

1 section, the boards shall jointly consider the relative importance of subsistence
2 compared to the totality of the following socio-economic characteristics of the area:

- 3 (1) the social and economic structure;
- 4 (2) the stability of the economy;
- 5 (3) the extent and the kinds of employment for wages, including full-
6 time, part-time, temporary, and seasonal employment;
- 7 (4) the amount and distribution of cash income among those domiciled
8 in the area;
- 9 (5) the cost and availability of goods and services to those domiciled
10 in the area;
- 11 (6) the variety of fish and wildlife species used by those domiciled in
12 the area;
- 13 (7) the seasonal cycle of economic activity;
- 14 (8) the percentage of those domiciled in the area participating in
15 hunting and fishing activities or using wild fish and game;
- 16 (9) the harvest levels of fish and game by those domiciled in the area;
- 17 (10) the cultural, social, and economic values associated with the
18 taking and use of fish and game;
- 19 (11) the geographic locations where those domiciled in the area hunt
20 and fish;
- 21 (12) the extent of sharing and exchange of fish and game by those
22 domiciled in the area; and
- 23 (13) similar factors the boards find relevant to their determinations
24 under this subsection.

25 (i) The boards shall jointly adopt by regulation a definition of "customary
26 trade" that is consistent with the definition of that term in AS 16.05.940(36).

27 * Sec. 6. AS 16.05.259 is amended to read:

28 Sec. 16.05.259. NO SUBSISTENCE OR CUSTOMARY USE DEFENSE.

29 In a prosecution for the taking of fish or game in violation of a statute or regulation,
30 it is not a defense that the taking was done for subsistence uses or customary uses.

31 * Sec. 7. AS 16.05.940(5) is amended to read:

1 (5) "commercial fishing" means the taking, fishing for, or possession
2 of fish, shellfish, or other fishery resources with the intent of disposing of them for
3 profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid
4 subsistence or customary use permit in possession, if required by statute or
5 regulation, is considered prima facie evidence of commercial fishing if commercial
6 fishing gear as specified by regulation is involved in the taking, fishing for, or
7 possession of fish, shellfish, or other fish resources;

8 * Sec. 8. AS 16.05.940 is amended by adding new paragraphs to read:

9 (36) "customary trade" means the limited exchange, for minimal
10 amounts of cash, as restricted by the appropriate board, of fish and game resources;
11 this paragraph does not restrict money sales of furs or furbearers;

12 (37) "customary use" means uses of fish stocks and game populations
13 permitted under AS 16.05.258(g).

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