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much higher percentage. Whichever way you prefer to look at it. But in any case, -- yeah -- but in any case it's three fourths.

SENATOR KERTTULA:

You have the floor.

SENATOR COLLINS:

Lastly, what is the consequence of taking no action, that is passing neither the Governor's bill nor a constitutional amendment?

MR. CAMPBELL:

The consequence of taking no action is the federal government will continue management of their fish and wildlife resources on their own land. That the state will continue management of its resources and almost all the waters but we will continue to do it under a desperately flawed bill that is going to -- is a severe impediment to our ability to manage.

SENATOR KERTTULA:

I would like to proceed. You had some other areas -- when we first brought you in, some other areas of federal litigation. Senator Duncan, did you have a question?

SENATOR DUNCAN:

No, Mr. Chairman. I just strongly disagree with the answer that Mr. Campbell gave and I think that you need to get other attorneys that can differentiate between management and the oversight to do that. Because he mentioned two together and he only said once in compliance to ANILCA you'll have one hundred percent federal management. You'll have one hundred percent oversight of management decisions made by the state Board. Right?

MR. CAMPBELL:

Sir, with compliance with ANILCA we will have one hundred percent oversight by federal courts of all management decisions made the state Board of Fish and Board of Game.

SENATOR DUNCAN:

Management decisions made by state Board are subject to review by the federal court. I think we need to keep that

differentiated. You brought that together in one specific answer to Senator Collins' question.

SENATOR KERTTULA:

Senator Taylor, were you seeking the floor? Senator Halford.

SENATOR HALFORD:

Is a decision to open a season on a [indisc.] specific for a specific species a management decision or an oversight decision?

MR. CAMPBELL:

We believe it's a management decision.

SENATOR HALFORD:

Thank you.

SENATOR KERTTULA:

Please proceed. Do we wish to continue this? We'll proceed, Mr. ...

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR KERTTULA:

Yes, Senator.

UNIDENTIFIED SPEAKER:

Can I request some information from Mr. Nelson or from the Department of Law. I would like to have hopefully by the end of the day other parts of our constitution whatever they might be. Whether its the civil rights section or the ...

SENATOR KERTTULA:

Virginia, would you kind of put this together for them, if possible.

UNIDENTIFIED SPEAKER:

... freedom of speech section, whatever other sections you feel that are enshrined in the constitution that are adverse to any type of development to the state or adverse to any type of activity in the state there where other people may be involved. Anything that you feel that is negative in our constitution. Something there that -- I mean, you're saying that which is --

and nobody disagrees that subsistence is the highest use of our resources. And yet you say it is enshrined within our constitution, it is going to have an adverse impact on our state. I would like a legal opinion from the Department of Law stating what other parts of our constitution that are enshrined that are going to have a negative impact on whatever in the state. And I'd like to have it by the end of the day.

SENATOR KERTTULA:

Counselor Jacobus will go right to work on that for you. Mr. Nelson, if you could proceed for other areas, if possible, because I know you have yet a meeting taking place almost at this moment. So please rush through those if possible.

MR. NELSON:

I wasn't aware of that other meeting so ...

SENATOR KERTTULA:

Well, maybe you don't have then.

MR. NELSON:

If I might go directly in to point that I think I was brought here for.

SENATOR KERTTULA:

Yes.

MR. NELSON:

I thought I was. I think that the big question is how is this subsistence bill going to impact on the basic body of court rulings out there so far interpreting state subsistence law? What effect is it going to have? I can tell you a few concrete things it's going to have. If you are looking at your standard to be least adverse impact, in other words, that state regulation of fish and game, subsistence use of fish and game must also have the least adverse impact on subsistence use of fish and game, this bill is not going to make you happy. It's not going to allow that kind of interpretation. And there's very good reasons why not. Even in ANILCA, least adverse impact, was if you read it closely, it's not in there to regulate how we manage subsistence uses of fish and game. It's

a land use regulation -- if you read it, it's a land -- federal public lands will be utilized in a way that will cause least adverse effect on fish and game. It does not say federal or state management of fish and game must be done in such a way as to cause least adverse impact on subsistence uses. That's a critical difference. Least adverse impact as a management standard is impossible. Because what it means - least adverse impact, is obviously no regulation. Is always going to be the standard. Least adverse impact means you don't regulate it. Because that will always be the least adverse impact. Now the Bobby decision did not say least adverse impact was the standard. Later cases seem to incorporate that from looking at Bobby. But Bobby didn't say that.

This bill will require the Boards to look at customary and traditional harvest patterns and conform as much as is reasonably possible and it gives some description to the Board, to those patterns. If the subsistence division goes out and finds that moose had been taken twelve months of the year historically in this particular area, that will not -- with that information the Board will not be required to have a twelve-month season. They'll be able to just look at more closely the facts and say maybe only six moose were taken in the months of April through July or something. And they will be able to disregard that and the opportunity that they give will still have to be reasonable but it won't have to match exactly historically every pattern of traditional subsistence use. I want to make it very clear. The bill was designed to give the Boards more reasonable approach than least adverse impact. So if least adverse impact is critically important to you, you won't like this bill.

Also customary trade. If you liked the decision coming out of Alexander in the Ninth Circuit, the Dedrickson [ph] jury decision in the federal district court, allowing commercial sale of fish or game to the tune of \$1700 or \$5100 or \$10,000 or \$11,000 you won't like this bill either. Because it's going to

limit it to non-commercial sales. There won't be any sales that go into the commercial channels. You won't be allowed to take some of your subsistence fish, go down to a tender and sell some of your fish to him. It won't be allowed. You will be allowed to help other subsistence users or neighbors round out their diets. If they feel embarrassed about asking you for fish without paying something, insist on paying you something, you'll legally be able to do that. You'll legally be able to pay each other for meat and game like that. But if you go put it in a grocery store, if you market it, if you give it to a commercial wholesalers or buyers, then that will be illegal. Those are two real clear areas. Least adverse effect and customary trade. I think there was an intent by the Council to eliminate that kind of standard.

Now on least adverse impact, we went -- I think the Council went a lot further than the current law does. I know it did. It went a lot further in setting out guidelines for the Boards, what they had to examine, not just by their own discretion, not just by their own regulation, but by statute. They have to look and make a good faith assessment and provide a reasonable opportunity. And they will be subject to challenge if they don't do that. And there have been Board decisions in the past that probably did not -- that don't meet that test. I can say that.

SENATOR KERTTULA:

I'm going to have to bring this to an end because we have a 1:15 scheduled teleconference to the Department of Interior. That only gives you forty-five minutes or less. I will, if the committee wants, allow for a half hour subsequent time off to do business in the office. But we have a 1:15 meeting right back here. Those that wish to participate in questions with the Interior, we have faxed this legislation, these bills to Interior this morning. So we just better recess now so you can get a cup of coffee. Senator Duncan.

SENATOR DUNCAN:

Senator, [indisc.] couple individuals here that [indisc.] long to testify.

SENATOR KERTTULA:

Yes. I apologize to you.

SENATOR DUNCAN:

When will they be able to [indisc.].

SENATOR KERTTULA:

I would ask Al Kookesh, another individual -- I'll ask them to testify after the interior meeting, which I would guess would be about two p.m. I apologize.

MR. CAMPBELL:

Mr. Chairman.

SENATOR KERTTULA:

Yes.

MR. CAMPBELL:

Yesterday at the end of the meeting, we were asked to prepare an analysis or comparison with the [indisc] ANILCA...

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Before we leave, we're having a [indisc.] council meeting at 12:30 [indisc.] and I hope we can have a quorum.

SENATOR KERTTULA:

McKie, please distribute these.

MR. CAMPBELL:

Yes, sir. This is what you requested yesterday.

SENATOR KERTTULA:

Yeah. I appreciate that. Will someone help him?

RECESS

12:30 - 1:25 p.m.

SENATOR KERTTULA:

If you have questions, please be prepared, including the Attorney General to help assist and Carl too,

SENATOR ADAMS:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

SENATOR ADAMS:

While we're waiting for the call to be placed there are some members that have come from all over Alaska that have written testimony. Who do we give this written testimony so they can be in a packet?

SENATOR KERTTULA:

If you'll hand them to the chairman, we will see to it that they're distributed right at the moment. If they can go to her, she'll make certain.

SENATOR ADAMS:

Thank you.

UNIDENTIFIED SPEAKER:

Mr. Chairman, is Senator Duncan going to be here?

SENATOR KERTTULA:

He'll hopefully be here in a moment. He will be here. The problem is that there's a lot of bookkeeping over [indisc.] trying to tell me for three days there. And I let him get out of hand here for a few minutes. And now they're out of sight. On to the next issue. [Simult. speech].

MR. VERN WIGGINS:

I was told you could hear that, could you?

SENATOR KERTTULA:

We can hear it, barely, but we can hear it, Mr. Wiggins or Mr. Suberg.

MR. WIGGINS:

You can hear us?

SENATOR KERTTULA:

Can you hear the Interior at this time? Can everybody hear him or not? Please speak one more time to us?

MR. WIGGINS:

This is Vern Wiggins speaking. Marty Suberg is also here. Senator Kerttula, how are you?

SENATOR KERTTULA:

Just fine, thank you, very much. It's good to talk to you Mr. Wiggins, Mr. Suberg. We have the whole Senate convened in the Committee of the Whole. About half the members are here and the others are on their way up the stairs. We also have the Attorney General, other legal counsel and the Commissioner of Fish and Game. There are some questions they want to ask you. I'm really pleased and thank you that you've responded in this way, Vern. Senator Adams, I think you have the first question. Is there anything you'd like to impart to use before we start? I hope I'm not shouting.

MR. WIGGINS:

No, you're not shouting. You're coming through loud and clear here. One comment and that is that we do appreciate the problem the Legislature can cope with. Certainly the Secretary indicated to Representative Grussendorf, I believe use the word ... [tape ends midspeech]

Tape 92-10

Side B

[Tape begins midspeech]

MR. WIGGINS:

... that we fully appreciate that. I will as we proceeded here to try to help in whatever way we can given the instruction that we're operating under. We're prepared to answer questions.

SENATOR KERTTULA:

You have received a copy -- we faxed a copy to your offices of legislation that's been proposed.

MR. WIGGINS:

We received a copy of both pieces of legislation. I believe it's 484 and 485. That is correct.

SENATOR KERTTULA:

We'll speak first to 484 but we may ask pertinent questions that are an aside to the legislation. Senator Adams, he has requested to speak first and he does have the floor, then. Thank you, Mr. Wiggins.

SENATOR ADAMS:

Thank you, Mr. Chairman, Mr. Wiggins and Mr. Suberg. This is Senator Al Adams representing district [indisc] in the State of Alaska. I've got a series of questions and we'll see if we can get some answers. What would it take for the federal government to relinquish management? Is it an administrative act or a congressional action?

MR. WIGGINS:

The phone is breaking up Senator Adams. It's awfully loud. Maybe you could repeat the question again. [indisc.] speaker is breaking up. We heard part of the question. What would it take something - and it broke up after that.

SENATOR ADAMS:

Thank you, Mr. Wiggins. What would it take for the federal government to relinquish management? Is it an administrative act or a congressional action?

MR. SUBERG:

Senator, this is Marty Suberg. I'm going to answer first. It's agreed that Mr. Wiggins wants to expand or supply an answer, he'll jump in and do so. With respect to your question, the obvious goal of return of state control of the subsistence program, so called federal public lands, first and foremost requires compliance with Title 8 of the Alaska National Interest Land Consolidation Act, what we call ANILCA, for shorthand. ANILCA talks about the laws of general applicability in the state that are consistent with Title 8 of ANILCA. I'm sure the entire -- the people of Alaska are well aware of the bind that that proposition was put in when the McDowell decision was rendered in 1989 holding that a preference [indisc.] administered under the state law was unconstitutional under the state constitution. So we are now left with the proposition of having to get the program back, if you will, whereas the federal government has been administering the preference on public lands since 1990. The answers are -- I don't believe, and again I'm not going to seek for state [indisc]. You have your own

Attorney General that can answer what state measures would be required. The test we have to meet is laws of general applicability that are consistent with Title 8 of ANILCA. So, I would defer to your own Attorney General and your own legislative counsel as to whether or not you think we could do something administratively to solve your constitutional problem. I will say that what we need at the federal level is a law of general applicability in the State of Alaska that is consistent with Title 8 of ANILCA.

MR. WIGGINS:

Senator Adams, this is Vern Wiggins. I do not see an administrative action that the state could take which would enable the Department of Interior to recertify and allow state to resume management. Mr. Suberg's comment about -- I think he quoted verbatim from the act [indisc.] regulations of laws of general applicability. If the State of Alaska were to have legislation and regulation which complied with the requirements of ANILCA, the state could then petition to the Department of Interior and there is a provision in the regulations for a petition to the Department of Interior. That petition would be subjected to compliance with the Administrative Procedures Act. Some of the comments here would be helpful and then the Department would make a judgement, yes or no, it did or did not comply with ANILCA. And if the program did presented comply with ANILCA, then we would step down if you will off the existing federal regulation, certify the state program and the state would return to management. There'd be no more dual management. So, the first act is a legislative act on the state part and then ours is an administrative action.

SENATOR ADAMS:

Mr. Chairman, I believe that the federal interior has gotten copies of both bills. The next question is, does the Governor's bill comply with ANILCA? Does the bill that I have submitted on behalf of the Bush Caucus comply with ANILCA? Which one of those two is closer to complying with ANILCA?

MR. SUBERG:

Okay, Senator, this is Marty Suberg again. I am going to answer them in reverse order. We got Senate bill number 484 by the Senate Rules Committee but I went through the Governor's -- the so-called Governor's bill and then 485 introduced by Senators Adams and Hoffman. I'll answer them in that order. Number 484 the administration bill. The question you posed in a letter to the Secretary some days back, we are in the process of sending you a written response over my signature. It is consistent with what I believe the Attorney General testified yesterday. The bill number 484 as drafted would in our view not be a law of general applicability sufficient to comply with Title 8 of ANILCA.

With respect to 485, I've had less opportunity to review it. We got it this afternoon our time. I have had a chance to read it. I might ask, having the benefit of the sponsor there, if I might ask some questions to make sure I fully understand the bill. I see that the bill offers a rural preference and it also talks about an urban preference for urban subsistence users. If I might, I'd ask a few questions just to make sure that we in the Department have a clear understanding of it.

SENATOR ADAMS:

Then, Mr. Chairman, you cannot say if the Adams bill 485, complies with ANILCA at this time. Am I reading you correct?

MR. SUBERG:

What I'm trying to say is I'm prepared to give you, based on my quick reading, a tentative view of how it does with respect to Title 8. But I just want to make sure I understand a few things in the bill [indisc.] So if I could indulge the Committee of the Whole by asking a few questions, I'd like to do that.

SENATOR KERTTULA:

Yes, please do that. I'll interfere for just this moment. Please do that. I also ask the Attorney General be allowed by the Committee of the Whole to participate if it becomes

necessary. We will, of course, recognize senators. Please proceed to do that, then Senator Adams will chime in again.

SENATOR ADAMS:

Perhaps to help things along, you had a copy of House Bill 592 and it's the same bill that you were given. So if you had that, and you analyzed that bill, those would be the -- it's the same as that one.

MR. SUBERG:

Okay, Senator, I'm going to rely on the fact that House Bill 592 is identical word for word for Senate Bill 485. If that is the case, and it is identical then obviously what we say with respect to 485 would also be true for 592.

SENATOR ADAMS:

That is correct.

MR. SUBERG:

All right. The one clarifying question I'd like to ask, maybe it would be two questions at most. The bill 485 has both rural and urban subsistence context in it. Is it the understanding of the authors of the bill that the rural preference, if you will, would be among the competing rural urban preferences -- the first preference. I'm not saying that very artfully but what I'm trying to determine is we are -- this bill would create two categories of subsistence, rural and urban. In times of shortage, or the way the bill is drafted, it's generally speaking would a priority go first to rural users and second to urban subsistence users the way you interpret this bill as drafted?

SENATOR ADAMS:

That is correct.

MR. SUBERG:

Okay, so, it would be a system in which the priority would be first to accommodate the needs of rural subsistence users. Secondly, that the remainder would be divided up first going to urban subsistence users as you've defined it under the act, and then the remaining and I guess in times of shortage, the

remaining resource would be going to other types of uses. Is that a fair reading of your bill?

SENATOR ADAMS:

That is correct.

MR. SUBERG:

In our view, that particular aspect of the bill with respect to 485 as opposed to 484 appears closer to the concept of Title 8 of ANILCA. Again, the way we have interpreted ANILCA consistently here in the Department of the Interior is that the priority must first and foremost go to rural communities. And obviously there's -- dividing rural communities is a task that many people are aware it would take some doing. But nevertheless, with agreed upon definitions of "rural", the preference goes first to rural communities whose people rely on subsistence. So in that regard, a [indisc.] like what your proposing and 485, based on community principle subsistence uses by a community disposed by individuals appears closer to what we believe the spirit of Title 8 of ANILCA is. Again, I have not had the opportunity to give a line by line inspection of 485, but paramount in the Secretary's review of this section, is making sure that rural users, again, however rural is defined ultimately, rural users in rural communities get to use the preference, get the preference for subsistence uses and that that regime be in place. So with respect to that, I am prepared to say that the concept of rural preference first is -- I believe [indisc.] consistent with ANILCA. I would obviously like some more time to go over the detail of this bill, but I am comfortable that it is -- at least on it's face consistent with ANILCA.

SENATOR ADAMS:

Thank you very much. I appreciate that answer and I was hoping that perhaps we could get a faxed answer so all members of the Senate could just read what you have stated. But my question is why haven't you been more helpful or forthright in the advice to the State of Alaska?

MR. SUBERG:

I'm not sure I understand the question. Why have we not been more forthright and helpful? Can you explain what you mean?

SENATOR ADAMS:

Just to say what the two bills does to show that one bill does not comply with ANILCA, and one bill does. Which direction that the State of Alaska should be going to help with the relinquishment of federal management.

MR. WIGGINS:

Senator Adams, this is Vern Wiggins. I guess [indisc.] like Marty is perplexed by your question. I am not aware that there has been less than forthright with the State of Alaska. I am aware, in fact, that we have repeatedly advised members of the administration that we've talked to that the situation Marty just outlined is the case. Your previous bill, when I was personally asked if it complied, my response after consultation with our solicitors office was in the affirmative. So I guess I'm perplexed by your question. If someone says we've been less than forthright, I guess that's an issue we need to deal with.

MR. SUBERG:

I might add, we've had the benefit of your the bill for about four hours here, Senator. I think we tried to give you an affirmative reading. So I'm a little bit bewildered by -- we're on the phone with you. What more -- we're trying our best. So given four hours to review. Your previous letter only asked about the Governor's bill, for example. It didn't even raise 485. I get a fax of this. I drop everything to review it. I'd be happy to do it. I am a little perplexed by your allegation that we're not doing anything.

SENATOR ADAMS:

Well, I need to apologize to you then, because the fact there's a lack of communications between the administration and the legislators and I apologize for that. But this is the first time that the department had opened up and gave us some

opinions. But I appreciate that and I apologize for that insinuation.

My next question is what are your fears in opening ANILCA to such amendments? Others here have asserted that ANILCA has been subject to many amendments. And this would be no big deal. Do you agree with this opinion?

MR. WIGGINS:

Senator, this is Vern Wiggins speaking. My comments will be mine personally and if I'm afforded the luxury of stepping out of my role as Assistant to the Secretary. I don't know if I've ever had the luxury, but let's assume I do for this purpose. It is my personal opinion that attempts to amend ANILCA with a major amendment, would expose the existing legislation to substantial risks that there would be an attempt to add other amendments. It is no secret in this circle back here in Washington, D.C., that there is [indisc.] desire by many to reopen ANILCA to classify more lands, to change some of the provisions that were included in ANILCA with respect to access and things like that. I believe, personally, that there is some risk, yes.

With respect to whether or not ANILCA has been amended since it was adopted in December of 1980. Yes it has been. There has been a succession of what are generally referred to as minor and/or technical amendments that have been instituted by either the Department of Interior or the Alaska congressional delegation to deal with minor or technical amendments. I believe, the record is clear that all the major attempts to modify ANILCA with substantive change have been initiated by other parties. Specifically, the Tongass legislation, et cetera. Those are my personal observations. There is a risk, yes.

SENATOR ADAMS:

Thank you, Mr. Chairman. I need to give other members of the Senate a chance to ask questions of you. But just tell me, when did you notify the Governor's office that it did not comply

with ANILCA and the latest communications and with whom in the administration, please?

MR. WIGGINS:

The conversation with respect to this matter in the current administration has been going on since the current administration took office. Prior to that time, conversations with the previous administration were ongoing on an equally regular basis. What is the first time that I made such an observation or anyone else that I know of, I can't tell you the specific date to the best of my recollection. It would have been sometime around a point in time, the Commission completed work and we expressed in discussion our concerns and our apprehension. The last time probably as recent as today in conversation with [indisc.] I can't be any more specific than that because I don't keep that kind of record.

SENATOR KERTTULA:

I'm going to recognize ...

MR. WIGGINS:

I would like to add that it should come as no surprise I expect it comes as no surprise to most of you if not all of you in that room, about that certainly. I know and appreciate that my good friend the Attorney General is there. I think he is even on record [indisc.].

SENATOR KERTTULA:

I'm going to ask Attorney General to comment briefly and then I'm going to ask Senator Halford. I'll recognize Senator Halford. But I'll ask Attorney General if he has something. It seems like he did and I did ask him to come to this table. At the time we didn't have a very full component either of people. But I'd like the Attorney General to have this opportunity.

MR. WIGGINS:

Charlie Cole?

ATTORNEY GENERAL COLE:

Yes. Mr. Wiggins and Mr. Suberg, I think you should be told that you're on the speaker phone in the Senate Finance

Committee chambers. Essentially, the entire Senate membership is here. There are approximately fifty or other people who are present. So I think you should have the privilege of knowing that. I want to confirm that we have been in communication with the solicitors office with respect to whether the Subsistence Advisory Commission's view complies with the requirements of ANILCA for the assumption of state management of fish and game on federal lands. And that I and other members of the administration have flatly said repeatedly that it is our view that that piece of legislation does not satisfy the requirements of ANILCA for state assumption of management. About that there has been no dispute. But I wonder, Mr. Wiggins, if I would be at liberty to disclose the nature and extent of those communications in detail or rather you would want me to keep them confidential?

MR. WIGGINS:

That's no problem, Charlie. By the way, we are aware of the nature of the conference call. We appreciate that.

ATTORNEY GENERAL COLE:

Well, it's clear isn't it that the reason that the Subsistence Advisory Commission's proposed legislation does not comply with ANILCA because it does not grant flat rural preference.

MR. WIGGINS:

I think that's correct.

ATTORNEY GENERAL COLE:

And it's also true, is it not, that ANILCA grants subsistence preference privileges to people in rural communities of less than twenty-five hundred regardless of whether they are and have been historic subsistence users?

MR. WIGGINS:

[Indisc.] in the law as I recall. But it's does grant to communities with that historic, yes.

ATTORNEY GENERAL COLE:

And so that there are in fact, subsistence preference

privileges granted under ANILCA to those who are not historic subsistence users?

MR. WIGGINS:

State your question again? Did you say to those who are not historic users?

ATTORNEY GENERAL COLE:

Yes.

MR. WIGGINS:

If you live in a rural community -- Mr. Suberg, I think the essence of what you're saying is, yes, it's a community based preference as opposed to an individual based preference. I suppose the possibility is there. Again ANILCA appears to deal with communities as opposed to individuals.

ATTORNEY GENERAL COLE:

And it's also true that ANILCA does not grant to historic subsistence users and those who are, in fact, current users a subsistence preference if they live in a so-called urban communities?

MR. SUBERG:

That's true. And in fact, there's recognition of that in some of the legislative history, merchant marine committee report of the ninety-sixth. Congress expressly dealt with that situation. That's correct.

ATTORNEY GENERAL COLE:

And how many Native Alaskans, according to statistics developed by the Department of the Interior live in urban communities?

MR. WIGGINS:

Charlie, I don't have those figures in front of me. If I can't respond specifically. I think you're referring to the census data. And as I recall that census data there is a substantial number, and without having those figures in front of me I won't dare to quote them or even reference them. My understanding - my belief is that those figures show that there is a substantial Native population in urban centers in Alaska.

I guess I will also add that ANILCA does not differentiate Native/non-Native. It differentiates urban/rural.

ATTORNEY GENERAL COLE:

Of course. Could you enlighten me, Mr. Wiggins, as to why ANILCA disenfranchised those people with historic cultural tradition of subsistence who happen to live in the urban communities?

MR. WIGGINS:

Mr. Suberg referenced a moment ago merchant marine fisheries committee congressional record. Again, I don't have a copy of that in front of me from the 1980 Congress, but you have that ...

MR. SUBERG:

I don't specifically as to what the -- remember generally that the policy behind that section that leads as far as the merchant marine committee was concerned was to recognize that rural Alaskans depend on the harvest of wild renewable resources and maintain their lifestyles as a significant supplement their income. It is a more detailed discussion of the policy considerations as to why they chose that particular definition of rural to speak to. But I do know it was a very conscious decision on the part of the Congress.

MR. WIGGINS:

It's my recollection, Mr. Cole, it's [indisc.] correct the Congress made a very conscious decision. I believe there are words in that Congressional Record to the effect that Congress recognized it would be an unpopular in some quarters, unlimited [indisc.] decision unless Congress was making that policy governed on the basis of their judgement. They adopted the rural preference and as you described it, one of the consequences was -- I believe you used the word "disenfranchisement" of certain individuals. It was a conscious decision clearly as I recall being directed.

ATTORNEY GENERAL COLE:

Just one more question, Mr. Chairman, if you would please.

From your reading of your Subsistence Advisory Commission's summation's proposed legislation, it's true, isn't it, that under that legislation the true subsistence user would be granted a subsistence preference over those people who happen to live in rural villages who, however, are not in fact subsistence users. That's the case, isn't it?

MR. SUBERG:

I think I had a hard time using the word "true subsistence user" or terms like that. But I think that 484 the bill the administration has introduced as I understand it, it is individually based [indisc.] It does make some recognition of rural characteristics, I believe, for under twenty-five hundred -- areas of under twenty-five hundred people for population. And the presumption is favored a subsistence for numbers that can be rebutted upon clear and convincing evidence for numbers above that. And the production [indisc.] So in short, if you do have a system that if you appear to make inquiries at least at some level about who actually uses the subsistence resource and who doesn't -- that's my understanding of the Governor's bill.

ATTORNEY GENERAL COLE:

Would you therefore, agree that it's truly ANILCA which is flawed?

MR. SUBERG:

I'm going to let Mr. Wiggins answer that one.

ATTORNEY GENERAL COLE:

That's all, Mr. Chairman. Thank you.

MR. WIGGINS:

That's what you got attorney's for, right, Charlie. I don't think I have the luxury of telling you whether or not the federal law is flawed.

SENATOR KERTTULA:

Senator Halford will be at the microphone next. Senator Halford, you have the floor.

SENATOR HALFORD:

Thank you, Mr. Chairman. We've had some discussion on the dual management question. I wonder what it would take to stop the federal courts from making management decisions in Alaska under Title 8 through the court intervention and direction of seasons, openings, closing and so forth? What action would that take at the state level and what action would it take at a federal level?

MR. SUBERG:

Again, you're putting your finger on a problem that vexes us here at the federal level, as well as you. Being in that we're managing -- the federal government is managing on public lands that means that there is recourse through the federal court because this is a federal program. At least right now it's a federal program that's administered by the federal government. We're not [indisc.] being challenged on the scope of what is the federal program. We've been challenged on the definition of public lands are in federal court. We've been challenged on the scope of the federal jurisdiction. It is very much a factor when you have federal government managing a program on federal lands that people will go to federal court when they disagree with decisions or feel that they've been adversely affected by decisions. To the degree that we can restore state management to the subsistence on public lands, it might lessen the pressure. It wouldn't reduce it completely. I know there have been federal challenges even under state management regime. But certainly at a time when the federal government is managing the resource on federal land, we're going to have obviously people going to federal court to vindicate what they believe their rights and possessions are.

MR. WIGGINS:

Senator Halford, this is Vern Wiggins, speaking by the way. How are you sir?

SENATOR HALFORD:

Fine, thank you.

MR. WIGGINS:

A good lawyer gave you a good lawyerly answer. My answer is I don't know how you seek finality in this thing. Congress passed this law in 1980. It was unpopular when they passed it. It's been litigated I don't know how many times. I would guess fifteen or twenty or more. The track record is dismal for both of us. Three different schemes -- scheme is used in a polite way not in an ugly way -- have been put in place. All three of them have been successfully challenged in state and/or federal court. I don't know how you stop anybody from going to court. Maybe if we can ever get a program that will pass the collective courts judgement maybe that will be the end of it. But I don't know if there's an answer to your question, Senator.

SENATOR HALFORD:

If we just go to state lands and state waters, can we then at least limit the federal judiciary's interaction in management of state fish and game by specifically not complying with ANILCA with regard to state lands and waters?

MR. SUBERG:

It's a hard question again. We are receiving challenges right now over the scope of federal jurisdiction in Alaska. There are people that maintain that in some of these cases that we shouldn't be limited exclusively to public lands. I guess I can't give you any real certainty in that. I'm afraid we're facing challenges on that very issue right now.

SENATOR HALFORD:

But it seems that we're caught in a Catch-22 in that if we comply with ANILCA to try to, quote, "achieve a unified management structure" we then put all of the lands and waters within the area of Alaska under the controls of the federal judiciary on appeal. Where if we don't comply, at least the state is in control until a court decides that the federal land jurisdiction goes further. At least the state is in control of all state waters and all state lands which currently encompass the majority of the resource harvest.

MR. SUBERG:

We do recognize that there are currently challenges in federal court asserting that a federal program is not sufficiently broad enough and does not take in state lands and waters, whereas the allegation are that it should. The risk of that decision remains there. You understand that I assume.

SENATOR HALFORD:

I think we've gone around the table on that. I was trying to reach some type of a conclusion. But it doesn't appear there is a federal legal opinion that's different than the state legal opinion. We, in fact, are caught between those two extremes.

MR. SUBERG:

I think that's fair. You asked a difficult and thought-provoking question.

SENATOR KERTTULA:

Senator Duncan, you're seeking the floor. And then Senator Cotten.

SENATOR DUNCAN:

Thank you, Mr. Chairman. I want to go back to the question -- skipping back to the judicial review question. State versus federal management. The management decisions whether they're made by state Board of Fish and game or the a federal Board. Mr. Wiggins, you put yourself in a personal position said you don't believe it's possible to amend ANILCA and to amend it to bring us into compliance with ANILCA. Taking that as the -- assuming that's the case. And I think our congressional delegation even expressed concerns about doing that, what state action then is necessary for us to bring ourselves into compliance with ANILCA without amending ANILCA?

MR. WIGGINS:

Senator Duncan, how are you? Since I know both of you personally, I have to say hello to each one of you. Two responses. One, I believe what I said with response to the question on amending ANILCA was that in my personal opinion there was substantial risk. I don't believe I offered opinions as to whether or not it could be done.

Secondly, what -- and I understand the second part of your question -- what does the state have to do to bring itself into compliance with ANILCA. That's as much legal, I guess, question as it is a policy question. Let me try to tackle part of it and then ask Marty to address it.

ANILCA, for better or worse, in the stark division with respect to who is eligible for subsistence. And that division as I said is very stark and our lawyers tell us very absolute. Urban, dash, rural. That's the division. It's not on any other basis. It's urban, dash, rural. The federal government -- if you read the statute carefully and I've read it so much I'd like to forget some of it. But what it does is it imposes that standard, urban-rural, on the federal government. And it says the federal government shall manage subsistence accordingly along that line. Urban rural. Then it says and the only exception to that is that the Secretary may not administer the program if he chooses not to administer the program if the state adopts laws and regulations of general applicability which meet that same standard. Now it doesn't use those exact words, but the fact is that the state would be held -- is held as the manager to the same standard that we the federal government are held to. To answer your question, against that background, if you can comply with that same standard that we're held to, then the Secretary can certify the state management program. That's a layman's response. It's not a lawyers response. I'd ask Marty to elaborate on it.

MR. SUBERG:

I think Vern fairly stated the issue. There's got to be laws of general applicability, which are consistent with and provide a program that ANILCA establishes in Title 8.

SENATOR DUNCAN:

Then, Mr. Chairman, just then to follow through, you are not looking at our state constitution. I guess the problem we run into then very clearly is that we can pass those laws except they're in conflict with the state constitution as presently

written. So we need to amend the constitution to allow us to bring -- to pass the laws to bring us into compliance. Let me ask just one other question, if I might, Mr. Chair.

SENATOR KERTTULA:

You have the floor.

SENATOR DUNCAN:

Could you just very clearly and succinctly state to me what the federal role would be in management, one, if we -- for example, if we passed the Governor's bill and don't bring ourselves into compliance with ANILCA. Or as an alternative, secondly pass legislation that would set criteria and so on and also pass a constitutional amendment that would bring us into compliance with ANILCA?

MR. SUBERG:

[Indisc.] burden if you pass legislation that's not in compliance with Title 8 of ANILCA, we have what we have today, continuing dual management for what we call the federal public lands which is in turn found in the ANILCA law. Basically, lands for which the United States holds title under which -- to which the United States owns titles. We continue to administer the preference. The asterisk I put next to that statement is again, that as we have interpreted that section, there are challenges to our administration which argue that we should take a broader view and administer the federal regime beyond that, particularly in the case of fish. Those are ongoing challenges, they're litigation and I'm not going to get into too much more detail, but there -- we need to be conscious of the fact that federal control may change over time with certain court rulings. So you would have the dual management system with the state on the one hand and administering everything but the public federal lands and then the federal government administering those public lands to the degree to which there can be coordination given mandate of Title 8 is obviously still up for discussion. To the degree that you [indisc.] constitutional amendment, again, we haven't reviewed any specific proposals for that. But to the

degree that a constitutional amendment which I'll defer to Charlie Cole on but I guess that would address the so-called McDowell problem resulting from the 1989 state Supreme Court decision and I suppose if there was -- we're implementing a further step with consistent with ANILCA then we could begin the process of recertifying or at least considering the recertification of state control of subsistence resources on public federal lands. The final regulations which were published by the federal subsistence Board on May 28 that go into effect on July first, that section fourteen of subpart (a) for those of us who like to read these regulations well into the night, contains a provision that talks about how recertification [indisc.] under way. I guess one test that has to be met in any recertification effort is that there's laws of general applicability that are consistent with Title 8 of ANILCA that provide that subsistence preference. That is sort of a general answer as to how that would work.

SENATOR KERTTULA:

Senator Cotten, do you wish to continue?

SENATOR COTTEN:

Thank you, Mr. Chairman.

SENATOR KERTTULA:

Senator -- yes.

SENATOR COTTEN:

I have a couple of points I was going to cover have been covered but I had a couple more. I think it's been covered. I'd like to just make sure I understand it though. The Governor's bill, in order for it to comply with ANILCA, ANILCA would have to be changed and primarily the definition of subsistence uses would have to be changed. Isn't that right? Taking the word "rural" out or something similar to that. Would you agree with that?

MR. SUBERG:

Senator, the difference as I understand it and I reviewed this situation, ANILCA provides for rural subsistence preference

based on communities as opposed to individuals -- criteria of the individuals who live in the community.

SENATOR COTTEN:

Right and, Vern, for you, you're discussion of what it would take politically to change ANILCA, you suggested that there would be some risks involved with any major changes. It has been suggested to me that this would be considered a technical change. Do you have an opinion on that?

MR. WIGGINS:

Well, Sam, excuse me, Senator Cotten, you're far more conversant than I am on what's a technical and what's a major change before a legislative body. You've been doing that a long time. I'm suggesting to you that any time you go to try to change ANILCA there are people who want to add more changes. And in my personal view, there is a risk and anytime you go to try to change ANILCA. If you can convince enough people and the legislative body that it's a technical amendment and nobody takes issue with you, the risk is probably much less and it's probably a greater likelihood that it can pass. If there are those who disagree with you that it's a technical amendment or if there are those who take issue with the amendment, it suddenly ceases to be technical and becomes very sensitive, dash -- or sensitive, parentheses, very political, very emotional. Maybe that's my criteria of the difference. Given the nature of this controversy, I believe it would be fair to say that this subject would draw an awful lot of attention. Again, these are my personal observations, Sam.

SENATOR COTTEN:

I had a couple more questions but I'll yield for the moment and catch me on the second round.

SENATOR KERTTULA:

All right. Senator Sturgelewski, you were seeking the floor.

SENATOR STURGELEWSKI:

I'd be happy to follow Senator Cotten. A couple of

questions. Vern, you've made a couple of -- alluded a couple of times to the issue regarding expansion of federal control -- potential expansion of federal control to fisheries. Could you comment a little further? Are you talking about -- give as many specifics on that as you can.

MR. SUBERG:

We have a couple of changes -- this is Marty Suberg. Vern asked me to take the first stab at this. There are a couple of cases. The Katie John case and particular another case known as Kluti-kaah, that raised the question of whether or not federal management should stop at the edges of federal lands. We were again, interpreted our control to extend to those lands for which we hold title, be they [indisc.] land or submerged land. Where the United States has title to the land, we say that's where we have control. We are then challenged on that on the theory that the control ought to be extended beyond that in recognition of the fact that resources move, that there are other theories of the federal government to assert control and so are limited. The challenge that we believe -- the position that we believe is proper under ANILCA and its definitions is being challenged and we are being urged -- we are being challenged in court to take a broader view. [tape ends midspeech].

Tape 92-11

Side A

[Tape begins midspeech]

MR. SUBERG:

... areas if we were to get a position contrary to what we've said in court.

SENATOR STURGELEWSKI:

Thank you very much for that, so you can't add an opinion, apparently at this time as to your view. I understand that Kurt McVee is listening by teleconference and he was kind enough in response to an earlier question that I had raised and I'm having it copied for all of the members, to make available -- it's

either in the Register but I believe as of the date of the end of May 1992, additional language -- could you explain to me whether the jurisdiction of the federal government is extended prior -- or in addition to what was in the June 26 Register which dealt with subsistence regulations for subsistence harvest in Nunavut and all Kuskokwim wildlife. Are you going beyond that in the current -- or proposed Register in the taking over management?

MR. WIGGINS:

Senator Sturgelewski and hello to you, too ma'am. My understanding that the answer to your question is, no. Let me further elaborate on another aspect of issue of extension of federal jurisdiction. I suspect that none of you have the copy of the letter but there was a communication on June 20, 1990 to Governor Cowper from Secretary Lujan. Let me read you two sections out of that letter. And I think it will help to enlighten you a little bit about another aspect of this concern. I'll read from that letter. Quote "As [indisc.] entities that may harvest allocations on non-public lands, the Boards of Fishery and Game obviously play a crucial role in determine whether sufficient wildlife resources will be available to meet subsistence needs on public lands. The subsistence regulations proposed by the Department of Interior are temporary. They are predicated on a high degree of cooperation between the Boards of Fishery and Game and the federal land managers in setting harvest limits and other management decisions. The regulations represent the minimal extension of federal authority necessary to fulfill those statutory obligations federal government has in this matter. Accent the high degree of cooperation described above we would be faced with the prospect of either closing public lands to non-subsistence use of fish and wildlife or further extending federal authority to comply with the mandate of the law. One of the things I must consider is the possibility that federal authority has to be extended predicated on the federal government's constitutional mandate to protect

Native American interests and our fish, wildlife and other natural resources." That's the end of the paragraph. That letter was dated January 20, 1990. The only thing that is different today is that we are about to implement current regulations whereas in June of 1990 we were on the threshold of implementing temporary regulations. So the situation has not changed with respect to that prospect dealing out there. I think its fortunate that in the intervening period, the past two years, there's has been a successful degree of cooperation and we've not had to consult that question.

SENATOR STURGELEWSKI:

Thank you, Mr. Chairman. May I proceed with one further question? Thank you. There's a number of issues that have been raised that might fit into major or minor amendments to ANILCA. But assuming that we've had the [indisc.] approach to this which would be a constitutional amendment, the Governor's bill with or without modification and some changes to ANILCA, the things that have most often come up have been discussions of needing definitions of certain things, such as included in the Governor's bill, for instance, the reasonable opportunity, the customary and traditional, the customary trade. And we've had discussion here today over the issue of the definition of rural. But one thing that keeps coming up time and time again is the section 807(a) which calls for the appeal to both federal and state courts. And the difficulty of, in a sense, what amounts almost to micro-management of the resource by the federal court. And I'd like to pose a question as to what do you feel about the idea, if agreement could be reached by Alaskans, in allowing due deference to the state for the initial appeals as opposed to having access to both courts? Could we have some discussion on that please?

MR. SUBERG:

I'll answer that question. We're both having a little bit of trouble. The phone line broke up a little bit there. Could we ask you to repeat the last part of your question, please?

SENATOR STURGELEWSKI:

Okay, on 807(A) allows for an appeal to both the state and the federal courts, which in the opinion of some, means almost micro-management by the federal government. If there were an agreement on the behalf of the parties what would your feeling be toward allowing due deference to the state court, prior, then of course to be able to go on to federal court? Is there history of that type of approach allowing the state courts to first hear the issues?

MR. SUBERG:

[Indisc.] I've got section 807(a) in front of me, Senator, first of all I think if the situation you're posing is met, in other words, we state presumption of management of subsistence on federal lands and the question is could you go to state court before permitting a challenge in federal court. As a practical matter, I think you correctly identified that that would take an amendment of ANILCA to accomplish because 807(a) does recognize access to federal court for failure of state and federal government to provide the priority for subsistence uses depending on who is administering the program. I would tell you though if you had a comprehensive state management program restored it in that probably would give the plaintiff the ability to challenge at the state courts and state law. It wouldn't preclude asking a change to ANILCA access to the federal court. I don't know if given the fact that we're talking about federal lands and a federal preference on federal lands that you could entirely do away with that. It's frankly getting into an area of state federal relations legally speaking, that I'm not comfortable offering an opinion on. I am comfortable this much that to a degree it were to become you would probably need a change to ANILCA. I'm not sure [indisc.] rule federal court jurisdiction entirely. But secondly, more importantly to the degree that you had state management and I would ask General Cole to provide whatever thought he had that to the extent that you did have a unified state management that

obviously that would set a limit on the state Boards again if people chose to litigate in state as opposed to federal courts.

SENATOR STURGELEWSKI:

Maybe the Attorney General would like to comment on that.

SENATOR KERTTULA:

You might briefly, Charlie.

ATTORNEY GENERAL COLE:

That is the subject, Senator, of which I have no opinion.

SENATOR STURGELEWSKI:

Thank you.

MR. WIGGINS:

That's a good answer, Charlie.

SENATOR KERTTULA:

Senator Hoffman was seeking the floor. He hasn't spoken yet, then Senator Adams, then Senator Cotten, unless someone hasn't spoken.

SENATOR HOFFMAN:

Thank you, Mr. Chairman, I have a couple of questions. The first one, since subsistence is so important to many of the Alaska Native people that I represent, I was wondering if you could give opinion on if the Alaska Native people were violently opposed to any changes in ANILCA what are the chances of ANILCA being amended?

MR. WIGGINS:

Senator Hoffman, I'll have to do what Mr. Cole did. I have no opinion. I wouldn't begin to answer. I don't know. I just don't know.

SENATOR HOFFMAN:

What about the other party?

MR. SUBERG:

I know the law of ANILCA a lot better than I know what the prospect for a particular change would be. Obviously I'm going to defer to Mr. Wiggins on how he would interpret what the chances of particular amendments or changes passing or not passing based on opposition. I really would be even less

qualified to offer an opinion than Mr. Wiggins on this.

SENATOR HOFFMAN:

Okay, my second question is was the Indian Commerce clause a basis for the enactment of ANILCA?

MR. SUBERG:

Yes, it was one of the clauses cited. The property clause of the Constitution and the interstate commerce clause were also cited. But I believe that the Indian Commerce clause was one of clauses those cited for authority in the enactment of ANILCA.

SENATOR HOFFMAN:

And in your opinion, is ANILCA considered Indian law?

MR. SUBERG:

That's a difficult question. I know that it's been raised from time to time. I'm aware of one opinion that the gentlemen in the Ninth Circuit -- I'm aware that different people read the opinion differently. But I'm aware of the issue with respect to -- I'm at least aware of what's taking in the Ninth Circuit does say it's Indian legislation. I'm also aware of the fact that Title 8 refers to rural residents.

SENATOR HOFFMAN:

So there is one opinion the Ninth Circuit that does say that does say that it is Indian Law?

MR. SUBERG:

That is my understanding. It's been awhile since I've read the opinion. I'm not even sure I could give you the tape. But yes, I believe there is one opinion -- that opinion in the Ninth Circuit.

SENATOR HOFFMAN:

And for the body's information, I wonder if you could give your definition of Indian law?

MR. SUBERG:

I'm not sure that's the meaning that I understand your question. Can you rephrase it? What's my definition of Indian Law?

SENATOR HOFFMAN:

Is Indian law a relationship between the federal government and the indigenous people on a government to government basis?

MR. SUBERG:

I'm still not tracking you, Senator. I'm sorry. I apologize but if you could spell it out a little more for me please.

SENATOR HOFFMAN:

Well, Indian law has to have a definition and the definition that I've been referring to is that Indian law is an agreement between the federal government and the Indian people on a government to government basis. Is that a fair definition or do you have a different definition?

MR. SUBERG:

Senator, I have no reason to disagree with anything you've said. With respect to the previous question you had whether or not, I guess, Title 8 of ANILCA is Indian legislation, yes. I was aware of the Ninth Circuit that it appeared at least some years back that suggested it was to the degree that it is, that does provide for certain rules of statutory construction that we here in the Department would follow. For example, there's an ambiguity in the legislation. One would construe it in favor of the Native plaintiff or defendants, depending on what the case is. And so, yeah, I have no reason to disagree with it. And again, I'm giving you the law the best I understand it.

SENATOR HOFFMAN:

Okay, then if we assume that ANILCA is Indian law then it could be only the Native people and the government that could change that agreement? Is that correct?

MR. SUBERG:

No, sir, I think I understand the premise of your question. Let me say, though, again, Title 8 of ANILCA refers to a rural preference. Simply a Native preference. That raises some interesting issues about how we work through this problem.

SENATOR HOFFMAN:

I understand that, but I said given the fact that we're

going to assume that ANILCA is Indian Law and there is precedent for that. Given that as a basis and if it were Indian law, only an agreement between the Native people and the federal government could change that law. Is that correct?

MR. SUBERG:

Now you're talking about the ability of Congress to amend it's own legislation. Obviously, I think Congress, given the fact that it cited the Indian Commerce clause as one of it's authorities for passing ANILCA, I'm certain that Congress would want to make sure they do -- was aware of what the Native concerns and preferences were on this issue. But to the extent that you're asking can Congress change this law, can Congress change Title 8 of ANILCA, it certainly has the power to do that. The question that you're asking I think is, [indisc.] do it, and that's a policy issue, that's a policy question that I really can't speak to.

SENATOR HOFFMAN:

Well, I'm asking if it's Indian law, and the Indian people say that they're dealing with the State of Alaska on a government to government basis, can Congress change that law without the consent of the Native people?

MR. SUBERG:

Sir, Congress can change the law [indisc.] Title 8 of ANILCA, Congress can change. What role the Native voice would play in this is obviously up for discussion. You're really asking a variation of your first question. Would Congress pass a law that the Native people in Alaska were against? And again, I don't know that. That's for the Congress to determine. That's for the Congress to decide. Congress has the authority to change Title 8 of ANILCA. That I do know. Would they? I don't know.

SENATOR HOFFMAN:

Thank you.

SENATOR KERTTULA:

We'll wrap it up shortly, but we have Senator Adams then

Senator Cotten. Senator Adams.

SENATOR ADAMS:

Senator Cotten, referred to some of the risk of opening up ANILCA. And someone said you've got to be very careful. Is it a possibility that once you opened up ANILCA, it's an open agenda, that perhaps the environmental groups would be looking at it and this could go against the Hickel Administration and it's economic development projects such as the water pipeline to California? Or perhaps or groups such as anti-hunting and trapping would be looking to close this and perhaps I might go hand-in-hand and holding the hand of the Alaska Outdoor Council to close this gap here. Or perhaps that groups that look at access rights to in holding. Or perhaps in mining. Mining is plays a great part in Alaska. Are these possibilities of some of the risks that we face by trying to look at opening up ANILCA?

MR. SUBERG:

Senator, I get about seven or eight or nine questions there. I guess if you could [indisc.] a risk, I wouldn't disagree with you. On the other hand, I don't know what the agenda of others might be so I don't know. Whether or not [indisc.] in relation to other projects I can't comment.

SENATOR ADAMS:

Thank you. Is it not true that the reason that we ended up with a rural priority was because the chairman of the interior committee considered a Native preference first of all and because he could not achieve this that Congress moved forward with the highest level of protection with a rural priority. Is that not correct?

MR. WIGGINS:

Again, I can't comment specifically. I would want to sit down and read and someone should sit down and read the Congressional record in its entirety.

MR. SUBERG:

Vern, I believe that preference in the question is correct

or where other versions of the bill my understanding towards the [indisc.] passage of the bill the term "rural" was substituted in Title 8. I think was a recognition that there was a good size Native population in the rural areas. I think there was a desire to protect the traditional subsistence uses. So, I guess, as far as that goes, I would agree with the characterization of the question the way you characterized it.

SENATOR ADAMS:

Thank you. I think the Governor and perhaps the Attorney General is going to make a trip down to Washington D.C. on the twenty-second and twenty-third of this month and they're planning coming down with Senate bill number 484 unamended. If that was the case, would your response be to them, and I repeat again, that it does not retain state management of federal lands?

MR. SUBERG:

I think General Cole has been forthwith in saying that he and I share the view that the bill as currently written would not leave the -- it would not meet the requirements of Title 8. So I presume that we share our views on that and so I don't see there being any disagreement or any changes in the position that I've given you here or in the letter that we have forwarded to Senator Adams. Yes.

SENATOR ADAMS:

Thank you very much. Then I can get on my bandwagon around the State of Alaska and say that a vote for the Governor's bill is a vote for federal management. Is that not correct?

MR. SUBERG:

I would not presume to ...

SENATOR ADAMS:

My final question, Mr. Chairman, would be since we're talking over two hundred million acres of land, would the federal government be receptive to contracting out management under some of the federal laws and regulations that we have in place today such as PLA 638 contracts, Native American and

federal contracts, also the Corporate Management sections in Title 8, that this is a possibility?

MR. SUBERG:

Senator, I think we even have some limited experience and we don't even go beyond Title 8 to find the authority for cooperative arrangements. I believe last year we were successful -- the fish and wildlife efforts were successful in engaging in a relationship with one of the Native contractors for a 809 cooperative [indisc.] under which we got the benefit of some biological and anthropological information. It would be a relationship based on what I've heard was very successful. I'd like to think that it would be repeated this year. So there's authority under the [indisc.] under Title 8, the Cooperative Management Authority that we have already utilized in engaging in arrangements with Native groups.

SENATOR ADAMS:

Thank you, and thank you, Mr. Chairman.

SENATOR KERTTULA:

Yes, Senator -- Senate President Eliason wishes to have the floor.

SENATOR ELIASON:

I just wanted -- it appears that from everyone speaking there is some type of something there that seems to hold the key to ANILCA. That if we should open that door we create a lot of problems. But it appears to me that if Congress had the will to open up ANILCA and lock up another million acres of Alaska land to wilderness, we don't have to give them the key. They have the key themselves. They can open up ANILCA anytime they choose to do so. Isn't that correct?

MR. WIGGINS:

I believe Mr. Suberg's answer a while ago was that Congress can amend the law on its own initiative, yes.

SENATOR ELIASON:

So I mean, so we as a state cannot prohibit them from tinkering with ANILCA? They can do it with or without our help.

So it seems to me it's sort of a red herring out there that we're the one's that hold the key to that door. I think Congress holds the key to that door. Is that correct?

MR. WIGGINS:

Senator, my comments are not meant to imply that the state holds the key to that door, as you say. I think it is correct that the state cannot probably permit the Congress from passing a statute. I think that's probably correct.

SENATOR KERTTULA:

The Attorney General wishes to make a brief comment.

ATTORNEY GENERAL COLE:

I have a quick question or two. Mr. Suberg, yesterday I was asked in a House committee hearing whether the waters of Southeastern Alaska are navigable. Do you have an opinion on that subject? Are they navigable?

MR. SUBERG:

Which ones, General Cole? Generally, speaking, I don't like to offer opinions unless I'm sure that we hold title to the [indisc.] of waters of which we're making claims.

ATTORNEY GENERAL COLE:

Well, how about the Gastineau Channel for starters?

MR. SUBERG:

Would be happy to review that situation. [indisc. - laughter] wanted me to. At this point, the United States will always open to start a claim to [indisc.] the navigable waters to which it believes it holds title and to the degree of historical information that suggests that we hold title to the [indisc.] to a particular body of water we will not be shy about asserting it. To the degree that we don't, in those cases, we would not say we hold title to [indisc.]. It's very much a case-by-case determination based on what kind of federal reservation was made? Did it include the [indisc.] of navigable waters. Was there a specific act of Congress? Those sorts of factors that you and I have discussed before when the federal government needs to retain land. So, on that particular one,

I'm not sure I could give a titled opinion today, but to the degree of significance we could talk about it further. But we do that on a case-by-case basis.

ATTORNEY GENERAL COLE:

Let me see if I can follow up a little bit more then. Has the United States claimed title to the lands beneath the navigable water of Southeastern Alaska?

MR. SUBERG:

In our regulations which we have claimed title to some of the navigable waters, for example, Glacier Bay we claimed title to because again some of the factors I've indicated. I know it's been controversial. I know that your Governor [indisc.] excuse me, General Cole has challenged that assertion in court.

ATTORNEY GENERAL COLE:

Well let's exclude the water at Glacier Bay and put that aside for the moment. And then can you answer that question if we exclude the lands beneath Glacier Bay.

MR. SUBERG:

I am not prepared -- I'm sorry Charlie, I'm just not prepared to answer that right now.

ATTORNEY GENERAL COLE:

You're saying that you don't know whether the United States has ever claimed and now claims title to the lands beneath the navigable waters in Southeastern Alaska, excluding Glacier Bay. Is that what you're saying?

MR. SUBERG:

I'm saying I'd be happy to inquire and go to my legal experts who will have a better understanding of it and get you an answer tomorrow.

ATTORNEY GENERAL COLE:

All right, thanks.

SENATOR KERTTULA:

Senator Halford, we're going to bring this to a head in a moment. Senator Halford wishes and then Senator Cotten.

SENATOR HALFORD:

Just to follow this same question, is the United States defending itself against the claim brought by AFN to take over all waters. Obviously it is.

MR. SUBERG:

Are we defending ourselves against the claim by AFN to take over all waters? Are you referring to the Katie John litigation?

SENATOR HALFORD:

Yes.

MR. SUBERG:

Okay, I'll tell you what we've done in the affirmative instead of the negative. We have based our claim of jurisdiction based on where we think we have title to land. Whether it's dry land, that's easy. We know whether we have title to it. And in the case of navigable waters or otherwise where we feel we have title to the defense of those navigable waters. That is our current posture. Anything that the United States has fee simple ownership in -- we have title to and we assert jurisdiction over it because that's how we read ANILCA. We've been challenged on that. There are others. I don't know [indisc.] characterization about the AFN [indisc.] There are others that have challenged us taken a broad view with respect to certain resources. Obviously we're going to see how we do in the court on that. There's at least a couple of cases that are pending on that. But our position is that if we have title to it. We assert jurisdiction over it. Because our primary goal under Title 8, as Vern indicated in the letter from the Secretary two years, is to make sure that the preference for subsistence on a public federal land is meaningful.

SENATOR HALFORD:

So you're defending yourselves against the action to force you to take over management on state waters on the basis that you do not own the underlying lands of state waters with regard to -- and I'm excepting Glacier Bay, Nunavak Island -- the arguments that the state's already having. But you aren't

making any case that you own any of the waters or having management authority but are making the opposite case. Are you not?

MR. SUBERG:

We're making the case -- we've identified in the regulations those areas that we think we got pretty good claim to them. Yes, and I know that that provoked the somewhat -- provoked the challenge and the litigation right now. We have limited our jurisdictional scope to making sure that the preference is good on public lands, yes.

SENATOR HALFORD:

Which does not include the waters except Glacier Bay or other federal reserves that preceded statehood?

MR. SUBERG:

I am not sure that we are prepared to say that our definition on what we think is in the federal jurisdiction [indisc.] In other words, what we've asserted as of May 28, 1992 is all we're going to assert. Frankly, there may be other lands we claim title to.

SENATOR STURGELEWSKI:

Mr. Chairman. It might be interesting to tell us what those lands are. I mean as far as -- apparently Kenai National Wildlife Refuge, the Kodiak National Wildlife Refuge, I believe, the waters within fifteen hundred feet of the shoreline of Afognak. Am I correct, those are the waters we're talking about? There's quite a list there and that's in the information that was submitted by Mr. McVee.

MR. SUBERG:

That is, I believe, the partially representative list, Senator. They are in our May 28 regulation. Those areas are there and we have made claim on them.

SENATOR STURGELEWSKI:

Yes, I think ...

MR. SUBERG:

They are in the regulation. That's correct.

SENATOR STURGELEWSKI:

That's correct. I did not read all of the ones in the Aleutian Islands and certain other areas of the state. Women's Bay, [indisc.] Cove, et cetera.

SENATOR KERTTULA:

Senator Cotten was seeking the floor and the Attorney General has one quick comment. We're going to try to wind this up. Thank you.

SENATOR COTTEN:

On this subject, there's something in Alaska, the Legislature or the executive branch to do to avoid the risk of the government losing the Katie John case?

MR. SUBERG:

Well, again, the reason we're in this situation is because we now have dual management. And to the degree that dual management remains, the question of who regulates becomes more important. When we had unified management, it wasn't so important for the federal government, at least for subsistence purposes, to specifically set out jurisdictional areas. Because we have one scheme a state program that was in compliance with ANILCA. However, as long as we have dual management, as long as we have a federal program and a state program administering subsistence preference, I would submit that the federal government has the duty to identify those areas for which it claims jurisdiction. And our regulations have made some effort to already identify some areas. And frankly it's an ongoing task that we're gong to have to keep doing. We've made reference to that in our regulation.

SENATOR COTTEN:

What's your assessment of the outcome? Is the government going to prevail or not?

MR. SUBERG:

Again, we have been challenged strongly. I'm not going to judge [indisc.] -- the judges involved in this case. We put forward our best defense but even defending those cases, the

federal government over the next few months, next few years is going to have to very clearly define where its jurisdiction is as long as we have dual management.

SENATOR KERTTULA:

As long as we're sitting right here and I'm interfering slightly, but does Senator -- do you Commissioner Rosier or General Cole have a comment in this area?

ATTORNEY GENERAL COLE:

Yes, sir, I do. And the question is this, Mr. Suberg. Yesterday when I was furnished with a copy of the permanent regulations with respect to the assertion of jurisdiction, I noticed that the beginning of the sentence there was this language which said, quote, "At this time", comma, dot, dot, dot, close quote. Could you explain to me the meaning of that qualification or why it was inserted into the regs?

MR. SUBERG:

General Cole, with all due respect, we're in litigation over this. So I think just about all I'm going to say on this.

ATTORNEY GENERAL COLE:

All right. Thank you.

SENATOR KERTTULA:

Senator Cotten, did you have further ...

SENATOR COTTEN:

Yes, I did, I wanted to just follow up with my original question was going to be on the history of ANILCA there and I guess Marty Suberg appears to be the expert within the Department of Interior. And the logic that was used to make the determination that those residents of Alaska who ought to be given preference would be defined as rural residents. I'm just trying to figure out whether if you make a change to that it wouldn't -- I'm trying to get to an easy conclusion that would be a technical amendment to change that, to describe it differently. And you said that the individual criteria basis was rejected and instead a residency basis was used. Can you tell us why that happened? Or why this other approach wasn't

considered? Or if it was why was it rejected?

MR. SUBERG:

I think I'll answer this way. What I believe the Congress did was to say that it preferred community basis versus urban criteria as opposed to an individual criteria, that you look at each individual to determine whether or not he was a subsistence users. Hence the difficulty we're in. I think one of your colleagues provided a relatively good overview of some of this history leading up to ANILCA and that is as conversant on all this as I should be. And I know there was a great interest in protecting that traditional lifestyle for those folks who wanted to engage in it. There was the recognition that it was rural Native subsistence users who uses it that Congress was trying protect. So ultimately Congress settled again for a number of reasons. I'm not sure I'm cognizant of all of them. But in the final analysis, Congress settled on the word "rural" to describe that category of people. I'm relatively clear about saying that it is based on community characteristics - community versus individual characteristics. I can't really shed any more light on it than that. But that is again, is based on the reading we've done here. That appears to be the deliberate choice of Congress.

SENATOR KERTTULA:

Are there further questions? There's no further request at this end. We thank you, Mr. Wiggins and Mr. Suberg and we thank the Secretary for providing the opportunity for us. We're hoping to see you before long up here in very pleasant surroundings. Thank you again, very, very, much on behalf of the whole Senate.

MR. SUBERG:

Sir, we thank you and hopefully we've been helpful.

SENATOR KERTTULA:

Yes, we'll recess for ten minutes then we'll come back for some brief testimony then we'll go to the body of the bill for action.

RECESS

3:00 - 3:10 p.m.

[Tape begins midspeech]

SENATOR KERTTULA:

... intensely on achieving the opportunity to acquire the Alaska Railroad at one time and I think I got to speak twice on the subject of five attempts. That's a distance and they were so busy and this is what's happening here too, attempting to accommodate legislation. We'll hear from a few more people. I don't know whether to have a permanent subcommittee to record and listen. Those that wish to submit written testimony, I ask that they do so. But I'll try to get a cross section of people now. We will as is possible, bring people to table. We are recorded. And there's a gentlemen here from, yes the back of the room, from the Council. I'll ask if he'll come forward at this time. Because we are recorded, even though we are not in any number here. But at least you'll have your opportunity to testify and as people show up. Then we'll bring Mr. Kookesh [ph] and others to the table. Please identify yourself for the record. This is recorded. This will be transcribed and record will be available to all legislators and the public. You may proceed.

MR. JOHN JAMES BURNS, GOVERNOR'S SUBSISTENCE ADVISORY COUNCIL:

Thank you, Mr. Chairman. I will purposely make my comments very brief.

SENATOR KERTTULA:

Thank you for waiting for us.

MR. BURNS:

I'll make my comments very brief, because there are many people who wish to comment. My name is John Burns. I was a member of the Governor's Subsistence Task Force as not representing any particular vested interest group. I am a biologist still. I work as an independent. I do believe that the issue before us, of course, is at a point where it can no longer continue to be just passed off. That's not to say that

it has been in the past. But we see the implementation of regulations. We see growing programs. I'd like to give you a little bit of my perception of what the Council tried to do. Whether we succeeded or not remains to be seen.

Clearly, as an ecologist I recognize that resources will always continue to rise and fall. And that one time or another one or more is going to be in short supply. And conversely, at one time or another others will be in great abundance. When important resources to subsistence users are not abundant enough to meet the demands of all state residents, we should have a scheme in place to provide maximum benefit to those people who depend upon it most as an important component of their culture, lifestyle, way of life. Conversely, and I haven't heard much talk about this so far. When the resources are abundant to withstand the harvesting by all of the potential users that choose to harvest it, they should have maximum access. So the point is that we're dealing with trying to award a preference, in fact, to users who have a great dependence on it during periods when the resources are in short supply. Recognizing that there are a variety of reasons that people have and different dependence on it. It might be choice of lifestyle, traditional dependence, areas where they live, economic limitations or alternatives. How much significance do we as Alaskans, you as the leaders of our state place on the issues of choice and the exercise of options. Because any limitations to those exercise of choice and limitations of options and they must occur, should in fact be based upon the resource status and the priorities of preferences to the people who, in fact, depend upon those resources. I'm sorry to be redundant now.

We asked many questions about federal versus state management. All of you have been around a long time. I have not been around as long as many of you, I came as a student thirty-three years ago. We now have a record of federal management. Since statehood. And I think you want to look at it very, very closely. And that record, for instance, deals

with the federal fisheries management. It is not particularly a good record. It's a mixed record. I note that the ground fish fisheries in the Gulf of Alaska reached essential commercial extinction. We're struggling greatly to rebuild them. That's in the Gulf of Alaska. In the Bering Sea, under federal management regime, we are now witnessing the precipitous decline in ground fish, particularly pollock and Pacific cod. On land, it's going to be interesting. And I think as a matter of historical record, we will see that federal management does not offer the options to protect our own subsistence utilization. If you start to look at management decisions made in Washington D.C. and you start to look at questions of maintaining or enhancing moose populations and the options that exist for them, many options will be foreclosed based on conflict of philosophies and what Washington may accept or what Alaska may accept.

I've gone beyond the time I wanted to use, Mr. Chairman. As I said, there are others who wish to speak. I would entertain a question if you have any. But in conclusions, what we tried to do is lay out a blueprint. The council tried to lay out a blueprint to, in fact, guarantee to the maximum extent that we could that people dependent and choosing to live a subsistence lifestyle may do so. We raised the issue of amendments to the constitution. I personally have no strong feeling one way or the other. By that I mean, giving it mention in the constitution certainly is important, but you would still need a blueprint and this is an example of a blueprint of how Alaskans would choose to protect, enhance and maintain a very important lifestyle. To dilute it to say everybody regardless of their lifestyle and need in rural Alaska depends on it is in fact, in my opinion, continuing population increases death knell to truly maintaining a meaningful subsistence lifestyle because it cannot be done. Unless some protections are [indisc.] Thank you.

SENATOR KERTTULA:

Thank you for appearing. Is John Schaefer [ph] here? Mr. Al Kookesh, is he here?

MR. AL KOOKESH, GRAND PRESIDENT, ALASKA NATIVE BROTHERHOOD:

Mr. Chairman, we have copies of our testimony. Would you like to have us distribute them before our testimony?

SENATOR KERTTULA:

Yes, I would. And I would ask, yes, Virginia, if you could pick it up. This is recorded and this will be permanent record. All members of the Legislature and the public will have it.

MR. ALBERT KOOKESH:

Thank you, Mr. Chairman. I'd like to introduce to you Ms. Selina Everson, who is the Grand President of Alaska Native Sisterhood; Mr. Ronald Williams, who is a member of the Executive committee of the Alaska Native Brotherhood. My name is Albert Kookesh. I'm the grand president of Alaska Native Brotherhood. We'll start today with Selina Everson.

MS. SELINA EVERSON, GRANT PRESIDENT, ALASKA NATIVE SISTERHOOD:

As Al said, my name is Selina Everson. I was born in Angoon, Alaska on Admiralty Island. I have resided in Alaska most of my life, but I know when I was absent from Alaska I missed my Native food. We are here today taking part ... [tape ends midspeech].

Tape 92-11

Side B

[Tape begins midspeech]

MS. EVERSON:

... busy schedules to tell you how we feel about our soul food, if you will. Also known by subsistence, subsistence lifestyle, it is important that these terms be understood in relation to our very existence as a people of this great State of Alaska. Subsistence food. We were born into our foods, learned from our grandparents, our great-grandparents the preservation of these foods. Our people were healthy and strong. They lived to be very old because our foods were prepared not with preservatives or additives or artificial

coloring or flavor. They were preserved in their natural state. Our system did not abide foods that you bought from the local stores. Dairy foods. Our systems were accustomed to our food preserved by our grandparents, our mothers, our fathers. Today we're here again, it seems like we are always fighting one issue or another. Our backs are to the walls. We have nothing else to give. We can't go home and tell our children that Governor Hickel killed their culture. It is a very emotional bill -- issue this subsistence. We have heard comments made where we can hear it directly. There's food on the shelves in the grocery stores. What are they fighting for? We are fighting for our very existence as a people of the state. We have resided here for thousands of years. And to us this issue is very touching to our hearts, to our physical and emotional well-being. Please resolve this once and for all. So that everyone can benefit that we can stay in this great state and live side-by-side with our white brothers and sisters. The paper has called our customs and traditions a myth. It is not a myth to us. It is us. It is our very soul. Our very existence, our very survival. Thank you very much for this time.

MR. KOOKESH:

Thank you. Can we hear from Mr. Williams.

MR. RONALD WILLIAMS, EXECUTIVE COMMITTEE MEMBER, ALASKA NATIVE BROTHERHOOD:

Thank you very much, Mr. Chairman and committee members. My name is Ron Williams the executive committee member of the grand camp of the Alaska Native Brotherhood. I appreciate the opportunity of saying a few words today. I understand that there is some thoughts of continuation of dual management between the federal and state of the subsistence program. And frankly, that makes us very nervous. For about ninety percent of the land in Southeast where we reside is under the federal management now.

During the territorial days of Alaska, the salmon industry was a very [indisc.] industry in Washington D.C.

They have fish traps that fish twenty-four-hours a day, seven days a week. In Icy Straits [ph] alone, where I come from, there were twenty-three of these fish traps. In 1921, the Alaska Native Brotherhood decided that these traps were damaging the salmon stock in Southeast. So they went to Washington, D.C. to see what could be done about eliminating or decreasing the number of fish traps. They ran into a stone wall. And every year after that, until statehood the ANB did everything possible to eliminate the traps. The only concession they got was to move some of these traps that were closer to the salmon stream, a little bit further from the mouth of the stream itself. When the cry came to make Alaska a state, along came the word that we could eliminate those fish traps so the Alaska Native Brotherhood supported that effort. We felt that it was in the best interests of the citizens of Alaska to manage their own resources. Of course we know that the fish traps were finally eliminated but not before salmon stocks became very depressed. Also during the same period, the federal government offered a bounty on harbor seals. These seals were the main source of food for our people. Literally thousands of these seals were slaughtered. This is federal management. To top everything off, the federal government put a bounty on the bald eagle for \$2 for a pair of claws. Thousands of these birds were killed. The bald eagle, as you are aware, is our national bird and appears on our national emblem. This is federal management. The Alaska Native Brotherhood favors state management. We do not want to go through another period like I just described. We urge you to start the process with the constitutional amendment for subsistence for protection of subsistence or to support the AFN subsistence bill. Thank you very much.

MR. KOOKESH:

Mr. Chairman, everybody seems so tense. I wanted to tell you a little story before I get started on my testimony. I remember the story of two gentlemen in the hospital. One was a Native and one was a non-Native. And they both had the same

illness. When the food was brought to them everyday, the non-Native couldn't eat. He was so sick, he couldn't eat. But the Native ate everything on his tray and even proceeded to eat the food on the other tray. After a couple of days, the non-Native looked at the Native and said, "Boy, I wish I had your appetite." As soon as he said that, the Native put his fork down and he stood up and he looked at the non-Native and said, "When you first came to this land, you took our timber. Then you took our women. Then you took our fish. I'll be damned if I'm going to give you my appetite."

Now that you're a little bit relaxed, I'm the grand president of the Alaska Native Brotherhood. The Alaska Native Brotherhood speaks for at least sixteen thousand people in Southeast Alaska and we have members up in Anchorage. I want to, before I get started also, mention that I'm a commercial fisherman. I have a Southeast gillnet permit and a United Fishermen of Alaska has never come to me and asked me for my opinion on either of the bills. I do support the Alaska Federation of Natives bill. We appreciate this opportunity to speak on an issue that could mean the end of a way of life for Alaska Natives if not handled properly. The Alaska Department of Fish and Game provided us with the following figures: We asked for this information on the total number of salmon caught in Southeast Alaska last summer which was 1991. They indicated that their records show the following by user groups: 44,355 by subsistence users; 257,595 by sports fisherman; 68,986,295 by commercial fisherman. Compared to the commercial fishing numbers, 44,355 seems hardly anything to worry about. It amazes us that the State of Alaska and the federal government spends so much time and money to satisfy a few people who say that subsistence users deplete the salmon stock and that it is only for Native people. It also amazes us that some of the commercial fisherman organizations are opposing subsistence. I'd like to repeat those numbers. 68,986,295 fish caught by commercial fisherman; 44,355 used by subsistence persons. In

order for the State of Alaska to regain the subsistence management we feel that the state Legislature should do two things while they are in special session. They are, number one, adopt the resolution that would request the Secretary of Interior to hold off pursuing the management of subsistence on a permanent basis.

Second, to start the process for a subsistence constitutional amendment to allow the vote in November using the wording that is already proposed to you. Article eight, section fifteen, is entitled, "No exclusive right of fishery". And it states, "no exclusive right or special privilege of fishing shall be created or authorized in the natural waters of the state. This section does not restrict the power of the state to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fisherman and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in this state." As you can see precedents have already been set in this article. In the early 1970's a proposal was advanced to limit the number of fisherman that could participate in a fishery primarily as a way of increasing a fisherman's income. This is sixth system of limited entry we have today. And because it creates a special privilege of fishery, a constitutional amendment was necessary to allow its adoption. Our guess, at this time, is that more than half of those permits now belong to people who do not reside in Alaska. In addition, aquaculture is also mentioned in amendments so private associations may possess the right to harvest the fish the produce. With this document I have also included a document from the State of Alaska, Division of Subsistence, which shows the numbers that I just read to you. It was a surprise to us to note that the department told us that nobody in Alaska has ever asked for those numbers. It's interesting to me to look at the numbers that the state has proposed and wondering where they got their figures from. This is the first time this document has been produced. It's

available now for your information. We hope you'll consider the two recommendations we're making to you and we thank you again for your time.

SENATOR KERTTULA:

Mr. Kookesh, thank you and your party for coming. I apologize for the time it takes. Mr. John Schaefer, I would ask that you come forward. Well General Schaefer, it's nice to see you today.

MR. JOHN SCHAEFER, CHAIRMAN OF THE BOARD, ALASKA FEDERATION OF NATIVES:

Good afternoon, Mr. Chairman. I'm not sure why you asked me up here, so I better ask.

SENATOR KERTTULA:

You are located on the list of people that said they might wish to testify so I thought I'd bring you up if you have anything to say, because you might want to lose the opportunity to hear from you. That's the reason, John.

MR. SCHAEFER:

Thank you, Mr. Chairman. Ladies and gentlemen, my name is John Schaefer. I'm the chairman of the Board of the Alaska Federation of Natives. I've held back testifying because I think there are many more Alaskans that can get their points across to you much better and you listened to them. So I'll make my comments very brief.

Essentially, I think I would speak for most Alaskans in saying that it's time the Legislature solved this problem. And as we looked at the problem, currently, and I want to point out the problems that we're creating is one we look at as long term, not short term in that if you allow federal management of our resources in the state, we're going to have a long term problem. And I think it's important that the Legislature insures that the State of Alaska has the opportunity to manage all the resources in the state. It's surprising to me that the Native people are making this pitch to the State of Alaska and the State of Alaska doesn't seem to give a damn. We fought for statehood, I

thought, for this very reason. To get control of Alaska's resources for Alaskans. And here we are the state and federal government is taking over management of some of these resources and we're sitting by [indisc.] I don't think we should do that. I think we owe the people of Alaska the opportunity for Alaskans to be able to manage our own resources. And for this, the Native people in Alaska are saying please guarantee that things won't get so bad that we have to start stopping people from using some of these resources. Give us a chance to use these resources for own sustenance. And this is what we're asking. Not a lot. We're not asking for ninety percent of the resources. We're asking for two things, for as little as one percent of those resources, when those resources are available for everybody. We're assuming that those resources are being depleted, that we'll ask for something less than one percent. We'll ask for whatever we can get. And that's all. I don't think that's too much to ask for. Why should people be so fearful of Alaska Natives and other Alaskans who utilize subsistence resources for their livelihood. To get such a small percentage of this state's great resource wealth. And on top of that, I think it's been made very clear by the people of this state, that if you can't handle the job, give them the option and they'll decide for you how to manage the resources of this state with a constitutional amendment. I think that's not asking too much. Mr. Chairman, I'd be happy to answer any questions.

SENATOR KERTTULA:

Any questions of John Schaefer? Thank you for coming, John.

MR. SCHAEFER:

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

SENATOR KERTTULA:

It's my understanding that Dave Katzeek [ph] been here very, very, appropriately dressed and probably pretty warm waiting. We'll ask that you identify yourself and please come

forward.

MR. DAVE KATZEEK:

[indisc. - Native language] - Translation: Greetings honorable people of the land. My name is King Gesta [ph]. I am of the Shandu Katie [ph] family from the Chilkat Valley. I'm from the Thunderbird House in the Chilkat Valley. It is very, very good the way that we are all sitting together to look at the resolving of an issue that affects every person within the State of Alaska."

Honorable people, It's with a real, real deep feeling of emotion that I come here. What I am wearing today is not for public relations. It's not for me to make a show of what my ancestors have. What you see upon me today is truly the grandest art of management that you can ever believe. This blanket is woven with the hair and the wool of the mountain goat from the Chilkat Valley. When any of you men that have gone mountain goat hunting, go into the mountains to hunt these wonderful grand creatures that God has given to us. To come out of the mountains with the wool, the blankets that eventually resulted in what you see upon my neck, back. The abalone, that shell that you see on this hand, proper use of the resource. Not for necessarily of game that my people shot just so they could have a trophy or went and harvested just so they could have a trophy.

I'm going to read something out of your big book and a big book that I choose as well. It's called the Bible. And I want to read something here that hopefully will bring us to a place where we can get to a common ground of understanding. Now, you can take this as a myth or you can take it as the word of God. It's your choice. [indisc. - Native language] You are a human being. You have the power to choose. And it says in -- it's found in Genesis first chapter in the twenty-ninth verse, if anybody has it in your bible. Maybe you can just go ahead and open it up and read it. If you don't I'll read it for you anyway. It says, "Then God said, see I have given you every

herb that you see, which is on the face of all the earth and every tree whose fruit yields seed. To you it shall be for food. Also to every beast of the earth, to every bird of the air and to everything that creeps on the earth and which there is life, I have given every herb for food and it was so. Then God saw everything that He made. And indeed it was very good"

Our people look upon the land [indisc. -Native language] our Lord, our God, our higher power [indisc. - Native language] He is the one that brought us to this land that gave us a land that literally flowed with milk and honey. Not for the purpose of capitalizing upon the resource for the benefit or the expense of other people, but so that we can have truly the blessing that God had actually given to us. Now when we begin to try and manage other peoples lives, usually there's a problem that we're trying to reach out to other people. And I'm here to say this, let's deal with what we need to deal with here. Right here. We can resolve this probable. We made need to lay aside our differences and our opinions but we can resolve a real important issue. It is for a day like this day that my grandfather, James Slenot [ph] spoke to me in his Native tongue so some of the things that you're hearing me say is James Slenot. His name is in the history books when the U.S. government came into the United States, my grandfather James Slenot from the Sukaki [ph] house worked with the federal government. You have an Alcan road that you're going to be celebrating in this next year, my people, my family, our people worked in that area and helping. Working cooperatively, not so things can be taken from us but so that you would have the blessing of the land such as we had. Not hoarding it to ourselves. Not keeping it to ourselves. So I encourage this day to take heed with respect to what you're dealing with. You're not just dealing with Indian type of food. The resource comes from a source greater than you or myself. And it's important to deal with it in that fashion. And I would say this, regarding the government, I think -- I say this humbly and I say it with pride. Look to the Native people. We still

believe in the spirit that effects everything that we do. We still believe in the spirit. We have it within our hearts so we respect the rivers and the streams, the mountains, the ocean the sea. We respect all those particular resources that have been given to use by our god. [indisc. - Native language] The Holy Spirit. Don't look at me as a person who's paganistic because you don't understand my regalia that I have. We have a management system that in my personal opinion exceeds a lot of management systems of today. When you're bailing out S&L company's at one billion dollars. When you're dealing with housing authorities where a lot of money has been ripped off, let me tell you this. We Native people have survived here for thousands of years and the reason we have has been because we never ripped each other off. We helped one another. And I apologize for saying what I am saying to this extent. I do not want to judge. This is not my intent. But I believe we have a management structure. I don't know how many mountain goats died for this. But you know what. A lot of the mountain goats that died for this blanket, the people ate. It was smoked and all the other things. So with all due respect, Senators, I appreciate this time. I may not have the time to say what I feel but I think we need to look to a higher power to resolve this problem. A power that's greater than ourselves. A power that can lead us and direct us in such a way that your forefathers talked about in the settling of this nation. We need to return to that and we need to look at it with love and compassion for one another. Not letting the newspapers dictate our lives. Not letting the newspapers destroy an opportunity to resolve a problem. When you talk about special interests. I'll finish this. We see the large vessels going into the Glacier Bay area. It isn't that special interest. We see the things that are happening. I don't need to carry it any further than that. There's a lot of special interests. Don't let it -- just because we're talking about the subsistence as you say, that's just a special interest for the Native people. We are a people

of Alaska just like you. And God brought us here and we settled here. And so I personally believe that you can resolve this problem. I personally do not stand with the Governor on legislation. That doesn't mean that you can't resolve those differences. They can be resolved [indisc. - Native language]. I know I took a lot of your time, but I took a lot of time sitting out there too. Thank you.

SENATOR ELIASON:

Thank you, Dave. The chairman is going to be absent for a few minutes so he asked me to preside. Flore Lekanof. [ph] Senior. Welcome.

MR. FLORE LEKANOF, ALEUTIAN-PRIBILOF ISLANDS ASSOCIATION, INC.:

Thank you distinguished president of the Senate and distinguished members of the Alaska State Senate. I am Flore Lekanof. I was born and raised on St. George Island out in the Pribilofs. For many years I lived under the wardship of the federal government. And since I guess it was a good idea but we became a state. But I grew up in the territorial days, even taught school for the territory upon a time and spent a little time doing World War II over at Funter Bay not too far from here. So there quite a bit of history that I have in the State of Alaska. I've been around a long time. I do have a few comments that I'd like to pass on, if I may. And before I do that I would like to also say that I was one of the organizers of the Alaska Federation of Natives, it's first chairman. I was also the organizer of the Aleut league which is now known as the Aleutian/Pribilof Islands Association of which I am an employee. I get to travel quite a bit in the Aleutians and the Pribilofs. We do serve 12 tribes just like the 12 tribes of Israel. And there are twelve Salani [ph] tribes, you know and there were twelve disciples. There are twelve cards in a suit in a poker deck. There are many twelves, you know, and I just thought I would mention that. Twelve months in the calendar. I don't have twelve children.

Let me just mention a few things. The Aleutian Pribilof

Island Association supports the Bush Caucus bill to solve our subsistence problems. I think there needs to be said a couple of things here. Many statistics have been thrown at you and I'm sure it's difficult with all of the information that has come by, in a few days, to decipher all of the important aspects of it to make a fair decision for all concerned in the State of Alaska which is your important duty, for which you have been elected.

The area fisheries have been talked about quite a bit. I think someone said that it is probably the largest area in which subsistence is taken by our indigenous people of Alaska. I think it is true. Keep in mind this that these figures have been given to you before but they are worth repeating. Ninety-five percent of all species of fish taken in Alaska are taken by commercial fisherman. One percent by the sports people and four percent by subsistence users. And of that four percent, fifty percent of them are non-Native. So were not talking strictly about Native people here. Going back to the ninety-five percent taken by the commercial fisherman, I think our state needs to look very carefully at the people we permit to fish in Alaska who are not Alaskan residents. This needs to be examined very carefully. I heard yesterday someone said that maybe fifty percent of permit holders in Southeastern may very well be non-residents of Alaska. We heard that maybe twenty-five percent of those holding permits in Cook Inlet may very well be non residents of Alaska. I did not hear figures about Bristol Bay. And having worked for the Borough of Bristol Bay, I suspect at least fifty percent of those permit holders are not Alaskans. So I think we need to look very carefully, not only at the aspects of the permit holders but the processing of fish. The fish processors themselves. I think we need to take a look at that. And if you look very carefully, I think you will find down through the history and even to this day, much of that operation is owned from outside of Alaska. Even to the extent that much of the interest is owned international from outside of

the United States. So I think there is quite a bit to say here. So what are we talking about? A very small percentage of fish, for example, that is taken for subsistence that is used by Alaskan people. I think it is that problem that has brought you all together. All of us together. And I hope we will come out with a solution that would be satisfactory to all.

And in closing, I would like to say this. That I think it is becoming clear to some of you and for those who had worked and lobbied hard for the Alaska Native Claims Settlement Act, know this for a fact. That if you read the conference committee reports of the Alaska Native Claims Settlement Act, you will read in there that there was a great deal of concern for the subsistence way of life of the Alaska Native people. And this is what I'm interested in, because I deal with the tribes. As I mentioned twelve tribes. And they are concerned about their subsistence way of life. There are two things, and I'll close with this.

One, we want to preserve our language. The Native languages should be preserved. We are working towards that. Secondly, we must preserve the Native cultures. It makes us that much more rich in Alaska to have the Native cultures as part of our state and preserve them. To preserve the Native culture we must also preserve their use of the natural resources, particularly those things with which they eat, their lifestyle as it pertains to food they use. I think we must be careful of those things. Those things are preserved for them, for us, because if we lose the language and the culture we will lose the indigenous people of Alaska. I don't think anyone here wants to see that happen. Thank you very much Mr. Chairman.

SENATOR KERTTULA:

Thank you. It's good to see you again. Is Martha Vlasoff here? I'm trying to get a cross-section here.

MR. WILLIAM THOMAS:

Mr. Chairman, my name is ...

SENATOR KERTTULA:

Introduce yourself, please.

MR. THOMAS:

My name is William Thomas. I'm a Board member of Kitna Native Corporation [ph]. Honorable Board members, elders and also member of Kitna Village Council and I want to tell you about my education. Fourth grade. One month in fifth grade September thirtieth at our school because of the depression -- I was sixteen years old when I got out of school. I was forced to get out to make my living. And I live all my life a subsistence life depending upon it. And I began to work for wages back in early, I mean latter part of thirties. I live in the city here. I work for the government during that time -- for twenty-one years I live in the city. I usually take one month off every year to go get my meat and my fish and berries. Berry picking. That I've been doing up till that very day, I'm been doing that. So you can say I'm very dependent on subsistence living. I have known our Governor Hickel for quite a while. I live in Anchorage for twenty-four years and I remember him when he was first elected and I do like Mr. Hickel and I'm a born again Christian. My Bible teach me that we must pray for our leaders. Our president, our Governor, our senators, down to police folks. That the way the bible teaches and that's part of my life. So I come here to tell you part of my life and how I live upon subsistence. One thing I'm sorry to say today that I won't support the Governor's bill. I got it down to a [indisc.] because why I don't support it. I do not support the Governor's bill because it doesn't solve the problems. I support the bill introduced by the Bush Caucus. I support that bill. And now I have two ways about amending the bill. I'm a little bit confused on it. That will be my testimony. I'm very dependent on my subsistence life.

SENATOR KERTTULA:

Thank you for coming. Are AFN attorney's fairly handy here? Thank you for bringing that in now. You may proceed. You are recorded for the record. We've got to try to find other

ways for everybody to get a chance to submit testimony one way or another.

MS. MARTHA VLASOFF, RURAL CAP:

My name is Martha Vlasoff and I'm from Tatitlek, Alaska and I'm originally from Cordova. My family are all commercial fisherman. That is the same out in the village. Most families depend on the income from commercial fishing but at the same time we are subsistence users. Each time we go out fishing, we make sure there is enough put up for winter use. We smoke fish, salt it and freeze it for all of our subsistence use. But it isn't just the salmon that we use for subsistence. I don't see how that some commercial fisherman can say that they wouldn't support the Bush Caucus bill when this is the bill that I believe will protect the Native subsistence rights and the non-Native subsistence users. Our village is only seven miles away from where the Exxon Valdez went aground. Subsistence for our village was gravely disrupted by that preventable disaster. There are people not only in our village but in the villages around the Prince William Sound and beyond that still don't eat traditional Native foods because they don't know if it's really safe to eat. I'm glad that Senator Kerttula has given us a chance to a piece in this puzzle that we are all trying to put together. Not everything that is being said is true so we must beware of that and make sure that our words and our testimony aren't being used against us. Which is the case in the Governor's speech the other day when he said, "The elders are pleading to us and praying for our help." While this statement is true in itself, it does not clarify what the elders are praying for. Clearly, you must see that from the testimony of our elders here that they are not in favor of the Governor's bill. God has clearly blessed the Native people with the wonderful understanding of this land and the fish and game and berries and fowl that are provided that He provided. But it isn't that Native subsistence that is the pleading resources [indisc. -cough]. Native people traditionally only take what

they use. The Native subsistence users and other non-Native subsistence users are no threat to the commercial fisherman of our state the way many components of the Governor's bill have stated. I don't know why many of the Native commercial fisherman have had a time to compare the Bush Caucus bill to the Governor's bill to see which best protects their interests. Especially now when they're all out fishing or preparing to go out fishing. But I do know that not all commercial fishermen are represented the United Fisherman of Alaska.

My husband Norman, everyone calls him Minnie [ph] was taught by his dad Big Paul [ph] to hunt and fish. He tells everyone he has a college degree in hunting. That handing down of traditional knowledge is what the people in our land depend on because he doesn't just bring enough seal home for our family. He brings home enough seal for everyone who is hungry for it. In trying to regulate subsistence take, people in offices and cities don't have an understanding of the traditional culture. And so many types of regulations say we are allowed to harvest, doesn't match up with how much the villages need to provide for their depending families. Often the traditional harvest of some fish and game is considered out of season by the people who regulate the harvest. That means the hunters must be torn between what is right in the eyes of someone who doesn't understand our way of life and what the people in the village have been providing for their families for centuries. What would you do? If you compared the taking of sixty black ducks for villagers to eat in our villages to the useless slaughter of one hundred thousand black ducks in the Valdez oil spill, I think you can get a picture of how unfair this subsistence battle really is. On one hand the village hunter has to fear the taking of traditional foods and on the other hand a corporate giant can afford to pay three billion dollars for the problem to disappear. But the oil spill was just another blow for our people. Just another part of our culture that keeps [indisc.] We always knew before the oil

spill that we had the blessing of living off the land, like Eleanor McMullen in [indisc.] said, "When the tide was out the table was set." Now there is doubt in everyone's mind how safe the subsistence food really is. This whole question of subsistence is vastly misunderstood by a lot of people.

I hope our testimony has helped you better understand the real concerns for the subsistence users. To me it is a question of dignity. The question of if people will qualify as a subsistence user, this really upsets me because it further erodes the dignity of the Native subsistence user. Just as people who elected you are dependent on your representation, so are we dependent on the Alaska Federation of Natives to represent how we feel on the subsistence issues. We trust them and believe they best represent our views. Please, we are asking that you treat our concerns with dignity. We are the people of the land and we need your support to make sure we are treated with dignity. In conclusion, I would just like to repeat what others hear have said. We are not in support of the Governor's bill, House Bill number 599. But we do support the House bill number 600 and a constitutional amendment. We want to resolve this issue so that it benefits all people of Alaska, the same as you do. Natives and non-Natives alike.

When we sat down to the table, when I was young, we ate the subsistence foods. My mother is non-Native and my father is Aleut. But all of us enjoyed God's bountiful provisions. I have learned from my husband and his family even more about our people's traditional ways. And I am proud to live this way of life in the village of Tatitlek. All the ... [tape ends midspeech]

Tape 92-12

Side A

[Tape begins midspeech]

MS. VLASOFF:

... put up fish before you finish this issue, we want you to remember that we are Christian people and our elders are

praying for you. God bless you and thank you, for your time.

SENATOR KERTTULA:

Thank you very much. Is Mr. Joe Demmert here? A former member of the Chairman's Board of Fish. It's good to see you today.

MR. JOE DEMMERT, JR., SEALASKA CORPORATION:

Good afternoon, Mr. Chairman, Senate President Eliason, members of the state Senate. My name is Joe Demmert, Junior. I am from Ketchikan. I was born in the village of Klawock and resided in the Klawock/Craig area on Prince of Wales until 1952. During that time I had an opportunity to utilize the various fish and game resources in that region. I still utilize those resources today. I've been a commercial fisherman for fifty-four years and forty-two of those years as a boat owner. My parents, my grandparents all utilized the same resources that they taught me to utilize while I was growing up. I've had an opportunity to serve on the state Board of Fish and Game in the early 1970's when it was a joint Board. There were ten members on that Board. I served as Chairman the last three years I was on there in the 1970's. That was a very trying time for the state. The stocks throughout the entire state were depressed at that time. The Board had to take many actions that were not favorable to a lot of the user groups but it was something that we had to do to restore those stocks to what they had been in the past. I think the stocks that you see throughout the state today, were because of the action that we took at that time and the management that had to implement those regulations that we adopted. I also had an opportunity to serve on the North Pacific Management council as a holding member in the early '80's. From 1980 to 1983. And I served on the state Board of Fisheries from 1987, '88 and '89. During this last term on the Board of Fish that we had the responsibility to adopt the regulations to implement 1986 Alaska Subsistence Law. That law was mandated by provisions in ANILCA. That came into being in May of 1986. The Board of Fish and the Board of Game in a joint

meeting in Anchorage, had to put the various communities in rural and non-rural categories since state law did not have any designation of rural or non-rural community. So we had to do the best we could with that part of it. To give you an example of what we did in Southeast, the only two communities that were non-rural in ANILCA were Ketchikan and Juneau. The Board put all the other communities in a rural category. For thirty-one communities that we made findings for, only ten qualified under the criteria that we had to apply in making those findings. So simply being in a rural category didn't assure any community of being customary and traditional user of various fish and game resources in the region. The Board of Fisheries spent endless hours and days coming up with the regulations. We conducted hearings throughout all of Alaska to adopt the regulations, to implement that 1986 law. I sincerely feel that had that law had an opportunity to be utilized by the State that we wouldn't be in the dilemma that we are in at the present time. The example I gave you of Southeast of thirty-one communities, only ten qualified for the customary and traditional use under the criteria that we had to use in making those determinations. The statistics that you hear time and again about three or four percent of the resource being utilized statewide would have been reduced further had that 1986 law with the regulations the Boards of fish and game adopted been able to be used. However, the courts struck that down before we were able to get it into place. I'm looking at where we are today, we have many people that are concerned about the outcome of the state's subsistence law.

I think one of the major concerns should be in providing for the needs of our Alaska residents. And above all, I think we should do everything we can to regain management of our fish and game resources. This is one of the major issues when Alaska pushed for statehood. And to see us jeopardize that today as we have by taking no action, I think is really sad. If you have any doubt about how to accomplish that, then I think it would be

in our best interests if you would vote to get this before the voters of Alaska. I think they should have the final say in how we deal with the subsistence issue. For some, it's a means to an end and a lot of people reside where they do because of the availability of those resources. For others it's tied directly to their culture, the customary and traditional use of the resources that's been handed down for generations.

When you look at where we are today, as far as the state is concerned, we can see our oil resources diminishing. The fisheries industry is probably the largest as far as the employment opportunities are concerned. But in the future, I could see where tourism could surpass even the fishing industry. The big attraction in the state today as far as tourism is concerned is the culture, the lifestyle of the Native residents of the state, is the big attraction. And I think we should do everything we can to sustain that. If it means setting aside a portion of the resources by putting a priority on it to sustain those lifestyles, then I think it's something we should all consider. I think over time, everything will fall in place. I know there's no magic number as to how you could achieve this. But I think if you get it before the residents of Alaska to vote on I'm sure you'll find that a vast majority of them would be willing to put a priority on the resources that are being utilized for subsistence today.

I've been involved with the Native community all my adult life. I've served as a Sergeant at Arms, as a treasurer, as a vice president, as a president of the Ketchikan ANB. I've served on the Tlingit and Haida Central Council for over twenty-five years. I'm just completing my third term on the Sealaska Board of Directors. So I've been involved with people for a lot of years and I know the resources that are available to them are very important to their lifestyle. It's something that we should assure that they will always have available to them. And I know it's a very difficult subject to deal with, however, you have a lot of input from various people throughout the state.

You can see it here. And we'd be glad to help you in any way we can. But I think the main issue is to get it out before the residents of Alaska to vote on. Thank you very much.

SENATOR KERTTULA:

Thank you very much, Mr. Demmert. Mr. Don Mitchell, can you come forward. There's been a request among the senators for an opportunity to ask a few questions of counsel and I think Mr. Cohen's here someplace too. But anyway, counsel to AFN about legislation. Subsequent to this which we will try to unfortunately control the time of just because we got to get along with the show. We'll bring back the bill then before you. If you have amendments, we'd ask that you have them ready so we can get them typed up and we'll take up the bill. I am concerned about providing for some method of hearing or for introduction of statements by every member that has come so far. As I've said, I've had your experiences when I went back to Congress. You wait for days, and sometimes you don't get to testify. Tomorrow we'll take up some testimony. If possible, I'll do it later this evening for those that can remain here among the senate. Mr. Mitchell, I think there are some questions. If you have an introductory statement, you're welcome to take the floor at this time. [indisc.] Chair if for questions of counsel. He's distinguished, knowledgeable and certainly an expert in this whole area. You have the floor.

MR. DONALD MITCHELL, ALASKA FEDERATION OF NATIVES LEGAL COUNSEL:

Thank you, Mr. Chairman. For the record, my name is Donald Mitchell. I'm accompanied this afternoon by Eric Smith who is another lawyer who's been actively involved in recent years litigating a number of cases that were discussed by the administration this morning. I do have a brief statement. For the last three days, the committee has spent considerable time attempting to determine what the facts are here and what the law is here. And how various policy decisions that they might or might not make during the balance of this week, might affect the law and the facts. There has been some confusion about all of

this and I - with all due respect to the administration, I would question whether or not the administration's performance this morning necessarily helped clarify just what the law is. It is difficult to discuss this issue quickly, as you know. It is a very complicated factual and legal situation with a long history. But I would make two or three brief observations. And Mr. Smith might have something to say then we're certainly available for questions.

SENATOR KERTTULA:

Thank you.

MR. MITCHELL:

The first observation I would have is that in 1990 when the Legislature first addressed this issue, the policy problem that this Legislature identified was the loss of state management. That was the major issue in the 1990 regular session. The major issue in the 1990 special session during the last gubernatorial election the Governor, when he was a candidate, when he talked about this issue, he said the major problem was the loss of state management. When the Governor's Advisory Committee was formed the issue was defined for the public as the public policy issue was the loss of state management. And now we find at the end of that process that suddenly the loss of state management is not the public policy issue at all. And in fact, the virtue of the Governor's bill is that we were told this morning that it does not return state management. I would just point out for the record that that may or may not be the policy goal, but I would like to note that the theme keeps shifting under the shell as to what the objective of this endeavor is.

Now in that regard you have been told by a number of people, including the Department of the Interior most recently, that the actual likelihood of Congress being going to substantively amend Title 8 of ANILCA is precisely for the present time absolute zero. There has been nothing in the record that has contradicted that assumption all week. Nevertheless, there has been a variety of discussion talking

about how terrible ANILCA is and why it is therefore the Governor's bill is a virtue because it does not comply with ANILCA and return state management. Those arguments having been made, it appears to me that we are electively drawn into at least a brief discussion of why ANILCA exists and the issue of whether or not as a matter of state policy would be the end of the world if the state were to again come back into compliance with ANILCA.

There was a lot of discussion by the Attorney General, that to comply with ANILCA would be knuckling under to the federal government. Mr. Lenzini represented to the Senate that ANILCA compliance would put the state back into the yoke of federal control. And those are all, with all due respect, illogical arguments. The fact is that while the State of Alaska doesn't like it and all of the other forty-nine states don't like it any better than this state does, federal government speaking through the Congress since, as early as 1913, has been able when it feels like it, when it thinks that the national interest requires it doing so, to supersede state regulation of fish and game and to lay down the rules pursuant to which state regulation will occur.

When Alaska became a state, federal government had been managing the taking of migratory water fowl since the early 1900's. This state did not get authority to regulation hunting of ducks and geese at statehood. The Alaska Board of Game for the last quarter century does nothing except implement the rules the federal managers decide upon. The federal government sets the seasons. The federal government sets the bag limits. And the Alaska Board of Game takes those instructions and in Alaska adopts regulations and implements them. I'm not saying that all the federal regulations are a great thing. In fact, we've been working for years to get some of them changed. But no one has ever alleged that the federal government did not have the authority to create that arrangements. Or that that is somehow an unfair takeover.

Prior to 1972, the Alaska Board of Fish and Game and the Board of Game, managed all hunting of marine mammals in Alaska. If you wanted to hunt seals, if you were a villager, you had to do it pursuant to state regulation. In 1972, Congress exercising it's judgement of public interest, took that over and said we think that there is a federal interest in marine mammal regulation. And they took away from the State of Alaska the authority to manage marine mammals. They set the rules. They did that only for Alaska, but for every other state in the union. There is no discussion that Congress did not have that authority or that somehow this is a terrible result with respect to state rights. If the State of Alaska is ever going to get back regulatory authority of marine mammals it will do so only by coming up with a management program that is consistent with federal guidelines that I, representing AFN and the state administration, assisted Congress in negotiating back in 1981. There has never been any discussion that that is knuckling under to the federal government or being in the yoke.

I could go on and on. But the point is is that if what this debate is about, is whether or not somehow the State of Alaska is going to knuckle under to the federal government with respect to fish and game management, that is an issue for better or for worse that has passed us by in legal history. It is over.

Now with respect to why we have ANILCA. From January 1960 until the passage of ANILCA -- I'm sorry, until 1978 when the state subsistence law passed, for eighteen years, the Alaska Board of Fish and Game and later the Board of Game, the Board of Fisheries were authorized by you and the House to adopt whatever regulations that did in it's discretion thought necessary to take care of everyone. Whether it was subsistence people, whether it was commercial fisherman or it was sport fisherman. And as you know without going into the record, many people who lived out in the villages thought that after over a decade of completely unfettered authority that the state regulatory bodies

were not treating them fairly. And I will not go back into the long bloody history of that but that was basically the situation. After the Native Claims Settlement Act passed, it was the federal state land use planning commission of which this state government was an active member, if you look at their early reports to Congress about ANILCA that first suggested that maybe Congress should visit this area in national interest. It was not the environmentalists. It was the federal state land use planning commission. Now when Congress decided that maybe this was an appropriate subject to include in ANILCA, it didn't ask Moses from the sky to bring out the rural subsistence priority. Where did that come from? The rural subsistence priority that we were told is such a terrible public policy was invented by the Alaska Board of Game in 1976. When the West Arctic caribou herd crashed in 1976, it was the Alaska Board of Game that adopted, for the first time in state history as an act of its discretion, a system for allocating the animals that were available up there. That system is set out in a regulation that is printed, this is a lawsuit that ended up being called State v Tanana Valley Sportsmen, it's downstairs in public and Pacific second and in that opinion it was published the regulations that were at issue in that lawsuit. Those regulations in terms of the way they worked are nearly identical to what Congress codified in ANILCA. Congress looked to the Alaska Board of Game and said as public policy what would be the way to handle this very difficult issue? And they took the Board of Game regulations. So to say that somehow ANILCA is bad public policy or is unfair, if people do not like it, with all due respect, the bone they have to pick is with the Alaska Board of Game. It is not with United States Congress.

Now the next to last point is that when ANILCA was adopted, when the process for ANILCA was ongoing there was considerable discussion in Congress about how would this priority be enforced. And the House of Representatives set up a bill that said that at any time that the Secretary of the Interior in his

judgement thought that the state Board of Game or the state Board of Fish was not implementing the law in good faith that he could unilaterally just take that over. Senator Stevens objected to that and there was a provision in the Senate bill that said that the gentlemen that you talked to today would do that job. That if the state Board of Game and the state Board of Fish was not adequately implementing the law, the federal subsistence law, then Mr. Suberg would basically go sue the Alaska Board of Game. And that was viewed by the Senate as the best way to do it. When ANILCA was being brought to closure, there were a variety of people for a variety of reasons that are too long to go into, who thought that neither of those approaches were very good. And so what they did, is they said, well look. If the state is going to comply with ANILCA, then let's have a federal forum in addition to the state forum for people who think they got a raw deal to be able to make that case. Now, Senator Sturgelewski, I know has expressed a lot of concern about that and has talked about the micro-management of our fish and game resources by the courts. But to a certain extent, it overstates the issue in my legal judgement. All of these lawsuits, Mr. Starkey and Mr. McNeil will join me as well. Mr. Starkey, like Mr. Smith, has also been involved in actually litigating this thing. All of these cases have come up where people rightly or wrongly believe that either the Board of Game or the Board of Fisheries has purposely not obeyed the law with respect to making a particular decision. Or that they tried to obey the law but the facts on which they made their decision, just simply weren't there to support the decision that they made. Now if ANILCA did not exist, they would be willing -- they would be able to right now to go into state court to get a state court judge to see what he or she thinks about that. There is no way you are ever going to stop lawsuits or judgments having that kind of review. The only issue is whether or not it was appropriate for Congress to [indisc.] in addition to asking Judge Katz or the judge up in Kotzebue if you can also go into

the federal courts, if you think that is appropriate, to ask them to review the same record. That's the only thing that's really going on with this purported federal management by the courts. Now that is not an unprecedented thing to do. I'm not an expert employment lawyer. For example, the federal government has come in and said, that if you believe that you have been discriminated against in employment, you can either file a lawsuit in state court [indisc.] or we will create a federal cause of action for you and you can go into federal court at your discretion. You decide. You're the person that's been [indisc.] You think which is best for you. But what has gotten mixed up this morning in my judgement is that the administration attorney's I think perhaps unintentionally confused when they used the term federal management, the issue of would you rather have the Alaska Board of Fisheries making decisions about our fishery resources and then having those decisions reviewed by judges when Alaskans -- these aren't people from out of state -- when Alaskans believe that maybe a mistake has been made. If you'd rather have that happen by judges that would include potentially federal judges that in the first instance have most of these decisions made by our state regulatory Board. Or would you rather keep on with the present system we have now, but having a bunch of federal bureaucrats become the Alaska Board of Fisheries. And then you can take comfort in the fact that supposedly the jurisdiction that these bureaucrats would exercise is so narrow as to be inconsequential. Which is frankly is startling. Pardon me.

But that is the public policy issue and that's why I think it's worth repeating here in some way. The issue is not the issue of how you feel about federal management. It is the choice, for better or worse, between having the regulatory activity performed by our state Boards subject to judicial review that would include that at the option of grieved Alaskans a federal judge looking at that record or would you rather have, because you feel so strongly that that's just such horrible

public policy you'd rather have the present situation that we have with federal bureaucrats taking the place of our fish and game Boards. And that, of course, to judge that question leads me to really my last major area.

And that is the whole business about fisheries. You were told this morning that not complying with ANILCA was a great deal because, what the heck, we still have unfettered, -- in other words, we don't have to obey - we don't have to have these federal judges exercising oversight over our decisions related to the game we have left plus all these fisheries. Wouldn't it be terrible if we had to submit to ANILCA and have federal judicial review of Board of Fisheries decisions again with all of our fisheries. While that presupposes, there is an assumption in that representation that there was a request [indisc.] by Senator Duncan. And that assumption was that that's true. That the federal jurisdiction does not reach to a lot more fishing activity than the present reach as we now sit here this afternoon. Now, that is a very complicated issue. I could testify on that issue for an hour and I'm sure probably half the committee is already tired of listening to me. But I will say this, that both Senator Duncan and Attorney General Cole and a number of other members of the Senate tried to pin Marty Suberg, the chief lawyer for the Department of the Interior down, just on the issue of Southeast Alaska. And he was like a, with all due respect to my old friend Marty, a trout frying in a campfire skillet, in terms of attempting not to definitively answer that question. And we believe, and again, I won't go into our legal reason as to why it's true, but we believe that both this whole, who owns the land thing is a complete mistake which is what we're litigating in Katie John right now. But what Congress really intended was just that all the waters regardless of who owns the ground is really the proper result. And that even given Mr. Suberg's best case, that assuming that he is correct, that Congress only intended the ANILCA regulation to fly to

water that flows over land that is owned by the federal government. That even under that scenario, giving him his best case, that areas like all the inland waters of Southeast Alaska, like all of Prince William Sound and areas where Senator Duncan has correctly indicated that the regulations say that they're not asserting jurisdiction, quote, "at this time", close quote, that there is nothing in the text of ANILCA that Mr. Suberg can assert jurisdiction over some areas when he feels like it and not others. That is a misimplementation of the statute.

Now, I've already gone much longer than I intended. As I indicated -- as you are well aware, these are very complex and difficult questions and certainly I would be willing to answer any questions. And I'm sure that Mr. Smith and Mr. Starkey and Mr. McNeil may have other ...

SENATOR KERTTULA:

I have one question and I have not abused this privilege. Then Senator Adams and Senator Halford. The administration through Mr. Campbell has characterized their bill as being two hundred percent at one time and another time it's 300 percent better than the present. Also they have strongly stated -- state strongly that definitions are a major problem and the definition are currently defined or at least better defined in the proposed legislation of administration. Would you care to briefly comment on, first the definitions as an improvement that it's a valuable tool. And two, why in your opinion they might see it as two hundred or three hundred percent better than the present situation. And I realize, maybe somebody does [indisc.] interior. I mean that's a whole.

MR. MITCHELL:

Yes, Mr. Chairman. As you know in developing statutes for the state Legislature that legal drafting and the meaning of words -- every word really has no meaning except in context of what the Legislature has intended through it's use of words and what Congress has intended through it's use of words, get's to be a very complicated business. In enacting ANILCA, Congress

used terms like "rural resident", "customary trade", "customary and traditional", all those kinds of terms. And did not define many of them. "Subsistence uses" was defined as a term at large [ph] "Family" was defined was a term at large. "Barter" was defined as a term at large. But not of all of the important terms were defined.

Now at the time that that was done, there was a section of ANILCA that was specifically put into ANILCA -- I'm sorry I don't have ANILCA in front of me. But I believe it is section 814, that specifically authorized the Secretary of the Interior and the Secretary of Agriculture to adopt regulations to implement Congress's [indisc. - paper shuffling] title. And that -- the assumption was at the time, that the Secretary's would have a rule making and terms like "customary trade" that assume [indisc. - paper shuffling] legitimate concern, would be defined. That the term "rural" would be defined, and other of the operative terms. That was never done, frankly. What happened was that the federal administration was involved in ANILCA which was the Carter administration, as you know left office immediately after the signing of ANILCA in January of 1981. The new administration for a variety of reasons never wanted to get involved the messy business of engaging in that kind of rule making. And we all know today, I think it would be a fair legal statement to say that they were penny wise and pound foolish. And so as a result, in terms of for example the Kenaitze decision. Regardless of how you feel about the result of the Kenaitze decision, the reason that the court had to decide what it thought the word "rural" meant was because it had had no guidance from the federal agency that had been charged by Congress with responsibility for guiding them.

It's the same situation with "customary trade". As a result of all this federal takeover business, sort of kicking and screaming if you will, the federal departments have had through the federal rule making process, to finally engage in that kind of rule making and define these terms. And now we

have in the federal regulations some terms about what they believe Congress intended the word "rural" to mean. What they believe Congress intended the phrase "customary trade" to mean. If you get management back, those kinds of regulations would still be helpful to keep on the books. And I'm not saying there is a lot of room for improvement with respect to the kinds of regulations that would relate fairly and describe "customary trade", for example. And you do not need to amend ANILCA to do that. You can have in a less heated environment, people of good will revisiting these issues. You do not have to go through the committee process that we've been told by Mr. Suberg is impossible.

With respect to your second question, Mr. Chairman, about why the administration bill would be viewed by administration spokes-advocates for that legislation as two or three hundred percent or whatever the percentage was better than either, I guess, the present situation or the Bush Caucus bill or whatever is, I am at a loss to know the basis upon which they reasoned to that result. Obviously, all of us here represent clients whose policy goals are really quite adverse to the Governor's at this time and so therefore, we certainly -- it would be legitimate for many members not to view us as fair brokers on this. But to the extent you would like to indulge us that presumption, we have looked at all of this legislation long and hard and we certainly do not see any basis for representing to either you or to the House, that that is in fact the level of improvement you would get from the Governor's bill. And we believe, frankly, that the Governor's bill, for a variety of reasons that again are just too long to go into, would be a step back in a technical level on a whole variety of grounds. And again, if someone is interested in exploring our reasoning, I'm sure we'd all be happy to do that. But that would be a very ambitious endeavor at this particular time.

SENATOR KERTTULA:

Thank you. Senator Adams.

SENATOR ADAMS:

Just a couple of questions, Mr. Chairman. In my opinion, this bill does not comply with ANILCA and it does not solve the problem of subsistence. But reading the piece of legislation, does this bill in any way affect ongoing litigations or lawsuits that have to do with fish and game Boards at this present time? And if so, which ones?

MR. MITCHELL:

I would like to, in terms of the present ongoing litigation, I'd like if I could to defer that question to Mr. Smith and Mr. Starkey, if I could. Because they've been involved in lawsuits.

SENATOR KERTTULA:

To the chair, please proceed.

MR. ERIC SMITH, ATTORNEY:

Thank you, Mr. Chairman. In a direct way, I believe that this legislation would affect the Morry case in two respects. The Morry case was a case brought on behalf of an individual in Anutuvik [ph] Pass who was cited for taking a bear and not returning the skull of the bear to the village for tagging and sealing by Department of Fish and Game. There is a Inupiat custom that has been extensively written about by the Department of Fish and Game, subsistence division that it is culturally inappropriate and disrespectful to the bear to bring the skull back to town. That the skull is to be left in the field. This is a custom that is also used in the Upik area. Mr. Starkey represented some interveners in that case. Two principle issues in the case were, number one, the so-called all Alaskans policy which I know you've heard a lot about. And number two, whether the state regulations were required to be in some manner consistent with Eskimo customs and have the least adverse impact upon those customs. Obviously if the Governor's bill will answer the first issue as to the all Alaskans issue. But it will also address the second issue. The least adverse impact consistent with village customs issue. And what it will do is

it will overrule Judge Jeffery's decision. Because Judge Jeffery stated that as far as under his interpretation of the state statute and under his interpretation of the federal statute, that least adverse impact consistency with village customs and traditions is an integral part of the statute. The current -- you might distinguish it by saying that the ANILCA and the '86 law mandated respect for those customs and traditions. The Governor's bill makes them a relevant factor, which means it's within the Boards discretion to essentially not follow them if they felt it appropriate. That is probably one of the most important cases that this bill would change.

All of the all Alaskan policy cases of course will be affected by this legislation. I think Mr. Campbell and the state administration made it very clear that they seek to overrule the cases involving customary trade. The other case that comes to mind for me and I'll turn it over to Mr. Starkey because I'm sure he can think of others, are the Kluti-kaah and Sleetmute cases which involve what the phrase "reasonable opportunity" means. And in those cases, again, the courts have been struggling to tailor season to meet village customs. In other words, what the Board of game, in the case of Kluti-kaah imposed a seven day moose hunting season for subsistence hunters in the Copper River area. And Judge Katz recently issued an opinion extending that to thirty days as more consistent with the customs in that area. Again, this bill would weaken the ability of subsistence users to make the argument that the state Board of Game regulations should be consistent with what traditional hunting practices are. And this all goes back, frankly, to the Bobby case which I'm sure you've all heard a great deal about. I think there is no doubt, and I think Mr. Nelson testified as such that the Governor's bill would diminish the central role of village culture and make it a relevant factor and in that respect the bill does seek to overturn the Bobby case to some extent by increasing the level of discretion that the Board would have.

And I'd just like to add, Mr. Chairman, that it has been an irony in my practice in this field -- I have done a lot of administrative law in the years that I've been practicing as well as -- beyond just subsistence law. And what we have discovered in litigating subsistence cases in the state and federal courts is that the federal courts have employed the usual highly deferential standard of review in reviewing administrative agency decisions. They are very deferential. the state courts do not employ as deferential a standard of administrative review. Maybe, I know it gets complicated but the concrete example would be Judge Holland in the Katie John and the Lime Village cases made it very clear that he was going to review the regulation on the record developed by the Board of Game, and the Board of Fisheries. The state courts under a case entitled State v Ebert which was decided by Judge Singleton in the Alaska Court of Appeals, he's now a federal court judge. Stated that the Board of Fisheries was not confined to the administrative record. And that's a very important distinction in administrative law because essentially it enables the judge to step outside what the Board did and to evaluate factors extrinsic to that and therefore is a less deferential manner of administrative review.

**MR. CHRIS MCNEIL, CHAIRMAN, ALASKA FEDERATION OF NATIVES
LEGISLATIVE COMMITTEE:**

Mr. Chairman, I'm Chris McNeil. I'm Chairman of AFN legislative committee and I had a couple remarks, if I could, on the same subject.

SENATOR KERTTULA:

Please make them brief, because time is [indisc.].
Proceed.

MR. MCNEIL:

Yes sir, I do understand. I just wanted to follow up on these remarks to the extent that while there may be an attempt to reverse some of these cases through legislation, I think the fact is, it will create just more elements of existing

litigation and cause more uncertainty in each of these areas. We weren't here to say our lawyers are better than their lawyers or anything. I think our message here in the litigation is to explain them just as clearly as we know how and secondly just to make a point that even the Native perspective, policy making by litigation is a very uncertain business. There have been cases that have come up and argued favorably to the subsistence users and some that have not. It is our belief that with the Governor's bill alone, that this method of dealing with public policy will just continue and will cause us further difficulty down the line. In respect to both the navigable waters issue and the customary trade issue, neither of those issues are closed today and as those issues are disputed in the courts, they will come down one way or the other. What we have seen is that when they come down, there's a tendency to solidify those positions and parties tend to go to their corners and say exactly where they are. That's public policy by chance. I think that our reason for being here is really to make our point of view that we think that it's better for the state Legislature to be making this policy and recognize that it would have to be on some kind of compromise basis in order to get the. But we're prepared to do that. But we think that the alternatives may work out for the Native community and subsistence users in some cases, recognize that will not always be the case.

One of the other things that I think is also ironic about the poking at the federal courts and the federal oversight is that, at least I find it ironic, that this poking is at many judges who were appointed by a very conservative, at least in my view, a very conservative executor. These are the people, that I think are by and large, are take a very particular view of statutes and constitution and yet they have come down in their decisions in many different directions. Thank you, I do appreciate the time.

SENATOR KERTTULA:

Thank you, Senator Adams.

SENATOR ADAMS:

One question. Would you tell us about the different between the two bills -- between the Governor's bill and the Bush Caucus bill regarding hunting and fishing for subsistence use, and I'm going to use a couple of the urban areas, Fairbanks, and Anchorage and maybe Kenai. Tell me the differences between the Governor's bill versus the Bush Caucus bill so we have an understanding of the urban.

MR. SMITH:

Thank you, Mr. Chairman. Fairbanks and Kenai, Senator Adams?

SENATOR ADAMS:

And Anchorage.

MR. SMITH:

And Anchorage. Under the Governor's bill, a person in Anchorage, Fairbanks or Kenai who met the seven criteria in the bill, each would have to prove to the department that they met those criteria. If they did meet those criteria then they would be eligible to go subsistence hunting or fishing in what -- I can't really describe it other than to say rural areas of the state. So, for example, an Anchorage hunter would be authorized to go hunting moose or caribou in unit thirteen if he or she qualified as a subsistence user in that unit. [tape ends.]

Tape 92-12

Side B

[Tape begins]

MR. SMITH:

A Kenai hunter or a Kenai fisher person who qualified as a subsistence user would not be eligible to hunt or fish on the Kenai Peninsula. But rather would have to go somewhere else. For example, they would have to go across the inlet and take a moose in Tyonek in competition with the hunters there. I should add that it may be difficult under the Governor's bill for an urban person in Anchorage or Fairbanks, actually to qualify because one of the criteria is use in a particular subsistence

unit -- subsistence use area. And it may be very difficult for a person to do all of the activities over the time period required in that particular subsistence use area.

Under the Bush Caucus bill, a person living in Anchorage, Fairbanks, or Kenai again would have to follow some kind of -- would have to meet some kind of eligibility criteria. Those are defined in the bill as either membership in a group with the custom and tradition or a person with the criteria developed by the Boards. Should a person be so qualified, if they live on the Kenai Peninsula, they would be authorized to engage in subsistence uses on the Kenai Peninsula because the Bush Caucus does not contain that limitation. A person in Anchorage or Fairbanks, would be authorized to engage in subsistence uses in other areas but it would be secondary priority to rural uses.

SENATOR KERTTULA:

Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chairman, I'm just trying to figure out. One of the things we'd heard from the state's attorneys was this concept -- the same concept involved in the case of the Bobby case of least adverse impact. I wonder if either Eric or Don would kind of comment on just exactly where you think is going and how it applies and then I've got another question.

MR. MITCHELL:

Certainly, Senator Halford, section 802(1) of Title 8 of ANILCA states as a policy as Congress's policy that the quote, "utilization" close quote of public lands to cause the least adverse impact possible on rural people. It was interesting today that Mr. Nelson indicated that he did not think that Congress intended that language that I've just described to you to deal with the utilization of fish stocks and game populations on those public lands. A terrible mistake by the judiciary had been made in that regard. Shortly I think that I can speak with some certainty in terms of the intent of the drafters and certainly most of the members of Congress who were involved in

developing that concept that they certainly believe that within the subject of utilization of public lands was implicitly utilization of the fish and game that inhabit those lands. That being the case, then the least adverse impact direction with respect to the exercise of administrative discretion would apply to decisions associated with hunting and fishing. And I would suggest without launching into an impassioned defense of that policy, that it is not necessarily outrageous. So long as we know biologically that you can only take one hundred moose in the Lime Village area by the people of Lime Village, isn't it more appropriate for those citizens who do not have the money out there to have refrigerators where they can hunt in the fall and they have to have a \$2000 refrigerator to store that meat to be able to hunt at a time that least adversely affects their way of life where they can hunt during winter after freeze-up and they can store that meat. I mean isn't that good public policy. And that's all -- it doesn't say least adverse impact regardless of the biological damage of the resources. It just says be reasonable. You look at these people that the statute was intended to benefit and you say, all things being equal, give them a break. And that's what the Bobby case basically said. it wasn't saying, you know, that the people of Lime Village could do whatever they want. It is an instruction to the regulators to say find out how these people live. And if it's a reasonable to accommodate them, then we think its appropriate that you do so. The Board didn't do it in that situation.

SENATOR KERTTULA:

You have the floor, Senator.

SENATOR HALFORD:

How long did the courts say the season had to be open in Lime Village.

MR. MITCHELL:

I'll let Mr. Smith respond to that.

MR. SMITH:

Senator Halford, in the case of Lime Village, the court