we would, perhaps lessen the number of cases that would go to the court. They're very upsetting in their use of both sides as to why we should do something or should not do something. And I have not seen in the new regulations that are being proposed just what may be added in there in terms of definitions of those.

But I guess, my direct -- and I would ask that staff would provide those to us. In other words, in the proposed Federal Register of the -- just what do we have in the way of definitions? And do they in turn conform with what's in the Governor's bill or what's in the proposed legislation by Senator Adams and others? But I guess my question is, is it not correct, we don't really have to amend ANILCA to get that? Do you think that that would be of some benefit to attempt to get the Secretary through the rulemaking power to work with the state in defining such things as "customary and traditional", "customary trade", et cetera? So do you think that would then lessen the potential for lawsuits?

MR. MITCHELL:

Part of the texture of Alaska, Senator, is Alaskans not taking guff when they think they've been mistreated and so unfortunately the idea that we're ever going to lessen lawsuits is probably a hopeless task for us all. With respect to those lawsuits prevailing, certainly the more certainty - the more clear direction that they can be given to the Board of Fisheries and to the Board of Game, the less likelihood that they're going to act in ways that are misdirected. So certainly the short answer to your question is, yes, I think the whole process could profit from such an exercise. And I would suggest that the whole history the regulation in this area beginning in the early 1980's was a combination of -- to put it bluntly, some members of the Board of Fisheries and the Board of Game who did not like the state law and federal law that they were given and purposely

chose not to obey those directions. That's a subject obviously that's serious. But on the other hand, there are also, I think to be fair, members of the Board of Game and members of the Board of Fisheries who really wanted to try and do the right job and it was a very confusing legal and regulatory situation for them. And they really didn't have a lot of information that they needed. So I think there were two kinds of folks struggling with this during that crucial era in our history of this whole statute. So certainly, if the Secretary of the Interior, after all of this was over, and the state complied with ANILCA and we're all back into rowing oars in the same direction, if he, with the cooperation of the state wanted to engage in rule making and Alaskans through the rule making process to send in their suggestions about these definitions, and really take a hard look at what Congress intended in some of these areas, that would be a very useful endeavor that could go a long way to ending a lot of these uncertainties.

SENATOR STURGELEWSKI:

Mr. Chairman, just very briefly. What would be the areas that have caused the lawsuits? We know that customary trade has. We know that customary and traditional has. What other issues have caused lawsuits? In terms of the definitions?

MR. MITCHELL:

I think that you have indicated the obvious ones. But I don't really think it profits this exercise at this time to try and really go through and look at all the different words in Title 8 that need to be -- that would profit from having some regulatory definitions. I think that's a very technical exercise and I think starting at page one and going all the way to the end and seeing what these phrases are that lawyers think both that causes problems in the past and also can be reasonably expected to give rise to some ambiguities in the future. And then flagging those words and then putting that out in a rule making and see what kind of public comment you get back about what people believe Congress intended specifically in this area.

Which would be very useful. But I'm not trying to duck your question, Senator. It's just that there may be some obvious words and phrases that have gotten a lot of press today but there may be some others in there that could give us the same kind of trouble five years from now and if we get to that right now we wouldn't have the problems that we have today with the ones we didn't address five years before this afternoon.

SENATOR STURGELEWSKI:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

Are there further questions. Senator Duncan, has -- excuse me, Senator, you have the floor.

SENATOR DUNCAN:

Mr. Chairman, just one question that I believe Mr. Mitchell to respond to. This morning there was quite a bit of discussion by the administration concerning the memo that Department of Law had written about the impact of a constitutional amendment giving a priority to subsistence, the impact [indisc.] ANILCA that that would cause. I was wondering if you could comment on that.

MR. MITCHELL:

Surely, Senator, just briefly. To date, before that memo was distributed -- at least all of the people that I'm in contact with we have always viewed that the priority for subsistence that would be in the text of the amendment that has been offered to you dealt exclusively with the issue of how you divide up the number of animals that are available. That it did not reach, and it was not intended by either Senator Hoffman or any of the other sponsors, to reach the issue of land use decisions regarding land the particular game populations might be on or particular fish populations might swim over. So we were really quite startled in a technical sense when these arguments first surfaced. If this is a problem, if people are uncomfortable, it is very simple technically -- this is your constitutional amendment, if in your policy judgement you choose

to pass it. It means what you indicate to the people of Alaska you intend it to mean. If you do not intend it to mean that it reaches land use decision making, it is very simple for you to say that. Both in this record, in letters of intent and in the statement that would go on the ballot that we describe the legal affect of this amendment for the voters. If this is a problem at all, it is a problem with a very simple technical [indisc.] in my legal judgement.

SENATOR KERTTULA:

Are there further questions of this distinguished group? You have the floor, Senator Halford.

SENATOR HALFORD:

Mr. Chairman, this is somewhat a management question, but I think they have also kind of thought about this one, too. But how are we going to avoid weak stock management under an absolute priority? The weakest stock is subject to maximum opportunity and minimum interference and that stock is mixed at the points of harvest. What do you do?

MR. SMITH:

Mr. Chairman, Senator Halford, that issue occupied, I would say conservatively, two full days of a four-day trial in Nome on the Elim case. It is a very complicated area. I guess the short answer to your question would begin by saying that at present, as I understand the managing practices at least on the Yukon River about which we received considerable testimony - they engage in weak stock management on that stream at this time. The supervising biologist there talked at length about how they structure the fishery openings and the way they distribute fishing efforts throughout the Yukon, all twelve hundred miles of it, through the six commercial sub-districts. In an effort to make sure that the exploitation rate on a particular weak stock does not get too high and that they try to distribute fishing efforts so as to avoid impacts on what they consider to be weak stocks. There was also testimony that on several of the index streams for the fall chum run this year -

if the run looks to be so weak that they are going to be closing commercial fisheries downstream -- and as Mr. Starkey pointed out, this is not a subsistence consideration, it is a sustained yield consideration that they are dealing with. So I guess, my answer, Senator Halford, without getting into all the details - and I'm not a fisheries biologist and I'm working more off what we learned in this litigation, there is a weak stock management policy now that seeks to minimize the impact on weak stocks in a mixed stock fisheries.

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

Just trying to figure it out [indisc.] response. The concerns that if you have an absolute priority and the priority is on the stock that is mixed and the weakest, that you don't end up having to destroy the commercial activity on all the stronger stocks because there's no way to harvest them other than mixed.

MR. MITCHELL:

Senator, at a policy level, the issue of mixed stock fishery management has been going on as a separate controversy independent of subsistence, again, as long as I have been working in this area. You may recall, that the Board of Fisheries had a policy that it never adopted as a regulation that said in its professional judgement as a general proposition, mixed stock fisheries are a very bad idea. For the very reason that many of the people we have been involved in representing believe it to be so. Which is that you have no idea what's going on inside a fishery with respect to those individual stocks. Whether it is a good idea or a bad idea is an issue that's got nothing to do with subsistence. I think it would be fair to say, just to test that theory, and again, I really don't want to cross pollinate that very emotional issue with this one. But if you think about some of the mixed stock fisheries that have attracted so much heat lately, if they did

not exist -- let's be up front and talk about False Pass. If False Pass fishery did not exist and someone thought up this great idea, they looked at the map and said, hey, you know, all the fish in western Alaska shoot through this funnel out there. Let's go to the Board of Fisheries and have a fishery. Now if that fishery doesn't exist and the proponents of that idea went to the Board of Fisheries just straight today, without that whole history of that fishery, and said, we think this is a really good idea. What would the biologists say of that proposition? They'd probably say, no, it's not a very good idea. We wouldn't know how to manage that fishery. We don't know what's going on. But the reality is that lot of those fisheries do exist. There are Alaskans that have grown to depend on those fisheries, and it creates a very difficult interaction between professional management on one hand and the legitimate needs of Alaskans on all sides of the issue on the other. But the reason I mention is that to attempt to deal with that one, in the middle of trying to deal with this one, is a truly heroic, and indeed in my view, professionally impossible task.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

I don't disagree with what Mr. Mitchell said. I'm afraid that we add, particularly the constitutional part -- you add another element that may make that more difficult.

MR. MITCHELL:

Senator, I would agree that because a number of these stocks are the subject of subsistence harvest at the end of the line ... [tape ends midspeech].

Tape 92-13

Side A

[Tape begins midspeech]

MR. MITCHELL:

... taken out of the hide of some Alaskans that don't have a lot of other places to go. So certainly, you are correct that to that extent the fact that subsistence is involved in terms of the ultimate harvest of some of these stocks [indisc.] streams, makes the mixed stock fishery problem that much more difficult. But it also, I would argue that an advocate indicates why originally before this [indisc.] issue got so politicized, the biologists told us that that was not a very good management approach to be in.

SENATOR KERTTULA:

No further questions. I thank you. I would ask -- yes, you have the floor, Senator -- excuse me - Senator Collins.

SENATOR COLLINS:

Thank you, Mr. Chairman. I do have a question [indisc.] I came in just as you were finishing up I believe with a question that one of the members and you indicated that at it was in your best interests in terms of the result that you might see [indisc. - cough] how Alaskans manage our fish and game. And I have a question. How does that conform, isn't there currently a lawsuit requesting the federal government to [indisc.] fish and game -- my question is how did that conform with the lawsuit that was currently ongoing? And secondly, how would the lawsuit impact the legislation that's been proposed by Senator Adams? [indisc.] that they all work together or they kind of different parts ...

MR. MITCHELL:

The answer to the second question first is that if, in fact, a constitutional amendment were enacted it would authorize you and the House to adopt Senator Adams' bill. That would moot the issue -- state regulation of all of our fisheries would return to state hands. That would moot as Mr. Suberg said Department of Interior, the question of what is the reach of federal jurisdiction. It wouldn't make any difference because the Alaska Board of Fisheries would be regulating the whole

thing. You wouldn't have to decide a lot of those questions that he didn't want to give answers to. So to that extent it would be very helpful.

In terms of the seeming inconsistency of on the one hand saying that it would be best to have the Board of Fisheries regulating our fisheries, and on the other hand getting involved in a lawsuit to take away that authority, the answer to that is, I think, what we said from the outset. That the Board of Fisheries is the best group to do that, if they use legal standards for exercising that important responsibility, that actually safeguard people out in the village at the end of the line. And that, with all due respect to the present members of the Board, that the past history of regulation was that when those standards were not in place, many people out in the villages just felt that they did not get a fair shake. And so if it's a question of the Board of Fisheries again being just given a blank check without the kind of legal direction that you gave to them in 1986 when you passed the Alaska Subsistence Statute, then I think that there are many people that think -- you know, it's a Hobson's [ph] choice, having those standards implemented by federal regulator until such time as the state can get back involved with those legal standards is the better of the two unpleasant results.

MR. SMITH:

Mr. Chairman, if I may add one thing. Senator Collins, another element of this is the all Alaskan policy problem. That the state management currently treats all Alaskans as eligible for subsistence fishing, which is not very protective of the villages. And the federal government, and as we all know too well, restricts the priority to rural people. And so through federal management, you reduce the pressure on the resource, that improves the opportunity for subsistence uses in the villages.

And I think that's another reason. There's just a general belief that the protections in the federal law are greater than

the status of the current state law, given the McDowell decision.

SENATOR KERTTULA:

Are there further questions? Thank you very much. We may ask if you participate in the days to come here, and I hope there aren't many -- more like hours to come. I would ask the Commissioner of Fish and Game, to maybe come forward now, along with Mr. Nelson and our two attorneys for legislative agencies. Thank you again.

MR. MITCHELL:

Thank you, Mr. Chairman. We appreciate the opportunity.
[simult. speech].

SENATOR KERTTULA:

We have the bill back before us and presuming there were some amendments that have been prepared, I've asked that to the maximum extent possible, that you hand those amendments in tonight and early tomorrow morning at the latest. I think that's fair to everybody so we can have them typed up and looked at. And if there are none, that indeed will be fortunate.

Are there questions about the bill? You've had the report yesterday as well as a sectional analysis and I also realize that you've been busy from morning to night -- all of us. So you probably haven't had much more time than I've had to restudy the issue. Senator, Mr. President.

SENATOR ELIASON:

Just one question. I'm a little concerned about the paperwork involved in this process. Once again, the question is do those people living in the communities of twenty five hundred or less, are they required to go through the paperwork scenario also?

MR. NELSON:

Senator Eliason, Mr. Chairman, the bill specifically provides that in communities under twenty five hundred that there is no paperwork. In fact, it explicitly states the Boards may not require a permit or [indisc.] from the state [indisc.]

person that meets the requirements. No additional paperwork of any kind.

SENATOR KERTTULA:

Are there questions -- can I go around the table? You have the floor.

SENATOR POURCHOT:

[Indisc.] basic question about whether this bill is constitutional and I think we heard from the Attorney General's office on why he felt it was constitutional and we've gone through some examples about -- it is permissible to let different residents have a different level of paperwork than other residents. I got to thinking about that later though and maybe in some of these cases, it's not just a matter of filling out form or not. And to follow up on the question by Senator Eliason. Even if you live in a community of less than twenty five hundred you still have to meet the requirements. You don't have to prove that you meet the requirements [indisc.] but you have to. And if you're an honest person, you would have to do it. Not only that it's [indisc. - cough] to go in and prove somebody has to.

So then it seems like you get into the situation like, let's take Palmer or Sutton versus Glenallen [ph] And you live on the outskirts of Palmer on Sutton -- I think Sutton is part of Mat-Su [indisc.] Let's say you're in Sutton and you call yourself a subsistence user. But you're under the road system seven thousand so you got to go through the seven point planner [indisc.] and score a certain score. Down the road in Glenallen a town that's actually maybe bigger than Sutton, on a road system but they're not considered part of the Mat-Su road system. They're less than twenty-five hundred. So the [indisc.] on district manager lives there and he makes about \$55,000 a year but he probably lives a rural subsistence kind of lifestyle or thinks he does. He doesn't have to take the test. Both these people -- if he were to take the test, he would score eighty-four. The guy in Sutton would score eighty-four too or

he has to make that so he does score eighty-four and he doesn't make enough points. So he's denied but the [indisc.] district manager were to take the test he'd score eighty-four, too. But he doesn't have to take the test and he is he is a subsistence user for purposes of enforcement -- for all practical purposes. So they're similarly situated on an objective basis, but one gets subsistence privileges and one doesn't. That seems to go further than just the people of differences [indisc.] and maybe how does that rationalize this constitution -- under the Supreme Court decision in McDowell?

MR. NELSON:

The current statute, the bill, the way it's written, it does contemplate that this will be over inclusiveness allowed at especially the village level, under twenty-five hundred. There will be people there who will be able to hunt and fish even though they're not qualified until the state goes and proves that they're not. And then that's -- assume there is going to be some leeway there, some over inclusiveness on that. The justification comes from the fact that the percentage in the communities that they live in, if there communities meet the criteria as required and it isn't just the population. It's also the community has to demonstrate a substantial actual dependence on subsistence. If that community is categorized that way there's a factually justified, I think, presumption based on -- assuming a higher percentage of qualified subsistence users in that area. And there will be some cases that it won't work out perfectly fair. It isn't a perfectly matched system. And so there will be cases like that. There won't be nearly as many as under any other bill that I've seen. But the council realized that there would be that. But I think some of the values we discussed today, the idea of not being over divisive in the smaller communities especially, those are the reasons -- it's more difficult for me as a state attorney to disqualify people through some kind of action.

SENATOR POURCHOT:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR POURCHOT:

What you've just answered, ironically, is the reason why ANILCA chose rural as [indisc.] definition. That's the same rationale. Part of it was not wanting to get into to small communities and choose between the people, not only from a mechanical paperwork standpoint, but also from a cultural social standpoint also. But ...

MR. NELSON:

Can I comment on that? ANILCA is a much, much, much rougher cut. It doesn't even come close really to even factually justify the presumptions of rural versus urban. In this case, you'll see a closer tailoring and the real problem that McDowell saw -- McDowell did focus on, I think, is not as much the over inclusiveness as the under inclusiveness. The fact that there are definitely people in the state who are living in urban areas who are just as dependent actually on fish and game for survival and for consumption and feeding their families as there are people in the village. Not as many. Obviously, we recognize that by the presumptions that we put in. Not nearly as many. But those people will be allowed to participate. Albeit through a more burdensome permitting system to be able to do it. But they will nevertheless be allowed to participate. That's one of the reasons I think this bill passed the state constitutional muster as well as being more fair than ANILCA -- than ANILCA was.

SENATOR KERTTULA:

You have the floor.

SENATOR POURCHOT:

So you're saying that your reading of McDowell as -- opinion as you read it was that it 's okay to deny the man in Sutton who didn't score enough points and allow someone with the same point total to participate. That's the less of a problem

under the constitutional provisions for equal access, equal protection, than to deny someone in Sutton who scored one hundred and ten or enough qualifying points that that is more [indisc.] to allow people who score high as subsistence users to not deny those people rather than allowing people who may not be, quote, "true subsistence users" or [indisc.].

MR. NELSON:

I did think that the Supreme Court of Alaska in McDowell and in other decisions vindicated it that they viewed that deprivation of someone whose equal to somebody who gets the opportunity and they both have clearly demonstrated reliance, is more serious than including someone who may not quite make it but he lives in a community with a very high percentage of people that do. And frankly, it would probably be an ideal world, it would be more fair to require the same exact per basis of everyone. But I think the council recognizes they flat don't have the resources to be able to do that. They realize what an administrative burden it would be if you were going to try and do that. And also in the considerations of the disruption to smaller communities and that was a concern. And that was the other reason they specified we try to do that through recent amendments to the bill to clarify that only the state would be in a position to challenge someone's qualifications. A private party will not be able to do that.

SENATOR POURCHOT:

Mr. Chair, I have one small ...

SENATOR KERTTULA:

Certainly.

SENATOR POURCHOT:

One small question. On poundage requirements under the point system and I -- when Mr. Campbell was talking about the history of one hundred and twenty-five pounds is some basis for that. How does the -- it says since the first person [indisc.] but yet it goes on and talks about sharing, sharing for other households. How does the poundage relate to numbers of people

sharing? That gets to be a lot of poundage if its really per person. [Indisc.] than I do, I know. That's still per year particularly if it were per person as opposed to per family and that seems like a very high threshold to me. To be so high as not to relate so much to subsistence as to relate how much meat a guy likes to eat.

SENATOR KERTTULA:

You have the floor.

MR. NELSON:

Mr. Chairman, Senator Pourchot, we do admit that a vegetarian does have a definite handicap under this. First off, this is consumption per person. This is entirely separate from sharing. But how much a person consumes is -- we specifically made it consumes versus how much a person took because while a typical anchorage hunter may go out and take a very large amount of meat because then he spreads it through the rest of his family [indisc.] it just worked out much better for qualified subsistence users to use consumption. In terms of how we actually arrived at one hundred and twenty-five pounds, we looked at several figures. The average man, woman and child in the western United States consumes two hundred and twenty-two pounds of meat, fish and fowl a year from all sources. The one hundred and fifty pounds of meat, fish and fowl per year will supply one hundred percent of your protein requirements. The average subsistence user, and I should use average very carefully because there's a big difference when you look around the state. But an average -- is down to the average subsistence user harvests three hundred and fifty pounds per person per year. Subsistence users tend to consume a higher quantity of meat, fish and fowl than non-subsistence users because in this average western United States diet that I talked about, a relatively high percentage of protein provided through milk products and other such substances.

SENATOR COTTEN:

Did you mean harvest or consumed three hundred and fifty?

MR. CAMPBELL:

Excuse me, the three hundred and fifty is harvest. We do not have actual consumption figures. But almost all of [indisc.] some form of harvest. So basically, what we looked at -- oh, I know where I was. The average subsistence user didn't actually consume a good deal -- higher pounds of meat fish and fowl because they are not just consuming generally to meet their protein needs, but also consuming it to meet caloric needs that the rest of us tend to meet through all kinds of other food sources that are available to us. I think everybody on the council agreed that the one hundred twenty-five pounds was actually a relatively low minimum figure when we're talking about subsistence use.

SENATOR POURCHOT:

Mr. Chairman.

SENATOR KERTTULA:

Questions around the table? Senator Zharoff.

SENATOR ZHAROFF:

I just have a question here. Kind of an interesting one. How does this deal with somebody, let's say, that has just moved -- I think the bill there probably just assumed everybody is going to stay where they are. But how does it deal with, say for example, somebody that moves from Anchorage out to a small community out there and they can't substantiate any type of a track record. Or if they move into an area where they have to document there that they have had some subsistence take.

MR. CAMPBELL:

Let me [indisc. - cough] both of those scenarios real quickly. If a person has lived in Anchorage and has not been a subsistence user in the past and then he moves up to Chufaluk [ph] at that point he is living in a town where he is presumed to be a subsistence user and he may legally go out and participate. That person may choose, if they wish to, if they're extremely scrupulous about this, to just go either -- if they don't want to go out and subsistence activities, they can

go out and they can harvest meat, fish or fowl on a general sports fishing or personal use fishing. This would be the circumstance say if the same person from Anchorage moves to Bethel, where they would be required to sign a form where it simply says, I meet the criteria to assert the presumption. In order for them to do that, if they do not have any prior history of use, they would need to harvest meat, fish or fowl, through sport use, commercial and general hunting. And one of the things we focused on and looked at very, very, carefully with the Department of Fish and Game is making certain that anywhere in the state you can meet all these requirements relatively easily through the sport, general hunt and personal use fishing standards. I think a similar question came up with Senator -- yesterday Senator Halford asked what if you lived in a national park? We acknowledged that might make it little more difficult but we feel you would still pretty easily meet it.

SENATOR KERTTULA:

Senator Adams was seeking the floor. Or are you ...

SENATOR ZHAROFF:

Just a quick clarification. So what you're saying then is that if you take an animal by sport hunting license, it's basically personal use that that poundage counts there towards your ...

MR. CAMPBELL:

Yes, sir. On page eight, starting on line one, subsection (k), it says, "The taking, processing and the use of fish and game to count toward qualification must have been legal non-commercial and characterized by efficiency and economy and effort, cost and transportation." I believe I talked a little bit the other day how certainly there are some types of sport use that would not qualify, if they are not efficient or economical. But you can -- under available regulations everybody would have the opportunity to engage in activities that would qualify them.

SENATOR KERTTULA:

Working through this bill and questions you have on this legislation. Senator Adams.

SENATOR ADAMS:

Thank you. I'm going to look at one of the sections -- section two on page five and you give me categories one, two and three. Tell me who does the application process? Is it each one of these in category one, which is an area less than twenty-five hundred in population? Category two twenty-five hundred to six thousand nine hundred and ninety-nine or category three, the urban areas? Who fills out this application? Is it each one of these categories?

MR. CAMPBELL:

Sir, the only people who fill out the application and this is I believe if you turn the page to page six and this is (h) one, two, and three it states in, one, people are simply presumed and there's no paperwork. In two, people may assert that they meet the criteria simply by signing a statement. At that point, there is a presumption that they qualify. And in the urban area, category three, that is the only place that a person fills out the application.

SENATOR ADAMS:

It's a small objection that I have to the Governor's bill, which creates what we call an unworkable paperwork system for applying for eligibility. Because an example of that particular difficulty has been people from the State of Alaska in each of our districts fill out the permanent fund that we fill out every year. I have problems - about four thousand problems in my Senate district on a yearly basis on just filling out a form. And it goes simply, are you in the military? And some people say they haven't been but they fill it out anyway. It is misunderstood. This occurs, Mr. Chairman, even in light of the statutory direction of the Department of Revenue who assist rural Alaskans. This form is misunderstood by not only the rural people but the Natives and non-Natives that live there.

If everyone would look at the application form that is in

your booklet with the Governor's bill, it's nine pages long with fifteen pages of explanation. So if you multiply the kinds of the problems that you have in your Senate district with a one page sheet, then you need to go back and look at that application they have. Can you tell me how you come to the conclusion that people will easily be able to meet the criteria in a bill. There are examples of one through nine pages.

Listen to this. How many days do you spend engaging in taking fish or game in your subsistence area or spent processing that fish and game during the past month? Score one point per day, there's thirty days minimum. Another question. In how many different months did you hunt or fish during the last twelve months? Scoring one point per month, there's four months minimum. During the last twelve months, how many which were the taking or processing of fish and game was your principle work effort? One point per week. This particular procedure that you have created is going to be one of the unworkable systems, unenforceable ones and you need to look at the fiscal note and enforcement of something like this. And I know there is no fiscal note in force because that's going to be supplemental.

SENATOR KERTTULA:

You have the floor.

MR. CAMPBELL:

Mr. Chairman, Senator Adams ...

SENATOR KERTTULA:

My experience I might say, in permanent funds, student scholarship loans and senior citizen programs [indisc. - simult. speech] I'm sure I made a thousand new contacts a year. And I guess, thank you very much, because I start writing these people on these subjects.

MR. CAMPBELL:

Sir, if I may, in your district, continuing his example, no one in any of the villages would be required to fill out any forms or any paperwork or sign anything. The people who live in Kotzebue, that is the only place within your district where this

would be the case ...

SENATOR ADAMS:

Nome.

MR. CAMPBELL:

I should qualify that.

SENATOR ADAMS:

Bethel.

MR. CAMPBELL:

Depending on where your district is the folks in Barrow, Nome, and Kotzebue and Bethel, if you have it or wherever that is, would have to sign their names to a form. There is a back of a form that is for their own informational purposes only. It's not required to be turned in, filled out or anything else. It's strictly there for informational purposes. Not one person in your district would ever be required to fill out the large application that is in here for the urban resident.

SENATOR KERTTULA:

Well, when I'm governor ten years ago, you'll have part of district you have to fill out.

SENATOR ADAMS:

No further questions, Mr. Chair

SENATOR KERTTULA:

Senator Hoffman. Oh no, Senator Duncan -- Senator Cotten and then Senator -- I'm sorry, Senator Cotten. I keep looking to the right nowadays. Senator Cotten.

SENATOR COTTEN:

How do you envision this working if you get several thousands of these from Anchorage, Commissioner. What are you going to write -- I think it says here, "the commissioner shall provide recommendations to the Board on qualifications procedures." What kind of recommendations are you going to make? Are they going to be spot checks, affidavits? Maybe you got that in here. I haven't studied it that closely. But will it be similar to a permanent fund where you have to get people that will sign their name saying that they'll swear that you

actually spent four months in the field or whatever the deal is?
You got a witness.

COMMISSIONER ROSIER:

The point system [indisc.] and I think I make the recommendation to the Board. The Board adopts regulations which I have to make that determination under the bill.

SENATOR COTTEN:

Do you envision checking to see make sure that Virginia Collins or Sam Cotten isn't, you know, kind of fudging a little bit.

COMMISSIONER ROSIER:

I'm not sure [indisc. - simult. speech] it would be our intent to look at fairly closely. Certainly in the early stages, you would have to be [indisc.].

SENATOR COTTEN:

How do you look close? How do you check?

COMMISSIONER ROSIER:

I think within the book here, you've got the whole section dealing with the process on this kind of explains this.

MR. CAMPBELL:

There are provided for your information fiscal notes and in the fiscal notes there is a pretty detailed explanation exactly of how many people, what they'll be doing everything. Those are the booklet furnished to all members. Specifically, one needs to look at the fiscal note by the subsistence division.

SENATOR COTTEN:

I'll look at that Mr. Chairman. Thank you.

SENATOR KERTTULA:

Are you satisfied with that Senator Cotten?

SENATOR COTTEN:

Well, I am for the moment. I'll look at the fiscal note. I hadn't seen that.

SENATOR KERTTULA:

We'll move around the table to Senator Hoffman if he's here and then Senator Fisher, and then Senator Cotten, if he desires.

Senator Fisher, you had a question? Paul, do you have a question?

SENATOR FISHER:

I thought you were over that way. Yes, on page five, following up with Senator Adams. How do you define an urban area? And I guess, my concern is the people in Anilchik [ph] have called and they wonder how they fit in with an urban area. Do you take the whole borough and count it as an urban area as a whole? Or do you take each community within a borough?

MR. CAMPBELL:

Neither sir. This is one of the areas that we have left to some extent to the discretion of the Board to adopt regulation. But we are very definite that we do not envision an entire borough being an urban area. We have used the example a number of times, for instance Sitka, would be into the urban status according to population growth. But in terms of the urban area of Sitka, where you're not talking about the whole unified municipality. We are simply talking about that [indisc] roaded area fairly tightly drawn boundaries so the Board could adopt regulations for the definitions, for instance, specific example, you're talking about that the Board will hold hearings in their area. We've talked to the people and trying to examine how closely tied those communities are and make their determination.

SENATOR FISHER:

I guess staying with that example, it doesn't have twenty-five hundred people. So they would look at this and say, gee, we're in category one. Right?

MR. CAMPBELL:

If they are not included in an urban area.

SENATOR FISHER:

Well, that's

MR. NELSON:

That community also has to demonstrate dependence upon subsistence as a principle characteristic of the economy, culture and way of life. So there will be variable of these

communities under twenty-five hundred that aren't in category one.

SENATOR FISHER:

Okay.

MR. NELSON:

Military installations and communities surrounding military bases, for example.

MR. CAMPBELL:

Can you give me which community you were talking about?

SENATOR FISHER:

Oh, I was just picking Anilchik because I think -- even though they're in ANILCA, somehow, they're a little bit of an exception in the Kenai, aren't they? As a village?

MR. CAMPBELL:

[Indisc.] roughly what the population of Anilchik is?

SENATOR FISHER:

No, but it can't be twenty-five hundred.

UNIDENTIFIED SPEAKER:

Eight hundred, probably. One thousand.

MR. CAMPBELL:

We will apply -- one of the things that's also in this book is there are [indisc. - cough] about two hundred and fifty-six communities that we feel are in category one though the Boards will make the final determination. Seven communities that we feel are in category two and those are Bethel, Nome, Kotzebue, Barrow, Cordova, Petersburg and Unalaska. And then thirty communities that are in category three. And those are primarily, either communities of over seven thousand or communities that we would describe as industrial settlements or military bases or things like that. [indisc.].

SENATOR FISHER:

No, that's all right. Go ahead. Can you just slip the book to me a minute and continue.

SENATOR KERTTULA:

Senator Collins, Senator Zharoff.

SENATOR COLLINS:

Thank you, on that point [indisc.] twenty-five hundred [indisc.] I thought earlier in response to Senator Adams it said that no one [indisc. - others speaking] fill out a form. Yet you said to Senator Fisher that there might be some communities that have twenty-five hundred or less that would not fit in category one [indisc.] is that correct?

MR. CAMPBELL:

Senator Collins, thank you for bringing that up. What I was referring to Senator Adams I didn't think that all of the communities under twenty five hundred in the district do fit into category one. But there are -- I can read you off very quickly or you can look -- it's in Table 3, Appendix B, referring to a list of communities that are under 2500 and do not qualify. And they're like Amchitka [ph], Bedworse [ph] Alcan [ph] Circle had some reservations [indisc.] Prudhoe Bay. There is a list of little temporary logging camps in Southeastern. I'm talking not about towns that have been there for awhile but where you have a couple dorms on a barge and they're temporary logging. And then it progresses up. So there are towns where there is not a dependence on subsistence as a principle element of the economy, culture or way of life that are under twenty-five hundred where they will have to use the affidavit [indisc. - paper shuffling].

SENATOR KERTTULA:

Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. Now am I to assume the -- maybe I'm wrong on this. But didn't your category one and category two and your category three, where people have made application and they have met some of the criteria and they're eligible for subsistence, that they don't need a sport fishing or hunting license?

MR. CAMPBELL:

Mr. Chairman, Senator Zharoff, as I understand your

question correctly, if a person is participating in subsistence hunting activities and they also wanted to go out and sport fish, they would have to get a sport fishing license. Which is how it is now and how it always has been. It would be their option about whether they wanted to go out and sport fish or not. Hunting in Alaska has always required a hunting license. We have not changed that at all. Specifically, the bill says is, and let me read the language to you again. It says, "the Boards may not require a permit or filing of the statement affirming that the person meets their requirements for qualification." And that's what I was going to say. We're not talking about any additional paperwork whatsoever. This is does not however, get rid of the requirement that if a person wants to hunt, he has to have a hunting license.

SENATOR ZHAROFF:

Who makes the determination there -- have a state trooper up there, a fish and wildlife protection officer comes across somebody that just shot a deer for example and doesn't have a hunting license. He says, well, I live in Buzinki [ph]. There's only seven hundred people there. I'm subsistence hunting.

MR. CAMPBELL:

Sir, let me say again, whether you hunt in a subsistence hunt or a general hunt, it is always required to have a hunting license. That is something in a different section of the state statute that we don't have any affect on whatsoever. So if you're hunting, you are going to need a hunting license. We're not changing that. We're not increasing it. But we're not decreasing it either. But what we're saying is, you do not have to file any paperwork to gain the presumption that you can go out and participate in a subsistence hunt [indisc.] that community.

SENATOR KERTTULA:

You have the floor.

SENATOR ZHAROFF:

I guess I'm just still a little confused here. You still

have to have a hunting license in order to hunt. So why have a subsistence designation? I guess I'm trying to figure that out there. Because what you're doing is that you're trying to get - the resource is to the point when you can't take it commercially, you can't take it by the sports guidelines, taking it under subsistence and people meet subsistence criteria at any time because a certain stipulations in here. And you think that if they're in a subsistence situation, since some people in here went ahead and raised the license fees for sport hunting licenses and the whole reason for subsistence because you can't basically afford anything else or you have other resources that are limited to you.

MR. CAMPBELL:

Sir, if I may. The Board tried to deal with just the law we had to change to do this. And in 1986, this body debated the issue of whether or not to remove the requirement of having a hunting license for subsistence hunting or not. And that got rejected by this body. We do not then attempt to second guess you and say, okay, let's do it. So we just simply left that section of state law totally alone. If a person has -- if a person is of low income, they may obtain a low income license but I want to emphasize that though sometimes somebody referred to that as a subsistence license, that license has nothing whatsoever to do with a person's eligibility to hunt or not to hunt. It is totally -- the price you pay is totally based on your income.

SENATOR ZHAROFF:

Let me ask you another question, in relation ...

SENATOR KERTTULA:

You have the floor.

SENATOR ZHAROFF:

... in relationship to let's say, sport fishing of particular species, and I'll just say coho because you are, and correct me if I'm wrong Commissioner, [indisc.] you're only allowed to have two in your possession at one time or per day.

whatever it might be. But if you're subsistence fishing, you can have whatever the number is like 25. Now, if you're out there catching, I guess you'd catch with rod and reel now. [indisc.] federal guidelines or whatever the deal might be. And you're out there picking up ten silvers and you stop by a protection officer and he comes up there and says, I want to see your fishing license. You show it to me and he writes you a ticket because you got more in your possession. But you are actually subsistence fishing out there because your limited in the time of availability being able to go out.

MR. CAMPBELL:

Sir, if I may. If you are subsistence fishing in some areas of this state, you are required to have a subsistence fishing permit. And again, [indisc. - paper shuffling] section of the law we do not [indisc. - cough] subsistence permit your certain limits. I think you mentioned twenty-five fish a day. Then if you want to go out and buy a sport fish license you get two additional fish a day through sport fishing. You can have a cumulative total if you wish. But in either case, I don't think you'll run into problems enforcing it.

UNIDENTIFIED SPEAKER:

You haven't been out.

UNIDENTIFIED SPEAKER:

[Indisc.]

SENATOR KERTTULA:

Are there questions around the table. Senator Adams.

SENATOR ADAMS:

Correct under the Governor's bill there's no rod and reel subsistence fishing. My question, we went over the criteria of the application form -- the Governor has allowed for presumed eligibility of residents of communities to be rebutted by the state. How is this going to be done? Is this going to be done by what entity? The Alaska fish and game? Department of Law? Department of Public Safety? The next question after you do that, who hears and decides the evidence of non eligibilities?

Is it the Commissioner of fish and Game? The Boards or the Courts?

MR. NELSON:

In those areas where presumption is going to be rebutted that presumption is going to be rebutted when the state through the Department of Law not simply public safety or fish and game, demonstrates to a court at the appropriate jurisdiction that that person is not qualified. The judge would have to reach a conclusion. And once that occurred, then that person would not be able to participate as a subsistence user until he qualified.

SENATOR ADAMS:

Who is going to do these? Who's going to do the eligibility in [indisc.] What state agencies?

MR. NELSON:

Initially, the person who would initiate -- it would probably be either a fish and wildlife protection officer or a fish and game biologist that sees what he thinks is a violation. He would then contact ... [tape ends midspeech].

Tape 92-12

Side B

[Tape begins midspeech]

MR. NELSON:

... right now I'm the only attorney in the state that does civil enforcement work for the state. And request that I file an action in court for declaratory judgement that this person was not qualified to subsistence hunt and fish. And it go through a review initially with that officer, then with me or the attorney that was going to decide whether or not to bring the case and then the judge would have to decide on the evidence presented by both sides.

SENATOR ADAMS:

In a recent study by Alaska fish and game, we can have presumed one hundred and ten thousand people eligible for this particular program. even though we don't have a fiscal note before us, have you done a cost -- how much it would cost if you

had to look at one hundred and ten people or ten thousand so that we could have some idea of what we're talking about for future cost of implementing this program?

MR. NELSON:

Senator Adams, if I can, I would refer you to the fiscal notes that are in the note which specifically do examine the issues of enforcement and compliance and the whole thing.

SENATOR ADAMS:

Okay. A final question, Mr. Chairman. If this bill passes, and in your view, will they be more or less people eligible to participate in subsistence once we do this? Ten years from now do you think this is not a means of slowly elimination of subsistence users for the future?

MR. CAMPBELL:

No, sir, but I'm very glad you asked. If I were a person who wanted to over time eliminate subsistence from this state, what I would adopt is a strict rural/urban criteria where anytime any community through growth bumped into the urban area, that's in everyone in that community would be totally out of subsistence. And over time, as our state grows I think that would result in a tremendous decrease in subsistence in our state. What we very specifically tried to do in this bill and discussed this a great deal on the council is develop a system where regardless of population growth, if people are living in a community through maybe nothing that has anything to do with them, that community around them grows up, but they are a person who is a subsistence user, they will be able to continue with that subsistence way of life regardless of the growth of the state or individual communities.

SENATOR KERTTULA:

Senator Pourchot and then I'll have something else

SENATOR POURCHOT:

Thank you, Mr. Chairman. I wanted to get back again to the constitutionality. And I apologize. I should have done this earlier. We've heard the Department of Law and I was in the

meantime, going back and reading Mr. Utermohle's memo to you on the constitutional issues with the Governor's bill and I -- it run a number of pages. It really does take issue I think with some of the conclusions by the Department of Law. I wonder if you could -- our division of legal service people [indisc.] haven't heard from them make sure they turn [indisc.] hear from Mr. Utermohle on that same copy that his [indisc.] constitutional aspect relate to the McDowell case on the Governor's bill

MR. UTERMOHLE:

Mr. Chair, Senator Pourchot ...

SENATOR KERTTULA:

You have the floor.

MR. UTERMOHLE:

For the record, my name is George Utermohle, Legislative counsel, Legislative Affairs agency. In [indisc.] regard to the community based presumptions issues -- questions [indisc.] Department of Law, the issue there is who will be entitled to presumptions that they're qualified to take subsistence and under what terms would they be eligible for those presumptions? It's quite possible that the issue will be analyzed in the courts under equal protection analysis under one of two provisions of the constitution. Either the equal protection clause of the constitution article one, section one. Or under the knowledge of uniform application section of the constitution which has been made famous by case subject McDowell.

In this instance, I tend to think that the community based presumptions in both the provisions of uniform application section -- in that uniform applications section is intended to have laws and regulations governing the use or disposal of natural resources that shall apply equally to all persons similarly situated with respect to the subject and the purpose of that legislation. In this case, the community based presumptions place different burdens on different people in the state depending on where they live. Under the equal protection

part of analysis that request under uniform application section, the courts will look at the importance of the state purpose behind the discrimination among residents, among persons. The importance of the interest of the state, and then balance those to see if the state's interest outweighs the individuals interests, and then determine whether or not the approach taken by the state is the least restrictive approach to solving that problem. In this case the individual interest of state care, is I think, more than the interest in equal paperwork. You've got persons here who, in the category one areas, are presumed to be able to engage in subsistence activities, whether or not they qualify. Persons not qualified to engage in subsistence activities under the criteria set up in the act, may go ahead and do so. Essentially, what [indisc.] is the bill essentially provides that they haven't [indisc.] gave them subsistence activities until they are denied under the presumptions [indisc.] Whereas a person in the category two area must sign a piece of appear saying that he satisfies these criteria and by signing that piece of paper, if he's not qualified and at the time he is aware of his lack of qualifications he has subjected himself to criminal prosecution for unsworn falsification.

And in the third case, we've got category three area residents who must complete a very substantial application, and be certified by the Commissioner of Fish and Game. These are very substantial requirements and the interest involved is much more than a uniform or equal paperwork. It's a matter of equal access to resources. And in reviewing these issues, the court will balance that interest against the individual interest against the state's interest be it administrative ease or relieving administrative burden on the state or whether it's rationing the state's enforcement resources because they don't have enough enforcement people to go out and check everyone in the state to see if they actually qualify. The court will balance those [indisc.] individual interest to see whether or not it outweighs the individual interest. Assuming that it

does, the court will then look to determine whether or not this is least restrictive mechanism available to the state to discriminate against residents -- individuals in this approach. It's my view that due to the much higher standard, the higher standard that the courts will apply in these situations, that it is less likely that the community based presumptions will withstand equal protection and analysis under the uniform application section, than it would under the equal protection clause in article one, section one. The standard being lower. And that being the case, there is a risk that the court may find that these presumptions are perhaps inappropriate and unconstitutional. That may have the affect of removing those presumptions or having the presumptions structure in law. It probably would not result in the revocation of the bill or the law.

SENATOR POURCHOT:

Mr. Chairman, if I may.

SENATOR KERTTULA:

You have the floor.

SENATOR POURCHOT:

When you say instructing the presumptions -- meaning striking the paperwork for the class three people or striking the automatic inclusion of the class one people? Category one.

MR. UTERMOHLE:

I hesitate to say how the court will assume to equalize the burdens. Those are all alternatives available.

SENATOR POURCHOT:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

SENATOR POURCHOT:

It seems like and I don't want to -- I'm certainly not arguing but it would be nice though if it were in the constitution. I think either way -- either of those outcomes are not public policy. I think on the one hand, one of the

quotes on page five of Mr.Utermohle's memo is that the category one two and three area concept is not the, quote, "classification scheme involving individual characteristics which the McDowell network proposed as being less evasive for the access value." If one of those -- if you were trying to rectify the constitutional problems of the bill, one of those is to make everybody have to go through the category three all drill which Senator Adams pointed out some of the obvious mechanical and [indisc.] problems in that. I don't think anybody wants to go that route. But that would presumably overcome some of these problems that a court down south [indisc.] reasonable enforcement, I guess. But the other way, gets us right back to the chaotic situation we're in now, presumably where everybody is presumed to be a subsistence user upon the basis of signing something that they are or just being presumed that they are. And I don't think that approach is obviously desirable either. That's why we're here. So Mr. Chairman, I guess, we obviously have [indisc. - paper shuffling] opinion here but the obvious answer is that we want [indisc. - paper shuffling] and always come back to a constitutional amendment. A constitutional amendment will allow you to employ those schemes that have a different way of presumption, I think. And in the absence of that, I think that in our own attorney's opinion, [indisc.]. It's just not one particular area. It's on several ...

SENATOR KERTTULA:

You could design the amendment that way it would be precisely that. State constitution.

SENATOR STURGELEWSKI:

Mr. Chair. I guess ...

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR STURGELEWSKI:

I guess just to pursue [indisc.] in conversation but there's certainly going to be tension between a constitutional

amendment which would make a scheme such as this appropriate and the wording that would be necessary to meet the federal requirements, I would think. Is that -- well, I don't want to [indisc.].

SENATOR KERTTULA:

Proceed.

SENATOR POURCHOT:

Mr. Chairman, again I think we need to be clear with this kind of [indisc.] a constitutional amendment per se is not in compliance with ANILCA.

SENATOR STURGELEWSKI:

Yes.

SENATOR POURCHOT:

[Indisc.] would be right. Law may be right. It may or may not. Obviously the Governor's bill from all the testimony does not [indisc.] compliance with ANILCA. A law that we might find different may not supply either [indisc.] but right now [indisc.] constitutional amendment [indisc.] ability to write any kind of law that has any kind of reasonable scheme even on just state land and state waters and you know, as you go down this road I think this is the central issue is we're just -- we want to avoid all these attorneys [indisc.] I think they would say, we'd all win. We attorneys all win, regardless of what the outcome of the state are. [indisc.] major court case. [indisc.] do something where we go in [indisc.] very shaky constitutional ground here.

SENATOR KERTTULA:

[Indisc.] design and select new that only you would remember in a couple of years. Excuse me. Mr. Utermohle, do you have a ...

MR. UTERMOHLE:

Mr. Chair, I would like to ask ...

SENATOR KERTTULA:

[Indisc.] because we're getting near the end of the day.

MR. UTERMOHLE:

Sorry to have taken so long. I must qualify in the sense that the cases we have in the uniform applications clause such as McDowell have dealt with cases of total exclusion of persons from the user group. This bill does not begin to exclude some one from subsistence. It just makes it more difficult for them to get there. As to how the courts will balance this is an unknown [indisc.] Supreme Court that's actually dealt with balancing the interests. It would just make it more difficult to get to the user group rather than excluding it. So it's still up in the air as to how the courts will come down as to the test to apply of such [indisc.].

SENATOR KERTTULA:

We're coming to the close of the day here. My understanding is and I think we should listen to one person from Bristol Bay a major of fish resource.

UNIDENTIFIED SPEAKER:

[Indisc.] question.

SENATOR KERTTULA:

Yes, I'll entertain them before we adjourn. However, I'd like to do that. Then also we have a nine o'clock session. The President of the Senate asked me to advise everybody And I hope that all amendments to this particular bill will be prepared and be available by ten a.m. So we go right back into the bill. We may call for caucus or something ahead of that. Let's have the amendments that you know of and I would ask that this group that is here today be available about ten a.m. tomorrow morning again. Now we'll continue for a while. Senator Collins, has the floor.

SENATOR COLLINS:

Thank you, Mr. Chairman. One of the concerns [indisc.] to the bill was the concern [indisc.] is that the Governor's bill were to pass it's my understanding that the concept in the bill would increase the number of subsistence users. And given the response you gave to Senator Adams that no one [indisc.] subsistence hunting and fishing. And you saw it almost as a

growth thing rather than a [indisc.] time. What assurance can you give us that [indisc.] were to pass, that there would not be a depletion of resources. That's the concern that I really I have as I see [indisc.]. And I'm wondering if possibly you could [indisc.] stringent enough [indisc.] protect the resources?

MR. CAMPBELL:

Thank you. Senator Collins, Mr. Chairman. I'm sorry I didn't have the benefit of hearing Mr. Mitchell talking about the depletion of the resource. But I have to confess I have a very hard time imagining what it is he was talking about. Everything in here being based on the sustained yield principle. The first time we feel we have a very good working definition for the sustained yield principle. And, in fact, for the first time anywhere in state law, we have a section and this is section (c) on page four, that instead of just arguing about how we slice the pie, actually talks about making the pie bigger. It says, that when there is [indisc.] of the resource to provide for subsistence and for other resources as well, that the department has to prepare a plan for enhancement, bringing back that resource and make recommendations to the Boards on how they're going to do that. This is the first time that we ever have a mandate that actually increase this.

I want to also make a second point if I could on my response to Senator Adams question about people being able to continue with subsistence. I do not see long term under this bill the number of subsistence users substantially increasing. But what I do see is that those people that choose to live a subsistence way of life will be permitted to do so. I think the vast majority of us, though we may care about hunting and fishing [indisc.] a great deal and actually and my example, very seldom [indisc.] but at the same time I don't want to be a subsistence user. I have certainly perfectly adequate access to the resources through sport hunting and general hunting or sport fishing. And I think that would be true for the vast majority

of urban residents. But if it is important to them that they have that option.

SENATOR ADAMS:

George, one of the qualifications we see on page seven, lines nine through twenty-nine, the first one, it says, the quantity of fish and game consumed by persons in the preceding twelve months of the mandatory minimum of one hundred twenty-five pounds consumed in that period. We talked about the eligibility criteria in the application form just a minute ago. What would happen if an Alaskan did not eat enough meat or fish but did sign the form. Would you consider that Alaskan to be a criminal and what class of punishment do you foresee for that Alaskan?

MR. UTERMOHLE:

Mr. Chair, the person who knowingly signs the required document knowing that he did not qualify is potentially subject to prosecution for unsworn falsification. It's a misdemeanor, probably a [indisc.] misdemeanor.

SENATOR ADAMS:

Pardon me.

MR. UTERMOHLE:

Probably a [indisc.] misdemeanor.

SENATOR ADAMS:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

I'm going to cut off the sport right now and I'm going to ask Mr. Tilden to come forward and speak if he could take, perhaps the Commissioner's spot. You wish to speak from Bristol Bay. Is that correct? Please come forward. We're going to hear you tonight. I know that you've come from an important resource producer. I hope again though that you will be brief. We all have other meetings and so on. And we'll all be here at ten a.m tomorrow and nine a.m. on session. Hope everybody will prepare their amendments by then. I think it's necessary for this bill. WE have to go on to other the legislation. You have

the floor. Please introduce yourself. Please proceed.

MR. THOMAS TILDEN, ALASKA FEDERATION OF NATIVES AND CITY OF DILLINGHAM:

My name is Thomas Tilden and I'm the Board member of AFN for village corporation, [indisc.] the Bristol Bay Native Association [indisc] and up until the last election, I was elected mayor of Dillingham. I want to thank you for allowing me to testify here. I am a subsistence fisherman. I am a commercial fisherman and since KC [ph] Company started a derby back home, I am also a sport fisherman.

Dillingham has a population of about twenty-three hundred people and of that population [indisc.- cough] percent of them are Native and four percent are non-Native. Our council is made up of six council members and the mayor. I am the only Alaska Native on that council. The reason why I point that out is because we had a resolution before us in regards to subsistence and a constitutional amendment. And I want to point out that that resolution passed unanimously. There was no opposition to it.

I am opposed to the Governor's bill as it stands. I feel that it does not give Alaska the management of the resources that we need. I feel it is a complex bill and I think that some of you also feel the same way by some of the questions that you have asked and some of the staff that you have had to march in here and ask and clarify some of the parts of the bill that you don't understand. It does not offer a final solution. I believe that it is going to be litigated. If it is litigated then we are going to be back here two more years from now doing this round one more time, at the cost of the residents of the state, capital projects and other needs. I think it's time to put this matter behind us. We have got to start looking forward. In my community this past year, we had an officer shot. We have got to start dealing with alcohol problems, suicide, economic problems. We have got to put the subsistence issue behind us once and for all. I believe that you can do it.

I'd like to go on record in support of the Bush Caucus bill because I believe that is what it's going to do. You see the newspapers and you see that three quarters of Alaskans want to vote on the issue. Let us put it to the Alaskans for a vote. Right now in some of the communities surrounding Dillingham we have seen a cut back of fishing. We have seen a cut back of hunting and we have seen a lot of idle [indisc.] put upon the hands of the village residents. Idle hands and nothing to look forward to means that you get into trouble. You turn to substance abuse, alcohol abuse and it only adds to the problem of the state. A few years ago in Dillingham, we were fortunate to have former commissioner Larry [indisc.] come up and address our tribal government conference. And during that government conference, he pointed out some of the things that happened out on the Pribilofs after the seal -- they were no longer to seal hunt out in that area. It was very sad. What he told me was a story about walking down the beach one morning and seeing three very young people trying to walk themselves into the cold Bering Sea. That has always stuck in my mind. We cannot take away from the village folks or the rural residents their lifestyle.

I cannot tell you what subsistence is. It is very difficult for me to tell you what subsistence is. I have lived it. I know it, but I cannot describe it to you. I equate it to if I was to walk down into the bay and smile -- up to my neck in water and smile at you and tell you that the water is warm. Come join me. You would not know until you came into the water with me up to my neck. I cannot describe subsistence to you. It is something that you cannot describe. It is very hard to put into words. I can tell you it's sharing. I can tell you its food. I can tell you its clothing. But it is something that you have to live, that you have to experience. It is something that I don't think you should be taking away from rural residents.

I read the constitution of the Alaska and I find it very ironic that in section eight of the constitution here, article

nine or section seven there is a special purpose site. The State of Alaska can preserve an object a mountain a tree, a building, something of cultural value, something of scenic value. But they cannot preserve the lifestyle and culture of the Alaska native. When I look down the road 20 years from now, we are not going to be dependent on oil. We are going to have to look at other resources. Tourism is one of our resources that we're going to have to look forward to. And tourism -- you think the tourists are going to come and watch Alaska Natives go into Safeway in cars and Costco. I think that they are going to want to look at the Alaska Natives in their natural setting, in their own culture, in their own lifestyle. I hope that you agree with some of the things that I have brought up. I hope that you oppose the Governor's bill and I hope that you let the voters decide in Alaska what is the right bill. Right now the Alaska Natives rural Alaskans' lifestyle is in your hands and I hope that you will let the people vote. Thank you very much.

SENATOR KERTTULA:

Thank you for your ... [indisc. applause]. You have the floor.

SENATOR COLLINS:

I did have a question, Mr. Chairman. The chairman of this committee [indisc] wanted to have [indisc.] amendments that are being drafted to the Governor's bill and I'm going to ask you and you haven't [indisc.] question, do you see any way that that bill can be amended [indisc.] preserve?

MR. TILDEN:

Are you referring to the Governor's bill?

SENATOR COLLINS:

Governor's bill.

MR. TILDEN:

Boy, I tell you I have looked at that bill and I think it would be -- really have -- I think I have a lot more questions than I have answers. Very difficult time.

SENATOR COLLINS:

Thank you.

SENATOR KERTTULA:

Thank you very much. We'll adjourn till 10 a.m. here.
Nine o'clock session.

ADJOURN

7:08 P.M.

SENATE COMMITTEE OF THE WHOLE
June 18, 1992
10:15 a.m.

(Meeting held in Senate Finance Committee Room)

MEMBERS PRESENT

Senator Jay Kerttula, Chairman
Senator Al Adams
Senator Virginia Collins
Senator Sam Cotten
Senator Shirley Craft
Senator Jim Duncan
Senator Dick Eliason
Senator Paul Fischer
Senator Steve Frank
Senator Rick Halford
Senator Lyman Hoffman
Senator Curt Menard
Senator Drue Pearce
Senator Pat Pourchot
Senator Pat Rodey
Senator Dick Shultz
Senator Arliss Sturgulewski
Senator Robin Taylor
Senator Rich Uehling
Senator Fred Zharoff

COMMITTEE CALENDAR

SENATE BILL NO. 484

"An Act relating to the taking of fish and game; and providing for an effective date."

SENATE BILL NO. 485

"An Act relating to the taking of fish and game for subsistence; and providing for an effective date."

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6/18/92

Tape 92-14
Side A

[Tape begins midspeech]

SENATOR KERTULLA:

... inform the senators, we're ready to roll and I hope legal counsel is here now. And the administration, of course. I suppose McKie is here. Carl, if you'll sit up front again.

[Tape breaks off for a moment]. We will proceed with legislation. I don't know if staff -- if any amendments to 484 has been brought forward. We don't have them. If they have been presented, please let me know [indisc.]. It is our intention that sometime later in the day we will have a brief period in which we will take testimony from a few more people across the area. As I said, we could have had sub-committee that could have met permanently taking testimony, recorded it, and brought it to us. But most of us wouldn't have had time to read it. So I felt we were better off taking a modest amount across the state if that's possible and hear the people directly on the subject. Again, I went to Congress five times and testified twice and went all the way back to D.C. So this does happen when you get too many people in too short of timeframe in which to deal with the testimony. We're trying to be fair and we'll attempt to be.

At this time, we're on the first page of the bill 484. We're on the bill. Are there amendments suggested or about to be suggested to the legislation? We do have legal counsel from our staff. We have McKie and the Commissioner and the Attorney General's staff. I'd ask -- Mr. Larson, would you please take that chair. But if we need more tables for you to work on we'll find them, or my office. And if there's questions around the table, or anything for the good of this order, please

There have been no suggested amendments. Are you prepared to -- first bill before us is 484. It is prepared to move the bill

out of committee as it is. Senator Adams has the floor.

SENATOR ADAMS:

Mr. Chairman, I did work up five amendments for this piece of legislation but when you have a terrible, unworkable bill that requires a constitutional amendment and which is not [indisc.] and it does not comply with ANILCA and gets you -- the state does not retain [indisc.] management there is no use for any of us to fix this. So I'm just basically not going to present any of my amendments today and just let it go, Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Cotten.

SENATOR COTTEN:

Will you accept a motion to move the bill, Mr. Chairman?

SENATOR KERTTULA:

I will accept a motion.

SENATOR COTTEN:

So moved.

SENATOR KERTTULA:

There is a motion to move the bill and there is debate.

SENATOR ADAMS:

Object.

SENATOR KERTTULA:

Objections noted.

SENATOR ADAMS:

My objections, Mr. Chairman, for moving the bill at this particular time is that one of the things we didn't get down to the comparison between the Governor's bill and the Bush Caucus bill to show the difference between each one. But I would like some discussion on that because it shows that the Bush Caucus bill complies with ANILCA. It still requires a constitutional amendment and it retains state management. And I think that's the great issue here for all Alaskans.

SENATOR KERTTULA:

I have no argument in continuing the debate on this. I felt the charge was to take up this bill first and any other subsequent

bills that fit within the call, or to modify the call, if the body wanted to for any other purposes. But there is a motion and I have entertained a motion and -- Senator Collins.

SENATOR COLLINS:

Just a point of clarification, it would seem to me that if this bill [indisc.] committee that it does not preclude that the look and work with the bill, Senator Adams' bill and [indisc.] Is that correct?

SENATOR KERTTULA:

That's correct. I intend to bring that bill up subsequently.

SENATOR COLLINS:

So objectively and [indisc.] we couldn't move both bills out of committee and ...

SENATOR KERTTULA:

That is correct. That's so far as I know, unless I'm technically in error. Mr. President.

SENATOR ELIASON:

Mr. Chairman, I think that to save you a lot of [indisc.] a lot of people here were not present at our caucus, but it's my understanding what we'd be willing to do is any bill that comes out of this committee will be read across the Senate and refer to the Finance committee. And then from there to the rules and to the floor. So there's still opportunity to make amendments on the floor, or the Finance committee if you chose to do so. Is there any objections to that procedure? I think we discussed this and I think it was general consent [indisc.].

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Yes. Senator Sturgelewski and then Senator ...

SENATOR STURGELEWSKI:

Mr. Chairman, I have some concern about moving the bill at this time. We have not had the discussion on a constitutional amendment. If there is a constitutional amendment, which I support, it seems to me that might engender some changes in this

bill. And I found that the Committee of the Whole is an excellent vehicle for getting information and everybody hearing the same thing, and our bill would be to really explore and to call before us the kind of people that could give us objective information. By voting to bring this bill to the next step, of course, would be the Rules Committee and that doesn't automatically mean it's going to go to the floor and I realize that there's an opportunity -- it has to go through Finance and then to Rules and eventually to the floor. It just seems we have an excellent opportunity here to get all the information. I personally would have preferred to go through Senate Bill 485, to have a caucus to discuss the issue of a constitutional amendment and then address the pieces of legislation before us. But we can each have our druthers and those are my druthers. And I realize ...

SENATOR KERTTULA:

I am very interested in what the will of the body is in this regard. All the way around the table. Mr. President, were you ...

SENATOR ELIASON:

Mr. Chairman, I might [indisc.] decision one way or the other. Except I think that we need to [indisc.] this morning and then as a Senate we are going to go into caucus. The caucus is going to be specifically to talk about how we'd handle -- to bring this to a conclusion. And at that time I certainly suspect the constitutional amendment proposition will be discussed. And when the caucus makes that determination of course, then we'll know exactly ...

SENATOR KERTTULA:

It may be more appropriate to await decision of the motion by Senator Cotten until after the caucus. We can do that -- the other discussions before us. Senator Duncan then Senator Cotten.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I suggest that's a better idea. also. I think there's still a lot to be discussed and decided here. I mean, quite honestly, my sitting through about twenty-

four hours of debate and discussion on the Governor's bill has led me only to one conclusion. That it doesn't work. It doesn't [indisc.] federal management of our resources. And that's what we're here about. And we should explore other alternatives that might work. One of those and I think it should be on the table even perhaps before we go [indisc.] for discussion and an understanding of what type of constitutional amendment would do that. I think a constitutional amendment is required. There maybe some options just as to the form of that constitutional amendment but one is required and that should be part of this discussion before we go to a caucus. And secondly, then what type of standing legislation that develops the criteria for rural subsistence users and urban subsistence users should accompany that constitutional amendment. I think that can be done as part of the discussion and then that's the package with all the possible alternatives before us and then decisions can be made. This [indisc. - cough] I can't support the moving of this piece of legislation at this time because I don't know -- it doesn't, in my mind, do anything [indisc.] the problem. So I would suggest that there's more to be discussed. The constitutional amendment and then what type of legislation should accompany that constitutional amendment to resolve the problems entirely.

SENATOR KERTTULA:

Senator Halford. Senator Cotten, you haven't spoken. Were you trying to say -- Senator Cotten.

SENATOR COTTEN:

Well, if people have additional questions or amendments that they'd like to offer to this bill or any other bill, I'll vote, yes, to move every piece of legislation that's before us to the floor, personally. So I'm not necessarily trying to deprive -- I'm certainly not trying to deprive people from an opportunity to discuss or I'm not trying to cut off debate. I'm not calling the previous questions. Any of those things. But I believe that we could spend several months here discussing this. We've been talking about this since 1978, when we wrote the first subsistence

law. And you know, if you got something else, let's put it up there and the only way we're going to get to a point where we make a decision is if we kind of force ourselves to that point. And that's the reason I made the motion. And we should have a caucus but it's the same thing as we're doing right here. What's the difference. Let's have our caucus right now.

SENATOR KERTTULA:

Senator Cotten, I am in agreement with you. I felt that maybe we had exhausted all the remedies to this bill with no amendments. The obvious thing was to move it out of the way and go on to the next measure which was the following bill, which I stated at the beginning of the committees that we would do. But it's fine to hold them all together if that's the will of the body. Who else? Senator Adams is next and please get my attention, because I think this is time to be -- Senator Hoffman I apologize. You may proceed.

SENATOR ADAMS:

I was happy that Senator Cotten had brought it up, but both bills -- both the Governor's bill and the Bush Caucus bill needs a constitutional amendment. I think basically what we need to do is to go back to the one we passed in the Senate in 1990 and each of you have that in your particular packet. And before we make that motion is basically vote up or down on the constitutional amendments. If there is fourteen votes and then basically string the page statutory language that follows that. If there is no fourteen votes for constitutional amendment in this particular body and then we're back to Senator Cotten's motion or up or down on a piece of legislation that we got before us.

SENATOR KERTTULA:

Are there other members that wish to participate at this time, around the table? You have the floor, Senator Hoffman. I apologize. I haven't written you off.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. I'd like to speak to Senator Cotten's motion about moving all of the bills to the floor. I

think that might be an admirable thing to do. The floor was here. We could have better dialogue here. We could talk about, bring up witnesses, and we can discuss them better here than we can on the floor. And we should decide here what we think is going to be the best for the state, best for the constituents. And I think it would be very difficult if we took all of the things that we have on the table here, and threw them on the floor.

Senator Sturgelewski stopped me this morning and talked about what's going to happen with federal management. That whole issue is something that we just pass over. That is going to be reality here shortly. And the people of the state will have to live with federal management. They're going to come in here and it's my guess that the people of the state are going to be very, very dissatisfied by federal management. And they can only point to one group, the people, for federal management. That's the Alaska Legislature. We are the ones that are responsible for allowing the federal people to come into the state. And we're going to have to live with that if we're not willing to try to even address a constitutional amendment.

SENATOR KERTTULA:

I don't think anybody is trying to stop addressing anything. At least I wasn't. I'm just trying to represent the will of the body.

SENATOR HOFFMAN:

I'm talking to the motion.

SENATOR KERTTULA:

Sure.

SENATOR HOFFMAN:

And before us to bring those to the floor. This is the forum for that discussion.

SENATOR KERTTULA:

Yes, it is.

SENATOR HOFFMAN:

Not the floor.

SENATOR KERTTULA:

Senator Eliason. You were trying to seek the floor?

SENATOR ELIASON:

Mr. Chairman. I'm not speaking for or against the constitutional amendment. I personally don't share Senator Adams views when he says the Governor's bill requires a constitutional amendment. I don't share that idea. I don't think that's -- we have the ability here to do the safe and sure, yes or no. I think, as we all know, if we were to legislate according to what our attorney's recommend one way or the other, we would never ever get out of the session because we would have arguments on both sides of every issue we bring before us. Those issues are decided in a court of law. So I don't exactly say that this bill does or does not -- Mark, Attorney General, says that it will pass muster. Our own attorneys question that. We had the same situation, I believe, on one of the fish and game bills during the session. Our attorney was very skeptical that they needed the bill. He said, in effect, we didn't particularly need that bill giving the authority to the Boards and the attorney for the Boards said yes, we did need it because he wasn't sure they had that authority. That type of argument is always here. We can always debate from this time until next session. So I think we're going to have to move one way or the other and make our own decision of whether or not this bill or any other bill is constitutional. That was the issue before we had told quite firmly here a number of years ago we did address this issue that what we had done was constitutional. The Justice Department signed -- the Interior Department signed off on it, and everything was fine until we went to the Supreme Court and they said, no. So I guess we're never will -- that decision will never be finalized until the courts look at. It's like they are right now across the street on reapportionment.

SENATOR KERTULLA:

Senator Sturgelewski.

SENATOR ELIASON:

I didn't -- Mr. Chairman, I ...

SENATOR KERTTULA:

Excuse me, you have the floor.

SENATOR ELIASON:

I certainly agree that we should discuss this and that's the purpose of the caucus. I don't care if we move the bill out of here now or later or when we do it. But I think all these things have to be discussed and I think they're -- we had decided for sure that if, in fact, we're arguing to the deal with the constitutional amendment, we're going to do it in a manner which is avoids litigation. It's my understanding that the caucus that we will adjourn this one sine die and call ourselves back in and address that specific question. But we can't do that until we have a caucus to determine that there's enough -- there's two thirds of the Senate who wants to do that. And of course there's always the other body.

SENATOR KERTTULA:

Senator Sturgelewski is seeking the floor. And please let me know if anybody wants to comment.

SENATOR STURGELEWSKI:

Mr. Chairman ...

SENATOR KERTTULA:

It's a broad reaching thing and I think you can speak to any corner of the motion or any other thing that has to do with this session.

SENATOR STURGELEWSKI:

Mr. Chairman, on the question I think is more in my opinion one of timing. It's been very interesting debate. We've had a lot of concern on the part of the administration and others about bringing state and private lands under federal courts. That has been a big issue about the problems that would ensue from that. And obviously we have seen a number of issues go to federal courts appealing that they are amenable to the interests and can better get on the part of the plaintiffs. But it seems to me and perhaps I'm remiss in not having brought it up when we had the Department of Interior, but it seems to me that that is only a part of it.

And in a sense, it pales, when we talk about the process that will follow if we simply adopt the Governor's bill.

And by the way, I find much of merit in that bill. I just had some brief discussions about what's going to happen with the federal government take over and that's exactly what it is. They will set up an interagency Board. It's going to have agriculture, BIA, Forest Service, Department of Interior, et cetera. They will not utilize, and it states that very clearly, the sustained principle of management, which is just a hallmark of state management. They will set the seasons and bag limits. They will set up regional councils, a new structure. So we'll have new equities being put into the law. They will utilize a lead agency proposal. Something that has been often talked about in our state and the management of our resources but has been summarily rejected by every Governor that I've seen, including this Governor. So that means that the Forest Service, in certain cases, is going to be the deciding honcho or BIA or whatever, Interior. All the different agencies that are there and then we have a system there and a state system and they'll be a new legislative body having to come in with a whole new set of circumstances and make a decision. Because we were not able to say, we're at a point in time and we're going to do something and know what follows. We have had no plan from the administration except the most vague utterances about what comes next.

This is the first step. The point is the first step sets into effect a whole chain of actions and we don't know what they are. But the new decisions will have to be made on that, I can assure you. We may say that our Attorney General is correct and I've got great respect for Charlie Cole. I really do. He may have every reason to believe this is a constitutional bill. Maybe it is. I don't know. The point of it is, there's going to be a lawsuit to test that. Let's not be naive about it. So we do have an opportunity, even it is imperfect to try to address the multiplicity of issues out there. I think this question of dual management is so critical that we do not carry out our

responsibility merely by acting on this small little part that we can get a hold of. And maybe there are votes for it. I may be willing to support it. I am not willing to support it if we don't at least make a valiant effort to address that question of dual management. I personally am scared to death about what is going to happen to fishing in this state. We have certain lawsuits but we already see the handwriting on the wall, where they want to control the water within the national enclaves and in certain areas to go off shore. What does that mean in the Gulf of Alaska to have the water adjacent to the Kenai Fjords under federal management? I think we have to consider those things and that we're just closing our eyes to a much larger problem by taking this step at this time. I would like to at least have a caucus before we make a decision.

SENATOR KERTTULA:

Well, it's -- you have a well reasoned, well stated position. I appreciate that.

SENATOR STURGELEWSKI:

Thank you.

SENATOR KERTTULA:

I appreciate being in the body if we can get this. Senator Fisher.

SENATOR FISHER:

Thank you, Mr. Chairman. Yesterday you gave us the charge that if we had any amendments or any changes suggested that they be in by ten o'clock. Are there any here at all?

SENATOR KERTTULA:

I've received none that I know and staff tells me I've not.

SENATOR FISHER:

Okay, so then the motion before us is for the Governor's bill. Then the question comes up on the constitutional amendment and I have no problem if a motion would even be in order to move that we consider a constitutional amendment. And if there's not fourteen votes here, then it's over. Then let's go back to the Governor's bill. I mean if it's okay, I have no problem doing

that. I think we've been here for four days ...

SENATOR KERTTULA:

Let's discuss around the table every option.

SENATOR FISHER:

Yes, we've been here four days and I think it depends many times on which attorneys you're going to believe, and I for one was convinced that the Attorney General Cole and his folks did a good job. I think we all pretty much in our own minds know yea or nay what we're going to do or how we feel with the constitutional amendment and I just hate to keep prolonging it and give people all kinds of expectations and hopes when we do have the answer. I think we all know the answer now.

SENATOR KERTTULA:

Senator Pourchot.

SENATOR POURCHOT:

Thank you, Mr. Chairman. This kind of goes back to the conversation we had a year or two ago on what I thought was an important point on the constitutional amendment and how that related to not only the Governor's bill but any [indisc.] legislation and I agree with Senator Fisher on one thing that we could have that kind of conversation. On the other hand, I think it's a little more complicated than just ...

SENATOR KERTTULA:

We need some hearing process if we're going to bring it up.

SENATOR POURCHOT:

... [indisc.] constitutional amendments, general wording and there be people, I don't know, but there may be people who support the Governor's bill that might also support some kind of constitutional amendment that makes them feel that the Governor's bill is constitutional even though it doesn't regain federal management. Even though it still -- it may only leave us with the sound management system or a better management system on the state lands alone. And there's several different aspects and I think it's more than just a straight up or down vote. There may also be people, I don't know -- there may be people who would be willing

to put forward a constitutional amendment to the voters who may not themselves support a constitutional amendment. So that's the kind of discussion that we really need to have.

SENATOR KERTTULA:

Thank you, you make a good point. Around the table? I frankly feel that and I think that the motion was before us but I do think that if we're going to go into a constitutional amendment or other items we need to give them fair hearing before we come to a conclusion on those items. That's with the constitutional amendments. We do need to give fair hearing before we say this bill and a constitutional amendment will go out. We have to do that. We have to put the time in. Senator Duncan then Senator Hoffman.

SENATOR DUNCAN:

Mr. Chairman, [indisc.] constitutional amendment, I have [indisc.] resolve the problem. I don't believe [indisc.] right now up or down. I think we should spend some time discussing how to [indisc.] the alternative language and how that would fit in. Along with [indisc.] legislation to solve the problem. [Indisc.] constitutional requires it. It's premature just to say let's vote up or down right now without definite preliminary discussion.

SENATOR KERTTULA:

Which one? What one?

SENATOR DUNCAN:

[Indisc.] different ideas. Senator Adams had one drafted that looks [indisc], somebody else had one drafted and we should discuss those and [indisc.].

SENATOR KERTTULA:

I do know that part of the constitutional amendment, however, is the question of the call. That goes back to presiding officers responsibilities and if that states he would be managing and negotiating both. Senator Halford, then Senator Hoffman. You haven't spoken yet.

SENATOR HALFORD:

Thank you, Mr. Chairman. I think you touched on what I was

going to say. There are not the votes here to consider adjourning and calling ourselves back into a special session on a constitutional amendment question. The debate is somewhat moot and I think we've probably been here long enough that we probably should take up that question and deal with it. If there are not the votes to

SENATOR KERTTULA:

[Indisc.] that would be the first thing.

SENATOR HALFORD:

That's right. And if we're going to stop the consideration of the Governor's bill until we've dealt with the consideration of even taking up the constitutional amendment, then let's do that. But I think the Senator Cotten is right. We need a process to go forward.

SENATOR ADAMS:

I have a response.

SENATOR KERTTULA:

Senator Hoffman was seeking the floor and then Senator Adams. Senator Adams.

SENATOR ADAMS:

I agree with my colleague from Eagle River because I want to make sure if we do this particular process if its a constitutional amendment, I want to do it legally right and I agree with my colleague from Eagle River.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

I would say that there has to be some discussion and I would agree with Senator Duncan that there has to be some discussion on what type of constitutional amendment we're talking about before we just vote it up or vote it down. There has to be some basis because I think Senator Pourchot hit on several aspects of different options that could be considered.

And regarding the Governor's bill I might point out that the Department of Interior yesterday in their testimony stated the

Governor's bill was not a first step. They did not consider that a first step and I think that is a major point to be considered when we're looking at that bill. They don't consider it a first step, then for the federal government. Then where are we going to go after that action on the first step?

SENATOR KERTTULA:

Mr. President, then Senator Cotten.

SENATOR ELIASON:

I think we all understand that if there is two thirds of the Senate who wishes to address the issue that doesn't necessarily mean that we have the ability to do that because there is another body that is debating that probably at the present time in caucus. However, and I also understand that if we do call ourselves into special session to address a constitutional amendment, it does not necessarily mean that the vehicle we vote on is going to get the two thirds vote because that's sort of all over the ball park. And I don't know if it's -- I guess it's a political decision now whether or not we want to stretch ourselves out and decide whether we want to go into special session for that issue, not knowing what the house does. I, in my own political instincts, tell me that House is probably not going to address this issue and I would like them to make it quite clear to us whether they are or whether they are not going to before we move forward on that issue. But I'm certain that we can discuss it in a caucus. I would like them to finalize what they're going to do. My own personal druthers, I would like to press it. I would support that. However, it doesn't necessarily mean that I'm going to support what the final vehicle is. But before we reach that point, I would like to know what the House is going to do. We have had no communications with its leadership. Maybe we should discuss this with them and find out exactly what their plans are.

SENATOR KERTTULA:

I think I'm going to call for a recess -- still puts the motion in place. I'm going to call for a recess for communication with the House to see if there's anything that could be

appropriately be brought before the body so far as an extension. And so far as an extension of a call goes. Senator Duncan.

SENATOR DUNCAN:

Mr. Chairman, I understand it takes two bodies to work this process. I guess I don't necessarily concur with the Senate President if we even find out what the House is going to do before we can tell them what we're going to do. It seems to me us telling them what we've got to support or consider a constitutional amendment, they shake their finger and may help them to support to do the same. So I'm not sure -- just your leadership talking to their leadership, you don't even know our sense I'm not sure what that does. It seems to me that maybe this body should take a leadership and say we want to do it right and we hope you, the House, will concur with that.

SENATOR KERTTULA:

Mr. President.

SENATOR ELIASON:

May I respond to it? That was what we agreed on at the first caucus. We're going to do this. We're going to do it right and do it according to the book. And the book says that we cannot deal with this constitutional amendment until we get into a special session for that specific subject. So we're in a sort of Catch-22. How do we resolve it? I don't know, but I think we can discuss it. [indisc.- cough] actually do anything, addressing it in a legal manner. We can't until the House and Senate makes that decision. So we're sort of Catch-22.

SENATOR KERTTULA:

Senator Menard has not spoken. Senator Menard.

SENATOR MENARD:

Thank you, Mr. Chairman. I think one of the things we talked about procedure and what we were called back for and how we were going to handle it and I think regardless of the other body's position, I think soon or now or what it would be incumbent upon us to see if there is fourteen votes to call us back to deal with the constitutional amendment. And if there are, we can go

forward. If there's not then we're dealing within our own body, and that's the way I feel. And I think we should move forward in that direction.

SENATOR KERTTULA:

Senator Zharoff. Senator Zharoff, I guess, hasn't spoken. Senator Zharoff, and then Senator Cotten.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. I've been sitting here listening to all the debate and it's sort of like, this issue is very big statewide. It's kind of like having twenty blind people trying to describe an elephant. We're all right in our own little position regarding this particular issue. And I think there are a couple of things that we can probably all agree upon. One, I don't think we can agree upon whether the Governor's bill is constitutional or not. We've heard both sides of that issue. One thing we can agree on there is it does not meet ANILCA. Certainly, if the bill is passed there is going to be litigation. Senator Sturgelewski is absolutely correct. And I think the question then comes, if we're really intent -- our intention is to work out the federal management and create a dual management system within the state, in my mind, my little piece of this elephant here tells me there that if we're going to do that, we need something that is going to at least indicate to the federal government that we are going to resolve this problem. Because I don't want them at this point here to change ANILCA. I'm afraid of what could happen [indisc. - cough] at that point. But what can we do here to make our statutes comply with our constitution which the courts say that at this point, there the laws we have on the books do not. And I don't think whatever books there that we start -- or any laws that we put on the books now that will at least [indisc.] preferential or different treatment of people in the state is going to fall under the guidelines of our constitution. The only thing that we can do, I think at this point, is to try to at least consider some constitutional amendment to go along with this. And I don't think anybody in here disagrees that subsistence is the highest priority

of use. It's just, how do we get to that point.

SENATOR KERTTULA:

Senator Cotten then Senator Halford.

SENATOR COTTEN:

Well, again, I think most people here are familiar with the issue and if we all close our eyes and there's fourteen toes of that elephant out there that are willing to consider a constitutional amendment, I think that will tell us something. And perhaps we need to take a break and really search our souls and decide for ourselves whether we should consider that. But I think most people probably know right now whether they are willing to consider a constitutional amendment. And if there are 14 people, then I think that answers the question. So I would be willing to withdraw my motion on one condition. And that being that another motion be placed on the table that we consider a constitutional amendment.

SENATOR KERTTULA:

We'll accept the withdraw because I'm certain that that will

...

SENATOR COTTEN:

If that's the other motion, otherwise I won't withdraw.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Of course, I suppose Senator Cotten could substitute the motion, but I wanted to go back to the whole question of dual management. We sit here and talk about dual management and there's been a number of things said and [indisc. - cough] have opinions on these things. We don't have to go back over all the disagreements, but I think because it hasn't been [indisc.] -- dual management was created in 1980. The question that we dealt with had been -- if the dual management implemented at the state's expense on all lands in Alaska by the federal courts or is it dual management implemented by the federal government now on federal lands only, while they go to court and argue about other places to

expand. But we don't get out of dual management if you count opening closing the seasons, bag limits and all the changes the courts have done. In anything that we do, in anything that we have in our capacity within the State of Alaska, the dual management question was decided at the federal level in 1980 Against the votes of our delegation.

SENATOR KERTTULA:

Around the table for comments. Senator Sturgelewski.

SENATOR STURGELEWSKI:

Yes, just a brief one. Back to Senator Eliason's concern about how we bring up the issue of a constitutional amendment before us. As we've heard comments that the Governor does not support a constitutional amendment but have we gone to the Governor to explore whether or not he might consider after discussion the potential of expansion of the call. I mean, is that a dead goose and we just forget about it or not?

SENATOR KERTTULA:

We spoke to him this morning -- Senator Eliason.

SENATOR ELIASON:

Mr. Chairman, the Governor -- I don't propose to speak for the Governor ...

SENATOR STURGELEWSKI:

I understand.

SENATOR ELIASON:

The Attorney General is here and he can correct me if I'm wrong but the Governor did tell us this morning he does not object to a constitutional amendment tied to changing ANILCA.

SENATOR STURGELEWSKI:

To explore that just very briefly.

SENATOR ELIASON:

I don't know ...

SENATOR STURGELEWSKI:

You don't know what those changes would be?

SENATOR ELIASON:

I think their proposal has been on the table before and I

think it's been rejected by AFN.

SENATOR KERTTULA:

There seems to be quite a few people chattering, but that is what I thought the Governor said too. Others may have -- I wouldn't speak for the Governor. But part of my suggested recess and there is merit with what Senator Duncan has to say but that could be the second time you go to seek House, even though it might be a good timing. I think part of the merit of this is not only talking to the House briefly, but also talking to the Governor before we make a decision on the suggestion of Senator Cotten that we might withdraw from this amendment and proceed with the other.

Again, however, I would like to see progress. I'll be here, so it's not me speaking, but there are others that would like to see progress on the whole broad framework on whether we're going decide. Whether it's going to be just this bill before us at the moment or the constitutional amendment. They're wanting to see progress and wanting us to move. So I'm going to push hard by the end of the day sometime tonight to get this bill and anything else on the floor so we can get moving. Senator Adams, are you seeking the floor?

SENATOR ADAMS:

Yes.

SENATOR KERTTULA:

You have the floor.

SENATOR ADAMS:

Yes, Mr. Chairman. I think a motion is in order to explore in here the difference of constitutional amendment to each one of us in this particular body was either on the other side or here that heard Committee Substitute for Senate Joint Resolution number 86 Resources amended. Or bring out another piece that has language that I understand Senator Pourchot has submitted to the Chief Clerk, to at least have that discussion and a vote taken once we explore these. And I think a motion is in order. And then if we fail to get fourteen votes, then we accept Senator

Cotten's motion.

SENATOR KERTTULA:

Senator Cotten, I'll recognize you place your motion at any time there's a little bit of -- if you'll withdraw your motion, we'll go through this other. You have the floor.

SENATOR COTTEN:

I won't withdraw the motion but I will allow someone else to make a substitute motion and that motion would be to consider a constitutional amendment. And if there aren't fourteen votes at this table to even consider a constitutional amendment we should know that and not waste our time.

SENATOR KERTTULA:

Is it the advice of the body to proceed immediately after that decision without any further communication or talking or any little private meeting. Senator Sturgelewski. You have floor.

SENATOR STURGELEWSKI:

Just so I understand, what you're saying is you immediately want us to take a vote before we talk about it in depth?

SENATOR COTTEN:

You can have a recess. That's always a motion that has precedence over any motion made by a member here. I'm sure you're aware of that. So you can call a recess anytime you like.

SENATOR KERTTULA:

But I wanted the will of the body because all twenty people say let's vote up or down right at this moment.

SENATOR COTTEN:

I'll let the chair and the president make the call on whether we need a recess first. But I think that -- I'm just trying to get it to a point where we are forced to make a decision. As the president said, it points out we don't have to agree on a constitutional amendment. We don't even have to by voting yes, say we're going to vote for one. But if there aren't fourteen people who are willing to consider one, we should know that.

SENATOR KERTTULA:

I -- yes, you have the floor.

SENATOR ELIASON:

I don't know if this particular proper form at this place. It might be better that we go into -- back into session and if we have fourteen votes then go on and record that and also communication with the House saying we are going to pursue it, we will ask that they come back into session. That's one way. I don't know if that's acceptable to the chairman here.

SENATOR KERTTULA:

I'll think I'll adjourn this meeting to call the chair and you bring us back to session and proceed the way you're suggesting. We'll come back into meeting on this subject and others.

SENATOR ELIASON:

Mr. Chairman, I think, Mr. Chairman we should be very careful how we do this because we're going to be litigated in either case. I think we should do this very deliberate and with proper and have everything recorded so [indisc.- cough] matter of court record someday I'm sure.

SENATOR KERTTULA:

You have the floor, Senator Taylor.

SENATOR TAYLOR:

[Indisc.] motion [indisc.] Senator Halford, probably [indisc.].

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Procedurally, this will be a multi-step process because it will entail a motion to adjourn this session and a motion to reconvene a session called by the Legislature which will be ineffective until that motion is also accepted by the other body. And that ...

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR HALFORD:

I think you could get a sense of [indisc.].

SENATOR KERTTULA:

Senator Drue Pearce and then Senator [indisc.].

SENATOR PEARCE:

Well, procedurally, I'm trying to figure out where this is headed. I'm not willing to vote sine die and bring ourselves back in specific to constitutional amendment and not have an opportunity [indisc.] this bill out of committee. I would like to see it go to the floor. I think that that's going a roundabout way to just constitutional amendment [indisc.] Governor's bill and I certainly don't support that. I hope there's certain [indisc.] I don't want to be asked right now do I want sine die because that answer is no.

SENATOR ELIASON:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Mr. President.

SENATOR ELIASON:

There are certain steps that Senator Halford mentioned. If we do wish to call ourselves back in, number one, we're going to have to pass a concurrent resolution to the House which says in effect that the business we're carrying on out will carry over into the next special session. Then we won't have to go through this process again. So be certain. We'll have to make sure that the steps we take before we adjourn sine die if we do that, are in order to keep everything alive that we have before us now.

SENATOR KERTTULA:

Senator Pearce wishes to respond.

SENATOR PEARCE:

Thank you, Mr. Chairman. Unfortunately there's another issue that knowing we were going to go to caucus, I was going to go before the caucus and that concerns another topic altogether which the House has dealt with in a positive manner in [indisc.] majority. I don't know whether the motion is in order to call for a recess for the specific purposes of a caucus to talk it out. It's a separate issue [indisc.] administrators. I don't think it

gets in this quorum [indisc.] we do need to discuss but certainly before we got to the floor, to talk about sine die [indisc.].

SENATOR KERTTULA:

Senator Collins [indisc.- cough] then Senator Duncan.

SENATOR COLLINS:

Thank you. I think that to agree I would like to make further comment on Senator Pearce's statement. If we, in fact, are going to come back to do a constitutional amendment, we are going to have to finish the work of this special session and the work of this special session was to consider the Governor's bill. And I think until we consider the Governor's bill we really -- it would be very inappropriate for us to discontinue this session and call ourselves back into session to deal with the constitutional amendment. Because, in fact, until this is off the table we really have to deal with it and we can't go on with the consideration of a constitutional amendment. So I think it's a great error if we put off making a decision on this piece of legislation and looking at this legislation because that is the work of this special session. That is the reason that we are here to consider the Governor's bill and to vote it up or to vote it down. And based on what happens when we close that session, then we'll have a direction as to whether we will go forward and deal with the constitutional amendment or send ourselves home. But I think that we simply cannot call ourselves back into session for a constitutional amendment issue until we have dealt with the piece of legislation that we've been brought here to deal with. And whether we vote it up or down, we need to consider it and we need to deal with it.

SENATOR KERTTULA:

Thank you. Senator Duncan.

SENATOR DUNCAN:

Mr. Chairman, Mr. President. Of course I need to take the Senate president's suggestion as being that it go to the floor as sine die motion. I took the suggestion meaning that there's two ways to get a sense of the body. That's really ...

SENATOR KERTULLA:

That's what I get too.

SENATOR DUNCAN:

... sense of the body. We need to get a sense of the body here ... [tape ends midspeech].

Tape 92-14

Side B

[Tape begins midspeech]

SENATOR DUNCAN:

... on whether we should consider a constitutional amendment or not. Before we go to the floor, take a formal roll call vote in a sense of the motion before the body as we've done on other occasions. Is it the sense of the body that we should consider the constitutional amendment and resolve the subsistence issue. And have that as [indisc.] public vote. There's two ways of doing that. Then once that's done and there's fourteen votes, you then go to the Governor and you go to the House and you say, we have two thirds who want to consider a constitutional amendment. We don't sine die till you get an agreement out of the other body that they're willing to go along with that. Or maybe even at that point the Governor says, I'll add it to the bill. So I think someone up here was trying to rush us into a sine die motion no one was talking about. We're talking about trying to get a sense of the body as to how we want to adequately address the subsistence question. Mr. President, that's how I interpreted what you were saying.

SENATOR ELIASON:

That's exactly correct.

SENATOR KERTTULA:

That's the way I interpreted it, too, and Senator Pourchot.

SENATOR POURCHOT:

Thank you. Along the same thing as Senator Duncan said that this is the first step it need not lead us to [indisc.] I think there are ways to [indisc.] adding something like this does not mean that necessarily but with two or three more days, I think

there are ways of taking care of that.

Just on Senator Collins, one point though about dealing with one topic before moving to the other topic, unfortunately I think for some people they're linked. There may be votes for the Governor's bill and for constitutional amendment. And if one without the other is not the same vote or the same [indisc.] or the same goal that people want to achieve. So I think there are more intertwined than that and frankly, can still be dealt with in an efficient way.

SENATOR KERTTULA:

You have the floor, Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. I hope the people don't get the impression that the constitutional amendment is the only answer. We're still going to have to have some statute -- statutory change or some statute in place there to do whatever needs to be done and meet whatever criteria that subsistence can be established under. It may very well be the Governor's bill. It may very well be the AFN bill or it may very well be some combination thereof. I think what I am trying to do is - what I'm trying to avoid is passing great pieces of legislation now and then still putting us in the situation for not in compliance with ANILCA and we do end up with dual management and at some point down the road, it could be another fifteen days from now, or thirty days from now, the Governor throws his hands up and says, hey, we need a constitutional amendment if we're going to get the feds off our back. Let's do it all at one time. Or at least look at the option of doing it all at one time.

SENATOR KERTTULA:

Are there arguments around the table? Is there anything more to contribute? I'm going to give you a 10 minute recess to come back. We'll recess for 10 minutes.

RECESS

11:10 - 11:35 a.m.

SENATOR KERTTULA:

Could the Senate Committee of the Whole please come back to order? We'll try to await the arrival of most all the senators. Hopefully, all of them. [Simult. speech]. The Committee of the whole has come to order. Senator Cotten.

SENATOR COTTEN:

Yeah, it's -- Mr. Chairman, as I mentioned I'd be happy to withdraw my motion in favor of -- and yield the floor to Senator Pourchot.

SENATOR KERTTULA:

Motion is withdrawn. Senator Pourchot, you do have the floor. We don't yield, but I do recognize you.

SENATOR COTTEN:

Thank you, sir.

SENATOR POURCHOT:

Thank you, Mr. Chairman. As we talked about prior to recess, I would move or put forth to question to be voted on by the committee of the whole that basically be the question, "Shall the Senate consider the ...

SENATOR KERTTULA:

I have an emergency phone call from my daughter. Can this be held for just a moment?

[Off Record]

[On Record]

SENATOR KERTTULA:

... order and you have the floor. Thank you very much.

SENATOR POURCHOT:

Thank you, Mr. Chairman. If the question I would propose to go before the body would be, "Shall the Senate consider the question of a constitutional amendment?" If I might, Mr. Chairman, what the question is obviously open and it does not address itself to the -- would not include an action on the bill before the committee or before the session. The item we have before us really would not speak to specific language of a constitutional amendment. There are several different versions that have been discussed in the past and during this session

informally. It would not speak to how our [indisc. - cough] vis-a-vis the Governor or vis-a-vis the House. And vote that it would be presuming [indisc.] use to them approach the House or approach the Governor or ways that that question might be promulgated. Or that it speak to several possible courses of action or alternatives on how that question voted on favorably would be formally [indisc.] would be put forth. But it would be kind of a base starting point if we were to take any additional action along the lines of considering a constitutional amendment.

SENATOR KERTTULA:

What about time frame to get pretty much knowledge of whether something can proceed and two thirds, the Governor's call, if in fact there is a constitutional amendment proposed. We need to have a feeling for the body that we will move along with the times before us. If in fact nothing can be [indisc.]. So I think that timing [indisc. - cough]. We move around by tomorrow at this time with the motion before if nothing can be done. Is that a fair and understandable -- no negotiations and so on, take place. I'm just kind of broken here. I hate to do that as chairman. But I think just get a feeling to the body that we're going to move ahead one way or another with either the bill before us or the bill and added subjects. Yes, Senator Shultz.

SENATOR SHULTZ:

I would think that we could, you know, with all the input that we have and all the knowledge that we have, as long as the issue has been around, and as long as we've debated constitutional amendments and we haven't really seen any light at this particular time -- but I would think that we could make a decision today. And I would like to ...

SENATOR KERTTULA:

Just stay in session until this happens.

SENATOR SHULTZ:

..., and then maybe take a vote at three o'clock or four o'clock this afternoon whether or not we're willing to adjourn and call ourselves back into special session or other purposes take up

a constitutional amendment. But I think that we would want to listen to the debate and I don't think we should deny the people a right to debate this issue. But I think we should do it [indisc] and we vote on this and then [indisc.- cough] we'd either go forward or [indisc.].

SENATOR KERTTULA:

I set a more liberal time frame but I get a consensus of moving along with the subject, that's what I want everybody to feel that I don't want to delay an extra moment beyond what the will of the body would be in this. You have the floor, Senator.

SENATOR POURCHOT:

Mr. Chairman, I would be all I have to say is I think it goes without saying I think the threshold here is fourteen votes. It will take fourteen votes to call us back into session, and fourteen votes to go to the Governor or go to the House [indisc.].

SENATOR KERTTULA:

Senator Duncan then Senator Shultz.

SENATOR DUNCAN:

Mr. Chairman, of course, I believe [indisc.] a sense of the body to consider a constitutional amendment. I see nothing wrong with a certain timeframe of when we're going to make a final decision. We need some time to hear out both sides [indisc.]. I don't see any reason why we couldn't do that by early evening or late afternoon and spend several hours here doing that.

SENATOR KERTTULA:

We'll make very effort to do it by five o'clock. At the outside.

SENATOR STURGELEWSKI:

Yeah.

SENATOR KERTTULA:

You have the floor, Senator Shultz.

SENATOR SHULTZ:

But I don't believe that it takes fourteen votes at this point in time. Because all we're talking about is allowing the discussion to take place on the constitutional amendment. We're

not talking about voting on a constitutional amendment because we haven't seen anything. So all we're talking about is the majority of the people of this body to agree with that we allow the debate to take place on the constitutional amendment [indisc.].

SENATOR KERTTULA:

Well, I think at this state, you're technically correct. You have the floor, Senator Collins and then ...

SENATOR COLLINS:

At this point, why do we need to take a vote on it if we, in fact have been discussing to a degree [indisc.] of the constitutional amendment. I think the chair has done an excellent job of moderating here today, but in fact we have discussed the constitutional amendment. If that's all you want us to do, I don't believe that we need to vote to discuss the constitutional amendment because the fact that we have been doing for the last four days.

SENATOR KERTTULA:

Well, is there objection to the motion? [indisc.].

UNIDENTIFIED SPEAKER:

I object.

SENATOR KERTTULA:

You object. State your objections and then the President of the Senate wishes to speak.

SENATOR HALFORD:

The question wasn't do we discuss a constitutional amendment as we have been doing for the last three or four days. The question to reach any real consideration of a constitutional amendment is do we go through the process which is required to call ourselves back under our own special session to consider the various versions, types, proposals and constitutional amendment ideas. I think there's a significant difference. We have been discussing without a majority vote or any other kind of vote constitutional amendments as part of any kind of package or solution that people have been advocating back and forth. But we don't have fourteen votes to go into our own special session to

consider a constitutional amendment, then the debate is moot and we should go on with the legislation before us and not continue the session for days while we keep talking about something that's not in force.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Mr. Chairman, I think I agree that, number one, there is no short process we're going to deal with it and we'll do it the right way and we'll be here as at least three days. which is fine if we're going to deal with it. On the other hand, I think it's a little bit premature to discuss something that we'll never be able to reach. When we reach that point then we'll vote on it. So what's come first, the egg or the chicken? I don't know. But I think, if we had eight people here or seven people here who do not want to consider going into a special session, it's over. We have fourteen people who do want to discuss it, doesn't necessarily mean we're going to do it. But at least we have a feeling of this body. I think that's important. Otherwise I can see a great deal of wasted time debating things which we can't get to in the end.

SENATOR KERTTULA:

Senator Collins, then Senator Shultz.

SENATOR COLLINS:

One of things we discussed was that without this whole process and at the time we did have our majority caucus we talked about the options that were before us. The options were to deal with the Governor's bill and subsequently make a decision to go back and call ourselves into special session to deal with the constitutional amendment. A lot of that discussion where people kept saying is whatever we do, we have to do it right. We have to make sure that the procedure is appropriate so that if there is any [indisc.] of this that we'll be able to go back and show, shall we say, a trail that makes it very clear that what we did was appropriate and that we did was in order. And that is the

reason I am objecting to taking any action with respect to a constitutional amendment before we have completed the process. And for me the very beginning, the cornerstone of that process is an up or down vote on the Governor's bill. I personally at this point can tell you how I'm going to vote on the bill. But I think in terms of following the process, in terms of doing it right and appropriate for us to move on to a constitutional amendment after we have resolved that matter.

SENATOR KERTULLA:

Senator Shultz was seeking the floor and then Senator Hoffman. Senator Hoffman.

SENATOR SCHULTZ:

I would like just a clarification from the chair on this vote. Is the vote going to be -- is the vote in the motion back if we vote yes that we're saying that we're going to bring ourself into special session for addressing a constitutional amendment? Or is the vote simply for the discussion to take place? I believe there's a difference.

SENATOR STURGELEWSKI:

Absolutely.

SENATOR KERTTULA:

My opinion, the vote is to approach the possibility of an extension of time for a constitutional ... Is that not right Mr. [indisc.].

SENATOR ELIASON:

We're just trying to get a sense of this body and the only way we get a census is ask people whether they want to consider the option of dealing with this issue if, in fact, there's not enough people to even consider it. At least we've made some progress.

SENATOR KERTTULA:

There's no guarantee they'll vote for ...

SENATOR ELIASON:

Exactly.

SENATOR KERTTULA:

... for a bill or for a constitutional amendment. But it is a vote to see if it's even worth pursuing.

SENATOR ELIASON:

But I can assure you we're going to do what we have to do in a legal way. We're not making any shortcuts. We're just getting a feeling of this body is all.

UNIDENTIFIED SPEAKER:

It's going to take two votes to get there.

SENATOR ELIASON:

We're going to take a number of votes to get there. We have to take this first step.

SENATOR KERTTULA:

Senator Cotten.

SENATOR COTTEN:

I think I agree with you Mr. Chairman. I think the one way to view this would be to consider the -- how the vote might come out if it were phrased in the negative. And I think that this vote happens to be in the positive, yes we shall. But it could just as easily been in the negative, no way. And if there are set of votes for no way, Then that's it.

SENATOR KERTTULA:

You Have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. I guess I would support the motion and I would beg to differ with my colleagues, Senator Collins, just because the Governor put something on the table during the normal session or during the special session, it's [indisc.] and I think we should be -- we have a problem here and we should look at any and every tool possible and consider them to resolve the problem. I think we owe that to the citizens of the state we don't owe the Governor a vote on his bill. In fact, if we come up and deal with the issue without even voting on his bill and resolve the problem, then I think the people of this state will be satisfied. The issue here isn't the Governor's bill, it's the people -- it's the services this state is providing to the people

of the state.

SENATOR KERTTULA:

Senator Uehling then Senator Pearce.

SENATOR UEHLING:

Thank you, Mr. Chairman, I assume also in the discussion that we're talking about [indisc.] discussions are going to go on until five o'clock ...

SENATOR KERTTULA:

Nothing takes place by five or so, we will have some hearing and so on. Senator Pearce.

SENATOR PEARCE:

Thank you. In respect to Senator Hoffman, during the regular session the Governor did put something on the table. Ask the Governor [indisc.] those bills all were in Senate Finance where Senator Hoffman sits at the end of the session. We should have dealt with it then. It's not -- you know, there's a number of people at this table who ask [indisc.] subsistence before we left the regular session and no [indisc.] at the will [indisc.] Governor has called us back and put something on the table [indisc.] that we should now expand to the global realm. [indisc.] special session when [indisc.] and I just [indisc.] Governor asked us [indisc.].

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Sturgelewski.

SENATOR STURGELEWSKI:

I would I guess plead, which is not too strong a word, for the opportunity for us to look at with a time certain and I appreciate Senator Schultz asking for that. So that we can look to see if there is a way to move forward. It's -- we didn't do this during the special session but it's not an unusual thing. You know, I spent -- the very first time I came down here, and you'll forgive a little memory lane, here, but the first thing we took up was the mental health issue. We not only not solved it

but it has become more complex. It never becomes less complex. We are a consensus body. And it's been very difficult to reach that point of consensus. But there's nobody else that can do it. We're the only ones. And for us to stop the debate and not look at some possible way -- I understand there are conversations going on between bodies outside that affect this. But you see, that's part of the process. There is a process going forward where people are becoming more aware of the implications of this action or that action. So let's go just a little bit longer. I don't think it's going to be history, that's going to say, well, my god, you took twenty-four more hours to do it. That's not what they're going to say. They're going to look and they're going to judge by the number of court cases and the number of problems that ensue from lack of a decision. Maybe we can't come to that but I think there are the seeds at least of a way to move forward.

I'm really proud of the Outdoor Council. I think they came a long way. I think the administration did a good job in a lot of thorny areas. But there are still some problems. Let's not cut off the opportunity to solve those other problems. I would hope there's a vote to move it in.

SENATOR KERTTULA:

You have the floor, Senator Rodey.

SENATOR RODEY:

Let's be decisive. I call for question.

SENATOR KERTTULA:

Question is called for. Senator Menard.

SENATOR MENARD:

Mr. Chairman, now are we voting for what? Are we voting to say that we will ...

SENATOR KERTTULA:

Senator, would you please reread the motion and express it.

SENATOR POURCHOT:

The questions would be, "Shall the Senate consider the question of a constitutional amendment?" I've heard a couple of interpretations but [indisc - laughter].

SENATOR KERTTULA:

Just until currently about five o'clock so we proceed at that.

SENATOR MENARD:

Just for discussion and it's not saying ...

SENATOR KERTTULA:

That's right. There's no commitment beyond that. Senator Collins, you were seeking the floor or are you waiting to ...

UNIDENTIFIED SPEAKERS:

Roll call.

SENATOR KERTTULA:

Roll call. We have Lorraine ready to call the roll. You have the floor.

SENATOR HALFORD:

If this motion is for discussion, obviously a simple majority says we're going to continue [indisc. -cough]. If this motion is to say that we're going to start the negotiate and work on the process of getting into an open special session, then to be effective it requires fourteen votes.

SENATOR KERTTULA:

I think frankly the fourteen vote is a symbolism here that's understood. I think that's what we're after. Question is -- Senator Shultz.

SENATOR SHULTZ:

My understanding is that's exactly what I was trying to get to Senator Halford was the fact discussion is one thing okay. Putting it before this body in the same form of a motion that it's going to -- for the discussion purposes it should only take eleven people, okay. If we're talking about putting a constitutional amendment with the idea that we are, in fact, going to bring ourselves into -- adjourn and come back into a special session, then that's a fourteen vote. It's different. What I was talking about was discussion -- for discussion to take place on the constitutional amendment till three or four o'clock this afternoon. That's it. And I wouldn't be [indisc.]. But

[indisc.] if you're asking me to vote on a constitutional amendment right now, I'm no.

SENATOR KERTTULA:

We certainly have no commitment to constitutional amendment. Incidentally, I've just been informed and I don't have a lot of experience to Committee of the Whole, we do not take roll call votes of the Committee of the Whole so it will have to be count of you raising your hand. The way we do it. Senator Fisher, seems to have a point here.

SENATOR FISHER:

Thank you. My concern is all during the four days when an issue came up regarding a constitutional amendment by everybody there was no objection. So in essence it was discussed. Now if we want to continue discussing it, we don't need to vote at all. And if people don't like discussing it we can walk out. But we don't need to vote. In my mind, if we're voting then we're voting for a constitutional amendment or we don't need to vote at all. And if that's the way [indisc.].

SENATOR KERTTULA:

There is a solution. I just request that Senator Pourchot's vote be adopted by unanimous consent. I don't see any objection to what we're proceeding with here.

SENATOR POURCHOT:

If it is for discussion purposes, I have no objection.

SENATOR KERTTULA:

Discussion or some negotiation. But discussion first.

SENATOR POURCHOT:

Well, discussion is different than negotiation.

SENATOR COTTEN:

You bet.

SENATOR POURCHOT:

I do not believe there are the votes here to go forward and call a special session.

SENATOR KERTTULA:

Senator Adams seeks the floor.

SENATOR POURCHOT:

If the votes are not here, then it's a waste of time.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS.

Thank you, Mr. Chairman. But all we want is the sense of this particular body. And to get a sense you need a count and I'm just going to ask for a procedure clarification from our legal. If Ms. Cook can tell us the sense of this body should be not by roll call?

MS. TAMARA COOK:

Mr. Chair, Senator Adams. On the Mason's manual, a Committee of the Whole does not topically use a roll call vote.

SENATOR KERTTULA:

We don't have to worry about Mason's manual.

MS. COOK:

Right. If the body prefers a roll call vote for whatever reason and there is no objection to that, obviously the procedural rule has been suspended for the purpose of this vote.

SENATOR KERTTULA:

If it's just Mason's manual ...

SENATOR ADAMS:

Thank you, ma'am, and the way I read the motion by my colleague, it's only for discussion purposes. It's not for an extension and it has no commitment on anything. That's the only thing was for discussion.

SENATOR KERTTULA:

I'm going to ask for a roll call under those circumstances. I [indisc. - simult. speech] no objection. Unanimous consent rules. We'll proceed. [indisc. - simult speech] You have the floor, Senator Cotten.

SENATOR COTTEN:

We didn't do anything. Now, the motion that should -- for those who have decided that they are going to reject a constitutional amendment under every circumstance, I would

appreciate a motion from them to put a motion on the table that says, no way to a constitutional amendment. And if there are seven votes for that, we should know that. That's what I'd like to get to. If there aren't and I've got it written down here in today's jargon, way or no way. And if you think maybe you can vote for something, then say, way. If you already know it's no way, then let's have a no way vote. We won't waste five more hours.

SENATOR KERTTULA:

It's a slight nuance. There is a motion before us strongly suggest precisely that, so we have to vote on it. I will entertain it.

SENATOR COTTEN;

The positive motion didn't seem to get us anywhere and I don't want to make the negative motion. So, apparently we're not going to get anywhere.

SENATOR KERTTULA:

You have the floor, Mr. President.

SENATOR ELIASON:

Mr. Chairman, I really don't know how to proceed. But I do know that we're going to have to put some time constraints on what we're doing. I would ask the chair that we go into official vote at five o'clock this afternoon whether or not we have fourteen votes to call ourselves into session. Between now and then we should talk about what we're going to deal with if we do that. We can waste that much time if we want to. But I would hesitate to go beyond that.

SENATOR KERTTULA:

Well, five was the deadline for any action. I don't mind doing it earlier.

SENATOR COTTEN:

That's fine with me. I think that's a good idea.

SENATOR KERTTULA:

What time is it now?

SENATOR COTTEN:

Noon.

SENATOR KERTTULA:

It's always frustrating getting going when you first start again. Senator Shultz.

SENATOR SHULTZ:

[Indisc. - simult. speech]. Just a point of clarification proceeding on from here, is it appropriate now since we've gone through this dialogue and really haven't accomplished anything to go back to the original motion of moving the bill from the committee -- it goes before the Finance committee. It still has - and get some kind of consensus to get that bill out of here. In the meantime, we're addressing between now and five o'clock we're going to be addressing whether there's fourteen votes here to extend the session on a constitutional amendment. We're going to take a vote on that at five o'clock or in that vicinity.

SENATOR KERTTULA:

I felt ...

SENATOR SHULTZ;:

Is that inappropriate?

SENATOR KERTTULA:

No. I felt these two sort of came down together. The vote about five or earlier on the constitutional amendment and subsequently if that fails immediately into the proposed by Senator Cotten, so that we get moving along. And it's true, while you're collecting your thoughts and your wisdom on the discussion for the afternoon, we'll recess for one hour. We are now recessed.

RECESS

12:05 - 1:20 p.m

SENATOR KERTTULA:

McKie Campbell just called and said he was trying to talk to the Governor and get a Governor direction on this basic position on any of the nuances of resolutions that might set up a constitutional amendment. Senator Pourchot made the motion, I presume, if we are going to use a vehicle, there are six or eight

different suggestions. I would suggest myself that we use the -- I think Senator Pourchot probably had it introduced to you, and I mean for this book. But wasn't that Senate Resolution 57 that you've been discussing. So just -- and you can amend that, change -- which is not really before us. But any way we could use another one, another idea. I suggest we confine ourselves to looking at least for the initial period Senate Joint Resolution number 57. I don't know where our legal counsel is. Attorney General is supposed to be here to respond to questions. Here comes counsel now. If you could sit at the end of the table with all legal counsel. Yes. That's fine. Senator Pearce will be a little late. You will have -- we'll bring on the counsel forward as they come. Senator Adams, wishes the floor. And again, let us use Senate Joint Resolution 57, if we start discussing a specific bill. You have the floor, Senator Adams.

SENATOR ADAMS:

Mr. Chairman, I respectfully ask that AFN's legal counsel be allowed with administration and also our legal counsel to sit up there in response [indisc.], Mr. Chairman.

SENATOR KERTTULA:

Yeah, I have no objections. [Simult. speech on seating arrangements] We do have counsel from the Legislature here. You have the floor, Senator Pourchot.

SENATOR POURCHOT:

I just wanted to make note, just before we broke, you had asked administration also to try to quickly recall the constitutional amendment in line with the limited entry format that I think McKie Campbell talked about. I think he characterized it as the least problematic to them. So we were hoping to get that in the notebooks. Presumably, they were in that folder, also.

SENATOR KERTTULA:

Mr. Campbell called. He was in seeing the Governor to get marching orders. He wanted Senator -- the presiding officer and myself to come down. I didn't think it was appropriate. He

hadn't even talked to the Governor and we didn't -- and I thought we should get this thing going. Not keep it waiting around. I don't know if we've learned that much anyway. There's going to get some kind of a discussion. And he's going to get his marching orders. But I'm awaiting that like you.

UNIDENTIFIED SPEAKER:

[Indisc.] But I must [indisc.] ...

SENATOR KERTTULA:

If the Governor asks us to come, we'll come. Just Mr. Campbell.

UNIDENTIFIED SPEAKER:

Oh, I thought you said he did.

SENATOR KERTTULA:

No, Mr. Campbell requested that -- go through the whole thing. He asked me if I thought that we could come down and meet with the Governor on this issue. And I said, well, we were just starting in the meeting. Would he please talk to the Governor about that issue and come back and get his marching orders. But that we could meet in a couple hours or less if it became necessary. Could be a lot less if it was really necessary. So we don't know -- and I don't know. I did ask the Attorney General's office -- would you call? And McKie said again, the Attorney General would be up here.

Well, are there questions about this suggested amendment to the state constitution that's embodied in Senate Joint Resolution 57? Or is there anything else? You have the floor.

SENATOR DUNCAN:

I just wanted to point out also in the notebook right behind Senate Joint Resolution 57 that Senator Pourchot was going to have introduced, the proposed Committee Substitute for the House [indisc.] 86 is not the resolution out of House Judiciary and House Rules [indisc - paper shuffling].

SENATOR KERTTULA:

And is this it?

SENATOR DUNCAN:

That's it. [indisc. - paper shuffling]. Titled, proposed constitutional amendment for House [indisc. - paper shuffling].

SENATOR KERTTULA:

Yes.

SENATOR DUNCAN:

There a copy [indisc. -- paper shuffling]. Another step.

SENATOR KERTTULA:

How does it differ from the one proposed by Senator Pourchot [indisc.].

SENATOR DUNCAN:

Well, I was so [indisc.] that Laurie Otto or someone else could explain that. That's why we're here.

SENATOR KERTTULA:

Let's request that Ms. Otto come to.

SENATOR DUNCAN:

[Indisc.].

SENATOR KERTTULA:

I noticed they both, of course, you have to read pretty far down and say they both may grant preference.

SENATOR DUNCAN:

We're talking different [indisc.]. I must say [indisc.].

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

Yeah, just things that I'm going to be interested in in terms of any proposed amendments would be, number one, is the Governor's bill as written in concert with the amendment? In other words ...

SENATOR KERTTULA:

Mr. Nelson, please have a seat with us here. I would appreciate it very much if you -- we're not going to try to get arguments between attorneys but you may direct questions. Senator Sturgelewski, if you will proceed again. Pardon me for the ...

SENATOR STURGELEWSKI:

That's fine, Mr. Chairman. The questions I would be interested in hearing asked or answered would be in terms of a constitutional amendment, number one, does the Governor's bill as we have it before us fit under that proposed constitutional amendment?

SENATOR KERTTULA:

While I think these gentlemen are talking, I think we may want to have them hear what you have to say too. They can't help it. They're trying to get organized.

SENATOR STURGELEWSKI:

For the third time.

SENATOR KERTTULA:

I'm going to have you start for a third time charm.

SENATOR STURGELEWSKI:

You'll listen won't you?

SENATOR KERTTULA:

Under that cozy, it really worries me.

SENATOR STURGELEWSKI:

Yeah, well, I'd be worried too. Okay, does the Governor's bill -- is it in concert or does it fit under that constitutional amendment? Secondly, with the Governor's bill, with the constitutional amendment how then do we fair with ANILCA and meeting the terms of ANILCA? What would need to be changed, if anything, with ANILCA to make the Governor's bill -- the constitutional amendments meet the terms of ANILCA? So those are the three things that I would be looking for. Is that make any ...

SENATOR KERTTULA:

I think that's a good place to start. And Lance, if you start and I would ask and if you wish to restate any portion -- they do have you. And then I would ask the other distinguished counsel. And very shortly we'll ask Ms. Otto to explain the difference between the House suggested bill here ...

SENATOR STURGELEWSKI:

Mr. Chairman, we don't need to get into it in that form. But

those are just things I'm going to be looking for.

SENATOR KERTTULA:

They're important I think it's good to start off that way. And I think we will start off that way, without objection. You have something to contribute here at this moment.

MR. NELSON:

Mr. Chairman, could I hear the first question again?

SENATOR KERTTULA:

Yes.

SENATOR STURGELEWSKI:

If we were to adopt either the resolution -- the proposed Senate Joint Resolution 57 or another one, I would like this question answered. Does the Governor's bill as it is proposed -- would it fit under the constitutional amendment? That was the first question. Would it fit under the constitutional amendment that's proposed? And ...

MR. NELSON:

By that you mean the ...

SENATOR KERTTULA:

Legal or ...

SENATOR COTTEN:

You're asking the wrong guy, I think.

SENATOR STURGELEWSKI:

No, I'm just ...

SENATOR COTTEN:

He already -- he thinks the Governor's bill is already constitutional.

MR. NELSON:

I do.

SENATOR STURGELEWSKI:

I know that. But if we put it on to the constitution, then we might be answering to some of us a constitutional question. And does the Governor's bill legal under that proposed constitutional change?

MR. NELSON:

Yes.

SENATOR STURGELEWSKI:

We are changing our constitution, yeah.

MR. NELSON:

There's nothing about the amendments that I've seen that would conflict with the Governor's bill.

SENATOR STURGELEWSKI:

Okay.

SENATOR KERTTULA:

Don? Mr. Mitchell?

MR. MITCHELL:

Yes, Mr. Chairman. I would basically agree with that. Those of us that disagree with Department of Law as to whether or not the Governor's bill is presently constitutional are concerned about the Governor's bill at a technical level is that it does hand out hunting and fishing opportunities based upon where you live. You're entitled to these presumptions or you're not based solely on where you live in the state is certainly a constitutional amendment that gave this body specifically the kind of authority to do that would -- I think Mr. Lenzini testified to the House -- I think I'm correct on this. I don't want to misquote him. But certainly, while they think it's unneeded it would certainly bullet proof, I believe were his words -- the Governor's bill.

SENATOR STURGELEWSKI:

Mr. Chairman, then the next set would be the Governor's bill is in force. The constitutional amendment is adopted and ratified. Then where are we in terms of compliance with ANILCA? What, if any, changes would need to be made in ANILCA, or conversely I guess, in the Governor's bill for us to qualify?

MR. NELSON:

The Governor's bill would not comply with the urban/rural requirement for subsistence priority in ANILCA. You need to either change -- well, if you pass the Governor's bill I think your obvious goal would be to change ANILCA to -- I think we may

have suggested that some earlier language before. We'd like to see a change in section 804(d) that recognized the substance of the Governor's bill as being in compliance with the provisions of ANILCA.

SENATOR STURGELEWSKI:

Okay, that is if we changed -- Mr. Chairman, if I could.

SENATOR KERTTULA:

Please.

SENATOR STURGELEWSKI:

If we have these two pieces in place. And you feel that the major change would be an amendment to 804(d) that would recognize the substance of the Governor's bill as meeting the intent of ANILCA. That's what you said, right?

MR. NELSON:

Yeah. I don't have ANILCA in front of me. I don't know if I've cited the ...

SENATOR STURGELEWSKI:

But Greg would.

MR. NELSON:

[Indisc.] right, but it would be the ...

UNIDENTIFIED SPEAKER:

805(b).

MR. NELSON:

805(b).

SENATOR STURGELEWSKI;

805(b). All right. Conversely then if we go the other way. Mr. Chairman, if I might?

SENATOR KERTTULA:

Please pursue it.

SENATOR STURGELEWSKI:

It seems to me that by the Governor's bill we have made a major step in the number of people that can qualify for subsistence. And it doesn't seem to me that the federal government should care if we have a larger pool, if we just be sure to take care of those people that are, quote, "rural" by some

definition. Would it take an amendment to the Governor's bill to absolutely guarantee subsistence without the potential that the state could come in and challenge someone's residency? It seems like what the Governor's bill does is to do two things. It's used a community standard and then there's an individual standard. Would we have to totally remove -- under the current ANILCA, would we have to remove that standard that is the individual standard? And just have it strictly based on a community standard?

MR. NELSON:

To be in compliance with ANILCA as it now stands?

SENATOR STURGELEWSKI:

Yes. Yes.

MR. NELSON:

Yeah, we have to make the changes.

SENATOR STURGELEWSKI:

In the Governor's bill?

MR. NELSON:

You'd have to go to a rural/urban criteria and any deviation from that and I don't think we'd comply with ANILCA.

SENATOR STURGELEWSKI:

Under this bill, under this constitutional amendment, it would allow us, would it not, to do that? To allow for a rural preference or a discrimination between urban and rural residents. Is that correct?

MR. NELSON:

It certainly would.

SENATOR STURGELEWSKI:

Yeah. Okay. That's fine, Mr. Chairman.

SENATOR KERTTULA:

Do you wish to comment?

MR. MITCHELL:

Yes, Mr. Chairman. I don't want to get too involved in a technical disagreement with Mr. Nelson, but I think in terms of analyzing the ANILCA problem the 805(b) business I don't think is necessarily directly on point.

The real issue, the heart of this debate is which Alaskans, as individuals, will be eligible for the subsistence priority. And under ANILCA, Congress has said that the group of Alaskans that are eligible for the subsistence priority are all those Alaskans who live in rural Alaska. Setting aside where rural Alaska is. The Governor's bill, when you get rid of all the presumptions and all the rest of that stuff, is basically an individual eligibility system. It says, it doesn't make any difference where in Alaska you live in a legal sense. If you as an individual meet these various criteria individually, then you are eligible. And if you don't meet these criteria, you're not eligible. So therefore you can live in rural Alaska and if you don't meet these criteria as an individual you are not eligible. So not in a legal sense in the Governor's bill, not all the residents of rural Alaska will be eligible to engage in this activity.

On the other hand, there will be Alaska residents who do not live in rural Alaska who, in at least a legal theoretical sense, the Governor's bill intends to include within the group of people entitled to this opportunity. The Governor's approach is on the one hand, more narrow than the ANILCA standard in that fewer than all Alaska residents -- fewer than all rural Alaska residents would be eligible. And at the same time it is also more expansive in that more than just rural residents would be eligible. So therefore, in a technical sense, if you want to fix -- to bring all this back into synch the way that Senator Sturgelewski has inquired about, you would have to do one of two things. Either you would have to amend the Governor's bill. If you wanted to make the Governor's bill comply with ANILCA, you have to amend the Governor's bill to get rid of the individual system. And to have the Governor's bill say, the people that can participate in this activity are all Alaskans who live in rural Alaska in the discussion. Or the alternative you would have to amend the definition of subsistence in ANILCA to say that subsistence is an activity that is not engaged in just by residents of rural Alaska,

but is an activity that is engaged in only by individual Alaskans who meet certain criteria. And there's a whole variety of technical ways to do that, that I won't bore you with. But that's the heart of the matter, it seems to me. And then the guys that do the typing, you know, we can ... [tape ends midspeech].

Tape 92-15

Side A

[Tape begins midspeech]

SENATOR KERTTULA:

... or whatever was requested between 57 and 86 or 86 the second draft [indisc.]. Except that's the same as the first. Please proceed.

MS. OTTO:

For the record, my name is Laurie Otto. I'm staff counsel to the House Judiciary Committee. The amendment that's identified is the rule CS for HJR 86. It's different than I think what the state introduced in the senate in a couple of key respects.

Number one, it does not require the Legislature to do anything. It gives the Legislature the authority to adopt legislation granting a preference between subsistence users. That's the second key difference. The original resolution enshrined in the constitution a subsistence priority. The Committee Substitute for HJR 86 does not deal in any way, shape or form with uses of fish and game resources. It only applies to the Legislatures ability to set up preference between [indisc. - cough]. That's the second key difference. Then the third key difference is it does not spell out any particular criteria upon which the Legislature must base its decision. The Legislature has authority within the confines of federal constitutional principles of equal protection and all of the Alaska constitutional provisions other than those that it will specifically identified in McDowell as prohibiting geographically based preferences. But aside from those things, the Legislature can set any criteria that it determines are appropriate.

There is another important element of having the resolution

structured in this way and that is that legislation adopted by this body pursuant to a constitutional amendment if this one passes would be subject to Governor's veto and would be subject to the power of the people through referendum. So it really only is giving the Legislature additional authority but isn't requiring the Legislature to do anything if it doesn't want to. One of the reasons for giving the Legislature this authority is exactly that, when was identified by Senator Sturgelewski and that is that the Governor's bill, and I understand that the Attorney General believes it's constitutional, there's a great deal of debate over whether or not it's constitutional. Certainly there will be extensive litigation over whether it's constitutional. This constitutional amendment would avoid all of that debate because it would give clear authority to the Legislature.

SENATOR KERTTULA:

Well, that's interesting news. Are there questions? You have the floor, Senator.

SENATOR STURGELEWSKI:

Well, Mr. Chairman, I think, that again, I don't want to cut off other people. But I would be interested in the -- if we're just confining it to Senator Pourchot's proposal or if we're now laying the other one kind of before us?

SENATOR KERTTULA:

I would like to just ask questions about what she had to say first. I think that we'll leave both open for questions.

SENATOR STURGELEWSKI:

Well, Mr. Chairman, what I would like would be if it's appropriate to have the same response from the state's attorney ...

SENATOR KERTTULA:

Ms. Otto might well know.

SENATOR STURGELEWSKI:

... or hear as to those three questions that I asked.

SENATOR KERTTULA:

That's 86 now. If you have 86 on the books for her previous

questions. She can restate them if you'd like.

UNIDENTIFIED SPEAKER:

Please.

SENATOR STURGELEWSKI:

Do you want me to restate them? Number one, is the Governor's bill in concert? And I'd guess you'd both say, or all three say yes, right? And two, is it in concert -- is our problem with ANILCA just exactly the same under your proposal vis-a-vis the 57?

MS. OTTO:

I think with the House proposal ...

SENATOR STURGELEWSKI:

Uh-hum.

MS. OTTO:

... the Legislature would need to adopt legislation to be in compliance with ANILCA, although the Legislature could choose not to do so if it didn't want to. So in this proposal, you need to adopt legislation to comply with ANILCA. But legislation that you adopted to comply with ANILCA would also be constitutional.

UNIDENTIFIED SPEAKER:

I think another -- perhaps way to restate, Ms. Otto, is that the text to all three of these constitutional amendments would provide the Legislature the discretionary authority if at a policy level it wanted to enact legislation to comply with ANILCA. All of these various drafts would give you that power. There's different ways to accomplish that goal. This are not self executing, I think was Ms. Otto's point. And therefore, just because you have a constitutional amendment does not mean that you have then complied with ANILCA. All you've done is given yourself the legal authority to then, if wish to comply with ANILCA, you can do that. Obviously right now even if you wished to comply with ANILCA, you cannot.

SENATOR STURGELEWSKI:

Well,...

SENATOR KERTTULA:

Senator Halford, do you have a question or a point?

SENATOR HALFORD:

Thank you, Mr. Chairman. I don't know if this was covered. I had a phone call I had to take. The proposed CS for HJR 86 says, "Consistent with the equal protection requirements of the constitutional of the United states." Why does it not say, "consistent with the equal protection requirements of the constitution of the State of Alaska" as well?

MS. OTTO:

Mr. Chair.

SENATOR KERTTULA:

You have the floor, Ms. Otto.

MS. OTTO:

Okay, Mr. Chairman, Senator Halford. The McDowell decision was, I think, complicated from a legal perspective. There was a majority opinion which was based on [indisc.]. There was a concurrent opinion in which two justices concurred where there was the finding that the rural preference, the geographically based preference violated Article one, section one, of the equal protection clause of the alaska constitution. Therefore, in order to avoid litigation which is the entire point of this from the House's perspective, this cannot be subject to the equal protection clause of the Alaska Constitution because our Supreme Court may very well conclude that a geographically based preference violates that provision.

SENATOR HALFORD:

So it is the intent of this proposal that therefore we cannot just give equal access to resources provision of the state constitution, but also the equal protection provision to the current state constitution.

MS. OTTO:

Mr. Chairman, Senator Halford. It's the specific intent of this resolution to give precedence to this constitutional provision over the equal protection clause of the Alaska Constitution.

SENATOR HALFORD:

And allow things that would otherwise not be allowed under the current constitutional equal protection provision. Or might not be allowed depending -- that was two [indisc.]

MR. LENZINI:

Mr. Chairman, may ...

SENATOR KERTTULA:

You have the floor.

MR. LENZINI:

May I add a point. I would think that what we are saying as well is that it would be subject to the interpretation of the equal protection clause of the U.S. Constitution of the Ninth Circuit in San Francisco.

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR KERTTULA:

Yes.

UNIDENTIFIED SPEAKER:

Obviously this is the text of the House constitutional amendment obviously is the House text. So I don't want to get in a position of defending it. But this whole equal protection situation first, as Senator Halford indicated, there is, at present, no definitive reason to believe that a rural priority would violate the equal protection clause of the Alaska Constitution. It is, in fact, however, an open question. The reason that it is of some concern, if the committee would like, I can drone on about the difference between the Alaskan equal protection text and the United States equal protection text and how the Alaska Supreme Court basically thought up in a relatively recent history the Alaska equal protection text in order to allow them to sit over and judge your policy decisions. And it's a very convoluted and turbulent area of constitutional law. Mr. Lenzini might want to attempt to resurrect out of the closet the bogey man of the Ninth Circuit but at this moment, every classification that this Legislature gets involved in, must pass muster with both the

Alaska constitutional equal protection and the United States constitutional equal protection as it is articulated by the Ninth Circuit acting as the agency ultimately behind the United State Supreme Court. So to say that somehow the Ninth Circuit the federal equal protection clause is some sort of bogey man that should scare people off this, with all due respect to my old and dear friend, Mr. Lenzini, I don't think that's necessarily quite accurate. But this state equal protection business and federal equal protection business, we can -- I don't want to start down that path unless the committee is interested in hearing at length about the theoretical problems. But the House has obviously identified that as a legitimate policy concern with respect to this particular ...

SENATOR KERTTULA:

Senator Halford, you may pursue this then, Senator Pourchot has been seeking the floor. Mckie, could you come up here ...

SENATOR HALFORD:

Maybe a better way to ask the question, Mr. Cole, is if a citizen of the State of Alaska feels that their rights of equal protection have been infringed on by some action of state government through the Boards or statute or whatever, and they go to court and want to defend their right to equal protection, we are saying by this amendment, they have to go under the interpretations through the Ninth Circuit court and the U.S. Supreme Court without the added protection of the Alaska Constitution and the state courts. That's part of my question.

The second question is where do they go? Do they go to the state Supreme Court or the state Supreme Court's interpretation of what the Ninth Circuit court said? Or do they go directly to the federal courts or can they go the federal courts on essentially an Alaska constitutional issue and then we get not only federal oversight of our statute but federal oversight of our constitution as well.

ATTORNEY GENERAL COLE:

I'll answer the second question. And I think Ms. Otto can

answer the first question, since it's the House text. With respect to where you go, the state courts can entertain both causes of action that allege violations of the state constitution and causes of action that allege violations of the federal constitution. However, with respect to appealing lower court decisions with respect to both of those, the Alaska Supreme Court is the end of the line with respect to what the delegates of the Constitutional Convention intended the Alaska Constitution to mean. The Alaska Supreme Court is not the end of the line. You can ask the U.S. Supreme Court to review what the Alaska Supreme Court thinks of the convention of 1787 and the fourteenth amendment mean with respect to the federal constitution. Now the federal court obviously is the place to go if you're really concerned exclusively about the federal constitution and not the state constitution.

SENATOR KERTULLA:

[Indisc.] participate a little [indisc.].

UNIDENTIFIED SPEAKER:

Mr. Chairman, the root to the Supreme Court on federal matters involving Alaska, these matters -- is through the Ninth Circuit. And to many people it is a matter of regret but not all decisions of the Ninth Circuit are reviewed by the Supreme Court.

SENATOR KERTTULA:

Senator Pourchot has been seeking the floor.

SENATOR POURCHOT:

Thank you, Mr. Chairman. I'm trying to figure out of some of the basic differences in approach between 86 and 57. We all know all the laws of the State of Alaska have to be consistent with the U.S. Constitution anyway. That probably goes without saying. So we can kind of scratch out that whole part and avoid some of these other problems. We also in normal construction, know that if we amend the constitution specifically in addressing that [indisc.] it seems like McDowell, I'm not even sure all that section [indisc.] great arguments that are used all the time. And we don't need to supersede [indisc] years ago we didn't do that. So

either our constitution worked last time [indisc.] or we didn't know something. But we didn't choose to expressly supersede or provide a specific state preference over potential inconsistent provisions. But when you say those things it clearly brings up a lot of questions like Senator Halford just brought up. And I'm wondering, going back to the 57 which was essentially the resolution that passed a couple of years ago, at that time, of course, we were thinking that we wanted to provide preference along certain criteria, for right or for wrong, maybe there's some different criteria or adding things but those were the things -- area characteristics, geography, traditional use -- these are some of the things that have always been talked about in some construction of state law that would be necessary. The implication is, of course, that there are some things that you may not want to provide for on the basis of like ethnic background or amount of [indisc.]. Or any other criteria. There may be a lot of things that you don't want the Legislature to create differences based upon. So if you look at 86 and basically you're just -- we will [indisc.] a label on that stuff because the Legislature made they granted preference for subsistence uses based on any and all things. Obviously, you always have to be in consistency with the U.S. Constitution. So the business [indisc. - cough] House [indisc.] trying to achieve by this approach and why did you avoid specific criteria?

MS. OTTO:

Mr. Chairman, Senator Pourchot. You asked a series of questions and I'll try to answer all of them, and if I miss some, please let me know. You are correct that it is surplus language to refer to the United States Constitution in the body of the amendment. That was done because of the language in section two to make it clear to anybody who was reading the document who was not a lawyer that there was not unfettered discretion in this regard so that the Legislature could not, for example, grant preference based on color of hair, or any of the other examples that you gave. So that's why that is in there. It's for, I

guess, information purposes to the reader and not because it's necessary. The language is not necessary. That's very obvious.

Number two, why are the specific references made to the other constitutional provisions that this takes precedence over? In discussing the issue with Tam Cook who drafted this she indicated to us that she had repeatedly advised the Legislature two years ago that there was a potential problem with the amendment that you were considering and that was it's interplay with other constitutional provisions. In addition to that, I also did a fair amount of research on the issue of whether or not this could be accomplished in a letter of intent which was one of the other options that we considered in the House. The problem with doing that is that unlike a piece of legislation that the Legislature passes directly, this goes into effect by vote of the people. And courts in other states in addressing the issue of what was intended for a constitutional amendment have said what the Legislature intended to do is basically not persuasive when what you're talking about is what's in the voters mind. And again, the goal of the people in the House who considered this was to avoid litigation. To avoid having to go through the courts and go through the two or three or four year process of finding out whether it, for example, a geographically based subsistence preference were constitutional under this amendment. Since the clear intent of the people in the House was to give the Legislature the latitude that it does not now have under the McDowell decision. They felt that it was cleaner, more honest and more straightforward to simply set that out in the constitution.

SENATOR KERTTULA:

Any questions of that? Yes, Mr. Attorney General, we've been discussing, essentially two resolutions. What they mean and how they may affect the legislation now before us submitted by the governor. They're both a constitutional amendment provision. Lance, you have the floor. Mr Nelson.

MR. NELSON:

Thank you Mr. Chairman. I guess I would like to point out

that we've been talking about how these amendments will supposedly authorize the Governor's bill or rural preference and other things. But I just jotted down a list of the kinds of preferences that they would also authorize in addition to the ones that you're talking about. It would authorize rural preference. It would authorize -- it could be argued that it authorizes Native preference. It could be argued that it authorized an urban preference, or [indisc.] rural preference. Very small community size, a sports hunting and fishing preference, trophy hunting preference, need -- having grocery stores within a certain number of miles of your home, guided hunter preference, or a strict income preference. They authorize a lot. To the extent that we need to overrule the other common use and equal access provisions of the constitution and that's really the only purpose you're having then. They would have the affect of authorizing -- as long as you were talking about similar situations with relationship to the resource, they would authorize a very wide ranging -- Legislature can involve very wide ranging kinds of preference.

SENATOR KERTTULA:

You have the floor.

UNIDENTIFIED SPEAKER:

Mr. Chairman. I would suggest that that's slightly overstates the case. Let's assume that Article eight dealing with natural resources had never been included in the Alaska constitution to begin with. Not every state has a natural resources article in their state constitution. The drafters, Lieutenant Governor Coghill and others thought it was appropriate for Alaska. And they made that decision. But it didn't have to be that way. If it did not exist, the Legislature under the equal protection clauses can discriminate and it does discriminate all the time on the basis of any criteria. And I'm speaking generally here, and there are exceptions to this. Under the basis of any criteria that when somebody looks at it, someone would say that those criteria are rationally related to the achievement of the legitimate purpose for legislating. Or in the case of the state

constitution, bear a fair and substantial relationship to an acceptable legislative end. So to say that it is somehow on policy ground objectionable to be discriminating between Alaska residents on the basis of any or all of that list that Mr. Nelson just jotted off, the answer is they can on the particular facts at hand that whether or not it is reasonable for you to have discriminated using those criteria to achieve a particular, otherwise legitimate end.

Now then, we come all the way back into Article eight and Article eight changes that by saying that with respect to fish and game and fish and game only, for some reason in the opinion of the majority of the Alaska Supreme Court and again Lieutenant Governor Coghill and the other members of the constitutional convention did not intend that geography would be able to be used to discriminate between Alaskans with respect to hunting and fishing. I mean, you do that -- this body just passed a bill during the regular session that the Governor signed. It set up a small business loan program for people that live in small communities in our state. I live in Anchorage. I can't -- if I wanted to start a small business, I can't do that. Because Anchorage, the community in which I live is above the limit in your legislation. You discriminate all the time in favor of where particular Alaskans live to advance particular legislative ends. And it depends whether that's appropriate. And it's just this unusual wrinkle about Article eight of the changes with respect to hunting and fishing opportunities only.

SENATOR KERTTULA:

Senator Halford, are you seeking the floor?

SENATOR HALFORD:

Thank you, Mr. Chair. Just to get back to Mr. Mitchell, then. You're saying that under the current constitution, there clearly could be a constitutional preference and I'm not advocating that every moose become a twelve-hundred pound [indisc.] stand but that there could be, in fact, a direct preference for subsistence based on need and be totally constitutional.

MR. MITCHELL:

I think the short answer to that is yes. And then part (b) of the McDowell case which I view as a gratuity, an advisory opinion that perhaps the court felt a little guilty about causing all of this trouble in part (a) that it said, well, now that we've wrecked the system. Let's give you some hints as to what it can do something new might pass our muster. They go on at some length in part (b) to at least hint that yes, if you want to, in your policy judgement, if you believe that is what this is about well that there is nothing even in Article eight that would preclude you from establishing such a system. If that's your policy assessment of what the point is here.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir, you have the floor.

SENATOR HALFORD:

A follow up question. I think it would probably be the House Judiciary Council because I can't figure out exactly how ...

SENATOR KERTTULA:

Could the Attorney General comment on that too at this time before you [indisc.].

SENATOR HALFORD:

Yes, Go ahead.

UNIDENTIFIED SPEAKER:

That doesn't work.

SENATOR KERTTULA:

Please do.

ATTORNEY GENERAL COLE:

Well, Mr. Chairman, I would like to say that is the very reason that I am firmly of the view that the Subsistence Advisory Commission's proposed legislation is constitutional. I mean for that very reason as Mr. Mitchell has just said. And I'm pleased to hear that he agrees with me on that score.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

I'll let you comment in ten words. No fistfights.

MR. MITCHELL:

At the risk of taking the risk of joining the debate with the Attorney General, I would just say for the record that that part of the Governor's bill -- it's not [indisc.] that has caused the concern about constitutionality. If the presumptions and all these standards approved and all the rest of it were out of the bill, and all we had was an individual eligibility system that is described in the Governor's bill then there are some problems I won't bore you with about whether or not those are constitutional enforced with individual standards. But if we give the Governor his due and say that they are, well, then that certainly would look a lot like what's in part (b) of the McDowell case perhaps. But that is not the concern. The concern is that the administration these presumptions are just an administrative housekeeping situation and there are a lot of us, with all due respect, that really think that's being somewhat disingenuous and really handing out substantive rights based upon where particular Alaskans live. And you don't have to decide whether the Attorney General is right about that or I'm right about that. But I think that your own lawyers have indicated that they have a substantial concern that my side of the table is right about that. But it's not the individual eligibility criteria in the Governor's bill.

SENATOR KERTTULA:

Does the Attorney General wish to speak to [indisc.]

ATTORNEY GENERAL COLE:

Yes, sir, think maybe most of us are familiar that the Legislatures frequently shift burdens of proof and most of us, I think, are familiar with the classic one in the Internal Revenue Code which puts all these burdens of proof on the taxpayer. That's a classic illustration of shifting of the burden of proof. Also we have in courts of equity, shifting of burdens of proof by standards of clear and convincing evidence. Those of us who are

forced to read the opinions of the Alaska Supreme Court on a weekly basis, are highly familiar with the shifting of burdens of proof based upon different circumstances. And I've been of the view that there is a fact related basis for shifting these burdens of proof. It's clear, I think, that in the rural communities most of the people who live there or are residents there, are subsistence users. And then as you drift farther away from local residency and accrue under twenty-five hundred population communities, the number of subsistence users who live in those communities lessen. And therefore consistent with that or concumbant with that is the burdens of proving subsistence use increase. If the law is common sense, those changes in the burden of proof will be upheld by the Alaska Supreme Court clearly.

MR. MITCHELL:

Mr. Chairman, just very briefly. As the Attorney General was delighted that I had agreed with his argument, I am delighted to say that the argument that he just gave you about why his rural presumption is constitutional is almost exactly the arguments I made to the Alaska Supreme Court as to why the rural priority was constitutional and lost.

SENATOR KERTULLA:

I would like to [laughter and applause] ...

ATTORNEY GENERAL COLE:

There is a considerable difference between the granting of substantive rights of subsistence use as pointed out clearly in Justice Matthews' opinion and Justice Rebenowitz [ph] descending opinion in McDowell. And burdens of proof and presumptions because those are far less protected rights under the constitution. Thank you.

SENATOR KERTTULA:

I would like to recognize the newly appointed to the Department of Natural Resources Commissioner Glen Olds. Good to see you here, Glen. Probably the first time he's been before the Senate. You have the floor.

SENATOR HALFORD:

Thank you, Mr. Chairman, just in coming back to this issue for one thing, because I think we're getting off in an area that [indisc. - cough] subsistence. And I'd like to ask the Attorney General which members of the Governor's subsistence panel were those who consistently fought for, encouraged and supported the provisions of a different standard of proof and the presumption? Were they the rural members or the non-rural members?

ATTORNEY GENERAL COLE:

I think I should properly defer that to Mr. Campbell.

SENATOR KERTTULA:

McKie, you may respond to the question that's been asked.

MR. CAMPBELL:

Mr. Chairman, Senator Halford, the rural members wish to have an irrefutable presumption at the smallest level with no ability for the state to rebut at any point. I believe that it was the Attorney General who offered the idea of clear and convincing which is a higher standard of proof which they did [indisc] instead. I should be very careful except agree to include in the draft though I don't think any of them were chosen that on their own.

SENATOR HALFORD:

Mr. Chairman, it's just inconsistent to argue that the Governor's bill is unconstitutional based on specific provisions that the same advocates are arguing that it's unconstitutional - argued for, worked for and tried to keep in there through the entire process. That is what is hard for me to sit here and take. Because that's what happened. The other side of the issue didn't want those differences. The Attorney General finally had to come back and say and absolute prohibition is probably going to be unconstitutional. So they went as far as they could constitutional go to accommodate the rural interest in that group. And now the same interests are coming back and saying because they went as far as they were asked to, the bill is now unconstitutional. That's an inconsistent argument.

MR. MITCHELL:

Mr. Chairman, if I could respond briefly.

SENATOR KERTTULA:

Yes, you may respond.

MR. MITCHELL:

I always thought I wasn't a particularly welcome guest, I don't think at least in my own mind to those proceedings so I could not attend many of them. However, I think there are two observations to be made about Senator Halford's last comment. First, ...

SENATOR KERTTULA:

Thank you, Ms. Otto. Thank you. Excuse me for interrupting.

MR. MITCHELL:

I know everyone really dislikes ...

SENATOR KERTTULA:

Mr. Chairman, Ms. Otto.

MS. OTTO:

Yes.

SENATOR KERTTULA:

He has one quick question he'd like to ask. I wonder if you could wait through Mr. Mitchell. Is that okay? And anytime you need him we'll send a learned senator down to consult with you [indisc.]. If you could sit for a moment and let Mr. Mitchell finish and then I'll ...

MR. MITCHELL:

Mr. Chairman, I'll finish quite briefly.

SENATOR KERTTULA:

Thank you.

MR. MITCHELL:

I just wanted to say that first of all I know nobody likes to hear it, but there was no member of that commission that was an attorney. People of good will can have very useful policy views but it does not mean that at a technical level those policy views can be legally accomplished. And it is unfortunate that that was the situation. This was a bill that was drafted by a group of lay people and I know I don't want to pull rank, but these are -- just

from your discussion today has shown these are very complicated legal and constitutional issues.

Secondly, I have been informed before Mr. Campbell responds that among the other instructions is that they were supposed to ignore ANILCA and they were supposed to ignore the constitution and just come up with what was a good bill. And now we find that a bunch of lay people who tried to do that are now being run up the flag pole as constitutional law experts that somehow are offering inconsistent arguments. But as I say, I was not present. If this is a matter of actual concern that is going to turn the Senate's decision making, I would suggest that we get the members -- that you consider getting the members of the Commission up here and ask them how all this came down, if it's that important.

SENATOR KERTTULA:

Mr. Campbell and then we'll ask -- we have to move right along.

MR. CAMPBELL:

Mr. Chairman, this is a very brief comment. It is correct to say that none of the nine members of the advisory council were attorneys. I would say however, that at every meeting we probably an attorneys who outnumber the participants out around the edge of the room, and I don't feel that there was any member of the council, particularly any of the rural members who were [indisc.] by lack of counsel at any point during the proceeding.

SENATOR KERTTULA:

I had heard that everybody was pretty happy until one of the distinguished counselors said -- the results were fairly happy until distinguished counsel came forward and turned them all around again. You have the floor.

UNIDENTIFIED SPEAKER:

Yes, Mr. Chairman. I was wondering through the chair if Mr. Campbell could clarify my information about whether or not the members in terms of their marching orders were repeatedly told not to worry about compliance with ANILCA and not to worry about the constitution.

SENATOR KERTTULA:

You may respond, Mr. Campbell.

MR. CAMPBELL:

That was the Governor's initial instruction? And that was correct. There was a number of members stated throughout that stated that they were worried either about ANILCA or the constitution. One or the other. The Attorney General came up with the specific language that we're discussing. And I believe then we discussed what may or may not be [indisc.].

SENATOR KERTTULA:

I'm going to be abusing the privilege of the House if I don't let the Senator ask Ms. Otto and then she has to go on her way. So please direct there and then we can go back to ...

SENATOR HALFORD:

Thank you, Mr. Chairman, appreciate your staying for the question. I'm trying to figure out the application section. We've talked about the House constitutional proposal having precedence over any inconsistent provision in section three which I [indisc.] but it also goes on at the end of that sentence and it says, "and section one of Article one". Now section one, Article one is titled, "The inherent right section" of the constitution. And that includes equal protection. But it also includes the core or the declaration of rights [indisc.] would be in the U.S. Constitution, I think. It's the declaration of rights here. It's the Bill of Rights and the U.S. Constitution. But it includes the natural right to life, liberty and pursuit of happiness and enjoying the rewards of their [indisc. - cough] and then it goes on "and all persons are equal and entitled equal rights and opportunities in protection, liberty and law". It seems like you're saying that this provision will supersede all of section one, Article one declaration of rights of the state constitution if I'm reading this correctly. Isn't that an awful lot more than you need to say?

MS. OTTO:

Mr. Chairman, Senator Halford, once again you may have proven

yourself to be a better drafter than all of the lawyers combined. One of the reasons for referring to equal protection in the parenthetical after section one was to make it clear that it was only that provision of section one, of Article one that was being affected. After you pointed this out to me, I think a better way to draft it would be to say, "and the equal protection provision in section one of Article one". I think that's a drafting matter rather than a substantive matter. The clear intent of the House was to limit it to the equal protection provision.

SENATOR KERTTULA:

Thank you. Thank you very much.

SENATOR COTTEN:

Mr. Chair?

SENATOR KERTTULA:

We charge \$150 an hour for this right here. [laughter]

UNIDENTIFIED SPEAKER:

How come your so cheap?

SENATOR KERTTULA:

You have the floor, Senator Cotten. Somebody else seeking the floor? Okay, you have the floor, Senator Cotten.

SENATOR COTTEN:

Well, I wanted to explore a different angle on this. There's been some discussion about the so-called limited entry approach. And if you'd rather exhaust this approach before we start on that one, that's fine with me. But if not, I'd like to bring that up now.

SENATOR KERTTULA:

Is there anything -- preferences? Please proceed, Senator Cotten. I presume nothing keeps us from going back if necessary.

SENATOR COTTEN:

Right, so maybe we can get some sort of response from the people that have been studying this. I haven't been but I understand that one approach could be to go to Article eight, section three, Common Use, which was the section, I believe, the court struck down our previous law. And include after the first

sentence, a section that would say or a sentence that would say, "this section does not restrict the power of the state to give a priority for subsistence uses." And I'm not sure what else to say. I mean, when you look at the limited entry section that talks about "for the purposes of resource conservation" which I don't believe applies here. Or "to prevent economic distress among" and in those case it would be "those dependent upon them". And I'm not sure that's necessarily the reason for it. So I'm trying to understand what people's thinking has been along those lines. And maybe that's the way to go. To say that "this section does not restrict the power of the state to give a priority for subsistence uses" period. And I'm not sure what the heck that really accomplishes .

MR. MITCHELL:

I guess, I would have several comments. First, while the common use clause, section three has gotten a lot of air play in this state, in a technical sense although they really don't spend a lot of time doing it, the McDowell opinion indicates that the court believes that in addition to section three, that independently section fifteen and seventeen, I believe, also separately can validate the authority of the Legislature to have the rural priority. So if, in fact, the policy choice was to have a constitutional amendment that would give back the authority for a rural priority as Ms. Otto did in her drafting, you have got to make it clear that you are reversing the McDowell interpretation with respect to all three of those sections. Not just section three. So Senator Cotten, if you have your fix -- I'm assuming that that fix where otherwise appropriate it would be my technical advise that it would not be in section three. It would have to go in a separate section.

The second observation I have is that while they do not spend a lot of time detailing the reasoning, at least to my satisfaction, they indicate that a rural priority in their judgement violates section fifteen, right? Is that the exclusive right of fisheries?

UNIDENTIFIED SPEAKER:

Uh-hum.

MR. MITCHELL:

And that already has the language that you're talking about in it.

SENATOR COTTEN:

Correct.

MR. MITCHELL:

I don't understand how -- again, in a technical sense, putting back in language that it's already in a section that the court has indicated that it doesn't think allows the rural priority, would then allow a rural priority.

SENATOR COTTEN:

Well, I'm not necessarily saying -- Mr. Chairman, if I could just banter back and forth here. I'm not necessarily saying I'm trying to accomplish making rural preference constitutional. I'm trying to maybe see if this wouldn't make the Governor's bill constitutional. Maybe you'd have to say, "this section does not restrict the power of the state to give a priority for subsistence uses to those dependent upon them."

MR. MITCHELL:

Well, that goes back -- Senator Cotten, Mr. Chair, back to discussion the Attorney General and I were having about what is the component of the Governor's bill that gives those of us that think that it's unconstitutional the grounds for thinking so. And it is our concern that if the presumption based -- the Attorney General is right. You and the Congress use presumptions all the time, but you don't necessarily use them all the time using where you live as the reason for handing them out. And the Attorney General indicates that in his view these presumptions do not distribute substantive state benefits. And if that's true, maybe he's right. It is our view that these presumptions with their shifting burdens of proof and all kinds of other stuff and that's all a smoke screen and these presumptions are the heart of the matter and give out hunting and fishing opportunities based upon

where you live. Which is really another way of having a different kind of rural priority.

SENATOR COTTEN:

But this would accent the final four words "those dependent upon them".

MR. MITCHELL:

Well, that raises then the question -- the Attorney General just argued to you as I indicated, not facetiously, exactly the same arguments that I made to the Alaska Supreme Court. That the rural priority was actually a needs driven priority because a reasonable person would know that as a policy matter, people that live out in rural Alaska individually, if you look at them, need fish and game more than people like you and I.

SENATOR COTTEN:

More than.

MR. MITCHELL:

Right. And that's a legitimate basis for discriminating between Alaskans. I lost that argument and that's why I, having been once burned, it's difficult for me to line up behind the Attorney General when he makes the same argument, in a slightly different context, in support of his own classification system. So I guess, what I'm saying is you don't have to resolve that argument between the Attorney General and myself, but ...

SENATOR COTTEN:

Well, it's not an absolute either. Because of the rebuttal presumption. I think that's what changes it.

MR. MITCHELL:

That is an opinion as to whether or not the presumption is a grant to substantive rights or not. And that's what the lawyers who tell three members of the Alaska Supreme Court will tell us if you enact that statute, we can argue that with a straight face back and forth as long as people have the patience to listen to us. Which hope is not forever.

SENATOR COTTEN:

Maybe another view.

SENATOR KERTTULA:

Are there other view of this statement? Attorney General, please.

ATTORNEY GENERAL COLE:

I would like first couple comments about prior discussion. I sat in on a good many of those committee discussion sessions and I must say, I certainly did not sit there speaking to the assembled group and saying, "don't worry about whether this bill complies with the Alaska Constitution. We'll just go ahead and do it anyway". I mean we weren't that foolish. We were concerned about whether this proposed legislation that we were working on did comply with the Alaska Constitution. And there was lengthy discussion on that subject as well as lengthy discussion on the constitutional validity of these presumptions. So, so much for that.

But, with respect to section nineteen, I sound a note of caution, we're here this afternoon talking about ...

ATTORNEY GENERAL COLE:

Pardon me?

SENATOR COTTEN:

Section nineteen.

ATTORNEY GENERAL COLE:

Section nineteen here. Formulation of a constitutional amendment. One which would endure in this state for years to come and we're wondering around I think. The discussion is ... [tape ends midspeech].

Tape 92-15

Side B

[Tape begins midspeech]

ATTORNEY GENERAL COLE:

... there is so many ramifications that are attached to a constitutional amendment of this magnitude that I think really requires legal research, legal analysis, thought, care in drafting, before we in the administration in the Legislature address or decide upon the terms of a constitutional amendment to

be presented to the electorate. I mean it's just much, much too fast and certainly not -- I mean there simply isn't enough time to give the proper analysis to something of this magnitude in our constitution.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTULLA:

Yes, sir.

MR. MITCHELL:

As Mr. Lenzini who practices in Washington D.C. and Senator Pourchot who has worked on the hill knows it is a time tested suggestion from members of Congress who do not want decisions to be made to suggest that we were making a decision that the Congress enact a statute that creates a study. To say at this late date that what this issue needs is yet more study, with all due respect, I do not find a persuasive argument against action. I think to bluntly rephrase the issue, when all is said and done, the policy issue before the body is, does the Legislature want to give itself the authority to enact a statute that complies with ANILCA? Either the Legislature as a policy matter wishes to do that or it does not. If the Legislature wishes to do that, the way to do that does not require more study. It does not require legal research. The Attorney General and I are [indic] body I'm sure could agree on a text in a few moments that would give you that authority. That is the heart of the matter, it seems to me.

SENATOR KERTTULA:

Twenty member judiciary recognizes the Attorney General, one more time.

ATTORNEY GENERAL COLE:

I want to say thing very quickly. For example, this proposed constitutional amendment says in section nineteen, "based upon criteria consistent with the equal protection requirements of the Constitution of the United States". Now the Alaska Supreme Court has drawn very sharp differences between the scope and the protection afforded by the Alaska constitutional equal protection

clause and the federal constitutional equal protection clause. And, in fact, the Alaska Supreme Court has said repeatedly that the equal protection requirements in the Alaska constitution are more strict than those in the federal constitution. So I point out to you and without being flippant, I say, who knows sitting in this body what really the basic criteria of the equal protection requirement of the United States constitution are today with this ever shifting ground before the U.S. Supreme Court and how they differ from the equal protection afforded by the Alaska Constitution. And that's just an example, of why I say these things are not to be lightly taken. And I'm not stalling. I'm simply saying that those are the sort of things that I think require a lot of careful thought and analysis. Thanks.

SENATOR KERTTULA:

Senator Cotten.

SENATOR COTTEN:

Could I get the Attorney General to respond to the other proposition. Mr. Mitchell gave a response. This business of adding something to either section three the common use, or whatever it was necessary to suggest that the section or maybe even the whole article doesn't restrict the power of the state to give a priority for subsistence uses to those dependent upon them. I heard off the record, people say it might bullet proof the subsistence council's bill. Do you see any danger in that direction, that language?

ATTORNEY GENERAL COLE:

Senator, it just points out what I've been saying to make a response here when you don't see that in writing. Give an opinion or off the cuff response is just too dangerous. I would like to see it written down carefully, study it, see where it fits in and then give almost no more than an offhand response. I just don't think it can be done myself. I wouldn't want to do it.

MR. MITCHELL:

Mr. Chairman?

SENATOR KERTTULA:

You have the floor.

MR. MITCHELL:

On a related matter for the committee's information, the Attorney General's remarks about the federal equal protection is somewhat unclear as to whether or not the rural priority would pass that. That I'm sure the committee that it's worth bringing back on the record that we are presently litigating that issue right now in what's known as the McDowell II case up in the United States District Court in Fairbanks. The plaintiffs in that case have alleged not the state's subsistence law, but that the ANILCA, the federal subsistence rural priority classification among other things, violates the federal protection clause. That's going to get litigated regardless of what this body does and if you were to adopt a constitutional amendment and enact a statute to comply with ANILCA if the court should decide that ANILCA is a violation of the federal equal protection clause, well that's the end of the matter. We obviously do not believe and the department of Justice does not believe, for a variety of reasons too much to go into unless you'd like to hear them, it would take -- I'd be happy to go into them -- that that's going to happen. Nor did the last Attorney General, I don't know what Attorney General Cole's view is but that is -- the reason I bring it up is that is at issue right now.

SENATOR KERTTULA:

Saying if we change ANILCA and ANILCA is thrown out, everything we've done is thrown out.

MR. MITCHELL:

Right. Then you're back -- everybody is back to square one.

SENATOR KERTTULA:

What is there progress of the case? I know you can never be sure but ..

MR. MITCHELL:

Well, there's a very -- I'm happy to give this report, Mr. Chairman, that case, what is filed -- I can't even remember when now. Everything is running together in my head, we've been at

this so long all week. But I guess last fall-- no, it was in the late summer or fall of '90 and then the plaintiffs were enthusiastic, to say the least, about rushing to a judicial determination of these very issues until suddenly Governor Hickel ascended to the third floor and suddenly the brakes were put on and the plaintiffs then spent the entire winter filing motions for continuances while they were representing to the court that at any moment the administration might be on their side. That took a year and then the matter was briefed. And the Judge Kleinfelt was advanced to the Ninth Circuit and the case was moved to one judge and then it turned out that that judge, Judge Singleton, had the minor problem of having to be a member Commonwealth North. He had written a book that discussed many of the legal issues and so it got moved to another judge and now the plaintiffs, I find it amusing are complaining that the case has not moved. So, the case is presently all briefed, it's ready to be argued and it's just a matter of Judge Holland putting it on the calendar.

SENATOR KERTTULA:

Are there further questions or statements? You have the floor, Senator Taylor.

SENATOR TAYLOR:

Thank you, Mr. Chairman. Invidious or cancer-like [indisc.] determination that has infected America from its very inception. Our history has been highlighted by [indisc.] has been recognized by our attempts to thwart out and eliminate that discrimination. Whether it was discrimination against [indisc.] whether its discrimination against blacks, whether its discrimination based on a person's religion, but whatever the discrimination was we have been known [indisc.] that people define discrimination to be totally obscene.

What we are talking about right now is modified and changing the single hallmark that has protected this nation and given us this reputation throughout the world for our entire history. I do not take it lightly. And I suggest that we should now discriminate as the United States government has based upon a

persons mere residence, I think opens the door for an opportunity that I would not want to see tried by this Legislature or any other. I can easily see where, in Georgia you could decide who would vote based upon the size of the community they lived in. Who would ride in what part of the school bus based on what size the community in which they live? I don't think this is a small matter. I would like, gentlemen and ladies in this panel, [indisc.] to comment upon whether or not ANILCA as passed by the U.S. government violates [indisc.] our constitution, that of the State of Alaska's equal protection provision. Does it violate the United States constitution's equal protection provision? And I hope you will not utilize the excuse, and I think it is an excuse, to label this as Indian law. That's a whole separate debate because we then do allow you to discriminate based upon whether or not it is Indian law. In fact, it is Indian law it would be allowed. Discrimination would be allowed and I understand that. Address instead [indisc.] .

SENATOR KERTTULA:

Mr. Mitchell, you do have the floor.

MR. MITCHELL:

First of all I guess as a preliminary observation as something of an amateur [indisc.] I would, with all due respect, disagree with your run through of American history. We discriminate all the time. We discriminate -- there are statutes that say that blind people are not eligible in this state to obtain driver's licenses, which is an important state privilege. To say that that discrimination is terrible or invidious is just simply untrue. It has a logical basis to achieve a legitimate governmental objective of not having blind people careening around in 60 mph in an automobile. We discriminate all the time.

Now what is true about Senator Taylor's statement is that in this country we have attempted with reasonable goodwill and uneven result to eliminate grounds for discrimination that the majority of our citizens believe are wrong. And certainly, prior to the Civil War, there was a whole variety of citizens of this country

that did not believe it was wrong to discriminate against people because they were black. Then we changed that. So what is a proper basis for discrimination evolves over time. Now with respect to whether or not discriminating on the basis -- between Alaska residents on the basis of where it is they live is a good or bad basis for discriminating is something I think about which people with goodwill can reasonably differ. But to say that it rises in a legal sense to the level of discriminating against someone because they are black, I guess I would, speaking only for myself, I do not think that's the situation.

At the risk of the first rule that Senator Taylor knows about practicing law in the courtroom is never ever regardless of provocation ask a question you don't know the answer to. But I would be violating that rule of taking the risk in the interest of entertainment if nothing else, I would be curious to know whether the Senator voted for the legislation that the Governor signed that I talked about earlier that established the small business loan program just for Alaskans who live in small communities. You voted for that. Well that is discriminating -- I cannot, if I want to start a small business and I want to apply for a loan, what those people are going to say are one thing. Don Mitchell, where do you live? And I say I live at the corner of 14th and F in Anchorage. And they say, get out of this office. You are not eligible for the loan program that Senator Taylor has created to help out those Alaskans who live in small communities. Now I'm not saying that your vote was wrong. I think it was probably a pretty good vote. Because we have a big bunch of problems in our local economies about which subsistence is an important component.

But the point is that we discriminate all the time in this State on the basis of where citizens live and it's just because of this Article eight problem that, with respect to the one area of state benefit which is handing out hunting and fishing opportunities, we find ourselves in the situation where you can't use that basis of discrimination to accomplish this governmental objective.

Now finally turning last to your question about whether or not I believe, personally, if these classifications are constitutional. I think, with respect to the federal test which I've described earlier and you're familiar with, I don't think it's a close question. Is it rational, not whether it's good public policy, but is it intellectually rational for the United States Congress after having toured the bush in 1977 for three and a half weeks and compiling a fifteen-volume hearing record, to conclude that people that live in the bush are just [indisc.] situated from people like myself when it comes to the need for fish and game. And I think that that is not a close question and that the answer to that is clearly, yes. That is a rational classification.

Now with respect to your second question about the Alaska Constitution, that unfortunately draws me into what I was trying to avoid which was discussing the Alaska equal protection text. And I would point out that in 1956 when the Lieutenant Governor Coghill and the other delegates put together the Alaska Constitution and they used the words "equal protection", the only equal protection test known to God was the federal equal protection test. That was it. Now beginning in the 1970's in a whole series of cases, they said on policy grounds, we don't think we like that because it doesn't give us enough authority to overrule policy judgments about classifications that this very body makes. And so they invented a new test. I have my policy views about the new test, but one thing I can say about the new test, whether it's a good idea or bad idea, it was not intended by Lieutenant Governor Coghill and the other delegates because it had never been invented in 1956. So how could the words "equal protection" in our constitution mean an entire elaborate intellectual construct that no one had gone to the trouble of thinking up. Well, what that test does, is it says, rather than a rational basis, we are going to decide how rational and how close we connect this classifications have to be based upon what we think the importance of the various rights that are

inconvenienced are. Now what that does is it means that any three members of the court who have an attitude about particular rights, or particular activities, basically, can decide what they think the value of those activities are and that decides the degree of supervision they will exercise over your policy judgements. Now the Attorney General - I was kidding him the other day when he was railing in the Daily News about the reapportionment case and how the judge's basically took over the role of the reapportionment Board. I told him that if he had struck out "reapportionment" and inserted "in lieu thereof" every time it appears the word McDowell v State it would have sounded exactly like me railing about the opinion in the McDowell case. So the answer to the state equal protection test, is I would agree with the Attorney General. I don't have a clue. It depends on -- Justice Moore [ph] has indicated that he thinks Mr. McDowell's opportunity to go catch a king salmon on the Kenai is constitutionally of the same magnitude as the right to travel interstate or the right to marry the person of your choice. Or almost to that level. I found that shocking. But he is the Justice. I'm not. So I don't know what the result is. But it's a problem. It's a big problem and it's a big problem because of the power grab that, with all due respect, I would suggest that the Legislature might someday want to -- particularly the judiciary committee, hold a hearing about and talk about it. It's not just subsistence. It's all your authority to classify.

SENATOR KERTTULA:

Are there further questions? You have the floor, Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chairman. I don't want to wind Mr. Mitchell up, so I would just say that reading from the McDowell case, I think the decision is far more limited than we all seem to take it to be. It just said, we hold only that the residency criteria used in the [indic.] was conclusively exclude all urban residents from subsistence hunting and fishing regardless of their

individual characteristics is unconstitutional. That's all that they said. They went on to say specifically that a classification scheme employing individual characteristics was exactly one of the examples they were using for a possible system. So the Attorney General's office and the task force reaches out and says, but we will accept some conditions that make it easier for rural residents when they put this classification scheme together and they come up with a bill. And now we're told the bill is unconstitutional. It's a compromise between the suggestion of the state Supreme Court and the advocates of subsistence that we have before us. And it works. It's far more constitutional than McDowell or than the previous McDowell case was. And it reaches as far as you can possibly go to get both sides. I think it's ridiculous to say that the very things that were asked for to try and help rural areas are now unconstitutional when they were suggested by the Supreme Court with the exception of the way they were applied, to simply make the system work without a paper nightmare to everybody in very small communities.

SENATOR KERTTULA:

Mr. Mitchell, if you wish to comment, you have the floor.

MR. MITCHELL:

The only thing I would say is that that is advocacy that makes statements of mixed law and policy and needless to say I could pick out the questions of law, but with all due respect to Senator Halford, I made this discussion on and off the record for years, that I would disagree with and with respect to the policy of -- I have my own personal views, but the policy arguments are really out of my brief.

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

Mr. Mitchell, do you agree that a system of individual classification would meet the state's constitutional test?

MR. MITCHELL:

I would say that to be slightly disingenuous, but I don't

know what the protection test of the constitution until Justice Moore and two other Justice's tell me. I have very little intellectual confidence in that. That having been said, I also believe that an individual test, and I don't want to say on the basis of the criteria in the Governor's bill, because I think that's a whole separate subject about how I feel about that on a technical level. But certainly an eligibility system based on individual criteria would seem to be the kind of classification system that as I said is a gratuity in part (b) of the McDowell case, the court indicated that it thought would be constitutional under Article eight, yes.

SENATOR HALFORD:

So the Supreme Court, in your opinion, or at least the majority, did say that an individual test would be constitutional?

MR. MITCHELL:

Well, they didn't say that. I don't want to split the hair too closely here. They certainly indicated that part (b) of the opinion, that they thought -- they expressed, of course, no opinion because an individual test was not before them. Which is why this whole thing was a gratuity. But they certainly indicated that they thought that if somebody wanted to present them with an individual eligibility system, that probably that system was going to pass muster, yes. But that system, of course, would not comply with ANILCA, then we [indisc.].

SENATOR HALFORD:

But that was not before them or not their concern?

MR. MITCHELL:

ANILCA or the individual test?

SENATOR HALFORD:

ANILCA.

MR. MITCHELL:

ANILCA was no more their concern than the individual test that had not been presented to them was of their concern.

SENATOR HALFORD:

But they came up with the individual test as an example of

something that would be a less invasive way to meet the purposes of protection of subsistence, is it not?

MR. MITCHELL:

They expressed no -- to defend the institution, they expressed no policy view about that. They merely said that if somebody who is in charge of policy gives us something like this then as the custodians of the constitution maybe this would be okay. That's all I would say.

SENATOR HALFORD:

I believe the exact words which they said, that's a good example of what would work.

SENATOR KERTTULA:

Are there further questions or further points of view to pose? Are there none? We'll be in recess for ten minutes.

RECESS

3:20 - 3:30 p.m.

SENATOR KERTTULA:

... I would ask the Sergeant-at-Arms and staff to search out the rest of the senators I think it's key that they appear now. There are those that already understood thoroughly the constitutional questions so they may not have been here for that period. The President of the Senate, there's one other area that you suggested that we approach more specifically the constitutional arena affecting [indisc.]. Will you please state that, try to keep it ...

SENATOR ELIASON:

Mr. Chairman, in order to examine all the propositions that we've had before us in the past and we have before us today, I think there should be some discussion, probably the strongest resistance we have to changing the constitution is to openings all state lands up to federal oversight, but in fact at the present time it's my understanding it's only federal lands are under federal oversight. That in itself created some problems for a lot of people.

However, on the other hand, it's my understanding if we only

pass a constitutional amendment and this bill or whatever other bill which would implement substitute program in, Alaska without addressing other problems, that we would, in fact, I think the term was we had gone two-thirds of the way. So I would like to examine the possibility of tying the whole package together, which, in fact, would give state control totally over all lands in Alaska with very little federal oversight. How we can protect subsistence and also do this. I don't know, but I think it's worth exploring. Rather than just off hand reject it by one side or the other. I don't know if there's a compromise position there. I understand this has been discussed at other times behind in closed session by members of both sides of this issue and they haven't been able to reach any consensus or agreement on that approach. However, that doesn't prevent us from discussing that maybe there is room to do something. I certainly would like to go home with everything tied together. I'd rather -- I think we all behooves us to get one third, maybe two thirds, or maybe all of it in one package. I think we have the ability to do that if we would make these concessions to each other. We all have a stake in this and I know it's a very emotional issue, but I for one, have probably lived in this state longer than most people in this room. I certainly want to [indisc.] I don't think we can polarize ourselves enough and not talk about all different aspects when there might be a possible [indisc.].

SENATOR KERTTULA:

Is Mr. Nelson available, McKie?

MR. CAMPBELL:

Sir, the Attorney General and Mr. Nelson are on their way.

SENATOR KERTTULA:

Thank you very much. Well to that end, I'm going to -- Don, you may wish to testify at this time. This whole area, of course, is pretty broadly opened up. If you'd comment, we'll start with that. Thank you.

MR. MITCHELL:

Certainly, Mr. Chairman. Senator Eliason, I think that the

issue that you've raised is an issue that I and others testified to yesterday to briefly review the issue which some members have identified as a problem. Is that under ANILCA if the state were to be in compliance with ANILCA then the Alaska Board of Fisheries and the Board of Game would again be the administrative body that makes all of our decisions about hunting and fishing regulations. So to that extent Alaska actively including the Board of Fish and the Board of Game would be regulating hunting and fishing everywhere in our boundaries.

Now if an Alaska resident believes that a decision that the Board of Game or the Board of Fisheries makes in a particular case is wrong, because that decision would not correctly implement the legal standards and the Alaska subsistence law which of course would be based on the legal standards of ANILCA, then in that kind of a situation under ANILCA that Alaska resident is given a choice. That resident can either if he or she wishes, go to the Alaska Court system and file an action in the Superior Court and request the state court judge to review the legality of that Board of Fisheries or Board of Game decision and to decide what to do about it if, in fact, the court looks at the record and decides that the Board was wrong. Judge Katz who is the state court judge did just quite recently when she was asked to do that in a state court case. She has [indisc.] for preliminary relief engaged in a variety of decision making that basically superseded the Board decisions with which she had legal disagreement in terms of the taking activities were in fact conducted. People sometimes do and sometimes do not have heartburn about that. We're not talking about this federal oversight that I'm always hearing about, well the courts are always managing our game. Well, the courts do that and that's the way our judicial system works. But in any case, certainly that Alaska resident can ask the state court judge to see if they've been mistreated. Now ANILCA also says that as a separate option, resident filing that lawsuit in state Superior Court that that Alaskan can go to the United States district court and file exactly the same lawsuit and ask the federal judge rather

than the state judge to review exactly the same legal arguments. That is not as I indicated in my testimony yesterday, either a novel or an unprecedented or indeed even an unusual thing for Congress to do to insure that it's policy choices are in fact quite correctly implemented. We do that with employment discrimination law. We do that with a whole variety of cases and where in which Congress has come in and set the rules of the road and the created a federal forum in addition to the state forum where a citizen believes that the law is not being correctly implemented. So that is the situation with ANILCA.

Now at a policy level, Senator Eliason, if you and other members of the Legislature believe that Congress's decision to create that federal judicial forum was a bad policy, then obviously the only way that we can remedy that is not to come to an agreement client [indisc.] on it, or with the Governor or anyone else. The only way we can deal with that is to request Congress to change the law to change ANILCA. And so unless Congress would be willing to do that, what this body might do in terms of this policy judgement about that initial of Congress is really with all due respect, really of no moment.

SENATOR KERTTULA:

Thank you, Attorney General for coming.

ATTORNEY GENERAL COLE:

Yes, sir.

SENATOR KERTTULA:

Please proceed.

MR. MITCHELL:

That raises the issue, first of all as to whether or not the Legislature as a whole believes that Congress made a wrong policy judgement when they included that section in ANILCA. And if -- and that' obviously your business not mine. But then if, in fact, you were to conclude that yes, we think that that was a bad idea and we'd like to see that alleviated, then you have to, I think, evaluate, the likelihood, really in terms of the planning purposes in terms of implementing public policy, the likelihood that

Congress would be willing to take this suggestion to heart, and in fact, do that.

While that is sort of off my brief, I do spend a fair amount of time in Washington, D.C. and I've worked with the authorizing committees of ANILCA for some time -- for a number of years. And I have no reason professionally to disagree with most of their, if not all of the testimony that's been given to the committee this week from Mr. Suberg who is the chief legal officer of the Department of the Interior and Mr. Wiggins the chief political officer for Alaska issues for the Department of Interior, from the congressional delegation from Senator Murkowski, from nearly anyone who operational on the ground is in play back there that that is really a very realistic possibility even if everybody in Alaska thought it was a good idea. I think I can fairly represent there are a lot of people in Alaska, in my client community for a variety of policy reasons who I think, with all due respect, would disagree that Congress made a bad choice. So even in the best of circumstances, it would be my professional judgment that it is a very, long stretch to believe that Congress would entertain reversing that decision even if you conclude that it's a bad one. But again, I obviously do not hold an election certificate in the United States Congress and my view of that matter is precisely what you paid for.

SENATOR KERTTULA:

Senator Eliason, you have the floor.

SENATOR ELIASON:

I'm not here to question one side or the other. I'm here to say that we can't get to that question and we don't have any other options. That's the dilemma we're in. Is that there are some very strong feelings on both sides of this issue and if we expect to get a constitutional amendment, that might be one way to do it. I don't know. But if you can't reach it through these other suggestions, this is another option. I'm not even sure that would work. But I think it should be talked about. I think there are some real concerns that -- the federal intervention -- we've been

through this before so I don't think anybody in this room likes management under feds. And I think that we should get out from under there. I think the first thing we should get out totally from under them. We've seen it every day. We see it more and more in other federal agencies in Alaska. EPA is a good example. We're just overwhelmed with federal regs and federal people coming to our state and telling us how to manage our lands when they don't know anything about to start with. To get out of that dilemma we're going to have to make some hard decisions as Alaskans to get them out. And we can't move them out unless we can come to some compromise allowing this [indisc.] to be fixed. And I don't know what the compromise is but we should discuss all the options.

MR. MITCHELL:

Senator, I just observed that I think a lot of Alaskans agree with you about that, but that again, part of the, I think, confusion about this is that there is a difference between the active regulating -- having federal bureaucrats coming up with the regulations on the one hand and having an opportunity for people to think the state bureaucrats who Alaskans believe that the state bureaucrats who have misbehaved by implementing a very important law, have the federal forum to make that argument. That's two entirely different things. Certainly, you're aware, probably better than anybody in this room, about how it was in the fishing in the old pre-statehood days because what you had was first the Department of Commerce and then the Department of Interior bureaucracies who were functioning as the Alaska Board of Fisheries. And I think everybody agrees that's a very bad idea. But that is different than having the Alaska Board of Fisheries managing our fisheries and then having a federal forum, a federal judge be available within Alaska. As I said yesterday, these are not people from other planets or even other venues. These are all Alaskans who believe that in particular instances that their Boards of Fisheries has incorrectly implemented the law in a way that they think might do some legal damage to their families.

Obviously, there are many people that don't believe that it is overly unfair for those Alaskans who think that to be able to make those cases in front of a federal judges, who are also, by the way, Alaskans. And I know that will, [indisc.] Mr. Lenzini to say yes, but then we go on the field to San Francisco and then we're off again on how much we all dislike San Francisco, although I was always fond of it when I was there. I'm not going to join the San Francisco faction. But so there we are. and it is a problem. I understand the issue but I think on balance, I know speaking for my client community that we believe that putting the Board of Fisheries back into the business of actually regulating Alaska's fisheries and the Board of Game back into the business of regulating all of Alaska's game, subject to federal judicial review solves the problem much more than the present situation where you have federal bureaucrats, of the federal subsistence Board, being the Board of Fisheries and the Board of Game and then you still have the same kind of judicial review you had that you find to be difficult.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Without the support of the Alaska Native communities, in your opinion, what is the chances of ANILCA to be opened?

MR. MITCHELL:

To amend ANILCA through the normal legislative process a bill to do that would have to be introduced in the House Interior Committee which is chaired by George Miller of California, of which Congressman Young is ranked a minority member. And move from that committee through the House of Representatives and then the Senate would then refer it to the Senate Energy Committee that is chaired by Bennett Johnston [ph] of Louisiana of which Senator Murkowski is a prominent minority member. And you then, of course, have to go through that committee and through the floor of the Senate and to be signed by the President. So that means as an opening proposition is a way of stating what is the likelihood

that the House Interior Committee or the Senate Energy Committee would entertain or even put on the calendar for discussion a bill to amend ANILCA if there were Alaska Natives and their representatives in the halls, basically saying that they think that is a very, very bad idea. It would be my view that the odds of that are really precisely zero. And that if, in fact, they were more than zero, if I would be completely wrong about that, then when you -- if nothing else got to the Senate floor, as Senator Pourchot and others know, one of the reasons that the United States of America is such a mess is that any senator who is displeased with any bill puts a hold on it and that's the end of the matter until that Senator is satisfied. And I think that there are many senators including Senator [indisc.] and others who even off the Energy Committee who are quite sympathetic to the concerns of Alaska Natives that led to ANILCA to begin with and I think it would have some very serious concerns about allowing a bill like that to go on the floor over, basically, the dead bodies of eighty-five thousand Alaska Natives. And I think I would have two suggestions. Neither of the people that I would refer you to are going to like my doing it. But certainly, my old friend John Katz [ph] who has been on the scene back there twenty-four-hours a day for almost as long as I have been visiting there who is the Governor and your expert on whether what I've just said is accurate. It might be worth getting him up on a conference call to ask him whether he disagrees with that assessment. And then I would also point out to the Committee that Senator Pourchot spent a number of years as the very distinguished member of the Senate staff of the Alaska congressional delegation and particularly in the Senate and he probably of all of you would be well positioned to enlighten us as to whether or not he believes my views are accurate. And those would be two ready references that I would suggest if you care to test my professional evaluation.

SENATOR KERTTULA:

You have the floor and then the President.

SENATOR ELIASON:

I just want to clear up this [indisc.] now. Believe me I don't think anybody at this table or in this room or even in this state would pursue it without the support of the people who are being effected by the subsistence so that's totally out of the question. We're talking about a compromise which we all think will [indisc.] we're searching for. We're not, at least this Senator, is not planning on [indisc.] anything.

MR. MITCHELL:

Senator, I understand that. I would just responding to the question was if that were to occur, what would be the situation. I don't think anyone would [indisc. - simult. speech].

SENATOR KERTTULA:

... work this in to compromise rather than the extreme. Senator Adams, and I'm speaking to Senator Adams.

SENATOR ADAMS:

Even though I'm against opening up ANILCA, if it had to be opened can it be to a specific item in ANILCA or would that open up the agenda? Just like the memo of Cheri Jacobus and [indisc.] constitutional amendment that would stop or hinder economic development. Can I say that if it was an open agenda and perhaps throw out scare tactics, just like the administration, that the environmental groups would look at locking up Alaska and also that the would hinder this administrations economic development or perhaps the anti-hunting and trapping groups would be looking at stopping that Alaska, perhaps my mining friends in Alaska that would stop that also. Is that a possibility when you look at opening up ANILCA?

MR. MITCHELL:

Senator as you and the other members are aware what a bill to amend ANILCA, even just to eliminate the one section that Senator Eliason has expressed concern about -- what that bill is in your business is a vehicle. A train that is on the road and leaving the station. And once it starts and every time it slows down in those little small town places where they dump off the mail, if there are people standing there who would like to climb on Board,

they can certainly do that. And I've certainly seen that calamity befall many of your worthy projects and the only thing that would restrain that would be germane restrictions with respect to legislation that appears on the floor of the bodies and I and not a departmental expert with respect to that particular level of the legislative process in Washington. I would think it fair to say that pretty much a bill that amended one section of ANILCA would find amendments relevant to amending any other section of ANILCA to be well within order. And so in theory if there were citizens or interest groups or economic factions that had the aspirations that you describe in your question, this obviously would be a vehicle for them to explore the likelihood of achieving those goals, yes.

SENATOR ADAMS:

If there was a package that we could put together and I don't know if that's a possibility, we in the Native communities would like to vote on a constitutional amendment of course with the Bush Caucus legislation. Is there anyway that we would touch on ANILCA if there was a package with the administration?

SENATOR KERTTULA:

What are you saying, Senator?

SENATOR ADAMS:

Is there any way that a compromise can be reached even though we know the facts that ANILCA cannot be opened?

SENATOR KERTTULA:

Is it appropriate for him to speak for the administration for instance on this subject. He's an advocate for a particular group and their positions and as knowledgeable as he is there would be other comment area, I think to this. You're welcome to participate.

MR. MITCHELL:

I guess that was going to be my answer, Mr. Chairman. That obviously ... [tape ends midspeech].

Tape 92-16

Side A

[Tape begins midspeech]

MR. CAMPBELL:

... is whether it is better to have one portion something less than one fourth under the management of the federal government for purposes of subsistence and have them also be able to regulate for other uses to the extent that it affects subsistence. I'm talking basically about the [indisc.] a very small percentage of federal lands. While pertaining to while complete and total state control without any federal interference whatsoever, over about ninety-eight percent of our fisheries and slightly under half of our game. Or whether it would be better to assume management in name the day-to-day management - but have a situation where any decision at any point on fish and game, either by the department or by the Boards at any time someone felt it adversely affected subsistence, they could go into federal court with deference whatsoever to the state agency, just simply what do they think? Rewrite it.

And if I could, I guess I would like to defer briefly to Mr. Nelson just to talk again briefly about that issue of judicial oversight. I distributed to you a memo by Mr. Nelson on that subject.

SENATOR KERTTULA:

You may have the floor, Mr. Nelson.

MR. NELSON:

Thank you, Mr. Chairman. I won't take a lot of your time. I think you've heard my comments yesterday and now have a written copy then. My memo contains references to a couple of cases where I think we've gotten [indisc.] largely because of their unfamiliarity and lack of contact with the State of Alaska. And I don't think anybody can predict that the decisions are necessarily going to get any better as time goes on. I pointed out that we have one judge, Judge Kleinfeld [ph], and then we have a senior circuit judge, Judge Boocheveer [ph] who from time to time might participate in making decisions, but generally we have one judge out of 28. Half the judges on the Ninth Circuit are

from California. Judge Stavinski [ph] has written -- for some reason has ended up on the panel of two major subsistence decisions and authored both of the majority decisions at least in both of those. He's from Pasadena California and unfortunately there weren't copies made of the two decisions, but we'll get those to you that I refer to in here. I think just reading through my memo and looking at those opinions will give you a good feel for the kind of results we can expect from the Ninth Circuit. I guess my concern is regardless of what you do with anything [indisc.], it's still going to be a problem. McKie is right. It is your policy decision at this time which [indisc.].

SENATOR KERTTULA:

Attorney General, I think you wish the floor for a moment here.

ATTORNEY GENERAL COLE:

Mr. Chairman, I just want to say if you want to trust your faith to one of these learned jurists in the Ninth Circuit, you should first read what he says about how clearly people know what the word "rural" means. You will see on page three of this memorandum that Judge Kasinski writes that "the term rural is not difficult to understand. It is not a term of art. It is a standard word in the English language, commonly understood to refer to areas of the country that are sparsely populated or the economy centers on agriculture or ranching." Now we know how much Judge Kasinski knows about the rural areas of Alaska when he writes that. So frankly it gives me the willies.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

Yes, Mr. Mitchell, you may -- we've had a lot of attention so we don't want too much.

MR. MITCHELL:

I have my own views of Judge Kasinski, a well known Reagan Whitehouse staff person before his startling elevation to the Ninth Circuit. But I do think in terms of considering your

policy, the lemon here, I as you know, have been involved in the subsistence issues for many, many years and I've certainly been involved day-to-day since the McDowell came down in December of '89 and it is only really this time around the block that suddenly I find that the policy argument is out of the blue that the reason it is better to have the federal subsistence Board managing game is because it's a monsters of the Ninth Circuit live in Pasadena California. The Ninth Circuit has the scarecrow leaping out of the closet is a policy concern. And as I said, I have my views on Judge Kasinski and overriding, and I think the Attorney General and I over a cup of coffee would agree. I'm very much in my old age, a judicial conservative, as hard as it is to believe.

MR. CAMPBELL:

I'm was getting a little worried there, now.

MR. MITCHELL:

But be that as it may, I mean as the Attorney General knows, the State of Alaska litigates in the U.S. District Court in the Ninth Circuit, day in and day out. It's a normal matter of business. I don't know why it is that with respect to all subject matter under this subsistence, it is not an act of judicial terrorism for there to be a Ninth Circuit, but with respect to this particular issue, this is such a terrible calamity that we continue to have dual management. As I said, maybe there's something I am not aware of here, because as I said, this is an argument that has just appeared in the lengthy record of the subsistence debate.

SENATOR KERTTULA:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

Mr. Chairman, I've heard so many words, my ears are ringing and not necessarily with joy. We've got a ferment in this country over what people feel is the lack of leadership and ability to solve problems and we jolly well are faced with that right now. What is tragic to me is the lack of faith and trust that we've got and I'm not lecturing. I'm saying this to myself and each other,

I think the lack of faith and the ability to come together and forging unified approach. I think it's true. I don't think there is one here. I guess I'd like to know why and we really haven't had that explained to us, why did the negotiations that I understood were going on between AFN which is a very influential spokesman for the main people behind the subsistence issue and the Attorney General or whomever breakdown. Why are we here today unable to advance? All the words you say do nothing more than just add an explanation point to what everybody already knows. We've got a breakdown in our ability to come together to what is perhaps the most important issue before this state. It's going to tear this goddamn state apart if we don't solve it. So we're all here with our words to say why we're where we are, which is separate. Why did we not find a way to move forward?

SENATOR KERTTULA;

Would the Attorney General or the Department of Fisheries like to comment?

ATTORNEY GENERAL COLE:

I'll respond to that, please, Senator. Where it broke down was in my view that the AFN said we will not take one whit less than our ANILCA guaranteed rights, period. And the administration said that's just not acceptable. You have to come off every singular ANILCA right or we won't get it done. And AFN was unwilling to do that. And I said, you know, that's not the way to get this done, insisting on keeping everything you have. So that's what happened. That's my version. Now there may be another version, but I must say, I have a vivid recollection of being told that.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

MR. MITCHELL:

I'm way out of the end of my league. This is the subject matter that President Kitka and others could better address than

I can. Taking that risk I'll just report at least on my recollections. I participated in a number of those meetings with the Attorney General and others, and with all due respect that is not at least -- does not correlate totally with my recollection of events. That the goal from the very beginning here has been to enact a constitutional amendment that would give the Legislature, if it wished to do so, the authority to enact a statute that would comply with ANILCA. Either the Legislature wishes to have that authority or it does not. And as I indicated earlier, if, in fact, there was the will to do that, I have every confidence that Mr. Cole and I could come up with a text that does that quite quickly. In fact, a number of the texts that have been circulating this afternoon, do that very easily.

When we met with the administration and the Attorney General, we indicated repeatedly that our primary goal was to come up with a constitutional amendment text that would achieve that goal. We took, during the course of those meetings, several drafts of language. I mean no one was committed to anything. But this was a very cool situation. People of goodwill trying to see what they could work out and we cobbled some text together that was based on some of the language that had been given to use by the administration that we thought was actually headed towards achieving that goal. And we walked out of that room that day and thought that maybe Senator Sturgelewski's hopes had been realized and that we were at least headed together down a road as opposed to not going anywhere and the next day when we reappeared it was the Attorney General and the Administration that took that language off the table. Once that language went off the table and we asked repeatedly that it not be off the table, there obviously was -- you cannot negotiate Senator Sturgelewski, as you know with yourself. There has to be someone else.

SENATOR STURGELEWSKI:

I've tried a lot.

MR. MITCHELL:

You at least have to agree on the goal that both parties have

before you can explore differences of opinion as to how to achieve that goal. I don't mean to second guess the administration for taking that off the table. I'm just saying that it reflected that in retrospect that they had serious policy concerns, obviously, about whether or not they agreed with our goal, which obviously we have brought to you again here this week, which is that we believe it's in the best interests of the people of Alaska to have their constitution, grant you the authority should you choose to exercise it to be able to comply with ANILCA. And after that is done, then obviously people of goodwill can continue on the process of working with ANILCA and dealing with each other.

SENATOR KERTTULA:

Mr. Campbell, I think you should [indisc.].

MR. CAMPBELL:

Just briefly, while I disagree with a substantial portion of at least that view of how negotiations came to the end. I would like to agree with one part of it. I do believe Mr. Mitchell correctly stated that throughout, and I believe continuing has been the goal of the AFN to simply pass a constitutional amendment and minimal statutory general if necessary to simply put us back into compliance with ANILCA. And as I believe the Attorney General refers [indisc. - cough] not give up anything that was in any way in ANILCA. And it was the view of the administration that the terms of ANILCA itself, not the preference of subsistence, but some of the terms like judicial enforcement, like the lack of definition of "customary trade", lack of ability to provide for a person who lives in -- who is a subsistence user but might be in what is classified as an urban part of the state, that every single person in rural Alaska without exception had to be granted a subsistence preference, we felt that you had to look at ANILCA also. And I believe that was the basic policy disagreement. That we thought ANILCA had to be looked at in addition and they thought it could not be.

SENATOR KERTTULA:

Mr. Attorney General.

ATTORNEY GENERAL COLE:

First, as I recall having heard over Alaska Public radio - that's a plug for Alaska Public radio - Byron Mallot says within this week we insist on all of our ANILCA rights. And I heard him say that just this week so clearly. And the administration's view then has been that ANILCA is fundamentally flawed and if we're going to reach accord, the AFN then has to come off insisting totally on all of their current existing rights under ANILCA. And we went through that story and discussions repeatedly.

And finally, it's sort of like asking a girl to dance. You know after she turns you down about three times, you don't ask anymore. We just got to that point that it wasn't any talking about the subject anymore because it was a fundamental different which we couldn't breach.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Senator Hoffman hasn't spoken, then Senator Sturgelewski. Senator Hoffman.

SENATOR HOFFMAN:

Well, it seems to me, it's quite clear to me during the last four days that it's impossible. It seems to be impossible to change ANILCA. [Indisc. - cough] the road blocks in Congress, the Congressional delegation telling us that it's impossible, AFN's attorney saying that there's too many ways for that to be blocked. Now for us to hang our star on solving the subsistence problem of this state and the dual management problem in the state on the possibility of one in one thousand and for the administration to take that stand seems ludicrous. Not only to the common persons thought process, it's an injustice to the people of this state.

SENATOR KERTTULA:

Mr. Campbell ...

SENATOR HOFFMAN:

... and I can see why the negotiation would [indisc.] out the administration takes that stringent of a position.

SENATOR KERTTULA:

Would the administration like to comment, Mr. Campbell [indisc. - cough].

MR. CAMPBELL:

Thank you, sir.

SENATOR KERTTULA:

And rapidly. We are down to the last forty-five minutes or less.

MR. CAMPBELL:

I will be very quick. I would like to endorse a suggestion that Mr. Mitchell made earlier. That it's something you might want to talk to Mr. Katz about this. We talked about this with him throughout this process. I think that we alone agree that if we had a consensus within Alaska, if we could have reached an agreement on amending ANILCA, that could have been done easily, quickly, efficiently as it has been done over, and over and over again, without any of the horror stories which we hear talked about coming through. The fact is, I think Mr. Katz will tell you as he told me that in fact it's sort of established an informal protocol. We're not Christmas treeing ANILCA [indisc.] and the Native communities has gone in itself have amended ANILCA over and over again. And the reason it hasn't been a problem is it [indisc.] the state. We are not suggesting that ANILCA is going to be amended over the stringent objections of the large portion of this state. But we do think that until ANILCA is amended the state is better served by being out of compliance with ANILCA than being in compliance with ANILCA.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, then Senator Cotten.

MR. MITCHELL:

Mr. Chairman, a brief comment on that. First, whether or not with a complete consensus in Alaska for doing so that an amendment to Title eight of ANILCA would be enacted by the Congress easily,

quickly - I forget the list of grease that's just been described to us - is obviously a question of fact. I think it would be interesting to know whether or not - that is I don't question Mr. Campbell representing that that's what Mr. Katz -- what he believes Mr. Katz believes the facts to be. I would certainly say that that's not necessarily the impression Mr. Katz left with me with respect to that. As I indicated, if that's an issue, it would be profitable to hear from Mr. Katz. And obviously if that is Mr. Katz's view I think it would be profitable to test the validity of his judgment in that.

But be that as it may, let's assume that that's all true. Let's assume for the purposes of argument that the Native community, we're going to shake hands with the administration, that whoosh, we could have a bill to amend ANILCA on the unanimous consent calendar. That presupposes the administration's argument which we really haven't gotten into here, other than a little bit yesterday, to respond to, is the ANILCA policy choices. The administration is certainly entitled to it's view that the policy choices that Congress adopted in ANILCA are bad public policy. I don't think there is any person that means to be mean-spirited or racist or anything else to hold those views. Those are legitimate views. It is nevertheless true that a vast majority of the people of Alaska including Alaska Natives think that while they would like to see improvements to ANILCA, and in fact we had suggestions for doing that. Most of which I think the administration would find more objectionable than ANILCA, probably. I don't know. Nevertheless, but on balance, that the ANILCA policy concepts were sound and indeed as I testified to yesterday were first developed by the Alaska Board of Game to deal with some real problems in the bush to begin with. They're home grown. To say that the Native community is being obstinate because it has that policy view and the administration is being obstinant because it has this policy view, is not necessarily probably being fair to either side. The administration is certainly happy -- entitled to have it's policy judgements - any policy judgements it wants. But many people

express real concern that in it's commitment to the fact that ANILCA is bad public policy, the ideology of that commitment becomes more important than returning regulatory control to the Board of Fisheries and the Board of Game. And that's the conflict that's presented to you.

SENATOR KERTTULA:

Senator Cotten has the floor.

SENATOR COTTEN:

Well, it's clear that there are some people that don't feel that we should have a constitutional amendment under any circumstances. And there are other people who feel that we should have no change to ANILCA under any circumstances. I think it's clear to everybody that we have to probably do a little bit of both in order to solve this problem. I passed out a proposition that was forwarded to me by the United Fisherman of Alaska that isn't a brand new idea. I think you've all been exposed to it before and there's a second page that would give you different way to approach that. And I suggest that we move forward with the program similar to this, if not this proposal, something similar because obviously Don Mitchell is not authorized to say on behalf of AFN that he'll accept changes to ANILCA. Nor I'm not sure whether Al Adams, Lyman Hoffman and others who are sponsoring legislation along these lines or that Senator Halford's going to say, okay, for the benefit of the people that I've been promoting ideas for, I'll accept a constitutional amendment. But I think it comes down to we either do something or we do nothing. And this is something. And I suggest this is what we do.

SENATOR KERTTULA:

Senator Halford, and then Senator Schultz and I've had Senator Schultz recognized now and then Senator Sturgelewski ...

SENATOR STURGELEWSKI:

No, that's fine.

SENATOR KERTTULA:

[Indisc.].

SENATOR HALFORD:

Thank you, Mr. Chairman. It looks like this proposal is similar to a previous one but it doesn't include the provisions that the administration was looking for with regard to judicial oversight. Is that the intent -- it requires amendment to ANILCA to recognize the statute as in compliance with ANILCA. But it does not require, as I read it, a repeal of 807 or a change in 807. that allows for the direct federal court access -- that provision. Does that kind of what the intent?

SENATOR COTTEN:

I didn't think that was necessary. If the Congress recognizes ...

SENATOR KERTTULA:

... for the counsel up here if we do, let them. It would be easier for them to work ...

SENATOR HALFORD:

They can respond better than I can.

SENATOR COTTEN:

Yeah, I'd like to hear from them, too. If Congress recognizes that the law we passed this special session is in compliance with 804 and 807 or whatever those sections are, well then, that's a congressional -- it's a determination on the part of the United States Congress. And I don't know if you would have to worry about judicial interference after that point. But I'm willing -- I'm anxious to hear what the lawyers too,

SENATOR KERTTULA:

Mr. Attorney General or Lance, do you wish to -- Lance, go ahead.MR. NELSON:

Thank you, Mr. Chairman. That kind of language may well would be helpful. But I don't think it would solve the problem. And in that the decisions that the federal court is making right now are not necessarily [indisc.] regulations in other words, reserve the statutory scheme, regulatory scheme in compliance with ANILCA. The federal court decisions have gotten into whether or not the regulations themselves are in compliance with or consistent with state laws as interpreted under an act. [indisc.]

themselves to decide in compliance. They're looking at the regulations themselves and hearing each one of them and making -- and they have the power to do that under 807. And requiring them to be revised, amended and brought back to them until they're satisfied. And then we have the same problem once that happens [indisc. - cough] but either way the appeal goes into Ninth Circuit and that's where every interpretation stops.

SENATOR COTTEN:

Are you saying the court would decide whether even though Congress could say that whatever we passed this session was in compliance with 807, the court might decide otherwise. Is that what you're saying?

MR. NELSON:

Right.

SENATOR COTTEN:

Does everybody agree with that? Do you agree with that?

UNIDENTIFIED SPEAKER:

Senator Cotten, it's for the courts to decide. The decision is taken under [indisc.] by the Boards if we're not in compliance with ANILCA.

SENATOR KERTTULA:

Senator [indisc.].

UNIDENTIFIED SPEAKER:

By complying with ANILCA by the bill, we put ourselves under the federal oversight provisions on a statewide basis. And unless we in some way address those federal oversight provisions we may have done kind of the worst combination instead of gotten [indisc.]. I hope we'll have somebody from UFA to testify on this proposal as advocated as theirs I'd kind of like to ask -- because I thought they were very much interested in getting out from under those federal oversight provisions too.

SENATOR KERTTULA:

I know this may be interrupting, but, Senator Schultz, you've been seeking the floor, forever. I apologize.

SENATOR SCHULTZ:

It's not necessary because I was kind of enjoying the debate here. I guess the thing is we're getting down to where we debated the issue for a long, long time and I'd just like to know, Mr. Mitchell, the -- is there any way that the people you represent could support a constitutional amendment that is in any way, shape or form tied to a change in ANILCA? If the answer is, no, then we're clearly talking only a constitutional amendment.

MR. MITCHELL:

I can say, first of all, I don't have the authority to answer that question. That is a question that you need to ...

SENATOR SCHULTZ:

[Indisc.]

MR. MITCHELL:

No, that's a policy question, not a legal question. And you need to address that question to -- it's a legitimate question. You need to address the question to the people that make the policy and obviously the place to start would be Julie Kitka, the President of AFN and John Schaeffer, the Chairman of the Board and then they and other officials of the organization that are available. That said, I think I can summarize public statements that have been made to date, which is I'm not familiar with any public statement of announcing policy that have been made by any officials of the Alaska Federation of Natives or indeed, any other representatives of the Native community during the special session or during the regular session, that would indicate that the answer to your question is, yes, that the people are prepared at this stage to revisit ANILCA as part of your decision making in terms of whether or not you like the state to comply with ANILCA. But as I said, I'm just summarizing the statements that have been made. You should ask.

SENATOR SHULTZ:

Well, I guess the question is -- going back to the Attorney General, didn't -- It was my understanding when the negotiations broke down was because of the discussions that got to ANILCA and tying any kind of a constitutional amendment to it. So I mean if

you're saying now you're willing to talk about it, that's one thing. But if we're still at the same point that we were a month and a half ago, negotiations stopped.

MR. MITCHELL:

As I said, Senator, you're having this conversation with the wrong guy. But I would say that it would be my impression as somebody who has been involved in this issue during the regular session in '90, the special session in '90, the regular session this year and now this special session, that I understand the political difficulty. But the analytical problem here is really very simple. The fact of the matter is that ANILCA is ANILCA. People have various views about it. Some people think it's fine for some reasons. Other people think it's not fine at all. It doesn't make any difference. ANILCA is ANILCA and the issue before the body is would the body like to give itself the authority, if it wishes to exercise that authority, to comply with ANILCA, or doesn't it? And that is the subject about which I have no view. It's not my brief to have it. But I can -- it is within my portfolio to describe for you what the issue is. And that is the issue.

SENATOR KERTTULA:

You have the floor.

SENATOR SCHULTZ:

Let me continue on. In 1990, we're sitting down here in special session and we were going over the constitutional amendment and the first time they were voted on, and then the second time they were voted on. Then we started holding hearings. Okay.

SENATOR KERTTULA:

Ms. Kitka.

SENATOR SCHULTZ:

Okay ...

SENATOR KERTTULA:

Julie.

SENATOR SHULTZ:

We brought this thing up for hearing, then we were looking for consensus. We were looking for things of areas of compromise and I believe we ended up taking approximately, if I recall, seven votes on that particular piece of legislation. Now, what I'm saying is there has been considerable amount of time that's lapsed between that time and now and the time that the first subsistence bill was written, et cetera. What I'm saying is, if we're still at the point where it's a constitutional amendment, period, and leave ANILCA alone, one side is over here and the other side is no constitutional amendment. That's just something -- and no one is going to give at all. No consensus. No attempting to get there. Then it's something you just need to throw up and vote on and move on.

MR. MITCHELL:

Senator, I don't think I can respond to that. That's sort of a description of your view, of course, of what the checker Board looks like here and I may have my views as to whether that's accurate and it doesn't make any difference what I think.

SENATOR KERTTULA:

Yes, Mr. Cotten, I think we're back to your amendments.

SENATOR COTTEN:

That's fine. I just think we're getting to the point where perhaps you ought to ask some of the people that can discuss policy at that table instead of the technical people.

SENATOR KERTTULA:

Ms. Kitka, I'm going to ask -- Senator Schultz, I'm going to have you ask Ms. Kitka one time that same question and I don't know if she's privileged either as the president to comment definitively but at least that question since she is here, one more time.

SENATOR SHULTZ:

Just very briefly.

SENATOR KERTTULA:

And we're only going to spend a maximum of ten minutes more on this subject, because we have other things to get to.

SENATOR SHULTZ:

My question is simply this. Is there any opportunity for any ability to tie a constitutional amendment with a change in ANILCA? Will you guys sign off on that? Will you work to try to accomplish something like that?

MS. JULIE KITKA, PRESIDENT, AFN

I guess the question is really depends upon what we're talking about.

SENATOR SHULTZ:

Senator Adams gave an example a while ago.

MS. KITKA:

We're talking about constitutional amendment language. I mean we all know how serious these things are and every word, comma and period makes a difference. I think we're also talking about, as far as ANILCA, the Native people have always been willing to talk about the federal law -- the conflict between the federal law and the constitution. It would depend upon what people are asking of us as far as the federal law. We are not unwilling to talk about that. In fact, internally in the Native community people have voted on a lot of things that they've like to see improved in the federal law.

SENATOR KERTTULA:

You have the floor.

SENATOR SCHULTZ:

Would like we heard from the Attorney General there as to why negotiations broke off and what happened?

MS. KITKA:

In my view, the reason why the negotiations broke off is because that a change to ANILCA that the administration was seeking -- the overall policy change that they wanted to use they wanted to weaken the protection for subsistence people under federal law and that they wanted to, in trying to state statute as the federal standard and get rid of federal oversight was the primary driving thing. From the Native perspective, the federal oversight is the protecti... we need to make sure that the state

does the right thing in implementing the program. So therefore, we could not allow Title eight to be gutted.

SENATOR SHULTZ:

Okay, you're saying that you want federal oversight on state management of our wildlife and fisheries resources. You want federal oversight, regardless of what we do with state law?

MS. KITKA:

What I'm saying is the reason federal oversight is in Title eight of ANILCA is to insure that the state is in compliance on that. That if the state is unwilling or unable to implement the federal law or the state statutes compliance with the federal law adequately, that there is a remedy for people that live out in all these remote areas on that to have standing to have their concerns addressed. Yes, it is a protection of subsistence.

SENATOR SHULTZ:

So regardless of where we go with this, the protection -- the ultimate protection that you're asking for is federal oversight of the fish and game resources of the State of Alaska? The ultimate place to go is with federal management?

MS. KITKA:

Okay, I guess what we're talking about -- the ultimate thing which Native people want is they want state and federal laws which protect our people. There's nothing sacred about ANILCA per se. We want to live under a legal framework, both in the state constitution and in the federal law, which protects our people's interests. No federal law is ever perfect. No state law is ever perfect. But we want a legal framework which would protect our people. And currently, right now, Title eight of ANILCA is the strongest protection we have for our people.

SENATOR SCHULTZ:

Can I ask a question?

SENATOR KERTTULA:

You have the floor, Senator Schultz.

SENATOR SHULTZ:

What would happen if this legislative body was going to draft

a piece of legislation that would state that only the Native people in the State of Alaska are allowed subsistence rights in this state. Would you be willing to go in and wipe out section eight of ANILCA?

MS. KITKA:

Could you repeat that?

SENATOR SHULTZ:

If we wrote a state law that simply said that the Native people of the State of Alaska are the only ones that are entitled to subsistence and we give them a definition of generations and so on and so forth. A very strong state law. Would you still want the protection from ANILCA?

MS. KITKA:

For one, I believe that such a statute would be unconstitutional.

SENATOR SHULTZ:

Well, I don't know whether it would or not.

MS. KITKA:

I'm no lawyer. I don't know either, but I would suspect it would be unconstitutional, but in addition, I think you have to look at the intent of the Congress to pass Title eight of ANILCA in including rural residents. Congress recognized that there are non-Natives that have adopted the subsistence lifestyle. There are non-Natives that have married into Native families that continue that lifestyle. There needs to be some recognition of that in and some affording us protection for people going forward and living this lifestyle and not divide families. There is some valid public policy reasons for why non-Native subsistence users are afforded this additional consideration. I might add, also for the record, we never sought from this legislation a Native priority on subsistence.

SENATOR SCHULTZ:

I know that. I was just asking a question. I was trying to reach out as far as I possibly could to find out when could you agree to a change in ANILCA.

SENATOR KERTTULA:

Are there another questions of Ms. Kitka? All right. You have the floor, Senator Fisher.

SENATOR FISHER:

Yes, I guess what I'd like to know, Julie, is did you see the proposals that the United Fisherman of Alaska have or that Senator Cotten passed out? I guess I'd like a yes or no as to whether you being a policy making person would like it's yes or no. Would you want to vote yes or no?

MS. KITKA:

I haven't seen it.

SENATOR FISHER:

Oh Okay.

MS. KITKA:

So, I'm sorry, but I guess as far as the question of whether or not Native people would agree to an amendment of ANILCA, of course, there would be point in time. I would suggest that the most appropriate way to address this is, one, do a constitutional amendment and get the authority back to the Legislature to enact a statute that complies with federal law. Get management back. And if there's changes to ANILCA that need to be discussed, there ought to be set up a negotiating process with the administration, Native people and whoever else, to take a look at those issue and work towards that. But get the legal ability to pass a law to get management back first. That, in my view, makes the most sense. As opposed to tying it all together as far as ANILCA, it is very hard to predict what the Congress will do as far as Title eight of ANILCA and it is a real gamble to this Legislature to put at risk unitary management banking on the Congress to do anything. I have been told since we testified at the last special session that one of the risk of opening up ANILCA is the environmental community wanting an additional fourteen million acres of wilderness of this state. There are other state interests that are at risk in opening up ANILCA. It's not just a simple thing of dealing with the Native community on this issue. There are other interests

that affect the state that come into play if that is the direction you go as far as opening up ANILCA. It's not just the Native people and what the Native people want that comes into play. There's a lot of other national interest in there, both pro and con to state interests.

SENATOR FISHER:

I guess what my concern is, we're going to at least -- the chair indicated that we need some solution. This is a solution, that the answer is no, and I think Senator Schultz was alluding somewhat to the same thing. That if the answer is no, to this one, then I don't even know why we're debating any issue that addresses constitutional amendment being dependent upon Congress doing anything. And I hear you say, no, that you don't want to go so far ...

MS. KITKA:

I've not seen the [indisc.] brief. But I'd be glad to step aside and ...

SENATOR FISHER:

Mr. Chairman.

SENATOR KERTTULA:

You're coming forward right off the street.

SENATOR FISHER:

Yeah, Mr. Chairman, and I would appreciate it if we could take the time, because if we spent four days here now and I think that if she could take the time to review it, this may be the answer that we've been looking for.

SENATOR KERTTULA:

Why not. We'll have five minutes recess.

RECESS

4:40 - 4:45 p.m.

SENATOR KERTTULA:

Senator Shultz, your question and I realize it was the barest minimum. Perhaps not time enough to reflect an answer, but Ms. Kitka Senator Schultz wanted you to see that and wanted to know if you might have a response. If any. Please proceed. We have a

quorum.

MS. KITKA:

Thank you, Mr. Chairman. You're right. I have had a chance to briefly look at and briefly give a brief comment. But I don't believe that we can support this bill for several reasons. One, it's totally dependent upon a state statute and we have no idea of what you're talking about in being enshrined in the federal law as a federal standard. So the uncertainties of that are way too much to make any determination. The second on that is I just don't think that we should have an amendment to a constitution depending upon an action by Congress in amending ANILCA. I think those are separate things on that, although I'm not opposed to talking about amendments to ANILCA in some type of process, in some point in time, I think linking that into a constitutional amendment is a big mistake for the State of Alaska because of the other interests and risks there are to the State of Alaska. I also think that amendments to the constitution when they're voted upon by the people of Alaska should be the ultimate policy statement by the people of Alaska, not dependent upon elected officials in the Congress to ratify or do whatever. If it's a constitutional amendment and it's voted by the people of Alaska, that ought to be the policy statement that enshrined our constitution. I know that this is [indisc.] solution, unfortunately, I commend United Fisherman of Alaska for this proposal I don't believe that we can support this.

SENATOR KERTTULA:

Are there further statements or questions about constitutional amendments that may be proposed? Senator Collins, does have the floor.

SENATOR COLLINS:

Thank you, Mr. Chairman. I must apologize to [indisc.] my question might have been asked and I apologize if it has and I am reiterating it. The assumption is in putting forth a constitutional amendment that (a) -- from the discussion I hear that (a) a constitutional amendment would have [indisc]. The

question that I'd like to ask is what happens if a constitutional amendment does go forward and it fails at the ballot box. What happens if the constitutional amendment goes forward and it [indisc.] by the voters challenges [indisc.] where are we then if our efforts to the address the issue of the constitutional amendment. Where do we go from there?

SENATOR KERTTULA:

You have the floor, Mr. Mitchell.

MR. MITCHELL:

With respect to the possibility of the constitutional amendment were to appear on the ballot failing, that's really a question that perhaps should be addressed to President Kitka.

SENATOR COLLINS:

No, it's's not. The question I am addressing to you is a legal question and I'm asking that [indisc.] a legal opinion.

MR. MITCHELL

Oh, okay. sure. Now, I understand the question. That is certainly if in fact a constitutional amendment were put on the ballot by the Legislature and at the November general election a majority ... [tape ends midspeech].

TAPE 92-16

Side B

[Tape begins midspeech]

MR. MITCHELL:

... voted that they did not want to amend the constitution in that fashion, voted the amendment down. Then legally the state would be left in exactly the same position it is right now, which is that it would -- there is ANILCA there and the state, if it wants to comply with ANILCA can do that because the Legislature doesn't have the authority to do that. You would be in exactly the same legal position that you are this afternoon, with respect to the federal state management problem and all the things which have obviously created difficulties for us.

SENATOR COLLINS:

In that case, what could we resort to solve the [indisc.].

MR. MITCHELL:

Well, at that point, that would then be a political situation. That would be a majority of the people of Alaska proving to Congress that it's policy judgement was correct in 1980 that it had to enact ANILCA to protect a minority of Alaskans from the will of that majority. Which is to a certain extent, to be blunt about it, what ANILCA had some of the policy concerns behind it driving it.

Now the second part of your question is what if the voters were to pass a constitutional amendment and then the courts were later to strike the amendment down. I do not believe that the courts would have the ability to strike the amendment down. What the Alaska Constitution says is what goes. In other words, what the courts does is it enforces the Alaska Constitution whatever the Alaska constitution may say. Now it may be that in implementing your new authority under this constitutional amendment that on other constitutional grounds someone might challenge the statute all over again and think up some other legal theory about why it's invalid. But I obviously cannot predict that and I wouldn't know what those other legal theories might be nor would I be able because I don't know what they are, to predict the likelihood that any of them would succeed. But in terms of the constitutional amendment itself, if the voters pass it and it's there and the amendment itself, in my view, cannot be invalidated by the courts. I don't know what the Attorney General would -- if he had a different opinion about that or not. Certainly, the amendment somehow violated the United States constitution, no state, Alaska or any other, can have a law or a constitution that would violate the guarantee that all citizens have with the United States constitution. But I don't think that we're talking about the likelihood of that being our situation.

SENATOR COLLINS:

Then, in the event, that say constitutional amendment failed and your [indisc.] that would be in exactly the same situation that we are currently ...

MR. MITCHELL:

Right.

SENATOR COLLINS:

... and that, in fact, that would be [indisc.] to Congress [indisc.].

MR. MITCHELL:

I think it would be a reasonable -- it would not be unreasonable to theorize that that kind of an anti-amendment vote would strengthen the belief of those members of Congress who believe that but for Congress to deciding that there was a national interest involved and how people out in the villages, most of whom are Native, are treated that the people of Alaska speaking through their electoral majority would not give folks a fair shake. It would be reasonable to assume. I wasn't trying to duck your question to begin with ...

SENATOR COLLINS:

And at that point, obviously then our chances to get [indisc.] to ANILCA obviously would be [indisc.].

MR. MITCHELL:

That's obviously a political judgement. I would say my personal opinion if you would have proved Congress this point and the likelihood of Congress being favorably disposed to arguments from the state trust us, we really love all those people living out in the villages would probably be very, very small.

SENATOR KERTTULA:

Senator Cotten.

SENATOR COTTEN:

I'm just compelled to go back and remember about 1980 when I sat and watched you testify in front of Congress telling them that the only reason we passed the subsistence law in 1978 was because we were afraid they were going to do it for us. And that wasn't the reason we passed it in 1978 and maybe that's why Congress thinks the way they do.

MR. MITCHELL:

Mr. Chairman, if I could respond to that.

SENATOR KERTTULA:

He's a good advocate.

MR. MITCHELL:

No, Senator Cotten, I've gone around on this for many, many years and I think that it is time that I gave a public apology to Senator Cotten for my testimony in 1980 in front of the House Merchant Marine Committee. However, having done that I'd like to offer a brief defense. And that is ...

SENATOR COTTEN:

You can quit right there.

MR. MITCHELL:

That is that in terms of the blind man leading the elephant, I can guarantee to you that with respect as representative of the State of Alaska in the venues in which I was operating which included certain prominent but here unnamed members of the Alaska Department of Fish and Game and others that the motivation that they communicated to me with respect to motivation of the Legislature and others in terms of its fondness to that act, I think were accurately reflected in my testimony. Since, that time, not only have I been instructed over the years by those of you who were actually on the scene -- I was in Washington, D.C. obviously during that session. But I've also aspired [indisc.] a very good question I also recently was doing some legal research that led me to start at the very beginning and look at every scrap of appear that had ever been generated by this body with respect to that original statute starting way before Representative Anderson had a special House committee on subsistence. And I was very much persuaded -- I remember coming out of the library really last month being reminded of our exchanges of views on this very subject and saying, oh my God, Senator Cotten actually was correct. That there was a lot of study and work that went in to a Legislature on the generic subject of subsistence that led to that statute that was going on at the same time that the ANILCA process and the other representatives of the state that I was dealing were involved in their actions. So if that's eating crow,

I've just swallowed it.

SENATOR KERTTULA:

Senator Cotten, I'm truly becoming a bit frightened. He's been so effective as being an s.o.b. for years, now he's switching the other way. If he's equally effective for the next [indisc.] I had a little chat too, I'm really afraid what's going to happen.

MR. MITCHELL:

If you'd like me to go back to being a jerk at all times.

SENATOR KERTTULA:

Please don't.

MR. MITCHELL:

I'd be happy -- whatever the will of the committee might be.

SENATOR KERTTULA:

Are there questions to the constitutional issues that proposed -- yes. Apparently Ms. Kitka does have something she'd like to state.

MS. KITKA:

[Indisc.] political side of this, Representative Collins question as far as what would happen if a constitutional amendment lived, I think that we would be in a period of time where we would be in dual management in the state for a period of time. But I don't believe that the dual management could continue forever. It's an irrational system and fish and game managed on two different management systems in which -- they don't respect boundaries on that -- I don't think that the State of Alaska on the health of the resources that could continue indefinitely. But I do think there would be a period of dual management for a period of time until there was some major consensus in the state as to how to resolve this. I just wanted to point that out [indisc. - cough].

SENATOR KERTTULA:

In our commitment jointly we would come to decisions in these matters at about five. We've reached that time. I welcome any wrap-up question or statement, but I think then we'll proceed to

those motions that were before us and any others. If there is no wrap-up, I guess I can ...

SENATOR MENARD:

Mr. Chairman.

SENATOR KERTTULA:

Senator, you have the floor, Senator Menard. You haven't asked any questions here.

SENATOR MENARD:

Thank you, Mr. Chairman. I'm sorry I was out of the room, but I missed your answer on the question on the federal oversight issue. And that being tied to the constitutional amendment. If you are willing to have that in a constitutional amendment that would remove the -- that would amend ANILCA.

SENATOR KERTTULA:

Could you just brief him on your answer. Please proceed.

MS. KITKA:

Our position on that, Senator, I only had few minutes to take a look at that [indisc.] is I don't think we can support that approach for a couple of reasons. One, it requires a lot of trust of what statute comes out of the Legislature and having that enshrined federal standard in ANILCA, I don't think we can support it. I also think it's bad public policy to make a constitutional amendment dependent upon Congress doing anything. I think a constitutional amendment if the Legislature wants to put one out to the people to decide, the will of the people of the State of Alaska ought to be the final voice on that. It shouldn't be dependent on the [indisc.] back in Congress. And I also truly believe that putting that back, with the state having the ability to regain some kind of management back on the table as far as the Congress is going to open up a lot of special interests trying to lever our delegation in the State of Alaska on a whole lot of other issues that are of national importance and not just Alaska so much on that. I think we could risk too much. I think that if the Legislature wants to put a constitutional amendment out and let the people decide, it ought to stand on it's own. If the

Legislature wants to request by resolution amendment to ANILCA, it ought to stand on its own. [indisc.] two together. I think the people of Alaska deserve better than that.

SENATOR KERTTULA:

Senator Pearce, you seem to wish the floor. You have the floor.

SENATOR PEARCE:

Thank you. Ms. Kitka, you said that you think it's bad public policy for us to tie a constitutional amendment to changes [indisc.] ANILCA. Do you think that it's good public policy for us to be forced to do a constitutional amendment based on congressional action?

MS. KITKA:

I think that -- Mr. Chair.

SENATOR KERTTULA:

You have the floor.

MS. KITKA:

Senator Pearce, I think that you have to look at what the intent of Congress was in Title eight of ANILCA. The intent of Title eight of ANILCA was to protect the people who live upon subsistence and that way of life as a very important national public policy issue that there's a national interest in protecting that way of life. Affording additional protections in the state is willing to [indisc.] and I think that that is something that is good. I don't think that that's something bad. I think the Congress in drafting a provision in Title eight of ANILCA which allowed the State of Alaska some management of federal public lands if they had a standard that met their standard, there is nothing wrong with that. The choice is still the state's. If they don't want to manage on federal public lands, they don't have to have a statute. But the federal government and Congress allowed that opportunity. I don't say the federal law is perfect. We are willing to talk about changes to ANILCA at some point in time. But I think linking a constitutional amendment and the effect would be that the constitutional amendment does a people of

Alaska a disservice. they should be allowed to vote on a constitutional amendment with finality, their voice on the constitutional amendment, change the constitution if it's desired, the Legislature change [indisc.] as far as ANILCA, express that in a resolution and do that. You shouldn't -- in my view, I think that is mistake to do that. We have never said that we would never amend ANILCA we said that we are willing to talk to the state and willing to talk to the administration. We don't think that that is something that is easy to resolve but we are not unwilling to talk. Our people see changes that would be but we also listen to the advice of the Congressional delegation in the last two years when the state said there are other national interests that would weight in if this would be opened up in the Congress. We believe them when they say that the Wilderness Society and the environmental community want an additional fourteen million acres of wilderness in the state. And we do believe them when they tell us that if this becomes a hot potato back in the Congress, that other interests will weight in and extract a pound of flesh out of the State of Alaska in order to get the amendment through. We ourselves would be very leery on amending ANILCA, even if it was something that we wanted. Because of the risk of other national interests being involved in the decision making.

SENATOR PEARCE:

Can I follow up?

SENATOR KERTTULA:

You have the floor.

SENATOR PEARCE:

How many times has ANILCA been amended?

MR. MITCHELL:

I don't know the answer to that. I can't say that ANILCA has certainly ...

SENATOR PEARCE:

[Indisc.].

MR. MITCHELL:

I don't know. I'd say that ANILCA -- the point is has ANILCA been amended since 1980.

SENATOR PEARCE:

[Indisc.]

MR. MITCHELL:

I don't know the answer to that.

SENATOR PEARCE:

[Indisc.].

MR. MITCHELL:

No. I means in terms of technical, no, I don't. Sorry.

SENATOR PEARCE:

Julie, I don't disagree with the point you're making [indisc.] do you think it's good public policy for us to change our constitution on a law [indisc.].

MS. KITKA:

Mr. Chairman.

SENATOR KERTTULA:

You may respond.

MS. KITKA:

I think if you pass a constitutional amendment and let the people of the State of Alaska vote you ought to be passing that constitutional amendment and the first thing is, one, on belief that the voters of Alaska should have the opportunity to be involved in the subsistence issue and should be allowed to express their views. Whether or not you support it or you don't support it, Alaskan people can be trusted to make that decision.

Secondly, I think that the Legislature ought to put a constitutional amendment on the ballot because I believe it is good public policy for the State of Alaska to recognize that it's something unique in this state. The subsistence way of life is a unique way of life as far as the rest of this country is concerned. If you went state by state on the other states in the rest of the United States, I don't think you would see very many states that could even compare to what we have in this state here. One, they don't have large tracts of land and the fish and game

resources. But it is very unique. That's a part of why Congress has this Title eight of ANILCA is to recognize the uniqueness of the state. I believe the Alaskan people can be trusted to make those type of decisions. And I think it is not good public policy on such a potentially divisive emotional issue on that to just not put that out to the people if there's a desire to let the people resolve this and get on with the state. I think it would be more divisive to the state to not solve this problem. If there is a way out of this whole situation that involves bringing this to the voters on that, that's a very legitimate, in my view, constructive measure for this Legislature to take. If the voters vote it down. If the people of Alaska have changed their policy direction on that, we can all live with the results. I don't believe that the people vote it down, that the state would completely lost management [indisc.] because I think what you'd be left with would be a dual management system which would be irrational. It's irrational now. It will continue to be irrational. The people that were looking out for the well being for the fish and the game and the management would have to get together with the state and the federal governments and the people that depend upon that and resolve that. Because it doesn't make any sense to have management based upon land ownership patterns. So like I said. I don't see why people would be afraid to let the people vote. The very worst case you exactly where you're at today and we would have incentive to try and get together and negotiate and get it resolved. I don't see the down side.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

Mr. Mitchell.

MR. MITCHELL:

Yes, I was wondering if I could just briefly respond to that. I think I understand, I think, the direction of the question and it was something that I alluded to yesterday and that is that I think the real public policy choice that I think Senator Pearce is

describing is that it is very upsetting in an institutional way to all states and the Legislatures that represent them that Congress asserts the national interest from time to time, with respect to saying what national policy should be, with respect to areas that states historically have regulated. Fish and game and I reviewed briefly yesterday was one. I'm not an expert on clean air and clean water, but as I understand it it's very similar to subsistence. Congress has said that we believe it's in the national interest for all states to have clean air and we're going to tell you how to do it. And State of Wyoming and State of Alaska and State of California, here are the national standards and if you want to be in this game you will implement the standards that Congress has determined are in the national interest. There are many Legislatures on those issues that say they disagree with those national standards. And those are legitimate policy disagreements between Legislatures and the Congress. But at some point, whether it's clean air or whether it's subsistence, policy choices - Congress has the ability to exercise it's judgement in the area, does the state think it's a good public policy and in the state's best interests to participate in assisting Congress in executing those policy decisions because the state doing it is more closer to the ground and the people that are affected by the implementation of those policies. And that's the choice here.

SENATOR PEARCE:

[indisc.] would be unconstitutional under Alaska state constitution [indisc.]

SENATOR KERTTULA:

I think we are in the position of pretty well wrapping up the questions. I learned a great deal this afternoon about three areas of the constitutional issues. I know there is counsel and so on that fully understood and the other members did. We're back now to the position we were approximately at noon.

MR. MITCHELL:

Excuse me, Mr. Chairman. Can we be excused. Is that ...

SENATOR KERTTULA:

Oh, sure, Thank you. Thank you very, very much for your time. Thank you for testifying and participating. It was meaningful and important and I do thank the administration for providing the Attorney General and his staff and the commissioner at all times available, still available

We had -- we don't have motions yet. But we had a situation of a motion from Senator Cotten to pass out the bill that was before us introduced by the Governor -- I think its 484. Senator Adams is still [indisc.] he'd like to see the bill introduced by himself and others also passed out. Is there anything else here before us or about to come before us? You have the floor Senator Adams.

SENATOR ADAMS:

Thank you. It's my understanding that if both bills passed out of committee they would go to Senate Finance where they would be both open to be moved out of that committee into Rules. And basically, Mr. Chairman, we can entertain a motion after that also to take up the constitutional amendment to get a sense of this committee that was introduced by Senator Pourchot.

SENATOR KERTTULA:

Sure I would. But I would ask though, that if there is a motion to bring out Senator Adams' bill, that there be some hearing and discussion on that bill in this committee which is totally appropriate before adoption of that motion of that bill. And that would be the way to proceed. If you wish to place the motion again, Senator Cotten, I will entertain that motion at this time. If not, then somebody else will entertain it. Senator Cotten. Oh, excuse me. I wasn't sure you heard me. That was all.

SENATOR COTTEN:

I thought there was another motion on the floor.

SENATOR STURGELEWSKI:

Is there one ...

SENATOR COTTEN:

I guess not.

SENATOR KERTTULA:

There's no motion. You went through the motion ...

SENATOR COTTEN:

Yes, that's right. Yours got adopted by unanimous [indisc.] Well, I yield to the Chair. If you want that motion, fine, eventually, I think that -- that's fine. I'd like to see any bill that's in this committee that people want out to get it out. So if you want to subsequently hold hearings now and have discussion on Senator Adams bill, maybe you would prefer to wait until then to move this bill out.

SENATOR KERTTULA:

Fine with me.

SENATOR COTTEN:

It's up to -- I'll look to your guidance, Mr. Chairman.

SENATOR KERTTULA:

If you're more comfortable, then I will say that Senate Bill 485 is before us for discussion and debate. Since you introduced it it's always in character for us to ask the prime sponsor to make a statement. And Senator Adams, I would [indisc.] at this time.

SENATOR ADAMS:

Thank you, Mr. Chairman. The piece of legislation that you have in your particular packets is a two page bill analysis on it and just to go -- the difference between this particular bill -- a quick comparison. This bill would allow Alaskan people to vote for a constitutional amendment. This piece of legislation also complies with federal law. This bill will also return management of subsistence programs back to Alaskan control. This bill would also put an end to useless court battles out and I think this bill complies constitutionally and if you would like, Mr. Chairman, I would also call a legal AFN attorneys. My thing is to if you want to onto the process here, it would be my understanding that the Governor's bill along with the Adams bill would go out also tonight so you have both bills into discussion that would go to

Senate Finance and move out of that committee and be available on Rules. Right.

SENATOR KERTTULA:

I think we need a briefing for an hour or so on this legislation. I think we have the time and we should take it here. We're all twenty participating and I think this is the arena that was intended for this type of discussion. I think it's the Barnes bill sectional analysis is identical, isn't it?

UNIDENTIFIED SPEAKER:

Where is it?

SENATOR KERTTULA:

I am wrong.

SENATOR ADAMS:

It's in your packet there. It's under Senate bill 485. Mr. Chairman, did you want me to give a presentation.

SENATOR KERTTULA:

If you wish to go through it. If you wish Mr. Mitchell to come forward. If we can bring Mr. Mitchell forward again, I'd ask the Attorney General to be available for questions. And Lance, if he's here.

SENATOR STURGELEWSKI:

Mr. Chairman, is there a sectional? I did not see the section.

SENATOR KERTTULA:

They tell me in your book it's in the very back.

SENATOR COTTEN:

Back as far as 485.

SENATOR ADAMS:

Mr. Chairman.

SENATOR KERTTULA:

Yeah. After you've got your section we'll come back to order. We'll use Senator Adams to introduce. We're going to use the staff members or legal counsel on the other side to comment and explain. Senator Adams, you have the floor.

SENATOR ADAMS:

The purpose that I introduce Senate Bill number 485 is to be develop subsistence legislation that is consistent with ANILCA and which provides for subsistence use by residents who do not reside in rural Alaska. This legislation accomplished this purpose by retaining the subsistence priority for rural Alaskans as mandated in ANILCA, for rural residents and then providing a secondary priority for persons who reside outside of rural Alaska. Those are such for urban residents.

Section one is a section on the findings. The bill contains four findings sections. The findings identify the importance of subsistence to rural and urban residence. We go on to recognize that fish and wildlife resources are not plentiful enough to meet the needs of all users and therefore it is necessary to provide a preference for subsistence uses over other consumptive uses. They conclude that a determination that there will be greater nutritional and economic alternatives in urban Alaska than in rural Alaska.

Section six through seven has to do with the subsistence Board. That portion is debatable. If there are members of this body that do not like section six and seven, the sponsor is willing to look at a compromise. Sections two, three, four, five, eight, nine, eleven, thirteen, fourteen, fifteen, sixteen, twenty-three through thirty is a conforming sections. These sections conform to existing statutes within the subsistence changes made in legislation. And there is no substantial impact in these particular sections that I have listed. Section number ten happens to deal with the subsistence allocations. Together with section seven, this section provides the substantive provisions for allocating fish and game for rural and urban subsistence uses. The subsistence Board which I said can be compromised together with the existing Board of Fisheries and Game are to determine what the harvestable surplus is of each fish stock and game population used for subsistence. The Board then develops subsistence regulations. This section uses the same method for allocation to rural subsistence use as is contained in the

existing state law and satisfies the requirement of ANILCA regarding the priority of subsistence uses in rural residents. In addition, however this section provides for allocations for urban subsistence uses and then gives those uses a secondary priority after rural subsistence uses and before other consumptive uses. Once again, both rural and urban subsistence uses have been satisfied for those stocks and populations subject to subsistence uses. Other consumptive uses are authorized.

Sections eleven and twelve have to do with reasonable counsel. This section amends the matter in which advisory committees are [indisc.] by giving the subsistence Board authority to act in conjunction with the Board of Fisheries and the fish and game. This section then creates a regional council system in statute which currently existing on in regulations. The regional councils are to have significant authority in how their recommendations to the subsistence Board on subsistence determined and regulations are to be considered. The three-part text contained in ANILCA is adopted in this particular section.

Section seventeen through twenty-two is a section on definitions. These sections contains new definitions for a "Board", "rural area", "urban area", "urban subsistence fishing", "urban subsistence hunting", and "urban subsistence uses". The existing definition of "subsistence uses" is maintained for rural subsistence uses thereby satisfying the third and final requirement of ANILCA. The definition of "urban subsistence uses" is similar to the definition of "subsistence use" - rural. Urban subsistence use is generally equivalent to a personal use of fish and game by state residents. Though the personal use categories are maintained because there is some fishing activity, such as dip netting fishery to harvest a return of hatchery fish which could not be considered as subsistence uses.

The last section of the bill is section forty-one through forty-three has to do with effective dates. The effective date of the bill is the date on which the constitution amendment authorizing rural and urban subsistence uses is approved by the

voters. I do have with me, Mr. Chairman, Mr. Cohen and Don to respond to questions from members.

SENATOR KERTTULA:

Thank you for a good once over. Are there questions at this time about this legislation? We will again in a fairly orderly way say each person exhausted a question but then others around the table will have full opportunity before you can ask a second time. Senator Cotten asked a question.

SENATOR COTTEN:

Yes. Senator Adams,

SENATOR KERTTULA:

Senator Cotten, Senator Adams.

SENATOR COTTEN:

Yeah, I wanted to explore this idea of the compromise on the subsistence Board. It sound like that was such an integral part of the plan that I didn't understand how you could get away from it. It sounded like the game Board, for instance, would decide how many animals could be harvested and the subsistence Board would decide how many were required for subsistence uses. So if you get rid of the subsistence Board, how does -- I don't understand how the plan would work.

SENATOR ADAMS:

The plan would go back to the fish Board.

SENATOR COTTEN:

So the fish Board would decide then how many were required for subsistence uses.

SENATOR ADAMS:

There are some members of the Senate who disagree with the subsistence Board and that's why I brought it right out in front that that could be taken out.

SENATOR KERTTULA:

Questions? Senator Menard.

SENATOR MENARD:

Thank you, Mr. Chairman. Senator Adams, did you say that this legislation was contingent on a constitutional amendment? Or

you said something about a constitutional amendment and I wasn't clear on it.

SENATOR ADAMS:

One of the things that people need to understand is both the Governor's bill and this particular bill require a constitutional amendment.

SENATOR KERTTULA;

Are there other questions? Questions on this particular measure? Senator Shultz.

SENATOR SHULTZ:

I just have a question Senator Adams. On page six of your analysis, section twenty three [indisc.] what is the status of hunting right now in state parks and in critical habitat areas?

SENATOR ADAMS:

Normal.

SENATOR SHULTZ:

Chilkat bald eagle reserves.

MR. NORMAN COHEN:

Mr. Chairman, this bill is just a conforming bill to allow the same the exact same things that are going on now in these areas to continue. In state game refuges hunting is allowed, in critical habitat areas hunting is allowed, in the sanctuaries hunting is not allowed.

SENATOR ADAMS:

They are with the conformance that we presently have there is no changes as I mentioned in section two, three, four, five, eight, nine, eleven, thirteen, fourteen, fifteen, sixteen, twenty-three through forty of the subsistence statute.

SENATOR SHULTZ:

Presently hunting and things go on in those areas at the present time without changing. We're just providing for a subsistence priority, is that correct?

MR. COHEN:

The only change here is that these are conforming changes to make this bill -- to make the provisions of this bill fit within

the existing statutes.

SENATOR SHULTZ:

Maybe I should pull this question, but what would happen on sustained yield basis? The stocks are down. Let's just say it's in the Chilkat bald eagle reserve. If they were down and the recommendation was no hunting, what would happen?

MR. COHEN:

If the recommendations was no hunting based upon the record there would be no hunting.

SENATOR SHULTZ:

For subsistence or anything else?

MR. COHEN:

Correct.

SENATOR KERTTULA:

Further questions? Mr. President.

SENATOR ELIASON:

Mr. Chairman, I was wondering, it does look like you set criteria for different levels of population. I guess getting back to the question I had on the other bill, [indisc.] people that live in these areas have to on a yearly basis fill out some type of form to get -- or do they go before the Board to get approval or how are they identified as subsistence users by the Board?

SENATOR ADAMS:

Would you respond to the eligibility of the Alaskans for subsistence preference, Don, that's where he's coming from.

MR. MITCHELL:

Actually Mr. Cohen as a former official of ADF&G may want to comment. But generally speaking right now, under the old system, it depends on what is being fished for or hunted for but generally speaking under the old system, all Alaskans who lived in certain areas for example, say in the Kuskokwim or in the Yukon go subsistence fishing just because if you live there, you can go subsistence fishing pursuant to the rules for engaging in that activity. You didn't have to go get a permit from anybody you just went out and did it. With respect to other activities, there

have been permitting requirements in order to keep track of who is doing what. and so it depends. But you would not have to in and of itself, just because this bill go in and like a driver's license and get yourself renewed every year.

SENATOR ELIASON:

Are you saying that everyone ...

MR. MITCHELL:

With respect to rural people.

SENATOR ELIASON:

Are you saying that everyone that lives in a community of a population less than twenty-five hundred, a hundred percent of those people are qualified for subsistence uses?

MR. COHEN:

Mr. Chairman, Mr. President. Under this bill all people who live in communities under seven thousand that where subsistence is a principal characteristic of the community would qualify similar to the state 1986 law. In communities over seven thousand where subsistence is not a principal characteristic, they would have to be applications to participate in subsistence and the Boards would be left with the responsibility to figure out how that system would work. It's not laid out specifically in the bill.

SENATOR ELIASON:

Are you suggesting then that a banker in a community of less than seven thousand who has never participated is automatically eligible to do that?

MR. COHEN:

Mr. Chairman, Mr. President. The bill is similar to existing state law to the McDowell case where it specifies that subsistence in small or medium sized communities was a community activity as opposed to an individual activity. The community should be looked at on a community-wide basis because otherwise it would create conflict in communities and that's not how the community works and that was the reason why that is how the system has worked since 1986 and people in those communities will qualify based on upon their residency.

SENATOR ELIASON:

The question being, the answer is yes, then. The banker would be qualified even though he's never done it before in his life. As long as he is as a resident.

MR. COHEN:

Yes.

SENATOR KERTTULA:

Senator Sturgelewski, do you seek the floor?

SENATOR STURGELEWSKI:

Yes, through the chair, Mr. Cohen, what you're saying is are you not, that in the urban area then, could a plan such as the Governor's in terms of a lengthy form that would be in this legislation I assume determined by the subsistence Board or the Board of fish be required? And that would be appropriate.

MR. COHEN:

It would be up to the Boards but they could have an eligibility system similar to the Governor's if that's what they determine ...

SENATOR STURGELEWSKI:

So we get then into the ideal of we go from community to another level of subsistence which would be based on an individual right. So you are mixing in this legislation but in a different way what the Governor is doing in his. Which is both a community standard so it complies with ANILCA and then an individual standard to broaden the definition of subsistence. Is that correct essentially?

MR. COHEN:

Essentially, that's correct. The Board difference is that in the Governor's bill if you individually qualify you can't go and hunt fish around where you live. You have to go somewhere else to be able to participate in it. So if you hunt and fish say -- I don't know what would be a good example, maybe Kenai Peninsula somewhere, you may qualify because you hunted and fish on the Kenai Peninsula. That maybe enough to qualify under the statute criteria that is set out in the Governor's bill. But then you

can't go and hunt and fish there for subsistence, but you can go somewhere else like to Tyonek where you have never hunted and fish but you qualify over there because you're in the same subsistence area. And so this bill if you have qualified in an urban area and then you're able to participate in that area.

SENATOR STURGELEWSKI:

You can down to Sheep Creek.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

MR. MITCHELL:

I think this is really, Senator Sturgelewski, the heart of the matter that this particular bill takes care of people that live out in rural Alaska in the villages in the way that ANILCA requires and in the way that you required in the 1986 subsistence statutes. Then, in addition to that, and that of course is not a goal that the Governor's bill achieves. Then in addition to that as a separate policy consideration there have been a number of Alaskans that have expressed legitimate policy concern that there would be an opportunity for Alaskans who do not live in the villages but who have reasonable subsistence activities as part of their activities to be able to participate in the subsistence system. And so this bill would then provide an opportunity that we believe is more rational and workable to achieve that policy goal than the way that the Governor would attempt to achieve the same type of goal, basically.

So this bill has the benefit of both complying with ANILCA which is for the rural people, which the Governor's bill obviously does not nor does it intend to, but then in addition, like the Governor's bill it then provides an opportunity for other Alaskans to participate and to do so in a way that is I guess Senator Adams and the other proponents of the bill, believe is a better approach than the approach in the Governor's bill.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Mr. Chairman, we listened to the Department of the Interior yesterday. The question was on the Governor's bill does it retain state management? They said no. They replied does this bill? This one does. This is the bill that we should be looking at. But as I said earlier, I'm willing to have both bills go out of committee, out of finance and then we have that proper debate on the Senate floor.

SENATOR KERTTULA:

You have the floor, Senator Halford.

SENATOR HALFORD:

But this bill does requires a constitutional amendment?

SENATOR ADAMS:

That is correct. It's just like the Governor's bill, Mr. Halford.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

Mr. Chairman, we have considerable testimony that suggests the Governor's bill does not require a constitutional amendment I would say that this bill requires a constitutional amendment unless there are the votes to pass a constitutional amendment which we precipitous pass out of committee without a constitutional amendment.

SENATOR ADAMS:

Yes, that's the same thing on the Governor's bill. Why pass the Governor's bill if you're not going to pass a constitution amendment?

SENATOR HALFORD:

Because the Governor's bill, in the opinion many, is constitutional.

SENATOR ADAMS:

It is an unconstitutional bill that we're going to pass out of committee.

SENATOR KERTTULA:

Are there questions now to the legislation that's before us, Senate bill 485? Counsel is here. The Attorney General is here. Department of Fish and Game. The proponents. Perhaps even the opponents. You have the floor, Mr. President.

SENATOR ELIASON:

Just one more question. I fully realize that we have to do something to get Southeastern Alaska out of the dilemma we're in as far as federal lands go. However, I do have a concern for those people who live in communities of more than seven thousand who are not classified as rural or classified as urban. How do we accommodate those people, specifically, if you don't fill out a form, how do you deal with those people in this community and my community who have a subsistence lifestyle? How do they get the permits or the recognition of that lifestyle so they can do it? What hoops do they have to jump through? I guess that's the question.

MR. COHEN:

Mr. Chairman, Mr. President. In this bill, the hoops are not laid out. There is direction to the Board to develop a system that would say how people would qualify. But there are -- it is not laid out. In this bill though, you could still be a community over seven thousand and still be within ... [tape ends midspeech].

Tape 92-17

Side A

[Tape begins midspeech]

MR. COHEN:

... probably would, at that point the Board would come up with a system to determine how to people in those communities would be eligible.

SENATOR ELIASON:

To pursue this further, how do you go before a Board that does not exist? If as the Senator says, that subsistence Board is

optional. Evidently, it's not as important [indisc.] Board. Who do they go to then?

MR. COHEN:

All the authorities of the bill would fall to the Board of Fish and the Board of Game if an amendment is made to take out the subsistence Board.

MR. MITCHELL:

Mr. President or Mr. Chairman.

SENATOR KERTTULA:

[Indisc.]

MR. MITCHELL:

I think the other thing that's supporting about evaluating this as a policy approach is that with respect to Alaskans that do not live in the villages, obviously there is going to have to be a way to identify those Alaskans that will be participating in this activity. One of the reasons that it is not spelled out as a policy choice in the bill, in terms of the details of that is that the Governor's bill takes a try at that activity in the text of its statute and there are a number of people that the kind of the criteria in the Governor's bill figuring all this out are both unenforceable and have a lot of practical difficulties and it illustrates that this is a very complicated subject. Therefore if the Legislature would give that responsibility to the Boards and then through the public hearing process and the rest of the way that the Board does it's business, then a broad swath of Alaskans who wouldn't be the people who would be participating in that urban activity would be able to advise the Board on what the criteria should be. Rather than having that done sort of in a vacuum. It's such an important point, we thought it would be better to give the authorization and allow a broad public policy for figuring that out than to bite off the task that the Governor attempted to bite off in his approach that illustrated how difficult it is to do in isolation.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

We have the comparisons between the two bills. I'd like one of you to respond to me about the management philosophy on the difference between the Governor's bill and the Bush Caucus bill that I have introduced. About what this bill creates, doesn't it -- what the Governor's bill is creating a drastic change in the management philosophy of fish and game resources. Norman, would you like to respond to that?

SENATOR KERTTULA:

And if the Commissioner of Fish and Game wishes to respond or the Attorney General, to this, subsequently I would suggest they do so.

MR. COHEN:

Mr. Chairman, Senator Adams. I believe that you turn to -- just a second here. To the definitions of "sustained yield" and it's -- oh. It's not in this bill. It's in the Governor's bill. Excuse me. The Governor's definition of "sustained yield" on page ten of SB484, "sustained yield" is not defined in statutes for purposes of fish and game. I believe it is defined for other purposes, timber or something in state statutes, but not for fish and game. And it is a constitutional standard. The standard says, "sustained yield means the management principal of utilization, development and maintenance applied to naturally current fish and game resources that provides beneficial consumptive uses and perpetuity subject to preferences among such uses and cease to provide for a desired population, increasing and prevent desired declines for the purposes of maintaining healthy self perpetuating stocks and populations" I guess I would just refer you to line twenty-eight, where it says, "it provides beneficial consumptive uses in perpetuity". Basically, as I read this language and as I understand what was intended by this bill, the purpose of sustained yield management, that is the constitutional standard, is going to be by this bill defined by the Legislature to mean that you are to provide -- that the Boards are to provide for in the management of each fish stock and game

populations for the beneficial consumptive uses in perpetuity subject to preferences among such uses. Now at least what I understand that to mean is that the Boards decide if they would like to manage the fish stock or game population for a non-consumptive use. I could take an example of a Pack Creek bears. Prior to the time that the Board -- the Legislature adopted the sanctuary there, the Boards decided that there wouldn't be any hunting. of that bear population because they felt that the highest and best use of that population was for viewing and for non-consumptive uses. This bill takes that and will say that the Legislature tells the Boards you can't do that anymore. For each fish stock and game population you've got to be providing for beneficial consumptive uses. Not just beneficial uses. And that you're only subject is to preferences among those uses, among consumptive uses. Now that is my reading of this bill and that is what I understood the word "consumptive" was intended to do when put in line twenty-eight and that is a major management change from the way fish and game is managed in the state and the authority that is given to the Boards.

COMMISSIONER ROSIER:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor. And I'd like you to comment on that point also. Because that would be something that -- please proceed.

COMMISSIONER ROSIER:

Thank you, Mr. Chairman. I believe that the Senators received yesterday during testimony from the Attorney General a reading on this particular point. And I believe the point was the Boards would not preclude [indisc.] for the managing for non-consumptive uses. There was a lengthy discussion about that on the record yesterday.

SENATOR KERTTULA:

What did you just say? I was distracted.

COMMISSIONER ROSIER:

I was saying that you were advised yesterday by the Attorney General's office during the discussion on this particular point, the Boards were not precluded from, in fact, managing for non-consumptive uses under this definition.

SENATOR KERTTULA:

Yes, that is very important.

COMMISSIONER ROSIER:

Yes.

SENATOR KERTTULA:

You have the floor.

SENATOR ADAMS:

So Commissioner, with the language that we have termed on page 10 on "sustained yield" in that paragraph, are you saying that this management philosophy does not change with this language you have in your present bill?

COMMISSIONER ROSIER:

That's correct. Mr. Chairman.

SENATOR ADAMS:

Norman, would you respond to that.

MR. COHEN:

Mr. Chairman, I was not here yesterday to hear the Attorney General's explanation of that.

SENATOR KERTTULA:

I'm going to recognize Senator Hoffman.

SENATOR HOFFMAN:

Well, I'd like to ask the Commissioner then if it does not change the management [indisc.] why do we need that language then, your language change?

SENATOR KERTTULA:

You have the floor, Mr. Attorney General.

ATTORNEY GENERAL COLE:

I may be able to respond to that. As I recall, and certainly this isn't an area where I have been familiar of the practices, but as I recall at one of the Subsistence Council meetings, it was brought out that sustained yield is the term used in the Alaska

Constitution. And that there is no statutory definition of sustained yield. And that this language was developed in the course of Subsistence Advisory Council meetings to provide a statutory definition of that term. And that's why it's in there to get something embodied in statute as to what sustained yield means. Because presently, if I recall correctly what transpired at that meeting, that nothing in statute which defines sustained yield. And it was therefore incorporated into this bill to provide guidance by the Legislature to the Boards of Fish and Game on the sustained yield.

SENATOR HOFFMAN:

I'm going to follow up here. Mr. Cole can respond to that -- Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

MR. COHEN:

I did not hear the discussion yesterday. I will stand by my opinion that what this language does is to change the way fish and game would be managed in the state. I would say that the original language that the Subsistence Advisory Council had before it did not place the word "consumptive" between "beneficial" and "uses" on line twenty-eight. It was added and it was added for a purpose because the council discussed and as I recall -- and I was sitting there during that time, as I recall they discussed that aren't we really talking about consumptive uses when we're talking about sustained yield. Isn't that what it's all about? And it's my reading of this language as written that the Legislature would be tying the Boards hands in terms of managing for non-consumptive uses.

SENATOR KERTTULA:

I thought there was testimony that there weren't terms involved. [indisc.]. Thank you very much. You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Well, I have a memo that was dated back in March 27, 1992

that was written to me on this very subject from George Utermohle and basically it states that it is not necessary that the Senate Bill contain the definition of "sustained yield" and I think he's in the audience and I wonder if he could come up and explain.

SENATOR KERTTULA:

He can if George is here and wishes to, even if he doesn't wish to. George, I think there's a spot for you to sit down even here. Senator Hoffman, if he hasn't heard, can you question him again.

SENATOR HOFFMAN:

Well, I wonder if you might briefly capsulize the memo that you sent me on sustained yield back in March 27, of this year. And basically, saying that the definition is not needed primarily because the resource managers well understand what the definition or what sustained yield means.

MR. UTERMOHLE:

Mr. Chairman, Senator Hoffman. In my memo I do mention that it is not essential and necessary that the bill contain a definition of "sustained yield". As a sustained yield required in the constitution, we've been managing our resources according to that requirement since statehood and we may continue to do so. There's ample knowledge on the part of our resource administrators and the courts were legally interpret the Alaska Constitution to understand what the constitutional amendment meant by sustained yield. In that regard there is no need to address -- prepare a definition of sustained yield in this piece of legislation.

SENATOR HOFFMAN:

Thank you.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, and I apologize.

MR. MITCHELL:

I just had a brief comment about this. There's been a lot of talk about this whole sustained yield problem. First is that it

is true that the Alaska Constitution requires our resources to be managed for sustained yield. However, if we assume that the proceedings of the constitutional convention are an accurate guide of what that standard is, which is a presumption I'm prepared to make -- the history of that section in our constitution indicates that the delegates intended this to be a sort of broad concept which they did not intend it as a strict legal standard the way that a lot of these terms are defined, particularly in federal law, like where sustained yield, optimum sustainable population, - - these are all legal standards that trigger certain requirements. I would suggest that I express no policy view as to whether it would be appropriate to have a statutory definition of sustained yield. I would say that I have been involved in litigation over the years in terms of federal wildlife law with respect to optimum sustainable population and other of these kinds of terms and I can represent, based on that experience, that if you are going to have one that it is a very complicated intermix between law and biology and should be done with some care. And obviously, whether Mr. Cohen or the Attorney General is right or wrong about the intent of the effect of this language, obvious their honest dispute indicates that there is some ambiguity as to the actual standard that is being created here in this particular text. And if that's true and if the policy is to have the statutory definition, it certainly is something that I would think as a technician would required considerable more attention.

SENATOR KERTTULA:

I'll ask the Attorney General to respond and then Senator Adams.

ATTORNEY GENERAL COLE:

Well, I would like to say that I know from personal involvement that this definition of sustained yield had a lot more care and attention than the discussion involving it than some of the constitutional amendments which are being discussed here today have had, number one. Number two is that one would think that the Legislature would want to exercise its prerogative and lay out a

definition of sustained yield for the guidance of those who are managing fish and game in this state. If it does not want to do that if they simply allow the present, I regard, ill defined basis of sustained yield management to continue as it is, it's certainly not an essential ingredient of the advisory council proposed legislation.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

George, under the definition of "sustained yield" and we use "beneficial consumptive uses", does the word "consumptive" in your mind does this change the policy or the management style of the state?

MR. UTERMOHLE:

Mr. Chairman, Senator Adams, I would have to say that there is grounds for concern for the issue that requires sustained yield be done in terms of consumptive uses. There is sufficient grounds for concern there.

SENATOR KERTTULA:

Excuse me. I don't want to interject, I do want to just now, state what the legislation proposed. That's what we're speaking to. We've heard extensively on the other bill. Let's go to the Adams bill. You have the floor, Senator Adams.

SENATOR ADAMS:

Mr. Chairman, the reason I brought this up is I wish to show the management style of the difference between the Governor's bill and this bill because maybe on the Senate we'll be debating these issues.

SENATOR KERTTULA:

I think it was a good exercise. I do think we do need to get back to moving along on the legislation before us. That's all

SENATOR ADAMS:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

Thank you. Are there other questions? Senator Menard.

SENATOR MENARD:

Thank you, Mr. Chairman. Senator Adams, I may be missing something. Is your bill defining sustained yield? Or does it leave it to the constitutional amendment? Is that correct? Or would the constitutional ...

MR. MITCHELL:

The Adams bill does not define the term "sustained yield" which is the present State of Alaska law which allows the Board of Fisheries and the Board of Game basically figure that out as part of their regulatory process. Which is the present state of the law at the time.

SENATOR MENARD:

But does the Adams bill state that they will manage it for "consumptive uses"?

MR. MITCHELL:

No. It does not fix a problem that is not [indisc.].

SENATOR STURGELEWSKI:

Yet.

MR. MITCHELL:

Yet.

SENATOR KERTTULA:

Are there questions? Is there a statement about the legislation? Is it understood?

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Yes.

SENATOR STURGELEWSKI:

I would just say I'm not prepared to make that amendment but I certainly don't support the part that has a subsistence Board. I think that's one that sets up an unnecessary and duplicative management [indisc. - cough].

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR ADAMS:

The sponsor of the legislation would honor amendments from the Senator from Anchorage if that is the wish the legislation could go.

SENATOR STURGELEWSKI:

When our bill was the bill before us I will make that.

SENATOR KERTTULA:

You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

On that point, I think that the language does deserve merit and I think that the Board and Fish and Game presently have a lot of responsibilities [indisc.] particularly the Board of Fish is meeting extensively and for them to come in and now be added weight he responsibility of deciding who can participate and who can't, that is going to take additional time. We already have people that are volunteers and many people declined to participate or be appointed because of the amount of time that they are presently spending on the Board of Fish. And I think if we continue to add responsibility to the Board of Fish, the pool that we can select from is going to get smaller, and smaller and smaller and that is going to cause further problems. Besides I think that it would better for the people that know the issue to be deciding on who and what subsistence is. To say that the Board of Fish is that body I would have to say that it is] You look at the composition - the present composition of the Board of fish, how many of them are subsistence users? Many are commercial users. Many are sports users. And I would say that the issue deserves more discussion than just an up and down vote.

SENATOR KERTTULA:

At this stage, do wish to question? You have the floor.

SENATOR COLLINS:

Thank you, Mr. Chairman. Senator Adams, indicated [indisc.] constitutional amendment and I've been looking through my packet here and I don't see an amendment. Do we have a copy of the amendment that goes along with Senator Adams bill?

SENATOR ADAMS:

Either one.

SENATOR KERTTULA:

You have the floor, Don.

MR. MITCHELL:

There have been several texts of constitutional amendments that have been presented to me this afternoon because I've been here in the bull pen or whatever in this area of the room. Both of the texts that I have seen would authorize enactment of a statue like this. In my judgement, one it was a copy of a constitutional amendment that the Senate passed in 1990 and another is a text that was based primarily on that draft but slightly different, with the same legal effect, I think, that had Senator Pourchot's name on it. Either one of those, I think, would accomplish that result.

SENATOR KERTTULA:

If there are no further question ...

SENATOR COLLINS:

[Indisc.].

SENATOR KERTTULA:

You have the floor.

SENATOR COLLINS:

Those amendments are not on the floor, is that correct?

SENATOR KERTTULA:

That's correct. We just brought the bill up for discussion purposes to be understood so that the twenty members have the opportunity to debate and to reflect and ask legal counsel, ask the Attorney General. At this time I'm going to move for a three minute recess and then we'll come back with the constitutional amendment discussion. And with that we will hopefully vote on legislation to go out of this committee.

RECESS

5:58 - 6:05 p.m.

SENATOR KERTTULA:

Yes, Senator Adams.

SENATOR ADAMS:

It's funny, but I have another bill here, sponsor substitute bill that would -- it's a bill without the subsistence Board which I think a majority of the senators -- it would be similar to the Governor's bill. The bill would maintain the existing Board system placing subsistence use in competition with other use and with that, Mr. Chairman, if it's okay with you, I'd like to pass out a committee substitute.

SENATOR KERTTULA:

Yes. Please do.

SENATOR ADAMS:

Its's just basically without the subsistence Board.

SENATOR STURGELEWSKI:

I think that's wonderful how you do that.

UNIDENTIFIED SPEAKER:

Does that lack the constitutional amendment, also?

SENATOR KERTTULA:

[Indisc.] If and when a motion came up on this it would probably be this work draft bill here.

SENATOR ADAMS:

That's correct.

[simult. speech]

SENATOR KERTTULA:

If people feel comfortable then Senator Eliason will move on 484. If you feel uncomfortable at this stage, we'll wait for everybody to arrive.

SENATOR ELIASON:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Eliason.

SENATOR ELIASON:

I intend to move -- I don't think there's any problem in moving both these [indisc.] However I think the second motion will be committee [indisc.] whether we want to begin the process of calling ourselves back into special session.

SENATOR KERTTULA:

That will be the third distinct motion.

SENATOR ELIASON:

So at that time, begin the process doesn't necessarily mean we'll ever get through that process, but we have to have some indication of what we're going to do [indisc.] I think that's true.

SENATOR KERTTULA:

Senator Eliason, I'll recognize you for the motion. There may be some debate.

SENATOR ELIASON:

Mr. Chairman, I would move and ask unanimous consent that Senate bill 484 be moved from committee.

SENATOR KERTTULA:

Without objection? So ordered.

SENATOR ELIASON:

Mr. Chairman, I move and ask unanimous consent that Committee Substitute for Senate Bill 485 as presented before us be adopted and moved [indisc.].

SENATOR KERTTULA:

Objection.

SENATOR ELIASON:

The main changes being made ...

UNIDENTIFIED SPEAKER:

That's correct.

SENATOR ELIASON:

... is subsistence Board has been eliminated and I move, Mr. Chairman, and ask unanimous consent that Committee Substitute for Senate Bill 485 be moved on to Committee.

SENATOR KERTTULA:

Objection.

SENATOR HALFORD:

Mr. Chairman, I object. [Indisc.]

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

Mr. President, as the second bill requires a constitutional amendment according to it's sponsor, I would hope that motion to move that bill is contingent upon the passing of consideration of a constitutional amendment. If we do not consider a constitutional amendment, by it's sponsor, that bill is not available to us. because he has said it requires a constitutional amendment to be able to pass it.

SENATOR KERTTULA:

Still I think it can leave this committee. There's other committees [indisc.] you have the floor, Senator Adams.

SENATOR ADAMS:

Mr. Chairman, the argument here is both bills need a constitutional amendment. The Governor's bill that we just moved out and my bill needs a constitutional amendment. I'm not going to hide behind it any thing on this and I think it's one that would be the third motion or the fourth motion is do we have sufficient votes here to vote on a constitutional amendment to take ourselves back.

SENATOR KERTTULA:

You have the floor, senator Halford,

SENATOR HALFORD:

Mr. Chairman, I will withdraw my objection and just point out that I do not believe [indisc.] have passed out requires a constitutional amendment. The Attorney General testified that it doesn't. I believe that that bill was constitutional without amendment. But this bill, the sponsor himself said, yes, this one does require a constitutional amendment. I think it's a different question. Whether it's going to be handled further down the process [indisc.] I'll withdraw my objection and move [indisc.].

SENATOR KERTTULA;

If there is no further objection -- comment.

SENATOR HOFFMAN:

Our legal counsel has said -- has told us to testify that both bills need constitutional amendment. Our legal counsel has stated that.

SENATOR KERTTULA:

If there's no further objections, motions passed. 485 is out of committee. If the [indisc.] will be taken around the tables, Sue or Carol or whomever is, for signature of both bills, I'd appreciate it. Start with Senator Eliason and go right around. And soon as the senator has signed this one, I believe we'll then take in motion any other considerations before the body here which has to do with the constitution.

SENATOR ELIASON:

Mr. Chairman, I believe we're all present.

SENATOR KERTTULA:

I do believe so.

SENATOR ELIASON:

I'd like to make a motion relative to how we're going to proceed from this point. The motion will be to the effect that shall we or shall we not proceed. A motion will be proceed -- to commence the process of calling ourselves back into a special session to address the constitutional amendment. However, I think we should also note that it's going to take, I assume fourteen votes to do that. And it doesn't necessarily mean it's going to happen because we have other forces at work on the other side who might not entertain that question.

I think that it's a question that we might [indisc.]. I think the wise thing to do would be to wait for the House to act, but I think that we're probably a little more mature and we can make that one step. Once we make that step and decide we're not going to of course they're going to blame us because we didn't do it. And if we do agree to that, they probably won't anyway. That's my [indisc. - laughter]. But I always [indisc.] body was probably more of a better position, especially those of us who are not returning [indisc. - laughter]. I'll make a motion.

SENATOR KERTTULA:

The motion is shall we call ourselves into special session

...

SENATOR ELIASON:

The motion, Mr. Chairman, is shall we begin the process to call ourselves back into special session to address specifically the constitutional amendment.

SENATOR KERTTULA:

Shall we begin the process -- Senator Pourchot to that motion.

SENATOR POURCHOT:

Thank you, Mr. Chairman. I just wanted to [indisc.] point [indisc.] at all but I guess I would I am assuming that we're really looking for -- would you entertain voting for a constitutional amendment. There may be a mechanical way we can do that. For example, taking fourteen votes to the Governor as saying would you add this to the call [indisc.] obviously [indisc.] come back in. [Indisc.].

SENATOR KERTTULA:

You have the floor, Senator Eliason.

SENATOR ELIASON:

That's exactly what I had in mind. We have to communicate, of course, with an approach the House. Obviously the House has two thirds and we have two thirds. We don't need the Governor's support in this issue, however, it would be beneficial if he would do that because he would [indisc.] the call of that specific item. I want you all to understand that if we call ourselves back into special session we can talk about anything. We can introduce any bills. We can do what we want to do and we might be here for thirty days.

SENATOR KERTTULA:

Senator Pearce.

SENATOR PEARCE:

I have a question about the motion. Which constitutional amendment are we talking bout? Is that ...

SENATOR ELIASON:

Just the process.

SENATOR PEARCE:

This is just a process to call ourselves back for a special

session [indisc.] open call. [simult. speech]

SENATOR KERTTULA:

[Indisc. - simult. speech]. Assuming some discipline.
Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chair. I know we went through a lot of legislation in Rules Committee and between the bodies everything from [indisc.] to a major fisheries facility in Anchorage under [indisc.] and a lot of other things that they never like to consider in a thirty-day special session. But I certainly don't want to do that. I think we've had a lot of time to consider this in regular session. This whole issue moved through the Resources Committee, moved through the Judiciary Committee [indisc.- cough] all the parts of it ended up in the Finance Committee and we didn't pass it out. Now we're back here. We're here four days before we get to this point. If we're going to look at constitutional amendment it would have to be introduced today. It can't be introduced today because we're not under the call to introduce it.

So I think Senator Eliason's point that it's at least a three-day period if the Senate decided and we got the House to decide today to go forward. It's at least a three-day addition to the session. And we know from the advocates of at least one form of constitutional amendment that they're opposed to adding any kind of a trigger back to ANILCA. And I think if you lose that side and you can't maintain the other side, you don't get there that way either. You don't get there through UFA's approach. You don't get there through AFN's approach. You don't get there through the position of the Outdoor Council. So I think we're essentially wasting our time to consider a constitutional amendment at this point. I would vote that we do not vote to extend ourselves in session to consider a constitutional amendment and take all the risks, all the other things that are out there maybe under consideration.

SENATOR KERTTULA:

Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. I was trying to think, I've gone through a couple of special sessions and I don't recall any of them going thirty days.

UNIDENTIFIED SPEAKER:

Two weeks. [simult . speech]

SENATOR ZHAROFF:

This could go as quickly as three days. Let's put the other end of that spectrum out there as well as the other. You can't scare [indisc.] most of us are dealing here with subject of subsistence. There may be a technical problem there that we've had. I think somebody has alluded to that today. So we can limit ourselves. We don't have to automatically deal with one hundred new pieces of legislation. There's sincerity in the body here to deal with subsistence, or whatever needs to be taken care of, let's do that. I think there's a spirit within the group here to do it as quickly as possible. Scare tactics just shouldn't work. We're fooling ourselves. We're trying to fool the public out there. We're trying to fool the administration.

SENATOR KERTTULA:

Senator Sturgelewski, then Senator Uehling.

SENATOR STURGELEWSKI:

Mr. Chairman. I just say that I would concur with Senator Zharoff's remark. Somehow, I don't think the public is going to judge us on three days. They're going to judge us by what we do. I think the great body Alaskans want to see a resolution. It may not certainly all agree with what we do, but I think for us to forestall that for some fear that we're going to bring out all of the failures or our own personal disappointments of the last session is simply not accurate.

SENATOR KERTTULA:

Senator Uehling.

SENATOR UEHLING:

Thank you, Mr. Chairman. I guess, some of the concerns on --

[indisc.] we've already gone through on special session here where there was some difficulty [indisc.] keep the agenda down and I would hope -- I do think that there should be some kind of resolution of this. At least we should take a look at the constitutional amendment. However, I do think it needs to be just limited to that, if possible. And I think in the discussion before us, regarding this motion, that we could [indisc. - cough].

SENATOR KERTTULA:

You have the floor, Senator Eliason.

SENATOR ELIASON:

Like you mentioned, we tried this before [indisc.] however, I would suggest that probably at the present make the committee assignments, I would be sure that any bill coming across my desk would be certain to have numerous committee referrals. So that's where I'm coming from.

SENATOR KERTTULA:

Senator Shultz.

SENATOR SHULTZ:

Just that I'm not afraid as some people are. I'm tired. And I call for question.

SENATOR KERTTULA:

Called for question. Roll call. Lorraine you call the roll - fourteen votes.

CLERK:

Senator Adams.

SENATOR ADAMS:

Yes.

CLERK:

Senator Collins.

SENATOR COLLINS:

No.

CLERK:

Senator Cotten.

SENATOR COTTEN:

Yes.

CLERK:

Senator [indisc.].

SENATOR :

Yes.

CLERK:

Senator Duncan.

SENATOR DUNCAN:

Yes.

CLERK:

Senator Eliason.

SENATOR ELIASON:

Yes.

CLERK:

Senator Fisher.

SENATOR FISHER:

No.

CLERK:

Senator Frank.

SENATOR FRANK:

No.

CLERK:

Senator Halford.

SENATOR HALFORD:

No.

CLERK:

Senator Hoffman.

SENATOR HOFFMAN:

Yes.

CLERK:

Senator Menard.

SENATOR MENARD:

No.

CLERK:

Senator Pearce.

SENATOR PEARCE:

No.

CLERK:

Senator Pourchot.

SENATOR POURCHOT:

Yes.

CLERK:

Senator Rodey.

SENATOR RODEY:

Yes.

CLERK:

Senator Shultz.

SENATOR SHULTZ:

Yes.

CLERK:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

Yes.

CLERK:

Senator Taylor.

SENATOR TAYLOR:

No.

CLERK:

Senator Uehling.

SENATOR UEHLING:

Yes.

CLERK:

Senator Zharoff.

SENATOR ZHAROFF:

Yes.

CLERK:

Senator Kerttula.

SENATOR KERTTULA:

No.

UNIDENTIFIED SPEAKER:

Would you give us the results of the [indisc.].

SENATOR KERTTULA:

Please read the total.

CLERK:

The roll shows; twelve yeas; eight nays.

SENATOR KERTTULA:

At this time we can adjourn. [Simult. speech]. We're
adjourned until subsequent call.

ADJOURN

6:35 p.m.

SENATE COMMITTEE OF THE WHOLE

June 19, 1992

11:27 a.m.

(Meeting held in Senate Finance Committee Room)

MEMBERS PRESENT

Senator Jay Kerttula, Chairman
Senator Al Adams
Senator Virginia Collins
Senator Sam Cotten
Senator Shirley Craft
Senator Jim Duncan
Senator Dick Eliason
Senator Paul Fischer
Senator Steve Frank
Senator Rick Halford
Senator Lyman Hoffman
Senator Curt Menard
Senator Drue Pearce
Senator Pat Pourchot
Senator Pat Rodey
Senator Dick Shultz
Senator Arliss Sturgulewski
Senator Robin Taylor
Senator Rich Uehling
Senator Fred Zharoff

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 601 (JUDICIARY) am (efd fld)
"An Act relating to the taking of fish and game."

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6/19/92

Tape 1

Side A

[Tape begins midspeech]

SENATOR KERTTULA:

... Senate can be brought forward and we will proceed. I believe that Senator Davidson's legal staff is here. I don't know if we're expecting [indisc.] for questions. I wonder if you could come forward, Ms. Otto, in the front. I think we will want to ask you a few questions about section one. I'm going to presume you're the resident expert on that subject. McKie, I expect you'll want to come forward also.

MR. CAMPBELL:

I can come forward [indisc.]

SENATOR KERTTULA:

Yes, whoever brings you [indisc.]. Choose the best seat, Ms. Otto. I see Don Mitchell upstaging everybody yesterday. He's tall anyway, so he sat about a foot higher and more comfortably than anybody else up there. He's no fool. Very bright guy. Put him on retainer, quick. I think we can start in with those that are here, although I regret that some very interested members aren't here. But if there are questions about this bill, rather than having an explanation, as soon as those that are walking in now sit down, why, we can proceed.

SENATOR KERTTULA:

It would be that's why I was kind of hoping enough people would be here so we won't waste their time. They're coming in now. But I thought if they weren't here, there might be a question. Writ of order, you may proceed. Would you give us a briefing. We don't have the analysis breakdown. So if you give us a briefing of this bill, if you can, I would appreciate it, Ms. Otto.

MS. OTTO:

Thank you, Mr. Chairman. My name is Laurie Otto, and I'm

staff counsel to House Judiciary Committee. The Committee Substitute to House Bill 601 has a very modest goal. It accomplishes very modest goals. During the course of the presentation at least in the House, I guess I was in the Senate a little bit and heard some of the same remarks being made. Some of the issues that seem to be driving apart the subsistence debate before the Legislature and issues about which there seems to be a great deal of consensus, were the problems on the Kenai Peninsula and the lack of a definition for "customary trade." On other issues, there didn't seem to be consensus and at least in the House, people were not able to come to a meeting of the minds on how to deal with the problems that I think Mr. Campbell has ably presented during the remarks that he's made both to the committees where I've been present and to the Senate. But everybody did agree that being able to sell, for example, herring roe in commercial channels to the Japanese after having taken the herring roe for subsistence purposes was not appropriate. Everybody agreed that the effect of the all Alaskans policy on the Kenai Peninsula created unacceptable pressures on the resource. So rather than have those problems go unattended, the Legislature would say unable to come to a meeting of the minds over all on the subsistence issue, House Bill 601 is intended only to deal with those two very minor problems. I think I've heard Mr. Campbell describe it as putting a bandaid on somebody who has been in a train wreck. And I guess I could characterize it as sticking a finger in the dike to stop it from leaking. There are two fairly significant problems that are capable of being solved by the Legislature. That is all this bill is intended to do. Nobody in the House believes it's a total solution to the subsistence problem. Nobody in the House believes for a minute that this issue is not going to have to be revisited. This is purely a stop-gap measure to deal with two of the problems that have been driving this debate. It accomplishes that in two different ways. The solution of the customary trade problem is fairly simple. A definition is written into the statute. Beyond that the

definition as presented requires the Boards of Fish and Game to define when to further restrict certain language that is set out in the definition and to make sure that they do that and that this issue does not continue to go without full definition that they will also direct the Boards of Fish and Game to complete the definition of customary trade. There are differences between the definition that is in this bill and the definition that was presented in the Governor's bill. The reason for the difference is this. The Governor's bill talks about not being - as being relevant to non-commercial transactions, yet in the discussions before the committee, everybody seemed to think, for example, that somebody, you know - the example that seemed to come up over and over again, is somebody in a village exchanging strips or selling a few strips for cash to get money to go out and go subsistence fishing was not inappropriate and should be allowed. But at least in the House people felt, given the time constraints of the special session, not being able to go through the normal committee process, not being able to have the luxury to accept testimony from all the interested people on those issues, they felt it was better to leave the full definition and the fleshing out of the definition to the Boards that have the expertise to deal with it. So they didn't tie the Boards hands. The Boards are going to be in a position where they can accept the Governor's definition if they care to do so. But they are going to be able to do it based on a record, and based on facts and not based on this kind of hothouse environment where at least in the House, legislators were being asked to accept things of faith as the best way to deal with the problem. So that's the customary trade issue.

It deals with the Kenai Peninsula problem in a little bit more complicated way. And I know that Mr. Campbell feels that there may be practical problems with the approach, but I think that it's one that truly gives the Boards more flexibility than they have right now to deal with the situation in Kenai. This is what the bill does.

Number one, it takes the F-3 areas, and I'm sure you're all

familiar with the Governor's bill right now to know what I'm talking about. In the Governor's bill and as you know, in the Governor's bill in F-3 urban areas, you cannot engage in subsistence activities. You have to go outside if those areas to do so. It takes exactly that approach. It says, "Urban areas", and we actually took out the population cap because of places like Sitka. People in the House felt that was an artificial line, that it was better to take the second part of the definition of the Governor's bill which is an area where the principle characteristic of the economy - you know the language and then and I can point it out to you in the bill. And I will do that. It's on page five, line fourteen and fifteen, "A non-subsistence area is an area or community where dependence upon subsistence is not a principle characteristic of the economy, culture and way of life in the area or community." That's language directly from the Governor's bill. We have defined that term starting on page five, line thirty. Again, we've taken the definition directly from the Governor's bill. So the Governor's concept - the Governor's way of defining it as the seven thousand population cap we felt was artificial. We took the Governor's definition where subsistence is a principle characteristic of the economy, culture and way of life. And said you can't engage in subsistence activities in those areas. Everybody who lived in those areas just like in the Governor's bill, is a subsistence user - well not in the Governor's bill but in [indisc.] subsistence user that can go out and engage in subsistence activities in other parts of the state. But in the urban areas, the boundaries of those areas are set by the board. People cannot engage in subsistence activities. But then people, said, well, what about, as an example and there are other examples and I'm not saying that this is designed to give total what the Kenaitze as a statute of general applicability. It is one that could be used in other parts of the state, but just to use an example, what about the Kenaitze? Because they live in an urban area, but we know through a lot of litigation that they have customarily used the resource in that area. What the House

decided to do is say that is that people who have customarily relied on the resources and the bulk -- the broad criteria set out on page five, lines twenty-four to twenty-nine, can qualify for what the House called "customary use permits." The benefit of having a customary use permit is since one of the things I've heard Mr. Campbell say, what's the difference between customary use permit and a personal use permit? Why are you creating this whole new category? Fisheries users. The House's answer to that is the Board may wish to allow people like the Kenaitze who have customary tenets on a particular resource to engage -- to take part in a fishery and not open it to everybody for a personal use fishery. One of the amendments that was made in the House at the request of the fishing groups was to say -- was to do two things. One, it gives the Board the discretion to adopt regulations, to allow for customary use permits. The original version said that they had to. And then it also gives the Board the discretion to allocate resources to those people to whom it has granted customary use permits. So there are two levels of discretion built into the bill. And all it really does is give the Boards a little bit more power to deal with situations where there's evidence presented on the record to them that they can justify based on facts to open a particular fishery in a particular way to a group of people who have customarily relied on the resource. Some of the members were particularly concerned about commercial fishing in Kenai, and wanted to make sure that the Board could structure the way in which it made the allocation. For example, could it allow a couple of nets on the beach or a net on the beach or out in the river. And this approach lets that happen. I'm not going to pretend to you that this bill is perfect, that there can't be amendments made to make it better. But that is the approach in general the House took in adopting in this Committee Substitute bill.

SENATOR KERTTULA:

There were questions [indisc.] so before I ask, Mr. Campbell, Senator Cotten, please.

SENATOR COTTEN:

I wanted to make sure I understand.

SENATOR KERTTULA:

Senator Adams.

SENATOR COTTEN:

Do I have the floor, now?

SENATOR KERTTULA:

You have the floor, Senator Cotten. I apologize.

SENATOR COTTEN:

In section five, that's where you begin to talk about this new - I guess it's a new term. Customary use.

MS. OTTO:

Yes.

SENATOR COTTEN:

And as a result of that, then you went back and did the other sections?

MS. OTTO:

Yes.

SENATOR COTTEN:

Sections one, two three ...

MS. OTTO:

Those are all conforming, but Mr. Chairman, those are all conforming amendments.

SENATOR COTTEN:

Right.

MS. OTTO:

The that is probably more significant, more than a conforming amendment is the one that's on page three, line twelve and that amendment is the one that gives the board the discretion to make allocation decisions.

SENATOR COTTEN:

And originally it was a "shall", and now ...

MS. OTTO:

The original draft of the bill -- the original discussion draft required the Boards to allocate to people who had customary

use permits. The original bill as passed out the Resources Committee on page five, line eighteen said the Board shall adopt regulations providing for the issuance of permits. And both instances, the legislation was changed to give the Boards the discretion to do that, if they chose to do so. It's not mandatory. It's an additional management [indisc.].

SENATOR COTTEN:

In the Governor's bill, that bill also sets aside an area like the Kenai and suggests that it is -- that you can't do subsistence hunting and fishing in that non-subsistence area. In that regard, the Governor's bill is the same. But in the Governor's bill should a person want to harvest fish other than by sport or commercial means, their only option would be personal use. And that would be for everyone. Whereas this allows for some people to get customary use permits, in an urban area, and other people to not be able to get them in an urban area. Is that correct?

MS. OTTO:

Mr. Chairman, Senator Cotten, that is correct, assuming that the Board actually implements this statute. Under this bill, the Board has to set up non-subsistence use areas. They are required to do that. That is the mandatory provision of the bill. The Boards can if they choose to do so, set up this customary use permit system. They don't have to. But they can if they want to, if they determine that it's appropriate.

SENATOR COTTEN:

One quick other question.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR COTTEN:

The Boards may not permit -- I'm reading section five, "May not permit subsistence hunting," et cetera, "in a non-subsistence area." And then the board shall identify the boundaries of the non-subsistence area. So it's really up to the Board to decide that, for instance, the Kenai Peninsula is an area

where subsistence is not a principle characteristic of the economy, culture and way of life. Right. So the Board says yes or no on that.

MS. OTTO:

Yes.

SENATOR KERTTULA:

In legal drafting on line eleven on that same page five, I know what "may" and "shall" are and in draftmanship, "may not" and "shall not" mean the same thing.

MS. OTTO:

That's correct, Mr. Chairman.

SENATOR KERTTULA:

Thank you very much. You have the floor, Senator.

SENATOR COTTEN:

Has there been a lot of discussion about the outer areas of where people can reach on this and what you can imagine the extreme examples of, for instance, could the Board issue a couple of hundred permits for gill nets on the Kenai River? I mean, would that be legal according to this statute? Could the Board do that or they could not do that or has that type of example been discussed?

MS. OTTO:

Mr. Chairman, Senator Cotten, yes, it has. First the Board would need to set up this system. First they would need to develop regulations, setting up the criteria for qualifying. Then they need to make allocations in this. But yes, one of the main reasons for doing this is to allow the boards in different areas of the state to deal with local problems.

SENATOR COTTEN:

I'm anxious, Mr. Chairman, I'm sure we're going to hear from the Commissioner of Fish and Game at some point.

SENATOR KERTTULA:

Yes, I presume we will.

SENATOR COTTEN:

Thank you. That's all I had.

SENATOR KERTTULA:

We can attempt -- may be Mr. Gruening will be able to find him. Inform the Commissioner of Fish and Game there's going to be a request for him to speak on the SB 601. Senator Adams has the floor.

SENATOR ADAMS:

We listened to the other two bills. Both of them had fiscal notes in the neighborhood of being one thousand. Mr. Chairman, if you could get a fiscal note on this before I ask my question, I'd appreciate that.

SENATOR KERTTULA:

I think the Finance Chairman was requesting a fiscal note for us. We do not have one at this time, but he is working on it.

SENATOR ADAMS:

Thank you. And going on to looking at section five, subsection(g), can you describe to me what is the eligibility criteria for permittees? Is it similar to the Governor's bill or what type of criteria am I looking at?

MS. OTTO:

Mr. Chairman, Senator Adams, the criteria set out on page five, lines twenty-four through twenty-nine, and basically they are that the -- these are asked to be fleshed out by the Board -- but it's the availability of alternative resources and either an individuals dependence on the resource for their cultural ties to the resource.

SENATOR ADAMS:

Is the application process similar to the one that was given by the Governor's bill? Do you know?

MS. OTTO:

Senator Adams, I think that the Boards would need to deal with that issue. This is something -- I think one of the riding philosophies behind this bill is that the Boards have expertise in fish and game management, that they are in a better position, given the constraints of the special session to make management decisions. And the House decided to leave the Board with a great

deal of latitude to make those kinds of decisions.

SENATOR ADAMS:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

Are you satisfied? Are there other questions at this time? If not, Mr. Campbell, do you have a comment on this?

MR. CAMPBELL:

Thank you, Mr. Chairman. We think this bill has only partially succeeded in one way but certainly fails in the rest. I think the it succeeded partially in the main thing of the bill, is simply revised some legislators feel that they have had to be able to vote for going home ...

SENATOR COTTEN:

Mr. Chairman, I want to just interrupt here.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR COTTEN:

Remind Mr. Campbell that motives of legislators ought not to be discussed here.

SENATOR KERTTULA:

You were not allowed to do so on the Senate floor.

MR. CAMPBELL:

Mr. Chairman, Senator Cotten, if I can.

SENATOR KERTTULA:

Thank you, Senator Cotten.

MR. CAMPBELL:

I would like to apologize and see if I can start over in a better fashion.

SENATOR ADAMS:

I'd like to interrupt because if you can start talking about motives. The motives of the Governor's bill is not to solve subsistence. It is basically to change ANILCA and that was the Governor's motives. And I apologize for stating that also.

SENATOR COTTEN:

You can talk about ... [laughter]

SENATOR KERTTULA:

[indisc. - laughter] We can talk about the administration.

SENATOR COTTEN:

Right. The Governor's motives are open season [indisc. - laughter].

SENATOR KERTTULA:

You were in order.

MR. CAMPBELL:

What I will try to discuss is what I understand the motives of the bill, I believe, the objectives of the bill is trying to achieve. The bill has been described as a "finger in the dike" and unfortunately we feel we're in a situation where the dike has crumbled and that this simply does not work. The bill basically does three things and I'd like to just go over each of them briefly, as well.

It does as Ms. Otto pointed out, provide the Boards some general language to restrict sale of fish and game resources and that is very mildly helpful. The second thing it does, is it establishes the non-subsistence areas. And we actually first saw this bill as it was created and moved very rapidly through a couple of committee's last night [indisc.] so it was until as we were waiting [indisc.] that I had a chance to really look at what this bill does. I'm sort of amazed. Because if we had done this bill, I believe there's some that would have thought, we knew it all along, the Governor's is trying to get rid of subsistence or [indisc.] rural subsistence users. Because what it does is throughout our Council process there was a lot of talk about the severe distrust of the Board among many rural residents. But what this bill does is that it empowers the Board with a fair degree of leeway, more substantial leeway, I would add, than our bill. There's no population language and some other reasons I'll get into - to if they look at an area and they feel that area if they can make the determination in their judgement that subsistence is not a principal element of the economy, culture and way of life, that they can simply declare that area a non-subsistence area.

Now the bill does list out the criteria and they lifted [indisc.] directly from our bill that they look at and make it that. I think that that's useful. But under this situation, there's some very distinct differences in how this works to the severe detriment of rural subsistence users.

In each bill, subsistence uses are not allowed in the urban areas. But because under the Subsistence Advisory Council bill, the number of potential subsistence users in those urban areas was very limited. Only a small fraction of the population, -- it was within the power of the Boards to, I believe, [indisc.] draw the boundaries very tightly because that small amount of people who are going to go out outside of the urban area were going to have a minimum impact on the rural residents. Here the motivation on the Boards is in fact the opposite. Which is to expand the boundaries as widely as possible and, in fact, I think there's going to be a tremendous temptation, particularly on the residents in between Anchorage and Fairbanks, if they are having a great deal of difficulties, say in the area Glenallen or up the highway or wherever, - to look at that and say, well, maybe we can decide subsistence is not a principal element of the economy and so we just take that element out - that whole area out of subsistence and put it in non-subsistence area and then not have to deal with these conflicts. It also retains the situation where everyone in Alaska is a subsistence user. And so for instance, every G.I. in Fort Richardson or Elmendorf who moves up here and establishes Alaska residency, can then go out, get in their car, drive down the road system and compete with rural subsistence users. For that matter, anybody [indisc.] around the state can compete with rural subsistence users. And we are in, I think, that some folks have said, well, we have a tier two situation criteria [indisc.] to fall back on if we get into that situation and we just say that the tier two criteria do not work well. In fact, they work okay when we're out away from the urban areas. But when we're around the urban areas, tier two hunts are an absolute disaster. They turn, quite frankly, into a liars contest and one that we cannot

enforce. So that's how it has an adverse affect on rural subsistence users.

The third thing it does is, I have to say I think something - well I think that many people look at this sort of customary use in the urban areas, and think, ah, this is what we've been waiting for. This is going to recognize that we, in this urban area, have a special subsistence use. I think those people are in for a somewhat bitter disappointment. And the reason I say that is this customary use which by the way is defined on page seven as "customary use means use of fish stocks and game populations permitted under 16.05.258 and then that's where customary use and it's what -- at least when I was involved in [indisc.] used to say it had a pleasing symmetry to them. But I don't think it answers what customary use is. But worse, it leaves us with the question of how on earth -- and I just ask each of you to think about this. If you were in the position in the Department of Fish and Game and you were dealing with an urban population of the Kenai Peninsula and you were just told you can sort those residents out. You're going to get to pick some who do participate and some who do not. And you're going to sort it out by somehow judging their availability of alternative resources and either their dependence on the resource or the person's cultural need to engage. And I would suggest that a cultural need is used as a racial factor is unconstitutional, and it is not [indisc.]. And I think what you do is put the Boards in the position where they have something absolutely impossible to administer, it's optional where they can provide pretty much the same thing through personal use fishing, right now, they'll simply say, why do it? And in fact, we haven't -- the Attorney General's office has looked at this right now, they say they feel right now if this somehow became a law, that the Attorney General would advise the Boards that this probably would not be feasible. This section is not useable.

So I guess those are the problems with what it does. I believe that we've talked enough in previous committee meetings about all the other problems that we need to fix. I won't run

through that list or take up more of your time. You've seen too much of me already. [indisc.] questions.

SENATOR KERTTULA:

I'd ask the Department of Fish and Game Commissioner -- does he have a comment on the legislation 601? We'd like him to come forward too.

COMMISSIONER ROSIER:

Thank you, Mr. Chairman. I'm sorry I came in late. I'm not sure what's been discussed and what hasn't been discussed here at the present time. In my view, the House Committee Substitute 601 is part of the issue here in terms of providing tools to the Board. But it certainly doesn't give them all of the tools. From my standpoint, I guess it's not really the clear definition which would be going to the Board. I guess, we're kind of creating a new class where we talk about customary use. It's kind of my feeling at the present that the Boards have a category of personal use that they could use in this particular scenario. And I think the Boards do use that at the present time. I'm not sure what we've really accomplished with the creation of this term "customary use" in terms of Board authorities. It's kind of my feeling that the bill certainly helps in terms of the authorities of the Board for identifying what customary trade is but the bill falls a little bit short, in my view, in really providing the tools that the Boards needs to deal effectively with the subsistence priority here at the present time. In my view, we need -- and there's a number of things that I think that we truly need -- for the Board to have that.

I think, one, the Board has to have the ability to identify parts of stocks that are eligible for subsistence, certainly, the Boards need the flexibility and the ability to provide for separate harvest provisions. I heard some testimony here in the last few days, about when a subsistence harvest should be occurring. Certainly, the Board can provide for that. But when you get into a tier two situation, for instance, and you have resources that are not, in fact, being fully harvested by

subsistence users, the Board's hands are tied, for instance, in being able to go after those whatever the additional resource is under the present state law. Certainly, some of the definitions that have been provided for in the Governor's bill and so forth would certainly add some strength to 601, but those would be my general comments on 601 at this time.

SENATOR KERTTULA:

Questions? You have the floor. Senator Cotten then Senator Adams, excuse me.

SENATOR COTTEN:

So the pluses of the bill are you define customary trade and you allow the Board to identify non-subsistence areas.

COMMISSIONER ROSIER:

That's correct.

SENATOR COTTEN:

What else you need as far as -- I'm trying to understand what the Department of Fish and Game needs as far as management tools to accomplish your job. You want to be able to identify stocks.

COMMISSIONER ROSIER:

That's correct. Stocks or parts of stocks, that are in fact eligible for subsistence. We still don't address though, as I understand 601, we still do not address the kind of all Alaskan issue here on this. We still kind of got an open situation where everyone is still eligible as a subsistence user. And I think the basis for that -- we need to address that particular issue because as long as that's the situation, the Board has a very difficult time in dealing with the allocation process and giving fair allocation to the subsistence users and the rest of the users that are involved.

SENATOR ADAMS:

Senator Cotten, can I go along with your question just to ask on that.

SENATOR COTTEN:

Okay, I just want to get one thing clear here. So this bill does give you the ability to identify stocks. So that isn't a

problem then?

SENATOR ADAMS:

The question I was going to ask, Senator, is don't we already have that in existing statutes [indisc.- simult. speech] identify stocks.

COMMISSIONER ROSIER:

Yes.

SENATOR COTTEN:

So then that leaves us with some definitions that were in the Governor's bill that aren't in 601?

COMMISSIONER ROSIER:

That's correct.

SENATOR COTTEN:

And the all Alaska issue?

COMMISSIONER ROSIER:

And the all Alaska issue.

SENATOR COTTEN:

That's the two things then that you're lacking that as a manager you need?

COMMISSIONER ROSIER:

As I see it, that's correct.

SENATOR COTTEN:

Okay, thank you, Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Adams.

SENATOR ADAMS:

Thank you, Mr. Chairman. In your mind, does this House bill cure the problems of this piece of legislation especially in the Kenai area?

COMMISSIONER ROSIER:

It may.

SENATOR ADAMS:

It may. Okay.

COMMISSIONER ROSIER:

It may.

SENATOR ADAMS:

I have looked at the Governor's bill. In my opinion, I have looked at the adjectives the administration says is unconstitutional. What is the administration saying about this piece of legislation and do you have a written opinion?

COMMISSIONER ROSIER:

I don't have an opinion on that at the present time.

SENATOR KERTTULA:

Senator -- you have the floor, Mr. Campbell, excuse me, if you wish. The Senator wishes you to respond.

MR. CAMPBELL:

Mr. Chairman, Senator Adams, when we first saw the version of this bill, it had on page five, the used proximity to the resource as one of the criteria. There were definitely we felt constitutional problems with that when used not in a time of shortage in tier two, but used right up front when there's a time of abundance, [indisc.] time of shortage. On the House floor, I think the [indisc.] concern last night they took that provision out. The Department of Law, is reviewing this -- actually we faxed it to Mr. Nelson, who is back in Anchorage today, hopefully settling a case that will bring the state about fifteen million dollars and be back down tonight. He is preparing a written opinion and will send it down to us. But my preliminary indication they also have at least some constitutional questions, particularly depending on as I mentioned earlier, if cultural is interpreted in a racial manner, then it is unconstitutional. If it is not, then it's very, very, difficult -- I don't know how you'd use that as a discrimination -- or how you would distinguish it on that basis.

SENATOR ADAMS:

Can I ask that same question ...

SENATOR KERTTULA:

You have the floor.

SENATOR ADAMS:

... of the House - the other bodies counsel.

MS. OTTO:

Mr. Chairman, and Senator Adams, we obviously were keenly concerned about the constitutional issues and after looking at the case logs and spending a lot of time reading and I'm sure you guys have too, reading the cases that have been decided by the Supreme Court on the issues presented in these bills, I believe it's constitutional. Legal services has looked at it and they believe it's constitutional. Certainly, the manner in which the term "cultural" is defined is left to the Board. And it's in their power to define it in a constitutional way. I guess on that particular issue, the constitutionality problem is frankly what stood in the way of the House and the all Alaskan policy. They really wanted to solve it and so Commissioner Rosier is incorrect that that issue is left unresolved. But it's left unresolved because the House was unable to come up with a way to do it in a constitutional manner. I would note, beyond that there's a few cases pending right now before the Alaska Supreme Court Morry v State in which the all Alaskan policy of the Boards is being directly challenged. An opinion is due out in that at any time and it's conceivable the court will give us additional guidance on whether or not all Alaskans is in fact constitutional [indisc.].

SENATOR ADAMS:

Mr. Chairman, have the legal opinion passed around, I would appreciate it.

SENATOR KERTTULA:

Please -- Mr. Campbell, do you wish a quick [indisc.].

MR. CAMPBELL:

Yes, sir. Just one very brief note to avoid any confusion about our questioning the use of "cultural" in this context because I think someone might note in all fairness, that in the Subsistence Advisory Council bill we also use the word "culture." And the only thing that I note the difference is the subsistence Advisory Council bill uses the term in the context of principal characteristic of the economy, culture and way of life in the area of the community. We are describing an overall aspect of the

community and the layout thirteen specific revisions that the Board looks at in making that decision. In this use, it is applied directly to a particular person and there are no criteria in terms of guidance as to how the Boards look at that.

SENATOR ADAMS:

Mr. Campbell, as I prepare my exit speech of this special session, and if this is the piece of legislation that passes both bodies and this lands on the Governor's desk, what is the Governor going to do? Is he going to sign it? Is he going to let it pass without his signature? Or is he going to veto it? I just need it so I can prepare my leave slip.

MR. CAMPBELL:

Senator Adams, I would not presume to speak for the Governor at this point, I can perhaps give you some thoughts. That is one, it is going to depend in part what the Attorney General's opinion is when it's finished being prepared this evening. Two, we've acknowledged the fact that in some ways this bill can make things slightly better for urban residents in reducing the conflict of subsistence user than others. But I think the Governor is going to be very deeply concerned that in our view, is rural subsistence users who are hurt under this bill. And I think he will consider that factor in, whether to veto it or not, but I know the Governor cares deeply about rural subsistence users.

SENATOR KERTTULA:

Senator Eliason and then Senator Pourchot.

SENATOR ELIASON:

Mr. Chairman, I'd like to make a couple points. First, I think that should be clearly understood that I think you used Sitka as an example. I think it was a very poor example. The only way you're going to relieve the problems in the community of Sitka or those of us here in Juneau is to change the constitution. Because we're surrounded by the national forest no matter what we do here today is going to solve our problems. And it's not going to solve your subsistence problems in the state waters, we don't have a problem at this point. So, Sitka is a very poor example.

We're in a box and we can't get out of it.

To be quite frank, I think if I were a member of the Outdoor Council, I would support this bill for a number of reasons. One, is that we went through the last two years through a very difficult session dealing with the Boards of Fish and Game and I can't believe that we're going to give the power to the Board of Fish and Game to determine they shall or they may implement subsistence regulations. That doesn't make a bit of sense to me. You're turning it totally over to a Board which, in many cases, you don't trust, and in many cases, I have some real problems with some of the members myself as it relates to sport and commercial fishing. So I think that it seems to be much wiser to set the criteria out as a legislative body. These are the steps you go through. Don't let the fish Board do that for you. You know, what kind of attention are you going to get? That's what scares me about this bill. It's like turning the fox loose in the henhouse. I hope you can see that. You and I have been on this issue about the Board membership and it's not going to get any better. We know that. I think you're going to look for a relief contingency through the courts because this Board, in my opinion, is not going to do a lot on subsistence. I would be very reluctant to turn this power over to those people. I mean, that's being quite frank. I think we can set the guidelines for them to do this. We set the guidelines. Don't let them do it. If they do it, they're not going to do what you think they're going to do. I can almost guarantee you that.

SENATOR ADAMS:

Well, if you weigh the two bills, of the Adams versus the Governor, I think your speech follows along with the Adams bill, Mr. President.

SENATOR ELIASON:

Can I reply?

SENATOR KERTTULA:

Certainly. You have the floor. Senator Pourchot next.

SENATOR ELIASON:

I have some very deep concerns about this and we can't get through constitutional amendment. I know that. But once again, if you're willing -- I don't think I'm willing to give the Board that authority. I don't think things are going to happen like you thought were going to. You're going to be very sorry [indisc. - paper shuffling].

SENATOR KERTTULA:

Senator Pourchot.

SENATOR POURCHOT:

Thank you, Mr. Chairman. I recognize that there's a lot of latitude that people use in arguing for their positions [indisc.] I still find it somewhat funny that we hear from the administration on a couple of points - on the arguments on why they may not like 601 contrasting to some of the efforts we've heard. The first is, of course, the last few days, Mr. Campbell, you have told us on two occasions how important that customary trade definition is and used that as an example why we need that legislation. And I've even argued on several occasions that you've used it in kind of a minor point to justify the big effort involved in a whole lot of other things. And now you're dismissing customary trade as something of minimal importance and maybe not even worthy of overcoming veto on this bill, that I guess, I would in that case hearken you back to your earlier arguments to make this small point, but it's an important point and it does solve the problem. I think the administration's is going to throw the baby out with the bath water. Nobody is claiming that 601 does anything spectacular and solve all the subsistence problem. But it does address a couple of points and one of them that you yourself have made on several occasions is that the definition of customary trade is very important tool that we need to do. So we throw that away at this stage of the game.

The second is on constitutionality. We've had big debates on whether or not the Governor's bill is constitutional or not and if the other bills are constitutional or not. And your attorneys

have gone to great lengths, I think, in stretching why the Governor's bill is constitutional. And now you say that one reason that 601 may not be constitutional is because somehow the definition of "cultural" they might use ethnic background. No one has ever talked about racial distinctions or ethnic distinctions in any of this discussion on subsistence. The people making these definition of cultural, the interpretation is going to be the Board. The Board is not -- I mean it would be ludicrous for them to come up with at this stage with racially defined - or racial definitions or ethnic definitions of cultural. I mean that's your classic red herring. And if that's the best we can do for an initial legal criticism for constitutional criticism I think that's really far out compared to some very real constitutional issues that we discussed so far.

SENATOR KERTTULA:

You may respond.

MR. CAMPBELL:

Thank you. Mr. Chairman, Senator Pourchot, briefly on both points. I believe what I said is that the empowerment of the Boards to restrict or that customary trade was a good thing, I think I described it as sort of a weak empowerment. We have concern -- we think that customary trade is very important. We think that this would be much better if you would put "not through commercial channels". Specify that customary trade could not be commercial. What we are concerned about -- this is definitely better than nothing. But what we're concerned about is that this is not going to give the Boards clear authority to draw [indisc. - cough] that all subsistence customary trade is non-commercial. If it did that that helps much more.

On the second issue of constitutionality and culture, it is my understanding and I am not ... [tape ends midspeech].

Tape 92-18

Side B

[Tape begins midspeech].

MR. CAMPBELL:

... an attorney but things can be unconstitutional in one of two ways. Either facially, that you look at it in a certain unconstitutional on its face or in application. What I suggested is that with culture unfortunately there seems to be one of two choices. Either the Board applies it in a way that means racially which is unconstitutional, but it is useful as a definitive factor for the Board. I mean, mechanically that would work. Or you don't apply it that way, and I think the Board would not apply it in an unconstitutional way. But at that point, we think I don't know what that means in terms of how the Board comes up and says, who has the culture of hunting and fishing? Or who is it important to or whatever. And what I'm saying is, if you do not apply it in a manner that's unconstitutional, then it is not a particularly useful approach in application. That's the only point that I'm trying to make.

SENATOR KERTTULA:

Senator Sturgelewski. Senator Pourchot, are you -- Senator.
SENATOR STURGELEWSKI:

Mr. Chairman, I want to stop this kind of debate because I just had a small question brought to me by someone in the audience.

SENATOR KERTTULA:

I think that it's okay to proceed now.

SENATOR STURGELEWSKI:

Mr. Chairman, through the chair I wonder if Laurie Otto, may I ask you a question. And this was brought up to me. If we would turn to page three line six and seven, item fourteen, my understanding that that is in the existing law. Nothing in the addition of customary use in other areas has any impact on that section, does it?

MS. OTTO:

Mr. Chairman, Senator Sturgelewski, that's correct.

SENATOR STURGELEWSKI:

In other words, that is there and amendments that are being made won't change how the Board would interpret or utilize those

kinds of presumptions.

MS. OTTO:

That's correct.

SENATOR STURGELEWSKI:

All right fin. That was important to some people. Thank you.

SENATOR KERTTULA:

Are there questions around the table? Yes, you have the floor, Senator Pourchot.

SENATOR POURCHOT:

As long as this language is on the table, I wonder if you can use get back to that question that Mr. Campbell raised. What was the rationale of the House on page seven, line nineteen, the definition of "customary trade". Why did the House adopt the language in the Governor's bill for customary trade definition [indisc.].

MS. OTTO:

Mr. Chairman, Senator Pourchot, I talked about this earlier, so I apologize for repeating myself but the -- if somebody has strips and goes to village store and sells them for cash as a means to buy gasoline to go subsistence fishing that is arguably a commercial channel. That is a definition that needs to be fleshed out further and it may not accurately and specifically enough define what you really want to prohibit. The definition that's here is broad enough to allow the Board to say non-commercial channels. But given the amount of time that was available in the House, the members at least in the Judiciary committee didn't feel that they really had a sufficient amount of time to responsibly deal with drawing the lines that needed to be drawn and they felt the Boards do have the expertise to do so. I would note that also in addition to this definition on page six, lines twenty-five and twenty-six, the legislation requires the Board to further flesh out this definition to make sure that we don't just leave this issue hanging in limbo, for some time to come. Beyond that I note that on the February '93 meeting, the

Board already has this issue on the agenda. So it should be dealt with in a timely manner. It's not something that's going to be pending for a long time. And I'm sure the Commissioner can [indisc.].

SENATOR KERTTULA:

You have the floor, Senator and then Senator Eliason.

SENATOR POURCHOT:

I appreciate this certainly conflict [indisc.] minimal amounts of cash and limited exchange in non-commercial. I guess what I am saying [indisc.] certain amount of complication [indisc.].

MS. OTTO:

That's correct and that was part of the debate. How can it be exchanged for cash, particularly when it's -- the example I gave you -- really felt that that was inappropriate. That that's exactly the kind of thing that customary trade is probably talking about. But we just didn't have the time to come up with the definition the members felt was not contradictory.

SENATOR POURCHOT:

Thank you.

SENATOR KERTTULA:

Senator Eliason has the floor then Senator Uehling.

SENATOR ELIASON:

Just one question [indisc.] Was my characterization of the powers that we're giving the Board correct, about how they deal with subsistence? I mean aren't we sort of giving them a blank check for saying you may do this, you may do that [indisc.] but beyond that they could do nothing and they wouldn't address -- if I were, like I say, a member of the Outdoor Council, I don't think I'd want a lot of attention given to subsistence in some cases. So it seems to me that the Board was influenced by that particular group. Do you think you anticipate a lot of action in that area?

MS. OTTO:

Mr. Chairman, Mr. President, this is one issue that -- I think the important distinction is that it's the distinction

between customary use and subsistence use. This does not give the Boards additional power [indisc.] subsistence areas in the areas of subsistence. It creates a whole new category of use of the fish and game resources of the state. So I guess to the extent that it's dealing with an entirely different approach to the problem, I don't think that it gives them more latitude except in defining the non-subsistence use areas, to do things with subsistence.

SENATOR ELIASON:

It seems to me though like they could adopt that interpretation but still do nothing about the issues that come before them because they are not required to do it. I think this thing could be in limbo.

MS. OTTO:

Well, certainly, the customary use permit issue I think it's true that it could remain in limbo. And I don't think that there's any confusion about that. I think what the intent was -- instead of just saying we have non-subsistence use areas. One approach to this would be to say simply we have non-subsistence areas. But there are circumstances, like on the Kenai, with allowing the Kenaitze to have one net on the beach that the Board may wish to allow. And this would give it a tool and a method by which they could allow that. But yes, you're right. If they don't want to -- if the Board decides it's not appropriate in this state to allow customary use permits in non-subsistence areas, they could certainly make that determination under this bill.

SENATOR ELIASON:

Am I right in assuming that the Governor's bill or the bill that we dealt with yesterday, lays out the criteria and the Board doesn't have a lot of ability to make -- they would have to move in that area subject to that criteria. They are mandated to do this.

MS. OTTO:

The approach taken in the Governor's bill to the issues raised in this bill, which is non-subsistence use areas, the

Governor's bill would not allow any subsistence activities in non-subsistence use areas. It would only be sports, personal use and commercial. What we did is take a new category and allow that in non-subsistence use areas. So we are giving the Board more latitude in those areas than they have right now and more latitude -- and not more latitude in the sense to do negative things but in additional power to do something positive for those who are economically and culturally dependent on the resource in a non-subsistence use area.

SENATOR ELIASON:

Which is back to the main point or the point that they have the [indisc.] to do that if they choose not to act, there's nothing that we can do on this [indisc.] issue requirement to do that. Is that correct?

MS. OTTO:

That's correct.

SENATOR KERTTULA:

Are there any other questions? Yes, Senator Uehling, then Senator Hoffman.

SENATOR UEHLING:

Thank you, Mr. Chairman. Along Senator Pourchot's question you had mentioned that in the House that you didn't have time to be more specific, that it was really hard for the Board to make the determination [indisc.] policy however they wish. I'd like to get back to the question regarding the customary trade in the Governor's bill on section (a), there's a more specific definition of what customary trade means. And essentially talks about non-commercial exchange, minimal amounts of cash as restricted by the appropriate Board and it goes on and says, "which does not include sale in commercial channels". Do you have an objection having that being more specific? Or would you rather [indisc.].

MS. OTTO:

Mr. Chairman, Senator Uehling, I just work here. [laughter].

SENATOR UEHLING:

And you still want to work here.

MS. OTTO:

I will tell you that this definition was debated actively in both the Resources and Judiciary Committees there was amendments [indisc. - cough] proposed in Committee. There was a floor amendment proposed on this particular issue. The arguments of the parties who sort of prevailed in their definition were those that I presented to you.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

And she still works here.

SENATOR HOFFMAN:

I have a question for McKie on the constitutionality question. He says that 601 is unconstitutional because of some cultural problems that are being utilized in the legislation. But if they are saying that that is, in fact true, then we should go back and be consistent and look at Senate Bill 484 which the Governor has submitted and on page five, there is some new definitions of category one talking about game management in units and in there is the word "cultural". So if you say that this is unconstitutional then by the same argument, I think you'd have to say that your legislation is also unconstitutional.

MR. CAMPBELL:

Mr. Chairman, Senator Hoffman, I'd like to run over again, the distinction in terms of the use of the word between two bills that's why I didn't bring it up -- in the Subsistence Advisory Council bill the word "culture" is used as part of the term and whether the community -- I can't find it. Unfortunately, I know it by heart now -- dependence upon subsistence as a principle element of the economy, culture and way of life of the community and the area. And then we have listed out thirteen specific factors which the Board looks at in making that determination. And this is clearly applying to the community as a whole and

factors are clearly not racial. I also want to be clear that I'm saying in reviewing this bill, but at this time we're not saying this bill is unconstitutional. We are simply pointing out that the use of the word "culture" for an individual criteria either can be used racially and in that case it would be unconstitutional, but is probably mechanically helpful in terms of sorting out who can and who cannot. Or it cannot be used -- it can be used in a nonracial sense and in that case it is not very helpful at all in terms of bringing a determination of who qualifies or not. I would assume the Board would interpret it in a line with the constitution but at that point it really loses much meaning in terms of interpreting who qualifies or not.

SENATOR HOFFMAN:

Let me say that the two words are the same. But in your legislation Senate Bill 485 on page five starting [indisc.-simult. speech] starting on line eight you say, "and where it is a dependence upon subsistence is the principal characteristic of the economy, culture and way of life in that area". And then you go to 601, the language on page five, line thirty, it says, "dependent upon subsistence in the principal characteristic of the economy, culture and way of life of the area" which seems to me the same wording. And you are saying that the word -- not only the word but the whole sentence in that area are identical and I would have to find that if one was unconstitutional the other is unconstitutional.

But I'd like to go now to an area that Ms. Otto had talked about in non-subsistence areas. The non-subsistence areas ...

MR. CAMPBELL:

Senator.

SENATOR HOFFMAN:

... you utilized in - I'm finished with those [indisc - laughter].

SENATOR KERTTULA:

Senator Hoffman has the floor. You have the floor, Senator.

SENATOR HOFFMAN:

Non-subsistence areas that you say are in Kenai are rural/urban, can rural area be defined as non-subsistence by your legislation?

MS. OTTO:

Mr. Chairman, Senator Hoffman, I don't believe so. And to the extent it can, it's the exact same situation that's presented in the Governor's bill because the definition is taken directly from it. This body may, for example, wish to put the population caps back in which is what we left out - the seven thousand cap. But other than that it's basically the same definition, because as I read the Governor's bill, even if an area is less than seven thousand, the Board can say that it is an area where dependence upon subsistence is not a principal characteristic of the economy culture and way of life and call that an F-3 which is a non-subsistence area. So we took the same approach that the Governor's bill did, but we left the Board with an opening to give something to people in that area if they were dependent upon the resources. I hope that answers your question. I'm not sure.

SENATOR HOFFMAN:

Thank you.

SENATOR KERTTULA:

Are there further questions? Do the other Senators wish to speak? You have the floor, Senator Cotten.

SENATOR COTTEN:

Just to Mckie or the Commissioner. The definitions that the House didn't deal with, for instance, "customary and traditional", "game management unit", "sustained yield". How critical are those definitions? Do they relate to particular court cases? Do they have particular applications that are critical?

MR. CAMPBELL:

Sir, several of them we feel are fairly critical. In particular, we feel that there is a strong need for some definition of the term "customary and traditional". We also feel there is a very strong need ...

SENATOR COTTEN:

Do you want to go ahead and just tell it. Say on "customary and traditional" and tell us why that's a critical issue.

MR. CAMPBELL:

The customary -- whether it's fish stock or game population is subject to subsistence or not is determined by whether or not it has been customarily and traditionally used for subsistence. And without a definition -- we have currently right now in regulation a series of regs which have worked fairly well in the past but we have lost the use of part of those because of the result of the McDowell case. And when we then lost part of those regs, we would up with the situation that almost every -- that it basically comes down to if you can -- a really relevant part of it -- if it's been used over time. I'm not talking about just an occasional use but over time if there has been a use of a fish stock or a game population no matter how distant in the past that use may be, it proves the use. At that time it is again subject to subsistence whether or not there has been any subsistence use of that stock or population in the recent past. King salmon in Southeast Alaska are a definite example that ...

SENATOR COTTEN;

So for instance, let me try to catch up here, and ask if you didn't have a good definition then, would it be difficult to identify a non-subsistence area? You'd need a better definition in order to do that?

MR. CAMPBELL:

Actually, I think that they could identify non-subsistence area. I think that they have a substantial leeway there in terms of how they do it. I think if I can, continuing for this moment on a non-subsistence area, I think Ms. Otto is correct in that the criteria that are laid out for the Boards are identical in determining those with or without that definition. But the pressures on the Board are very different because under this bill you have the situation that every Alaskan who remains a subsistence user which is an extreme pressure to extend out subsistence areas. Whereas under our bill, only a tiny fraction

of urban residents are subsistence users, and there's a motivation to contract subsistence areas. I'd be happy to continue with other definitions we feel are critical.

SENATOR COTTEN:

Fine. If you could quickly go through them. If there are particular court cases that you're trying to make -- have an effect on, I wish you'd say that as well.

MR. CAMPBELL:

I will sir. To the extent that I'm aware and perhaps I may miss one [indisc.] figure out if I missed a case. On the reasonable opportunity, there are some court cases on this, but more and more there is the situation where not a particular court case -- the Bobby court case is one of them affected in part by this. But we've had a situation where we require Boards to allocate to provide for reasonable opportunity for subsistence. But we've had a situation where many people who are subsistence users feel the Boards have not properly done that. They've provided a season or bag limit or whatever that really does not provide reasonable opportunity. And the guidelines - the one definition of what that is or is not in the Subsistence Advisory Council bill is very clearly laid out what it is not and gives a number of specific factors for the Boards to consider. The Boards have said they want and need that guidance.

SENATOR COTTEN:

Where is that definition in your bill?

MR. CAMPBELL:

In our bill it is on page eight, subsection (01) starting on line nineteen.

SENATOR COTTEN:

So is there -- are those the two most critical definitions then?

MR. CAMPBELL:

Let's see, yes, sir. I believe that the definition "sustained yield" is also extremely important. Commissioner do you want to [indisc.].

COMMISSIONER ROSIER:

Yes, I think that it is. The event that we have a population that needs rebuilding we want to be sure that there's a court mandate here to provide for a harvest that we in fact have the mechanics in place to in fact rebuild. This is a protection for stocks type definition. [indisc.] This is part that we may be conditionally mandated to over harvest if we don't have that definition.

SENATOR KERTTULA:

You have the floor.

SENATOR COTTEN:

Can I ask then Ms. Otto for here interpretation perhaps of why they were left out of the House bill. I understand that you just work here.

MS. OTTO:

Mr. Chairman, Senator Cotten, what we were trying to do in this bill is solve as many problems as -- and I'm saying we because I helped write it and I'm taking responsibility for its flaws and I'm sure there are flaws in this. But what we were trying to do is solve as many problems as we could that were identified by the administration, and for which we could use consensus. And the two most pressing problems that were raised over and over again in our hearings were the Kenai Peninsula and the lack of a definition of "customary trade". We, in fact, were able to reach a consensus on those two points and those are what are in the bill. The other definitions clearly raise important issues that are going to have to be dealt with as is the all Alaskans policy, as are a number of issues related to subsistence. But at least in the process that was followed in the committees where I was involved, we were not able to reach consensus on those issues.

SENATOR COTTEN:

So there was a disagreement as to how to define "reasonable opportunity" and "customary and traditional"?

MS. OTTO:

There was a deep division of opinion on how those should be done and beyond that there were things that came up in the process that made some people concerned about what was actually being done in the definitions. For example, the definition of "sustained yield" although it's really being talked about much, applies only to consumptive of fish and game resources. It's a definition of a statute of a constitutional term by limiting it to only consumptive uses. What is the effect on managing areas like Pack Creek and the McNeal River where you are managing them in large part for non-consumptive uses, i.e., [indisc.]. What is this mean for stocks that are not consumed, that are not taken for consumptive purposes? How does this apply with the constitutional requirement to sustained yield? Is this a legitimate interpretation of that principal? There were all kinds of other collateral issues that came up and as with my dialogue with Senator Pourchot over the customary trade issue, there were so many issues that were raised by this and so many different viewpoints and so many different facts that people felt they were just not able to reach consensus on those points. Although they are important and they do need to be defined.

SENATOR COTTEN:

Mr. Chairman. Thank you, I think we could probably spend a lot of time on those definitions and I won't require the committee to sit through it.

SENATOR KERTTULA:

Thank you. Are there questions around the table?

SENATOR COTTEN:

We could do it if you wanted but I didn't want to be the only one that was interested.

SENATOR ADAMS:

Can I ask each of you -- we look at the Alaska Administration Code and we looked at part six in chapter ninety-nine in subsistence use and we go and look at customary and traditional subsistence use. We have eight criteria which number four has been repealed. Can you tell me if any of those criterias are no

longer needed or unworkable?

MR. CAMPBELL:

Mr. Chairman, Senator Adams, while I'm certainly familiar with the list, I do not recite them verbatim, if I can obtain the list from you I can tell you which ones we have allowed that don't prove very useful in sorting out.

SENATOR KERTTULA:

[Indisc.].

MR. CAMPBELL:

If I can run through them real quickly. One is longer term consistent pattern of use excluding interruption by circumstances beyond users control such as regulatory prohibitions. And the question is if that has to be an ongoing use or not, right now clearly, I believe, under regs that it does not. And by ongoing I don't mean, has to be happening right this moment. But even has to be right now in recent times. It could have been a long term consistence [indisc. -cough].

Two, a use pattern recurring in specific seasons of each year. Sir, in Alaska almost every use pattern recurs in specific seasons of the year.

Three, a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort, cost and conditioned by local circumstances. And actually that is one factor that we appropriated into statutory language in our bill to describe criteria but is not particularly useful in saying this is or is not. It is of some help.

Four was repealed. Five, the means of handling, preparing, preserving and storing fish or game which have been traditionally used by past generations and actually if we stopped right there that would be a useful criteria. But then it continues, but not excluding the recent technological advances where appropriate which does not render it particularly useful in sorting out whether something is or isn't. It means if you dry your fish on an air rack or if you freeze them in a vacu-seal. Either one [indisc.].

Six, a use pattern which includes the handing down of knowledge of fishing or hunting skills, values [indisc.] from generation to generation. And, sir, being in the [indisc.] leading up the point where we are, there are way to many people of all races, origins, everywhere else talk about their use patterns and how their father taught them to squirrel hunt in Kentucky or whatever and that has not proved particularly useful for the Board.

A use pattern in which the hunting fishing effort or the products of that effort are distributors or shared among others including customary trade, barter, sharing and gift giving. And then it says, customary trade may include limited exchanges for cash where it does not include significant commercial enterprises. But that's in the regs and it has not proved particularly helpful to us. I would suggest that the use patterns include sharing there are many people throughout the state again, who make strong cases that is not particularly something for a subsistence way of life. So that factor has not been particularly helpful to us.

A use pattern which includes reliance for subsistence purposes upon a wide diversity of fish and game resources and provides cultural, social and nutritional elements of this subsistence users life. I think that is a useful criteria and in fact that use pattern includes reliance on a wide diversity is specifically included as one of the criteria in the bill. And those are the criteria. And if it would be helpful, I would be happy to see if we could get somebody from the Attorney General's office to tell us the difficulty they've had in excluding species under this.

SENATOR KERTTULA:

Are there further questions of these witnesses? Further statements? You have the floor, Senator Pourchot.

SENATOR POURCHOT:

I wanted to call up on the comment and the frustration by Senator Cotten here earlier on the definitions that were included. I for one am interested in pursuing the possibility of including

some of the definitions, particularly if they'd be helpful [indisc. - cough] position would be in the administration [indisc.] sense of taking resistance in improving this bill, but it seems like there is grounds for that. [indisc.] on the sustained yield definition [indisc.] expressed you had a conversation about [indisc.] I was wondering if Mr. Campbell [indisc.] for the same reasons that I think [indisc.] on how that word got in there. I got the impression that it started out not being in there and I was reading on page ten, line twenty-six through thirty, their definitions saying sustained yield, include that without the word "consumptive" in it. And it sounds to me, from a laypersons standpoint it still works. I would just like your explanation of using "consumptive" doesn't mean that you lose your ability to manage non-consumptive uses by deleting "consumptive" it seems like it doesn't complicate the same interpretation for both consumptive and non-consumptive.

MR. CAMPBELL:

Mr. Chairman ...

SENATOR KERTTULA:

You have the floor.

MR. CAMPBELL:

... Senator Pourchot, as you pointed out [indisc. - paper shuffling] as I look through this I did highlight that word because it had been a particularly controversial word and as I told you we have again I'm sorry we have those aging backlog on opinions [indisc.] from but an opinion specifically on that and certainly none of us would want to be part of something that says we can't manage McNeal River or Pack Creek. But I also thinks it works without this word and I highlighted it because I wanted to make sure you were aware of it's situation for you.

SENATOR COTTEN:

So you don't care if we take it out?

SENATOR KERTTULA:

You have the floor.

COMMISSIONER ROSIER:

Mr. Chairman, I would like to say that I have no objection to that word coming out of there. I don't think [indisc.].

SENATOR POURCHOT:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Pourchot.

SENATOR POURCHOT:

Again, I don't want to be the one to get into this, but I think there is an area where from the testimony so far it seems an area where if we wanted to we could probably say take out the definition of sustained yield deleting the word consumptive out of the Governor's bill and in some small way solve one more problem.

SENATOR KERTTULA:

We remain open for amendments to the legislation after we complete this section. Are there questions? Further questions? It's the intent of the chair to recess to call the chair looking - - and I would suggest look to the amendments. My understanding is the President of the Senate wishes the Rules Committee to meet and bring a bill to the floor. We cannot act on this bill until tomorrow. I know that much about the constitution. And I know every well it's a constitutional requirement. So it's open for meeting subsequently in the day. We can recess to call the chair, for purposes of the Rules Committee meeting or [indisc.] whatever you should choose. We've exhausted the present bill -- there is a suggestion of an amendment here then. Are there amendments? Senator Zharoff would like to see the bill moved out. Are there amendments. You have the floor, If we can prepare the amendments. That would seem very, very simple, Senator, that might be able to be expressed if we have the bill before us. If there is a question and you want them typed, and it becomes a more detailed in location or amounts of wordage why, of course, we'll have to. You have the floor, Senator Pourchot for suggestion.

SENATOR POURCHOT:

Mr. Chairman, [indisc.] way to do this.

SENATOR KERTTULA:

Precisely, and if there are more amendments, we'll just have to go to another [indisc.].

SENATOR POURCHOT:

[Indisc.] for purposes of discussion I would -- can the Governor's bill 484 on page ten, lines twenty-six through thirty, there's a definition of "sustained yield". Mr. Chairman, I would move that in the appropriate location in SB 601 that that definition of "sustained yield" be included with the exception of the word "consumptive" in line twenty-eight which is not [indisc.].

SENATOR KERTTULA:

You -- does your legal counsel -- would you come forward. Do you have materials -- I would ask that you sit at this table so the Commissioner has room to work here. There's going to be one or two potential amendments come up, we could look at them in this fashion. If there's more and we don't have the time to do so, we'll have to prepare them. I will recognize you just in a moment. Do you understand the motion now? If Senator Pourchot would restate that motion so that everybody around the table has the ability, including counsel, who may well be asked to draft it. And then I will recognized Senator Zharoff. But please, let's first do this.

SENATOR ZHAROFF:

Mr. Chairman, I was going to ask before we totally get into this can we take about a three to five minute break and then maybe talk about some of that.

SENATOR KERTTULA:

I have no objection. Five minute break while we can get in some concerns, Senator Pourchot and counsel can get together here to. Five minute break.

RECESS

1:00 - 5:25 p.m.

SENATOR KERTTULA:

[Indisc.- simult. speech] Will the committee come to order? Everybody was studying the bill and some were preparing

amendments. I have one major amendment. I don't know if there are other amendments. There's some suggestions on amendments on my desk. Does everybody have what amendments I have which is just amendment one at this moment?

SENATOR STURGELEWSKI:

I don't think we do. Do we? Amendment number one.

SENATOR KERTTULA:

Amendment one. We're to order. Amendment one I believe is

SENATOR KERTTULA:

Yes, it's titled Senator Halford's [indisc.] Halford and a whole lot of work rather quickly went into that amendment. I also think there's our bill back there someplace -- administration. Senator Halford, if you wish to speak to the amendment, please do so. You may speak in advance of the motion in this committee.

SENATOR HALFORD:

Mr. Chairman, following caucus, I went and got together with the Attorney General and the Commissioner of Fish and Game and staff and try to go through the Governor's proposal to see how it would merge with the House bill and what of the House bill they [indisc.] and so forth. I also received a copy of kind of a mark up that I think some members of the House had worked on to try and achieve the same purposes. When we compared the two bills, there were already two significant differences in what it would take if you were trying to merge those two proposals and they are both contained on page six, but essentially what the -- I'll get to what the legislation does is it gives us the core House provisions with regard to the Boards limiting subsistence hunting and subsistence uses in a non-subsistence area. And it provides that that is a mechanism that is the major limitation and it in essence goes back to the all Alaskan policy in terms of qualifications. It takes up all the individual qualification provisions. It takes up the presumptions of the individual qualification provisions and with them takes out the constitutional questions that have been

raised. I think the majority of the constitutional questions were on those presumptions and there's debate as to whether they were constitutional or not. But those things are taken out.

It also takes out some of the definitions in conflict and I would point out on page six, the House proposed or some of the members of the House that were working on this in an effort that, I think is an honest effort, to try to get some kind of a middle ground, proposed taking out the definition of "subsistence" on page six and proposed deleting the word "consumptive" in front of "uses" in the definition of "sustained yield". They were not in the draft that we worked through in trying to come up with what was a merge. There were substantive questions. But I would just point out that they were questions that were trying to reach some kind of a consensus with the bill with the House and we concur they can be dealt with minimal complication and try to get it out of here. Those are two issues that remain open in terms of differences, at least with those that are trying to reach some kind of conclusions from the House side. And I would ask the administration to kind of go through the same thing in terms of what the bill does and what those questions are. And then I think we should go to those two areas - what needs to be in there like, I have question probably to the Commissioner of Fish and Game, is do we need, if we're going to have a conflict on whether consumptive or non-consumptive is in the definition of "sustained yield", do we need the definition of "sustained yield" in the bill, for example. And what is the reason for having the definition of "subsistence uses" in the bill and if that makes it easier to sell, does that need to be there and why, I guess, can we go the administration?

SENATOR KERTTULA:

Yes.

COMMISSIONER ROSIER:

Mr. Chairman, if I might, in regard to the definition of "sustained yield", I believe that particular definition was

placed in there as more or less a guideline to the courts. Sustained yield is a requirement of the department in terms of managing the fish and wildlife resources in the state. And certainly we can -- we operated for a good many years without that definition and at this point in time, it seems to me it's not totally necessary for use within the bill.

SENATOR HALFORD:

Could I ask the same question on the definition of "subsistence" also on page six.

COMMISSIONER ROSIER:

Subsistence is the - page six.

SENATOR COTTEN:

Page ten.

SENATOR KERTTULA:

Am I looking at the wrong bill, okay, on the new bill 601.

COMMISSIONER ROSIER:

Again, I'm sorry, Mr. Chairman.

SENATOR KERTTULA:

You do have the floor to speak.

COMMISSIONER ROSIER:

Okay, thank you again. In this particular case, I think that this provided additional guidance to the Boards and certainly to the courts as well. But again, I think that overall the bill deals with the definition of subsistence. Here again, we could live without this particular definition.

ATTORNEY GENERAL COLE:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

ATTORNEY GENERAL COLE:

I wanted to say that if you looked at the definition of subsistence in section thirty-one, it includes in the definition the provision for and the acknowledgement that a component of subsistence is the sharing among the Native peoples. And we discussed that in one of the hearings which I attended and it

was pointed out that that is the major component of subsistence - the sharing. And this is a recognition -- in the section, there is a recognition in this section that sharing is a part of subsistence. And I think that it adds something to the Native subsistence uses and I would like to see it included for that reason. But Mr. Campbell would like to comment on that a little bit. Yes, that's true.

SENATOR KERTTULA:

If you have something further to add, please proceed.

ATTORNEY GENERAL COLE:

Well, let me just say this that Mr. Campbell, points out that if we go with the old definition, there is a recognition of sharing in the old definition. It's just a question of what we do with section thirty-one. Whether we eliminate it entirely or whether we don't.

SENATOR KERTTULA:

You have the floor, Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chairman. Section thirty-one was part of the Governor's bill and in trying to reach some type of compromise is it essential that it remain in the bill to be able to maintain the core improvements that this bill makes in terms of managing [indisc.].

ATTORNEY GENERAL COLE:

No.

[Tape ends].

Tape 92-19

Side A

[Tape begins midspeech].

SENATOR ADAMS:

... to the definition of "sustained yield", I think that can be amended if on lines twenty-three if after the word "beneficial" the removal of "consumption" there. And read the sentence out after the line twenty-four "seeks to" the deletion of "provides for desired population. "Increase and provide

undesired" -- provide for surface of -- the deletion of that because that has reflects perhaps ongoing litigation within the state systems. So the sentence would then read, "that provides beneficial uses in perpetuity subject to preference among such uses and seeks to maintain healthy, self perpetuating stocks or populations". That basically would be the recommended language. Or basically the other thing is the complete deletion of that language so that perhaps we can work on it next session. I just offer that as a suggestion, Mr. Chairman.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Mr. Chairman, I want to make the motion, and unless the attorneys states otherwise, I'm going to make the motion to adopt the CS, I will move to adopt it excluding essentially what is section five and excluding the definition of "sustained yield". Those are not essential to maintain the system. The testimony so far from the administration is that they are not necessary to get a bill that can provide [indisc.] direction. And there are also areas that raise conflict and seemed to have raised some conflict with our colleagues from the other side. So I concur with Senator Adams, if we can avoid that conflict.

ATTORNEY GENERAL COLE:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

ATTORNEY GENERAL COLE:

It would be my suggestion that it be eliminated and that we address it in the next legislative session. I think it's something that the Legislature should address, but I expect it's going to take just a little more work and a little more analysis, a little more input from various groups to achieve an acceptable definition.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

You're suggesting then, Mr. Attorney General, to take out all [indisc.] and not just some and then deal with the definition of "sustained yield" at a later time next year?

ATTORNEY GENERAL COLE:

Yes, sir.

SENATOR KERTTULA:

did you say all of section five, Senator Halford?

SENATOR HALFORD:

Yes, I did. Section five is the definition of "subsistence". Also it's not necessary to maintain the [indisc.].

ATTORNEY GENERAL COLE:

Mr. Chairman, on that point, does that take out the sharing and bartering question provided by the Commissioner and the [indisc.] Attorney General? Can they comment on that? Then Mr. Chairman, it would just stay where it is where it's been deleted on line eight.

SENATOR KERTTULA:

Mr. Campbell, your response was, yes? Are there further comments to those two areas? Thirty-eight, five and all of section five. Senator Halford, you may proceed.

SENATOR HALFORD:

Mr. Chairman, just so we have a -- I guess it's a CS. I assume it's an amendment that the committee can offer [indisc.] CS.

SENATOR KERTTULA:

Yes.

SENATOR HALFORD:

Under our rules as a Committee of the Whole. But I would move and ask unanimous consent that we adopt Senate Committee Substitute for House Bill 601 SC as the Committee Substitute for mark-up purposes excluding the provision on page eight which is

all of section five and, I mean, on page six which is all of section five and on page six, lines twenty-one through twenty-five which is the definition of "sustained yield".

UNIDENTIFIED SPEAKER:

Mr. Chairman, on thirty-six and thirty-seven on lines twelve through nineteen will remain in the bill?

SENATOR HALFORD:

That is correct.

SENATOR KERTTULA:

Are there objections to that motion to use this as mark-up. Senator Adams.

SENATOR ADAMS:

Just shortly object. We have just received this shortly. I think there is four to five different areas that need to be looked at because this bill still does not allow proper perhaps representation of the rural interest in subsistence and it does not get us to where we want to go as far as a constitutional amendment to solve subsistence and it's why we're down where. But I do not mind something to be worked and with that I will remove my objections, Mr. Chairman.

SENATOR KERTTULA:

For the record, we will adopt this as a working bill for 601, as a substitute for 601. I suppose at this stage, you may wish -- with assistance from the Attorney General, Mr. Campbell, those of you that have worked on the amendment I just ask that you proceed Senator Halford on assisting in the briefing.

SENATOR HALFORD:

Mr. Chairman, the language that's before us is all out of the House Bill or the Governor's bill and I guess ...

SENATOR KERTTULA:

Is the entire House bill in ...

SENATOR HALFORD:

No, neither the entire House bill nor the entire Governor's bill is. There's a substantial portion of each bill is [indisc.] a number of pages and the entire classification system

of course is coming out of the Governor's bill and the core provision of the House bill, as I said, is the provision that deals with the Boards with the subsistence hunting and fishing in the non-subsistence areas. I probably would just go ahead and defer to either the Commissioner or the Attorney General and Mr. Campbell to go through the bill. But the bill is all made up of what we spent the last four days on.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Yes, you have the floor.

SENATOR STURGELEWSKI:

The critical issue that we need, it seems to me, to understand is how we govern subsistence now in terms of both rural and urban users. I wonder if somebody could either go through it or somebody could just paint a picture of what happens now. Because we've gotten rid of the structure of presumption and we - you indicated there's a difference in the approach that was used in terms of flexibility of the Boards of Fish and Game. So I'd like to understand just how this bill works.

ATTORNEY GENERAL COLE:

Mr. Chairman.

SENATOR KERTTULA:

Yes.

ATTORNEY GENERAL COLE:

If you please and Senator Sturgelewski, I'd like to ask Mr. Campbell to do that and give you that picture.

SENATOR STURGELEWSKI:

Okay. Thank you. If that's appropriate.

SENATOR KERTTULA:

Yes, it is, and going through, please respond.

MR. CAMPBELL:

Thank you, Mr. Chairman, Senator Sturgelewski, this bill adopts basically the House 601 approach in terms of dealing with

subsistence users. Everyone in the state will remain a subsistence user, however, there will be declared non-subsistence areas in areas where there is not a dependence upon subsistence as a principal element of the economy, culture and way of life. In those areas, there will be no subsistence users and it is up to the Board to establish that in the criteria. There are thirteen criteria that are listed that were contained both in the Advisory Council bill and in House Bill 601 and those criteria remain unchanged. It's up to the Boards determination.

SENATOR KERTTULA:

I think at this stage then you may want to role through this bill in context. Those things that are part of the bill as previously testified, you can just roll right along. Anything new or different ...

UNIDENTIFIED SPEAKER:

Mr. Campbell [indisc.] I think Commissioner ...

SENATOR KERTTULA:

Yes, he rolled through quite well in about an hour and half or less on the previous bill. Presumably we're slightly more aware now so you can move. Are there other questions before we start this. Senator Zharoff, do you have a question?

SENATOR ZHAROFF:

Thank you, Mr. Chairman. In this area on the non-subsistence areas, I imagine you're talking about on page four subsection (e).

MR. CAMPBELL:

Pardon me, Senator Zharoff. [indisc.].

SENATOR ZHAROFF

On the section there with non-subsistence areas, you're talking about page four, subsection (e).

MR. CAMPBELL:

Page four, subsection (e), that is correct, sir. That language is a direct lift from the House Bill 601.

SENATOR ZHAROFF:

Okay, does this call back for legislative review of those areas that are designated as non-subsistence areas?

MR. CAMPBELL:

Mr. Chairman, Senator Zharoff, this bill does not call for legislative review of any specific areas, however, it does retain the feature of the Subsistence Advisory Council which calls for a review process of the entire bill and how it goes and it will report back to the Legislature within two years.

SENATOR ZHAROFF:

So, Mr. Chairman, my understanding is that there is no legislative review then of those areas that are designated as non-subsistence areas?

MR. CAMPBELL:

That is correct.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Mr. Chairman, I wonder if you could identify bits and pieces that go in each bill.

MR. CAMPBELL:

I certainly will.

SENATOR KERTTULA:

You might as well start at the very beginning and I think we both have the other two bills - the base of the problem.

MR. CAMPBELL:

Sir, starting on page one, the findings of the Legislature were left basically intact, however, we did delete findings which referred to the percentage of subsistence users in the different communities. It was basically the legislative basis for the presumptions. We also removed specific findings that talked about dependence upon subsistence being the criteria to be a subsistence user. [indisc.] all Alaska issue. We also removed findings regarding applications of presumptions based on domicile. In the purpose of the bill we removed from the Governor's bill the Subsistence Advisory Council bill the

purposes which again, talked about substantial dependence. Those are in the old bills, [indisc.] three and four. And did the same thing in the intent of the bill removing discussion of statutory protection for actual [indisc.] dependence.

Moving then to AS 16.05.268 on page two, the phrase, "except in non-subsistence areas", was added on line nineteen. The step by step allocation process which lays out the [indic.] guidance for the Board and additional preferences for subsistence in existing law right now was retained.

On the next page we deleted those subsections of the old Governor's bill [indisc.] that refer to subsistence use areas and empower the Boards to go through and change the boundaries of those use areas. Continuing deleted those sections of the Subsistence Advisory Council bill that caused the Boards to divide the state up and characterize by regulation into category one, two and three communities. We did retain from the Subsistence Advisory Council bill the portions that is in subsection (c) at the bottom of page three of your CS that calls for the department to prepare and submit a plan to the Boards for stock or populations recovery if there's insufficient animals or fish available.

Let's see, on the top of page four, line three, subsection (e) there is the provision for the non-subsistence area that Senator Zharoff mentioned just a few minutes ago. And that language is taken in total from House bill 601.

Subsection (e) on page four was identical in both House Bill 601 and in the Subsistence Advisory Council bill. So there those bills were consistent already.

UNIDENTIFIED SPEAKER:

What section was that please?

MR. CAMPBELL:

Subsection (e) starting on line seven, page four. Those are the factors that the Board looked at the thirteen factors in deciding whether or not dependence upon subsistence is a principal element of the economy, culture and way of life.

On subsection (f) at the bottom of page four and subsection (g) were retained unchanged and those are also basically very similar to the existing law.

On page five, line six, subsection (h) -- excuse me, moving back up just for a second. In between here, we did some very substantial deletions that I should mention from the Subsistence Advisory Council bill. We deleted those sections that establish presumptions based on community size and we deleted the sections whereby -- basically in the old bill we deleted most of page six and in page seven in it's entirely which set out the individual criteria on which the Boards established eligibility to participate in subsistence. We further deleted on the old bill subsection (j) and subsection (k) and (l) which talked about expediting review process, talked about qualifying basically the criteria. And then we go back into the two other subsections that I just mentioned, that are already in the bill.

We retained the definition of "reasonable opportunity" on subsection (h) starting on line six. Sections three and four on the bottom of page five.

SENATOR KERTTULA:

Yes, Senator Uehling, you wish ...

SENATOR UEHLING:

May I interrupt for a second? [indisc.] community size question where we have the different categories, the different populations and so on, and again the reasoning for that is because we wanted to apply that to what was going on at the federal level and now do you have a comment on that. That's not necessary at all or that's a bone of contention that nobody is agreeing on or what just briefly what happened?

MR. CAMPBELL:

Sir, the reason we deleted that while we had the means of the particular population breaks to at least be the same as the federal level, that was population breaks were used to apply the presumption of individual criteria. Everybody from twenty-five hundred -- since we are no longer doing that we no longer needed

those three breaks. That, by the way, was one of the main areas that some persons had grave questions about constitutionality and I believe when legislative counsel joins us remembers to ask them how they feel about the bill now.

On the bottom ...

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

You mentioned the feds. What was the reference to the feds in that section?

MR. CAMPBELL:

Sir, the reference to the feds was a question from Senator Uehling and what he was remembering is back in the original presentation we were talking about why we use the actual population figures of zero to twenty-five hundred, twenty-five hundred to seven thousand. There's no reference to the feds in connection with this bill.

SENATOR ELIASON:

I thought the feds had more or less settled on twenty-five hundred or less as rural and that's as far as they go. Is that right?

MR. CAMPBELL:

Sir ...

SENATOR ELIASON:

Then its up to the state to broaden that criteria if they chose to do so.

MR. CAMPBELL:

The federal government in their regulations regards all communities under twenty-five hundred to be presumed to be rural communities, between twenty-five hundred and seven thousand to be presumed to be, or excuse me, no presumptions, and to be communities over seven thousand to be urban. In our old bill, we had used those same three population figures but we employed them in a different manner, in applying the presumptions. But we have deleted that section in its entirety from the Governor's

bill so that because we're now no longer dealing with individual qualifications or presumptions.

SENATOR ELIASON:

I guess the point being those numbers Senator Zharoff talked about earlier, are not arbitrary numbers. They are set by the feds.

MR. CAMPBELL:

Yes, sir.

SENATOR ELIASON:

Thank you.

MR. CAMPBELL:

On the bottom of your copy of page five, sections three and four are simply conforming sections and left as they are. On the top of page six, you have in adopting the CS just deleted subparen thirty-one, the definition of subsistence. Also deleted in this draft is the definition of subsistence fishing and subsistence hunting. So for all three of those definitions, there are existing definitions in law and those definitions will simply remain in force without change.

Continuing on page six, section six, we retained number thirty-six, line twelve, the definition of "customary and traditional" and line sixteen, number thirty-seven, the definition of "customary trade". You have by actually adopting this CS just deleted subsection thirty-eight, the definition of "sustained yield". The rest of the bill is simply regulations effective date, the portion that picks up the review committee and the transition and that portion, other than references to try to be consistent is the same. It is my understanding that legislative legal is working on a draft of this and will bring it back to you. They [indisc.] of this draft and it is my understanding the only difference is they're going to make sure all the internal references like section (a) or (g) or whatever for consistency. In some [indisc.] I'd simply say there have been, we've taken both bills. We have done major deletions from each one and we have combined the two. We have removed all

those portions of the Governor's Subsistence Advisory Council bill [indisc.] raise the question about constitutionality. And we believe this is a good bill and it will work.

SENATOR UEHLING:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir. Senator Uehling.

SENATOR UEHLING:

Backing up to thirty-eight, we took out consumptive uses, so "consumptive" is now out of there. We took out -- I'm sorry. So it's completely gone. So just thirty-six and thirty-seven

Mr. Chairman, the other thing I just briefly talked again, but legal drafting is going to come up with some more language so the bill is consistent only or are they going to add something here on [indisc.]?

MR. CAMPBELL:

Mr. Chairman, Senator Uehling.

SENATOR KERTTULA:

You have the floor.

MR. CAMPBELL:

I believe that we discussed this with them. The only change you will see is that they will have typed it on their machine and making sure that all the paragraphs that we refer to as described in subsection (a) or something, that that's really the right paragraph.

SENATOR KERTTULA:

You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Mr. Chairman, prior to this draft the administration said their legislation was the first step in solving the subsistence problem. If this is adopted what is the second step? The final conclusion to the problem that the state is facing as far as the administration is concerned?

ATTORNEY GENERAL COLE:

Mr. Chairman, Senator Hoffman, this is the first step

because it addresses subsistence on the state and private lands by the administrations view a workable solution to the problem there. Of course, as we have repeatedly said, during the hearings, there remains the problem of ANILCA's application to federal lands. That obviously in the future will have to be addressed and I think it would simply and duly prolong my response here to repeat what has been said on that subject during these hearings in these past five days.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR HOFFMAN:

Is it the intent of the administration to tout this as Alaska's solution to the problem in Washington and say that this is better than what is presently in Title 8 of ANILCA and that Title 8 of ANILCA should be changed to allow something that's similar to this piece of legislation.

ATTORNEY GENERAL COLE:

Senator Hoffman, I just can't respond to that other than saying you first must address this proposed legislation and indeed I think, and see how it works in the next few years. It may be a simple solution to all after we see how it works. And it may not be. So I think it would be premature to respond any further than that at this time.

SENATOR HOFFMAN:

So then it may be and it may not be but it may be that the administration may go to Washington after working for a few months, -- few weeks, few months, few years, and say that we need to change Title 8 of ANILCA because this is working for the people of the State of Alaska. This is something that the Alaskan Legislature has adopted.

ATTORNEY GENERAL COLE:

Well, Senator let me just fence with you just a little bit more. I would say the administration would not do that until it had the blessing of the Native people of Alaska.

SENATOR KERTTULA:

Senator Cotten then Senator Sturgelewski.

SENATOR COTTEN:

I just had a technical question. As I was noticing the proposed change to the definition of "subsistence uses" and I notice that in our statutes it still says for instance by resident domicile in a rural area in the state, I guess I understood that was part of what Cutler struck down in McDowell, I think. Maybe it wasn't Cutler, but whatever. But it still shows up in our statutes. And I was wondering, this is a technical question, when does that either go away or does a reviser take care of that or does it require legislation or is it too hot to handle. What's the deal?

UNIDENTIFIED SPEAKER:

[Indisc.] Larry Holmes right and left jabs.

SENATOR COTTEN:

How is the fight going?

MR. CAMPBELL:

Sir, it doesn't have any effect there. I don't know what counsel would say. They may -- oh, here they are. George might more able answer that question.

SENATOR KERTTULA:

You have the floor, sir.

MR. UTERMOHLE:

Mr. Chair, in regard to the word "rural" being contained in the definition of "subsistence fishing", "subsistence hunting", "subsistence uses" in the current statutes, that term remains there until removed by the Legislature. The courts require, by the McDowell decision, that that term be disregarded and it was applied as if the word is not there. If the Legislature intends that statute be corrected to reflect the current state of law, we would have to adopt the appropriate legislation.

SENATOR KERTTULA:

Do you footnote eventually the court decision effecting those terms?

MR. UTERMOHLE:

The McDowell decision is referenced in the paste notes to 16.05.258. And definitions ...

UNIDENTIFIED SPEAKER:

Mr. Chair.

SENATOR KERTTULA:

Yes, sir.

UNIDENTIFIED SPEAKER:

I wondered if the Assistant Attorney General would like to comment on that.

ASSISTANT ATTORNEY GENERAL:

I'm sorry. I was looking at my [indisc.] Could you repeat the question. I apologize.

SENATOR COTTEN:

I see it is listed as notes to decisions in the statutes. I hadn't caught that.

SENATOR KERTTULA:

It was just methodology as to whether it came out of the statutes.

SENATOR COTTEN:

Right. I was wondering how it ever came out. Did it happen with the revisers bill or it takes a legislative act. One way or the other.

ASSISTANT ATTORNEY GENERAL:

[Indisc.] legislative action.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR STURGELEWSKI:

Mr. Chairman, to follow-up the questions raised by Senator Cotten. I think we've all been very concerned about the road map and we're taking another step on the road, but we know it's only a part of it. And there have been a lot of attempts to resolve that, including give us several years and we'll see how it is. And I note in the review section of section ten, on page

seven, pretty well confined to what the act is and the review of the act. I had a conversation with one of the members of the Subsistence Council who had apparently advanced to that Subsistence Council - happened to be from the Native community and was very happy with the process, and felt I think it's been mentioned here a number of times that Outdoor Council and groups came together and it was a compromise effort and but a real genuine effort to advance. And taking on some of the notes from that individual and adding some of my own but having very, very little time - what I'd like to do is hand out a piece of paper that is not in any kind of form to see if the body either the amendment on the floor or this group constituting [indisc.] would like to take some action to expand the review process that could not only do that review, but get into the next step. Convene a group of Alaskans, with appointments by the Senate President and the House and the Governor, to convene a council that would look at some of the broader issues. And with that I'm going to have handed out just a very rough idea of what that might consist of. It would obviously take a lot of work and I'm not going to push it unless there's interest in being, say a council formed and that it would have a continuing role to look at these big issues that are still on the [indisc. - cough]. Obviously the authority always rests with the Legislature in terms of making action.. But I don't want ...

SENATOR KERTTULA:

[Indisc.] for a moment while this [tape stops suddenly] of the legislation rather than the suggestion by Senator Sturgelewski.

SENATOR STURGELEWSKI:

Right.

SENATOR KERTTULA:

... this moment because they have to pass around [indisc.]. Senator Adams, you were seeking the floor.

SENATOR ADAMS:

Mr. Chairman, a question to Mr. Campbell. Was any of these

suggested changes or the Senate Committee Substitute which is before us -- was any of these changes submitted to the other body for their consideration?

SENATOR KERTTULA:

You have the floor if you wish to respond.

UNIDENTIFIED SPEAKER:

If the other body referred to Senator Halford, I think ...

SENATOR KERTTULA:

Senator Halford, do you wish to respond?

SENATOR HALFORD:

Thank you, Mr. Chair. The overwhelming majority of the deletions from the Governor's bill particularly after the changes on page six, were recommended by members of the other body. In an effort to try and get what could be agreed on, that the amendment has been proposed. I think that was done by the administration. But the only difference, actually, I think of series of recommendations and now is that they had a different way to deal with sustained yield and left it in that bill.

SENATOR ADAMS:

This ...

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Yes, a question to the maker of this CS, was that overwhelming majority done in the committee meeting process? Or how was that done? How did you find out about the overwhelming majority of the other body.

SENATOR HALFORD:

It wasn't an overwhelming majority.

ATTORNEY GENERAL COLE:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

ATTORNEY GENERAL COLE:

Perhaps I could

SENATOR KERTTULA:

He might respond to that same one [indisc. - simult. speech]. Attorney General, please respond.

ATTORNEY GENERAL COLE:

I would say, Senator Adams, that this proposal represents a view among some members of the House, but I would not feel comfortable in saying more than that.

SENATOR KERTTULA:

Are there - yes, you have the floor.

SENATOR ADAMS:

Just, Mr. Chairman, directed to you, Mr. Chairman, when we get done with the administration, I wonder if I could be provided with the rural attorneys to give the other side of the story, if I may on the CS.

SENATOR KERTTULA:

Yes, of course.

SENATOR ADAMS:

Thank you.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. What I understand from the presentation, page four subsection (e) lines three through six, this is the only section that survives House Bill 601?

SENATOR KERTTULA:

Mr. Campbell?

MR. CAMPBELL:

That is correct. We deleted major portions of each bill -- deleted a lot more actually out of the Governor's Advisory Council bill [indisc.].

SENATOR ZHAROFF:

Okay, Mr. Chairman -- as I go through and I look at this here, at first look I don't have any problems with it or not, but it sounds like what we're doing here is we're identifying the non-subsistence area and once you identify the non-

subsistence area, then subsistence will not be permitted in that area at all. Is that correct? Okay, how does this affect now - and I'm looking at the original or the House Bill 601. And on page five, subsection (g) the way I understand it, it goes on and says not only do you identify these areas and that you have a non-subsistence area identified and then you go on to line fifteen. The way I read is that the Boards then identify the regulation of fish stocks and game populations that have been customarily taken for subsistence use and then so on. But it sounds to me there that you somewhat evaluate the area even if it's a non-subsistence area and if there have been some traditional subsistence fisheries taking place in there or subsistence game hunting you will allow it to continue under some criteria. But in this new bill, that option has been taken away. And I'm thinking like for example Ship Creek in Anchorage. Now I don't know if there's been any subsistence fish taken out of there, but that's identified as a non-subsistence area. Then under this bill regardless of whatever traditional uses that have been in place before, whatever the strengths of the returns have been this would be excluded from any type of subsistence take. And maybe as you get up into the interior where you have the subsistence dip net fishing or whatever it might be, if that becomes a non-subsistence area, then this no longer is a valid activity that could continue. And I'm wondering if it is the intent to become that restrictive and whether it is the intent that maybe we should leave a little bit of that door ajar so that you still have the possibility to take place. And maybe I may think of Adak for example, where that would probably be identified as a non-subsistence area, but there's no commercial fisheries and yet there is a return that comes into those rivers that people have been able to take as a subsistence fishery. But under this provision would not. And I'm trying to just sort of get a little bit of understanding. Is there a door ajar so that you can get into that?

MR. CAMPBELL:

If I can quickly.

SENATOR KERTTULA:

You have the floor.

MR. CAMPBELL:

Thank you, Mr. Chairman. Senator Zharoff, in non-subsistence areas, everybody would be available for personal use fisheries. Personal use fisheries [indisc.] established in existing law are exactly the same as subsistence use fisheries except they do not have a priority over other fisheries. The customary use fishery that was in 601 also did not have any preference over any other use but they did have a criteria that limited down who could participate in them. It was [indisc.] that if you have the situation where the Boards had a choice the customary use fishing was strictly optional in 601 where they could either establish a personal use fishery fairly easily and allow people to use dip nets or gill nets or whatever means to harvest the fish they need. Or they could go through what we felt was an extremely complicated and pretty unworkable scheme to try and figure out who could participate in that but then simply never use that. And so we simply left existing law in place the way it is so that personal use fisheries are available to non-subsistence areas. And Adak [indisc.] or in Ship Creek or anywhere else in that state [indisc.] non-subsistence area.

SENATOR ZHAROFF:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR ZHAROFF:

Maybe since the Commissioner is wishing to respond.

COMMISSIONER ROSIER:

Mr. Chairman.

SENATOR KERTTULA:

Yes.

COMMISSIONER ROSIER:

I would just elaborate a little bit on what McKie Campbell

has said here. We've got a lot of personal use fisheries in a lot of areas scattered around the state at the present time. Certainly another option of the Board of Fisheries has not been bashful about utilizing. One of the biggest in the state is the [indisc.] fishery on the Copper River. That's considered a personal use fishery up there, literally hundreds of people from all over the interior participate in that particular fishery. The runs on the Copper River are managed to accommodate that particular utilization.

SENATOR ZHAROFF:

Mr. Chairman, I guess what I wanted to do to get on the record that that is not the intent to do away with that subsistence personal use fisheries, slash personal use. So that a lot of people have a little bit of a confusion when you talk personal use and you talk subsistence and when you see this in here and it says you no longer can subsistence fish in a non-subsistence area but yet actually it's a personal use. People are going to have some confusion of that. So I just wanted to have that clarification for the record so that at some point if there is a question that comes up that we will be able to refer back to this session and get the clarification there. I think that's important.

SENATOR KERTTULA:

Commissioner, do you wish to respond at all?

COMMISSIONER ROSIER:

I was just going to say that certainly is not the intent of this, Mr. Chairman.

SENATOR KERTTULA:

And there is no structure in reading this with direct contrary to the [indisc.] Senator Duncan is seeking the floor. Senator Zharoff, are you satisfied? Senator Duncan then Senator Halford.

SENATOR DUNCAN:

Mr. Chairman, I want to make a statement more than anything. Because I'm really concerned about where we are

heading here. I've actually for the past couple of years tried to resolve the subsistence issue permanently and not put a bandaid on it. And I'm concerned that really what we're doing here with this compromise proposal that is before us as well as House Bill 601, I never have been very enthusiastic about House Bill 601 quite honestly. We haven't had a hearing on it. I wasn't sure I was going to support that piece of legislation because I don't think it resolve the subsistence question. I think it just puts off any permanent resolving of the issue for years. [indisc. - cough] works for years and then decide where you go from there.

I, for a long time, have felt very strongly that we could have a permanent resolving of the issue and that requires either the amendment of ANILCA which as we all know isn't going to happen. Or it requires us to come into compliance with the constitutional amendment. And apparently we're not going to do that and we're not going to push it. I signed do not pass an ANILCA [indisc.]. I may vote against this piece of legislation because I don't think it does anything for Southeast Alaska, quite honestly. I signed do pass on Senator Adams' bill because it requires a constitutional amendment and a current resolving of the issue. I don't see this - it doesn't bring us in compliance with ANILCA. It does mean we're going to have permanent dual management on a federal lands. Federal management and that's on ninety percent of the land in Southeast Alaska. Ninety percent in the land in Southeast Alaska is ninety percent and in the municipality of Sitka is ninety-seven percent and in Ketchikan it's ninety-seven or ninety-eight percent. You're going to have dual management in Southeast Alaska. There is a question about what will happen with the waters in Southeast. They completely [indisc.] that in great detail the past two or three days. It's very probably that the federal government will assume management of the waters - the coastal waters in Southeast Alaska and we'll have federal management of those. I just don't see this doing anything and I

just wanted to express that. I'm [indisc.] should be what's considered to be a compromise, but I for one, maybe I'm the only one, may not even support this. Because it doesn't resolve the issue. I think what it does though is it leads people of this state to believe that we have resolved the subsistence issue. And it takes the pressure off of the administration. I takes the pressure off of the Legislature to do the job right. And we'll sit for years trying to decide if this is going to work and meanwhile we'll be under federal management and we really haven't addressed the problems.

Urban residents of Southeast Alaska are to benefit from this. We don't do anything, they're saying [indisc.] just as they are. Personal use statute, personal use criteria will allow the urban residents of Southeast Alaska to continue to do the subsistence hunting and fishing. So I think we need to slow down a little bit and think about what does this do. If we're just interested in walking away from this session saying and trying to [indisc.] and saying we resolved the subsistence issue then we pass something like this. If you really want to do it, you probably turn down everything, bring us back again and let's do a constitutional amendment. Let's do it right. And quite honestly, I'm thinking of removing [indisc.] compromise. [indisc.] compromise on a piece of legislation that really hasn't had a hearing in the whole yet, [indisc.] whether this body wants to support that. I have not [indisc.] the House of Representatives [indisc.] 601. That was their idea. Not mine. The idea is that I was supporting a constitutional amendment and legislation that set criteria to provide for the subsistence priority. This doesn't in my mind do anything in this area of the state. I hope other members of the Committee of the Whole and other members of the Senate will think about that. but I think we're just relieving pressure and years from now we'll decide what the next step is. Senator Hoffman asked about step two. The Attorney General said, or maybe it was the Commissioner, said well, we'll see how this works for a few

years. That's not an answer. So I just wanted to put that on the record. If you've got a response maybe you don't. I think we need to think about what we're being driven to do here is really nothing.

SENATOR KERTTULA:

If there is a desire to speak briefly on this matter. This wasn't a question but there were some questions involved. You may do so, Mr. Commissioner.

COMMISSIONER ROSIER:

Thank you, Mr. Chairman. The only response that I would make is that this compromise, this piece of legislation we're working on here certainly responded to the Boards of Fish and Game request for tools ... [tape ends midspeech].

Tape 92-19

Side B

[Tape begins midspeech].

COMMISSIONER ROSIER:

... and legislative guidelines for in fact dealing more effectively with subsistence throughout the state. Not just in Southeast but throughout the state. Certainly this provides that legislative guidance. It may not be one hundred percent, but it is certainly a long ways from where we are under the present law. So [indisc. - cough] the Board being able to do a better job with the state and the Board being able to do a better job with the resources of this state on whichever one is in fact dependent, this bill goes a long way to meeting those needs.

ATTORNEY GENERAL COLE:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

ATTORNEY GENERAL COLE:

I would be remiss in my responsibility if I sat here silently and did not respond to Senator Duncan's statement that the United States would soon take over the waters of

Southeastern Alaska. In my view, the waters of Southeastern Alaska are navigable waters. The lands beneath those waters are owned by the State of Alaska and never during the Hickel administration and my tenure as Attorney General will we allow the United States to take over the management of fish in those waters without challenge.

SENATOR KERTTULA:

You have the floor Senator.

SENATOR DUNCAN:

I didn't say that that was necessarily a clear cut issue. But I did say it's very likely that the federal government will say that that's the case then the [indisc.] Lands Act, coastal waters, federal withdrawals, they may have a case. That's right. In fact, we looked at the Federal Register just two or three days ago and we saw exact language in the Federal Register that says for Southeastern Alaska area at this time, federal subsistence fishing regulations only apply to non-navigable waters. We asked the Department of Interior and others what that means. They surely didn't say it means that we will never think about assuming withdrawal. [Indisc.] the words that you referred to makes it very clear that the federal government may think about it. [indisc.] I hope that they don't either. My point is I don't think if we [indisc.] the next few years we can wait and see what happens [indisc.] I think we have to do something to be sure that that happens and that takes a constitutional amendment and Senator Adams bill we passed out of this Committee. Or something that you might propose [indisc.] I don't care if it's his bill or not. Excuse me.

SENATOR KERTTULA:

The Russians have a lot of surplus equipment right across from Nome. You might want some of that to help you out. We could also retrofit the ferry [indisc.] Any of those things might be a possibility I suppose, in federal takeover waters. You have the floor, Senator Adams,

SENATOR ADAMS:

In your mind, does this bill regain state management over federal lands? Commissioner.

ATTORNEY GENERAL COLE:

do you want me to play the record, again, Senator Adams?

SENATOR ADAMS:

So the administration has given up on that and you have canceled your trip to Washington D.C. on June 20, 22 with Lujan?

ATTORNEY GENERAL COLE:

I should respond to that by simply saying I have yet to make reservations.

SENATOR ADAMS:

Thank you. Thank you, Mr. Chairman.

SENATOR KERTTULA:

Thank you. On the is particular suggested amendment that has been incorporated into the bill for discussion purposes at this time, are there particular questions that you wish to direct? Yes, Senator Taylor. That is just the mere vehicle mark-up that leads to, I think, this bill. So you can see the sections deleted in 484 essentially. It might be of some help to you while you're taking notes. I know it was to me or will be.

At this time, then I'll ask the AFN counsel and I hope you all remain close would come forward and express some points of view as we did on 484, and 485. And now on 601 as amended. I think they will be available for questions. We'll slowly learn. We would like the Attorney General to remain as close as possible. So someone could mention that to him. There are some that feel that he may wish to respond. If you want a cup of coffee, Mr. Cole, it's up front here. We don't want you to get out of sight. I think at this time we can come back to order, distinguished counsel, you may proceed.

MR. MITCHELL:

Thank you, Mr. Chairman. For the record this afternoon, my name is Donald Mitchell and I'm representing the Alaska Federation of Natives during this part of your proceeding. With

me is Norman Cohen who is also an attorney working with AFN. God, Mr. Chairman, as they say is in the details and this bill makes a number of changes in the way words are used that have significant consequences legally. I will not go through many of those. I think it would probably be more productive in the time we have available to just generally flag the policy concepts that are enshrined in this particular draft and then indicate what they are and also the policies that are not dealt with in this draft. And then Mr. Cohen has some observations and then obviously we'll be available for questions.

I think probably the easiest way to understand what this bill does at the outset is it takes the House concept of the non-subsistence use area that you've become familiar with and it makes a significant change and that says that within these non-subsistence use areas, wherever they may be, the legal consequences that the Alaska subsistence statute is repealed. That's basically the consequence. In these areas, it sort of a free pass and there could be harmless activities that could occur in these areas, but these activities would be regulated under the statutes that authorize all of the kinds of taking other than subsistence take. So that would mean that there could be sport hunting. There could be sport fishing. There could be commercial fishing. There could also, I believe under Senator Zharoff's remark, there could be personal use fishing which would be fishing with a net or fish wheel for food but would not be entitled to a priority or anything like that. This would be open in terms of the Alaskans who could participate in those normal activities. It would be the same Alaskans that can now participate in those activities. In other words, the House approach of having this permit system where individual people who wanted to engage in this customary use category as part of this, that would be eliminated. So again, within these non-subsistence use areas, the legal effect is the subsistence statute would be repealed and all harvest activities that would occur in the areas would occur to other statutes other than

subsistence law.

Now what happens outside of non-subsistence use areas. Outside of non-subsistence use areas the Alaska Subsistence Statute would still govern the rules of the road. However, one of the things that I'm surprised that this does not do is it assuming that the state position or the Morry litigation is correct that the present Alaska law allows all Alaskans to qualify to participate in subsistence uses, everywhere in the state other than in these non-subsistence use areas, that policy would continue. I know there is a lot of concern on the part of the administration at the beginning of the week that one of the reasons that we needed to achieve goals this week was to deal with the all Alaska problem, if it is such. And I think I can represent fairly that this draft does not in any way on my quick reading -- and I may be corrected by the Attorney General or others, but I do not see anything in here that in any way addresses that problem. So in theory assuming that the state position other than asserting in the Morry lawsuit is correct, then all Alaskans would still be able to at least in theory to participate in subsistence uses. One of the details that I think is worth mentioning is that the present Alaska subsistence statute is found that Alaska Statute 16.05.258 and it is a long step-by-step process that describes the thinking that the Board of Game and the Board of Fisheries is to go through in terms of making allocations and dividing up the harvestable surplus among the various user groups. The text of that statute and the way that it was drafted -- it was drafted in 1986 -- focuses specifically on identifying the actual number of animals that the Board would reasonable believe the folks in the subsistence category would need. So, for example, in the Sleetmute area which is a subject of a recent lawsuit on the subject, if the biologist said that you can safely take a total of five hundred moose in an area, then 258 as it is presently drafted in Alaska law, would then require the Board to say, well, how many of those five hundred moose do we need to make available for

subsistence uses? And they would have to come up, as the statute is written, with some kind of a number. Like two hundred moose would be needed for subsistence and some analysis of the relationship between the animals available and the need for Alaskans engaged in subsistence. That process which I won't bore you with anymore because it's a technical matter is eliminated and in place of 258 many of what looks like a lot of the concepts of 258 are recreated in what is the new section 268 which begins on page two, line eighteen of this draft and goes on for some time. And the basic thrust of that, as again as I read it, just one time through, is to basically eliminate that kind of requirement. You start out talking about identifying a harvestable portion that might be available for subsistence, but then when you get to the actual making of that portion available, it starts fudging in a legal sense, and says well, all the regulations authorizing those takings have to do is to provide a reasonable opportunity to participate. Participate not to acquire the amount of animals that would be needed. And that is a drafting change that, I think has a serious enough substantive consequence that has a technical matter worth identifying.

With respect to what happens in situations in which there is not enough of the game population that would be available even for subsistence uses, under present law -- the present law which is sort of the tier two area, tracks the subsistence priority of ANILCA. Which is that if there's not enough for everybody, then you look at the individual Alaskans, dependence is the mainstay of livelihood and local residency and availability of all kinds of resources. I'm sure you're familiar with the process.

On page three, lines nineteen down to twenty-five, those concepts are kept but they are changed in some ways. So to the extent that that portion of the statute, if it were ever to be used in the future as a template for attempting to comply with ANILCA, I think there would be a question as to whether or not

this text would be as consistent with the same kind of provision in ANILCA that is not controversial to my knowledge to date.

The one other thing I would note is I have not been actively involved in the drafting exercise in the House. Mr. Cohen was with them on that. But I do know that there was a lot of concern on the part of the administration, as I understand it about using local residents as a criteria in that statute because it is a fair reading of the McDowell case, and it's certainly a concern that I have as well as the administration, that the McDowell case may stand for the fact that you can't use where anybody lives at all as a criteria. And so if that's true, then local residents are just as vulnerable constitutional challenge under Article eight as rural residents. That hasn't been resolved but I think that is a fair issue among the lawyers, assuming the administration has identified it. And it's something upon which we both agree that is a legitimate concern. However, after taking that kind of thing out of the House Bill, I noticed that on again, page three, lines twenty-two and twenty-three one of the criteria for how you divide up the sub-subsistence category is the proximity of domicile of the subsistence user to the stock or population. To me as the technician, that's just another more longwinded way of saying local residents. And so I would again, sort of like not dealing with the All Alaskans policy, based on some prior representations of the administration I was somewhat surprised to see that still in the text.

You're familiar basically with giving the Boards the assignment of identifying these non-subsistence use areas so I won't go through that. One of the additional changes in the House bill is that with respect to customary trade, it is obviously an issue that's been identified consistently as important. Rather than the House approach, this text as near as I -- I don't have the Governor's bill in front of me, but it looks to me like the Governor's approach to this is the approach that they take in lieu of the House approach and that would be

in two areas. One on page six, the lines seven and eight -- oh this is going? It is? Then I stand corrected on -- okay.

Then the major ...

SENATOR STURGELEWSKI:

Did I understand what you didn't say?

MR. MITCHELL:

Yes, but ...

SENATOR STURGELEWSKI:

You didn't state it.

MR. MITCHELL:

Senator, as I was whipping through this in the bleachers it was my reading that what is identified as section thirty-one on page six, lines one through ten that that was still in the game here. Mr. Cohen has just advised me to the contrary and so ...

SENATOR STURGELEWSKI:

I thought you were on line thirty-six so I was confused.

MR. MITCHELL:

Right, so the first comment I was going to say about customary trade is inoperable and Mr. Cohen has saved me from a horrible public error, once again.

SENATOR STURGELEWSKI:

You could spell potato.

MR. MITCHELL:

Then so the major ...

SENATOR KERTTULA:

Then you saved all the rest of us from the same [indisc.].

MR. MITCHELL:

Mr. Cohen, I think Mr. Chairman has a legendary capacity for saving us all for our impetuosity from time to time. Then with respect to the customary trade definition on thirty-seven, it would appear to me that the -- actually it's the same change. That obviously "non-commercial" is inserted in there. We still have the minimal amount of cash standard which is in the House Bill but non-commercial exchange of -- without debating that issue. I'm not sure what a non-commercial exchange was the

intent of the drafters might be. Non-commercial channels for example, that might be one thing you sell out of your house. It's another thing to sell to a store. But even that, I think, has some problems with ambiguity with visiting if you got serious about that. But non-commercial exchange what ever that means that is a change from the House approach. That's about all I can do at this time is flag that limited obviously.

Then also we have the issue of primarily for personal or family consumption and that is not in the House bill and the only reason that is worth flagging is that is been -- obviously that does not apply to trapping. So that is not a problem. With respect to other kinds of customary trade that I think people would view as legitimate I am not, as a draftsman, fully comfortable in terms of understanding the reach of the intent there. Does that mean that if a person in a village was to take a salmon that they could divide that salmon into strips so long as with respect to that individual salmon some of those strips went into their own refrigerator and they can put the other strips from that same salmon into customary trade? Or does it mean that so long as they are taking it in the generic category of salmon for subsistence for their personal use that some actual salmon -- every last bit of that salmon could be put in customary trade? I realize that may even sound almost silly, but these are lawsuits in the making, at least out past experience has been that these kinds of things do get litigated.

And then, of course, the final two additions -- right sustained yield is gone. But customary and traditional has been added in which is not in the House bill. A definition that I think Mr. Cohen may want to speak to and also a definition of "reasonable opportunity" has been added, which I believe was drawn from the Governor's text and certainly goes again to a lot of the policy issues that have been discussed repeatedly this week and I won't review them for you other than certainly one that leaps right out is page five, line ten that reasonable opportunity does not guarantee the conditions of the hunt or

fishery. And I have at least have assumed to the sole least adverse impact business. That we're not guaranteeing the conditions pursuant to which you engage in this activity will be conditions that you enjoy or you will find helpful. You have no legal standing to basically say that [indisc.] one time [indisc.]. But again I did not draft this, and know what they mean.

So again, just to briefly review, without going through it all over again, this does not deal with the all Alaskans problem that has been represented as being one of the reasons that we need to fix the bill. It obviously is the discussion which Senator Duncan's has indicated has nothing to do with complying with ANILCA. Certainly does not deal with the potential that again Senator Duncan has raised of an expanded assertion of jurisdiction over our fisheries. This would just apply a system in those areas in which we end up retaining fishery jurisdiction whether it is the areas over which the state is presently asserting jurisdiction or a smaller area at some future time.

With that, I think that Mr. Cohen has a couple of additional ...

SENATOR KERTTULA:

I would like to -- you have noted that you are an advocate. that you are definitely [indisc.] counsel and you understand this probably almost like no other person. I mean this whole area. [indisc.] You had little enthusiasm for the, quote, "Governor's bill". Although with constitutional amendment and so one, I don't say that you suggested but there were those [indisc.] suggests there might be something [indisc.] with the Governor's bill if there had been a constitutional amendment and it could be worked together. That's my interpretation. But my understanding is you have even less enthusiasm for this piece of legislation.- suggested legislation.

MR. MITCHELL:

I think with all due respect, Mr. Chairman, the level of my happiness at particular moments of your proceedings is of great

interest to me. I'm not trying to be flip. I'm not really in a position to be making statements about whether any of this is good or bad policy. I think I can testify about the Governor's bill as a technician that I thought it was horribly drafted. I testified to that repeatedly in both bodies. And I certainly indicated on behalf of my clients as an advocate - to say that it's badly drafted is a technician statement. I have also indicated repeatedly on behalf of my client community that the policy that it would enshrine are policies that they believe are bad public policy. I believe that they have also testified that there are components of the Governor's bill -- obviously the customary trade issue being a perfectly good example, that certainly were quite legitimate in terms of policy questions that they recognized were the subject of reasonable debate and discussion. But I wouldn't want to go any farther than that in characterizing their enthusiasm either for the Governor's bill or for this bill. That's obviously a matter for President Kitka and others if we wish their views on that. I was really trying to do to the extent that I'm capable as a dishonest broker to really sort of take you through in a technical sense how we viewed the policy choices that are made in this particular bill without really expressing any personal judgement other than to note for example, that like the all Alaskans policy it had been identified in the administration as a major policy concern and it was absent from this bill.

SENATOR KERTTULA:

It was somewhat unfair of me to even ask that question. I think you did a very good job. Mr. Cohen.

MR. COHEN:

Thank you, Senator. I'd just like to repeat two things that have been said here. One is that the real substance of this is in the details and it's really important to look at the details. And the second thing I'd like to do is repeat what Commissioner Rosier said that the Board was looking for the tools and this provides the tools. Just use that analogy. This

bill does provide many tools to the Boards and virtually all of them work against the interest of rural people who are intending to benefit from the subsistence law. If these tools work against rural residents in a couple of ways. First it provides a great deal more discretion to the Boards for them to do what they would like to do as opposed to what the existing subsistence laws told them to do. And that's I think the important point. That is found in the reasonable opportunity definition where it gives the Boards great latitude to define what is a reasonable opportunity and to do pretty much anything they would like to do. It is also found in the changes between 268(a)(b) and (c) and those similar provisions in the existing 258 that provides the basis for the subsistence law.

And finally in the definition of "customary and traditional" by taking off the table any fish stock or game population that is not first used somehow for a generation is basically saying that no new populations will ever be subject to subsistence use. So I guess it does provide several tools to the Board, but these tools don't do anything positive for rural residents who are looking at these laws to provide them some protection. Rather they all work against them.

SENATOR UEHLING:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR UEHLING:

On that point and we went back to the question of [indisc.] population of different areas you know whether it's twenty-five hundred or so on and so forth. that was part of the original bill. I don't know where you all stood on that particular part of that. Whether that was a help to the bill or a hindrance to the bill because it did sort of fit the federal [indisc] situation.

MR. MITCHELL:

Well, Senator Uehling, it actually, it is sort of a federal

concept that then was used in the way that did not fit into the federal situation. Let's see, the federal concept was having a set of criteria that includes now the federal regulations in certainly populations levels to assist the regulators in figuring out what areas of Alaska are located in rural Alaska and what areas are not for the purpose of deciding which individuals because they live in rural Alaska can participate in certain subsistence related activities. The administration bill took that approach and then sort of moved it from being used to identify which Alaskans can participate into identifying certain areas and that backed in again through the back door without [indisc.] try to get you back in to who these people were with this presumption business. It really had nothing -- it was sort of certainly was a concept that came out of the federal regulatory system but it really had nothing to do with comply with the federal regulatory system and many of us who are operational view this unhelpful in terms of setting up the workable regulatory process.

SENATOR UEHLING:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator

SENATOR UEHLING:

Second point also, Mr. Cohen had just mentioned the situation about discretion of the Board now has was that also the case in the Governor's bill that there was the same amount of discretion [indisc.] hasn't changed.

MR. COHEN:

Senator, that's correct. The provisions that have been retained here are the discretionary provisions borough [indisc.] or discretion except of the definition of sustained yield which was removed.

SENATOR KERTTULA:

Other questions of counsel here? Senator Taylor

SENATOR TAYLOR:

Are we getting close to the Adams bill [indisc.] where we were last sat at yesterday. Have we wasted all our time [indisc.] I haven't heard a positive comment on the bill that's in front of us. I'm totally opposed to it [indisc.].

MR. MITCHELL:

Senator, whether we are closer to a bill or farther from a bill since I am not asked or invited to attend any of the discussion that I'm sure all of you have, you would be in a better position than I would to know the answer to that question. I think I can say is that this legislation certainly to the extent that this particular text that I'm familiar with it was not developed in consultation with me or Mr. Cohen or with any other of the technical drafters that have been helping the Native community through this process. I have no idea who drafted this. And I can obviously reasonable figure it out, but I have no active personal knowledge of who drafted this bill other than to know it wasn't me and to know it wasn't Mr. Cohen and I know it wasn't Mr. Starkey.

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR KERTTULA:

Are you finished Senator Taylor?

SENATOR TAYLOR:

Yes, sir.

SENATOR KERTTULA:

It's probably a generic question really. Senator.

SENATOR ADAMS:

It was my request to ask for another review of this committee substitute the AFN delegation. Senator from Ketchikan if we're wasting our time, I would like you to ask the Senator who introduced it to remove it from us. And then we'll quit wasting our time and go back to the original bill that was sent over so we can debate that and vote it up or down.

SENATOR KERTTULA:

Is this decided -- yes, Senator.

SENATOR TAYLOR:

I wasn't trying to be facetious. I was merely suggesting what I thought we had been [indisc.] 601 as a format. If we haven't been, then it's my error and I do apologize. I didn't intend it to be that way. I felt there was some compromise we were definitely achieve here and we're not. Then I think it's time to go back [indisc.] sustained yield [indisc.].

SENATOR KERTTULA:

Senator Taylor, as near as I can tell, during the period of time since 601 was brought up and it was collectively decided to hear it and any suggested amendments. Those amendments I think in that whole period was a response the House leadership meeting with President of the Senate, majority leaders and so on, trying to see what was going to happen to the House and Senate and Administration relationship here. That's all -- and so this is a compromise of some sort -- work it out with the House. That was where it came from. Or some parts of the House.

SENATOR ADAMS:

There's no compromise with the House leadership on this bill and I don't believe so this [indisc.] can remark to this fact. But I also would like if we're going to do mark-ups let's take the Governor - let's do Senate Bill 485 and do a mark-up with that to insert with the House bill at least that bill complies with ANILCA. At least that bill retains state management.

SENATOR KERTTULA:

Senator, we wish essentially sent to this task by the House -- by the Senate Caucus. And this was an amendment that was presented and any other amendments including the whole 484 have been represented as amendments to this bill. I was just instructed to bring it before us. Senator Eliason, you have the floor.

SENATOR ELIASON:

Mr. Chairman, [indisc.] it is a condition of [indisc.] we have tried to construct something which we all are not

particularly happy with. I think this is a product of mens good will, I hope and ladies good will trying to bring this session to conclusion. We were faced with some very difficult ultimatums.

SENATOR KERTTULA:

Could the administration's members please come forward again and just speak to this a bit. Attorney General, Mr. Campbell. Commissioner. Excuse me. Senator Eliason. Just to how we got. Senator Eliason [indisc. - simult. speech].

SENATOR ELIASON:

I was trying to saying that being [indisc. - simult. speech] solve the impasse [indisc.] we were outlined those [indisc.] the ultimatums the House had given the Senate. One of those being that they would not accept a Committee Substitute of the Governor's bill on this bill. If we did they'd go home. So that's the conditions we're trying to work under. We're trying to keep this thing together, trying to solve something and of course, [indic] House was I don't think the Senate wants to be about a year [indisc.] proceed and try to reach resolution. And if you're going to go home, you can go home any time you choose to go home, but we're doing what we can to salvage something out of this session here. And this is a movement in that direction. It might not be the final product but in this system as we all know, you got to give an take. You try to take more than you get. Somewhere in this process, we hope we can have something which will relieve some of the problems we have in the management of fish and game on state lands. We know what Senator Duncan said that and I said that the first day I came over here knowing that we weren't going to resolve the problems in Ketchikan, Juneau or Sitka because we can't get to that one without a constitutional amendment. However, I think I'm looking at other parts of the state and I think there's some solution to what we might be brought to bear to solve some of the problems in the other areas of Alaska and state lands and I'm willing to work towards that. Not because it [indisc.] not

because of anything Southeastern but I think it's for the benefit of the whole state, we can come together with something that does something positive. And that's sort of where we are. Otherwise the other option is go home.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

Yes, Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chairman. I would just say that I think the compromise ideas both of them were proposed by House members who had not previously supported the Governor's bill. The effort was trying to get a package of things that we could get done in this session and be done with it. I mean, I -- the alternative was essentially to offer the Governor's bill Committee Substitute and I was prepared to do that. But I don't think that their suggestions frankly [indisc.] a step in the right direction. I think the bill that remains before us does clean up some major [indisc.] So I don't think the House proposal -- and frankly, I was very irritated by the meeting that we had. But the proposal that came back was not in my opinion [indisc.].

SENATOR KERTTULA:

Senator Duncan, you were seeking the floor.

SENATOR DUNCAN:

Thank you, Mr. Chairman, maybe I could ask the Attorney General a question here in just a moment. And let me just say a couple of things. I am more deeply concerned about what we're doing [indisc] our efforts after Mr. Cohen has simplified because not only doesn't it resolve the problems of Southeast Alaska because of the large amount of federal ownership, but it doesn't resolve the problems of rural Alaskans. So what are we trying to do. I mean who are we trying to help? Rural Alaska that's where the subsistence lifestyle is predominant and we're not going to resolve the problems there. We're not going to resolve the problems of Southeast. I'd like to help everyone in

the state. That's what we're here for. Is to help everyone in the state by doing it correctly with a constitutional amendment. We [indisc.] discussion. I guess [indisc.] this body pursuing that at this time. What really concerned me, really got me to the point of saying what I said, was that Senator Hoffman said, okay, this is step one. Now tell us what step two is and step two from your -- and tell me if I'm wrong but what you said step two was well, we'll wait several years and see how this works and then decide what we have to do. Well you won't be here for several years probably.

SENATOR STURGELEWSKI:

He doesn't know anything either. [Indisc. - simult. speech and laughter].

SENATOR DUNCAN:

That's not a very comforting answer for the people of this state who are depending on subsistence for their lifestyle. It's not a very comforting answer for those in the areas of the state where there's large -- where there's dual management on federal lands. It's not a very comforting answer for these in the state who really want to resolve the subsistence problem once and for all to hear you say, well, we'll see how this works for several years. It just -- all we've heard here tonight is just relieving pressures so we can all go home and wave goodbye and say we solved the problem and nobody is going to say anything [indisc.]. tell us what step two is. What are you going to do next month after [indisc.]? What's going to be your next step? How are you really going to get to resolving the issue? Are we not going to address it next year at all in the Legislature?

ATTORNEY GENERAL COLE:

Let me respond if I may.

SENATOR KERTTULA:

You have the floor.

ATTORNEY GENERAL COLE:

If you look at this broadly, Senator, you're not going to

solve this problem here tonight, today, tomorrow. That's clear. And anybody that thinks that this problem is going to be solved permanently tonight or tomorrow or next week just hasn't given the problem a lot of thought. It's not going to happen. You know that. We all know that. So that's [indisc.] The decision that the Senate has to make this evening is simply this. Do you want to take the first step along this long and tortuous route to solve this problem? That's the decision you have to make. Do you want to take the first step or do you want to take no step? Because that's -- if I may, please. Thank you. So the decision and this legislative body's decision is simply shall we take the first step towards solving this problem or no step? And the first step is a constructive step that resolves the problem that are pressing and making the management of fish and game in this state difficult for Commissioner Rosier and the Boards. And if you want this confusion, lack of statutory authority and management fish and game effectively in this state you should just do nothing thank everybody and go home. But this legislation solves some of the problems. It's a constructive step and it ought to be taken.

SENATOR KERTTULA:

Senator Duncan.

SENATOR DUNCAN:

Mr. Chairman, first of all, I didn't say that we would solve everything tonight or next week. But we could have solved by November in this general election year [indisc.] with the constitutional amendment on the ballot for the voters in this state [indisc.] We can take step one tonight and pass this legislation and set the criteria and we should take step two in November and to have the subsistence issue to the greatest extent possible resolved. The only other concern would be left is not a concern in my mind to a great extent, but the only concern that would be left would be those who are saying we don't any of the federal oversight by courts. Step three to resolve that would be to convince Congress, convince the other

interested groups in the state that we should amend ANILCa.

My concern with your statement, Attorney General, is you're not proposing step two. You're proposing step one and stop.

SENATOR KERTTULA:

Senator.

SENATOR DUNCAN:

I have not heard a proposal from you, from the administration for step two. Senator Hoffman has asked these questions day after day after day. What is step two? We don't have a step two.

ATTORNEY GENERAL COLE:

Senator, look ...

SENATOR KERTTULA:

You have the floor.

ATTORNEY GENERAL COLE:

If this body wants to adopt a constitutional amendment it certainly may. You may take the vote on that this evening in this body or in the House and present that issue and some constitutional amendment which we don't even know what it is or what the terms are or what it looks like [indisc. - cough] toss around constitutional amendment as if we really knew what we were talking about. It's clear that we don't. But that notwithstanding. It's true. It's a thought we recognized the - the votes in this body are not there to pass a constitutional amendment and so why do you continue to ask me, a member of the administration who doesn't vote on it, who has nothing to do with it, why doesn't the administration adopt some constitutional amendment. That's this body's prerogative. And the House's prerogative. So I mean, you know don't continue to ask me why we don't do it. It's not up to the Governor to do that. It's up to this body to do it. and the House to do it.

SENATOR KERTTULA:

Before we break up and I'll recognize Senator Duncan again, I would like to have your response to the bill before us shortly. We're not out of order because it ties in. But we're

perilously close to being out of order of discussing something that is not essentially before us after last night's vote.

Senator Duncan does have the floor.

SENATOR DUNCAN:

Just one final statement then we'll stop this debate. If I can get the last word in. Mr. Attorney General, I understand the way constitutional amendments are put before the voters of this state [indisc.] I also understand that as long as I've been in the Legislature that if the Legislature is going to do a constitutional amendment it probably takes not just the House and the Senate working in that direction but also the administration. It takes the leadership of the administration. And you can't vote and the Governor can't vote in front of those bodies, but by your strong commitment and your persuasion I'll bet you two more votes in the Senate will be picked up real easy. With your strong commitment and your persuasion that you could have the fourteen votes for constitutional amendment. You could probably get the twenty-seven votes [indisc.] Two years ... [tape ends midspeech].

Tape 92-20

Side A

SENATOR KERTTULA:

At this stage and this time of evening we'll start engendering unnecessary hostilities even from other members of the Senate wishing to chime in.

UNIDENTIFIED SPEAKER:

As opposed to necessary hostilities.

SENATOR KERTTULA:

I'm looking at you Senator Halford. If you weren't sitting right next to Senator Duncan, I might want to recognize. But that's a little close proximity. Will you please comment in any way you wish to the value or whatever of the legislation that's just before us now. Thank you, very much gentlemen. You have the floor, Mr. Rosier.

COMMISSIONER ROSIER:

If I might, one more time. I think is the story that I've been telling right from the very beginning. We have management problems in the state in terms of doing the job that we feel is necessary to maintain our fish and game population. We've gone through a long period of rebuilding these resources over time and I'm very pleased to say that these resources are in very good condition, throughout the state at the present time. We want to see to it that we, in fact, have a system that, in fact, assures those resources are maintained in that state. Certainly we've got a public process of regulations in this state that is strongly supported by most of the residents. It's an extremely democratic system that provides for opportunities to go before the Boards at any time you've got a problem. And that particular issue is to be considered by the Board and develop a management program that meets the needs of the people of this state. On this particular issue, with the assignment of the priority for subsistence the Boards have said, we've got problems. We cannot fully implement the legislative intent of subsistence. We're encountering significant problems. We need guidelines from the Legislature. We need the help from the legislative body to permit us to, in fact, do the job for the people of the state to develop the resource. And based on the legislation before you, I think that you've taken a strong step in that direction. The Boards and the resources in this state.

SENATOR KERTTULA:

You're stating that this bill as amended that's before us is in your view still a substantial tool for perpetuation of the resource?

COMMISSIONER ROSIER:

Very definitely so, Mr. Chairman.

SENATOR KERTTULA:

Thank you. Now around the table, unless there's another statement from McKie. Senator Uehling, you were ...

SENATOR UEHLING:

Just quickly on the second step what would you say the

second step [indisc. - cough] paraphrase to us essentially that the Boards themselves are going to have the management tools to do what necessary then to go forth at least from the [indisc.] sense [indisc.] everything else. But as far as our own [indisc.].

COMMISSIONER ROSIER:

Mr. Chairman, this really begins to put the state's house in order on this. I think ultimately it challenges the state management authority that may come from the feds. We don't know certainly. But certainly, we heard some of the evasive answers the other day. This does put the state's house in order. It says that we've got a management system that works from our standpoint. Feds stay out. It states out the state's authority on state lands and state waters and it's an effective management program.

SENATOR KERTTULA:

Senator Sturgelewski, then Senator Hoffman. Senator Sturgelewski.

SENATOR STURGELEWSKI:

Yes, Mr. Chairman, very briefly. I wonder if we might ask George Utermohle just to make a brief comment. I think perhaps we've been remiss in not getting on the record the question as to legal services view towards it's constitutionality.

SENATOR KERTTULA:

George, if you are -- Mr. Utermohle, if you can respond to that, please do, as legislative counsel.

MR. UTERMOHLE:

Mr. Chair, in regard to the proposed Committee Substitute you have before you, in regard to the Governor's bill which has been before the Legislature since this second regular session, ...

SENATOR KERTTULA:

You already spoke to that.

MR. UTERMOHLE:

Right, I have reviewed ...

SENATOR KERTTULA:

Now about this bill.

MR. UTERMOHLE:

Recognize two problems that were carried forward into the legislation which is now before us in the special session. Both of those items dealt with revisions that have been deleted from the Governor's bill and are no longer contained in this proposed CS. So the problems that we previously recognized with the Governor's legislation are not present in this bill.

SENATOR KERTTULA:

Thank you. Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. This compromise legislation is before us and as the President has said, there's always some give and take regarding the legislation. And I would like to hear from AFN if they -- what are they perceived to be getting and what are they giving on this particular piece of legislation that is proposed to be a compromise because when I look at it I don't see anything, as Senator Duncan has pointed out, anything that the Native community and, for that matter any rural residents, are gaining from this particular piece of legislation. I'd like to have that done at some time for the benefit of all of this body. But before that I have a question for McKie Campbell. Throughout this hearing process for the last several days, he has stated that one of the major problems that needs to be addressed is the all Alaskan problem, and yet this legislation does not address that. And I was wondering if he might comment about that.

SENATOR KERTTULA:

Mr. Campbell, if you wish to comment, please do.

MR. CAMPBELL:

Mr. Chairman, Senator Hoffman, I would like to comment. We clearly do feel, as I have stated many times that the all Alaska problem is a real problem. And it was for the reasons that we felt that the original draft of the bill drafted by the

Subsistence Advisory Council was a better overall solution. However, it has become apparent that there are number of members who had other opinions. We also felt [indisc.] been passed by the House and we had hoped that this might be something that might meet some of the needs or compromises that had been mine in the beginning. Maybe I'm entirely wrong about this, but Mr. Cohen, Mr. Starkey and a number of other representatives [indisc.] were closely involved in drafting 601. [indisc.] but we have certainly included the all Alaskans policy in this bill exactly as it was in 601. We felt that we don't [indisc.] House leadership, that we have something that can pass that is very good positive first step towards going down the road.

SENATOR KERTTULA:

Does anybody else wish to ask questions of these gentlemen, speak to the issue? Thank you very much. We're getting on with time in the evening. I hope you remain available. Did you have further comments. Are there any other questions.

SENATOR HOFFMAN:

I have a questions, Senator.

SENATOR KERTTULA:

You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. I would like to go back to the first part of my question for AFN and that's their position on the bill and as I said the President had said that any compromise there's give and take. And I was wondering what AFN perceived they were getting in this particular piece of compromise and what they are giving up.

SENATOR KERTTULA:

If you are capable and wish to speak on this question -- we've been having legal counsel here. I welcome your testimony. I ask that it be encapsulated to any extent possible.

MS. KITKA:

I'll make it very short.

SENATOR KERTTULA:

Thank you.

MS. KITKA:

For one thing we don't view it as a compromise. We don't see anything being given to the Native community. AFN came to Juneau strongly ...

SENATOR KERTTULA:

Julie, it's a terrible situation with acoustics here and that does not magnify on this record -- permanent record. So I guess I'll have to counsel everybody to keep quiet and ask you to speak to the extent you can. The members right here were saying they couldn't hear you. Thank you.

MS. KITKA:

Thank you. The Alaska Federation of Natives came to Juneau strongly believing that the recommended constitutional amendment was a critical public policy element in resolving this divisive issue. We believe this and we will continue to pursue it with all our resources. The amendments proposed here have not been fully analyzed by us, but based upon what we've been able to review, the resulting legislation still does not achieve a legislative solution that deals with the issues that have to be addressed. AFN knows and shares with you your desire to solve this issue and we pledge our best efforts to continue to work with you and the administration, both during the remainder of this session and beyond. I am not prepared at this time to be responsive to questions regarding the substance of the issue. But we don't view this as a compromise and anything being given to the Native community.

SENATOR KERTTULA:

Thank you very much. Questions? You have the floor, Senator.

UNIDENTIFIED SPEAKER:

Would there be some way that you could tell us -- I see it basically that there are three choices. SB 484 as it is now, HB 601 as it is now and I know you can't comment on the content,

versus nothing. If you were to prioritized those, which would be your choice at this point?

MS. KITKA:

Mr. Chairman, based on my understanding Senator Adams' is still under consideration by the Senate and AFN has testified that we support Senator Adams' piece of legislation. I'm not under any impression that that has been taken off the table.

UNIDENTIFIED SPEAKER:

Then if I can just ask it this. That would be supported with the exclusion of what I suggested as being unacceptable? Those three that I just mentioned. Nothing, SB 484 or HB 601 as amended? You're saying Senator Adams' bill, constitutional amendment or nothing. Is that what I hear?

MS. KITKA:

Mr. Chairman, I believe that the Senate has to identify what the purpose of this special session is and what you're down here to solve. I came down here to help the state regain the unified management system. I came down at the direction of the Native people to help do that. The state is unwilling or unable, either one, to deal with that issue in an effective way. We will do the best we can to solve the problems on that. But that is why we came down here. And I think that Senate needs to take a look at what the goals of this special session are and what you wanted to accomplish. And I believe that Senator Adams is a good faith effort that complies with ANILCA and solves the problem. That is what we have put forward as solution. The state does not desire to solve the problem that's at hand, which I believe is where we're at with the threat of federal management, permanent control February first. I think that's important that message be [indisc.] to the Alaskan people because that is why the Native people came down here to help you see. That is what we've been working on the last two years is to help the state regain unified management. We wanted to help the state not at the expense of our rural people who live out there who depend upon hunting and fishing to provide for their

families. If that is not the goal of this Legislature, of it's not the goal of the Senate, I think that we need to be aware of that. I think that it is a very difficult issue to wrestle with. I know it's very difficult to come up with a solution. But I don't think you can allow yourself to be sidetracked off that issue.

SENATOR KERTTULA:

Questions? You have the floor, Senator Eliason.

SENATOR ELIASON:

Of course it takes this body and the other body also to agree on a constitutional amendment. And your group came before the House Committee urging the House to adopt the constitutional amendment [indisc.].

MS. KITKA:

Mr. Chairman, yes, we have. And in fact I believe that the House has passed through a constitutional amendment to two committees and it's sitting in House Rules pending some type of discussion between the House and Senate on adopting it. I believe that we have testified in the House Resources committee, House Judiciary State Affairs committee of what we believe about the House constitutional amendment and it is pending in House rules.

SENATOR KERTTULA:

You have the floor, Mr. President.

SENATOR ELIASON:

[Indisc.] before them the situation we can't put it before us we have fourteen members and even then we have problems. However, it's my understanding and I think it's common knowledge in this Legislature is only twenty-one votes over there to deal with that. The question is, if we would somehow or other [indisc.] fourteen votes on this side, could you pick up six more on the other side?

MS. KITKA:

Mr. Chairman, we hope to work as hard as we could to do that. Our goal down here is to solve the situation as far as

the state losing unified management. I believe the options of the Legislature not wrestling with that issue, is federal courts are going to make the decisions and run fish and game and we will have a dual management system. And that is not in the interest of the fish and game resources. It's not in our interests and in it's not in the state's interest.

SENATOR ELIASON:

The point I was really getting to is the fact that we tried knowing fully well that the House would never concur [indisc.] but we took that step forward and try to get a constitutional amendment started on this side and we failed. Now I don't think it's quite fair to blame this body for inaction on that particular issue because we tried.

MS. KITKA:

Mr. Chairman, I can appreciate that and maybe part of the problem with coming up with adequate members of vote has to do with the language of the constitution amendment. I know that people often think that a constitutional amendment does a lot more things than it actually does, but if a constitutional amendment similar to the one that's being considered by the House which primarily just restores to the Legislature the ability to make these kind of distinctions on that, you know, maybe it's a matter of this body looking at different versions as far as what that is. And maybe it being in the abstract people are a little hesitant about supporting such an approach. But if they are looking at exact language, maybe they're not as hesitant. If everybody understand what the purpose of the constitutional amendment is to restore to the is legislative body the ability to make certain types of decisions and distinctions, classifications between rural Alaskans to do certain things, it's not mandating the Legislature to do something. It's to restore back to the Legislature that ability. I find it hard to think that the Legislature wouldn't want to have that additional flexibility. Whether you're going to ever utilize it. But I find it hard to believe that the

Legislature wouldn't to at least have that ability where it had the opportunity to seriously discuss how you could regain that ability to make those type of distinctions. I'm kind of at a loss. Maybe it's a matter of not having concrete proposals. maybe it's a matter of not seriously looking at the House proposals that's made it through several committees and taking a look at it whether or not there is any proponents of that . Maybe there's more support than you think. I don't have the answers to that.

SENATOR KERTTULA;

What we've heard one particular advocates side and it's a very, very important one. We've given it a great deal of time. We have not listened to other advocates outside of the state itself. I think that's very clear. It bothered a few people. I think we've allocated their time, resources to debate, essentially stating the state people and the advocates for AFN to the exclusion primarily of virtually everybody else. Trying to get through in a meaningful way these bills in a difficult setting. I thinks it's about the time of the day and the night that if there is going to be a motion to move this bill out, I try and cut off debate, we ought to start thinking about it. [indisc.] we ought to consider adjourning for the night. In any event, I think it's up to me to start bringing to the table this bill and Senator Halford, you do have the floor. We've had no discussion prior to this.

SENATOR HALFORD:

I think we have adopted a CS.

SENATOR KERTTULA:

We have adopted a CS. This is the CS.

SENATOR HALFORD:

Mr. Chairman I would move that we pass out of the Committee of the Whole Senate Committee Substitute House Bill 601 as before us, noting the two changes from the draft that are on page six.

SENATOR KERTTULA:

Are there objections?

SENATOR ADMAN:

Object.

SENATOR KERTTULA:

Objections noted. Do you wish to state your objection.

SENATOR ADAMS:

This bill doesn't do anything, Mr. Chairman. It doesn't gain state management. It is flawed. I think that it basically doesn't do anything. It just goes back to the original House Bill, vote that one in and let's get out of here.

SENATOR KERTTULA:

Is there a roll call requested or can we do a show of hands? All right. Just a show of hands to move the bill out. I think that that's acceptable. All those in favor of moving the bill out on individual recommendation just show their hands. Have you counted? All those opposed same sign. Lorraine, could your report.

THE CLERK:

The hand vote shows seventeen ayes; three nays.

SENATOR KERTTULA:

Four nays.

THE CLERK:

Sixteen;four.

SENATOR KERTTULA:

I believe that it is one missing, fifteen for and four against. We'll adjourn [indisc.].

ADJOURN

7:30 p.m.