

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
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consider a constitutional amendment, then the debate is moot and we should go on with the legislation before us and not continue the session for days while we keep talking about something that's not in force.

SENATOR KERTTULA:

Senator Eliason.

SENATOR ELIASON:

Mr. Chairman, I think I agree that, number one, there is no short process we're going to deal with it and we'll do it the right way and we'll be here as at least three days. which is fine if we're going to deal with it. On the other hand, I think it's a little bit premature to discuss something that we'll never be able to reach. When we reach that point then we'll vote on it. So what's come first, the egg or the chicken? I don't know. But I think, if we had eight people here or seven people here who do not want to consider going into a special session, it's over. We have fourteen people who do want to discuss it, doesn't necessarily mean we're going to do it. But at least we have a feeling of this body. I think that's important. Otherwise I can see a great deal of wasted time debating things which we can't get to in the end.

SENATOR KERTTULA:

Senator Collins, then Senator Shultz.

SENATOR COLLINS:

One of things we discussed was that without this whole process and at the time we did have our majority caucus we talked about the options that were before us. The options were to deal with the Governor's bill and subsequently make a decision to go back and call ourselves into special session to deal with the constitutional amendment. A lot of that discussion where people kept saying is whatever we do, we have to do it right. We have to make sure that the procedure is appropriate so that if there is any [indisc.] of this that we'll be able to go back and show, shall we say, a trail that makes it very clear that what we did was appropriate and that we did was in order. And that is the

reason I am objecting to taking any action with respect to a constitutional amendment before we have completed the process. And for me the very beginning, the cornerstone of that process is an up or down vote on the Governor's bill. I personally at this point can tell you how I'm going to vote on the bill. But I think in terms of following the process, in terms of doing it right and appropriate for us to move on to a constitutional amendment after we have resolved that matter.

SENATOR KERTTULA:

Senator Shultz was seeking the floor and then Senator Hoffman. Senator Hoffman.

SENATOR SCHULTZ:

I would like just a clarification from the chair on this vote. Is the vote going to be -- is the vote in the motion back if we vote yes that we're saying that we're going to bring ourself into special session for addressing a constitutional amendment? Or is the vote simply for the discussion to take place? I believe there's a difference.

SENATOR STURGELEWSKI:

Absolutely.

SENATOR KERTTULA:

My opinion, the vote is to approach the possibility of an extension of time for a constitutional ... Is that not right Mr. [indisc.].

SENATOR ELIASON:

We're just trying to get a sense of this body and the only way we get a census is ask people whether they want to consider the option of dealing with this issue if, in fact, there's not enough people to even consider it. At least we've made some progress.

SENATOR KERTTULA:

There's no guarantee they'll vote for ...

SENATOR ELIASON:

Exactly.

SENATOR KERTTULA:

... for a bill or for a constitutional amendment. But it is a vote to see if it's even worth pursuing.

SENATOR ELIASON:

But I can assure you we're going to do what we have to do in a legal way. We're not making any shortcuts. We're just getting a feeling of this body is all.

UNIDENTIFIED SPEAKER:

It's going to take two votes to get there.

SENATOR ELIASON:

We're going to take a number of votes to get there. We have to take this first step.

SENATOR KERTTULA:

Senator Cotten.

SENATOR COTTEN:

I think I agree with you Mr. Chairman. I think the one way to view this would be to consider the -- how the vote might come out if it were phrased in the negative. And I think that this vote happens to be in the positive, yes we shall. But it could just as easily been in the negative, no way. And if there are set of votes for no way, Then that's it.

SENATOR KERTTULA:

You Have the floor, Senator Hoffman.

SENATOR HOFFMAN:

Thank you, Mr. Chairman. I guess I would support the motion and I would beg to differ with my colleagues, Senator Collins, just because the Governor put something on the table during the normal session or during the special session, it's [indisc.] and I think we should be -- we have a problem here and we should look at any and every tool possible and consider them to resolve the problem. I think we owe that to the citizens of the state we don't owe the Governor a vote on his bill. In fact, if we come up and deal with the issue without even voting on his bill and resolve the problem, then I think the people of this state will be satisfied. The issue here isn't the Governor's bill, it's the people -- it's the services this state is providing to the people

of the state.

SENATOR KERTTULA:

Senator Uehling then Senator Pearce.

SENATOR UEHLING:

Thank you, Mr. Chairman, I assume also in the discussion that we're talking about [indisc.] discussions are going to go on until five o'clock ...

SENATOR KERTTULA:

Nothing takes place by five or so, we will have some hearing and so on. Senator Pearce.

SENATOR PEARCE:

Thank you. In respect to Senator Hoffman, during the regular session the Governor did put something on the table. Ask the Governor [indisc.] those bills all were in Senate Finance where Senator Hoffman sits at the end of the session. We should have dealt with it then. It's not -- you know, there's a number of people at this table who ask [indisc.] subsistence before we left the regular session and no [indisc.] at the will [indisc.] Governor has called us back and put something on the table [indisc.] that we should now expand to the global realm. [indisc.] special session when [indisc.] and I just [indisc.] Governor asked us [indisc.].

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, Senator Sturgelewski.

SENATOR STURGELEWSKI:

I would I guess plead, which is not too strong a word, for the opportunity for us to look at with a time certain and I appreciate Senator Schultz asking for that. So that we can look to see if there is a way to move forward. It's -- we didn't do this during the special session but it's not an unusual thing. You know, I spent -- the very first time I came down here, and you'll forgive a little memory lane, here, but the first thing we took up was the mental health issue. We not only not solved it

but it has become more complex. It never becomes less complex. We are a consensus body. And it's been very difficult to reach that point of consensus. But there's nobody else that can do it. We're the only ones. And for us to stop the debate and not look at some possible way -- I understand there are conversations going on between bodies outside that affect this. But you see, that's part of the process. There is a process going forward where people are becoming more aware of the implications of this action or that action. So let's go just a little bit longer. I don't think it's going to be history, that's going to say, well, my god, you took twenty-four more hours to do it. That's not what they're going to say. They're going to look and they're going to judge by the number of court cases and the number of problems that ensue from lack of a decision. Maybe we can't come to that but I think there are the seeds at least of a way to move forward.

I'm really proud of the Outdoor Council. I think they came a long way. I think the administration did a good job in a lot of thorny areas. But there are still some problems. Let's not cut off the opportunity to solve those other problems. I would hope there's a vote to move it in.

SENATOR KERTTULA:

You have the floor, Senator Rodey.

SENATOR RODEY:

Let's be decisive. I call for question.

SENATOR KERTTULA:

Question is called for. Senator Menard.

SENATOR MENARD:

Mr. Chairman, now are we voting for what? Are we voting to say that we will ...

SENATOR KERTTULA:

Senator, would you please reread the motion and express it.

SENATOR POURCHOT:

The questions would be, "Shall the Senate consider the question of a constitutional amendment?" I've heard a couple of interpretations but [indisc - laughter].

SENATOR KERTTULA:

Just until currently about five o'clock so we proceed at that.

SENATOR MENARD:

Just for discussion and it's not saying ...

SENATOR KERTTULA:

That's right. There's no commitment beyond that. Senator Collins, you were seeking the floor or are you waiting to ...

UNIDENTIFIED SPEAKERS:

Roll call.

SENATOR KERTTULA:

Roll call. We have Lorraine ready to call the roll. You have the floor.

SENATOR HALFORD:

If this motion is for discussion, obviously a simple majority says we're going to continue [indisc. -cough]. If this motion is to say that we're going to start the negotiate and work on the process of getting into an open special session, then to be effective it requires fourteen votes.

SENATOR KERTTULA:

I think frankly the fourteen vote is a symbolism here that's understood. I think that's what we're after. Question is -- Senator Shultz.

SENATOR SHULTZ:

My understanding is that's exactly what I was trying to get to Senator Halford was the fact discussion is one thing okay. Putting it before this body in the same form of a motion that it's going to -- for the discussion purposes it should only take eleven people, okay. If we're talking about putting a constitutional amendment with the idea that we are, in fact, going to bring ourselves into -- adjourn and come back into a special session, then that's a fourteen vote. It's different. What I was talking about was discussion -- for discussion to take place on the constitutional amendment till three or four o'clock this afternoon. That's it. And I wouldn't be [indisc.]. But

[indisc.] if you're asking me to vote on a constitutional amendment right now, I'm no.

SENATOR KERTTULA:

We certainly have no commitment to constitutional amendment. Incidentally, I've just been informed and I don't have a lot of experience to Committee of the Whole, we do not take roll call votes of the Committee of the Whole so it will have to be count of you raising your hand. The way we do it. Senator Fisher, seems to have a point here.

SENATOR FISHER:

Thank you. My concern is all during the four days when an issue came up regarding a constitutional amendment by everybody there was no objection. So in essence it was discussed. Now if we want to continue discussing it, we don't need to vote at all. And if people don't like discussing it we can walk out. But we don't need to vote. In my mind, if we're voting then we're voting for a constitutional amendment or we don't need to vote at all. And if that's the way [indisc.].

SENATOR KERTTULA:

There is a solution. I just request that Senator Pourchot's vote be adopted by unanimous consent. I don't see any objection to what we're proceeding with here.

SENATOR POURCHOT:

If it is for discussion purposes, I have no objection.

SENATOR KERTTULA:

Discussion or some negotiation. But discussion first.

SENATOR POURCHOT:

Well, discussion is different than negotiation.

SENATOR COTTEN:

You bet.

SENATOR POURCHOT:

I do not believe there are the votes here to go forward and call a special session.

SENATOR KERTTULA:

Senator Adams seeks the floor.

SENATOR POURCHOT:

If the votes are not here, then it's a waste of time.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS.

Thank you, Mr. Chairman. But all we want is the sense of this particular body. And to get a sense you need a count and I'm just going to ask for a procedure clarification from our legal. If Ms. Cook can tell us the sense of this body should be not by roll call?

MS. TAMARA COOK:

Mr. Chair, Senator Adams. On the Mason's manual, a Committee of the Whole does not topically use a roll call vote.

SENATOR KERTTULA:

We don't have to worry about Mason's manual.

MS. COOK:

Right. If the body prefers a roll call vote for whatever reason and there is no objection to that, obviously the procedural rule has been suspended for the purpose of this vote.

SENATOR KERTTULA:

If it's just Mason's manual ...

SENATOR ADAMS:

Thank you, ma'am, and the way I read the motion by my colleague, it's only for discussion purposes. It's not for an extension and it has no commitment on anything. That's the only thing was for discussion.

SENATOR KERTTULA:

I'm going to ask for a roll call under those circumstances. I [indisc. - simult. speech] no objection. Unanimous consent rules. We'll proceed. [indisc. - simult speech] You have the floor, Senator Cotten.

SENATOR COTTEN:

We didn't do anything. Now, the motion that should -- for those who have decided that they are going to reject a constitutional amendment under every circumstance, I would

appreciate a motion from them to put a motion on the table that says, no way to a constitutional amendment. And if there are seven votes for that, we should know that. That's what I'd like to get to. If there aren't and I've got it written down here in today's jargon, way or no way. And if you think maybe you can vote for something, then say, way. If you already know it's no way, then let's have a no way vote. We won't waste five more hours.

SENATOR KERTTULA:

It's a slight nuance. There is a motion before us strongly suggest precisely that, so we have to vote on it. I will entertain it.

SENATOR COTTEN;

The positive motion didn't seem to get us anywhere and I don't want to make the negative motion. So, apparently we're not going to get anywhere.

SENATOR KERTTULA:

You have the floor, Mr. President.

SENATOR ELIASON:

Mr. Chairman, I really don't know how to proceed. But I do know that we're going to have to put some time constraints on what we're doing. I would ask the chair that we go into official vote at five o'clock this afternoon whether or not we have fourteen votes to call ourselves into session. Between now and then we should talk about what we're going to deal with if we do that. We can waste that much time if we want to. But I would hesitate to go beyond that.

SENATOR KERTTULA:

Well, five was the deadline for any action. I don't mind doing it earlier.

SENATOR COTTEN:

That's fine with me. I think that's a good idea.

SENATOR KERTTULA:

What time is it now?

SENATOR COTTEN:

Noon.

SENATOR KERTTULA:

It's always frustrating getting going when you first start again. Senator Shultz.

SENATOR SHULTZ:

[Indisc. - simult. speech]. Just a point of clarification proceeding on from here, is it appropriate now since we've gone through this dialogue and really haven't accomplished anything to go back to the original motion of moving the bill from the committee -- it goes before the Finance committee. It still has - and get some kind of consensus to get that bill out of here. In the meantime, we're addressing between now and five o'clock we're going to be addressing whether there's fourteen votes here to extend the session on a constitutional amendment. We're going to take a vote on that at five o'clock or in that vicinity.

SENATOR KERTTULA:

I felt ...

SENATOR SHULTZ;:

Is that inappropriate?

SENATOR KERTTULA:

No. I felt these two sort of came down together. The vote about five or earlier on the constitutional amendment and subsequently if that fails immediately into the proposed by Senator Cotten, so that we get moving along. And it's true, while you're collecting your thoughts and your wisdom on the discussion for the afternoon, we'll recess for one hour. We are now recessed.

RECESS

12:05 - 1:20 p.m

SENATOR KERTTULA:

McKie Campbell just called and said he was trying to talk to the Governor and get a Governor direction on this basic position on any of the nuances of resolutions that might set up a constitutional amendment. Senator Pourchot made the motion, I presume, if we are going to use a vehicle, there are six or eight

different suggestions. I would suggest myself that we use the -- I think Senator Pourchot probably had it introduced to you, and I mean for this book. But wasn't that Senate Resolution 57 that you've been discussing. So just -- and you can amend that, change -- which is not really before us. But any way we could use another one, another idea. I suggest we confine ourselves to looking at least for the initial period Senate Joint Resolution number 57. I don't know where our legal counsel is. Attorney General is supposed to be here to respond to questions. Here comes counsel now. If you could sit at the end of the table with all legal counsel. Yes. That's fine. Senator Pearce will be a little late. You will have -- we'll bring on the counsel forward as they come. Senator Adams, wishes the floor. And again, let us use Senate Joint Resolution 57, if we start discussing a specific bill. You have the floor, Senator Adams.

SENATOR ADAMS:

Mr. Chairman, I respectfully ask that AFN's legal counsel be allowed with administration and also our legal counsel to sit up there in response [indisc.], Mr. Chairman.

SENATOR KERTTULA:

Yeah, I have no objections. [Simult. speech on seating arrangements] We do have counsel from the Legislature here. You have the floor, Senator Pourchot.

SENATOR POURCHOT:

I just wanted to make note, just before we broke, you had asked administration also to try to quickly recall the constitutional amendment in line with the limited entry format that I think McKie Campbell talked about. I think he characterized it as the least problematic to them. So we were hoping to get that in the notebooks. Presumably, they were in that folder, also.

SENATOR KERTTULA:

Mr. Campbell called. He was in seeing the Governor to get marching orders. He wanted Senator -- the presiding officer and myself to come down. I didn't think it was appropriate. He

hadn't even talked to the Governor and we didn't -- and I thought we should get this thing going. Not keep it waiting around. I don't know if we've learned that much anyway. There's going to get some kind of a discussion. And he's going to get his marching orders. But I'm awaiting that like you.

UNIDENTIFIED SPEAKER:

[Indisc.] But I must [indisc.] ...

SENATOR KERTTULA:

If the Governor asks us to come, we'll come. Just Mr. Campbell.

UNIDENTIFIED SPEAKER:

Oh, I thought you said he did.

SENATOR KERTTULA:

No, Mr. Campbell requested that -- go through the whole thing. He asked me if I thought that we could come down and meet with the Governor on this issue. And I said, well, we were just starting in the meeting. Would he please talk to the Governor about that issue and come back and get his marching orders. But that we could meet in a couple hours or less if it became necessary. Could be a lot less if it was really necessary. So we don't know -- and I don't know. I did ask the Attorney General's office -- would you call? And McKie said again, the Attorney General would be up here.

Well, are there questions about this suggested amendment to the state constitution that's embodied in Senate Joint Resolution 57? Or is there anything else? You have the floor.

SENATOR DUNCAN:

I just wanted to point out also in the notebook right behind Senate Joint Resolution 57 that Senator Pourchot was going to have introduced, the proposed Committee Substitute for the House [indisc.] 86 is not the resolution out of House Judiciary and House Rules [indisc - paper shuffling].

SENATOR KERTTULA:

And is this it?

SENATOR DUNCAN:

That's it. [indisc. - paper shuffling]. Titled, proposed constitutional amendment for House [indisc. - paper shuffling].

SENATOR KERTTULA:

Yes.

SENATOR DUNCAN:

There a copy [indisc. -- paper shuffling]. Another step.

SENATOR KERTTULA:

How does it differ from the one proposed by Senator Pourchot [indisc.].

SENATOR DUNCAN:

Well, I was so [indisc.] that Laurie Otto or someone else could explain that. That's why we're here.

SENATOR KERTTULA:

Let's request that Ms. Otto come to.

SENATOR DUNCAN:

[Indisc.].

SENATOR KERTTULA:

I noticed they both, of course, you have to read pretty far down and say they both may grant preference.

SENATOR DUNCAN:

We're talking different [indisc.]. I must say [indisc.].

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

Yeah, just things that I'm going to be interested in in terms of any proposed amendments would be, number one, is the Governor's bill as written in concert with the amendment? In other words ...

SENATOR KERTTULA:

Mr. Nelson, please have a seat with us here. I would appreciate it very much if you -- we're not going to try to get arguments between attorneys but you may direct questions. Senator Sturgelewski, if you will proceed again. Pardon me for the ...

SENATOR STURGELEWSKI:

That's fine, Mr. Chairman. The questions I would be interested in hearing asked or answered would be in terms of a constitutional amendment, number one, does the Governor's bill as we have it before us fit under that proposed constitutional amendment?

SENATOR KERTTULA:

While I think these gentlemen are talking, I think we may want to have them hear what you have to say too. They can't help it. They're trying to get organized.

SENATOR STURGELEWSKI:

For the third time.

SENATOR KERTTULA:

I'm going to have you start for a third time charm.

SENATOR STURGELEWSKI:

You'll listen won't you?

SENATOR KERTTULA:

Under that cozy, it really worries me.

SENATOR STURGELEWSKI:

Yeah, well, I'd be worried too. Okay, does the Governor's bill -- is it in concert or does it fit under that constitutional amendment? Secondly, with the Governor's bill, with the constitutional amendment how then do we fair with ANILCA and meeting the terms of ANILCA? What would need to be changed, if anything, with ANILCA to make the Governor's bill -- the constitutional amendments meet the terms of ANILCA? So those are the three things that I would be looking for. Is that make any ...

SENATOR KERTTULA:

I think that's a good place to start. And Lance, if you start and I would ask and if you wish to restate any portion -- they do have you. And then I would ask the other distinguished counsel. And very shortly we'll ask Ms. Otto to explain the difference between the House suggested bill here ...

SENATOR STURGELEWSKI:

Mr. Chairman, we don't need to get into it in that form. But

those are just things I'm going to be looking for.

SENATOR KERTTULA:

They're important I think it's good to start off that way. And I think we will start off that way, without objection. You have something to contribute here at this moment.

MR. NELSON:

Mr. Chairman, could I hear the first question again?

SENATOR KERTTULA:

Yes.

SENATOR STURGELEWSKI:

If we were to adopt either the resolution -- the proposed Senate Joint Resolution 57 or another one, I would like this question answered. Does the Governor's bill as it is proposed -- would it fit under the constitutional amendment? That was the first question. Would it fit under the constitutional amendment that's proposed? And ...

MR. NELSON:

By that you mean the ...

SENATOR KERTTULA:

Legal or ...

SENATOR COTTEN:

You're asking the wrong guy, I think.

SENATOR STURGELEWSKI:

No, I'm just ...

SENATOR COTTEN:

He already -- he thinks the Governor's bill is already constitutional.

MR. NELSON:

I do.

SENATOR STURGELEWSKI:

I know that. But if we put it on to the constitution, then we might be answering to some of us a constitutional question. And does the Governor's bill legal under that proposed constitutional change?

MR. NELSON:

Yes.

SENATOR STURGELEWSKI:

We are changing our constitution, yeah.

MR. NELSON:

There's nothing about the amendments that I've seen that would conflict with the Governor's bill.

SENATOR STURGELEWSKI:

Okay.

SENATOR KERTTULA:

Don? Mr. Mitchell?

MR. MITCHELL:

Yes, Mr. Chairman. I would basically agree with that. Those of us that disagree with Department of Law as to whether or not the Governor's bill is presently constitutional are concerned about the Governor's bill at a technical level is that it does hand out hunting and fishing opportunities based upon where you live. You're entitled to these presumptions or you're not based solely on where you live in the state is certainly a constitutional amendment that gave this body specifically the kind of authority to do that would -- I think Mr. Lenzini testified to the House -- I think I'm correct on this. I don't want to misquote him. But certainly, while they think it's unneeded it would certainly bullet proof, I believe were his words -- the Governor's bill.

SENATOR STURGELEWSKI:

Mr. Chairman, then the next set would be the Governor's bill is in force. The constitutional amendment is adopted and ratified. Then where are we in terms of compliance with ANILCA? What, if any, changes would need to be made in ANILCA, or conversely I guess, in the Governor's bill for us to qualify?

MR. NELSON:

The Governor's bill would not comply with the urban/rural requirement for subsistence priority in ANILCA. You need to either change -- well, if you pass the Governor's bill I think your obvious goal would be to change ANILCA to -- I think we may

have suggested that some earlier language before. We'd like to see a change in section 804(d) that recognized the substance of the Governor's bill as being in compliance with the provisions of ANILCA.

SENATOR STURGELEWSKI:

Okay, that is if we changed -- Mr. Chairman, if I could.

SENATOR KERTTULA:

Please.

SENATOR STURGELEWSKI:

If we have these two pieces in place. And you feel that the major change would be an amendment to 804(d) that would recognize the substance of the Governor's bill as meeting the intent of ANILCA. That's what you said, right?

MR. NELSON:

Yeah. I don't have ANILCA in front of me. I don't know if I've cited the ...

SENATOR STURGELEWSKI:

But Greg would.

MR. NELSON:

[Indisc.] right, but it would be the ...

UNIDENTIFIED SPEAKER:

805(b).

MR. NELSON:

805(b).

SENATOR STURGELEWSKI;

805(b). All right. Conversely then if we go the other way. Mr. Chairman, if I might?

SENATOR KERTTULA:

Please pursue it.

SENATOR STURGELEWSKI:

It seems to me that by the Governor's bill we have made a major step in the number of people that can qualify for subsistence. And it doesn't seem to me that the federal government should care if we have a larger pool, if we just be sure to take care of those people that are, quote, "rural" by some

definition. Would it take an amendment to the Governor's bill to absolutely guarantee subsistence without the potential that the state could come in and challenge someone's residency? It seems like what the Governor's bill does is to do two things. It's used a community standard and then there's an individual standard. Would we have to totally remove -- under the current ANILCA, would we have to remove that standard that is the individual standard? And just have it strictly based on a community standard?

MR. NELSON:

To be in compliance with ANILCA as it now stands?

SENATOR STURGELEWSKI:

Yes. Yes.

MR. NELSON:

Yeah, we have to make the changes.

SENATOR STURGELEWSKI:

In the Governor's bill?

MR. NELSON:

You'd have to go to a rural/urban criteria and any deviation from that and I don't think we'd comply with ANILCA.

SENATOR STURGELEWSKI:

Under this bill, under this constitutional amendment, it would allow us, would it not, to do that? To allow for a rural preference or a discrimination between urban and rural residents. Is that correct?

MR. NELSON:

It certainly would.

SENATOR STURGELEWSKI:

Yeah. Okay. That's fine, Mr. Chairman.

SENATOR KERTTULA:

Do you wish to comment?

MR. MITCHELL:

Yes, Mr. Chairman. I don't want to get too involved in a technical disagreement with Mr. Nelson, but I think in terms of analyzing the ANILCA problem the 805(b) business I don't think is necessarily directly on point.

The real issue, the heart of this debate is which Alaskans, as individuals, will be eligible for the subsistence priority. And under ANILCA, Congress has said that the group of Alaskans that are eligible for the subsistence priority are all those Alaskans who live in rural Alaska. Setting aside where rural Alaska is. The Governor's bill, when you get rid of all the presumptions and all the rest of that stuff, is basically an individual eligibility system. It says, it doesn't make any difference where in Alaska you live in a legal sense. If you as an individual meet these various criteria individually, then you are eligible. And if you don't meet these criteria, you're not eligible. So therefore you can live in rural Alaska and if you don't meet these criteria as an individual you are not eligible. So not in a legal sense in the Governor's bill, not all the residents of rural Alaska will be eligible to engage in this activity.

On the other hand, there will be Alaska residents who do not live in rural Alaska who, in at least a legal theoretical sense, the Governor's bill intends to include within the group of people entitled to this opportunity. The Governor's approach is on the one hand, more narrow than the ANILCA standard in that fewer than all Alaska residents -- fewer than all rural Alaska residents would be eligible. And at the same time it is also more expansive in that more than just rural residents would be eligible. So therefore, in a technical sense, if you want to fix -- to bring all this back into synch the way that Senator Sturgelewski has inquired about, you would have to do one of two things. Either you would have to amend the Governor's bill. If you wanted to make the Governor's bill comply with ANILCA, you have to amend the Governor's bill to get rid of the individual system. And to have the Governor's bill say, the people that can participate in this activity are all Alaskans who live in rural Alaska in the discussion. Or the alternative you would have to amend the definition of subsistence in ANILCA to say that subsistence is an activity that is not engaged in just by residents of rural Alaska,

but is an activity that is engaged in only by individual Alaskans who meet certain criteria. And there's a whole variety of technical ways to do that, that I won't bore you with. But that's the heart of the matter, it seems to me. And then the guys that do the typing, you know, we can ... [tape ends midspeech].

Tape 92-15

Side A

[Tape begins midspeech]

SENATOR KERTTULA:

... or whatever was requested between 57 and 86 or 86 the second draft [indisc.]. Except that's the same as the first. Please proceed.

MS. OTTO:

For the record, my name is Laurie Otto. I'm staff counsel to the House Judiciary Committee. The amendment that's identified is the rule CS for HJR 86. It's different than I think what the state introduced in the senate in a couple of key respects.

Number one, it does not require the Legislature to do anything. It gives the Legislature the authority to adopt legislation granting a preference between subsistence users. That's the second key difference. The original resolution enshrined in the constitution a subsistence priority. The Committee Substitute for HJR 86 does not deal in any way, shape or form with uses of fish and game resources. It only applies to the Legislatures ability to set up preference between [indisc. - cough]. That's the second key difference. Then the third key difference is it does not spell out any particular criteria upon which the Legislature must base its decision. The Legislature has authority within the confines of federal constitutional principles of equal protection and all of the Alaska constitutional provisions other than those that it will specifically identified in McDowell as prohibiting geographically based preferences. But aside from those things, the Legislature can set any criteria that it determines are appropriate.

There is another important element of having the resolution

structured in this way and that is that legislation adopted by this body pursuant to a constitutional amendment if this one passes would be subject to Governor's veto and would be subject to the power of the people through referendum. So it really only is giving the Legislature additional authority but isn't requiring the Legislature to do anything if it doesn't want to. One of the reasons for giving the Legislature this authority is exactly that, when was identified by Senator Sturgelewski and that is that the Governor's bill, and I understand that the Attorney General believes it's constitutional, there's a great deal of debate over whether or not it's constitutional. Certainly there will be extensive litigation over whether it's constitutional. This constitutional amendment would avoid all of that debate because it would give clear authority to the Legislature.

SENATOR KERTTULA:

Well, that's interesting news. Are there questions? You have the floor, Senator.

SENATOR STURGELEWSKI:

Well, Mr. Chairman, I think, that again, I don't want to cut off other people. But I would be interested in the -- if we're just confining it to Senator Pourchot's proposal or if we're now laying the other one kind of before us?

SENATOR KERTTULA:

I would like to just ask questions about what she had to say first. I think that we'll leave both open for questions.

SENATOR STURGELEWSKI:

Well, Mr. Chairman, what I would like would be if it's appropriate to have the same response from the state's attorney ...

SENATOR KERTTULA:

Ms. Otto might well know.

SENATOR STURGELEWSKI:

... or hear as to those three questions that I asked.

SENATOR KERTTULA:

That's 86 now. If you have 86 on the books for her previous

questions. She can restate them if you'd like.

UNIDENTIFIED SPEAKER:

Please.

SENATOR STURGELEWSKI:

Do you want me to restate them? Number one, is the Governor's bill in concert? And I'd guess you'd both say, or all three say yes, right? And two, is it in concert -- is our problem with ANILCA just exactly the same under your proposal vis-a-vis the 57?

MS. OTTO:

I think with the House proposal ...

SENATOR STURGELEWSKI:

Uh-hum.

MS. OTTO:

... the Legislature would need to adopt legislation to be in compliance with ANILCA, although the Legislature could choose not to do so if it didn't want to. So in this proposal, you need to adopt legislation to comply with ANILCA. But legislation that you adopted to comply with ANILCA would also be constitutional.

UNIDENTIFIED SPEAKER:

I think another -- perhaps way to restate, Ms. Otto, is that the text to all three of these constitutional amendments would provide the Legislature the discretionary authority if at a policy level it wanted to enact legislation to comply with ANILCA. All of these various drafts would give you that power. There's different ways to accomplish that goal. This are not self executing, I think was Ms. Otto's point. And therefore, just because you have a constitutional amendment does not mean that you have then complied with ANILCA. All you've done is given yourself the legal authority to then, if wish to comply with ANILCA, you can do that. Obviously right now even if you wished to comply with ANILCA, you cannot.

SENATOR STURGELEWSKI:

Well,...

SENATOR KERTTULA:

Senator Halford, do you have a question or a point?

SENATOR HALFORD:

Thank you, Mr. Chairman. I don't know if this was covered. I had a phone call I had to take. The proposed CS for HJR 86 says, "Consistent with the equal protection requirements of the constitutional of the United states." Why does it not say, "consistent with the equal protection requirements of the constitution of the State of Alaska" as well?

MS. OTTO:

Mr. Chair.

SENATOR KERTTULA:

You have the floor, Ms. Otto.

MS. OTTO:

Okay, Mr. Chairman, Senator Halford. The McDowell decision was, I think, complicated from a legal perspective. There was a majority opinion which was based on [indisc.]. There was a concurrent opinion in which two justices concurred where there was the finding that the rural preference, the geographically based preference violated Article one, section one, of the equal protection clause of the alaska constitution. Therefore, in order to avoid litigation which is the entire point of this from the House's perspective, this cannot be subject to the equal protection clause of the Alaska Constitution because our Supreme Court may very well conclude that a geographically based preference violates that provision.

SENATOR HALFORD:

So it is the intent of this proposal that therefore we cannot just give equal access to resources provision of the state constitution, but also the equal protection provision to the current state constitution.

MS. OTTO:

Mr. Chairman, Senator Halford. It's the specific intent of this resolution to give precedence to this constitutional provision over the equal protection clause of the Alaska Constitution.

SENATOR HALFORD:

And allow things that would otherwise not be allowed under the current constitutional equal protection provision. Or might not be allowed depending -- that was two [indisc.]

MR. LENZINI:

Mr. Chairman, may ...

SENATOR KERTTULA:

You have the floor.

MR. LENZINI:

May I add a point. I would think that what we are saying as well is that it would be subject to the interpretation of the equal protection clause of the U.S. Constitution of the Ninth Circuit in San Francisco.

UNIDENTIFIED SPEAKER:

Mr. Chairman.

SENATOR KERTTULA:

Yes.

UNIDENTIFIED SPEAKER:

Obviously this is the text of the House constitutional amendment obviously is the House text. So I don't want to get in a position of defending it. But this whole equal protection situation first, as Senator Halford indicated, there is, at present, no definitive reason to believe that a rural priority would violate the equal protection clause of the Alaska Constitution. It is, in fact, however, an open question. The reason that it is of some concern, if the committee would like, I can drone on about the difference between the Alaskan equal protection text and the United States equal protection text and how the Alaska Supreme Court basically thought up in a relatively recent history the Alaska equal protection text in order to allow them to sit over and judge your policy decisions. And it's a very convoluted and turbulent area of constitutional law. Mr. Lenzini might want to attempt to resurrect out of the closet the bogey man of the Ninth Circuit but at this moment, every classification that this Legislature gets involved in, must pass muster with both the

Alaska constitutional equal protection and the United States constitutional equal protection as it is articulated by the Ninth Circuit acting as the agency ultimately behind the United State Supreme Court. So to say that somehow the Ninth Circuit the federal equal protection clause is some sort of bogey man that should scare people off this, with all due respect to my old and dear friend, Mr. Lenzini, I don't think that's necessarily quite accurate. But this state equal protection business and federal equal protection business, we can -- I don't want to start down that path unless the committee is interested in hearing at length about the theoretical problems. But the House has obviously identified that as a legitimate policy concern with respect to this particular ...

SENATOR KERTTULA:

Senator Halford, you may pursue this then, Senator Pourchot has been seeking the floor. Mckie, could you come up here ...

SENATOR HALFORD:

Maybe a better way to ask the question, Mr. Cole, is if a citizen of the State of Alaska feels that their rights of equal protection have been infringed on by some action of state government through the Boards or statute or whatever, and they go to court and want to defend their right to equal protection, we are saying by this amendment, they have to go under the interpretations through the Ninth Circuit court and the U.S. Supreme Court without the added protection of the Alaska Constitution and the state courts. That's part of my question.

The second question is where do they go? Do they go to the state Supreme Court or the state Supreme Court's interpretation of what the Ninth Circuit court said? Or do they go directly to the federal courts or can they go the federal courts on essentially an Alaska constitutional issue and then we get not only federal oversight of our statute but federal oversight of our constitution as well.

ATTORNEY GENERAL COLE:

I'll answer the second question. And I think Ms. Otto can

answer the first question, since it's the House text. With respect to where you go, the state courts can entertain both causes of action that allege violations of the state constitution and causes of action that allege violations of the federal constitution. However, with respect to appealing lower court decisions with respect to both of those, the Alaska Supreme Court is the end of the line with respect to what the delegates of the Constitutional Convention intended the Alaska Constitution to mean. The Alaska Supreme Court is not the end of the line. You can ask the U.S. Supreme Court to review what the Alaska Supreme Court thinks of the convention of 1787 and the fourteenth amendment mean with respect to the federal constitution. Now the federal court obviously is the place to go if you're really concerned exclusively about the federal constitution and not the state constitution.

SENATOR KERTULLA:

[Indisc.] participate a little [indisc.].

UNIDENTIFIED SPEAKER:

Mr. Chairman, the root to the Supreme Court on federal matters involving Alaska, these matters -- is through the Ninth Circuit. And to many people it is a matter of regret but not all decisions of the Ninth Circuit are reviewed by the Supreme Court.

SENATOR KERTTULA:

Senator Pourchot has been seeking the floor.

SENATOR POURCHOT:

Thank you, Mr. Chairman. I'm trying to figure out of some of the basic differences in approach between 86 and 57. We all know all the laws of the State of Alaska have to be consistent with the U.S. Constitution anyway. That probably goes without saying. So we can kind of scratch out that whole part and avoid some of these other problems. We also in normal construction, know that if we amend the constitution specifically in addressing that [indisc.] it seems like McDowell, I'm not even sure all that section [indisc.] great arguments that are used all the time. And we don't need to supersede [indisc] years ago we didn't do that. So

either our constitution worked last time [indisc.] or we didn't know something. But we didn't choose to expressly supersede or provide a specific state preference over potential inconsistent provisions. But when you say those things it clearly brings up a lot of questions like Senator Halford just brought up. And I'm wondering, going back to the 57 which was essentially the resolution that passed a couple of years ago, at that time, of course, we were thinking that we wanted to provide preference along certain criteria, for right or for wrong, maybe there's some different criteria or adding things but those were the things -- area characteristics, geography, traditional use -- these are some of the things that have always been talked about in some construction of state law that would be necessary. The implication is, of course, that there are some things that you may not want to provide for on the basis of like ethnic background or amount of [indisc.]. Or any other criteria. There may be a lot of things that you don't want the Legislature to create differences based upon. So if you look at 86 and basically you're just -- we will [indisc.] a label on that stuff because the Legislature made they granted preference for subsistence uses based on any and all things. Obviously, you always have to be in consistency with the U.S. Constitution. So the business [indisc. - cough] House [indisc.] trying to achieve by this approach and why did you avoid specific criteria?

MS. OTTO:

Mr. Chairman, Senator Pourchot. You asked a series of questions and I'll try to answer all of them, and if I miss some, please let me know. You are correct that it is surplus language to refer to the United States Constitution in the body of the amendment. That was done because of the language in section two to make it clear to anybody who was reading the document who was not a lawyer that there was not unfettered discretion in this regard so that the Legislature could not, for example, grant preference based on color of hair, or any of the other examples that you gave. So that's why that is in there. It's for, I

guess, information purposes to the reader and not because it's necessary. The language is not necessary. That's very obvious.

Number two, why are the specific references made to the other constitutional provisions that this takes precedence over? In discussing the issue with Tam Cook who drafted this she indicated to us that she had repeatedly advised the Legislature two years ago that there was a potential problem with the amendment that you were considering and that was it's interplay with other constitutional provisions. In addition to that, I also did a fair amount of research on the issue of whether or not this could be accomplished in a letter of intent which was one of the other options that we considered in the House. The problem with doing that is that unlike a piece of legislation that the Legislature passes directly, this goes into effect by vote of the people. And courts in other states in addressing the issue of what was intended for a constitutional amendment have said what the Legislature intended to do is basically not persuasive when what you're talking about is what's in the voters mind. And again, the goal of the people in the House who considered this was to avoid litigation. To avoid having to go through the courts and go through the two or three or four year process of finding out whether it, for example, a geographically based subsistence preference were constitutional under this amendment. Since the clear intent of the people in the House was to give the Legislature the latitude that it does not now have under the McDowell decision. They felt that it was cleaner, more honest and more straightforward to simply set that out in the constitution.

SENATOR KERTTULA:

Any questions of that? Yes, Mr. Attorney General, we've been discussing, essentially two resolutions. What they mean and how they may affect the legislation now before us submitted by the governor. They're both a constitutional amendment provision. Lance, you have the floor. Mr Nelson.

MR. NELSON:

Thank you Mr. Chairman. I guess I would like to point out

that we've been talking about how these amendments will supposedly authorize the Governor's bill or rural preference and other things. But I just jotted down a list of the kinds of preferences that they would also authorize in addition to the ones that you're talking about. It would authorize rural preference. It would authorize -- it could be argued that it authorizes Native preference. It could be argued that it authorized an urban preference, or [indisc.] rural preference. Very small community size, a sports hunting and fishing preference, trophy hunting preference, need -- having grocery stores within a certain number of miles of your home, guided hunter preference, or a strict income preference. They authorize a lot. To the extent that we need to overrule the other common use and equal access provisions of the constitution and that's really the only purpose you're having then. They would have the affect of authorizing -- as long as you were talking about similar situations with relationship to the resource, they would authorize a very wide ranging -- Legislature can involve very wide ranging kinds of preference.

SENATOR KERTTULA:

You have the floor.

UNIDENTIFIED SPEAKER:

Mr. Chairman. I would suggest that that's slightly overstates the case. Let's assume that Article eight dealing with natural resources had never been included in the Alaska constitution to begin with. Not every state has a natural resources article in their state constitution. The drafters, Lieutenant Governor Coghill and others thought it was appropriate for Alaska. And they made that decision. But it didn't have to be that way. If it did not exist, the Legislature under the equal protection clauses can discriminate and it does discriminate all the time on the basis of any criteria. And I'm speaking generally here, and there are exceptions to this. Under the basis of any criteria that when somebody looks at it, someone would say that those criteria are rationally related to the achievement of the legitimate purpose for legislating. Or in the case of the state

constitution, bear a fair and substantial relationship to an acceptable legislative end. So to say that it is somehow on policy ground objectionable to be discriminating between Alaska residents on the basis of any or all of that list that Mr. Nelson just jotted off, the answer is they can on the particular facts at hand that whether or not it is reasonable for you to have discriminated using those criteria to achieve a particular, otherwise legitimate end.

Now then, we come all the way back into Article eight and Article eight changes that by saying that with respect to fish and game and fish and game only, for some reason in the opinion of the majority of the Alaska Supreme Court and again Lieutenant Governor Coghill and the other members of the constitutional convention did not intend that geography would be able to be used to discriminate between Alaskans with respect to hunting and fishing. I mean, you do that -- this body just passed a bill during the regular session that the Governor signed. It set up a small business loan program for people that live in small communities in our state. I live in Anchorage. I can't -- if I wanted to start a small business, I can't do that. Because Anchorage, the community in which I live is above the limit in your legislation. You discriminate all the time in favor of where particular Alaskans live to advance particular legislative ends. And it depends whether that's appropriate. And it's just this unusual wrinkle about Article eight of the changes with respect to hunting and fishing opportunities only.

SENATOR KERTTULA:

Senator Halford, are you seeking the floor?

SENATOR HALFORD:

Thank you, Mr. Chair. Just to get back to Mr. Mitchell, then. You're saying that under the current constitution, there clearly could be a constitutional preference and I'm not advocating that every moose become a twelve-hundred pound [indisc.] stand but that there could be, in fact, a direct preference for subsistence based on need and be totally constitutional.

MR. MITCHELL:

I think the short answer to that is yes. And then part (b) of the McDowell case which I view as a gratuity, an advisory opinion that perhaps the court felt a little guilty about causing all of this trouble in part (a) that it said, well, now that we've wrecked the system. Let's give you some hints as to what it can do something new might pass our muster. They go on at some length in part (b) to at least hint that yes, if you want to, in your policy judgement, if you believe that is what this is about well that there is nothing even in Article eight that would preclude you from establishing such a system. If that's your policy assessment of what the point is here.

SENATOR HALFORD:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir, you have the floor.

SENATOR HALFORD:

A follow up question. I think it would probably be the House Judiciary Council because I can't figure out exactly how ...

SENATOR KERTTULA:

Could the Attorney General comment on that too at this time before you [indisc.].

SENATOR HALFORD:

Yes, Go ahead.

UNIDENTIFIED SPEAKER:

That doesn't work.

SENATOR KERTTULA:

Please do.

ATTORNEY GENERAL COLE:

Well, Mr. Chairman, I would like to say that is the very reason that I am firmly of the view that the Subsistence Advisory Commission's proposed legislation is constitutional. I mean for that very reason as Mr. Mitchell has just said. And I'm pleased to hear that he agrees with me on that score.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

I'll let you comment in ten words. No fistfights.

MR. MITCHELL:

At the risk of taking the risk of joining the debate with the Attorney General, I would just say for the record that that part of the Governor's bill -- it's not [indisc.] that has caused the concern about constitutionality. If the presumptions and all these standards approved and all the rest of it were out of the bill, and all we had was an individual eligibility system that is described in the Governor's bill then there are some problems I won't bore you with about whether or not those are constitutional enforced with individual standards. But if we give the Governor his due and say that they are, well, then that certainly would look a lot like what's in part (b) of the McDowell case perhaps. But that is not the concern. The concern is that the administration these presumptions are just an administrative housekeeping situation and there are a lot of us, with all due respect, that really think that's being somewhat disingenuous and really handing out substantive rights based upon where particular Alaskans live. And you don't have to decide whether the Attorney General is right about that or I'm right about that. But I think that your own lawyers have indicated that they have a substantial concern that my side of the table is right about that. But it's not the individual eligibility criteria in the Governor's bill.

SENATOR KERTTULA:

Does the Attorney General wish to speak to [indisc.]

ATTORNEY GENERAL COLE:

Yes, sir, think maybe most of us are familiar that the Legislatures frequently shift burdens of proof and most of us, I think, are familiar with the classic one in the Internal Revenue Code which puts all these burdens of proof on the taxpayer. That's a classic illustration of shifting of the burden of proof. Also we have in courts of equity, shifting of burdens of proof by standards of clear and convincing evidence. Those of us who are

forced to read the opinions of the Alaska Supreme Court on a weekly basis, are highly familiar with the shifting of burdens of proof based upon different circumstances. And I've been of the view that there is a fact related basis for shifting these burdens of proof. It's clear, I think, that in the rural communities most of the people who live there or are residents there, are subsistence users. And then as you drift farther away from local residency and accrue under twenty-five hundred population communities, the number of subsistence users who live in those communities lessen. And therefore consistent with that or concumbant with that is the burdens of proving subsistence use increase. If the law is common sense, those changes in the burden of proof will be upheld by the Alaska Supreme Court clearly.

MR. MITCHELL:

Mr. Chairman, just very briefly. As the Attorney General was delighted that I had agreed with his argument, I am delighted to say that the argument that he just gave you about why his rural presumption is constitutional is almost exactly the arguments I made to the Alaska Supreme Court as to why the rural priority was constitutional and lost.

SENATOR KERTULLA:

I would like to [laughter and applause] ...

ATTORNEY GENERAL COLE:

There is a considerable difference between the granting of substantive rights of subsistence use as pointed out clearly in Justice Matthews' opinion and Justice Rebenowitz [ph] descending opinion in McDowell. And burdens of proof and presumptions because those are far less protected rights under the constitution. Thank you.

SENATOR KERTTULA:

I would like to recognize the newly appointed to the Department of Natural Resources Commissioner Glen Olds. Good to see you here, Glen. Probably the first time he's been before the Senate. You have the floor.

SENATOR HALFORD:

Thank you, Mr. Chairman, just in coming back to this issue for one thing, because I think we're getting off in an area that [indisc. - cough] subsistence. And I'd like to ask the Attorney General which members of the Governor's subsistence panel were those who consistently fought for, encouraged and supported the provisions of a different standard of proof and the presumption? Were they the rural members or the non-rural members?

ATTORNEY GENERAL COLE:

I think I should properly defer that to Mr. Campbell.

SENATOR KERTTULA:

McKie, you may respond to the question that's been asked.

MR. CAMPBELL:

Mr. Chairman, Senator Halford, the rural members wish to have an irrefutable presumption at the smallest level with no ability for the state to rebut at any point. I believe that it was the Attorney General who offered the idea of clear and convincing which is a higher standard of proof which they did [indisc] instead. I should be very careful except agree to include in the draft though I don't think any of them were chosen that on their own.

SENATOR HALFORD:

Mr. Chairman, it's just inconsistent to argue that the Governor's bill is unconstitutional based on specific provisions that the same advocates are arguing that it's unconstitutional - argued for, worked for and tried to keep in there through the entire process. That is what is hard for me to sit here and take. Because that's what happened. The other side of the issue didn't want those differences. The Attorney General finally had to come back and say and absolute prohibition is probably going to be unconstitutional. So they went as far as they could constitutional go to accommodate the rural interest in that group. And now the same interests are coming back and saying because they went as far as they were asked to, the bill is now unconstitutional. That's an inconsistent argument.

MR. MITCHELL:

Mr. Chairman, if I could respond briefly.

SENATOR KERTTULA:

Yes, you may respond.

MR. MITCHELL:

I always thought I wasn't a particularly welcome guest, I don't think at least in my own mind to those proceedings so I could not attend many of them. However, I think there are two observations to be made about Senator Halford's last comment. First, ...

SENATOR KERTTULA:

Thank you, Ms. Otto. Thank you. Excuse me for interrupting.

MR. MITCHELL:

I know everyone really dislikes ...

SENATOR KERTTULA:

Mr. Chairman, Ms. Otto.

MS. OTTO:

Yes.

SENATOR KERTTULA:

He has one quick question he'd like to ask. I wonder if you could wait through Mr. Mitchell. Is that okay? And anytime you need him we'll send a learned senator down to consult with you [indisc.]. If you could sit for a moment and let Mr. Mitchell finish and then I'll ...

MR. MITCHELL:

Mr. Chairman, I'll finish quite briefly.

SENATOR KERTTULA:

Thank you.

MR. MITCHELL:

I just wanted to say that first of all I know nobody likes to hear it, but there was no member of that commission that was an attorney. People of good will can have very useful policy views but it does not mean that at a technical level those policy views can be legally accomplished. And it is unfortunate that that was the situation. This was a bill that was drafted by a group of lay people and I know I don't want to pull rank, but these are -- just

from your discussion today has shown these are very complicated legal and constitutional issues.

Secondly, I have been informed before Mr. Campbell responds that among the other instructions is that they were supposed to ignore ANILCA and they were supposed to ignore the constitution and just come up with what was a good bill. And now we find that a bunch of lay people who tried to do that are now being run up the flag pole as constitutional law experts that somehow are offering inconsistent arguments. But as I say, I was not present. If this is a matter of actual concern that is going to turn the Senate's decision making, I would suggest that we get the members -- that you consider getting the members of the Commission up here and ask them how all this came down, if it's that important.

SENATOR KERTTULA:

Mr. Campbell and then we'll ask -- we have to move right along.

MR. CAMPBELL:

Mr. Chairman, this is a very brief comment. It is correct to say that none of the nine members of the advisory council were attorneys. I would say however, that at every meeting we probably an attorneys who outnumber the participants out around the edge of the room, and I don't feel that there was any member of the council, particularly any of the rural members who were [indisc.] by lack of counsel at any point during the proceeding.

SENATOR KERTTULA:

I had heard that everybody was pretty happy until one of the distinguished counselors said -- the results were fairly happy until distinguished counsel came forward and turned them all around again. You have the floor.

UNIDENTIFIED SPEAKER:

Yes, Mr. Chairman. I was wondering through the chair if Mr. Campbell could clarify my information about whether or not the members in terms of their marching orders were repeatedly told not to worry about compliance with ANILCA and not to worry about the constitution.

SENATOR KERTTULA:

You may respond, Mr. Campbell.

MR. CAMPBELL:

That was the Governor's initial instruction? And that was correct. There was a number of members stated throughout that stated that they were worried either about ANILCA or the constitution. One or the other. The Attorney General came up with the specific language that we're discussing. And I believe then we discussed what may or may not be [indisc.].

SENATOR KERTTULA:

I'm going to be abusing the privilege of the House if I don't let the Senator ask Ms. Otto and then she has to go on her way. So please direct there and then we can go back to ...

SENATOR HALFORD:

Thank you, Mr. Chairman, appreciate your staying for the question. I'm trying to figure out the application section. We've talked about the House constitutional proposal having precedence over any inconsistent provision in section three which I [indisc.] but it also goes on at the end of that sentence and it says, "and section one of Article one". Now section one, Article one is titled, "The inherent right section" of the constitution. And that includes equal protection. But it also includes the core or the declaration of rights [indisc.] would be in the U.S. Constitution, I think. It's the declaration of rights here. It's the Bill of Rights and the U.S. Constitution. But it includes the natural right to life, liberty and pursuit of happiness and enjoying the rewards of their [indisc. - cough] and then it goes on "and all persons are equal and entitled equal rights and opportunities in protection, liberty and law". It seems like you're saying that this provision will supersede all of section one, Article one declaration of rights of the state constitution if I'm reading this correctly. Isn't that an awful lot more than you need to say?

MS. OTTO:

Mr. Chairman, Senator Halford, once again you may have proven

yourself to be a better drafter than all of the lawyers combined. One of the reasons for referring to equal protection in the parenthetical after section one was to make it clear that it was only that provision of section one, of Article one that was being affected. After you pointed this out to me, I think a better way to draft it would be to say, "and the equal protection provision in section one of Article one". I think that's a drafting matter rather than a substantive matter. The clear intent of the House was to limit it to the equal protection provision.

SENATOR KERTTULA:

Thank you. Thank you very much.

SENATOR COTTEN:

Mr. Chair?

SENATOR KERTTULA:

We charge \$150 an hour for this right here. [laughter]

UNIDENTIFIED SPEAKER:

How come your so cheap?

SENATOR KERTTULA:

You have the floor, Senator Cotten. Somebody else seeking the floor? Okay, you have the floor, Senator Cotten.

SENATOR COTTEN:

Well, I wanted to explore a different angle on this. There's been some discussion about the so-called limited entry approach. And if you'd rather exhaust this approach before we start on that one, that's fine with me. But if not, I'd like to bring that up now.

SENATOR KERTTULA:

Is there anything -- preferences? Please proceed, Senator Cotten. I presume nothing keeps us from going back if necessary.

SENATOR COTTEN:

Right, so maybe we can get some sort of response from the people that have been studying this. I haven't been but I understand that one approach could be to go to Article eight, section three, Common Use, which was the section, I believe, the court struck down our previous law. And include after the first

sentence, a section that would say or a sentence that would say, "this section does not restrict the power of the state to give a priority for subsistence uses." And I'm not sure what else to say. I mean, when you look at the limited entry section that talks about "for the purposes of resource conservation" which I don't believe applies here. Or "to prevent economic distress among" and in those case it would be "those dependent upon them". And I'm not sure that's necessarily the reason for it. So I'm trying to understand what people's thinking has been along those lines. And maybe that's the way to go. To say that "this section does not restrict the power of the state to give a priority for subsistence uses" period. And I'm not sure what the heck that really accomplishes .

MR. MITCHELL:

I guess, I would have several comments. First, while the common use clause, section three has gotten a lot of air play in this state, in a technical sense although they really don't spend a lot of time doing it, the McDowell opinion indicates that the court believes that in addition to section three, that independently section fifteen and seventeen, I believe, also separately can validate the authority of the Legislature to have the rural priority. So if, in fact, the policy choice was to have a constitutional amendment that would give back the authority for a rural priority as Ms. Otto did in her drafting, you have got to make it clear that you are reversing the McDowell interpretation with respect to all three of those sections. Not just section three. So Senator Cotten, if you have your fix -- I'm assuming that that fix where otherwise appropriate it would be my technical advise that it would not be in section three. It would have to go in a separate section.

The second observation I have is that while they do not spend a lot of time detailing the reasoning, at least to my satisfaction, they indicate that a rural priority in their judgement violates section fifteen, right? Is that the exclusive right of fisheries?

UNIDENTIFIED SPEAKER:

Uh-hum.

MR. MITCHELL:

And that already has the language that you're talking about in it.

SENATOR COTTEN:

Correct.

MR. MITCHELL:

I don't understand how -- again, in a technical sense, putting back in language that it's already in a section that the court has indicated that it doesn't think allows the rural priority, would then allow a rural priority.

SENATOR COTTEN:

Well, I'm not necessarily saying -- Mr. Chairman, if I could just banter back and forth here. I'm not necessarily saying I'm trying to accomplish making rural preference constitutional. I'm trying to maybe see if this wouldn't make the Governor's bill constitutional. Maybe you'd have to say, "this section does not restrict the power of the state to give a priority for subsistence uses to those dependent upon them."

MR. MITCHELL:

Well, that goes back -- Senator Cotten, Mr. Chair, back to discussion the Attorney General and I were having about what is the component of the Governor's bill that gives those of us that think that it's unconstitutional the grounds for thinking so. And it is our concern that if the presumption based -- the Attorney General is right. You and the Congress use presumptions all the time, but you don't necessarily use them all the time using where you live as the reason for handing them out. And the Attorney General indicates that in his view these presumptions do not distribute substantive state benefits. And if that's true, maybe he's right. It is our view that these presumptions with their shifting burdens of proof and all kinds of other stuff and that's all a smoke screen and these presumptions are the heart of the matter and give out hunting and fishing opportunities based upon

where you live. Which is really another way of having a different kind of rural priority.

SENATOR COTTEN:

But this would accent the final four words "those dependent upon them".

MR. MITCHELL:

Well, that raises then the question -- the Attorney General just argued to you as I indicated, not facetiously, exactly the same arguments that I made to the Alaska Supreme Court. That the rural priority was actually a needs driven priority because a reasonable person would know that as a policy matter, people that live out in rural Alaska individually, if you look at them, need fish and game more than people like you and I.

SENATOR COTTEN:

More than.

MR. MITCHELL:

Right. And that's a legitimate basis for discriminating between Alaskans. I lost that argument and that's why I, having been once burned, it's difficult for me to line up behind the Attorney General when he makes the same argument, in a slightly different context, in support of his own classification system. So I guess, what I'm saying is you don't have to resolve that argument between the Attorney General and myself, but ...

SENATOR COTTEN:

Well, it's not an absolute either. Because of the rebuttal presumption. I think that's what changes it.

MR. MITCHELL:

That is an opinion as to whether or not the presumption is a grant to substantive rights or not. And that's what the lawyers who tell three members of the Alaska Supreme Court will tell us if you enact that statute, we can argue that with a straight face back and forth as long as people have the patience to listen to us. Which hope is not forever.

SENATOR COTTEN:

Maybe another view.

SENATOR KERTTULA:

Are there other view of this statement? Attorney General, please.

ATTORNEY GENERAL COLE:

I would like first couple comments about prior discussion. I sat in on a good many of those committee discussion sessions and I must say, I certainly did not sit there speaking to the assembled group and saying, "don't worry about whether this bill complies with the Alaska Constitution. We'll just go ahead and do it anyway". I mean we weren't that foolish. We were concerned about whether this proposed legislation that we were working on did comply with the Alaska Constitution. And there was lengthy discussion on that subject as well as lengthy discussion on the constitutional validity of these presumptions. So, so much for that.

But, with respect to section nineteen, I sound a note of caution, we're here this afternoon talking about ...

ATTORNEY GENERAL COLE:

Pardon me?

SENATOR COTTEN:

Section nineteen.

ATTORNEY GENERAL COLE:

Section nineteen here. Formulation of a constitutional amendment. One which would endure in this state for years to come and we're wondering around I think. The discussion is ... [tape ends midspeech].

Tape 92-15

Side B

[Tape begins midspeech]

ATTORNEY GENERAL COLE:

... there is so many ramifications that are attached to a constitutional amendment of this magnitude that I think really requires legal research, legal analysis, thought, care in drafting, before we in the administration in the Legislature address or decide upon the terms of a constitutional amendment to

be presented to the electorate. I mean it's just much, much too fast and certainly not -- I mean there simply isn't enough time to give the proper analysis to something of this magnitude in our constitution.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTULLA:

Yes, sir.

MR. MITCHELL:

As Mr. Lenzini who practices in Washington D.C. and Senator Pourchot who has worked on the hill knows it is a time tested suggestion from members of Congress who do not want decisions to be made to suggest that we were making a decision that the Congress enact a statute that creates a study. To say at this late date that what this issue needs is yet more study, with all due respect, I do not find a persuasive argument against action. I think to bluntly rephrase the issue, when all is said and done, the policy issue before the body is, does the Legislature want to give itself the authority to enact a statute that complies with ANILCA? Either the Legislature as a policy matter wishes to do that or it does not. If the Legislature wishes to do that, the way to do that does not require more study. It does not require legal research. The Attorney General and I are [indic] body I'm sure could agree on a text in a few moments that would give you that authority. That is the heart of the matter, it seems to me.

SENATOR KERTTULA:

Twenty member judiciary recognizes the Attorney General, one more time.

ATTORNEY GENERAL COLE:

I want to say thing very quickly. For example, this proposed constitutional amendment says in section nineteen, "based upon criteria consistent with the equal protection requirements of the Constitution of the United States". Now the Alaska Supreme Court has drawn very sharp differences between the scope and the protection afforded by the Alaska constitutional equal protection

clause and the federal constitutional equal protection clause. And, in fact, the Alaska Supreme Court has said repeatedly that the equal protection requirements in the Alaska constitution are more strict than those in the federal constitution. So I point out to you and without being flippant, I say, who knows sitting in this body what really the basic criteria of the equal protection requirement of the United States constitution are today with this ever shifting ground before the U.S. Supreme Court and how they differ from the equal protection afforded by the Alaska Constitution. And that's just an example, of why I say these things are not to be lightly taken. And I'm not stalling. I'm simply saying that those are the sort of things that I think require a lot of careful thought and analysis. Thanks.

SENATOR KERTTULA:

Senator Cotten.

SENATOR COTTEN:

Could I get the Attorney General to respond to the other proposition. Mr. Mitchell gave a response. This business of adding something to either section three the common use, or whatever it was necessary to suggest that the section or maybe even the whole article doesn't restrict the power of the state to give a priority for subsistence uses to those dependent upon them. I heard off the record, people say it might bullet proof the subsistence council's bill. Do you see any danger in that direction, that language?

ATTORNEY GENERAL COLE:

Senator, it just points out what I've been saying to make a response here when you don't see that in writing. Give an opinion or off the cuff response is just too dangerous. I would like to see it written down carefully, study it, see where it fits in and then give almost no more than an offhand response. I just don't think it can be done myself. I wouldn't want to do it.

MR. MITCHELL:

Mr. Chairman?

SENATOR KERTTULA:

You have the floor.

MR. MITCHELL:

On a related matter for the committee's information, the Attorney General's remarks about the federal equal protection is somewhat unclear as to whether or not the rural priority would pass that. That I'm sure the committee that it's worth bringing back on the record that we are presently litigating that issue right now in what's known as the McDowell II case up in the United States District Court in Fairbanks. The plaintiffs in that case have alleged not the state's subsistence law, but that the ANILCA, the federal subsistence rural priority classification among other things, violates the federal protection clause. That's going to get litigated regardless of what this body does and if you were to adopt a constitutional amendment and enact a statute to comply with ANILCA if the court should decide that ANILCA is a violation of the federal equal protection clause, well that's the end of the matter. We obviously do not believe and the department of Justice does not believe, for a variety of reasons too much to go into unless you'd like to hear them, it would take -- I'd be happy to go into them -- that that's going to happen. Nor did the last Attorney General, I don't know what Attorney General Cole's view is but that is -- the reason I bring it up is that is at issue right now.

SENATOR KERTTULA:

Saying if we change ANILCA and ANILCA is thrown out, everything we've done is thrown out.

MR. MITCHELL:

Right. Then you're back -- everybody is back to square one.

SENATOR KERTTULA:

What is there progress of the case? I know you can never be sure but ..

MR. MITCHELL:

Well, there's a very -- I'm happy to give this report, Mr. Chairman, that case, what is filed -- I can't even remember when now. Everything is running together in my head, we've been at

this so long all week. But I guess last fall-- no, it was in the late summer or fall of '90 and then the plaintiffs were enthusiastic, to say the least, about rushing to a judicial determination of these very issues until suddenly Governor Hickel ascended to the third floor and suddenly the brakes were put on and the plaintiffs then spent the entire winter filing motions for continuances while they were representing to the court that at any moment the administration might be on their side. That took a year and then the matter was briefed. And the Judge Kleinfelt was advanced to the Ninth Circuit and the case was moved to one judge and then it turned out that that judge, Judge Singleton, had the minor problem of having to be a member Commonwealth North. He had written a book that discussed many of the legal issues and so it got moved to another judge and now the plaintiffs, I find it amusing are complaining that the case has not moved. So, the case is presently all briefed, it's ready to be argued and it's just a matter of Judge Holland putting it on the calendar.

SENATOR KERTTULA:

Are there further questions or statements? You have the floor, Senator Taylor.

SENATOR TAYLOR:

Thank you, Mr. Chairman. Invidious or cancer-like [indisc.] determination that has infected America from its very inception. Our history has been highlighted by [indisc.] has been recognized by our attempts to thwart out and eliminate that discrimination. Whether it was discrimination against [indisc.] whether its discrimination against blacks, whether its discrimination based on a person's religion, but whatever the discrimination was we have been known [indisc.] that people define discrimination to be totally obscene.

What we are talking about right now is modified and changing the single hallmark that has protected this nation and given us this reputation throughout the world for our entire history. I do not take it lightly. And I suggest that we should now discriminate as the United States government has based upon a

persons mere residence, I think opens the door for an opportunity that I would not want to see tried by this Legislature or any other. I can easily see where, in Georgia you could decide who would vote based upon the size of the community they lived in. Who would ride in what part of the school bus based on what size the community in which they live? I don't think this is a small matter. I would like, gentlemen and ladies in this panel, [indisc.] to comment upon whether or not ANILCA as passed by the U.S. government violates [indisc.] our constitution, that of the State of Alaska's equal protection provision. Does it violate the United States constitution's equal protection provision? And I hope you will not utilize the excuse, and I think it is an excuse, to label this as Indian law. That's a whole separate debate because we then do allow you to discriminate based upon whether or not it is Indian law. In fact, it is Indian law it would be allowed. Discrimination would be allowed and I understand that. Address instead [indisc.] .

SENATOR KERTTULA:

Mr. Mitchell, you do have the floor.

MR. MITCHELL:

First of all I guess as a preliminary observation as something of an amateur [indisc.] I would, with all due respect, disagree with your run through of American history. We discriminate all the time. We discriminate -- there are statutes that say that blind people are not eligible in this state to obtain driver's licenses, which is an important state privilege. To say that that discrimination is terrible or invidious is just simply untrue. It has a logical basis to achieve a legitimate governmental objective of not having blind people careening around in 60 mph in an automobile. We discriminate all the time.

Now what is true about Senator Taylor's statement is that in this country we have attempted with reasonable goodwill and uneven result to eliminate grounds for discrimination that the majority of our citizens believe are wrong. And certainly, prior to the Civil War, there was a whole variety of citizens of this country

that did not believe it was wrong to discriminate against people because they were black. Then we changed that. So what is a proper basis for discrimination evolves over time. Now with respect to whether or not discriminating on the basis -- between Alaska residents on the basis of where it is they live is a good or bad basis for discriminating is something I think about which people with goodwill can reasonably differ. But to say that it rises in a legal sense to the level of discriminating against someone because they are black, I guess I would, speaking only for myself, I do not think that's the situation.

At the risk of the first rule that Senator Taylor knows about practicing law in the courtroom is never ever regardless of provocation ask a question you don't know the answer to. But I would be violating that rule of taking the risk in the interest of entertainment if nothing else, I would be curious to know whether the Senator voted for the legislation that the Governor signed that I talked about earlier that established the small business loan program just for Alaskans who live in small communities. You voted for that. Well that is discriminating -- I cannot, if I want to start a small business and I want to apply for a loan, what those people are going to say are one thing. Don Mitchell, where do you live? And I say I live at the corner of 14th and F in Anchorage. And they say, get out of this office. You are not eligible for the loan program that Senator Taylor has created to help out those Alaskans who live in small communities. Now I'm not saying that your vote was wrong. I think it was probably a pretty good vote. Because we have a big bunch of problems in our local economies about which subsistence is an important component.

But the point is that we discriminate all the time in this State on the basis of where citizens live and it's just because of this Article eight problem that, with respect to the one area of state benefit which is handing out hunting and fishing opportunities, we find ourselves in the situation where you can't use that basis of discrimination to accomplish this governmental objective.

Now finally turning last to your question about whether or not I believe, personally, if these classifications are constitutional. I think, with respect to the federal test which I've described earlier and you're familiar with, I don't think it's a close question. Is it rational, not whether it's good public policy, but is it intellectually rational for the United States Congress after having toured the bush in 1977 for three and a half weeks and compiling a fifteen-volume hearing record, to conclude that people that live in the bush are just [indisc.] situated from people like myself when it comes to the need for fish and game. And I think that that is not a close question and that the answer to that is clearly, yes. That is a rational classification.

Now with respect to your second question about the Alaska Constitution, that unfortunately draws me into what I was trying to avoid which was discussing the Alaska equal protection text. And I would point out that in 1956 when the Lieutenant Governor Coghill and the other delegates put together the Alaska Constitution and they used the words "equal protection", the only equal protection test known to God was the federal equal protection test. That was it. Now beginning in the 1970's in a whole series of cases, they said on policy grounds, we don't think we like that because it doesn't give us enough authority to overrule policy judgements about classifications that this very body makes. And so they invented a new test. I have my policy views about the new test, but one thing I can say about the new test, whether it's a good idea or bad idea, it was not intended by Lieutenant Governor Coghill and the other delegates because it had never been invented in 1956. So how could the words "equal protection" in our constitution mean an entire elaborate intellectual construct that no one had gone to the trouble of thinking up. Well, what that test does, is it says, rather than a rational basis, we are going to decide how rational and how close we connect this classifications have to be based upon what we think the importance of the various rights that are

inconvenienced are. Now what that does is it means that any three members of the court who have an attitude about particular rights, or particular activities, basically, can decide what they think the value of those activities are and that decides the degree of supervision they will exercise over your policy judgements. Now the Attorney General - I was kidding him the other day when he was railing in the Daily News about the reapportionment case and how the judge's basically took over the role of the reapportionment Board. I told him that if he had struck out "reapportionment" and inserted "in lieu thereof" every time it appears the word McDowell v State it would have sounded exactly like me railing about the opinion in the McDowell case. So the answer to the state equal protection test, is I would agree with the Attorney General. I don't have a clue. It depends on -- Justice Moore [ph] has indicated that he thinks Mr. McDowell's opportunity to go catch a king salmon on the Kenai is constitutionally of the same magnitude as the right to travel interstate or the right to marry the person of your choice. Or almost to that level. I found that shocking. But he is the Justice. I'm not. So I don't know what the result is. But it's a problem. It's a big problem and it's a big problem because of the power grab that, with all due respect, I would suggest that the Legislature might someday want to -- particularly the judiciary committee, hold a hearing about and talk about it. It's not just subsistence. It's all your authority to classify.

SENATOR KERTTULA:

Are there further questions? You have the floor, Senator Halford.

SENATOR HALFORD:

Thank you, Mr. Chairman. I don't want to wind Mr. Mitchell up, so I would just say that reading from the McDowell case, I think the decision is far more limited than we all seem to take it to be. It just said, we hold only that the residency criteria used in the [indic.] was conclusively exclude all urban residents from subsistence hunting and fishing regardless of their

individual characteristics is unconstitutional. That's all that they said. They went on to say specifically that a classification scheme employing individual characteristics was exactly one of the examples they were using for a possible system. So the Attorney General's office and the task force reaches out and says, but we will accept some conditions that make it easier for rural residents when they put this classification scheme together and they come up with a bill. And now we're told the bill is unconstitutional. It's a compromise between the suggestion of the state Supreme Court and the advocates of subsistence that we have before us. And it works. It's far more constitutional than McDowell or than the previous McDowell case was. And it reaches as far as you can possibly go to get both sides. I think it's ridiculous to say that the very things that were asked for to try and help rural areas are now unconstitutional when they were suggested by the Supreme Court with the exception of the way they were applied, to simply make the system work without a paper nightmare to everybody in very small communities.

SENATOR KERTTULA:

Mr. Mitchell, if you wish to comment, you have the floor.

MR. MITCHELL:

The only thing I would say is that that is advocacy that makes statements of mixed law and policy and needless to say I could pick out the questions of law, but with all due respect to Senator Halford, I made this discussion on and off the record for years, that I would disagree with and with respect to the policy of -- I have my own personal views, but the policy arguments are really out of my brief.

SENATOR KERTTULA:

You have the floor.

SENATOR HALFORD:

Mr. Mitchell, do you agree that a system of individual classification would meet the state's constitutional test?

MR. MITCHELL:

I would say that to be slightly disingenuous, but I don't

know what the protection test of the constitution until Justice Moore and two other Justice's tell me. I have very little intellectual confidence in that. That having been said, I also believe that an individual test, and I don't want to say on the basis of the criteria in the Governor's bill, because I think that's a whole separate subject about how I feel about that on a technical level. But certainly an eligibility system based on individual criteria would seem to be the kind of classification system that as I said is a gratuity in part (b) of the McDowell case, the court indicated that it thought would be constitutional under Article eight, yes.

SENATOR HALFORD:

So the Supreme Court, in your opinion, or at least the majority, did say that an individual test would be constitutional?

MR. MITCHELL:

Well, they didn't say that. I don't want to split the hair too closely here. They certainly indicated that part (b) of the opinion, that they thought -- they expressed, of course, no opinion because an individual test was not before them. Which is why this whole thing was a gratuity. But they certainly indicated that they thought that if somebody wanted to present them with an individual eligibility system, that probably that system was going to pass muster, yes. But that system, of course, would not comply with ANILCA, then we [indisc.].

SENATOR HALFORD:

But that was not before them or not their concern?

MR. MITCHELL:

ANILCA or the individual test?

SENATOR HALFORD:

ANILCA.

MR. MITCHELL:

ANILCA was no more their concern than the individual test that had not been presented to them was of their concern.

SENATOR HALFORD:

But they came up with the individual test as an example of

something that would be a less invasive way to meet the purposes of protection of subsistence, is it not?

MR. MITCHELL:

They expressed no -- to defend the institution, they expressed no policy view about that. They merely said that if somebody who is in charge of policy gives us something like this then as the custodians of the constitution maybe this would be okay. That's all I would say.

SENATOR HALFORD:

I believe the exact words which they said, that's a good example of what would work.

SENATOR KERTTULA:

Are there further questions or further points of view to pose? Are there none? We'll be in recess for ten minutes.

RECESS

3:20 - 3:30 p.m.

SENATOR KERTTULA:

... I would ask the Sergeant-at-Arms and staff to search out the rest of the senators I think it's key that they appear now. There are those that already understood thoroughly the constitutional questions so they may not have been here for that period. The President of the Senate, there's one other area that you suggested that we approach more specifically the constitutional arena affecting [indisc.]. Will you please state that, try to keep it ...

SENATOR ELIASON:

Mr. Chairman, in order to examine all the propositions that we've had before us in the past and we have before us today, I think there should be some discussion, probably the strongest resistance we have to changing the constitution is to openings all state lands up to federal oversight, but in fact at the present time it's my understanding it's only federal lands are under federal oversight. That in itself created some problems for a lot of people.

However, on the other hand, it's my understanding if we only

pass a constitutional amendment and this bill or whatever other bill which would implement substitute program in, Alaska without addressing other problems, that we would, in fact, I think the term was we had gone two-thirds of the way. So I would like to examine the possibility of tying the whole package together, which, in fact, would give state control totally over all lands in Alaska with very little federal oversight. How we can protect subsistence and also do this. I don't know, but I think it's worth exploring. Rather than just off hand reject it by one side or the other. I don't know if there's a compromise position there. I understand this has been discussed at other times behind in closed session by members of both sides of this issue and they haven't been able to reach any consensus or agreement on that approach. However, that doesn't prevent us from discussing that maybe there is room to do something. I certainly would like to go home with everything tied together. I'd rather -- I think we all behooves us to get one third, maybe two thirds, or maybe all of it in one package. I think we have the ability to do that if we would make these concessions to each other. We all have a stake in this and I know it's a very emotional issue, but I for one, have probably lived in this state longer than most people in this room. I certainly want to [indisc.] I don't think we can polarize ourselves enough and not talk about all different aspects when there might be a possible [indisc.].

SENATOR KERTTULA:

Is Mr. Nelson available, McKie?

MR. CAMPBELL:

Sir, the Attorney General and Mr. Nelson are on their way.

SENATOR KERTTULA:

Thank you very much. Well to that end, I'm going to -- Don, you may wish to testify at this time. This whole area, of course, is pretty broadly opened up. If you'd comment, we'll start with that. Thank you.

MR. MITCHELL:

Certainly, Mr. Chairman. Senator Eliason, I think that the

issue that you've raised is an issue that I and others testified to yesterday to briefly review the issue which some members have identified as a problem. Is that under ANILCA if the state were to be in compliance with ANILCA then the Alaska Board of Fisheries and the Board of Game would again be the administrative body that makes all of our decisions about hunting and fishing regulations. So to that extent Alaska actively including the Board of Fish and the Board of Game would be regulating hunting and fishing everywhere in our boundaries.

Now if an Alaska resident believes that a decision that the Board of Game or the Board of Fisheries makes in a particular case is wrong, because that decision would not correctly implement the legal standards and the Alaska subsistence law which of course would be based on the legal standards of ANILCA, then in that kind of a situation under ANILCA that Alaska resident is given a choice. That resident can either if he or she wishes, go to the Alaska Court system and file an action in the Superior Court and request the state court judge to review the legality of that Board of Fisheries or Board of Game decision and to decide what to do about it if, in fact, the court looks at the record and decides that the Board was wrong. Judge Katz who is the state court judge did just quite recently when she was asked to do that in a state court case. She has [indisc.] for preliminary relief engaged in a variety of decision making that basically superseded the Board decisions with which she had legal disagreement in terms of the taking activities were in fact conducted. People sometimes do and sometimes do not have heartburn about that. We're not talking about this federal oversight that I'm always hearing about, well the courts are always managing our game. Well, the courts do that and that's the way our judicial system works. But in any case, certainly that Alaska resident can ask the state court judge to see if they've been mistreated. Now ANILCA also says that as a separate option, resident filing that lawsuit in state Superior Court that that Alaskan can go to the United States district court and file exactly the same lawsuit and ask the federal judge rather

than the state judge to review exactly the same legal arguments. That is not as I indicated in my testimony yesterday, either a novel or an unprecedented or indeed even an unusual thing for Congress to do to insure that it's policy choices are in fact quite correctly implemented. We do that with employment discrimination law. We do that with a whole variety of cases and where in which Congress has come in and set the rules of the road and the created a federal forum in addition to the state forum where a citizen believes that the law is not being correctly implemented. So that is the situation with ANILCA.

Now at a policy level, Senator Eliason, if you and other members of the Legislature believe that Congress's decision to create that federal judicial forum was a bad policy, then obviously the only way that we can remedy that is not to come to an agreement client [indisc.] on it, or with the Governor or anyone else. The only way we can deal with that is to request Congress to change the law to change ANILCA. And so unless Congress would be willing to do that, what this body might do in terms of this policy judgement about that initial of Congress is really with all due respect, really of no moment.

SENATOR KERTTULA:

Thank you, Attorney General for coming.

ATTORNEY GENERAL COLE:

Yes, sir.

SENATOR KERTTULA:

Please proceed.

MR. MITCHELL:

That raises the issue, first of all as to whether or not the Legislature as a whole believes that Congress made a wrong policy judgement when they included that section in ANILCA. And if -- and that' obviously your business not mine. But then if, in fact, you were to conclude that yes, we think that that was a bad idea and we'd like to see that alleviated, then you have to, I think, evaluate, the likelihood, really in terms of the planning purposes in terms of implementing public policy, the likelihood that

Congress would be willing to take this suggestion to heart, and in fact, do that.

While that is sort of off my brief, I do spend a fair amount of time in Washington, D.C. and I've worked with the authorizing committees of ANILCA for some time -- for a number of years. And I have no reason professionally to disagree with most of their, if not all of the testimony that's been given to the committee this week from Mr. Suberg who is the chief legal officer of the Department of the Interior and Mr. Wiggins the chief political officer for Alaska issues for the Department of Interior, from the congressional delegation from Senator Murkowski, from nearly anyone who operational on the ground is in play back there that that is really a very realistic possibility even if everybody in Alaska thought it was a good idea. I think I can fairly represent there are a lot of people in Alaska, in my client community for a variety of policy reasons who I think, with all due respect, would disagree that Congress made a bad choice. So even in the best of circumstances, it would be my professional judgment that it is a very, long stretch to believe that Congress would entertain reversing that decision even if you conclude that it's a bad one. But again, I obviously do not hold an election certificate in the United States Congress and my view of that matter is precisely what you paid for.

SENATOR KERTTULA:

Senator Eliason, you have the floor.

SENATOR ELIASON:

I'm not here to question one side or the other. I'm here to say that we can't get to that question and we don't have any other options. That's the dilemma we're in. Is that there are some very strong feelings on both sides of this issue and if we expect to get a constitutional amendment, that might be one way to do it. I don't know. But if you can't reach it through these other suggestions, this is another option. I'm not even sure that would work. But I think it should be talked about. I think there are some real concerns that -- the federal intervention -- we've been

through this before so I don't think anybody in this room likes management under feds. And I think that we should get out from under there. I think the first thing we should get out totally from under them. We've seen it every day. We see it more and more in other federal agencies in Alaska. EPA is a good example. We're just overwhelmed with federal regs and federal people coming to our state and telling us how to manage our lands when they don't know anything about to start with. To get out of that dilemma we're going to have to make some hard decisions as Alaskans to get them out. And we can't move them out unless we can come to some compromise allowing this [indisc.] to be fixed. And I don't know what the compromise is but we should discuss all the options.

MR. MITCHELL:

Senator, I just observed that I think a lot of Alaskans agree with you about that, but that again, part of the, I think, confusion about this is that there is a difference between the active regulating -- having federal bureaucrats coming up with the regulations on the one hand and having an opportunity for people to think the state bureaucrats who Alaskans believe that the state bureaucrats who have misbehaved by implementing a very important law, have the federal forum to make that argument. That's two entirely different things. Certainly, you're aware, probably better than anybody in this room, about how it was in the fishing in the old pre-statehood days because what you had was first the Department of Commerce and then the Department of Interior bureaucracies who were functioning as the Alaska Board of Fisheries. And I think everybody agrees that's a very bad idea. But that is different than having the Alaska Board of Fisheries managing our fisheries and then having a federal forum, a federal judge be available within Alaska. As I said yesterday, these are not people from other planets or even other venues. These are all Alaskans who believe that in particular instances that their Boards of Fisheries has incorrectly implemented the law in a way that they think might do some legal damage to their families.

Obviously, there are many people that don't believe that it is overly unfair for those Alaskans who think that to be able to make those cases in front of a federal judges, who are also, by the way, Alaskans. And I know that will, [indisc.] Mr. Lenzini to say yes, but then we go on the field to San Francisco and then we're off again on how much we all dislike San Francisco, although I was always fond of it when I was there. I'm not going to join the San Francisco faction. But so there we are. and it is a problem. I understand the issue but I think on balance, I know speaking for my client community that we believe that putting the Board of Fisheries back into the business of actually regulating Alaska's fisheries and the Board of Game back into the business of regulating all of Alaska's game, subject to federal judicial review solves the problem much more than the present situation where you have federal bureaucrats, of the federal subsistence Board, being the Board of Fisheries and the Board of Game and then you still have the same kind of judicial review you had that you find to be difficult.

SENATOR KERTTULA:

Senator Adams.

SENATOR ADAMS:

Without the support of the Alaska Native communities, in your opinion, what is the chances of ANILCA to be opened?

MR. MITCHELL:

To amend ANILCA through the normal legislative process a bill to do that would have to be introduced in the House Interior Committee which is chaired by George Miller of California, of which Congressman Young is ranked a minority member. And move from that committee through the House of Representatives and then the Senate would then refer it to the Senate Energy Committee that is chaired by Bennett Johnston [ph] of Louisiana of which Senator Murkowski is a prominent minority member. And you then, of course, have to go through that committee and through the floor of the Senate and to be signed by the President. So that means as an opening proposition is a way of stating what is the likelihood

that the House Interior Committee or the Senate Energy Committee would entertain or even put on the calendar for discussion a bill to amend ANILCA if there were Alaska Natives and their representatives in the halls, basically saying that they think that is a very, very bad idea. It would be my view that the odds of that are really precisely zero. And that if, in fact, they were more than zero, if I would be completely wrong about that, then when you -- if nothing else got to the Senate floor, as Senator Pourchot and others know, one of the reasons that the United States of America is such a mess is that any senator who is displeased with any bill puts a hold on it and that's the end of the matter until that Senator is satisfied. And I think that there are many senators including Senator [indisc.] and others who even off the Energy Committee who are quite sympathetic to the concerns of Alaska Natives that led to ANILCA to begin with and I think it would have some very serious concerns about allowing a bill like that to go on the floor over, basically, the dead bodies of eighty-five thousand Alaska Natives. And I think I would have two suggestions. Neither of the people that I would refer you to are going to like my doing it. But certainly, my old friend John Katz [ph] who has been on the scene back there twenty-four-hours a day for almost as long as I have been visiting there who is the Governor and your expert on whether what I've just said is accurate. It might be worth getting him up on a conference call to ask him whether he disagrees with that assessment. And then I would also point out to the Committee that Senator Pourchot spent a number of years as the very distinguished member of the Senate staff of the Alaska congressional delegation and particularly in the Senate and he probably of all of you would be well positioned to enlighten us as to whether or not he believes my views are accurate. And those would be two ready references that I would suggest if you care to test my professional evaluation.

SENATOR KERTTULA:

You have the floor and then the President.

SENATOR ELIASON:

I just want to clear up this [indisc.] now. Believe me I don't think anybody at this table or in this room or even in this state would pursue it without the support of the people who are being effected by the subsistence so that's totally out of the question. We're talking about a compromise which we all think will [indisc.] we're searching for. We're not, at least this Senator, is not planning on [indisc.] anything.

MR. MITCHELL:

Senator, I understand that. I would just responding to the question was if that were to occur, what would be the situation. I don't think anyone would [indisc. - simult. speech].

SENATOR KERTTULA:

... work this in to compromise rather than the extreme. Senator Adams, and I'm speaking to Senator Adams.

SENATOR ADAMS:

Even though I'm against opening up ANILCA, if it had to be opened can it be to a specific item in ANILCA or would that open up the agenda? Just like the memo of Cheri Jacobus and [indisc.] constitutional amendment that would stop or hinder economic development. Can I say that if it was an open agenda and perhaps throw out scare tactics, just like the administration, that the environmental groups would look at locking up Alaska and also that the would hinder this administrations economic development or perhaps the anti-hunting and trapping groups would be looking at stopping that Alaska, perhaps my mining friends in Alaska that would stop that also. Is that a possibility when you look at opening up ANILCA?

MR. MITCHELL:

Senator as you and the other members are aware what a bill to amend ANILCA, even just to eliminate the one section that Senator Eliason has expressed concern about -- what that bill is in your business is a vehicle. A train that is on the road and leaving the station. And once it starts and every time it slows down in those little small town places where they dump off the mail, if there are people standing there who would like to climb on Board,

they can certainly do that. And I've certainly seen that calamity befall many of your worthy projects and the only thing that would restrain that would be germane restrictions with respect to legislation that appears on the floor of the bodies and I and not a departmental expert with respect to that particular level of the legislative process in Washington. I would think it fair to say that pretty much a bill that amended one section of ANILCA would find amendments relevant to amending any other section of ANILCA to be well within order. And so in theory if there were citizens or interest groups or economic factions that had the aspirations that you describe in your question, this obviously would be a vehicle for them to explore the likelihood of achieving those goals, yes.

SENATOR ADAMS:

If there was a package that we could put together and I don't know if that's a possibility, we in the Native communities would like to vote on a constitutional amendment of course with the Bush Caucus legislation. Is there anyway that we would touch on ANILCA if there was a package with the administration?

SENATOR KERTTULA:

What are you saying, Senator?

SENATOR ADAMS:

Is there any way that a compromise can be reached even though we know the facts that ANILCA cannot be opened?

SENATOR KERTTULA:

Is it appropriate for him to speak for the administration for instance on this subject. He's an advocate for a particular group and their positions and as knowledgeable as he is there would be other comment area, I think to this. You're welcome to participate.

MR. MITCHELL:

I guess that was going to be my answer, Mr. Chairman. That obviously ... [tape ends midspeech].

Tape 92-16

Side A

[Tape begins midspeech]

MR. CAMPBELL:

... is whether it is better to have one portion something less than one fourth under the management of the federal government for purposes of subsistence and have them also be able to regulate for other uses to the extent that it affects subsistence. I'm talking basically about the [indisc.] a very small percentage of federal lands. While pertaining to while complete and total state control without any federal interference whatsoever, over about ninety-eight percent of our fisheries and slightly under half of our game. Or whether it would be better to assume management in name the day-to-day management - but have a situation where any decision at any point on fish and game, either by the department or by the Boards at any time someone felt it adversely affected subsistence, they could go into federal court with deference whatsoever to the state agency, just simply what do they think? Rewrite it.

And if I could, I guess I would like to defer briefly to Mr. Nelson just to talk again briefly about that issue of judicial oversight. I distributed to you a memo by Mr. Nelson on that subject.

SENATOR KERTTULA:

You may have the floor, Mr. Nelson.

MR. NELSON:

Thank you, Mr. Chairman. I won't take a lot of your time. I think you've heard my comments yesterday and now have a written copy then. My memo contains references to a couple of cases where I think we've gotten [indisc.] largely because of their unfamiliarity and lack of contact with the State of Alaska. And I don't think anybody can predict that the decisions are necessarily going to get any better as time goes on. I pointed out that we have one judge, Judge Kleinfeld [ph], and then we have a senior circuit judge, Judge Boocheveer [ph] who from time to time might participate in making decisions, but generally we have one judge out of 28. Half the judges on the Ninth Circuit are

from California. Judge Stavinski [ph] has written -- for some reason has ended up on the panel of two major subsistence decisions and authored both of the majority decisions at least in both of those. He's from Pasadena California and unfortunately there weren't copies made of the two decisions, but we'll get those to you that I refer to in here. I think just reading through my memo and looking at those opinions will give you a good feel for the kind of results we can expect from the Ninth Circuit. I guess my concern is regardless of what you do with anything [indisc.], it's still going to be a problem. McKie is right. It is your policy decision at this time which [indisc.].

SENATOR KERTTULA:

Attorney General, I think you wish the floor for a moment here.

ATTORNEY GENERAL COLE:

Mr. Chairman, I just want to say if you want to trust your faith to one of these learned jurists in the Ninth Circuit, you should first read what he says about how clearly people know what the word "rural" means. You will see on page three of this memorandum that Judge Kasinski writes that "the term rural is not difficult to understand. It is not a term of art. It is a standard word in the English language, commonly understood to refer to areas of the country that are sparsely populated or the economy centers on agriculture or ranching." Now we know how much Judge Kasinski knows about the rural areas of Alaska when he writes that. So frankly it gives me the willies.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

Yes, Mr. Mitchell, you may -- we've had a lot of attention so we don't want too much.

MR. MITCHELL:

I have my own views of Judge Kasinski, a well known Reagan Whitehouse staff person before his startling elevation to the Ninth Circuit. But I do think in terms of considering your

policy, the lemon here, I as you know, have been involved in the subsistence issues for many, many years and I've certainly been involved day-to-day since the McDowell came down in December of '89 and it is only really this time around the block that suddenly I find that the policy argument is out of the blue that the reason it is better to have the federal subsistence Board managing game is because it's a monsters of the Ninth Circuit live in Pasadena California. The Ninth Circuit has the scarecrow leaping out of the closet is a policy concern. And as I said, I have my views on Judge Kasinski and overriding, and I think the Attorney General and I over a cup of coffee would agree. I'm very much in my old age, a judicial conservative, as hard as it is to believe.

MR. CAMPBELL:

I'm was getting a little worried there, now.

MR. MITCHELL:

But be that as it may, I mean as the Attorney General knows, the State of Alaska litigates in the U.S. District Court in the Ninth Circuit, day in and day out. It's a normal matter of business. I don't know why it is that with respect to all subject matter under this subsistence, it is not an act of judicial terrorism for there to be a Ninth Circuit, but with respect to this particular issue, this is such a terrible calamity that we continue to have dual management. As I said, maybe there's something I am not aware of here, because as I said, this is an argument that has just appeared in the lengthy record of the subsistence debate.

SENATOR KERTTULA:

Senator Sturgelewski.

SENATOR STURGELEWSKI:

Mr. Chairman, I've heard so many words, my ears are ringing and not necessarily with joy. We've got a ferment in this country over what people feel is the lack of leadership and ability to solve problems and we jolly well are faced with that right now. What is tragic to me is the lack of faith and trust that we've got and I'm not lecturing. I'm saying this to myself and each other,

I think the lack of faith and the ability to come together and forging unified approach. I think it's true. I don't think there is one here. I guess I'd like to know why and we really haven't had that explained to us, why did the negotiations that I understood were going on between AFN which is a very influential spokesman for the main people behind the subsistence issue and the Attorney General or whomever breakdown. Why are we here today unable to advance? All the words you say do nothing more than just add an explanation point to what everybody already knows. We've got a breakdown in our ability to come together to what is perhaps the most important issue before this state. It's going to tear this goddamn state apart if we don't solve it. So we're all here with our words to say why we're where we are, which is separate. Why did we not find a way to move forward?

SENATOR KERTTULA;

Would the Attorney General or the Department of Fisheries like to comment?

ATTORNEY GENERAL COLE:

I'll respond to that, please, Senator. Where it broke down was in my view that the AFN said we will not take one whit less than our ANILCA guaranteed rights, period. And the administration said that's just not acceptable. You have to come off every singular ANILCA right or we won't get it done. And AFN was unwilling to do that. And I said, you know, that's not the way to get this done, insisting on keeping everything you have. So that's what happened. That's my version. Now there may be another version, but I must say, I have a vivid recollection of being told that.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

Yes, sir.

MR. MITCHELL:

I'm way out of the end of my league. This is the subject matter that President Kitka and others could better address than

I can. Taking that risk I'll just report at least on my recollections. I participated in a number of those meetings with the Attorney General and others, and with all due respect that is not at least -- does not correlate totally with my recollection of events. That the goal from the very beginning here has been to enact a constitutional amendment that would give the Legislature, if it wished to do so, the authority to enact a statute that would comply with ANILCA. Either the Legislature wishes to have that authority or it does not. And as I indicated earlier, if, in fact, there was the will to do that, I have every confidence that Mr. Cole and I could come up with a text that does that quite quickly. In fact, a number of the texts that have been circulating this afternoon, do that very easily.

When we met with the administration and the Attorney General, we indicated repeatedly that our primary goal was to come up with a constitutional amendment text that would achieve that goal. We took, during the course of those meetings, several drafts of language. I mean no one was committed to anything. But this was a very cool situation. People of goodwill trying to see what they could work out and we cobbled some text together that was based on some of the language that had been given to use by the administration that we thought was actually headed towards achieving that goal. And we walked out of that room that day and thought that maybe Senator Sturgelewski's hopes had been realized and that we were at least headed together down a road as opposed to not going anywhere and the next day when we reappeared it was the Attorney General and the Administration that took that language off the table. Once that language went off the table and we asked repeatedly that it not be off the table, there obviously was -- you cannot negotiate Senator Sturgelewski, as you know with yourself. There has to be someone else.

SENATOR STURGELEWSKI:

I've tried a lot.

MR. MITCHELL:

You at least have to agree on the goal that both parties have

before you can explore differences of opinion as to how to achieve that goal. I don't mean to second guess the administration for taking that off the table. I'm just saying that it reflected that in retrospect that they had serious policy concerns, obviously, about whether or not they agreed with our goal, which obviously we have brought to you again here this week, which is that we believe it's in the best interests of the people of Alaska to have their constitution, grant you the authority should you choose to exercise it to be able to comply with ANILCA. And after that is done, then obviously people of goodwill can continue on the process of working with ANILCA and dealing with each other.

SENATOR KERTTULA:

Mr. Campbell, I think you should [indisc.].

MR. CAMPBELL:

Just briefly, while I disagree with a substantial portion of at least that view of how negotiations came to the end. I would like to agree with one part of it. I do believe Mr. Mitchell correctly stated that throughout, and I believe continuing has been the goal of the AFN to simply pass a constitutional amendment and minimal statutory general if necessary to simply put us back into compliance with ANILCA. And as I believe the Attorney General refers [indisc. - cough] not give up anything that was in any way in ANILCA. And it was the view of the administration that the terms of ANILCA itself, not the preference of subsistence, but some of the terms like judicial enforcement, like the lack of definition of "customary trade", lack of ability to provide for a person who lives in -- who is a subsistence user but might be in what is classified as an urban part of the state, that every single person in rural Alaska without exception had to be granted a subsistence preference, we felt that you had to look at ANILCA also. And I believe that was the basic policy disagreement. That we thought ANILCA had to be looked at in addition and they thought it could not be.

SENATOR KERTTULA:

Mr. Attorney General.

ATTORNEY GENERAL COLE:

First, as I recall having heard over Alaska Public radio - that's a plug for Alaska Public radio - Byron Mallot says within this week we insist on all of our ANILCA rights. And I heard him say that just this week so clearly. And the administration's view then has been that ANILCA is fundamentally flawed and if we're going to reach accord, the AFN then has to come off insisting totally on all of their current existing rights under ANILCA. And we went through that story and discussions repeatedly.

And finally, it's sort of like asking a girl to dance. You know after she turns you down about three times, you don't ask anymore. We just got to that point that it wasn't any talking about the subject anymore because it was a fundamental different which we couldn't breach.

SENATOR STURGELEWSKI:

Mr. Chairman.

SENATOR KERTTULA:

Senator Hoffman hasn't spoken, then Senator Sturgelewski. Senator Hoffman.

SENATOR HOFFMAN:

Well, it seems to me, it's quite clear to me during the last four days that it's impossible. It seems to be impossible to change ANILCA. [Indisc. - cough] the road blocks in Congress, the Congressional delegation telling us that it's impossible, AFN's attorney saying that there's too many ways for that to be blocked. Now for us to hang our star on solving the subsistence problem of this state and the dual management problem in the state on the possibility of one in one thousand and for the administration to take that stand seems ludicrous. Not only to the common persons thought process, it's an injustice to the people of this state.

SENATOR KERTTULA:

Mr. Campbell ...

SENATOR HOFFMAN:

... and I can see why the negotiation would [indisc.] out the administration takes that stringent of a position.

SENATOR KERTTULA:

Would the administration like to comment, Mr. Campbell [indisc. - cough].

MR. CAMPBELL:

Thank you, sir.

SENATOR KERTTULA:

And rapidly. We are down to the last forty-five minutes or less.

MR. CAMPBELL:

I will be very quick. I would like to endorse a suggestion that Mr. Mitchell made earlier. That it's something you might want to talk to Mr. Katz about this. We talked about this with him throughout this process. I think that we alone agree that if we had a consensus within Alaska, if we could have reached an agreement on amending ANILCA, that could have been done easily, quickly, efficiently as it has been done over, and over and over again, without any of the horror stories which we hear talked about coming through. The fact is, I think Mr. Katz will tell you as he told me that in fact it's sort of established an informal protocol. We're not Christmas treeing ANILCA [indisc.] and the Native communities has gone in itself have amended ANILCA over and over again. And the reason it hasn't been a problem is it [indisc.] the state. We are not suggesting that ANILCA is going to be amended over the stringent objections of the large portion of this state. But we do think that until ANILCA is amended the state is better served by being out of compliance with ANILCA than being in compliance with ANILCA.

MR. MITCHELL:

Mr. Chairman.

SENATOR KERTTULA:

You have the floor, then Senator Cotten.

MR. MITCHELL:

Mr. Chairman, a brief comment on that. First, whether or not with a complete consensus in Alaska for doing so that an amendment to Title eight of ANILCA would be enacted by the Congress easily,

quickly - I forget the list of grease that's just been described to us - is obviously a question of fact. I think it would be interesting to know whether or not - that is I don't question Mr. Campbell representing that that's what Mr. Katz -- what he believes Mr. Katz believes the facts to be. I would certainly say that that's not necessarily the impression Mr. Katz left with me with respect to that. As I indicated, if that's an issue, it would be profitable to hear from Mr. Katz. And obviously if that is Mr. Katz's view I think it would be profitable to test the validity of his judgment in that.

But be that as it may, let's assume that that's all true. Let's assume for the purposes of argument that the Native community, we're going to shake hands with the administration, that whoosh, we could have a bill to amend ANILCA on the unanimous consent calendar. That presupposes the administration's argument which we really haven't gotten into here, other than a little bit yesterday, to respond to, is the ANILCA policy choices. The administration is certainly entitled to it's view that the policy choices that Congress adopted in ANILCA are bad public policy. I don't think there is any person that means to be mean-spirited or racist or anything else to hold those views. Those are legitimate views. It is nevertheless true that a vast majority of the people of Alaska including Alaska Natives think that while they would like to see improvements to ANILCA, and in fact we had suggestions for doing that. Most of which I think the administration would find more objectionable than ANILCA, probably. I don't know. Nevertheless, but on balance, that the ANILCA policy concepts were sound and indeed as I testified to yesterday were first developed by the Alaska Board of Game to deal with some real problems in the bush to begin with. They're home grown. To say that the Native community is being obstinate because it has that policy view and the administration is being obstinant because it has this policy view, is not necessarily probably being fair to either side. The administration is certainly happy -- entitled to have it's policy judgements - any policy judgements it wants. But many people

express real concern that in it's commitment to the fact that ANILCA is bad public policy, the ideology of that commitment becomes more important than returning regulatory control to the Board of Fisheries and the Board of Game. And that's the conflict that's presented to you.

SENATOR KERTTULA:

Senator Cotten has the floor.

SENATOR COTTEN:

Well, it's clear that there are some people that don't feel that we should have a constitutional amendment under any circumstances. And there are other people who feel that we should have no change to ANILCA under any circumstances. I think it's clear to everybody that we have to probably do a little bit of both in order to solve this problem. I passed out a proposition that was forwarded to me by the United Fisherman of Alaska that isn't a brand new idea. I think you've all been exposed to it before and there's a second page that would give you different way to approach that. And I suggest that we move forward with the program similar to this, if not this proposal, something similar because obviously Don Mitchell is not authorized to say on behalf of AFN that he'll accept changes to ANILCA. Nor I'm not sure whether Al Adams, Lyman Hoffman and others who are sponsoring legislation along these lines or that Senator Halford's going to say, okay, for the benefit of the people that I've been promoting ideas for, I'll accept a constitutional amendment. But I think it comes down to we either do something or we do nothing. And this is something. And I suggest this is what we do.

SENATOR KERTTULA:

Senator Halford, and then Senator Schultz and I've had Senator Schultz recognized now and then Senator Sturgelewski ...

SENATOR STURGELEWSKI:

No, that's fine.

SENATOR KERTTULA:

[Indisc.].

SENATOR HALFORD:

Thank you, Mr. Chairman. It looks like this proposal is similar to a previous one but it doesn't include the provisions that the administration was looking for with regard to judicial oversight. Is that the intent -- it requires amendment to ANILCA to recognize the statute as in compliance with ANILCA. But it does not require, as I read it, a repeal of 807 or a change in 807. that allows for the direct federal court access -- that provision. Does that kind of what the intent?

SENATOR COTTEN:

I didn't think that was necessary. If the Congress recognizes ...

SENATOR KERTTULA:

... for the counsel up here if we do, let them. It would be easier for them to work ...

SENATOR HALFORD:

They can respond better than I can.

SENATOR COTTEN:

Yeah, I'd like to hear from them, too. If Congress recognizes that the law we passed this special session is in compliance with 804 and 807 or whatever those sections are, well then, that's a congressional -- it's a determination on the part of the United States Congress. And I don't know if you would have to worry about judicial interference after that point. But I'm willing -- I'm anxious to hear what the lawyers too,

SENATOR KERTTULA:

Mr. Attorney General or Lance, do you wish to -- Lance, go ahead.MR. NELSON:

Thank you, Mr. Chairman. That kind of language may well would be helpful. But I don't think it would solve the problem. And in that the decisions that the federal court is making right now are not necessarily [indisc.] regulations in other words, reserve the statutory scheme, regulatory scheme in compliance with ANILCA. The federal court decisions have gotten into whether or not the regulations themselves are in compliance with or consistent with state laws as interpreted under an act. [indisc.]

themselves to decide in compliance. They're looking at the regulations themselves and hearing each one of them and making -- and they have the power to do that under 807. And requiring them to be revised, amended and brought back to them until they're satisfied. And then we have the same problem once that happens [indisc. - cough] but either way the appeal goes into Ninth Circuit and that's where every interpretation stops.

SENATOR COTTEN:

Are you saying the court would decide whether even though Congress could say that whatever we passed this session was in compliance with 807, the court might decide otherwise. Is that what you're saying?

MR. NELSON:

Right.

SENATOR COTTEN:

Does everybody agree with that? Do you agree with that?

UNIDENTIFIED SPEAKER:

Senator Cotten, it's for the courts to decide. The decision is taken under [indisc.] by the Boards if we're not in compliance with ANILCA.

SENATOR KERTTULA:

Senator [indisc.].

UNIDENTIFIED SPEAKER:

By complying with ANILCA by the bill, we put ourselves under the federal oversight provisions on a statewide basis. And unless we in some way address those federal oversight provisions we may have done kind of the worst combination instead of gotten [indisc.]. I hope we'll have somebody from UFA to testify on this proposal as advocated as theirs I'd kind of like to ask -- because I thought they were very much interested in getting out from under those federal oversight provisions too.

SENATOR KERTTULA:

I know this may be interrupting, but, Senator Schultz, you've been seeking the floor, forever. I apologize.

SENATOR SCHULTZ:

It's not necessary because I was kind of enjoying the debate here. I guess the thing is we're getting down to where we debated the issue for a long, long time and I'd just like to know, Mr. Mitchell, the -- is there any way that the people you represent could support a constitutional amendment that is in any way, shape or form tied to a change in ANILCA? If the answer is, no, then we're clearly talking only a constitutional amendment.

MR. MITCHELL:

I can say, first of all, I don't have the authority to answer that question. That is a question that you need to ...

SENATOR SCHULTZ:

[Indisc.]

MR. MITCHELL:

No, that's a policy question, not a legal question. And you need to address that question to -- it's a legitimate question. You need to address the question to the people that make the policy and obviously the place to start would be Julie Kitka, the President of AFN and John Schaeffer, the Chairman of the Board and then they and other officials of the organization that are available. That said, I think I can summarize public statements that have been made to date, which is I'm not familiar with any public statement of announcing policy that have been made by any officials of the Alaska Federation of Natives or indeed, any other representatives of the Native community during the special session or during the regular session, that would indicate that the answer to your question is, yes, that the people are prepared at this stage to revisit ANILCA as part of your decision making in terms of whether or not you like the state to comply with ANILCA. But as I said, I'm just summarizing the statements that have been made. You should ask.

SENATOR SHULTZ:

Well, I guess the question is -- going back to the Attorney General, didn't -- It was my understanding when the negotiations broke down was because of the discussions that got to ANILCA and tying any kind of a constitutional amendment to it. So I mean if

you're saying now you're willing to talk about it, that's one thing. But if we're still at the same point that we were a month and a half ago, negotiations stopped.

MR. MITCHELL:

As I said, Senator, you're having this conversation with the wrong guy. But I would say that it would be my impression as somebody who has been involved in this issue during the regular session in '90, the special session in '90, the regular session this year and now this special session, that I understand the political difficulty. But the analytical problem here is really very simple. The fact of the matter is that ANILCA is ANILCA. People have various views about it. Some people think it's fine for some reasons. Other people think it's not fine at all. It doesn't make any difference. ANILCA is ANILCA and the issue before the body is would the body like to give itself the authority, if it wishes to exercise that authority, to comply with ANILCA, or doesn't it? And that is the subject about which I have no view. It's not my brief to have it. But I can -- it is within my portfolio to describe for you what the issue is. And that is the issue.

SENATOR KERTTULA:

You have the floor.

SENATOR SCHULTZ:

Let me continue on. In 1990, we're sitting down here in special session and we were going over the constitutional amendment and the first time they were voted on, and then the second time they were voted on. Then we started holding hearings. Okay.

SENATOR KERTTULA:

Ms. Kitka.

SENATOR SCHULTZ:

Okay ...

SENATOR KERTTULA:

Julie.

SENATOR SHULTZ:

We brought this thing up for hearing, then we were looking for consensus. We were looking for things of areas of compromise and I believe we ended up taking approximately, if I recall, seven votes on that particular piece of legislation. Now, what I'm saying is there has been considerable amount of time that's lapsed between that time and now and the time that the first subsistence bill was written, et cetera. What I'm saying is, if we're still at the point where it's a constitutional amendment, period, and leave ANILCA alone, one side is over here and the other side is no constitutional amendment. That's just something -- and no one is going to give at all. No consensus. No attempting to get there. Then it's something you just need to throw up and vote on and move on.

MR. MITCHELL:

Senator, I don't think I can respond to that. That's sort of a description of your view, of course, of what the checker Board looks like here and I may have my views as to whether that's accurate and it doesn't make any difference what I think.

SENATOR KERTTULA:

Yes, Mr. Cotten, I think we're back to your amendments.

SENATOR COTTEN:

That's fine. I just think we're getting to the point where perhaps you ought to ask some of the people that can discuss policy at that table instead of the technical people.

SENATOR KERTTULA:

Ms. Kitka, I'm going to ask -- Senator Schultz, I'm going to have you ask Ms. Kitka one time that same question and I don't know if she's privileged either as the president to comment definitively but at least that question since she is here, one more time.

SENATOR SHULTZ:

Just very briefly.

SENATOR KERTTULA:

And we're only going to spend a maximum of ten minutes more on this subject, because we have other things to get to.

SENATOR SHULTZ:

My question is simply this. Is there any opportunity for any ability to tie a constitutional amendment with a change in ANILCA? Will you guys sign off on that? Will you work to try to accomplish something like that?

MS. JULIE KITKA, PRESIDENT, AFN

I guess the question is really depends upon what we're talking about.

SENATOR SHULTZ:

Senator Adams gave an example a while ago.

MS. KITKA:

We're talking about constitutional amendment language. I mean we all know how serious these things are and every word, comma and period makes a difference. I think we're also talking about, as far as ANILCA, the Native people have always been willing to talk about the federal law -- the conflict between the federal law and the constitution. It would depend upon what people are asking of us as far as the federal law. We are not unwilling to talk about that. In fact, internally in the Native community people have voted on a lot of things that they've like to see improved in the federal law.

SENATOR KERTTULA:

You have the floor.

SENATOR SCHULTZ:

Would like we heard from the Attorney General there as to why negotiations broke off and what happened?

MS. KITKA:

In my view, the reason why the negotiations broke off is because that a change to ANILCA that the administration was seeking -- the overall policy change that they wanted to use they wanted to weaken the protection for subsistence people under federal law and that they wanted to, in trying to state statute as the federal standard and get rid of federal oversight was the primary driving thing. From the Native perspective, the federal oversight is the protecti... we need to make sure that the state

does the right thing in implementing the program. So therefore, we could not allow Title eight to be gutted.

SENATOR SHULTZ:

Okay, you're saying that you want federal oversight on state management of our wildlife and fisheries resources. You want federal oversight, regardless of what we do with state law?

MS. KITKA:

What I'm saying is the reason federal oversight is in Title eight of ANILCA is to insure that the state is in compliance on that. That if the state is unwilling or unable to implement the federal law or the state statutes compliance with the federal law adequately, that there is a remedy for people that live out in all these remote areas on that to have standing to have their concerns addressed. Yes, it is a protection of subsistence.

SENATOR SHULTZ:

So regardless of where we go with this, the protection -- the ultimate protection that you're asking for is federal oversight of the fish and game resources of the State of Alaska? The ultimate place to go is with federal management?

MS. KITKA:

Okay, I guess what we're talking about -- the ultimate thing which Native people want is they want state and federal laws which protect our people. There's nothing sacred about ANILCA per se. We want to live under a legal framework, both in the state constitution and in the federal law, which protects our people's interests. No federal law is ever perfect. No state law is ever perfect. But we want a legal framework which would protect our people. And currently, right now, Title eight of ANILCA is the strongest protection we have for our people.

SENATOR SCHULTZ:

Can I ask a question?

SENATOR KERTTULA:

You have the floor, Senator Schultz.

SENATOR SHULTZ:

What would happen if this legislative body was going to draft

a piece of legislation that would state that only the Native people in the State of Alaska are allowed subsistence rights in this state. Would you be willing to go in and wipe out section eight of ANILCA?

MS. KITKA:

Could you repeat that?

SENATOR SHULTZ:

If we wrote a state law that simply said that the Native people of the State of Alaska are the only ones that are entitled to subsistence and we give them a definition of generations and so on and so forth. A very strong state law. Would you still want the protection from ANILCA?

MS. KITKA:

For one, I believe that such a statute would be unconstitutional.

SENATOR SHULTZ:

Well, I don't know whether it would or not.

MS. KITKA:

I'm no lawyer. I don't know either, but I would suspect it would be unconstitutional, but in addition, I think you have to look at the intent of the Congress to pass Title eight of ANILCA in including rural residents. Congress recognized that there are non-Natives that have adopted the subsistence lifestyle. There are non-Natives that have married into Native families that continue that lifestyle. There needs to be some recognition of that in and some affording us protection for people going forward and living this lifestyle and not divide families. There is some valid public policy reasons for why non-Native subsistence users are afforded this additional consideration. I might add, also for the record, we never sought from this legislation a Native priority on subsistence.

SENATOR SCHULTZ:

I know that. I was just asking a question. I was trying to reach out as far as I possibly could to find out when could you agree to a change in ANILCA.

SENATOR KERTTULA:

Are there another questions of Ms. Kitka? All right. You have the floor, Senator Fisher.

SENATOR FISHER:

Yes, I guess what I'd like to know, Julie, is did you see the proposals that the United Fisherman of Alaska have or that Senator Cotten passed out? I guess I'd like a yes or no as to whether you being a policy making person would like it's yes or no. Would you want to vote yes or no?

MS. KITKA:

I haven't seen it.

SENATOR FISHER:

Oh Okay.

MS. KITKA:

So, I'm sorry, but I guess as far as the question of whether or not Native people would agree to an amendment of ANILCA, of course, there would be point in time. I would suggest that the most appropriate way to address this is, one, do a constitutional amendment and get the authority back to the Legislature to enact a statute that complies with federal law. Get management back. And if there's changes to ANILCA that need to be discussed, there ought to be set up a negotiating process with the administration, Native people and whoever else, to take a look at those issue and work towards that. But get the legal ability to pass a law to get management back first. That, in my view, makes the most sense. As opposed to tying it all together as far as ANILCA, it is very hard to predict what the Congress will do as far as Title eight of ANILCA and it is a real gamble to this Legislature to put at risk unitary management banking on the Congress to do anything. I have been told since we testified at the last special session that one of the risk of opening up ANILCA is the environmental community wanting an additional fourteen million acres of wilderness of this state. There are other state interests that are at risk in opening up ANILCA. It's not just a simple thing of dealing with the Native community on this issue. There are other interests

that affect the state that come into play if that is the direction you go as far as opening up ANILCA. It's not just the Native people and what the Native people want that comes into play. There's a lot of other national interest in there, both pro and con to state interests.

SENATOR FISHER:

I guess what my concern is, we're going to at least -- the chair indicated that we need some solution. This is a solution, that the answer is no, and I think Senator Schultz was alluding somewhat to the same thing. That if the answer is no, to this one, then I don't even know why we're debating any issue that addresses constitutional amendment being dependent upon Congress doing anything. And I hear you say, no, that you don't want to go so far ...

MS. KITKA:

I've not seen the [indisc.] brief. But I'd be glad to step aside and ...

SENATOR FISHER:

Mr. Chairman.

SENATOR KERTTULA:

You're coming forward right off the street.

SENATOR FISHER:

Yeah, Mr. Chairman, and I would appreciate it if we could take the time, because if we spent four days here now and I think that if she could take the time to review it, this may be the answer that we've been looking for.

SENATOR KERTTULA:

Why not. We'll have five minutes recess.

RECESS

4:40 - 4:45 p.m.

SENATOR KERTTULA:

Senator Shultz, your question and I realize it was the barest minimum. Perhaps not time enough to reflect an answer, but Ms. Kitka Senator Schultz wanted you to see that and wanted to know if you might have a response. If any. Please proceed. We have a

quorum.

MS. KITKA:

Thank you, Mr. Chairman. You're right. I have had a chance to briefly look at and briefly give a brief comment. But I don't believe that we can support this bill for several reasons. One, it's totally dependent upon a state statute and we have no idea of what you're talking about in being enshrined in the federal law as a federal standard. So the uncertainties of that are way too much to make any determination. The second on that is I just don't think that we should have an amendment to a constitution depending upon an action by Congress in amending ANILCA. I think those are separate things on that, although I'm not opposed to talking about amendments to ANILCA in some type of process, in some point in time, I think linking that into a constitutional amendment is a big mistake for the State of Alaska because of the other interests and risks there are to the State of Alaska. I also think that amendments to the constitution when they're voted upon by the people of Alaska should be the ultimate policy statement by the people of Alaska, not dependent upon elected officials in the Congress to ratify or do whatever. If it's a constitutional amendment and it's voted by the people of Alaska, that ought to be the policy statement that enshrined our constitution. I know that this is [indisc.] solution, unfortunately, I commend United Fisherman of Alaska for this proposal I don't believe that we can support this.

SENATOR KERTTULA:

Are there further statements or questions about constitutional amendments that may be proposed? Senator Collins, does have the floor.

SENATOR COLLINS:

Thank you, Mr. Chairman. I must apologize to [indisc.] my question might have been asked and I apologize if it has and I am reiterating it. The assumption is in putting forth a constitutional amendment that (a) -- from the discussion I hear that (a) a constitutional amendment would have [indisc]. The

question that I'd like to ask is what happens if a constitutional amendment does go forward and it fails at the ballot box. What happens if the constitutional amendment goes forward and it [indisc.] by the voters challenges [indisc.] where are we then if our efforts to the address the issue of the constitutional amendment. Where do we go from there?

SENATOR KERTTULA:

You have the floor, Mr. Mitchell.

MR. MITCHELL:

With respect to the possibility of the constitutional amendment were to appear on the ballot failing, that's really a question that perhaps should be addressed to President Kitka.

SENATOR COLLINS:

No, it's's not. The question I am addressing to you is a legal question and I'm asking that [indisc.] a legal opinion.

MR. MITCHELL

Oh, okay. sure. Now, I understand the question. That is certainly if in fact a constitutional amendment were put on the ballot by the Legislature and at the November general election a majority ... [tape ends midspeech].

TAPE 92-16

Side B

[Tape begins midspeech]

MR. MITCHELL:

... voted that they did not want to amend the constitution in that fashion, voted the amendment down. Then legally the state would be left in exactly the same position it is right now, which is that it would -- there is ANILCA there and the state, if it wants to comply with ANILCA can do that because the Legislature doesn't have the authority to do that. You would be in exactly the same legal position that you are this afternoon, with respect to the federal state management problem and all the things which have obviously created difficulties for us.

SENATOR COLLINS:

In that case, what could we resort to solve the [indisc.].

MR. MITCHELL:

Well, at that point, that would then be a political situation. That would be a majority of the people of Alaska proving to Congress that it's policy judgement was correct in 1980 that it had to enact ANILCA to protect a minority of Alaskans from the will of that majority. Which is to a certain extent, to be blunt about it, what ANILCA had some of the policy concerns behind it driving it.

Now the second part of your question is what if the voters were to pass a constitutional amendment and then the courts were later to strike the amendment down. I do not believe that the courts would have the ability to strike the amendment down. What the Alaska Constitution says is what goes. In other words, what the courts does is it enforces the Alaska Constitution whatever the Alaska constitution may say. Now it may be that in implementing your new authority under this constitutional amendment that on other constitutional grounds someone might challenge the statute all over again and think up some other legal theory about why it's invalid. But I obviously cannot predict that and I wouldn't know what those other legal theories might be nor would I be able because I don't know what they are, to predict the likelihood that any of them would succeed. But in terms of the constitutional amendment itself, if the voters pass it and it's there and the amendment itself, in my view, cannot be invalidated by the courts. I don't know what the Attorney General would -- if he had a different opinion about that or not. Certainly, the amendment somehow violated the United States constitution, no state, Alaska or any other, can have a law or a constitution that would violate the guarantee that all citizens have with the United States constitution. But I don't think that we're talking about the likelihood of that being our situation.

SENATOR COLLINS:

Then, in the event, that say constitutional amendment failed and your [indisc.] that would be in exactly the same situation that we are currently ...