

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672
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the way it's always been, the definition of sport fishing in 16.05.940 is fishing with a rod and reel. So if they see somebody out on the stream fishing with a rod and reel they know that person is supposed to have a sport fishing license. And so they wanted it in there. So we have put it there. And I do understand that there's some feelings about this. Because I had a discussion with a gentlemen here in town who said, what do you mean? He said, I catch all my subsistence fish with a rod and reel. No, Bob, you do exactly like I do. You catch an awful lot of fish that you eat with a rod and reel and you'll continue to do it. But you'll catch them under the sport regs. So simply we're setting that out as the status quo. It is a policy for this body.

SENATOR COTTEN:

Point, Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR COTTEN:

Why do you take out "fishing for"?

MR. CAMPBELL:

Excuse me. What the Attorney General pointed out that the term "taking" includes both fishing and fishing for. And that was simply technical drafting. That "taking" is defined in the law as both -- it sounds silly -- but both taking and also attempting to take.

SENATOR COTTEN:

Where is that defined?

MR. CAMPBELL:

I would get the --

SENATOR COTTEN:

I'd like to have it.

MR. CAMPBELL:

I will get that to you.

SENATOR COTTEN:

This is essentially the same definition we wrote in 1978.

MR. CAMPBELL:

Right.

SENATOR COTTEN:

With the exception of the residency requirements.

MR. UTERMOHLE:

Mr. Chairman, yes that definition is in 16.05.940, definition of "taking".

MR. CAMPBELL:

That's exactly the same question.

SENATOR COTTEN:

That's good enough.

MR. CAMPBELL:

The definition of subsistence hunting, again, we just made it by a qualified resident. The same question about hunting or hunting for [indisc.]

The next substantive definition issue is on page ten, line four, number thirty-one, the definition of "subsistence". And this used to be the definition of "subsistence uses". But in the Council and discussion with the legal folks, we said, really what we're talking about here is both subsistence taking and use. And it's the taking much more than the use that we're really attempting to regulate. So we simply made it the definition of subsistence, to include both taking and use. So we said, "it is non-commercial, customary and traditional in a use areas of the state". We specified that it has to be non-commercial. We deleted "shelter, fuel and tools" on line eight. And the reason we did that is those three in general on the past definition it referred to the use generally of firewood, berries, things like that. And again, our legal counsel advised us, guys, you're in Title 16. You're dealing with fish and game and if you want to be consistent, then deal with fish and game. And so we did that. That's the only reason there.

Then we also specified about non-commercial sharing and barter, customary trade and kept the existing definition of "family".

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

UNIDENTIFIED SPEAKER:

What is non-commercial sharing? How do you define that? What's that mean?

MR. CAMPBELL:

Sir, there had been in the discussion -- I think that that's maybe a touch of paranoia on our part. That we're recently been dealing with a lot of customary trade issues and talking about -- that I'll talk about as soon as we get down to that customary trade definition. There was a lot of talk about various ways and loopholes in the law. And we simply wanted to be real plain that we were talking about the small scale family to family - what we all think of as sharing.

Then, the next thing is the definition of "customary and traditional". And here customary and traditional is an absolutely key phrase in this bill, in existing law and in ANILCA. But unfortunately in both ANILCA and in existing law, we didn't have a definition of it. And that has led to a good deal of confusion and problems. The Boards of Fisheries and Boards of Game adopted a set of eight criteria to determine what was and wasn't customary and traditional and they've used those over time. The portion of that that had proved to be the most used talked about multi-generational use. Because what happened is in the wake of McDowell and subsequent court decisions, some of the most useful parts of those regulations have been struck down or at least our Department of Law has implied they are no longer applicable and useable. And we would up in the situation where our Department of Law at least advised us that we were in a situation that any fish stock or game population anywhere in the state that has been used for food over time regardless of back when that time was, can be subject to subsistence.

SENATOR KERTTULA:

Senator Adams are you trying to seek the floor, or are you

going to wait?

SENATOR ADAMS:

Going to wait

SENATOR KERTTULA:

Please proceed.

MR. CAMPBELL:

I would just say there are very few fish stocks and game populations that at least some point in the state have not been used over time for food. So what we did is we put in a definition and we said, it means the non commercial, the long term consistence and ongoing dependence on the taking and use of fish and game in a specific area and the use patterns and the harvest levels that have been established over at least one preceding generation of users. And the reason we use that term "over at least one preceding generation of users" the old term was "multi-generational use" and back two years ago when Cook Inlet first went subsistence and the Board was floundering around about what to do and what is multi-generational. We had folks come in and say, my father and my son and I were all out last week and used the resource and we got a multi-generational use and clearly nobody believed that. And they spent way too much time talking about it. So here we say "it's an ongoing use that has been that's been consistent over time for at least one preceding generation."

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

I'm trying to understand that point. So this is dealing with stock versus the usage. In other words, you're not saying that in order to meet the customary and traditional standard the individual has to prove that a member of a preceding generation had use. Or are you saying that?

MR. CAMPBELL:

No, sir. What we are strictly talking about -- we're talking about two things in this bill. One is whether or not the stock or

population is subject to subsistence. And two, when the Board goes to make allocations and provide reasonable opportunity, one of the things they have to make a finding on is what has been the customary and traditional patterns and levels of harvest. And they have to make sure that they're adequately providing for that. But anyone who is qualified and in that area can participate.

SENATOR COTTEN:

Mr. Chair.

SENATOR KERTTULA:

Yes, sir.

SENATOR COTTEN:

Will you try to give us an example on that? For instance, how about as an example, hatchery chum salmon on the, I don't know, Noatak River.

MR. CAMPBELL:

Actually, let me throw out a number of examples, if I can and I'll use fish. If there has been, in general, if there is a new hatchery stock that is created, there will not be a customary and traditional use for that stock. If that stock, though, is intermingled with natural stocks, you're going to have to provide a subsistence fishery on that mixed fishery. We also specifically talked about if you had a strain where you had a very weak stock but you had a customary traditional use of that weak stock and you went in and enhanced it, you need to provide subsistence use on the whole enhanced stock. But you create a brand new [indisc.] it's all separate by itself.

SENATOR COTTEN:

That answered my question. Thank you.

MR. CAMPBELL:

Next is the issue of customary trade. And again, this is a key term. It is a term that is in ANILCA. It's a term that is in existing law. In neither case does it have a definition. Everybody on the Council supported customary trade in the context of the small scale sale for cash from one subsistence user to another of subsistence resources. But nobody on the Council,

without exception, supported the interpretation that reasonably two federal courts have held that is that has to be the federal interpretation of customary trade where we have very large scale sale of fishery resources that are harvested exclusively for sale and sold through commercial channels. In this case, to the Japanese. Nobody thought that was right. That's commercial fishing. And it's fine for folks to do it but they shouldn't be doing it and then having a preference over other people who are legitimately commercial fisherman. So what we said, is we suggested customary trade means the "limited non-commercial exchange for minimal mounts of cash as restricted by the appropriate Board". Because we've had folks tell us, the Boards could go ahead and restrict it. And I think and I kind of hope that they could but not it's not clear in existing law. So we made it clear to the Boards can. "As restricted by the appropriate Board of Fish and Game resources harvested primarily for personal or family consumption". In other words, if I'm a subsistence users and I live up in Haines and I take a bunch of hooligan [ph] for my family and I have some extra hooligan, I can come down here and sell it to a friend or somebody in Juneau. That's fine. But what I can't do is just fish exclusively for sale. And then we say, "customary trade does not include sales in commercial channels". The definition of commercial fishing, according to definition in 16.05.940, is "sales through commercial channels". So we draw that line there.

Then we talked about furs. Let me mention furs in just a minute. We say customary trade does not include -- excuse me. The terms of this paragraph do not restrict money sales of furs or furbearers. And it has been said, and fairly and accurately, that it's real hard to tell what that means. And I have to tell you that was exactly the intent of the Council. And the reason we made that hard to understand exactly what it means and is sale of furs customary trade or not trade, is unfortunately we are dealing with the national park service in this state that would just love to kick every single trapper they could out of the national parks

and is making a real effort to do so. And anybody they can identify as a commercial trapper, they're going to kick out or sport trapper, they're going to kick out. But they got to let the subsistence trappers stay. But in this state, we've never had subsistence or sport trapper or commercial trapping. It's just trapping. And so we developed this after a lot of talk and work with people that are working day to day on this issue. And actually we had some of the folks from the federal government who are involved in the legal process but aren't sympathetic to what they're doing tell us under these terms, they cannot decide whether it is or isn't subsistence, and therefore they're not going to be able to kick the trappers out of the parks. First time, I've ever said, yeah, here's a deliberate ambiguity in the law.

Next is the definition of "game management unit". I think that that's pretty much self evident. Next is the definition of "sustained yield". And that's worth a little bit of discussion. But we're almost through. [Tape ends]

Tape 92-8

Side A

[Tape begins midspeech]

MR. CAMPBELL:

... Unfortunately, we're also dealing some of the time with federal courts. And we have had at least some problems in the past with federal judges offering their own interpretations of sustained yield. And what we did is we went back and we looked at all the minutes of the constitutional convention when they talked about this. And they were very explicit that when they put the sustained yield provision in the constitution that they expected the Legislature to adopt the definition of "sustained yield". And they talked a good bit about what they thought it meant. And we believe we've been very true to that. So let me run through real quickly how we put it together. And it's been suggested it is overcomplicated and it may be. But I will just

say that every part in there is something that meant a great deal to somebody.

It means "the management principle of utilization, development and maintenance". Those three terms, utilize, develop and maintain are directly out of the constitution in sustained yield. "Applied to naturally occurring fish and game resources". Naturally occurring and healthy, down on the bottom line, line 30, are federal terms [indisc.] that the feds are required to manage for. And in our discussion with the federal government and their solicitors, we've been advised that, by this inclusion, the feds can't come in and say, we're sorry. But naturally occurring or healthy are somehow higher standards than sustained yield and therefore we got to do it, you can't. We put those in for those purposes.

"That provide beneficial". Again, right out of the constitution. "Consumptive uses". And there's a lot of debate over consumptive uses. There were folks who were concerned about it. Many of the rural members, Native members of the Council wanted that in. There were some Native members who didn't want it in. I think the AFC wanted it in. And there was also a real concern does this somehow mean that you cannot manage, for say, bears to be used in McNeal Park or bears to be viewed at McNeal River. Or bears to be viewed at Pack Creek or some species you [indisc.] The Attorney General's office has said, no, it clearly does not mean that. I've asked them to provide us with a memo which I hope to have by tomorrow, an opinion from the AG that it does not mean that. But again, I would have your own folks look at it. It was an issue that caused a lot of people a lot of nervousness. And I want to flag it for you. That's the word "consumptive".

"Uses in perpetuity". That's again, just the essence of sustained yield. "Subject to preferences among such uses". Again, right out of the constitution. "And seeks to provide for desired population increases and prevent undesired declines." Here we're getting to the heart of the matter. We're trying to

address -- with the federal court, because we have a situation with the caribou herd where we had a very seriously depressed herd. And You had a few caribou that you could harvest, but you were in a sort of permanent tier two subsistence situation where you couldn't even provide enough for all the subsistence users. And the Boards wanted to close any hunting to that herd and let it build back up a little bit, so that you could provide for more of the subsistence users. And then eventually, they could provide for other users. And I think the judge said no. He had some qualms about that. And we also were real concerned about, as long as we're at it, "prevent undesired decline". Because he might have a herd that is substantially too big for its range. It's overgrazing range. You can't maintain it at that size. You need, through hunting or other means, to reduce the size of it for its own health. Not just wait until it crashes through natural causes. So we put both of those in there specifically. And the constitutional framers, if you go back and look at the minutes, are extremely explicit. They talk in some detail about they certainly intend for people to provide for increases and declines and management in that. And so we've done that.

And then -- in just one second, I'm going to go back to that sentence that I said I'd come back to. "For the purposes of maintaining healthy". I've already talked about that. "Self perpetuating" Again, just the essence of sustained yield. "Stocks and populations."

Now, I promised that I would come back to page four, line twenty-nine. And that says, "If the subsistence use of a stock or population has been eliminated to achieve sustained yield, the appropriate Board will adopt regs to allow subsistence uses when the Board determines the stock or population has recovered sufficiently to allow the taking for any consumptive use consistent with sustained yield." The reason we put that in there is everybody agreed that, yes, if a herd is really so seriously depressed, even if you could take two animals aa year and get by with it, you need to be able to close it to build it

back up. But they were worried, that say, the Boards might enter into collusion ...

UNIDENTIFIED SPEAKER:

[indisc.]

MR. CAMPBELL:

I [indisc.]

SENATOR COTTEN:

I think it's line sixteen -- page four, line sixteen.

SENATOR KERTTULA:

Yeah. I didn't find it myself.

MR. CAMPBELL:

I'm sorry. I was saying page four, line twenty-nine. subsection (c).

SENATOR COTTEN:

You got the wrong. (c) is on line sixteen.

MR. CAMPBELL:

Perhaps the drafters numbered it differently than [indisc.] Anyway, it is, let me say it is subsection (c), the third full sentence that starts out, "If subsistence use of a stock or populations has been eliminated to achieve sustained yield ..." Okay. The concern there was the Boards might somehow enter into collusion and say, well, we have a seriously depressed herd. And we're going to have to shut it down to build it back up. But we're going to keep it shut until not only is it taken care of subsistence and we can take care of all the general hunters and sports hunters also. And so what we wanted to say here, is that if the Board is going to shut something down for sustained yield, as soon as they can start allowing any harvest again, they have to provide that to the subsistence users. Probably first in a restrictive tier two hunt. Then maybe you take care of all the subsistence users. Then maybe over time if the herd goes up and provide some additional animals for the general hunters. You have management [indisc.] to make that happen. So that's all, that's what that sentence is about and why we're doing it.

The only last thing I mentioned about the bill, are simply

that while the majority of it becomes effective July one, the transition into effectiveness through the normal Board cycle. And then we have also included on the last page, section twelve, Review. Byron Mallot suggested and I think everybody on the Council voted as an outstanding idea, that we put together a review Council. Because on something such as this, we think we've done a good job. But we also know that you never get it absolutely all right. There may be some problems. And so what we said is we mandate that the Governor pulls together a group to review this and then make recommendations back to the Governor and the Legislature, and say, this part's working fine. This part needs some fine tuning. Maybe they'd even say this part's a total spunker [ph]. So I think if we do that part, we'll do [indisc.] But to take this back to it. There was discussion in the group of making this an actual sunset. And I think as soon as the group thought about what that may mean, we might have to come back and go through this again. We all recoiled with horror. If you all want to go through it again, then [indisc.]. That's it. I'd be happy to take questions.

SENATOR KERTTULA:

Questions? Senator Sturgelewski. Then Eliason, Halford and Adams. You have the floor.

SENATOR STURGELEWSKI:

Okay. McKie, you said you would point out for us the areas and we don't need to get into debate, but the areas of potential constitutional conflict. One had been on page four, section (d). Were there other areas?

MR. CAMPBELL:

[indisc.] quickly. Senator, the three areas that I have heard anyone mention and there may be other areas I haven't heard anyone mention, of possible constitutional problem are, number one, the use of differing presumptions. You know, the presumption for the rural or for the little ones. You assert your right and then you're presumed in mid-size and have to go through an application process. And so that has been questioned. And the

Attorney General, very, very quickly, said basically, because anybody in the state has the -- who is engaged in subsistence living can participate, you are not talking here about equal right about the right to hunt and fish. We are talking about the right to equal paperwork is not a protected right under the constitution.

SENATOR STURGELEWSKI:

Okay, so that is the area. Yeah, we don't need to get into debate.

MR. CAMPBELL:

That's one. Number two, is the use of different standards of proof for the state to use to rebut. In the communities under twenty-five hundred, the state would have to prove by clear and convincing evidence that a person does not comply. In the other area, they can prove by preponderance of doubt. But again I'll let the attorneys later talk about that.

And the third is the use of the subsistence use area. Making persons that qualify in a specific area and then restricting their use to that subsistence area. And that is the third level. And one of the things -- and I mentioned, I think, why we did all the things. The other thing that I would mention, not only do we feel it is constitutional -- even if these three things had been struck out, they could easily come back and fix and even what was left was be three hundred percent better than what we have right now.

SENATOR STURGELEWSKI:

Mr. Chairman. The other thing would be -- and if this is too much time involved here I could -- you could personally get that to me. Have you identified the specific parts of the bill that would be in direct conflict with ANILCA the way the bill is written?

MR. CAMPBELL:

Yes, ma'am. I would be happy to do that. And again, I offer a very quick version. The part that is most likely in conflict with ANILCA is the fact that we do not guarantee that every person

who lives in rural Alaska without exception and regardless of their dependence or lack of dependence on the resource, is a subsistence user. In my discussions -- now I read you the stated purpose of ANILCA. To provide the persons engaged in a subsistence -- or excuse me, rural residents engaged in a subsistence way of life making sure their uses are protected. We think our bill very clearly meets that purpose. But it probably does not meet the letter of the law that every single residents. In informal discussions with Interior, I said, I just want to make sure I understand. My wife is down on vacation in Ohio to see her folks. If she happens to play the lottery and win twenty million and comes back up and we move out to Bristol Bay and I spend the rest of my life catching or at least fly fishing and eating frozen dinners, do I have to have that preference over any urban user, no matter how qualified that urban user may be or how much that person really lives the subsistence way of life. And they said, yes.

SENATOR STURGELEWSKI:

So that's a major area. Are there others?

MR. CAMPBELL:

That is the major area. You know, I think you can quibble about issues. For instance, like customary trade. But that certainly would not render the bill -- I would strongly urge you to pass this and see what happens.

SENATOR STURGELEWSKI:

Thank you.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Thank you, Mr. Chairman. Just two questions. One is you explained pretty well the rural perspective. But to qualify for those areas that do not fall within a rural definition, that [indisc.] at the Council. Everybody hates the to fill out paperwork. Is this an annual event? Or once you qualify you continue to qualify? Or do you have to go through this like

income tax every year?

MR. CAMPBELL:

Sir, unfortunately, it is an annual event. Though we have talked within the department a great deal about how the process ...

SENATOR ELIASON:

That's a good enough answer. Under the federal regs, would that type of annual event, take care of those people in the urban areas? Or are they not even qualified, period?

MR. CAMPBELL:

Under the federal regs, no one in urban Alaska is a subsistence user, period. Without exception. Without regard to how dependent or not they may be.

SENATOR ELIASON:

Okay. Thanks.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Thank you Mr. Chair. Just as an education, I'm trying to figure out this "sales through commercial channels". If you can't use sales through commercial channels, I wonder is, for example, the roadside pickup truck with the freezer in the back of it selling fishery resources, is that a commercial channel?

MR. CAMPBELL:

No, sir. I don't think it is. And in discussion, we discussed, not that particular example, but we discussed for instance, somebody taking down a whole bunch of dried fish strips to a ANB convention and selling them in a booth. And they felt that was not a commercial channel. What we're talking about here is exactly what the federal court said that was protected which is where these folks sold to a middle person, a fish broker, who turned around and sold to the Japanese, a fish buyer. That's sales through commercial channels.

SENATOR HALFORD:

But there is still the room then for substantial commercial

sales of fishery resources through just roadside sales in large communities.

MR. CAMPBELL:

If I ..

SENATOR HALFORD:

You can sell a lot of fish and a lot of shrimp on the road between the airport and town here. You can sell a lot of salmon. You could sell a freezer full every weekend and make a pretty good living at it. That's what I'm curious about.

MR. CAMPBELL:

If the only restriction were sales through commercial channels, I certainly agree with you. The other restrictions though, that are in there, are that it is a "limited non commercial exchange for minimal amounts of cash". We give the Boards the power to restrict the amounts or prohibit if there are violations. And we also specify that the resource has to be have been harvested primarily for your personal use or your family's use and then you have some extra for selling. It isn't going out and harvesting for sale itself.

SENATOR HALFORD:

Okay.

SENATOR KERTTULA:

Senator Adams, then Senator Taylor.

SENATOR ADAMS:

Thank you. How long are we going? I've got a number of questions for the administration.

SENATOR KERTTULA:

I figure probably you want to recess pretty shortly until -- Senator Taylor. Is yours brief?

SENATOR TAYLOR:

Very brief.

SENATOR ADAMS:

Well, I'll just ask one question and then I've got a bunch of questions tomorrow, if you don't mind Senator Taylor.

SENATOR KERTTULA:

SENATOR ADAMS:

The only question I have at this particular time and then I'll reserve the rest of my questions -- is the administration going to provide any amendments to the Governor's bill?

MR. CAMPBELL:

No, sir. I would say that we make no claims, this is a perfect bill. We do make the claim that every word and line and paragraph we spent hours and hours on, and we've gotten it out the best we can.

SENATOR ADAMS:

Mr. Chairman, I do have additional questions, but I'll hold until tomorrow.

SENATOR KERTTULA:

All right. Tomorrow at 9:30 we'll come back to order. We'll listen to Lance Nelson briefly. Subsistence [indisc.] Senator Taylor.

SENATOR TAYLOR:

Thank you. My only question was if Senator Eliason and Sturgelewski both raised questions I found very interesting. I wondered if when you come back you could give us a brief review and comparison of this legislation as it compares to ANILCA and [indisc.] population sizes and what's available to a person under ANILCA and what's available to us under [indisc.] I think each of them raised questions that I have.

MR. CAMPBELL:

I'd be happy to do that Senator.

SENATOR KERTTULA:

Senator Cotten.

SENATOR COTTEN:

Well, I'll warn him about what my questions going to be, too. I'm going to want to know what you -- what change you think is going to be necessary to ANILCA in order to make this bill comply?

SENATOR STURGELEWSKI:

Or vice versa. What this needs to change to conform.

Yes. Shirley. Senator Craft.

SENATOR CRAFT:

Just quick. I think I heard you say that no one in an urban area would qualify for subsistence fishing. Did I hear that?

MR. CAMPBELL:

No, ma'am.

SENATOR CRAFT:

Well, I'm thinking about somebody in Fairbanks.

MR. CAMPBELL:

Oh. Anyone in the state regardless of where they live, if they've lived their way of life -- lived the subsistence way of life [indisc.] they qualify.

SENATOR COTTEN:

That's what you said, but you were talking about federal regulations.

MR. CAMPBELL:

Oh, I'm sorry. Senator Craft. I would answer your question about, under federal law, no one in Fairbanks would qualify for either subsistence fishing or subsistence hunting. Under our bill, they could.

SENATOR KERTTULA:

Senator Eliason then Senator Fischer. Senator Fischer. Senator Fischer.

SENATOR FISCHER:

Thank you. I guess the question I have is back to Senator Halford's question. In the case of a borough that if these roadside people who come in and sell fish or whatever, they have to get a business license. They also have to get a sales tax license. Does that run counter to what you're saying? If these people say, no, I'm subsistence, so therefore I don't have to get a borough ...

MR. CAMPBELL:

I believe sir, if they're doing -- if they're actually engaged in a business [indisc.].

SENATOR FISCHER:

The first sales commercial.

MR. CAMPBELL:

Well, we talked a lot about the fact that the what is a non commercial sale for cash. But that was and used in the history [indsic] of 1986 [indisc. - simult. speech] regards to commercial enterprise.

SENATOR KERTTULA:

Do you have copies of the proposed federal regs.

MR. CAMPBELL:

I could bring those. I don't have multiple copies but I do have two copies.

SENATOR KERTTULA:

Why don't you bring them. We're going to adjourn until 9:30 a.m.

ADJOURN

7:15 p.m.

SENATE COMMITTEE OF THE WHOLE

June 17, 1992

9:45 a.m.

(Meeting held in Senate Finance Committee Room)

MEMBERS PRESENT

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

COMMITTEE CALENDAR

SENATE BILL NO. 484

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

SENATE BILL NO. 485

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

WITNESS REGISTER

Lance Nelson, Assistant Attorney General
Department of Law
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501-1994

McKie Campbell, Special Staff Assistant
Office of the Governor
P.O. Box 110001
Juneau, AK 99811-0001

Paul A. Lenzini, Attorney At Law
1735 New York Avenue, N.W.
Washington, D.C. 20006

Charles E. Cole, Attorney General
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

Vern Wiggins
Department of the Interior
Washington, D.C.
(202) 208-4813 or 7551

Marty Suuberg
Department of the Interior
Washington, D.C.
(202) 208-4813 or 7551

John James Burns, Member of Governor's
Subsistence Advisory Council
P.O. Box 83570
Fairbanks, AK 99708

Albert Kookesh, Grand President
Alaska Native Brotherhood
Box 91
Angoon, AK

Selina Everson, Grand President
Alaska Native Sisterhood
320 Willoughby Ave.
Juneau, AK 99801

Ronald Williams, Member of the Executive
Committee, Alaska Native Brotherhood
320 Willoughby Ave.
Juneau, AK

John Shaffer, Chairman of the Board
Alaska Federation of Natives, Inc.
411 W. 4th Ave.
Anchorage, AK 99501

David Katzeek
421 W. 10th St.
Juneau, AK 99801

Flore Lekanof, Sr., Representing Aleutian-Pribilof Islands
Association, Inc.
401 E. Fireweed Lane, Suite 201
Anchorage, AK 99503

Mr. (first name indisc.) Thomas
Bettles, AK 99726

Martha Vlasoff, Representing Rural CAP
Box 112
Tatitlek, AK 99325

Joe Demmert, Jr., Representing Sealaska Corp.
2724 4th Ave.
Ketchikan, AK 99901

Donald Mitchell, Legal Counsel representing the
Alaska Federation of Natives, Inc.
1577 C St., Suite 100
Anchorage, AK 99501

Eric Smith, Attorney
731 E. 8th Ave.
Anchorage, AK 99501

Chris McNeil, Chairman of Alaska Federation
of Natives Legislative Committee
Alaska Federation of Natives, Inc.
1577 C St., Suite 100
Anchorage, AK 99501

John Starkey, Attorney
Association of Village Council Presidents
Alaska Federation of Natives, Inc.
1577 C St., Suite 100
Anchorage, AK 99501

George Utermohle, Legislative Legal Counsel
Division of Legal Services
Legislative Affairs Agency
130 Seward St., Suite 409
Juneau, AK 99801-2105

Thomas Tilden, Representing AFN & City of
Dillingham
P.O. Box 786
Dillingham, AK 99576

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Tape 92-9

Side A

SENATOR KERTTULA:

If we can come back to order, I understand there's twelve people here. We have a quorum. Although we will go on to continuing work to suggesting amendments and questions prepared and available last night. But we thought we would adjourn by seven p.m. Certainly, by seven p.m. tonight, we want to adjourn, no later. It's kind of a Senate tradition. And I think it's a good tradition. We'll be working away with the full hour for lunch and other brief times off. I have been informed that the AG's opinions and the legal opinions now separate from legislative affairs are separated in your three-ring folder. All the proposed constitutional amendments -- many of them are informational at this time. Some of them have not been introduced. I don't know maybe if any of them have been. One, I think, has. In any event, they're also now an addendum to the book.

Al Adams was prepared to ask some questions of McKie Campbell at the time we adjourned. But I'm going to ask Mr. Lance Nelson, if he's available to sit here and bring us up to date on the subsistence litigation. In briefing us, there may be a few questions. But if you could just sort of roll along with it and give us the highlights. And into any depth, the committee would desire from the individual. If you will just identify yourself for the record and proceed. I know you've been very busy and you are distinguished public servant and we appreciate your work down there at the fishery area. Please proceed.

MR. NELSON, ASSISTANT ATTORNEY GENERAL:

Mr. Chairman, my name is Lance Nelson, Assistant Attorney General, Natural Resources section of the Attorney General's office in Anchorage. My normal assignment is to do fish and game enforcement work for the Department of Public Safety, Division of

Fish and Wildlife Protection. Although a couple of years before I started this assignment, I advised the Department of Fish and Game, including the Boards of Fisheries and Game, for over a period of a year and a half to two years and I continue to be involved in subsistence litigation to some extent. Although I give you the proviso that very few of these cases on the list of current subsistence litigation are my cases. They are spread between four and five attorneys in our office who are Liza Gay [ph], Rob Nalheim [ph], Jeff Kellum [ph], Henry Wilson, Steve White [ph] in Juneau and other attorneys from time to time, as need requires. So I'm not intimately familiar with every case. I think I do have a basic understanding of what's happening, and I do probably have the best understanding of the proposed legislation proposed by the Governor, because of my assignment of the last six months of advising the Subsistence Advisory Council in drafting the proposed legislation.

Most problems with the present subsistence law can be directly traced to a lack of criteria for identifying subsistence users and fish stocks or game populations subject to subsistence uses. Likewise, the present law has failed to clearly give the Boards direction in how to make those allocations. The new proposed law, in many ways, minimizes the Boards discretion and should therefore reduce litigation.

As a general matter, under the new subsection, which would be AS 16.05.268(a), the Board of Fisheries and the Board of Game are to identify fish stocks and game populations that have been subject to customary and traditional subsistence use just as before. However, because this process was not well defined in the old law, the new law would attempt to give the Boards greater guidance. This process of giving better direction to the Boards, we believe, reducing the amount of litigation. In addition, because the term "customary and traditional" is defined under the proposed AS 16.05.940(36), section six of the bill, the Boards job should be easier and their decisions more defensible. There are definitions of "fish stock and game populations" in existing law

and those definitions are left unchanged. Existing law also all ready requires the Boards to identify the stocks and populations used for subsistence. The identification of fish stocks and game populations subject to subsistence regulations is a situation where all groups can potentially win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that subsistence preference is protected. In the long run, it should make everyone's job easier. In addition, the new law would clearly impact any case in which the all Alaska policy is at issue. The new law gives the Boards clear authority and guidance by creating criteria for the Boards to apply to determine who is actually a subsistence user. Defining the new law would eliminate those clearly commercial activities from the subsistence debate.

In defining "customary trade", under section six of the new law, to include only non-commercial trade for small amounts of money, there is several, probably, more critical cases on the list of our cases, that I'm sure that the members of the Senate have more concern about. I guess I would address a few of them and then turn the time over to questions about other specific cases, rather than go through every case, which would probably be a waste of this body's time.

SENATOR KERTTULA:

Questions at any time, will you be willing to respond. Thank you. [indisc.] continuity. But on the other hand, there may be some questions.

MR. NELSON:

I don't mind questions, any time.

SENATOR KERTTULA:

Thank you.

MR. NELSON:

One of the cases that has been used a lot both, I think, to as a bill runner for plaintiff's groups and also as, I guess, a mark of paranoia, in a way by the people who would like to see a

more restrictive subsistence law, is the Bobby case.

SENATOR STURGELEWSKI:

Bobby?

MR. NELSON:

Bobby. It's the Lime Village case. Judge Holland made a decision in that case. And in that case, he decided that since reasonable opportunity wasn't defined in the statutes, he tried to decide what, under the influence of ANILCA and looking at state law, what should be required when the Board makes decisions about setting seasons and bag limits in a rural area. And ...

SENATOR ADAMS:

Mr. Chairman.

SENATOR KERTTULA:

Mr. Adams. Senator Adams.

SENATOR ADAMS:

Lance, I wonder if you can, while you're giving your presentation on these different cases, will you cite precisely in the piece of legislation where those lines and items ...

MR. NELSON:

Sure.

SENATOR ADAMS:

... and these court cases that were overturned or making a decision for them. Please.

MR. NELSON:

Let me state right off, I don't think this new bill overturns the Bobby decision. As far as the Bobby decision dwells on the allocation of proper season and bag limits for customary and traditional subsistence uses. I don't think the new statute does that. It does have the effect of -- the Bobby decision -- part of it was deciding what do the Boards need to do in matching bag limits of seasons to customary and traditional patterns. And another part of the decision was whether or not a criminal defendant can use the validity of a subsistence regulation as a defence in a criminal defence when he or she violates a hunting or a fishing regulation.

SENATOR ADAMS:

I would like the right to reserve to rebuttal that ...

MR. NELSON:

Sure.

SENATOR ADAMS:

... at a different times of what the ongoing cases.

SENATOR KERTTULA:

Yes, in front of or at any time, it's now problem.

UNIDENTIFIED SPEAKER:

Thank you.

SENATOR KERTTULA:

McKie, do you have something you would add here?

MR. CAMPBELL:

On that point here, if I could add very quickly.

SENATOR KERTTULA:

You can.

MR. CAMPBELL:

The thrust in drafting this bill was not to pick a particular case and reverse that case. But again to pick up the common threads that ran through a series of court cases that caused problems. Made it difficult for the Boards to act in a way and cause people to feel they needed to sue or cause the state's action to be vulnerable. And try to improve that situation. But it was not a "here is the case. What line do we change to fix or reverse this case."

SENATOR KERTTULA:

Thank you.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir. Senator Halford.

SENATOR HALFORD:

As we go through these cases, I think in three sentences, you can summarize, for example, the Bobby case. What happened? What was charged? What the outcome was?

SENATOR KERTTULA:

Yeah. That's a good point.

SENATOR HALFORD:

So we know -- other than referring to it that we know everything [indisc.] except the attorney fees, what's the case? What happened? What was charged? What happened?

SENATOR KERTTULA:

And kind of figure people like me know very little.

MR. NELSON:

The Bobby case -- it was brought by residents of Lime Village, challenging the validity of the seasons and bag limits, primarily and the regulations that the Board of Game had made on caribou and moose. The plaintiffs felt like the seasons weren't sufficient to give them a reasonable opportunity to take moose and caribou. They also felt like the way the bag limit was set up and the tradition of hunting in Lime Village was such that a relative few hunters took quite a few animals to share with the rest of the village. And they didn't feel like the bag limit as it stood took that pattern into consideration. And that was basically what -- they said that the state's law interpreted under ANILCA would require cultural mesh between customary and traditional patterns. The regulations themselves, seasons and bag limits, had to be more closely matched.

Judge Holland went through that. That's one aspect of the Bobby case. That's the one I think we need to talk about the most. The other aspect was whether or not you can raise a criminal defense -- in subsistence as a criminal defense in the prosecution. And that's a separate issue from the one I'm talking about now. Judge Holland went through the Board of Game record and decided that record wasn't sufficient to show how the Board reached a conclusion. In the decision he said, "For all I know, the season and bag limits are sufficient, but I can't see how the Board got there. I need to see a better record." And when you go through this process, he said, "You need to be very careful that the season and bag limits you do come up with are consistent with

customary and traditional patterns of use. And provide for those." After that decision, the Board of Game went back and went on the record again at a Board meeting and made findings and, I think, as far as I know, came up with seasons and bag limits which were much closer to what the plaintiffs wanted. We didn't appeal that case in the Ninth Circuit. The Board of Game responded. And as far as I know, no lawsuit has come out of that Board decision after that at the present time.

SENATOR KERTTULA:

Senator Halford, you had a question.

SENATOR HALFORD:

Just so we understand that, Judge Holland's ruling dealt with state land or federal land, or private land or all lands? How did it do it?

MR. NELSON:

That actually dealt with all lands. There was not ...

SENATOR HALFORD:

So the federal judge's ruling interpreting ...

MR. NELSON:

State law.

SENATOR HALFORD:

... state law on state, private and federal lands.

MR. NELSON:

That's right.

SENATOR HALFORD:

Could you explain how that works?

MR. NELSON:

Under section 807 of ANILCA, the federal district court is given authority to rule on the validity of state regulations. As long as we're in compliance with ANILCA and the federal government is withholding their management [indisc.] under ANILCA, then we're subjected to suits in federal court and the federal district court judge would make a ruling on interpreting state law, deciding whether or not the regulations were valid under state law. When they do that, every time they do that, they look at ANILCA to

guide them in their interpretations of state law. And the look at ANILCA legislation history to do -- at least the district court judges do, to make their -- reach their own conclusions. Once they've reached their conclusion, our recourse is to appeal to the Ninth Circuit. It is not to go back and seek some kind of different ruling in a state court. We're bound by that law, even though we might have a similar suit in state court which reached different conclusions, under, say, section 807 of ANILCA; we still have to obey the federal court directions and judgment.

SENATOR KERTTULA:

You have the floor.

SENATOR MENARD:

I think this gives us, kind of the idea of what one of our biggest problems is. If the Bobby case had occurred after the McDowell case [indisc.- cough] on to federal court in a way it did [indisc.] only complying to state and private lands?

MR. NELSON:

No, it would not. Since the McDowell decision, Judge Holland has dismissed challenges based simply on consistency with state law and has limited himself to federal subsistence management decisions.

SENATOR KERTTULA:

[Indisc.] please proceed.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

To pursue this point, help me. If 807 allows for in a sense suits I would imagine almost simultaneously both in state and federal court -- in a normal way of dealing with federal law, am I correct or incorrect? Would it be totally out of consideration to limit the access first to state court and then to pursue through the federal courts but not to go forward simultaneously? What are some examples that you may be aware of how federal law is

handled where there could be primacy first by the state and then by the federal law? What are some possibilities? Because this has created a continuing problem of having so much uncertainty. Where would we best take this case? Where can I get the best answer? Are there some solutions out there that are possible based on how we handle other laws, for example?

MR. NELSON:

Let me make a couple of comments here. First of all, I think there's generally -- I think it's a well accepted rule of thumb that subsistence plaintiffs believe they will get ...

SENATOR STURGELEWSKI:

Better treatment.

MR. NELSON:

... more favorable treatment in the federal court than state court. And I think they are justified in that from the rulings. At the time, before McDowell, we only had one or two subsistence cases in state court and the rest of them are all in federal district court. They could have been brought in state court, but it is obvious that they were making a well reasoned, well advised decision for the pursuit of cases in federal district court. Because of the record that had been established by court decision there.

There are options that you have open to you to amend ANILCA. The Department of Law, I'm sure, all the attorneys that I know, would much prefer to see federal district courts jurisdiction limited to deciding whether or not state law was in compliance with ANILCA, and not getting into particulars of exactly what was required of the Boards of Fisheries and Boards of Game under state law. Rather than getting involved in the details. And that would be the preferable way as far as attorneys that handle the state's action. And I'm sure other people would think differently about that. At least, that would drop the inconsistency, I think, between state and federal courts. The federal courts would still have power to declare the state out of compliance with ANILCA and we would lose state management on federal public lands. So there

would be quite a bit of influence on the state to try and satisfy the concerns of the federal district court. At least they wouldn't be getting involved in everyday day-to-day management.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR STURGELEWSKI:

What you're suggesting then, Mr. Nelson, is that there might be possibility of having the broad question -- I mean they would have to rule on that broad question. But the particular cases, such as Lime Village or others that have come, would actually because of that with our regulatory Boards, go through the state.

MR. NELSON:

Yes.

SENATOR STURGELEWSKI:

But then the broader question would still be available through the federal courts. But that would take, as you say, an amendment to 807.

MR. NELSON:

It would.

SENATOR STURGELEWSKI:

Yeah.

SENATOR KERTTULA:

Senator Menard.

SENATOR MENARD:

Thank you, Mr. Chairman. In the federal court rulings are they dealing just with rulings on federal lands, or are they including state and private lands?

MR. NELSON:

Before McDowell, they were including -- they dealt with regulations on any land in the state. After McDowell, they are limited to federal, public lands as defined under ANILCA. The definition of which is being litigated right now.

SENATOR KERTTULA:

What was your last comment and answer? Before McDowell and after? Just please state that again.

MR. NELSON:

Before McDowell, when we were considering in compliance with Title 8 of ANILCA, the federal districts courts were maintained -- would accept jurisdiction in any issue subsistence on any land in Alaska. Federal, state or private. After McDowell, Judge Holland ruled that federal district court jurisdiction only extended to federal public lands. That's what -- the definition of that is still an open question.

SENATOR ELIASON:

Mr. Chairman.

SENATOR KERTTULA:

Yes, you have the floor, Senator Eliason.

SENATOR ELIASON:

In fact there is a constitutional amendment which goes back to the issue that was under debate. What would happen in courts then? Would they pursue federal -- would they go back into jurisdiction on all lands in Alaska?

MR. NELSON:

Yes. Land and water. If the Department of Interior agreed that we were once again in compliance and if that decision was upheld in the courts, then we would be in The same situation as pre-McDowell. And the federal district courts would continue -- would once again have jurisdiction over all subsistence disputes in Alaska.

SENATOR ELIASON:

In essence that means that the feds would be control of fish and game in Alaska.

MR. NELSON:

Yes.

UNIDENTIFIED SPEAKER:

The federal courts would be.

SENATOR KERTTULA:

Senator Menard, did you have further questions?

SENATOR MENARD:

[Indisc. - cough].

SENATOR ADAMS:

That's a big if, huh?

MR. NELSON:

Which if?

SENATOR ADAMS:

If you're in compliance.

MR. NELSON:

I don't know, probably. We're not in compliance now, obviously.

SENATOR ADAMS:

And this bill doesn't do it.

SENATOR KERTTULA:

I think the President of the Senate had further questions.

SENATOR ELIASON:

The question is if we amend the constitution and that would put us back into the situation where we would be subject to federal control -- through the court system, federal courts ...

MR. NELSON:

Yes.

SENATOR ELIASON:

The fish and game in Alaska ...

MR. NELSON:

Yes.

SENATOR ELIASON:

Including navigable waters in Alaska?

MR. NELSON:

Right.

SENATOR ELIASON:

Which also means the commercial fishing.

MR. NELSON:

Let me make one comment about that. It does mean commercial fishing.

SENATOR ELIASON:

It does or doesn't?

MR. NELSON:

Well, it does to the extent that commercial fishing might impact subsistence. The federal government will not -- the federal courts won't be [indisc.] regulating commercial fishing. That's not their role. But they will be to the extent that it might maybe have some impact on commercial fishing -- or on subsistence that the federal district court feels is proper under ANILCA.

SENATOR ELIASON:

One further question, Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR ELIASON:

How do we get out of that scenario? By amending ANILCA?

MR. NELSON:

You mean getting -- if you want to be in compliance and not have that detailed oversight?

SENATOR ELIASON:

Correct.

MR. NELSON:

Yeah, you'd have to amend ANILCA.

SENATOR ELIASON:

And that's the only way we can truly get back to state management of fish and game?

MR. NELSON:

Yeah, I don't know any other way.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Just to offer, maybe an example of Senator Eliason's question. If there were a lawsuit with regard to proper impound fish availability versus False Pass fishery - commercial fishery. If we were in compliance with ANILCA, that lawsuit would go directly to federal court and be decided by a federal judge in

spite of the fact that we're dealing with state waters. Is that correct?

MR. NELSON:

That's correct.

SENATOR HALFORD:

And if we're not in compliance, that decision would be made in the state court?

MR. NELSON:

That's right. With the warning, I guess that ...

SENATOR HALFORD:

And the appeals.

MR. NELSON:

... public lands is not then -- is finally be defined by the courts.

SENATOR HALFORD:

Going back to the Bobby decision, what was -- the Bobby conclusion from the federal courts seem to indicate that essentially you had to have eliminated virtually all other use before you can have any restriction, season, bag limit or almost anything. That, in fact, that subsistence unless you had a very, very strong record in the state history, right?

MR. NELSON:

Yeah. I don't believe the Bobby decision goes that far. But cases since then in state court, since McDowell, in fact, seem to use Bobby for that conclusion. No where in Bobby does it say that subsistence regulation of fish and game must cause the least adverse impact. Those three words -- those terms on subsistence uses. Bobby doesn't say that. Yet, it's been cited I guess, as authority for that proposition in the Morry decision, for example, and the Sleetmute decision. And some other cases too. But I don't think Bobby goes that far. I don't think Judge Holland intended it to go that far. But that was what got the ball rolling. That idea that we may be able to get a more -- what we believe in the Department of Law, is a more reasonable interpretation through the Supreme Court and Morry. But we don't

have that decision yet.

SENATOR COTTEN:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. The reason for federal oversight and, correct me if I'm wrong, is that the state of Alaska has consistently failed to provide for subsistence.

MR. NELSON:

The reasons for that being in ANILCA, you're asking me?

SENATOR HOFFMAN:

No. The reason for federal oversight.

MR. NELSON:

The reasons for federal oversight is because section 807 provides for it. I wasn't involved during ANILCA. I'm not sure what the reasoning was for Congress putting that in there. But somebody else might be able to better address that.

MR. CAMPBELL:

Sir, Mr. Chairman. If I could address that question?

SENATOR KERTTULA:

Yes, if the Senator is satisfied. Please do.

MR. CAMPBELL:

I believe that Senator Hoffman is correct that the inclusion of 807 was spurred by a fear that the state would not provide properly for subsistence and they wanted to make sure that there was the federal hammer, as it were, to force the state to provide for subsistence. I would point out, however, that was done before there was any state subsistence -- excuse me. Before some of the later versions of our state subsistence law and state subsistence bill that we have before you right now offers a very detailed, step-by-step protection for subsistence and actually provides for -- they treat several part preference for subsistence that even goes beyond that required in ANILCA.

SENATOR HOFFMAN:

If I might pursue that a little bit. You know, I think that is one of the reason why Lujan and others have been watching to see what the state is going to do with this big question. They may go even further and take control of waters. Because one of the biggest subsistence uses by the Native people in the state of Alaska is salmon.

SENATOR KERTTULA:

At 1:15, we are meeting with, via teleconference, [indisc.] some of your questions may well be [indisc. -cough]. Please proceed. Senator Cotten.

SENATOR COTTEN:

I just wanted to make sure I understood this business about when and how the federal government may decide to manage fish in Alaska and water. And you suggested that if we passed a constitutional amendment and didn't change ANILCA then all these decisions would be made in a federal district court. Therefore, there would be the obvious opportunity for the courts to manage fish. Do I understand that correctly?

MR. NELSON:

That's basically. If we were back in compliance with ANILCA, plaintiffs would still have the option of going into state court and getting judicial remedy there. If past history is any proof of things or prediction of things, then I think you'd expect most of the cases continuing by the federal district court.

SENATOR COTTEN:

But now is it possible to get there another way? I mean aren't there other cases -- the Katie John -- aren't there other cases and other opportunities for the federal courts to manage fish in Alaska? Aren't there other scenarios where that might happen anyway?

MR. NELSON:

That's one thing I pointed out. The definition of public land right now -- federal public land defines its federal court jurisdiction is somewhat unsettled. The state believes that navigable waters are off limits to federal jurisdiction. So does

the federal government according to their position in the lawsuit. But the question has been briefed to the federal district court and so we're awaiting a decision on that issue.

SENATOR COTTEN:

And which case is this?

MR. NELSON:

That's in the Lime, Katie John ...

SENATOR COTTEN:

Kluti-kaah.

MR. NELSON:

Well State v Lujan brings that issue up too. But I don't think it's been briefed in that case here. But in the Kluti-kaah also, the federal Kluti-kaah decision, [indisc.] navigable waters but it's asking the question as far as activities that might off federal lands and influence subsistence -- the availability of subsistence resource on federal land, what is the federal court jurisdiction in those situations? That's up for grabs, too.

SENATOR COTTEN:

In order to prevent that, I mean, if you had a constant goal out in front of you of trying to eliminate any possibility of the federal executive or judicial managing fish in Alaska, again, would we have to -- in order to prevent that, what course of action would we have to take in that case? Again, would we have to amend ANILCA to satisfy that? Would that get you there?

MR. NELSON:

What ...

SENATOR COTTEN:

Eliminate the possibility of the federal government, either courts or judicial, managing fish in Alaska.

MR. CAMPBELL:

Mr. Chairman, Senator Cotten, if I can interject for just a moment. The amendment of ANILCA is what could solve that problem for sure. And again, we are not talking in any way when we talk when we talk about amending ANILCA, about taking out the preference for subsistence or protection. But that's what could

solve the problem. In the court cases that Mr. Nelson has been mentioning, some of that in terms of which waters the state is going to manage, is precisely at the point. We have been in discussions with the Department of Interior and the Secretary and I know the Secretary has indicated he wishes to get the most minimally possible involved in navigable waters of the state. In fact, in the decision whether to proceed with State v Lujan, which is on our control all of our navigable waters, it came down to a tiny fraction of what we consider navigable waters in Alaska, but the federal government thinks the terms of the specific withdrawal, such as Glacier Bay and there are a few others. Nunavak [ph] Island has been mentioned. That whether or not we retain control or [indisc.]. But I would emphasize, at least in our discussions between the state and the Department of Interior, we are only arguing over tiny fractions of the total state's navigable waters. However, in State v Lujan one of the things the Alaska Federation of Natives has joined that in one of the things their brief asks for is they ask that the federal judge order the Secretary of Interior and the Secretary of Agriculture to assume permanent control over the entire Alaska water column for compliance with ANILCA.

SENATOR KERTTULA:

Senator Sturgelewski, then Senator Adams.

SENATOR STURGELEWSKI:

Yes, Mr. Chairman. I just -- I don't know if this has been made available to anybody. But on the Federal Register published in June 26, 1991, it does state in the Kuskokwim area federal subsistence regulations for the subsistence harvest fish are in effect for all waters on Nunavak Island and within a mile of all the shorelines -- waters of the old Kuskokwim Wildlife Refuge. It seems to me that this is just a time bomb out there. If I were a commercial fisherman, I'd be scared to death if this issue was not resolved. And I would hope that -- you say that pleadings have not yet been made by the state in this case? In the case that you brought against the Secretary of Interior?

MR. NELSON:

To my knowledge, they have not yet. To a certain extent the issue has already been briefed. Well, it doesn't match exactly the facts. The issue of federal jurisdiction over navigable waters in the state has been briefed and is now awaiting decision from federal district court on the Katie John case.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Mr. Chairman, this is very important that we need to ask the Department of Interior. But the question is, how does the Governor's bill solve the federal court oversight? And personally, I say, it doesn't do that. And basically, what I'd like to see the easiest way to solve it is with a constitutional amendment. And the second approach, the other route this is what you would attempt -- this is the second alternative is change ANILCA. Mr. Chairman, we are only getting this administration's side of this particular problem. I would also like to interject that there is the right side and perhaps have an AFN attorney up there debating the issue because we are being misled by this particular approach. When we have a one-sided ...

SENATOR KERTTULA:

I don't want to sit like a court. I'd like to have this played out. Senator Hoffman has requested that we also have an AFN attorney available for a presentation -- and I will do that. That means there will be less testimony from the public, because there's is only so much you can take. But we will do that. And I think what I tried to do here and what we collectively tried to do is present the administration's side on the legislation, on the program and then we brought in from the Attorney General's representative. Then we brought in the AFN for it's original presentation and redirect. We'll do the same thing now, at the sufferance of the committee. I think that's probably the wisest approach.

SENATOR ADAMS:

Can we hear the answer again, how does the Governor's bill solve the federal court oversight? In real language please. This particular bill that I have before me.

MR. NELSON:

Well, right now federal court oversight is limited to federal public lands. The Governor's bill -- our best estimate is that it would not bring the state into compliance with ANILCA without -- ANILCA amendment that's the knowledge by most people who have looked at it. But on the other hand, a constitutional amendment would not solve the federal oversight problem. If you define federal oversight problem by federal court decisions on lands all through the state on detailed decisions about subsistence.

SENATOR KERTTULA:

Does anybody want to question this point only, now? First.

SENATOR ELIASON:

That point ...

SENATOR KERTTULA:

President of the Senate, then Senator -- I'm going to try to go, incidentally, before I start. If somebody hasn't asked a question yet then I'll recognize them in advance. Senator Eliason, then Senator Hoffman, then Senator Halford.

SENATOR ELIASON:

Let's pursue to this point further. Let's turn that question around a little and I think you already answered it by amending the constitution, that does not remove federal oversight? Correct? The only way you're going to remove federal oversight is by changing ANILCA. Is that correct?

MR. NELSON:

That's correct.

SENATOR ELIASON:

Okay.

SENATOR KERTTULA:

Senator Hoffman.

SENATOR HOFFMAN:

Federal oversight is viewed differently by different people.

I don't see it as a problem. I see it as the average where people of the state, their rights to subsistence are being protected. We stated earlier that it was put there because the federal government felt the state of Alaska was not adequately providing for the subsistence needs of the people of this state. And I would say that that is why the federal oversight is there and for that matter, that is why the Native people have been going to court because this state has not been providing for subsistence. And the Native people have continually won on the merits of their rights for subsistence. And that is why, I believe, the federal government put the oversight there and I would say, that that is good and that oversight should continue to stay there for the protection of the subsistence needs of the people.

SENATOR KERTTULA:

Senator Halford. Do you wish to comment?

MR. CAMPBELL:

Mr. Chairman.

SENATOR KERTTULA:

And I don't want a lot.

MR. CAMPBELL:

No, I was just going to make sure the senators are aware that we also have with us here today, Paul Lenzini. Paul is under contract to the Department of Law. He's been under a long term contract. His entire career is directly related to fish and game resources, state versus federal throughout the entire United States. He is available also for any questions on this issue.

SENATOR KERTTULA:

Do you wish to make a statement now?

MR. PAUL LENZINI, ATTORNEY:

I would like to add just one thing, Mr. Chairman. That one of the problems with federal oversight ...

SENATOR ADAMS:

For the record, who is he?

MR. LENZINI:

Paul Lenzini.

SENATOR KERTTULA:

Excuse me, and thank you, Senator Adams.

MR. LENZINI:

Senator Adams, one of the problems.

MR. CAMPBELL:

Perhaps it would be useful for Senator Adams if you gave a brief background on yourself.

MR. LENZINI:

Senator, I have represented the 50 state fish and game agencies since about 1967. I have litigated in defense of recreational hunting and fish and wildlife management in almost all the circuits of United States -- federal circuits. And in many states, I have represented the states in the Supreme Court in behalf of state authority.

One of the problems with federal oversight in section 807, is that the statute delegates no authority to the State of Alaska to manage its fish and wildlife on the public lands. What it says is that if the state will manage in a certain way, the federal government will stay it's hand. The Ninth Circuit has ruled that when the state is brought before the federal court and was brought before the federal court, the decisions of the state Boards were not entitled to any particular deference. Federal agencies when they make decisions and issue regulations, have for the last nearly two hundred years, since an early case of Supreme Court written by Chief Justice Marshall in 1810 have been entitled to the presumption of regularity or deference as they call it. Which means that an agency need not continually defend itself on the basis of a de novo [ph] review from the scratch of the decisions it made. One of the problems is that the way 807 is set up, the state is entitled to no deference. And it has become kind of an administrative meat grinder through which its had to journey.

SENATOR KERTTULA:

You have the floor, Senator Halford. You were seeking the floor.

SENATOR HALFORD:

I'm trying to come to some conclusions as to whether this bill does not bring back the federal oversight through the court system of state lands or private lands in Alaska. However, a constitutional amendment without a change in ANILCA would, in fact, bring back all state decisions on state lands and waters to direct access to the federal court. Is that the situation?

MR. NELSON:

That's correct.

SENATOR HALFORD:

Thank you.

SENATOR KERTTULA:

If there are no -- yes, Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chair. And I don't know which one of the three of you can answer this here. What is the likelihood that ANILCA could be changed without a consensus of the state?

MR. NELSON:

I really am not in a position to help.

MR. CAMPBELL:

Mr. Chairman, Senator Zharoff. We do not anticipate that ANILCA is going to be changed without a consensus in this state. But one of the things that we do anticipate is that if people lived with the system of state management on almost all waters and state management for game on all the state and private lands, under this bill, we feel that people are very quickly going to find out that state management is a lot more responsive to their needs. In the end, more protective of subsistence as well as hunting, sports fishing and commercial fishing. It's been the federal system. And we feel that that consensus will develop. We are not anticipating forcing that upon anyone.

SENATOR KERTTULA:

Senator Duncan, has a question. Were you through, Senator Zharoff? Please proceed.

SENATOR ZHAROFF:

Well, I'm just trying to think then. How do you develop the

consensus? What we're trying to do right now or I should say what the Governor's trying to do right now is to cram his bill through the Legislature to impose his views or his objectives here onto the subsistence users of the state. And you expect them, in a short period of time, medium period of time, long period of time, to embrace the idea and say we concur that there ought to be changes in ANILCA and that we want those changes now.

MR. CAMPBELL:

Mr. Chairman, Senator Zharoff, what we are trying to do with this bill is fix the desperate problems we are going to be in in our own management of fish and game because of a desperately flawed state law. That is the main purpose of this bill right now and the urgency in passing this bill right now. The only problems we have right here in our own state law. In a longer term issue though of compliance there are two possible ways that they can be reached. One I mentioned is simply people live with this for awhile. And I am convinced that people are going to find out, for instance at a village level, with the exception of having better bag limits and better seasons and things like that, this bill will be totally transparent. And they will find that federal management is not transparent a bit, but very intrusive.

The other way if you so choose, and we discussed this for a long time coming up to this issue, is put an issue on the ballot that combines some form of constitutional amendment tied by a effective date to changes in ANILCA, to remove the issue of judicial enforcement and to state that our bill is in compliance. Not in any way to reduce the preference for subsistence. We could put that in. And we proposed that. And what we were told by the same folks who said let the people vote on the constitutional amendment, was, no, they did not want the people to vote - excuse me - on such an effective date. I think that if such an issue were put on the ballot, combined, then I think there would be overwhelming support. I want to make a point. I'm not advocating that from the Department ...

[tape ends midspeech].

Tape 92-9

Side B

[Tape begins midspeech].

MR. CAMPBELL:

... from the point of view of the administration.

SENATOR KERTTULA:

Senator Zharoff, are you [indisc. - cough] -- to the extent possible, I'd like to debate between the legal counsel who's here for a limited time and if it's necessary, of course, we'll have others that studied the bill, like Mr. Campbell, participate.

SENATOR ZHAROFF:

Mr. Chairman, I guess I'm ...

SENATOR KERTTULA:

I'm not speaking to you. I'm speaking to the group up front.

SENATOR ZHAROFF:

I guess I'm still not convinced here that we're going to take a look at some sort of short term solution here and Mr. Lenzini can may have his response in his professional opinion [indisc.] based on his background. What is the short term action there that the Legislature can take now that puts us into compliance? I think the same thing as Senator Adams, that the only thing that really puts us into compliance within our own statutes is a constitutional amendment to our constitution that recognizes subsistence as a way of life here to comply with ANILCA.

MR. LENZINI:

Senator, I think -- the Advisory Council bill goes a very long way to solve an existing problem that you have in state management. It does not go all the way. There's no doubt about that. There's more to be done. But the fact you can't [indisc.] ball of wax lacks immediately it seems to be not to [indisc.] against trying to get a good chunk of it now.

SENATOR KERTTULA:

Senator Duncan.

SENATOR DUNCAN:

Mr. Chairman. It seems to me that we've done a good job here

of confusing the issue of management versus oversight. What we really need to do is separate those issues so they are separate issues and one question is -- the question of management is, do you want federal management of our fishery or do you want state management of our fishery? State Board of Fisheries managing our fisheries or do we want federal management? Quite obviously the Governor's bill does not resolve that problem. The Governor's bill does not provide for state management. I think the Governor's Office has recognized that. It does not provide for state management. Nor does the Governor's bill resolve the problem of federal oversight. It doesn't do either one of those two things. What will resolve the problem of federal versus state management is a constitutional amendment. That will resolve the management problem. If we come into compliance with ANILCA with a constitutional amendment we will then have state management. You still have the federal oversight though, that you're now talking about. But that's different than management. You still have federal oversight problems and if you want to solve your oversight. You're suggesting the only way to resolve the federal oversight problem is to amend ANILCA, that's what you're really after -- if that's what you truly want, you're at the wrong table. You should be talking to the feds. They're the ones who can amend ANILCA, not us. What we're trying to do is to avoid federal management. And that's what your first step should be is to avoid federal management of our fisheries and that requires either amend ANILCA or we go somewhere else to do that. Or it requires a constitutional amendment which should be before us. So let's don't confuse the management and oversight. They are two different -- there are differences here. Management versus oversight. The Governor's bill does not resolve the oversight problem. The way, as I understand it, the oversight problems you go get ANILCA amended. I'm not recommending that. But that's if the Governor's office wants to do, that's where you should be.

SENATOR KERTULLA:

[Indisc.] Does legal counsel wish to respond? I'm not trying

to blindfold you, but we want to hear from them and in time we'll be hearing from ...

MR. NELSON:

The only thing I would say, I guess, is I think that information on this is in response to questions from the members of the Senate here and I'm not here to push any approach. I've been responding to questions and I think accurately to them.

SENATOR KERTTULA:

I'm satisfied that you are. I think the committee is. And we'll walk any other federal questions that are underway, too. Senator Duncan has the floor.

SENATOR DUNCAN:

Mr. Chairman. I think it's important to differentiate between management versus oversight. Because you've gotten that confusion in the discussion. Go on to the question of managing, which is really the short term question, to the question of oversight. Maybe we didn't answer the question. That's where we've evolved to. All of the sudden start talking about oversight and I think it's fair to admit that Mr. Campbell or Mr. Nelson or Mr. Utermohle but the Governor's bill doesn't resolve the oversight question. Correct?

SENATOR KERTTULA:

McKie, do you wish to briefly comment?

MR. CAMPBELL:

Yes, sir, I do. What we have said from the beginning the reason that is vital that this bill pass now, is because of the problems we have with state law. Regardless of what happens with the federal government one way or another, we have a crisis in fish and game management developing with state law that has nothing to do for the moment with the federal government.

The second issue and that is what we are saying is the main reason is vital that this bill pass. The second issue that is being raised is management versus oversight and internally I think I believe that each senator has drawn the distinction about if we make the management decision that paid for them ourselves but

every decision can be appealed through a federal court what the decision is. I do know that in many cases throughout our state system, we have had cases where the lawyers have tried their best to come up with a decision and in the federal courts they've said no, that's not it. Do this instead. To me that's not state management.

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

It's not just a yes or no answer then. Does the Governor's bill resolve the question of federal oversight in the federal courts?

MR. CAMPBELL:

Senator Duncan, we've said, no, it does not from the beginning. We've said [indisc.] state problems and state law.

SENATOR DUNCAN:

How do you resolve -- the Governor's bill resolve the question of federal management of fisheries?

MR. CAMPBELL:

Yes, sir, it does.

SENATOR DUNCAN:

Pardon?

MR. CAMPBELL:

Yes, sir, it does.

SENATOR HALFORD:

How does it do that?

MR. CAMPBELL:

It does that -- we took one half we manage about ninety-eight percent of our fisheries without the federal government coming in and being able to interfere, of people being able to appeal our decisions of our state Board of Fisheries to the federal courts. If we go into simple compliance and do nothing else, at that point, we potentially subject every decision on fisheries to federal court review.

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR DUNCAN:

That's a different story from what I've been hearing for the past few days. I've had people sit before me yesterday state's that the Governor's bill does not bring us into compliance. It does not resolve the problem of federal management and that there are two ways of coming into compliance with ANILCA. One a constitutional amendment which gives the rural preference for our state constitution. Or secondly to amend ANILCA. And this Governor's bill does neither.

MR. CAMPBELL:

Mr. Chairman, if I may, briefly, and I'll try to be very clear about this. The reason and what I say about this bill it prefers state management fisheries is if we are not in compliance with ANILCA, the federal courts do not have the right to come in and change decisions. If we were to simply pass a constitutional amendment in the statutes that put us into compliance with ANILCA, without other changes, at that point it makes every fisheries decision that has anything to do with subsistence potentially appealable to a federal court. So the distinction that I am making is by being out of compliance Alaska fisheries are to a much greater extent right now, free from federal court interference.

SENATOR KERTTULA:

I'm under rules here so those that haven't spoken. Now Senator Halford -- that's just a brief interject. I'll allow that this one time. But then Uehling, Taylor and Cotten.

UNIDENTIFIED SPEAKER:

[Indisc.] when in fact the court is setting seasons, bag limits, methods and means. I mean is it -- what is that but management? I mean the choice seems to be management by federal judge. He's probably less informed than a federal agency which we may disagree with but at least have a biological, data base and everything else from which they're dealing. It seems like we don't have a choice. At least the bill doesn't get us back into giving state land and state waters over to federal oversight. And

federal oversight in this state by the cases we have in front of us have been exercised as federal management with [indisc.].

SENATOR KERTTULA:

Senator Uehling.

SENATOR UEHLING:

Thank you, Mr. Chairman. I'm trying to just kind of pursue the long question as we've been going along here. I guess what I -- McKie, did you want to respond to that?

MR. CAMPBELL:

Yes, sir, I was just going to ...

SENATOR UEHLING:

Well, I was just trying to see where you go from here. Everybody keeps saying well this is one first step going in that direction. What I'd like to do is get some input there from Mr. Lenzini and how the interface is going to be with the federal government once this is tried out as a trial balloon. Where does it go from there? You kept talking about an administrative review and that's kind of the thing that we're up against as we go down this road. What are the chances on this being able to be sustained or are we just -- I mean how much further along down the road does this really get us?

MR. LENZINI:

Senator, I think it's certainly true that ANILCA will not be amended without consensus in the state. But I think if this bill were to pass it seems to me -- and I've seen a number of bills -- it seems to me this is a very conscientious bill. This is a very earnest effort to try and tailor something to the end in view. Now the end in view for this Legislature in the bill, is to identify and protect the subsistence way of life. That's one sentence and that's the whole objective. And the rest of the bill is designed to establish the means to the end. Now in the case of ANILCA, the means to the end, the end is the same. But the means to the end is very, very blunt instrument. And the Supreme Court of Alaska said, it was not closely related to the objective of the bill. It seems to me, Senator, that this bill is very

conscientious and a very closely tailored attempt to fit the means to the end. I think if this were to sit side by side with Title 8 of ANILCA it would soon become evident to the members of Congress if they thought much about it that this is a far superior effort to do the job. Now that doesn't mean that just because it's superior, it's going to prevail. It's going to take some time do. But I think this is clearly a superior effort.

SENATOR UEHLING:

So, Mr. Chairman, what you're saying is that in essence if this bill passes, it's really a good faith effort as far as the state trying to get it's own house in order as far as their management plans. And even though it doesn't comply by the letter of the law exactly, at least it's one step in that direction. But you still foresee problems going down further with federal Department of Interior?

MR. LENZINI:

I think there has to be some experience under it. But the fact is that the State of Alaska through it's Legislature will have established in law, in statutory law -- in 1982 or '81 when Secretary Watt certified the state as being in compliance with ANILCA, it was necessary to patch the thing up a little bit with opinion that turned out to be off the mark. But this is a statute. This is a very precise statute. Many of the principle elements in ANILCA, customary and traditional, customary trade, opportunity for subsistence way of life, are not defined. They are often left to courts. This bill identifies these principle elements.

SENATOR KERTTULA:

Senator Taylor has been seeking the floor. Thank you.

UNIDENTIFIED SPEAKER:

Do you pass?

SENATOR TAYLOR:

Yes. My question has been asked and answered. Thank you very much.

SENATOR KERTTULA:

Thank you very much. Then Senator Cotten.

SENATOR COTTEN:

Thanks for your indulgence, Mr. Chairman. I'm trying to understand -- 807 says that a civil action filed against the state, the court shall provide relief by requiring the state to submit regs that satisfy the requirements of section 804. Right? 804 is where the subsistence uses are accorded priority on public lands. And then we define subsistence uses to say that that's the rural Alaska residents. How -- I'm trying to understand the effect then of the -- when you suggest that the constitutional amendment should we pass one, would then give the courts the ability to manage or have oversight depending on how you want to do it on state lands as well? When do state lands become public lands? I don't understand that transition. That was your logic, right? If we passed a constitutional amendment, didn't change ANILCA, the courts would then have direct oversight on state lands. And I don't understand how you get there from there.

MR. NELSON:

The way ANILCA works is -- you start at 805 (d) of ANILCA which says that [indisc.] implement subsection (a), (b), and (c) of these sections if within one year from the date of enactment of this act, the state enacts and implements -- and there's the key thing, I think, laws of general applicability which are consistent with and which provide for the definition preference and participation specified in these other sections. So in order to be in compliance with ANILCA, we have to provide a statutory scheme that's consistent with those preferences spelled out in ANILCA. That apply statewide, not just on federal public lands.

SENATOR COTTEN:

Well, that puts us in compliance. I understand that.

MR. NELSON:

Right, and then once we're in compliance, if you are dissatisfied with a subsistence regulation that impacts you and you don't think that it lives up to the ANILCA preference or the

state law the way it should be interpreted, you sue in federal district court. The federal district court looks at 807 and says I have the power to order the state upon this person's claim, yours, to ...

SENATOR COTTEN:

To satisfy 804.

MR. NELSON:

To provide regulations that I think satisfy 804. And if you disagree with that then you appeal to the Ninth Circuit. Very rarely would it ever go beyond the Ninth Circuit. The Ninth circuit is usually the final determines in what satisfies ANILCA.

SENATOR COTTEN:

I still don't understand how they get the state lands on that. But I won't take the question here, but I'd like maybe give me one more ...

MR. NELSON:

[Indisc.] do it, because that phrase, "laws of general applicability", in order to comply with ANILCA we don't just have to provide that same preference that ANILCA provides. ANILCA just says there's a preference for subsistence taken by rural residents on federal public lands in Alaska. And then it goes on to say, if we won't enact that management, that scheme with a preference, if the state enacts the law and not only provides that same preference on federal public lands, but on a law that applies to every piece of land in the state. "The laws general applicability", that's what it means. It means it has to apply generally throughout the state. So ANILCA was, in effect, a tool to get a federal preference spread throughout the state. Congress may not have generally or chose not to directly require preference on lands throughout the state, but it held out a carrot and said, but if you do it state, then we'll -- you can also manage federal public lands as well as state and private land.

SENATOR KERTTULA:

Senator -- do you have ...

SENATOR COTTEN:

I'll ...

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

I just -- I'd like to pursue what Senator Duncan was talking about a moment ago. As I recall, he said the only way to solve this issue is a constitutional amendment. In a way, I agree. Because we are living in Southeast Alaska surrounded by federal lands. So matter what we do here today to the statutes, we're not going to be able to participate in hunting and fishing and those types -- hunting on those federal lands except for some private lands here in Southeastern. However, it seems to me that if, in fact, we say, okay, the only way to solve this is to pass a constitutional amendment, that in effect -- and correct or not when I say that, that in effect, will eliminate those people who live here in Juneau who use subsistence as a livelihood, those people who live in my community in Sitka who use subsistence as a livelihood, and those people living in Ketchikan who use subsistence as a livelihood would be prohibited from that subsistence use. Is that correct? [indisc.] another factor involved and that is the criteria to set up so they can be allowed a part of that process which I believe contained in this bill.

MR. NELSON:

It is.

SENATOR ELIASON:

But that's a constitution only. We're not doing anything for the people in my community who live in Southeast under subsistence. We're not doing anything for people in Juneau who live here and subside in Southeast or Ketchikan unless we take another step. And that step could well be contained in the legislation before us. Is that right?

MR. NELSON:

That's right. That's a constitutional amendment would be a solution. The question is, is it the solution you want to live with? [indisc. - simult. speech].

SENATOR KERTTULA:

The next person seeking -- Halford, Adams, Uehling is the way it is. Now if there's any person that hasn't spoken I'm directed to interject and recognize you. Senator Halford.

SENATOR HALFORD:

Mr. Chairman, just for the Washington Council [indisc.] state attorney for Mr. Campbell. Is it in the state's best interest to wholly and technically comply today with an unamended ANILCA?

MR. LENZINI:

No, sir, I don't think it is. Do you want the reasons why?

SENATOR HALFORD:

I think we've gone through the ...

MR. LENZINI:

My answer sir, is no, because it's only a very partial solution to a larger problem. And to enact a statute that you have before you addresses a very large portion of the problem. It doesn't address the whole problem [indisc.]. But if you -- the constitutional amendment without more simply brings you under the federal yoke.

SENATOR HALFORD:

I'd like to answer. Paul [indisc.].

MR. NELSON:

Okay. I've going to have to be off a little bit because I don't speak for the administration. I'm a lawyer. I advise on legal issues. From a litigator's perspective - a person who has been involved in subsistence lawsuits for quite awhile and felt some frustration and sometimes probably deservedly, but frustration at dealing with the federal district courts, I would much prefer to see these issues being handled by state courts who are responsive to the citizens of the state. Who stand for confirmation periodically in the state rather than by ending up being decided by judges from California and Arizona in the Ninth Circuit.

MR. CAMPBELL:

Senator, Mr. Chairman. I do not think it is in the state's

best interest, and I would like to talk about two reasons why I feel that is not in the best interest to simply go into compliance without additional change.

One is the situation we're in right now, the state controls and will continue to control the vast majority of our fish and game resources. And I say that because fisheries in terms of poundage and value and economic importance to the state without in any way downplaying the importance of game. But has a tremendous effect on this state. And the fisheries we virtually control without federal oversight [indisc.] such a very, very limited extent. The game - we still control about slightly less than half of the game. The same thing without federal involvement. So what we would be doing is saying for that limited portion to gain management in name of that limited portion the feds do control, we are going to give up management in actual final result on all our resources.

The second reason I think it is not in the state's best interests is the problems over and over have come up from ANILCA, that I think -- I don't think any of these federal judges have had equal intent. But they are faced with interpretations based on a whole series of key phrases in ANILCA that simply have no definitions. In ANILCA, for instance, I'll just use the problems we've had in customary trade. In ANILCA, there is no definition of "customary trade". That's something we have to provide for them. We talked about the problems and have come up with that. I think its much better to have a state law where we have good working definitions that the policy making bodies of this state, the Senate and the House, have decided this is what makes sense for Alaska and protects subsistence and is not going to result in strange rulings I think none of us would agree with. And so that's the second reason.

SENATOR KERTTULA:

Senator Adams.

SENATOR HALFORD:

I had one more question. This goes back to the cases that

you have a summary of before us. I wonder if and I guess [indisc.] Mr. Nelson, but could you just give us a quick list of which cases have been dismissed or effectively made inactive or moot because of the McDowell case. You got a long list that was set out I think the fourteenth. But a number of these have simply been made moot or dismissed because of McDowell case. and I think that's an illustration of how many times we got out of court when we, in fact, went out of compliance with ANILCA.

MR. NELSON:

Senator, I'm sorry. I don't have that at my fingertips. I've been working off the cases that are either still pending or recently dismissed. There are a number of them. I know some of them already. The Kluti-kaah decision at federal court was thrust of that case I think was dismissed. The only issue that's left now, there is the impact that off federal public land -- activity might have off federal public land as subsistence is still alive. But generally, it's a lot narrower issue because of that. The Bobby decision would have been. The Morry decision that was in state court anyway. The John v State would have been except for the issue of the navigable waters and the definition of federal public lands. Kitka v State was originally brought -- was also brought in federal district court but that was dismissed as I understand it. Clevlika [ph] IRA Council versus State would not have happened. I think the Dog Lake moose case. The Thunder Strait [ph] Advisory Committee case was originally brought I believe in federal court. That would have -- that was dismissed and refiled in state court.

SENATOR HALFORD:

Mr. Chairman, I think that illustrates [indisc.] go through a list of a huge number of cases that have made moot by not being in compliance other than [indisc.] question.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Thank you. But doesn't section 807 of ANILCA specifically

limit judicial relief to directing the Alaska Board of Fisheries and the Board of Game to develop new regulations?

MR. NELSON:

The new regulations that, in effect, well that finally that district court are satisfied with that it approves, right.

UNIDENTIFIED SPEAKER:

That's correct.

MR. NELSON:

Although it's also gives it authority to issue preliminary injunctive relief -- preliminary and other kind of relief, too. And the district court has ordered hunts and fisheries to take place under guidelines that it approves of.

SENATOR ADAMS:

What federal court decision has ever had a judge setting up a hunting or fishing season?

MR. NELSON:

The Kwethluk council - Kwethluk IRA council for example, was exactly that. The Kenaitze decision was, in effect, that requiring that. The Bobby case was -- in effect, what it boils down to is that the power of the court is you go back and work on those regulations until you get one that I approve of.

SENATOR ADAMS:

Somebody ...

MR. NELSON:

They have that power in every case. They've done it in several.

SENATOR ADAMS:

Someone used the word "tailor." Did you help tailor this bill so it would not comply with ANILCA?

MR. NELSON:

I did not. Me, personally? No, I did not.

SENATOR KERTTULA:

We have Senator Uehling seeking the floor. Senator Taylor, will you take the floor.

SENATOR TAYLOR:

[Indisc.].

SENATOR KERTTULA:

Thanks. Senator Uehling.

SENATOR UEHLING:

Yesterday we got a line by line, paragraph by paragraph sectional analysis of the bill which allowed me to understand probably a lot more than I have in the past on subsistence issues. And I was wondering in this Citizen's Advisory -- Subsistence Advisory Committee, you know, obviously there's a lot of compromise and a lot of work [indisc. - paper shuffling] if you had a perfect [indisc.] or perfect kind of bill where do you feel the greatest weaknesses in this bill are and how would you make it better if you could?

MR. NELSON:

You're going get me fired. I'm an enforcement attorney and I like everything to be more enforceable. That's just my [indisc.] I guess. So you know I would like all the standards to be higher and more objective and that's my personal thing. There was -- and those issues -- I've raised issues and the Council didn't agree with me, frankly.

SENATOR UEHLING:

Sort of a second question, I think, Mr. Chairman. But when I went through the bill yesterday we went through that sort of elaborate point system. Do you feel that would be too cumbersome, too bureaucratic for that to be administered on people? To me it seemed very complicated [indisc.] one of many things. Could you comment on that?

MR. NELSON:

No, I don't think it's too cumbersome. I think it could be administered. I think you're going to find, as I told the Council, that the challenges to rural residents are going to be relatively few in number because of the state resources and the difficulty that we'll have challenging individuals. But I think that's -- I think it's a system that can be handled without too much of a burden. It's going to be -- the first year too is going

to be difficult. Any system is going to be difficult when you get down to individual qualifications. I suspect that in a year or two you're going to want it fine tuned so they -- we're going to find problems with certain factors. I suspect that will be true even if it was written exactly as I wanted it to be written.

SENATOR UEHLING:

Okay. Thank you.

SENATOR KERTTULA:

Senator Sturgelewski seeks the floor.

SENATOR STURGELEWSKI:

Yeah, Mr. Chairman, I realize I've spoken before.

SENATOR KERTTULA:

That's okay.

SENATOR STURGELEWSKI:

What's very difficult now is to keep from all the [indisc.] in saying you know, I'm right here and I'm not going to go this way or that. But I personally see a way I feel that we could bring about a solution here. I think the seeds of it are there if we just kind of keep cool and keep looking. I was impressed yesterday with a number of things. I was impressed with the bill. And I have to admit it's the first time I really sat down and took a look but I think it does answer a lot of questions. I was impressed with the testimony of many people, but including the Outdoor Council. Because I think people have come a long way in kind of focusing on what subsistence is.

So we have the bill here. And it may be whatever. There are many of us that have favored for along time a constitutional amendment but I think it's also become obvious that we do have some flaws and we need to go -- and I'd like to go to that next step. And I've been trying to listen very carefully. And it seems like there's five areas that may need attention. And if there are more, just for purpose of discussion I would like to have some response.

The question of definition seems to be very critical and one definition that is lacking is reasonable opportunity. The

Governor's bills speaks to that in page eight, line twenty. We don't need to go into that now. But I'm just going to make a statement and then a question. It also speaks to customary and tradition on page ten, line fifteen. And to customary trade, which has been a big problem on page ten, line nineteen. Now I believe I'm correct that instead of defining rural, it sets up another hierarchy and includes access to subsistence based on some other standards. And I guess one question I would have, if we had a constitutional amendment and that constitutional amendment would lead us toward acceptance of, in a sense, new definition of what subsistence is. What would that require in terms of amendments to ANILCA? In a way it seems to me an expansion of rural as opposed to -- you know, I don't know if that would need a new definition, but certainly some expansion if we were to meet what maybe a new consensus that could emerge from the state. So that's a question.

The second question would be on some change in the method of appeals so that again, the federal court would be available to compliance but not to get into the regulatory method and the carrying out. So that I see is an area. The basic question I ask is, are there other areas that would have to be amended if we could develop a package, if we could get consensus, if we could move ahead? The reason I think it's necessary to try to keep an open mind and not just find the thing and say, this is where I am. Is that I see just in the court cases, some real problems. I mean we'll fight the Glacier Bay and we might fight off the Kuskokwim waters and all the rest of it. But I see a peril there for other users of the resource. It's an ongoing firing line. And I appreciate the administration saying, golly, you know, this is a first step. And it is. But it's that second step and how we get there that worries me. Because at this very tenuous -- at this time, I think there's some real opportunity. What additional things have to be changed in order for us to fix the whole problem?

MR. CAMPBELL:

Senator Sturgelewski, Mr. Chairman, We believe that there are

two specific amendments in ANILCA which would fix the whole problem. The first would be an amendment to section 805 (d) of ANILCA. Right now that section starts out with some old outdated language that they put in there where -- and they said, "the Secretary shall not implement subsections (a), (b), and (c) of this section within one year of the date of the enactment of this act. The state could act some implements." And then it goes on to talk about laws of general applicability which are consistent, et cetera. And what we believe is you can simply delete the section - the outdated language I think everyone would agree that no longer need it, that says, "Within one year of passage of this act". And then instead insert simply, "Alaska session law xx" Whatever it's going to be, you know, whatever this bill number winds up and then continue on with the existing language. Which says, "is a law [indisc.]" Change the verb to "is a law of general applicability which is consistent with and will provide for the definition preference" et cetera. Also in that section, you would put the sentence that said, "If your Legislature -- or excuse me, if the Alaska Session Law xx is amended, the Secretary then shall examine amended state law for compliance with the Title." And if the Secretary finds that we are not in compliance, then he implements the ANILCA section. What that would do is it would put -- allow our state law to comply. And I mentioned yesterday that we tried to keep as close as possible -- for instance, we used the same population breaks, et cetera, that the feds used. We're very, very close but we are not exactly in compliance with the letter of the law. But this then would bless the state's use of the various definitions and other terms.

The second thing that we could do is amend section 807 initial compliance, either to remove state actions from review or to set up some sort of graduated system with deference to state agencies. I'd like to turn it over to Mr. Lenzini, or Mr. Nelson.

MR. LENZINI:

Concerning 807, every federal agency unless Congress specifically says not, is entitled to running room, some

discretion. And its called deference. This is not accorded to the State of Alaska in carrying out the subsistence requirements. So if 807 were amended simply to treat the state decisions like federal decisions that that would be extremely [indisc.] helpful.

MR. NELSON:

It's interesting, if you look at the Bobby decision, for example, they're testing the procedural validity of a state Board regulation. The cases cited by the federal district court are not cases that deal with the state administrative procedure act. The cases deal with the federal administrative procedure act. That seems to be very consistent. They don't recognize -- they fail to recognize and test the state regulations under the state rules but go to the federal cases and proceed regulatory validity as opposed to looking at state law.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor.

SENATOR STURGELEWSKI:

I would hope that we might -- I'll pursue this further. There have been questions raised about the constitutional issue. And I'm wondering, Mr. Campbell, if those amendments were made -- but you also see a constitutional amendment that could give subsistence the highest priority as being a useful thing to have, plus the amendments to ANILCA. Is that not correct?

MR. CAMPBELL:

Senator Sturgelewski, Mr. Chairman. What we have said is that one way to demonstrate a consensus within the state for a desire to an amendment to ANILCA is to include the effect within the effective date of the constitutional amendment. However, I would like to clarify that we have very grave concerns -- I want to make a point. The Governor has no philosophical trouble with the subsistence having a higher priority. That's what our bill does very plainly. Some very serious legal concerns have been raised about the effect of giving subsistence a priority above

other natural resources in the constitution. Because the courts have to construct that differently and more strictly. I'd like to defer to our attorney on [indisc.] on that issue. It matters tremendously what it says and how its drafted.

SENATOR KERTTULA:

We have legal counsel for any reason necessary to committee but also to report on cases and what is going on. Do you wish to respond to that door that was opened, by the Senator responded in part by McKie at this moment or not? Do you have some more to say about that.

MR. NELSON:

I guess I would wait for specific questions.

SENATOR STURGELEWSKI:

Mr. Chairman, that's fine at this time.

SENATOR KERTTULA:

Okay. Senator Duncan was seeking the floor and, of course, I'm not going to attempt to bridle anybody to important issues, but I'm going to try to move to further reports by the counsel. You have the floor, Senator Duncan.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I want to go back to where I was before about the difference between federal management and federal oversight and reemphasize that there is a difference there and that the Governor's bill does not resolve the problem of federal management nor federal oversight, either one. We should not confuse the difference between those two issues. But then I want to respond to Senator Eliason's comment and I suggested that the way to really resolve this issue is to bring us into compliance with ANILCA by a constitutional amendment -- bring us into compliance - that resolves the federal management problem. It doesn't resolve the oversight problem because you need an amendment to ANILCA to agree with that. Senator Eliason then said but if you do a constitutional amendment that brings us into compliance with ANILCA, that gives a rural preference which means all the residents of Juneau who, of course, are subsistence users,

the residents of Juneau, Ketchikan and Sitka would lose that right. I just wanted to pursue that a little bit more. I disagree with that blanket statement. I think that by bringing us into compliance with ANILCA would do would bring management to the state and allow the Board of Fish to continue to allow subsistence use by [indisc. - road noise] passed legislation [indisc.] but to continue to allow subsistence use by residents of Juneau, Ketchikan, and Sitka just as they now are. But if there ever became a real crunch as to how much was available for subsistence, the rural folks would have priority and at that point urban people may be cut out. It would not just blanket prohibition against continued use of the resources for subsistence purposes by the urban residents. In fact right now, the urban residents who are using them subsistence fisheries for [indisc.]. I want your response to that. I don't believe bringing us into compliance with ANILCA with a rural preference just means that Juneau, Ketchikan and Sitka are automatically out - their residents are automatically out. The Board of fish can still allow subsistence use by those individuals. You may have to pass statutes, they have criteria that can still be allowed, but when it comes crunch time, preference goes to rural residents. And is that correct?

MR. NELSON:

I think your last statement maybe clarified it a little bit.

SENATOR DUNCAN:

Did what?

MR. NELSON:

Clarified it a little bit. If you just had a constitutional amendment that said rural preference is okay. We plug back into the '86 bill, subsistence statute -- at that point, Sitka, Juneau, Ketchikan, Fairbanks, Anchorage residents would still be excluded. You would then have to pass new legislation not Board regulation. Because they couldn't do it. You'd have to pass new legislation allowing a tiered, it sounds like a graduated preference.

SENATOR DUNCAN:

Sure, and I think that's the point of this whole discussion is that what we really should be doing is trying to resolve the issue completely -- constitutional amendment, legislation that would set criteria. I think, by the way, if you haven't gotten to that yet, I think the bill's been introduced by Senator Adams does do that and will allow the Board of fish the means to set criteria to allow urban residents who are presently using subsistence to continue to do that. I just wanted to make that clear. Senator Eliason's statement left us kind of hanging. I think that the implication that all Juneau residents who are using subsistence right now atomically are going to be out the door if we pass the constitutional amendment. Not true if we pass legislation that sets criteria.

SENATOR ELIASON:

The point I was trying to bring out the fact that Senator Duncan said the fact the only solution is to pass a constitutional amendment period. I said, no, that's not necessarily the full story. You also have to trigger that with something that takes care of my community, and his community and the Ketchikan community. You can't solve it by just a constitutional amendment. That is [indisc. - cough].

SENATOR DUNCAN:

But we can do that and bring us ourselves into compliance with ANILCA. And the only way to bring ourselves in compliance with ANILCA, Senator, is to do the constitutional amendment, pass criteria that goes ahead and protects the subsistence user ...

SENATOR ELIASON:

Yes, in other words, more than a constitutional amendment to solve the problem.

SENATOR DUNCAN:

Right.

SENATOR ELIASON:

That's the point.

SENATOR DUNCAN:

Well, where's it end?

SENATOR ELIASON:

Oh, you didn't say that.

SENATOR DUNCAN:

Well, I did now.

SENATOR KERTTULA:

Is there -- just a moment. Is Senator Duncan's [indisc. - cough] -- are you satisfied, Senator Duncan? I just don't -- we've had a three-four way trip here.

SENATOR DUNCAN:

I didn't mean to get into an argument with Senator Eliason. I'm satisfied that the response is that bringing us into compliance with ANILCA by constitutional amendment that gives a rural preference. If we then give the state the authority to manage the fisheries and they could manage those fisheries to allow urban residents to continue to have subsistence use. That could be done by statutes we pass or any number of regulations. I am satisfied that that's the correct answer that doesn't automatically eliminate [indisc. - cough] individuals.

SENATOR KERTTULA:

Briefly and then Senator Halford wants a response. Then I must recognize Senator Pourchot. He's been long suffering here.

MR. CAMPBELL:

Thank you, sir.

SENATOR KERTTULA:

And he should be recognized right now.

MR. CAMPBELL:

Directly on the point of urban residents -- subsistence by urban residents and ANILCA compliance. As long as rural residents have a preference in the use of fish and game for subsistence over every other resident in this state, then if the state wishes to within the urban areas set up some other ... [tape ends midspeech]

Tape 92-10

Side A

[Tape begins midspeech]

MR. CAMPBELL:

... over all other residents at all times. The second point that I would like to make is the Senator used the term "in the crunch". And I think one of the most common myths that goes around is that the subsistence preference is only a preference in times of shortage or whatever. The subsistence preference exists at all times. In existing state law and our proposed state law. And what is in times of crunch, has unfortunately been interpreted many different ways by a lot of different courts. And I guess, that's just the one point that I would like to make.

SENATOR KERTTULA:

Senator Halford, do you wish to [indisc.] yes. Senator Duncan has the floor and then ...

SENATOR DUNCAN:

I didn't want the implication to be left that I thought that once you have a subsistence priority that didn't always exist. It does. I agree with that. I meant by [indisc.] that if you came to a decision between rural and urban residents, the rural residents would have a preference over urban because [indisc. - cough] constitutional amendment to rural priority. It seems to me with -- if we can bring ourselves into compliance and get the management back, which is the bottom line here. We can pass statutes that will benefit urban residents for subsistence users.

MR. LENZINI:

Mr. Chairman.

SENATOR KERTTULA:

Quickly and then please.

MR. LENZINI:

The final result is still that unless you get an amendment to ANILCA, that scheme is going to be administered by federal judges sitting in California at the appeal level with not very much information or knowledge about the area and the circumstance. That's the other side of the thing is a [indisc.].

SENATOR DUNCAN:

[Indisc.] oversight and management ...

MR. LENZINI:

And they have to apply oversight to management. Opens and closes seasons and they've done the whole thing.

UNIDENTIFIED SPEAKER:

That's right.

MR. CAMPBELL:

Mr. Chairman.

SENATOR KERTTULA:

Do you wish to respond?

MR. CAMPBELL:

Very briefly.

SENATOR KERTTULA:

Yeah.

MR. CAMPBELL:

Would either of you Senators to do sort of debating this question of oversight versus management or whatever in the federal courts, is that we will try to obtain copies -- we will furnish you with copies of the Alexander decision by Judge Kasinski [ph]. And I think what you will find when you read that decision and that's a decision on customary trade, is for whatever reason, that judge devoted a lot more time to making fish puns throughout the entire decision. And there's a lot of good puns. I like puns. They're great. But the whole thing was filled with fish puns and jokes and the decision is terrible for Alaska. And if that's what we want to go under we have that choice.

SENATOR KERTTULA:

Senator Pourchot. Thank you, McKie.

SENATOR POURCHOT:

Thank you, Mr. Chairman [indisc.] is on the issue of constitutional amendment I would hope that after we deal with these pieces of legislation, of course, I assume that at some point we're going to have conversations or look at constitutional amendments and language. And I would just make a couple of observations. First is, in the packets [indisc. - paper shuffling] constitutional amendments and even though need to learn from things in the past, the constitutional amendment that passed

the body two years ago -- passed the Senate, bears rereading. I mean it's a little [indisc.] but the constitutional amendment per se doesn't put us into compliance with ANILCA. But it allows us to do lots of things. And if you reread that paragraph you'll see that it can allow us to do the Governor's bill. It can allow us to do something that maybe the Secretary of Interior says we're in compliance with ANILCA, but it in itself is just the allowance for the Legislature to pass legislation. And we can choose to pass legislation that's in compliance with ANILCA or not. But it's a lot more open and flexible than I think some of the conversations have been directed here.

And also in some response with the administration, it talks about making that a preference to and among Alaska residents in the taking of fish and game for subsistence uses. It didn't talk about DNR land management. It didn't talk about ANWAR oil and gas development. You know, I think it's clear here we're talking about the taking of fish and game. So you know, some of this conversation maybe is a little premature. We do need to have a revisiting of the constitutional language. But I think it's important that even the Governor's bill may not be constitutional. In fact, our legal people say it's not. And a constitutional amendment, even if it doesn't comply -- lead us to compliance with ANILCA, may allow the Governor's bill to be enacted as a constitutional piece of legislation.

SENATOR KERTTULA:

We're going to recess and I'm going to represent -- everybody come back [indisc.] We're going to try and exhaust this. We'll probably have some testimony and questions answered by counsel of AFN. But I want the other counsel to remain here as they have remained here. And then we're going to go on to the body of this bill as quickly as is feasible towards getting amendments, getting this particular bill exhausted. And then proceed from there to other legislation that will be before us. Anyway, we'll recess for about five minutes.

RECESS

11:25 - 11:50 a.m.

[Tape begins midspeech]

SENATOR ZHAROFF:

... resident of the state as a result of those. But there is a memo that was sent to Commissioner Rosier from yourself and Cheri Jacobus and I assume under your opening remarks you listed a number of attorneys that were working on this in behalf of the Governor in the Department of Law. And you listed other attorneys. Is Cheri listed as one of the others?

MR. NELSON:

If I could comment. Cheri, Senator, is the office chief of the Anchorage office of the Attorney General's office. She supervises every section, including the Natural Resources section in Anchorage. She also handles personal litigation dealing with natural resources as part of her own case load. She is my boss two levels up. Liza Gay is my immediate supervisor and Cheri is Liza's supervisor. She is a person, because of her background and strong experience in natural resources law, she consults with us a lot and we consult with her about litigation decisions that we have. She is not one -- because of her job, she doesn't have the ability to handle a lot of litigation cases, but she has some including State v Lujan, that deal with subsistence issues and federal state issues especially. That's where her strength is.

SENATOR ZHAROFF:

Okay. So is she basically involved with the subsistence issue?

MR. NELSON:

Well, not on a day-to-day basis, like the attorneys. She's not handling the litigation and directing the litigation. She's there as a consulting -- yeah, we consult with her. She doesn't -- she did not ...

SENATOR ZHAROFF:

Either she is or she isn't.

MR. NELSON:

It isn't that easy, unfortunately. It isn't that clear cut. She is not a member of the natural resource section. She does not represent the state in subsistence litigation except for to the extent in the State v. Lujan, she's involved. She does not play any part at all in advising the Subsistence Advisory Council where I was involved as the Department of Law representative. She was not consulted about the drafting of the bill, and didn't play a role in that at all. I understood that the Governor had decided that she would not participate with the Subsistence Advisory Council and that did not occur. I never understood that she would not be involved in subsistence litigation as a consultant. Never mind.

SENATOR ZHAROFF:

Then you're taking sole responsibility then for the memo that was written June twelfth then to Commissioner Rosier?

MR. NELSON:

Sole responsibility? No, Cheri helped draft the memo.

SENATOR ZHAROFF:

So then she's involved in subsistence?

MR. NELSON:

Yes, to that extent, she is. As I explained, yes.

SENATOR ZHAROFF:

And the Governor told the people of Bethel that no way would she be involved with subsistence.

MR. NELSON:

That was not my understanding of what he said.

SENATOR ZHAROFF:

People of Bethel seem to have a different idea. I don't have any ...

MR. NELSON:

Let me just say something about Cheri. Cheri is probably the brightest, most hardest working definitely attorney I've ever known. And for us not to talk to her about some of these issues and get advice on how to proceed, would be an absolute waste of an important state resource. I make no apologies for

Cheri or my consulting her.

SENATOR ZHAROFF:

Mr. Chairman, I don't have any problems with the credentials of Ms. Jacobus and her ability to do certain things. I think she's probably a very fine, capable person there to handle any task that confronts here. But I'm looking at an article that's appearing in this morning's Daily News. And I'm looking at the memo on page three which was sent to Commissioner Rosier which says, in addition to the development of other resources, and it says, "There is a risk that a subsistence preference enshrined in the constitution would be interpreted to prohibit or prevent development of other resources, such as logging, mining, oil, et cetera". And this article in the paper goes on through to pretty much substantiate that. And we've had a subsistence law on the books before it was challenged. And I can't remember a time there that it has never [indisc.] these developments. Now this -- there may be an instance or two, but for the most part there, this has basically a scare tactic and it's the smoke and mirrors that's been alluded to by myself and others there about the administration's position on this bill. Other instances there, which I guess there was news on the radio this morning that verified what I said yesterday. There's just this illusion -- there's fear being put out there that a subsistence constitutional amendment is going to bring this state down to its knees. That we're not going to have development. We're not going to have commercial fishing. We're not going to have sport fishing. We're not going to be able to have guided sport fishing operations anymore. And then everything is going to go totally subsistence. That's the impression there that is being portrayed by the Governor to get support for his bill and its doing nothing more than polarizing this state which should be united, not divided.

MR. NELSON:

Would you like me to comment?

SENATOR KERTTULA:

Yes, counsel wishes to comment.

MR. NELSON:

Thank you. I do. The language that you quoted from that memorandum was my language that I wrote. Cheri didn't write that. I wrote that after getting comments from every attorney in our office in Anchorage in the natural resources section who did subsistence litigation. And I found no disagreement with the content of that memorandum among those attorneys.

The other thing is that what we're addressing in that memorandum is a constitutional amendment that enshrines subsistence, in effect, for ever as preferential use of these natural resources. Now, that was not what the 1990 proposed amendments would do. The 1990 amendments that were proposed and were subject to pass by this body, in fact, did not enshrine subsistence as a preference. It authorized the Legislature to allocate to subsistence uses fish and game on the basis of rural residency and criteria. But it did not enshrine subsistence as the preferential use of all fish and game in the state. And it created no constitutional subsistence right. The amendments that we're addressing, as noted in the memo, are different from that. They would create an individual constitutional right to preferential right to subsistence uses of fish and game. And that is the portion of those amendments that we're addressing in that memorandum. Those are not scare tactics. Those are not smoke and mirrors. Those are what we believe to be genuine risk based on our experience defending state actions as part of the Attorney General's office. I was not instructed by anybody in the administration to write that -- to come up with that kind of opinion. We were responding to Commissioner Rosier's concerns and we stand -- I stand behind that completely. I wrote probably ninety percent of that memorandum and Cheri Jacobus also contributed. I really should have included every name of the person that made comments. That would have been only fair. I included Cheri's name because she was my supervisor. And felt I should attribute some of it, to her at least. Give her credit.

for something. But I make no apologies for those opinions in that memorandum and I stand by them.

SENATOR ZHAROFF:

Mr. Chairman.

SENATOR KERTTULA:

Do we have that memorandum?

SENATOR ZHAROFF:

It's in your file. I'm not going to argue with the attorney. I know better than that. But it seems to me there that Cheri is your supervisor twice removed according to what you said before. That you've got a couple others. Well, I don't know why you didn't give credit to another person there that's somewhere in between.

MR. NELSON:

It's because -- I can answer that if you want?

SENATOR ZHAROFF:

[Indisc.] But I think its very noble of you to let her take full responsibility in that particular section of the memorandum here. But regardless though, it still is a memorandum that comes out and hits us at a time there that is very critical for having good positive open unbiased debate on the legislation and other proposed legislation there that are available. Senator Pouchot had brought up the constitutional amendment that was before us a couple years ago that did pass the Senate, did not pass the house. Is there anything wrong with that terminology? And I've also asked the Commissioner of Fish and Game yesterday, give us some language. What is acceptable as a constitutional amendment in terms of language? Can you do that?

MR. NELSON:

For the policy side of it I can't. What that memorandum was doing, was advising you about legal concerns, legal risks that we saw -- the impact of that particular language. I think McKie could probably speak for what the administration finds acceptable or not. I don't have that authority.

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SENATOR ZHAROFF:

Can you give us language as to what would be acceptable or what language could be used for drafting a constitutional amendment that would be acceptable?

MR. NELSON:

In this instance, I don't have the authority to give you that language.

SENATOR ZHAROFF:

[Indisc.].

MR. NELSON:

I could work with you to on that language.

MR. CAMPBELL:

Mr. Chair.

SENATOR KERTTULA:

You can contribute to it with our counsel being lead. Presumably the Governor will say, yes, if we asked him also. You have the floor briefly, again.

MR. CAMPBELL:

Thank you, sir, I can answer that question. And first briefly I'd just like to speak to the timing of the release of this memo. The reason that this memo was released is in the House Judiciary Committee meeting last Wednesday, Representative Gruenberg put in a request to me for the release of all Attorney General's opinions, internal memorandums, whatever on the Subsistence Advisory Council for this issue. [indisc. - cough] as well. And as full response to that request, we furnished this to the House Judiciary Committee. That's why this memo came out, other than that it was simply an internal memo.

The second point is the question on language on constitutional amendments. And I think that I have made plain here that it is the administration's position that there is no legal ground for a constitutional amendment. The least dangerous constitutional amendment language would be the same which would accomplish that task is language that would almost exactly parallel that language in Title 8, section fifteen of

the Alaska Constitution and that is limited entry provision. And what that specific language says is this section does not restrict the power -- excuse me. What that section would say if you simply change the words "fisheries" to "subsistence" and "fishing groups" to "subsistence users", "This section does not restrict the power of the state to limit participation in the subsistence taking of fish and wildlife for purposes of resource conservation and to prevent economic distress among subsistence users and those dependent upon it."

I want it to be plain that what I answering is simply direct question, in order to be least dangerous language, but I'd also like to say that would -- that is probably the least dangerous language that you could put it in. That again, does not solve any of the problems that we've been talking about all morning of federal judicial oversight and compliance with -- through ANILCA compliance.

SENATOR KERTTULA:

Are there questions of these gentlemen at this time?

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Sturgelewski.

SENATOR STURGELEWSKI:

Just to get a little clarification -- the amendment that was passed by the senate in 1990. I thought I heard two different things. What did I hear? It seemed to me that you felt that would not have the problems that were pointed out in your memorandum. Am I correct?

MR. NELSON:

The problems that were pointed out in our memorandum were addressed -- those provisions in some of the sample amendments that have been introduced or discussed recently that deal with enshrining subsistence ...

SENATOR STURGELEWSKI:

I don't want to talk about them. I want to talk about the

one that was passed. It would not meet -- it would not bring about those problems that you cited in the memo?

MR. NELSON:

Yeah. No. Our memo doesn't address that kind of language.

SENATOR STURGELEWSKI:

That kind of language would not create the problems laid out in your memorandum?

MR. NELSON:

That's correct.

SENATOR STURGELEWSKI:

That's what I needed to know. Thank you.

SENATOR KERTTULA:

Senator Duncan, Senator Zharoff.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I'm not going to on this line again. But Mr. Campbell finished up his conversation by saying that the language that Senator Zharoff was talking about wouldn't solve the problem of federal oversight. Neither does the Governor's bill solve the problem of federal oversight. The federal oversight problem is only solved by amending ANILCA. Is that correct?

MR. CAMPBELL:

Sir, amending ANILCA solves the problem of federal oversight but simply complying with ANILCA expands greatly the problem of oversight onto all our fisheries resources and a good portion of our game that currently do not have that problem.

SENATOR DUNCAN:

The answer to your question is it solved the problem of federal oversight [indisc. - cough] amendment to ANILCA.

MR. CAMPBELL:

[Indisc.].

SENATOR DUNCAN:

It didn't supply anything that Senator Zharoff was talking about doesn't work because it solves federal oversight problems. Yours doesn't work [indisc.] federal oversight also. Correct?

MR. CAMPBELL:

It's just that ours does not expand the problem.

SENATOR DUNCAN:

And I'm not convinced that this would expand the problem either if you do this correctly with the proper statutory law. Correct?

MR. CAMPBELL:

[Indisc.]

SENATOR DUNCAN:

[Indisc.] constitutional amendment that brings you compliance with ANILCA and the statute that helps address the criteria, et cetera. You probably haven't expanded the problem ...

MR. CAMPBELL:

Yes, sir, we have greatly expanded the problem. Right now, by not being in compliance, the federal courts have no oversight over state management decisions on the vast majority of our fisheries and perhaps slightly under half of our game. If we simply go into compliance and do not totally solve the problem in ANILCA as you indicated, we've expanded that problem to all our fishery resources and all our game resources.

SENATOR DUNCAN:

One more.

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

Then the Governor's proposal, as I understand it, we still have federal management [indisc. - paper shuffling].

MR. CAMPBELL:

Under the Governor's proposal, I believe federal management of game on federal lands for purposes of subsistence and fish in those waters, very limited waters controlled by the federal government, federal oversight and federal management would continue.

SENATOR KERTTULA:

Senator Zharoff.

SENATOR ZHAROFF:

Thank you, Mr. Chairman. I guess, I'm confused there in whatever the Department of Law says that subsistence amendment to the constitution is going to have these adverse affects on the resource development of our state. And then I have a memo here from the Resource Development Council and let me read most of it in it's entirety so that we don't take things out of context so that we just don't let people hear what we want them to hear. And it says, "As you are aware, RDC has been involved in the subsistence issues since the special session of 1990. At that time, RDC's executive committee voted to support whatever means necessary to resolve the issue. Including the concept of a constitutional amendment. RDC took the position because it was felt that the resolution of the issue via an amendment or other means was the best option for resource development. The Board members were concerned that the lack of a concisive, conclusion to this issue would, in fact, have a negative impact on the future economics of resource development." And I didn't paraphrase anything out of there. There's still other sections [indisc.] ANILCA.

UNIDENTIFIED SPEAKER:

Is there a date on that, sir?

SENATOR ZHAROFF:

It's April seventeenth, this year. And I'll make the memo available to you. But it doesn't seem to be a consistency there in terms of what this administration is saying in terms of resource development and what the people that are closest to the resource development of this state are actually saying themselves.

SENATOR KERTTULA:

Do you wish to ...

MR. CAMPBELL:

I'd be happy to respond if you want, Mr. Chairman.

SENATOR KERTTULA:

Please respond if you wish to.

UNIDENTIFIED SPEAKER:

I guess it's in your file.

SENATOR KERTTULA:

Okay. Senator Eliason quickly and then Senator Collins.

SENATOR ELIASON:

Mr. Chairman, maybe this is going to bring this to some type -- back onto [indisc.] focus. The total issue, as I see it, a vehicle, statute, presumably the Governor's which does the job as far as I'm concerned about setting a criteria where you can deal with those people in my community, in the community of Juneau, and Ketchikan and other large areas in Alaska -- sets a criteria where they'll be able to participate in subsistence. Right.

Number two, pass a constitutional amendment. Along with that make some changes in ANILCA and by those three legs of the so-called stool, we could number one, we could provide for subsistence which is all we're trying to do. We can provide the least oversight by the feds who we want to get away from, at least the majority of the people I work for would like to get out of that arena. Number three, we can accomplish something for everyone in Alaska. Is that essentially what it takes to do the whole job?

MR. CAMPBELL:

Sir, if I may, legally the first and third accomplish the job. Changing statutes and a change in ANILCA. Whether or not a constitutional amendment is necessary politically to help accomplish that package ultimately comes down to a decision from this body. And what we have attempted to do is point out, one, the specific legal problems that exist with some wordings of constitutional amendment. Two, point out the fact that constitutional amendment by itself is not the answer or even a statute is not the answer. But if this body and the house has two thirds to [indisc.] constitutional amendment as you aware, that neither comes to the Governor for signature nor veto. We

are not out lobbying against this. We are just trying to make sure everybody understands what it totally takes.

SENATOR ELIASON:

I guess your answer is yes, then.

MR. CAMPBELL:

The answer was yes at first ... [indisc. - simult. speech].

SENATOR ELIASON:

... we could do that. Accomplish a total program with those three items. Maybe we could do it with two, but that could take maybe a considerable length of time. We can't do it in one obviously.

MR. LENZINI:

Senator, might I add that ANILCA does not require that Alaska in a constitutional amendment mandate subsistence. It does not require a constitutional amendment. It permits or authorizes subsistence. It requires laws of general applicability, namely statutes are adequate.

SENATOR KERTTULA:

Senator ...

SENATOR ELIASON:

Do the statutes comply with our state constitution? They don't.

MR. LENZINI:

Sir, we believe that this bill of the Advisory Council complies with the state constitution.

SENATOR ELIASON:

Mr. Chairman, may I pursue it a little further?

SENATOR KERTTULA:

[Indisc.].

SENATOR ELIASON:

I have a communication here from Senator Murkowski which says in effect that what we're doing here the Governor's bill will not comply with ANILCA.

UNIDENTIFIED SPEAKER:

That's true.

SENATOR ELIASON:

That's right.

MR. LENZINI:

That's correct.

SENATOR ELIASON:

So, it's my understanding that in order to comply with ANILCA, you have to get total preference to rural, right? Which is not contained in this bill because there are some strings attached to it. Everyone not in rural Alaska is not eligible. ANILCA says everyone should be. Our courts say we can't allow everyone because it's a preference. [indisc] criteria some could be and some couldn't be. [indisc.].

MR. LENZINI:

Well, Senator, your first and third points would solve the problem. The second point you made [indisc.] to solve the problem.

MR. CAMPBELL:

If I could interject, again. The question of whether or not that is politically necessary is a decision for this body and for the House. The thing though that I would like to emphasize again, if I may, is whether we take the second and third steps and solve the whole solution because nobody is more interested in a total solution than the Governor. But whether we do, we desperately need this bill for the management of our own fisheries resources and game resources. State law.

SENATOR KERTTULA:

You have the floor yet.

SENATOR ELIASON:

My remarks are made combine only to a constitutional amendment vehicle that passed the Senate two years ago. Beyond that I can't -- we can't say for sure [indisc.] But this one, in my opinion, would. And that's not enshrined subsistence in this constitution. And that passed the Senate so I assume this would do the [indisc.] in trying it and bringing into play some of the things that Senator Zharoff was taking about development

of Alaska lands. This would not trigger that.

SENATOR KERTTULA:

Senator Collins.

SENATOR COLLINS:

Thank you, Mr. Chairman. I guess it's going back to the Governor's [indisc] a couple of times, because its been asked differently, each time the answer has gotten different. I guess, what I'm interested in is consequences and I'm trying to understand what the consequences would be of the [indisc.] I want to be sure that I understand where you're coming from on that. It's my understanding that based on this whole issue of federal oversight and federal management, based on what I've heard you say, that the three different times that you've been asked, I seem to hear you saying that if we pass a constitutional amendment alone then we're in compliance. We will have one hundred percent federal management - federal. Is that a yes or a no?

UNIDENTIFIED SPEAKER:

Yes.

SENATOR COLLINS:

The second part of that if we have the bill as proposed by the administration, that the consequences of that action are that we will have a percentage of the federal management and federal oversight and a percentage of state authority. Is that correct?

MR. CAMPBELL:

That's correct.

SENATOR COLLINS:

What are those percentages?

MR. CAMPBELL:

Let me lay this out and there are two different ways we've been -- if you simply say we have almost all the fish and about half the game, you might say we have three fourths total state control. If you want to do it on a per pound or dollar value basis, then the fish overwhelms the game and it becomes a much,