

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672

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HOUSE RESOURCES

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Phase 2 of the Oil Transportation Assessment will develop a menu of practical alternatives for reducing the risk of future spills with cost/benefit estimates for each option. Priorities for implementation will be recommended. The final report is expected by the beginning of June 1990.

A key facet of the Prevention Alternatives studies will be their review by a study panel composed of members from the Washington Department of Ecology, the U.S. Coast Guard, the B.C. Ministry of Environment, Canadian Coast Guard, Environment Canada, the British Columbia Ministry of Energy, Mines and Petroleum Resources, and the oil industry.

The focus of the panel will be to assist the contractors in weighting risk factors, to help build consensus and to ensure the implementation of recommendations for reducing risks and preventing oil spills. Industry representation on the study review panel will be expanded in phase two to include producers and shippers as well as refiners.

Emergency Response Subcommittee

Task - To identify existing policies/procedures in Washington, British Columbia, Oregon and Alaska, to explore how they can be modified to complement each other, and to recommend a mutual aid plan to ensure a timely and effective response to future spills.

Progress on Joint Emergency Response Plan

The committee has reviewed the Canada/US Coast Guard agreement and each jurisdiction is submitting a matrix of agency functions and response mechanisms currently in place. They will form the body of the plan.

The plan outlines a concept of operations and is intended to be a living document with provisions for appropriate review, updating and annual joint exercises. It identifies which jurisdictions at the provincial, state and local levels need to be involved in support of existing and future federal and international agreements. British Columbia is drafting the first section to introduce the concept of operations and how it relates to the Canada/US agreement.

All jurisdictions involved in the subcommittee support the adoption of the process known as the Incident Command System as a basis for providing consistency of procedure for alerting and monitoring, and for the provision of mutual expertise.

Progress on Joint Notification/Fan-out List

A joint notification list has been assembled and is currently being edited prior to publication. It will contain criteria to be used in notifying the appropriate personnel within all designated agencies. The list will be updated annually.

Progress on Oil Spill Response Exercises

The committee has agreed to a tiered approach to oil spill exercises, and full cooperation with all other concerned parties. A five-year schedule for exercises, starting January 1990, is currently being drawn up.

Financial Recovery Subcommittee

- Task 1 - Cost Recovery and Damage Assessment Options:** Review existing information on procedures and laws for recovering costs and damages from responsible parties.
- Task 2 - Generic Field Contract:** Provide a short contract for field use to allow spiller to assume responsibility.

Progress

British Columbia and the federal government of Canada have now completed a draft synopsis of the law of British Columbia as it would pertain to cost recovery matters arising out of oil spills.

The synopsis outlines the various enactments, both federal and provincial, and the common law principles that relate to the assessment and recovery of environmental damage. It reviews the various limitations and international conventions of which Canada is a participant, and outlines procedures in the federal court, which is the most important forum for admiralty actions in Canada.

The state of Washington has completed a draft manual of recovery options outlining the historical development of admiralty law in the United States. The manual deals with the issue of legal standing and the concept of "public trustee" as it pertains to state resources. It contains a comprehensive review of the statutory causes of action under both federal and state statutes, as well as the common law relating to maritime negligence and nuisance.

Consideration is also given to legislation regarding the assessment of environmental damage and the various funds available in the United States to deal with the consequences of a major oil spill.

Briefs relative to the statute law of Alaska, Oregon and California are expected prior to the final report of the subcommittee.

Technology Sharing Subcommittee

Task 1 - Oil Spill Equipment Inventory: Obtain an inventory of private and cooperatively held response equipment, including an assessment of the capabilities of the equipment and recommendations for further needed equipment needs.

Task 2 - Technology Evaluations: Provide consensus opinions on which technologies can and cannot work for the task force members. Review technology submittals and evaluate promising proposals.

Progress

An equipment inventory has been received from Washington. Inventories have been requested from British Columbia and Columbia River cooperatives. Once all the inventories are compiled (including the upgrades and the PIRO major spill equipment), the subcommittee will make an evaluation of the capability of spill response equipment. If there are obvious shortcomings, they will be pointed out in the final report.

Numerous new and innovative suggestions and proposals for clean-up technology and oil spill response were received by provincial and state governments. These proposals encompassed a wide range of technologies including absorbent materials, marine transportation concepts, clean-up devices and others.

Many of the proposals were forwarded to the Environmental Emergency Technology Division of Environment Canada in Ottawa, Ontario, and the US Coast Guard testing facility in Groton, Connecticut, for professional technical review.

These suggestions, along with the thousands of proposals submitted to Alaska, will be thoroughly evaluated at the federal level. If appropriate, the results will be shared through federal channels. Task force members will need to be aware of these reviews as they are made available.

The subcommittee will hold forums to discuss beach cleanup techniques and resource damage assessment methodology. These forums have been delayed due to the loss of our coordinator. The purpose is to bring together experts in these areas to foster consistency and comparison of ideas.

In addition to the above tasks, the technology sharing subcommittee has undertaken to make a study of oil supply routes in the Washington/B.C. area. This study, which was commissioned by the Western States Petroleum Association, is now complete. The study shows oil supply routes in the Puget Sound and off the coasts. The contractor was the University of Washington's Marine Studies Institute.

INDIVIDUAL ACCOMPLISHMENTS

Since the Nestucca oil spill, personnel from Alaska, British Columbia, Washington, Oregon and California have been working together on the task force to find ways of cooperatively responding to spills in the future. Each has also been occupied with coordinating its own state/provincial response and drafting legislation that will clarify responsibility for clean-up operations.

The following reports describe what each is doing in these areas.

Alaskan Initiatives

The Oil and Hazardous Substance Spill Response Section of the Alaska Department of Environmental Conservation is currently organizing and staffing two new projects charged with implementing emergency response and contingency planning legislation passed in the wake of the Exxon Valdez disaster.

Senate Bill 264 directs the establishment of an office of emergency response, a volunteer emergency response corps, and state-wide strategically located emergency response equipment depots.

Senate Bill 261 provides for the production and annual review and revision of a state master contingency plan, and regional master contingency plans for selected areas of the state.

Funding for these projects is provided by the Oil and Hazardous Substances Response Fund, which has been increased by a .055/bbl charge on TAPS oil. The new legislation also permits the funding by contract for research and training in the area of oil spill containment, cleanup and assessment.

In addition to the above projects, the department has undertaken an extensive reevaluation of individual vessel and facility contingency plans. A contract is being let to examine the criteria for contingency plan review and approval, and to develop a state-wide computer data base to facilitate the tracking of every installation and operator required to submit a plan.

The department continues to work diligently with the Alyeska Pipeline Service Company to produce an acceptable oil spill contingency plan for Prince William Sound. It is expected that Alyeska will submit a revised plan for approval in January 1990.

The Dispersant Functional Working Group to the Alaska Regional Response Team (ARRT) is re-evaluating the dispersant use guidelines for Alaska and dispersant use zones for Prince William Sound and Cook Inlet to determine if any changes are necessary based on recent use of the guidelines and the pre-approval agreement with the Environmental Protection Agency (EPA) and the Coast Guard.

Other legislation passed during the 1989 session provides improved protection and compensation laws.

House Bill 68 sets liability similar to CERCLA specifying owners, operators, past owners, and those who arrange contracts for transport and disposal as responsible for damages to persons, property and the environment. Exclusions were made for acts of God, war and actions of a third party not under control of a diligent owner or operator.

Senate Bill 271 increased civil penalties for crude oil discharges to \$8 per gallon up to 420,000 gallons and \$12.50 per gallon in excess of 420,000, to a maximum of \$500 million. In addition, the court may assess four times the penalty amount for negligence, failure to take reasonable cleanup measures, or failure to follow a contingency plan.

Senate Bill 277 established a special commission to investigate the Exxon Valdez disaster and recommend changes to Alaskan laws; propose legislation to encourage and fund prevention and cleanup of spilled oil; and to identify steps necessary to handle better oil and oil spills.

British Columbian Initiatives

The States/B.C. Oil Spill Task Force has been a focus of the B.C. government effort in the area of oil spill prevention and response since the Nestucca spill in December 1988. However, it has also undertaken several other initiatives that fall outside the task force mandate.

Immediately following reports of Nestucca oil stranding on Vancouver Island beaches, a federal-provincial team was assembled to assess the short- and long-term environmental impacts of the spill. Several projects and activities were instigated to determine the immediate impacts of the oil on the environment.

Environment Canada and the B.C. Ministry of Environment have jointly published a report, *The Nestucca Oil Spill, Preliminary Evaluation of Impacts on the West Coast of Vancouver Island*, prepared by Environmental Sciences Ltd., which describes the results of many of these studies. Longer-term research programs are still in progress.

Another direct result of the Nestucca spill was the appointment of David Anderson as the special advisor on oil spills to the Premier. Through a series of public hearings, and through private interviews and correspondence, Mr. Anderson has investigated a broad range of matters dealing with oil spills and tanker safety. His report to the Premier in December contained over 180 multi-jurisdictional recommendations for action dealing with:

- preventing oil spills by reducing consumption, recycling oil products, reducing tanker traffic, and improving ship safety;
- responding to spills by a variety of improved methods and by the establishment of an independent oil spill response agency; and
- improving oil spill compensation and insurance.

British Columbia has taken some very positive steps in the matter of response and clean-up to those spills that may occur despite our best efforts at prevention. In the spring, a preliminary oil spill contingency plan was prepared. Two oil spill response teams were formed (north and south coast teams), made up of technical, professional and managerial staff of the Ministry of Environment and the Provincial Emergency Program (PEP).

At the present time, B.C.'s contingency plan is being expanded into a more comprehensive document, and a full training program in oil spill response is being drawn up for the two response teams.

In the general area of contingency planning, a new focus at the Ministry of Environment is to ensure that all industries that store or transship petroleum products have taken appropriate measures to avoid spills and also have workable contingency plans to ensure a timely and effective response to those spills that do occur.

A steering committee, which includes federal and provincial agencies and representatives of major industry associations, has been struck to establish rigorous standards for industry contingency plans. The committee will also develop an effective process for auditing industry contingency plans.

A major long-term goal of the Ministry of Environment is the development of a computerized oil spill response information system, critical in oil spill contingency planning for the identification of high risk shoreline, protection methods for all types of shoreline, simulated oil spill response tests, assessment of oil impact for clean-up operations, and long-term monitoring of the effects of oil. The immediate tasks being undertaken in the achievement of this long-term goal are:

- cataloguing and editing of coastal videos, which will make biophysical data readily accessible in the event of an oil spill;
- preparation of a hard-copy oil spill response atlas for southwestern Vancouver Island;

- identification, compilation, cataloguing and summary of existing environmental data (pertinent for planning and implementing oil spill countermeasures) in the southern portion of the Strait of Georgia;
- preparation of an appropriate coastal resources and sensitivity mapping system on a pilot scale for the Queen Charlotte Islands (along with Environment Canada through the Environmental Coordinating Committee); and
- analysis of feasibility and requirements for an oil spill response information system for the Ministry of Environment.

The provincial government is confident that these initiatives, in conjunction with task force activities, will contribute significantly to an improved preparedness in dealing with future spills.

Washington Initiatives

Contingency Plan Review and Revision

- The state is revising its contingency plan to more accurately explain the roles of ecology spill responders. The plan will be consistent with local, regional and federal plans. The state has revised its response organization and management scheme to assume effective response for major spills.
- The state has reviewed the US Coast Guard contingency plans for: MSO Puget Sound, MSO Portland, Region X, and the CANUS plan. Detailed comments have been forwarded to the USCG for their use in revising their plans.

Dispersant Policy

- This task was originally a part of the task force, but was deferred to the Regional Response Team (Ecology is a member of the RRT and will be involved in the policy developments.).

- The state has obtained agreement from all Washington state resource agencies that dispersants, with appropriate conditions placed on their use, may be an effective tool for spill response,
- A major consideration will be State Environmental Policy requirements, which require an environmental impact statement.

Puget Sound Water Quality Authority Issue Paper

- Comprehensive listing of oil spill prevention issues.
- The state has asked for further details and some prioritization.
- A final paper is to be submitted to the States/B.C. Task Force.
- Recommendations and a worklist for implementation will follow.

Nestucca Report

- The state has completed the final report on the spill, which assesses the state's response and presents recommendations for improvements.
- Major recommendations include definition of roles among state and federal agencies, volunteer management policy, and revision of the spill response plan.
- Ecology will work with the Department of Wild Life to develop policies for bird rescue and rehabilitation. Major parts of these policies will be state trustee roles and protocols for the setting up of bird rescue centres.
- Ecology will work with the Division of Emergency Management to develop an effective volunteer management policy. including liability concerns.

Legislative Efforts

- HB 2242 requires owners or operators of vessels over 300 gross tons, which transport petroleum products in the state, to provide evidence of financial responsibility. Liability limits are one million dollars or \$150 per gross ton, whichever is greater.

- ESHB 1853 directs Ecology to adopt an oil spill compensation schedule of up to \$50 per gallon on spilled oil to compensate the state for damages that are unquantifiable or very difficult to quantify at reasonable cost.
- Ecology has spent considerable time with our key legislators to develop these bills and other legislation. Ecology has worked through the National Governors Association and our federal delegation to eliminate state preemption for liability limits. Ecology will continue to work with state and federal legislators to enact comprehensive and responsible oil spill prevention and response bills.

Washington Conservation Corps Training

- Corps members have completed a training session on bird cleaning techniques. The Environment Youth Corps of British Columbia was included in this training. The WCC was very valuable in bird and beach cleanup during the Nestucca spill, and the training will provide a skilled work force to assist in future spills. Corps members who have received this training could conceivably train other responders.

Oregon Initiatives

Oregon Emergency Operations Plan: Oil and Hazardous Materials Emergency Response Plan (DEQ, 1987)

- This plan describes local, state and national communications networks for reporting spills of any kind.
- The plan details roles and responsibilities for local, state and federal agencies as well as industry and volunteer responders during minor, medium and major spills.
- The plan describes how the response system will work from local level to the national level for all types of spills including oil.

Natural Resource Protection Plans

At present, three coastal areas and one river system have plans specifically designed to protect the sensitive resources of those areas. These areas are: the Columbia River to Bonneville Dam, the Willamette River to Willamette Falls, Yaquina Bay and Coos Bay.

All of the above plans identify sensitive natural resources, prioritize them for protection on a seasonal basis, suggest methods for protection, identify boom sites and possible containment sites, locate access points, and identify available equipment, personnel and response needs.

New Initiatives

The Oregon legislature recently mandated the Department of Environmental Quality to develop oil spill contingency plans for the entire Oregon coast and all the estuaries, the Columbia River to Pasco, and the Willamette River to Willamette Falls.

The plans will build on and supplement existing planning documents utilizing Geographic Information Systems (GIS) mapping systems. They will focus on natural resource protection, emphasize interstate coordination, and will deal with issues such as wildlife rehabilitation, debris disposal, dispersant use, and damage assessment. The plans are due to be completed by July 1, 1991.

New legislation also requires DEQ to develop rules to require all ships carrying bulk petroleum products over 300 gross tons to provide financial assurance of \$1 million or \$150/ton.

Another piece of legislation requires DEQ to develop rules to impose additional civil penalties for the unlawful discharge of oil. All monies collected would be placed in a newly created fund to be used for damages to the environment.

Californian Initiatives

Each day, California consumes over two million barrels of oil, much of which is imported into the state by oil tankers to the principal processing areas around Los Angeles and San Francisco Bay. There are some 2,500 tanker trips through state waters each year.

As all the production, transportation, and processing of crude oil is done in the private sector, federal and state laws require that responsible parties assume primary obligation for the prevention, control, and cleanup of oil spills, and the consequent rehabilitation of affected areas.

Current Capabilities

Spill Prevention through Permitting and Planning

Stringent laws and regulations control platform and pipeline design, and construction and operation, as well as the operation of vessels and marine terminals and harbors.

The Harbors and Navigation Code makes provision for the control and cleanup of oil spills in all harbors and navigable waters of the state. State Lands Commission (SLC) requires, reviews and approves plans for operations and equipment for platforms, pipelines and terminals for state leases. SLC personnel monitor compliance and effectiveness of those requirements by performing regular inspections and drills. The Minerals Management Service (MMS) imposes similar requirements on operations in federal waters.

The Coastal Commission (CCC) is empowered by Section 307 of the Coastal Zone Management Act (CZMA) and Section 30232 of the California Coastal Act to make provisions for "effective protection against the spillage of crude oil, gas, petroleum products, or hazardous materials...."

CCC has, in the past, used the consistency process to require spill prevention requirements, such as the use of pipelines rather than tankers, adoption of an approved oil spill contingency plan, and adoption of terminal/platform/pipeline operation manuals. Similar measures have been negotiated by the governor as lease sale stipulations under Section 19 of the OCS Lands Act.

Spill Response Capabilities

Industry response equipment and materials are available at two levels. Every production/processing facility, whether onshore or in state or federal waters, has on-site response equipment that may include spill containment booms, skimmers, storage vessels, response boats, and fire-fighting equipment.

To supplement on-site capabilities and to respond to large spills off-site, the industry has established four oil spill cooperatives that have regional response plans, extensive response equipment, full-time staff, and regular training and drill exercises.

Clean Coastal Waters - with three depots in southern California - maintains 15 large skimmers, several thousand feet of boom of various specifications and applications, one large (145 feet) and three smaller (34 foot) response vessels, storage tanks, and a large stock of dispersants.

Clean Sea - with six centers including Carpinteria, Santa Barbara and Ventura in central California - has 28 skimmers, 45,000 feet of containment boom of 13 different sizes and types, three large (1300 to 180 feet) and several smaller (15 to 46 feet) response vessels, as well as other items that include firefighting, oil transfer, communications, dispersant and storage equipment.

Clean Bay - based in San Francisco - maintains similar quantities of equipment and stocks as the other two southern cooperatives. Response vessels and oil storage capacity is provided mainly through outside contractors.

Humboldt and Morro Bay Oil Spill Cooperatives - maintain equipment adequate to respond to smaller local spills, primarily in Humboldt and Morro Bays. Their offshore capabilities are limited.

Response Coordination and Funding

Pursuant to the federal Outer Continental Shelf Lands Act (OCSLA) and state laws such as the State Lands Act and the California Coastal Act, oil and gas developers are required to prepare comprehensive oil spill contingency plans, make adequate equipment available, and train personnel in proper response procedures.

Tanker operators, facility owners, and offshore oil developers are generally required to post bonds in the order of \$100 million to insure that adequate funding is available for cleanup, resource rehabilitation, and compensation for losses sustained as a result of a spill.

Several federal and state funds may be accessed by responsible agencies if needed to supplement or even take over the response by the spiller where necessary.

Currently, oil spill contingency plans are not required to be prepared by tanker owner/operators. Tanker operations are required to follow certain procedures enforced by the coast guard, and may be included in permit requirements if the oil is transported from a platform or to an onshore facility by tankers.

All tanker operators are required to file a certificate of financial responsibility (bond) based on the gross tonnage of the vessel. In the event of a spill, the tanker operator will be required to deposit monies into a fund from which the coast guard may withdraw clean-up costs.

The federal revolving fund used for cleanup is determined by the aspect of liability of the spill - e.g. Outer Continental Shelf (OCS), Trans Alaska Pipeline Service (TAPS), deepwater, or general oil transportation operation.

The Offshore Oil Spill Pollution Fund, administered by the Minerals Management Service, stands around \$200 million. Funds come from a levy on all OCS production, and is available to spills resulting from OCS operations. This includes tankering from OCS rigs.

The 311 K fund, administered by the coast guard, is available for deepsea and general oil and/or hazardous materials spills. The balance in this fund was about \$6 million before Valdez. Exxon has recently been ordered to maintain it at the pre-Valdez level throughout the cleanup operation.

Figures on the TAPS fund. The federal superfund may be used only if oil has been contaminated with CERCLA-designated (Comprehensive Environmental Resource Compensation and Liability Act) hazardous substances.

California has the Fish and Wildlife Pollution Cleanup and Abatement Account, administered by Fish and Game, and the State Water Pollution Clean-up and Abatement Account administered by the State Water Resources Control Board (SWRCB). Both accounts have low balances of around \$600,000 and \$4 million respectively. The SWRCB account may only be applied where no other source exists and where surface or ground water is threatened. The state superfund has basically the same applications limitations as the federal superfund.

State and Federal Involvement in Oil Spill Response

While the primary responsibility for the containment and cleanup of a spill rests with the spiller, federal, state and local agencies play a central role in the coordination and monitoring of the spiller's response. In the event that the response is deemed inadequate, these agencies may assume responsibility for the cleanup and restoration efforts.

If the spill occurs in internal waters, the lead federal agency generally is EPA. In coastal waters, the coast guard takes the lead.

The Department of Fish and Game (DFG) has been designated as the state's operating authority responsible for federal/state coordination and the direction of all state responses to oil spills.

The National Contingency Plan (NCP) and the state Oil Spill Contingency Plan (OSCP) require that the federal National Response Center (NRC) and State Office of Emergency Services (OES) be notified of all reportable spills. Where appropriate, the State Land Commission (SLC), Environmental Protection Agency (EPA), US Coast Guard (USCG) and other state and local agencies may need to be notified.

Small spills will generally be handled entirely by the spiller on-site or with the assistance of the cooperatives. In the case of exploration and production processing facilities, lease stipulations and permits generally require a one-hour response time for on-site spills, and two to six hours for other spills. The location and size of the spill, environmental threat, and weather conditions may predicate a more rapid response time.

If, in the opinion of the on-scene coordinator, the spiller is unable to respond adequately to the spill, the appropriate state or federal agency may take over the management and, if necessary, the funding of the operations. This last line of defense may occur within a 24 - 48 hour time frame. The extensive manpower and equipment of the US Navy, the Pacific Strike Team (USCG) and other private contractors may be summoned.

Current Oil Spill Prevention/Response Activities in California

Industry Action

The American Petroleum Institute (API) has proposed a number of improvements to current procedures and capabilities. All their proposals would affect California and would enhance oil spill prevention, response and cleanup in the state. The major points are:

- mandatory and expanded vessel traffic systems, pilotage, tug assistance, drug and alcohol testing and automatic pilot capabilities;
- investigation of feasibility of double hulls and on-board oil spill response equipment; and
- establishment of regional response centres.

As part of the offshore exploration/production activities, additional oil spill response activities have been undertaken by the industry. A major contingency plan covering the Santa Maria Basin and its resources was prepared by WOGA (now WSPA). Additional cleanup facilities, drills, and prevention measures have been provided as a result of the negotiated lease sale stipulations. These facilities include sea otter rehabilitation capabilities being planned currently.

Legislative Proposals

On the state level, SB 1482 (Keene) has been introduced to:

- create an office of oil spill response in the Department of Fish and Game;

- enact the Oil Spill Prevention and Response Act, which would prohibit any marine terminal or facility from being used by large tankers unless prescribed prevention requirements are met;
- create a \$500 million oil spill and response fund from \$.50 per barrel fee on marine terminal operators;
- authorize SLC to issue cease and desist orders on facilities that are not operating in a manner consistent with the act and/or regulations; and
- require that a state oil spill contingency plan and terminal facility contingency plans be established and updated annually.

This bill is the same as one introduced by Assemblyman Lempert (Preprint AB8). Both bills are currently being analyzed and will be heard before committees in 1990.

Sb 1193 (Marks), signed in 1989, enables DFG to integrate fishermen into oil spill cleanup operations by training charter boat operators and commercial fishermen in oil spill response and by making provision for establishing compensation for this service. This type of training is also now being provided by Clean Seas.

State Agency Actions

- SIOSC -- pursuant to SB 92 (Marks) enacted prior to Valdez, a report is being prepared on California's capability to respond to oil and hazardous materials transportation and storage disasters. The final draft is due in late 1989.
- DFG -- another effort begun prior to Valdez, the revised State Oil Contingency Plan 01 is in draft form and will be released for agency and public review shortly. Both documents have been delayed in order to incorporate recommendations made from experience gained from Valdez.

- Pursuant to SB 686 (Chapt. 1429, California Statutes of 1985), DFG has been conducting several studies: obtaining, cataloguing, storing and examining oil samples and cargo manifests from vessels operating in state waters; oil spill command, control and communication; cleaning of oiled birds and marine mammals; response personnel training; damage assessment manual; damage evaluation and assessment manual; environmental effects of chemical dispersants; and mapping and surveys of sensitive fish and wildlife habitats.
- DFG is currently negotiating with the University of California, Davis for a small veterinary research vehicle for wildlife.
- SLC, CCC and several legislators have sponsored workshops and public hearings on California's capability to respond to a major spill. SLC is also addressing oil spill capabilities as part of their California Comprehensive Offshore Resource Study (CCORS).
- OES is in the process of convening a task force to prepare an emergency disposal procedure to deal with cleanup wastes from oil spills and other emergencies. OES is also in the process of initiating a study with the Air Resources Board on the relative air impacts of burning a large oil spill vs the natural evaporation of such a spill.

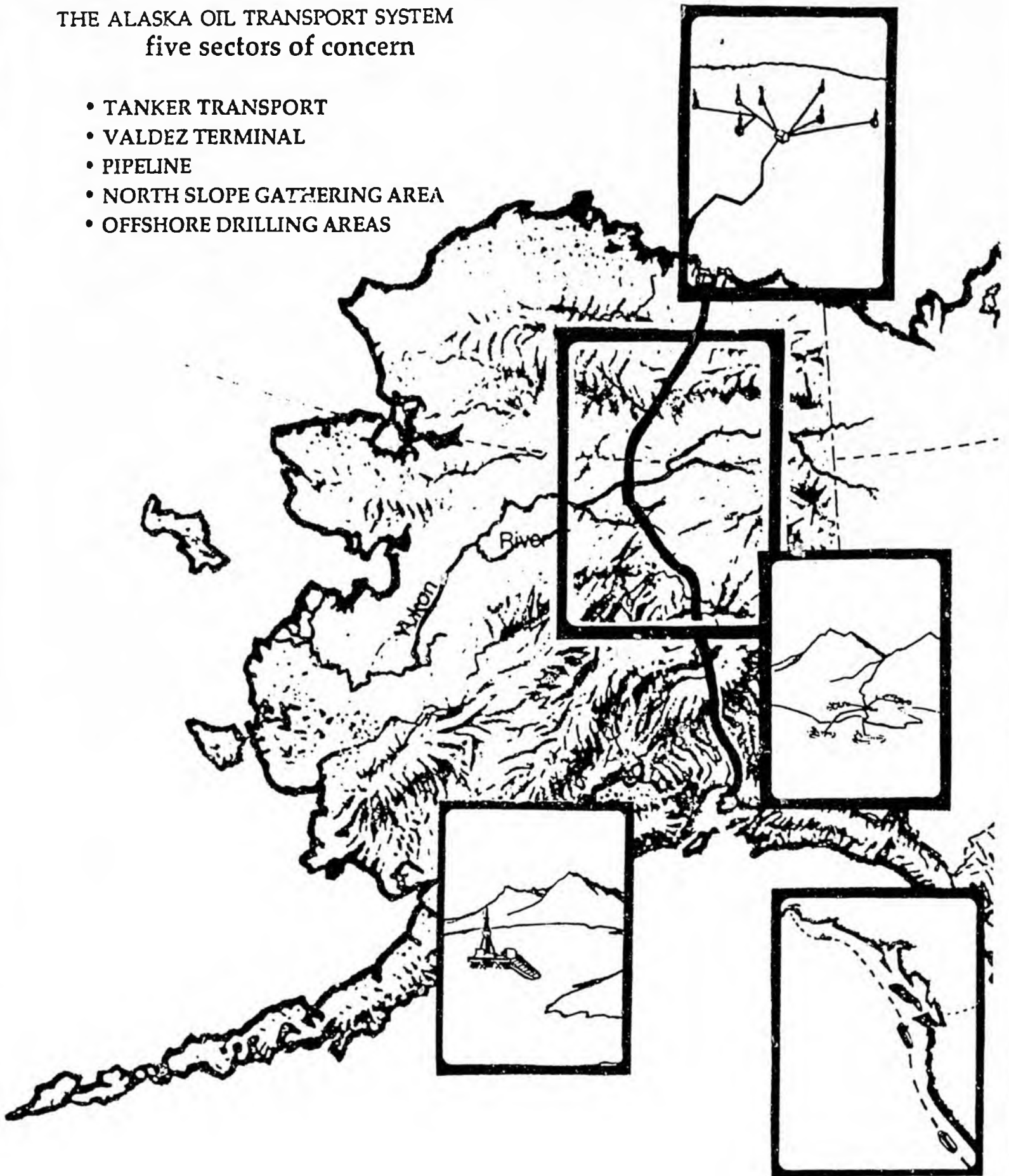
Local Agency Actions

Several local governments are preparing oil spill contingency plans and establishing cleanup facilities through the Coastal Resources and Energy Assistance Program under the Secretary of Environmental Affairs.

Santa Barbara county has completed its own marine emergency management study and has just released a draft of its crude oil transportation analysis as part of the Gaviota Marine Terminal/Point Arguello Project permitting.

THE ALASKA OIL TRANSPORT SYSTEM
five sectors of concern

- TANKER TRANSPORT
- VALDEZ TERMINAL
- PIPELINE
- NORTH SLOPE GATHERING AREA
- OFFSHORE DRILLING AREAS



DEC

TESTIMONY FOR HOUSE RESOURCES COMMITTEE
January 17, 1990

Kelso's testimony

Thank you for the opportunity to testify. With me is Larry Dietrick, Director of the Department's Division of Environmental Quality. Larry's staff is responsible for oil spill contingency planning and for oversight of responses to spills when they occur.

Background

The Department of Environmental Conservation (DEC) responds to about 400 of the 3,000 oil spills reported each year. Under Alaska law, more than 400 oil handling facilities, barges, or tank vessels must have approved oil spill contingency plans.

When a spill occurs, the Department staff oversees the adequacy of the spill response. In the case of the T/V Exxon Valdez spill, DEC personnel went on-scene immediately, boarding the tanker at about 3:00 a.m. with the U.S. Coast Guard. The DEC spill response team mobilized immediately and set up operations in the state court building in Valdez. They initiated surveillance of the spill, monitoring of the response and interaction with the responsible parties, Coast Guard, fishermen, and other agencies. DEC personnel demanded repeatedly that Alyeska Pipeline Service Company implement the oil spill contingency plan. Alyeska claimed repeatedly that they were on the way; this was not true. Before the end of the first day, DEC requested the Regional Response Team to re-evaluate the capability of the responsible parties to conduct the necessary containment and recovery work.

On the second day, Exxon took over the response from Alyeska. This was done without consulting the state. Exxon also failed to follow the oil spill contingency plan for Prince William Sound, and valuable opportunities were lost. The Department and other state agencies then began an unprecedented effort to push the spill response to an effective level. With the cooperation and active assistance from local residents of Prince William Sound and from other state agencies, we simply began taking matters into our own hands, carrying out portions of the contingency plan that Exxon and Alyeska had abandoned. The Division of Emergency Services (DES) provided communications, air transportation, and other support. The Department of Fish and Game and the Cordova District Fishermen United joined us in our temporary spill response office in the court building. The Department of Natural Resources supplied field staff and offered equipment. Other departments -- Administration, Labor, Transportation and Public Facilities, Health and Social Services, Community and Regional Affairs, Public Safety, and others -- provided help or advice. We made contact with local officials in Valdez, Cordova, Tatitlek, and Chenega. During the first week, we began expanding

those contacts to other communities that would be threatened by the spill.

This was a very intense, highly technical response effort. It evolved as the oil went ashore in Prince William Sound, moved into the Gulf of Alaska, and hit the Kenai Peninsula, Kodiak, and the Alaska Peninsula. At that time the emphasis shifted to shoreline assessment and cleanup. Following Exxon's pullout in August and September, the emphasis changed again. Between mid-September and the end of 1989, the Department concentrated on updating information about shoreline condition, locating oily debris, reviewing available cleanup technology, and gathering scientific data.

Numerous firsts were achieved since the spill response began on March 24:

- * By the time Exxon was able to deploy its response effort, the state had already put in place most of the infrastructure for responding to the spill, including communications, oil tracking systems, computer data handling, technical and scientific assessments of the oil, air operations, and sampling and laboratory support.

- * Emergency orders were issued requiring tug escorts for tankers in and out of Prince William Sound, daylight tanker operations, and increased spill response capability.

- * The Department initiated air surveillance of the oil and set up a computer mapping and tracking system that became the standard reference.

- * DEC wrote agreements with local communities to compensate them for spill response activities.

- * Field staff identified the need for aircraft spotting to position skimmers, set up a barge in Prince William Sound as a helipad and refueling depot, and deployed boom by helicopter.

- * The Departments of Environmental Conservation and Fish and Game worked together with federal agencies to initiate a fish, vessel, and processor inspection program to guarantee that no contaminated fish reached market.

- * DEC worked with local fishermen on a spill response strike team to protect three hatcheries and Eshamy Bay by deploying boom to exclude oil from these sensitive areas.

- * In "The Battle of Sawmill Bay", DEC with the help of local fishermen and other volunteers deployed a ferry borrowed from the Alaska Marine Highway and protected the hatchery using a "mosquito fleet" of skiffs and fishing vessels.

- * DEC staff, contractors, and local fishermen pioneered

the use of vacuum trucks mounted on barges as an alternative to Exxon skimmers that were unavailable, clogged, or out of service.

* DEC staff put together a computer system to record information about condition and movement of the oil, its location on the shore, and other information. This system is the first one of its kind developed anywhere in the world.

Since mid-December the effort has moved to a new phase: evaluation of the data already gathered in field work, consolidation of information on maps, and preparations for spring and summer 1990.

Spill Response Preparations

Based upon our experience with the Exxon Valdez and other major spills, we have several observations about strengthening spill contingency planning and other response preparations. Many of these are already being implemented; others will be brought on line at the appropriate time.

Incident Command System

We believe the Incident Command System (ICS) can provide the organizational framework for the state's overall spill response effort. ICS methods were developed to provide an efficient, multi-disciplinary command structure as a civilian alternative to military command. The system worked well this summer in communities such as Seward, and the Department's staff were involved directly in those operations. The Incident Command System can be adapted specifically for use in responding to oil and hazardous substance releases. Planning for its use can be accomplished prior to major spill events, and it can be designed to be useful in spills smaller than the Exxon Valdez.

Involvement of Local Communities

The T/V Exxon Valdez spill demonstrated the importance of a role for local officials and other residents in spill response. Plans for spill response should include local governments and other local resources. Residents of areas affected by a spill often have local knowledge and specialized skills that may not be available from other sources. Spill response preparation can be strengthened by laying out ahead of time the role of local authorities, the nature of the working relationships among agencies, and the kind of assistance likely to be needed.

Planning for Solid Waste Disposal and Other Needs

Arrangements for needs associated with response activities should be detailed in the industrial facility's approved oil spill contingency plan and pre-approvals should be initiated. For example, methods for solid waste collection or disposal, including oily solid waste, should be identified in the

contingency plan. Applications for these facilities should be made as part of the contingency planning process, and approvals should be secured ahead of time. This would help prevent conflict between local governments and the responsible party.

Communications, Logistics, and Other Support

Under the Incident Command System, there is an important role for logistics. Preparations for oil spill response should take account of that function and make adequate plans for communication and other logistical services. For example, the Division of Emergency Services and the Department of Administration provided valuable assistance by establishing communications links in Prince William Sound. In preparing for spill response, the state should utilize the existing expertise and resources of state agencies. Delivery of this support can be strengthened by laying out ahead of time the nature of the working relationships and the establishing mutual expectations.

Statewide and Regional Response Preparations

The legislature enacted several pieces of legislation last session that authorize improved spill response preparedness. At tomorrow's committee session, we will report to you on the implementation of those measures.

Oil Spill Contingency Planning Required of Industry

The Department issued emergency orders to Alyeska in April and May requiring immediate actions to increase spill response capability and longer term revisions to the Alyeska oil spill contingency plan for the oil terminal and tankers. Response capacity has been substantially increased. Alyeska has also submitted a new oil spill contingency plan. We have required the company to plan for a likely spill event of no less than 250,000 barrels. The plan is under review, discussions with the company are underway, and public hearings are planned for February.

Cook Inlet is another area that has considerable risk of oil spills and was the site of a major spill from the tanker Glacier Bay in 1987. The Department has initiated a full review of the situation in Cook Inlet, including evaluation of all contingency plans. Working with local governments, fishermen, and the oil and gas industry we are identifying specific steps to strengthen spill response capability. We have established a task force with Kenai Borough officials and other local residents.

Cook Inlet needs an integrated regional spill response capacity. This should be a comprehensive, region wide spill response capability that pulls together the efforts of shippers, producers, and facility operators.

Oil Spill Contingency Plan Reviews

As a starting point in improving the facility contingency plans required of industry, we are negotiating a contract to assist with the review of vessel and facility contingency plans. This effort includes:

- * Recommendations for possible revisions to the contingency plan regulations;

- * Development of guidelines for facility and vessel inspections;

- * Development of Guidelines for spill drills and evaluation of drill performance;

- * Reviewing all contingency plans against the new criteria.

Individual vessel and facility contingency plans are the primary line of defense in a spill. Rigorous plan review is essential, coupled with drills to test actual performance and formal inspections to make sure that the equipment and resources are available and operation. Containment and cleanup resources absolutely must be ready and immediately available. Availability in the lower 48 is not sufficient.

Contingency plan reviews can be more effective if the prevention side of the equation is strengthened. Currently contingency plans focus on response capability and not on preventive aspects such as vessel integrity, navigation aids or vessel monitoring.

The Legislature has taken important steps to strengthen the oil spill program, increasing the funding for the Oil and Hazardous Substances Release Response Fund and authorizing the use of the fund for response preparations. The Governor's FY 91 budget request includes money for oil spill contingency plan review on a continuing basis. State law requires all contingency plans to be reviewed and updated every three years. Along with the Legislature's previous actions, the Governor's request would enable the department to field a full oil spill contingency plan program.

Conclusion

The Exxon Valdez spill teaches many important lessons. Along with prevention measures, spill preparedness and contingency planning are essential elements of protecting Alaskans. We look forward to working with you to ensure that Alaska is ready for future challenges.

***SUBSISTENCE -
HOUSE WORK
SESSION
(6/20-21/90)***

STATE OF ALASKA
HOUSE WORK SESSION ON SUBSISTENCE

June 20-21, 1990

Anchorage Legislative Information Office
Anchorage, Alaska

Legislators present or on teleconference during session:

Sam Cotten
Mike Navarre
Curt Menard
Bill Hudson
Robin Taylor
Johnny Ellis
David Finkelstein
Kay Brown
Judy Salo
Romona Barnes
Terry Martin
Lyman Hoffman
Ron Larson
Mike Miller
Max Gruenburg

Kay Wallis
Sen. Zharoff
Mark Boyer
Mike Davis
Niilo Koponen
Eileen McLean
Richard Foster
Cheri Davis
Loren Leman
Alyce Hanley
Virginia Collins
Ben Grussendorf
Sen. Pat Pourchot

Transcription

Navarre: Work session called to order.

Status of Subsistence Management in Alaska:

Cohen: (Beginning of Norman Cohen's presentation omitted due to taping difficulties)...when the western Arctic caribou crashed. Responding to the problem, the Department and the board attempted to devise an ad hoc system that would give permits to hunt the remaining allowable harvest to residents that had the most reliance on the caribou. In fact, it is this regulation that the three criteria found in the Tier II portion of the state's and ANILCA's subsistence statutes were first promulgated. These criteria, customary and direct dependence, local residency, and availability of alternative resources were intended to allocate the caribou to rural Alaskans in the up northwest Arctic. This regulatory arrangement was challenged in Alaska courts by the Tanana Valley Sportsman's Association on the grounds that the board illegally delegated to local officials its authority to determine who was to receive permits to hunt the caribou and on the basis that the board did not have the authority to allocate to specific individuals. The Alaska Supreme Court ruled in favor of the Plaintiffs by finding that the delegation was illegal. The court did not rule on the ability of the board to allocate among individuals based on certain criteria. Had they done so, we probably would not have had to wait until 1989 to receive the McDowell Decision. It is difficult to speculate about what may have happened if the court had considered the issue 15 years ago. But with a different court there were indications in the opinion recognizing differences between urban and rural Alaska. Based on this challenge of board authority, upon the perception in rural Alaska that hunting opportunities would continue to be limited without a change in statute, and upon the interest in the Congress to address subsistence uses in its deliberations on ANILCA, the genesis

of Title 8 approach can be easily understood. It is during these negotiations over the final language to place into ANILCA that the Alaska legislature began in earnest the consideration of the State's subsistence law. Crafted mainly from language proposed in ANILCA, the 1978 Subsistence law was a compromise intended to put off greater federal management presence in Alaska. Since the state law was adopted in 1978 and ANILCA not adopted until 1980, during that two year period the circumstances changed which were the root of the need to amend the state law in 1986. At the time of the passage, the proposed ANILCA language did not limit the subsistence priority to rural Alaskans. This came later as a result of the consideration of the implication of the decision providing for subsistence of king salmon fishery at Tyonek. If all residents were qualified for this limited fishery, the people intended to benefit by the decision would not have received very much access to the King Salmon resource. So when Congress adopted the subsistence title in ANILCA in 1980, the two laws were inconsistent: the state law not having a rural priority, but the federal law having one. This was later corrected in 1986 with the inclusion of rural limitation on subsistence eligibility in state law to match that rural limitation in federal law. In addition to the amendment to the state law in 1986, to bring the state in compliance with ANILCA and forestall federal management of subsistence uses on public lands, the law was also challenged in 1982 through Initiative #7. While the law at this time does not restrict subsistence to rural residents, regulations adopted by the Joint Board of Fisheries and Game did so limit eligibility. Consequently, the law voted on by the public at that time was in essence the same law that was adopted by the legislature in 1986 and the same is found invalid in McDowell in 1989. These regulations were found invalid in 1986 in the Madison case where the court found that the legislature in 1978 did not intend to limit subsistence only to rural

residents. Here is another opportunity that the Supreme Court had to inform the legislature that limiting subsistence to rural residents was unconstitutional and another opportunity that they did not take. The vote on Initiative #7 in 1982 was 58% in retaining the state's subsistence law at the time, and 42% opposed. The basic structure of the subsistence laws enacted by the Congress and the Alaska legislature are the same. In order to understand how the subsistence laws work, some rudimentary understanding of the structure of the statutes is required. The structures of the laws can be summarized as follows:

1. That subsistence uses of fish and wildlife must be identified in regulations authorizing them promulgated by the boards.
2. That subsistence uses are limited to residents of rural Alaska communities or areas, but not to individual residents.
3. That when necessary to restrict subsistence uses below customary and traditional levels, non-subsistence uses should be eliminated, and that when it is necessary to further restrict subsistence uses in order to provide for sustained yield of fish stock or game population in question, criteria are to be used to pick and choose among the most dependent upon that stock or population.

This is the so-called Tier II criteria. The basic policy choice identified in this structure is that first it is necessary to provide regulation for subsistence uses for fish and game by rural residents, and that that subsistence use is qualitatively different from other uses of fish and wildlife to such a degree that when there is not enough to go around, subsistence use by rural residents should be given the first priority. In order to implement this

structure, the first responsibility of the board is to determine who qualifies. There are two tests which must be passed. The first is whether the community or area is a rural or non-rural community or area. The second is whether in regard to a specific fish stock or game population, the rural community or area in question has customary and traditional uses of that stock or population. A misconception that continues to be held is that any rural resident has a priority for the taking of fish and wildlife over a non-rural resident anywhere in the state. This is incorrect. Residents of the Angoon may have a priority over other residents for the taking of deer on Admiralty Island, but have no greater access to the Nelchina caribou herd, or to the Kenai River King Salmon than does any other residents. Rural communities and areas are limited in their subsistence opportunities to fish and game stocks and populations for which the boards have determined that they have customary and traditional uses. There are criteria in regulation to assist the boards in making these determinations.

The other major question to be asked and answered is when does the subsistence priority begin. While the boards are required to provide for subsistence uses, since these uses by rural residents only comprise 4% of the total amount of fish and game harvested in the state, it is obvious that in most cases there are sufficient resources available for subsistence, commercial, recreational and personal uses of fish and wildlife. However, in those cases where there are insufficient numbers to go around, subsistence users get an extra opportunity to hunt and fish, perhaps through longer seasons, higher bag limits, more fish and gear. Or, get the only opportunity to participate. There only a few instances where there is no other opportunity on a particular stock or population, except for subsistence, the Haines moose hunt being an example where it is limited only to subsistence use

in the Haines area. There is no question that these subsistence laws are complicated, cumbersome to implement, and fraught with controversy. This is because there are numerous determinations that must be made which have occupied a great deal of time by the boards of fishery and game. In addition, in very popular hunts and fisheries where use must be limited, a rural subsistence priority is going to become controversial. Further, many people are concerned with the fact that all users in the community are eligible for subsistence use rather than all the most dependent residents. This was a major policy choice by the Congress understanding the administrative burden of the individual determinations and a view that most people intended to be benefitted would fit within the program. Add to this the tendency of the courts to expand subsistence opportunities beyond regulations adopted by the boards, and you get an ongoing concern for the ultimate result of the subsistence laws. That concludes my opening comments concerning the status of where we are today.

Questions:

Taylor: Mr. Cohen, I assume that you prepared those remarks and have them typed out?.

Cohen: I did some editing on the plane this morning and it needs a little cleaning up but I'll have them available for Juneau.

Taylor: If you would. I'd really appreciate it if we could have those remarks. Thank you.

Koester: Thank you. We're going to transcribe the whole process. Rep. Boucher.

Boucher: Thank you Mr. Chairman. Now you said the magic words there. The definition of rural and urban. You kind of passed over

that like everybody agreed on what that definition was. Focus on that for a minute because that is constantly brought up. It appears to be a numbers game. Give your thoughts on that.

Cohen:

Certainly Rep. Boucher. As I said, the idea for a rural priority was - the genesis of the idea came about in 1979 with the Tyonek case where about 3,000 king salmon were allocated to a fishery in Tyonek when the king salmon runs in the Susitna and the drainage became strong enough to open up after a closure for the past 17 years or so. The resource had some big problems in the early 60's and it was not able to be open until the early, until the late 70's. The original federal law, the federal law on the books today talked in terms of rural and urban and gave only some indication of what they had in mind by saying Anchorage, Fairbanks, Juneau, and Ketchikan were definitely not rural, but sort of the border communities, the regional communities: Bethel, Barrow, Kotzebue, Dillingham were rural. And it was up to the boards or whoever was to implement the subsistence law to determine what that meant and which communities fell in and which communities fell out. After the boards adopted criteria to determine and to look at a community on a case-by-case basis, the 13 criteria that the boards of Fishery and Game came up with, in 1985 the Supreme Court decided in the Madison case that it was the legislature of 1978 did not mention rural at all and had not had rural in mind when they passed the 1978 subsistence law, which is consistent with where the HR39 and S9 or S8, or whatever the Senate bill was in Congress, which did not include a rural restriction until 1979. So, the boards adopted these regulations and they were thrown out in 1985, and then in 1986 the legislature passed a rule that the advice given to the legislature was that the Congress intended basically the importance of fish and wildlife and how the community works was the basis for determining

whether its rural or non-rural. The federal courts had an opportunity to review this in the Kenaitze case and the 9th Circuit determined that rural is more - its not that kind of judgment on whether fish and wildlife is an important use, but you have to do something more quantitative such as density or population based or whatever. So while in 1986 the legislature passed the statute which said rural is where customary and traditional uses of fish and wildlife are significant, a principle component of the economy or community, the 9th Circuit said that is not consistent with what we think that rural means in ANILCA, and we think it means something to do with the population, census base, something or other - generally what you think of as rural. So the state rule was found invalid in terms of being in compliance with ANILCA, and we now have another attempt at figuring out what rural means. And that is the federal definition that we find in the federal subsistence program, which is currently in draft form but will be adopted for the July 1st assumption of Fish & Game subsistence management by the federal government. They have a definition which is close and in practical terms will work very similar to the way that the 1986 state law worked, but it does contain at least some population figures in it that put the range on what the, at least the Fish & Wildlife Service and federal agencies mandated to implement the ANILCA and believe that they believe what rural means. And that is if you're in a community over 7,000, you more than likely are not rural. If you're in a community of 2,500, you probably are rural. And if you're between 2,500 and 7,000, we don't know one way or the other. But their criteria, sort of like the state's criteria, but a little different that we're to use and figure out whether they are rural or not. They also do something different than the state law did. They aggregate places that look like they belong together, so Eklutna or Girdwood are probably a part of Anchorage, then maybe being considered separately, and things like. Whether Kenai and

Soldotna and Nikiski and North Kenai get combined - they may likely get combined into one sort of area, and then you'd consider the population of that entire area rather than just considering them independently. But that's sort of the basis of the federal regulation which is the interpretation of ANILCA and will be, if the legislature adopts the constitutional amendment I approach, and reinstates the subsistence law except for these old state rural definition and shows its intent to include the federal definition as the one that the board should use. We would then have it the same rural definition in state law and federal law. So, it is possible without any change in ANILCA at this point, to interpret things in such a way as the state law and federal law would be the same in terms of a rural definition.

Boucher:

Really, this is the guts of the thing now. You take, well under 7,000, then you leave this gray area (2,500 to 7,000). Now is that what the federal government is proposing? In other words, they brought us no solution at all on the thing if that's the case because a lot of people fall within that particular area. And since by and large nobody looks at subsistence as a word, its a way of life. That's the way I have always felt. Its either the census numbers, or you come up with economic - but to some people its a religion. Its a way of life. And I never hear that word brought into this. But back to my point Mr. Chairman, it looks like we're leaving a gray area from 2,500 to 7,000 and that's a lot of numbers, if this is what the federal government is proposing.

Cohen:

What they're proposing is there are 14 communities between 2,500 and 7,000 in the state. And they plan, as I understand it, to take these criteria that they have to review this, and those include fish and wildlife use, transportation, communications, education, governmental institutions, and obviously if you look more like Anchorage, you're

non-rural, and if you look less like - you more like _____ or Angoon, you look more rural. But that's sort of - and then they plan to make individual determinations on those 14 communities. So that will be done at some point. I'm not sure what there plans are. If the state had this system, then the state boards would be required to make a determination on each of those 14 communities. So while it is definitely not black and white, it is - there is at least a process that is set up to make those determinations. Just to follow-up on your second point dealing with a way of life: people concentrate on the rural portion of the eligibility because it was, the definition was thrown out by the federal courts and we have to deal with that. But we should not lose sight that there is a second level of qualification and that is that the community or area has to have customary and traditional uses of a particular resource - a particular fish stock or game population. Those individual determinations limit first of all the range of where somebody qualifies for subsistence use or whether the community qualifies for subsistence use. But that customary and traditional monitor is the way of life that you're talking about. It is where has this community traditionally taken animals, fish or game for food and clothing and other uses for personal or family consumption. Where does that take place? And has it happened over a long period of time in that community? And that's the kind of place where way of life comes in in the customary and traditional determination as opposed to the rural determination. But there are two criteria and I just want to make sure that's clear and hope that answers your question.

Taylor:

Thank you Mr. Cohen. I realize I should hold this down, and I want to establish maybe a clearer understanding of what we're talking about. And maybe hopefully Tom might join in this answer. Its my understanding that we, the State of Alaska, because of, and this has been I believe

ratified or certified by court decision, that we the State of Alaska retain management of our fisheries resources in that we do control those navigable waters within this state, including lakes, and that we have jurisdiction recognized by the federal government and the federal courts out to the 3-mile limit. So when I hear people constantly in terms of our fish and game resources may somehow be jeopardized and that the federal government may be taking this over and people being paranoid and frightened of this all over the state - that's not accurate is it? In fact, we're only talking about game - we are not talking about fish, and I want that to be understood. If my understanding is incorrect on those decisions, then I want to be corrected now.

Koester:

Mr. Chairman, Rep. Taylor, I was going to get in to after Tom's presentation, into the federal program and what it includes and answer that question in more detail. But the gist of it is, you're right and you're wrong. If I could be presumptuous enough - in terms of the program as laid out now, fish in navigable waters are not covered. Now that does not mean that fish in non-navigable waters isn't covered, and in fact it is covered. So some fishery resources are now covered by the program.

Taylor:

Let me interrupt you. Under the Clean Water Act and others, the term "navigable" by the federal government itself has been dramatically expanded. I think navigable includes areas I would have a very difficult time taking the lightest weight canoe or kayak. It definitely includes the lakes. It definitely includes all of the stream and water systems in the state, which we retain jurisdiction over and have a court decision on this. I'm not talking about some federal regulators proposed program and whether or not we may be within or without it. I'm talking about federal court decisions that say we, the State of Alaska, has jurisdiction over fisheries in navigable waters and up to 3 miles off the

shores. If that's the case, its a complete misstatement in the press and by the administration to be talking in terms of "oh, we're going to have a real problem with our fisheries resource cause the feds are going to take it over." They can't take it over by federal law.

Koester:

I think we're sort of mixing somewhat apples and oranges here. First of all, the program as laid out now only deals with non-navigable waters and there are some fishery resources in non-navigable waters. But it is not the great majority of the fishing effort that takes place for subsistence uses and that's certainly most of the activity takes place in marine waters or in major rivers, and therefore those are navigable and are covered, retained by the state. And the state's position has been that it is to retain management to the extent possible to keep the federal program as narrow as possible and the state believes that it should retain its authorities over fisheries in navigable waters. That's the first issue. The second issue though is, it is not whether it is navigable or not in terms of whether the federal program can reach into navigable waters. The issue is the definition of public lands that's contained in ANILCA. Public lands and then lands include title - lands in which there is title in the federal government or interest therein. Now the question the federal government at this point has made its determination as to how far this program should reach has taken a narrow view, and that narrow view is that the federal government interest in navigable waters is not such to require a federal subsistence program under ANILCA. The question that remains is whether in litigation whether that will stand up. The federal government does not need title in navigable waters to be able to assert its jurisdiction under ANILCA. It is a definitional question of what public lands means under ANILCA. In the initial federal program they do not have authority over fish in navigable water. It will certainly

be litigated, and it is that question which the court will be asked to respond to and will determine on its own whether fish do apply within the federal program or not. But it is a long way from certain as to what the result of that will be.

Taylor: You don't believe the current cases that are on record establish that fact are relevant because the question of whether or not ANILCA overrides all of the navigable waters so to speak jurisdictional cases has yet to be tested. Is that what you're really saying?

Koester: The cases that have been established all are derived directly from what is called the equal footing doctrine. They basically involve title to the beds of the water bodies. Those cases may not be directly applicable to the question of what does ANILCA require with respect to management of fisheries, and the reason for that is that ANILCA describes its reach as covering all public lands. That is in ANILCA a subsistence preference for rural residents is established by the United States Congress on all "public lands". Public lands are defined as all lands belonging to the federal government. Lands, in turn, is defined in ANILCA as saying, "lands and waters in which the federal government has an interest." Now the navigability cases all hold that the state has the title to the bed of the water bodies, but they do not necessarily say that only the state and not the federal government, has any interest in the waters. And so the legal issue would be, does the federal government have a sufficient interest in the waters of navigable water bodies? That those water bodies come within ANILCA's definitions of public lands such that the subsistence preference for rural residents under federal law applies to them. The draft program that the Interior Department has published for public comment right now takes the position that under ANILCA the navigable waters are not public land. And in

that sense the state has, if you will prevail on that argument, in the draft program. That does not however mean that the federal courts will not be asked. I'm relatively confident they will be asked to overturn that decision. I'm sure the state will be a participant. And its consistently been our position that that should not be the result. That, in fact, the water bodies of the federal government does not have an interest in the waters. But that's a question that will be litigated. Just as a matter of information, if one looks at the Kenaitze decision, there are at least three judges on the 9th Circuit Court of Appeals who seemed, in that case at least, to very clearly think that ANILCA does in fact reach fishery resources because the precise questions at issue were fishery resources in the Kenai River in that case. So there is at least some pre-diliction it would seem on the part of three judges on the 9th Circuit Court of Appeals that ANILCA does reach fishery resources. Certainly under the draft federal program that has been published for public comment right now, that would not be the result. We would argue, or it can certainly be argued that Interior is the agency that is supposed to implement ANILCA. Its views are entitled to deference by the courts, and it may very well be that the courts ultimately will conclude that ANILCA does not reach fishery resources. But an argument can be made that ANILCA does reach fishery resources, particularly to the extent that the Courts will look at the legislative history of ANILCA. It seems relatively clear that at least a number of members of the United States Congress contemplated that ANILCA would, in fact, reach fishery resources because there's relatively substantial legislative history regarding the use of fishery resources for subsistence purposes by rural residents and so on. So, its not, we cannot say with certainty that the Equal Footing Doctrine case and the navigability cases preclude a judicial result that ANILCA does in fact reach fishery resources. That is not beyond the realm of possibility. So to say that they

may be in jeopardy is an accurate statement. One cannot say with certainty that they are not in jeopardy of a federal takeover. And to believe that would be a very serious mistake.

Taylor: It is accurate to state then that the question of management of the fisheries is going to be left up again in this case to the federal district court?

Koester: One of the things that the legislature I'm sure realizes is that the courts are the ultimate interpreters of statutes. ANILCA is a federal statute. The federal courts are going to be the ultimate interpreter of ANILCA. That's part of the federal system of government that we have. That's one of the realities of the way our society is developed. I know that no one particularly likes government by judiciary. Unfortunately, that's what happens when legislation is not as clear as it could be, because it does leave, in my view, much too much room for judicial interpretation. ANILCA is one of those statutes that as a result of negotiation and the process of compromise leaves a considerable amount of gray areas. And its those gray areas that the courts are called upon under our system of government to fill in. This is one of those gray areas, and that is the definition of public lands. By using the phrase "lands, waters, and interests therein" in effect the Congress invited the courts to fill in that gray area and determine what constitutes an interest in waters sufficient that those waters become public lands or not. That is a question that will in effect be answered by the courts.

Martin: Thank you Mr. Chairman. In light of your wrap up here on that particular point. I kind of agree with you that it will end up in court. I'm wondering why not does not the principle of ANILCA apply to all states of this nation, especially in consideration of the 14th Amendment. Also,

when we talk about navigable waters and also the equality of people, should a federal law not be equal in all states or is the absolute law that is equal to one state and not the citizens to other states. And as you say and the other gentlemen, all these ands, ifs, and buts are going to go to court. Why is that the governor's office and the department is always insisting that the legislature either change our constitution, especially the equality clause, would change legislation to comply with the federal law, when we're going to end up in court anyway? Why don't we have a friendly judiciary like other states and solve these difficult cases. You're telling us this "if" and this "if", this interpretation, and we're representing the common people. We are common people. You guys are the super lawyers and you can't give us an answer. So I don't know. I'm really frustrated these past 6 months sitting on the Judiciary committee when we've have at least 8 different bills presented to us and every time the lawyers say well you can't do this cause you got to do that. You can't do that cause you got to do that. You got to have the court bless you. Let's go there first. Is everything we do going to go to court? Is there anything we can do that won't go to court?

Koester:

Mr. Chairman, if I may. There's certainly some things that the legislature can do that will not go to court. I mean the legislature can put an amendment to the state constitution on the ballot and let the people vote. No one is going to contest the legislature's power to do that. The legislature has the power. Because its written in the constitution so no one is going to challenge the legislature's power to do that. If the legislature acts through statute, then it is always open to the people of this society to argue in front of a court that the legislature acted in a way in that statute that violates the constitution. Either the state constitution or the federal constitution. Its certainly open to the state at this point to

challenge ANILCA under the federal constitution and argue that the United States Congress acted in excess of its powers. We've looked at the legal issues and possibility of doing that, and have concluded as a legal matter, that its unlikely the state would prevail in that case. But there are a number of other reasons that go beyond the purely legal merits of that challenge that at least appear to be policy reasons not to take that course of action. The first of which is of the period of uncertainty, the time it takes to get a case through the federal district court, through the court of appeals, and then to the United States Supreme Court, assuming it would take review - leaves a vacuum, if you will, in the meantime without taking any kind of a _____ so it doesn't even have to go through the district court and the court of appeals. It was filed in May of 1979, we still do not have a final resolution in that case because the court procedures takes so long. That's 11 years. I'm not sure people want to wait that long for an answer to this kind of question. The second policy reason is for not, or least thinking about not bringing a law suit. Weighing the alternatives - weighing the options. That this would appear at least to be a reversal of state policy. If we are not going to challenge the congressional established policy that rural residents of Alaska should have a subsistence preference in the use of fish and wildlife resources, that is a policy that has been the policy of this state since we negotiated ANILCA, since the Board of Fisheries and Board of Game established in 1982 in the regulations that rural residents would have a preference, and since this body enacted the 1986 subsistence law that rural residents should have a preference. So that would be a dramatic reversal of state policy, what's been state policy for a decade now. Congress thought the state agreed with this compromise in 1980. It was something that none of the parties that were negotiating that (sportsmen, the Native community, development interests, environmentalists and the state) none of the

parties to that compromise agreed with all provisions of ANILCA. But Congress, rightly or wrongly, had an expectation that at least these parties will live with this compromise. If we now say that we want to take the benefits that we got from ANILCA, but will challenge in court and will try to throw out those pieces of the compromise that we don't like, what does that do to the state's ability to negotiate meaningful with Congress in the future on issues like ANWR and other development issues that the state has before it? Is Congress going to give us the same kind of credibility and the same kind of standing in the negotiating process if Congress has the impression that we'll negotiate a deal, get it through Congress, and then try and through the parts we don't like, which is exactly what we'd be doing here if we challenged ANILCA. Finally, if we succeed, and if we throw out the rural preference in ANILCA, what's the alternative? What do we get in its place? Do we get nothing at all? I think if you look at the legislative history leading up to ANILCA, this part of the package trying to deal with the subsistence needs of Alaska residents was a very important part of Congress' consideration with respect to the use of fish and wildlife resources on federal land. In 1976 the U.S. Supreme Court held unanimously that Congress does have the power to regulate fish and wildlife resources on federal land. It has that constitutional authority under the United States Constitution. It also has power under the Indian Commerce Clause to legislate with respect to Native Americans. One possibility certainly would be for Congress to say that a Native preference for fish and wildlife on federal lands is an appropriate alternative. That's one possible alternative. Another one is no consumptive uses of fish and wildlife on federal lands. So in terms of looking at a lawsuit as an option, one has to look at okay, say you succeed, what are the alternatives? What might you get instead? And I think its for those policy reasons, as well as the reasons that its unlikely the state will prevail in

that litigation, even those that are advocating litigation agree it would be a difficult and a complex case to win. Still beyond the merits there are policy reasons to think twice before deciding that a lawsuit is the preferred option.

Martin:

I'm not going to think twice, I'm going to think ten dozen times before we prepare constitutional legislature. Well we had the perfect option a number of years ago on local hire. At least this state at least four different times legislature passed a constitutional amendment, we sold the people in believing that it was constitutional, red, white and blue, and then its found unconstitutional. I think the same thing is being jammed our throat now. To deny the people equality and say we are going to deny our right to equality, for usage of our natural resources. That is going to be thrown out. I don't want to come into a simple solution saying all we have to do is make a amendment to the constitution and let the people vote on it and our problems are over. That's not true, sir. Just because we enact legislation saying they can vote on it doesn't make it constitutional. And even if they vote on it doesn't make it constitutional. Is it not going to be challenged. Certainly, I feel Mr. Chairman, we're getting this fear of crisis developing too much. Fear of change. Change is inevitable. The Supreme Court has changed itself when the U.S. Constitution is questioned 228 times. So why shouldn't it change itself on this and other questions before the court? What I'm trying to say is I don't want to be doing action because of fear. If we're afraid of something, why did the founding fathers give up their life, you know. I don't want to use fear as a technique as to why we should actions is what I'm saying.

Cohen:

There's one point that Rep. Martin made and I think its probably the key question here and something that I sort of

mentioned in my presentation but probably was in an inappropriate place and people may have missed it, but there is a fundamental policy choice here. And the choices, is the use of fish and wildlife in rural Alaska qualitatively different than it is that use in urban Alaska such that when there were shortages people in Rural Alaska get the better opportunity for those resources? It is that simple question. Now, that can be viewed in terms of its not equal for everybody, therefore its something we shouldn't do and we shouldn't pass a constitutional amendment to allow that to happen. But, if the policy choice, which has been made at least by the Congress and by this legislature in the past is that there is a difference and that difference needs to be recognized when there's a shortage of fish and wildlife to meet those needs, then the choice is for a constitutional amendment. And its that simple question which is before you -- that policy choice.

Cohen:

If I may Mr. Chair, it may be appropriate as this is a work session and not a hearing, to try to at least get through to the extent we're able the background so that everyone has the same basis of information. Once that is done the policy questions begin to emerge and then it may be a more appropriate time to begin debating policy. Rep. Martin asked a specific question about litigation and there are obviously both advantages, policy advantages, to find litigation against the United States challenging the constitutionality of ANILCA. What I was trying to point out is that there may also be disadvantages. But all that I think is part of the informational base that will be necessary for this body really to approach in a meaningful manner an effort at resolving or at least deciding what the policy direction for this state ought to be with respect to this issue. And so rather than getting further embroiled in policy arguments at this point, it may be more appropriate to try to continue disseminating the information if that's appropriate.

Navarre: You want to go through your prepared testimony before we get to questions, is that the...?

Cohen: I think questions are appropriate, but some of the questions now are anticipating some of the information that not everyone may have. For example, what are the specific provisions of ANILCA? What did the 1986 law do? What have the various lawsuits that have been brought held with respect to a variety of these issues? And some of that information may make this kind of discussion more appropriate.

Wallis: Mr. Chair? This is Rep. Wallis in Juneau. We're losing track in the discussion of who was talking when. And could you also tell me what representatives are speaking, and could you also indicate the what the agenda is going to be.

Navarre: Yeah, you should have a copy of the agenda. If not, we'll fax a copy of the agenda down to you in Juneau. There should be one there. I will mention that Rep. Foster and and Rep. Cheri Davis joined us. Rep. Foster in Nome, Rep. Davison in Ketchikan. Also, Rep. Hoffman and Rep. Cotten have joined us here in addition. Rep. Boucher was here earlier. Rep. Taylor is here. Rep. Collins, Rep. Brown, Rep. soon to be Judy Salo, Rep. Menard, Rep. Ellis, Rep. Martin, Rep. Lemay, and Rep. Hudson, also Rep. Hanley was here and has stepped out for a moment. And we'll try to identify as we speak about, as people are asking and answering questions, please identify yourself.

I have a question with respect to the definition of rural, back on the definition of rural. The federal definition and how it interacts with the decision in the Kenaitze decision. If they're going to try to, I guess, put the area together on the Kenai, Kenai-Soldotna, and say it is not rural, how does that work with the Kenaitze decision?

Cohen:

Mr. Chairman, the Kenaitze decision determined that the state law and implementing was not consistent with the federal term "rural" and what the court thought that it probably meant, which is at least something that has to do with population numbers. The District Court in Anchorage, Judge Holland, determined that the 9th Circuit, when it made that decision, was not saying that all of the Kenai Peninsula was rural, but was just saying that the state definition was not consistent with ANILCA. Therefore, it is up to either the federal court or the federal agencies at this point to make a definition of rural that would interpret what ANILCA means. Once that is done, the Kenaitze will be subject the definition of rural that is in federal law insofar as their claims are that they're entitled to a fishery under ANILCA. But their assertive affected by both the rural definition, which if Kenai, Soldotna, and North Kenai and Nikiski are considered one area are greater than 7,000 obviously and therefore would be non-rural, therefore most of the people in the Kenaitze tribe who live in those communities would then not be entitled to the right under ANILCA to a fishery, as well the determination that ANILCA doesn't reach into navigable waterways and it doesn't reach into where they conduct their fishery in the Kenai River, they would also not be entitled to that fishery under the geographical scope of the federal subsistence program implementing ANILCA. So there is, the Kenaitze at this point are subject to these rules that federal agency comes out with and those rules are further interpretation of the 9th Circuit opinion that just said that the state law was not what Congress meant when it adopted the rural in ANILCA.

Navarre:

Could the Gulkana decision be interpreted as nullifying the Kenaitze decision or overriding the Kenaitze decision?

Cohen:

I think that Tom is probably more up on this than me, but I think the gist of what was said earlier is that the Gulkana

decision has to do with what is navigable. The issue is whether the federal interest in navigable waters is enough to kick in ANILCA, not whether its navigable and therefore the state owns the bottom. We're really talking about who has right to regulate the fish which are in the river.

Rep. Hudson: Thank you Mr. Chairman. For the line, Rep. Hudson. We're called upon to make some pretty strong policy decisions here pretty directly, and so I would urge you to indulge our ignorance of the law, and I want to get to back just a little bit to this question of navigable waters and the fisheries versus the game. Because, as I look at this whole issue from a policy perspective, if you were to lump them altogether and assume that you were going to say seriously lose the management of your fishery resources as well as your game, that would have a greater implication and require in my opinion at any rate, more consideration on the policy determinations we might come up with. And so I would hope as you make your presentation, Tom, that you'll kind of dig into that just a little bit. I am questioning whether or not it wouldn't be possible, feasible, and maybe even desirable for us to seek some sort of opinion from the court vis-a-vis that very issue. And if not, that subject wouldn't be, as we say, the issue be divided. The question, be divided, on the fisheries side as well as on the game side. If we were to go to court, what was your opinion would we have to _____ maybe help us sustain the fact that the state would _____ even though the _____ might be more clouded and _____. And so I think, I would hope at any rate that, you know, we went all the way back with the historical and social and those kind of definitions. It is really kind of difficult for us to understand because we had it back in '78 and everybody seemed to be satisfied with it. And ANILCA was passed and all of a sudden over a period of time and we 've had a lot of different things, so as we get into this thing I think

the impact on fish and game especially about rural preferences, and particularly the Kenaitze case _____. Also, I _____.

(Transcriptionist could not hear remarks on tape due to high pitched tone on tape. Missed remarks of L. Leman, V. Collins, and R. Taylor).

Navarre:

Norm, I'd like to follow-up on your response to Rep. Taylor's question on regarding navigability versus non-navigability, and I'm not familiar with the Gulkana decision, so I can't speak to that. I guess my question is simple. Are the tests for that anything like the application of the Clean Water Act for navigability? If not, what are they, if you can give it in a short answer. And if we do have the answer, do we have a tabulation of what is non-navigable or some graphical presentation, or could we have that at least by Monday morning? Or, is that not possible? Is that also subject to court interpretations.

Koester:

If I may Mr. Chairman, the Clean Water Act definition of navigability is much more extensive than the...the Clean Water Act extends to all waters in the United States and that now includes even wetlands, which are not necessarily water, so you have your drudge and fill permits that the Corp of Engineers uses and so on. Its an exercise of Congress' Commerce Clause power which extends very very broadly. And, in fact, the courts have continuously expanded Congress' under the Commerce Clause Power. President Reagan's Commission on Federalism noted that that's been one of the basic erosions of states' rights over time through the United States Supreme Court's expansive interpretation of the Commerce Clause power. The navigability test on the other hand relates directly to navigation on waters. The test for total navigability is whether the waters were susceptible of use for trade and commerce on the date of statehood. In the Gulkana River case, the 9th Circuit Court

of Appeals affirmed the Federal District Court judgment that when in trying to apply that test, that language test, the word test, to actual water bodies in the State of Alaska, that it is legitimate to present evidence of a use of a water body by a variety of craft that many people think of as recreational: canoes, inflatable rafts and so on. The federal government was urging that the question be, can this magic mythical boat (the magic boat test as it became euphemistically referred to by the attorneys) in affect a boat capable of carrying a ton or two tons of cargo with a three draft keel and so on, whether that kind of a boat can navigate the water body. We were arguing for a much more liberal test. That in fact use by recreational use by kayaks, canoes, inflatable rafts, would suffice to demonstrate that this water body was susceptible of use in trade and commerce. We were successful in that case. The consequence of that is that a much larger number of water bodies in the state are navigable for this title determination purpose. Does the state or does the federal government or private parties own the bed of the water body? So as a consequence of that case, many more water bodies in Alaska will be found navigable. And as a consequence, the state will have title to the bed of those additional water bodies. Whether we can provide a map that will show all of the navigable water bodies by Monday, I don't know, but I will certainly check with the Department of Natural Resources and see if we can have that available.

Navarre:

Or at least perhaps a tabulation perhaps of non-navigable, if that list is much shorter. I'm not sure which list would be longer. And, maybe those non-navigable waters that have the support of fisheries. Even, you know, reduce that to a smaller substance, so we can determine what portion of the fishery are we talking about that possibly could come under these draft regulations.

Cohen: There are very few fisheries that will come under the draft program. We're only talking about non-navigable streams that are on federal lands, as opposed to all non-navigable streams in the state. Which we're talking about the upper regions. And at this point, it is our understanding that the federal programs have been vague on this, but it is our understanding that unless the activity place in that non-navigable area, then it would not apply. The question though is and where the state gets the bed of the river, if its navigable. But navigability also gives federal interest in that water such that the federal government can regulate it. And that's how they regulate under drudge and fill permits, wetlands, etc. So there are federal interests in navigable waters despite the fact that the state owns the bottom. And it is, the question is: is that interest of such a degree that ANILCA kicks in for purposes of fisheries? And, it probably, and this is going to be determined on the basis of whatever case comes up. If it looks like an egregious case, it probably, you know, those are the kinds of things that are going to get involved in this basically a legal question, but it probably will be - depend a lot on the type of sympathies the court has for the people who are pursuing the litigation.

Collins: I think my question has been answered, which similarly phrased differently, is what percentage of our fishery is in non-navigable waters, and I think if we had that answer that would maybe be the easiest way to get around it. If you could give us that off the top of your head. Less than 1%?

Cohen: Well virtually none of it takes place in non-navigable waters. There is some. I mean you'll find lake trout, brook trout, things - fisheries which take place on federal lands which we're talking about. But your major salmon, subsistence salmon fisheries are still going to be regulated

under this program at this time until litigated and something else comes out by the state.

Taylor:

No, the salmon fisheries of this state are going to continue to be regulated by the State of Alaska. The federal government has absolutely no jurisdiction over those salmon fisheries resources, and anybody telling the press that salmon fisheries resources are in jeopardy because of this "alleged federal takeover" is in complete disregard of the Gulkana case, unless the Attorney General's office is telling me that you want to fall over and surrender on that one too. Isn't that the bottom --- we've been at this half an hour for you to finally tell us there are no salmon involved, that navigable waters, yes we have jurisdiction over them. When the question was asked 20 minutes ago. And you actually said, oh, we do have a percentage of our fisheries resources that may be in this area. And when asked what is the percentage, zero.

Navarre:

I think what Mr. Koester mentioned earlier -- this is Rep. Navarre and I want to ask again that people, before they speak, since we're going to have this transcribed to please state who you are so that when we get it transcribed we can attribute it to the proper people. Thank you. I just want to mention that what Mr. Koester said earlier is that apparently the Gulkana decision does not address whether or not the federal government has an interest in the fisheries. That question has not been determined by the courts, so that therefore the fisheries resources should be considered in jeopardy. Not, maybe not right now, but that's going to be decided by the courts also. Whether or not the interest in fish that in the navigable streams, which is in that reference to it in ANILCA, whether or not that interest is such that the federal government therefore could go in and exercise some jurisdiction over the fisheries resources. Is that reasonably accurate.

Koester:

I think that's correct. And to specifically answer Rep. Taylor's question. We're not going to roll over on the Gulkana decision. We won the Gulkana decision. We litigated it and won it and we're not going to turn our back on it. We have supported other states in their equal footing doctrine claims. We supported Utah and got 33 other states to join in an amicus brief to the United States Supreme Court, which the Utah Lake case held that a pre-stated federal withdrawal does not defeat state title under the equal footing doctrine to the bed of the navigable waters within that federal withdrawal. The case was profound implications for the State of Alaska. We successfully supported in that case. We have no love for the federal government, and we're going to litigate and do whatever we need to do to continue to assert legitimate state claims to jurisdiction, particularly the equal footing doctrine. But to say that there is no jeopardy to the salmon resources is an incorrect statement, because there is in fact some jeopardy. Under the federal program, the draft federal program that has been published by the Department of the Interior, the federal takeover would not include salmon resources. The Interior Department has made a judgment call in interpreting ANILCA that ANILCA does not include navigable waters. Legal arguments to the contrary can be made, particularly if, as a result of the McDowell decision, and if the subsistence preference statewide is no longer part of state law, so that subsistence users do not have a preference for salmon resources. Because those are not on federal land and there's not subsistence preference in state law. It is likely that that question will be litigated. And legal arguments can be made under ANILCA that Interior's interpretation is incorrect. I am not advocating that Interior's interpretation be found incorrect. And certainly everything that the state has done in the past with respect to jurisdiction over waters and fisheries is that that is not part of federal land. And so they are not subject

federal regulation. But to say flatly that there is no jeopardy is an incorrect statement because legal arguments can be made that in fact ANILCA does reach those resources. The Interior Department has not taken that position in its draft plan. That's not to say though that the question might not be litigated and the Court reach a different conclusion. And again, the courts are the ultimate interpreters of statutes, not administrative agencies. Just so, there is some jeopardy.

Cohen: One interesting thing about the federal program is that they are going to adopt by reference all of the state's subsistence fishing regulations, or actually specifically adopt them. Asked why, if they're not asserting jurisdiction over navigable waters they would do this, is that well, if we lose the court case at least all of those regulations will be in place at the time we lose the court case. So, just, to give you an indication of sort of the confidence that the Interior Department at this point has in terms of whether it believes ultimately fishery resources will be subject to ANILCA.

Taylor: I understand that nothing is certain in this world, that some federal judge at some point may overturn almost anything. But as the Department seems want to make predictions about whether or not certain litigation might prevail or not prevail, you'd be willing Mr. Koester at this time to give the legislative body your prediction about whether or not this state will continue to retain its jurisdiction over the management of our natural fish resources in navigable waters and for up to 3 miles, or do you predict that we are going to lose this one?

Koester: I think the strongest legal argument is that ANILCA does not reach fishery resources.

Taylor: Good.

Koester: Thank you. I think the strongest legal argument. On the other hand I also thought the strongest legal argument was that the state's definition of rural was consistent with the use of the term "rural" in ANILCA, and we had three judges of the 9th Circuit Court of Appeals who, in the view of at least some analysts, decided that case, or at least their written opinion, seems to reflect more personal views and philosophies than a strict analysis and interpretation of the language of the federal statute. And I think that is at least something that we need to throw into the mix, if you will, in terms of trying to make predictions as to what courts will decide. And so while I feel very confident that the best legal analysis, strict construction if you will, of the terms of ANILCA is that ANILCA does not reach navigable waters; instead, only reaches uplands. I can not say with confidence that that's what the result would be if the question is litigated. Particularly and again in response to Rep. Hudson's question, right now the state is not in a position to bring a lawsuit. One of the prerequisites for a lawsuit to make that determination is that there be an actual case and controversy. So for us to sue the federal government, the federal government would have to announce that it was attempting to reach those waters. Then we would have a controversy. We would be taking one position, the federal government another position. That's what you need to get into court. You have to have an actual controversy. Right now the federal government has taken the position that we believe is legally correct. We don't have a controversy with the federal government under the draft plan, and if that's what ultimately adopted by the federal government, we won't have a controversy over that plan. So we won't have the jurisdictional prerequisite to getting into court to litigate on that issue. Who will have that controversy? The people who believe that ANILCA does in fact reach

navigable waters are the ones who will have the controversy with the federal government if that becomes the final plan - the federal government's final plan. They are the ones who will bring the lawsuit against the federal government. So, that was one of your questions Rep. Hudson. Can we bring a lawsuit right now and get a determination from the court? And the answer is, if the draft plan becomes the final plan, the answer is no.

Hoffman:

Thank you Mr. Chairman. The Gulkana decision as it relates to management of fish I think is irrelevant. The Gulkana decision talks about the jurisdiction to manage the land underneath those navigable waters. The Gulkana decision does not talk about managing the water resource or manage the fish that pass through that resource. Is that correct?

Koester:

That's correct.

Hoffman:

The other issue regarding the federal plan for the management - federal takeover, you know, I participated in the proposed, the hearings in Bethel from 7:00 p.m. to close at 2:00 a.m. in the morning, and the issue of the position that the federal government is taking on management of fish, they told us is temporary, while the regulations are temporary and they are still further considering whether or not they will include management of fish. It is the position of the people at least that participated in the hearing in the Bethel region, that Title 8 of ANILCA does include a preference for fish and for game. And that was founding results at least of the testimony that the people of the region out in Bethel participated in. It was also expressed to the federal government at the hearing that when they informed the body that there were hearings in Juneau, in Anchorage, in Fairbanks and in the one semi-rural area in Bethel, that there was a lot of displeasure in at least the federal government's presentation in the hearing process for the

hearings and the people that are most affected by subsistence and the federal takeover are not participating at least in the hearings. And they had advised that at least the people in that hearing that these were emergency temporary regulations and that further regulations were going to come about to try to address the needs. It was presented by AVCP that if those regulations did not include the management or preference for fish, that there would be a legal action taken. It seems as though, I know that this will play a part in the decision process, but the question before the legislature I think is the one of whether or not we will retain management of our fish and game, and whether or not we will comply with the provisions of ANILCA in order to accomplish that.

Boyer: Excuse me, this is Mark Boyer in Fairbanks. Could I ask a question of Rep. Hoffman. Why would AVCP seek to sue on the question of whether or not the fisheries were managed under, by federal authority when they seem to be pushing for state regulation and control of the fisheries or the resource, and they seem to be happy with the state management. And if they end up with state management because it isn't managed by the feds, why would they sue on that question? I'm not sure I understand.

Hoffman: Well I don't know if I can speak for AVCP, but the Association of Village Council Presidents have had problems with the State of Alaska in that from appearances the fishery has been managed for commercial purposes and not for subsistence purposes as the first priority. Although there have not been a great deal of pressure placed upon many resources, fisheries resources, in that region, at least in the Kuskokwim. But there have been problems on the Yukon.

Boyer: Thanks.

- Hanley: Thank you Mr. Chairman. This is Rep. Hanley for the record. I had a question. If the draft regulations that we have seen now that the federal government put out, if they do not affect the navigable waters, does that nullify the Kenaitze decision. If we don't do anything between now and July 1st will the Kenaitze decision go away?
- Koester: If the regulations are upheld, then the Kenaitze decision would go away. There would be no federally mandated subsistence fishing in the Kenai River more than any other navigable water bodies in the state.
- Cohen: Just one slight variation on that is that the decision at this point is based upon a preliminary injunction and order. So you would have to go to court if you wanted to take immediate action. The order applies to this summer only. So its possible that even after July 1st the order could stay in place for the rest of the summer and the fishery could continue this summer, but that would be the end of the right to the fishery at that point. So it doesn't necessarily come to an end on July 1st. That's a decision that the people are going to have to make as to whether or not to seek to end it before the end of the fishing season.
- McLean: Excuse me, this is Rep. McLean from Barrow and i would like to ask a question with relation to the water. What if the federal government treats the water as a subsistence resource and it has been done I know in the central Yukon area. So what if its defined as that?
- Koester: I'm not aware -- this is Tom Koester -- I'm not aware that the federal government has treated water as a subsistence resource. I don't believe the draft plan addresses that and certainly the way the draft plan is put together, the federal government is not asserting that navigable waters are public lands within the meaning of ANILCA.

Finkelstein: This is Sen. Finkelstein. You might have mentioned this before, but in the conclusions on the chances of a lawsuit succeeding, is one of the key cases the Kleppe v. New Mexico case? Is that one still -- I remember 8 years ago it was -- is it still the most current case?

Koester: Kleppe v. New Mexico is a United States Supreme Case. In that case Congress enacted a statute called the Wild Horses and Burros Act. In that law Congress found that the continued free roaming of wild horses and burros on the federal lands of New Mexico was in the national interest. There were a number of ranchers in New Mexico who were using federal lands, had long-term grazing leases on federal lands, and the wild horses and burros were grazing on the same lands that the ranchers wanted to graze cattle on. The wild horses and burros were in effect rendering the lands valueless for grazing livestock, domesticated livestock. So New Mexico passed a law authorizing the ranchers to dispose of the wild horses and burros either through killing them or through removing them physically from the land. Congress passed a law saying no, free roaming wild horses and burros on public lands are in the public interest and this law supersedes the New Mexico law. New Mexico challenged arguing that wild horses and burros are game in effect, are wild animals subject to state regulation not federal regulation. United States Supreme Court held unanimously that a clause in the United States Constitution called the property clause gives the United States Congress the power to regulate wildlife on public lands. And since that was a legitimate exercise of Congress' power under the constitution, that it was not a violation of New Mexico's right to regulate wildlife under the supremacy clause, and that the federal law therefore prevailed. That's one of the clauses. The property clause is one of the clauses that Congress invoked in ANILCA in establishing that there is to be a

preference for rural residents for subsistence uses of fish and wildlife on federal land.

Finkelstein: I guess the question is, has anything occurred since then? Was that a '78 case? Is that right?

Koester: That was a 1978 case. There has been no United States Supreme Court case since then. There have been some lower federal cases that have under the Commerce Clause power concluded that Congress has the authority to regulate even off federal land. But not a United States Supreme Court decision.

Finkelstein: Right. I guess the part I was getting at was I remember the news stories when that case came down. And the stories in Alaska was that this was a strong statement against state's rights on wildlife issues. And basically we're saying nothing has occurred since then to overturn that decision.

Koester: That's correct.

Boucher: We started in '74 and I was with Gov. Egan when the state finally recognized that it had to come to grips with the issue because it tied into the Statehood Act, the construction of the pipeline and everything. You know, and quite often we start in '74 and we just talk about fish and game and we don't talk about land. We had come out, for those who may not be aware of it, the Secretary of Interior had frozen the land in the State of Alaska. And I'm just wondering if we can't come to grips with this problem that extends far more beyond just fish and game management. It talks about right of ways of pipelines and etc. And that's one of the things, Mr. Chairman, that I am concerned about. I said on the floor down there, and I - do you feel I have a legitimate concern? The reason there was a land freeze was we told rural Alaska, "hey the state can't solve the problem, go to Washington." And we've got to remember that.

And Washington was sympathetic to that. They still are today. So if we cannot have the solution and we tell rural Alaska to go to Washington again, I think we're going to come out on the short end of the stick, because there is not a constituency that tends to agree with us in the eastern United States. All we need is two hundred million Americans telling us how to manage our land and we'll be right back in it with the New York Times and the rest of it. I've expanded a bit and editorialized on it and excuse me Mr. Chairman, cause it is a deep concern of mine. I saw the struggle. Do you feel if we do not solve this problem --

Cohen:

You never know what the effects are going to be if no action is taken. And I think that you know, key to Rep. Taylor's concern about saying the sky is falling, when maybe the sky isn't totally falling or else all we're doing is guessing the sky is falling. And saying it is and it doesn't fall and we just look like we're a bunch of Chicken Littles running around. And I guess, I don't, its hard to say what will happen. We know what will happen if a constitutional amendment is passed. We go back to the system that we had in place before McDowell and if its passed by the voters, will go into the system we had before McDowell and the rural situation, the rural issue I believe taken care of by the federal regulation. And we'll basically know where we are. If we don't, we don't know where we're going to be. We know for sure that there will be lots of litigation. As Rep. Hoffman pointed out, people are going to litigate the issue of whether fishery resources come within ANILCA. The state may be successful on that and ANILCA may not apply. On the other hand it may apply and then the other fishery users in the state will be subject to federal decisions on fish are used. Its possible. We don't know whether it'll happen. As Tom pointed out earlier in talking about suing on federal laws that we have been part of the crafting of, whether it

will -- the state will be viewed as a _____ negotiating partner in terms of opening ANILCA, gasline, whatever...it is possible that that will happen. We don't know for sure. But these kinds of affects are possible. There's a course of action which you gives a fairly certain future, and there's one which leaves it up to courts, the will of Congress, and the way the state is viewed. The state in the federal regulations has done everything possible to maintain state jurisdiction to the maximum extent. That is primarily the way that the federal agencies have decided to go, but there are policy choices that they've made there, and if the state in the preface to the federal regulations, they said they're going in a very narrow manner. A very limited amount of work at this point to give the state a chance to get back into compliance and not disrupt things unnecessarily at this point if there is a possibility of the state coming into compliance by the end of the calendar year. So the federal government has said that. But whether they will expand the program greatly afterwards to address what they see as subsistence needs as opposed to what state residents see as what subsistence needs are out there, who knows. But, at least they've told us that you can expect a much more expanded and comprehensive program than we have now. What it will be, we can't tell you. But we just know that that's the case. We do know in the federal program that five career federal bureaucrats with a national constituency will be making these decisions. It won't be Alaskans. It will be people who are responsive to Washington D.C., responsive to non-Alaskan concerns. They were responsive to non-Alaska concerns in such things as wolf hunting in national preserves. You now, you get a bunch of letters from people in New Hampshire who think its a bad idea. And then you say, well by God, we got to take some action here, State of Alaska you'd better do something or we're going to do it ourselves. There are those kinds of things out there. We can stay in control of our destiny, or we can let go, roll

the dice and see how things work out. Its perfectly legitimate to roll the dice and see what happens, but that's basically the choice that we have in the next week or so.

Hoffman: Okay. I have a question for Mr. Koester. Then I guess if the federal government does not include fisheries as a subsistence resource, and the state does not have a subsistence program, particularly for salmon, historically there's been 60% of the take for subsistence has been salmon. And how from your viewpoint is this going to resolve an issue when the people are heavily dependent upon salmon in virtually region in the state?

Cohen: Rep. Hoffman, maybe I can take a shot at that one. You're correct. If there is no state subsistence law and ANILCA does not apply to fisheries, then there will not be a priority for subsistence over other uses and it'll be totally within the discretion of the Board of Fisheries how they deal with fisheries. They could make subsistence the lowest priority, middle priority, high priority - whatever they feel is appropriate. But in the limited situations with fish where there is not enough to go around - in those cases it will be very difficult to give a subsistence priority and still allow other uses to occur. We're talking about a small number of situations where the subsistence rules are more expansive than the personal use rules which apply to non-subsistence use. We're talking about king salmon on the Kuskokwim before July 1. We're talking about local use of the Copper River red salmon resource with the preference there. There are very few places, but in those what you'll see is that the people who rely on the resource either 1) will not be able to get as much as they're able to get now; 2) changes are going to have to be made on other users to reduce their opportunities. You may have to -- if the Copper River situation fishery which takes place primarily prior to July 4th, if that was going to take place

later in the summer we would probably, because the number of people who would be eligible for the expanded bag limits and expanded methods that local residents are eligible for now - if that situation was going to take place later in the summer, we would have to change, probably change the commercial fishery on the Copper River to respond to that expanded use. But basically its up to the Board, it'll be up to the Board to determine what kind of priority they want to make for what use.

Hoffman: You know, basically we're talking about millions and millions of pounds of resources here. And in many instances these resources go to many of the poorest people of the state. If this resource is taken away, you know, what type of impact - and I know that this may be straying from the issue, but then the more people are going to be applying for food stamps and other state and federal programs. It seems absurd to do something like this - and are we saying that if the federal government from Koester's comments, if the federal government says that they are going to include salmon as a federal plan as a subsistence resource, you say the State of Alaska is going to fight that - no the other way around.

Cohen: That's correct.

Hoffman: Under what basis?

Cohen: On the basis that the fishery resources are under the jurisdiction of the state, not subject to the jurisdiction of the federal government through ANILCA.

Taylor: I think Mr. Hoffman here has maybe confused, at least me. I'm sitting here today Rep. Hoffman doing everything I can to try to find a way to prevent the federal government from taking either a fisheries resource or a game management

resource in this state. That's what I'm trying to do here today, because I'm concerned about people living on the Kuskokwim and living in other areas that need those fish and need that game. But you're telling me that the village presidents are going to file suit to see to it that the federal government is given jurisdiction over salmon because they're not happy with the way our state has managed it regarding subsistence?

Hoffman: No, I don't believe that that was a fair statement. I think that that, and their attorney is in the audience and you might want to hear from him. I think he's - and Mr. Starkey correct me if I'm wrong. They're trying to insure that subsistence of fisheries will continue.

Starkey: My name is Sky Starkey. I'm the attorney for the Association of Village Council Presidents. There's two issues here. There's state management of fish and game, and then there's just subsistence priority for fish in the Kuskokwim River. People on the Kuskokwim are for the most part are fairly satisfied with state management and would like to see state management continue because they feel like there's more local input. As the regulations are currently are drafted the board, the federal board would be the regional supervisors of the various federal agencies, and we don't feel like we get a lot of local input. So we'd like to see the management stay within the local Board of Fish hands. On the other hand, if management of navigable waters remains within the state's control, there will be no priority for subsistence fishing...

Taylor: Unless the state sets one.

Starkey: ...unless the state sets one. But....

Taylor: That's what we're trying to do here.

Starkey:

...But, the problem with that is, from the view of the people on the Kuskokwim, the state has the chance to do that right now. They can do that through a constitutional amendment which brings them into compliance with ANILCA. Otherwise, all the people have is this legislature's word, this current legislature's word that they're willing to protect the priority. That doesn't mean that that can't change next session. It doesn't mean that the Board of Fish within their discretion can't change their mind and not allow priority. That's the reason why people back to Congress because they wanted that right guaranteed. Not for just the next ten years, but until their lifestyle changes, until they make the decision that they want to change. And that security is simply not within a state statute. Therefore, if there is not a priority guaranteed, a federal priority guaranteed the people on navigable waters to continue their lifestyle for fishing, everybody on the...almost everybody in the villages, there's a few people that are listening to this. Everybody's out in fish camp right now gathering those fish. And the Association of Village Council Presidents will seriously consider filing suit against these regulations to ensure that that priority continue on navigable waters. And contrary to Mr. Koester's opinion, I feel like the strongest legal arguments is within for the subsistence users. As Mr. Cohen mentioned, it will term largely on the facts. And there are villages in the AVCP region that depend almost exclusively on salmon for their nutritional needs. They don't have marine mammals. They don't have moose and caribou. But they go out early as soon as the Kings start to run and they stay on that river all summer river long at fish camp putting up fish. And if we bring suit on behalf of one of those villages that depends exclusively on fish, and we argue to the court that ANILCA says fish and game, and that if Congress didn't give us fish, they gave us an empty platter. I challenge you to ask the attorneys for the state what the equity arguments is

going to be on their side. And I also ask you to consider that if we lose that suit, and we go back to Congress and we say you said fish and game and you didn't give us fish, the State of Alaska is going to seem pretty small in a lot of people's eyes. And I think the sympathy is going to be for the native people that depend on those fish. So we feel pretty confident about prevailing on this argument. And be warned that we will continue this fight until we win it. I'll be glad to answer any questions, but that's where we stand.

Wallis: Mr. Chairman. This is Rep. Wallis in Juneau. I don't speak for our Tanana Chief Conference, however their indications are doing what Sky just indicated. For people's information. Thank you.

Cohen: We do have about 50 minutes left and we do have a fairly significant amounts of more information to provide. And if its possible just to continue on here. We have some comments on the federal program and some more of the legal cases that have molded this situation.

Navarre: Do you have an administrative proposal other than the talk of a constitutional amendment? Is there another proposal that administration is prepared to offer for our consideration?

Koester: Mr. Chairman, at this time there is not. I think the Governor, when he called this special session and subsequently has indicated first that a constitutional amendment is the preferred solution. There is continuing work looking for possible alternatives and continuing work in attempting to forge consensus and to contact different constituent groups to see what options might obtain the broadest base of support. But at this point there is nothing to advance as a concrete proposal. The

administration will be advancing a proposal when the session convenes, but there's nothing at this point.

Boucher: I don't mean to interrupt, but that's...you mean we're going to Juneau and there isn't a plan? We've got to have something in front of us. Now you're telling me there isn't a plan. And I think that's a question that he was asking. What are we going to do -- thrash around down there and play dart board approach to it. Now I'm very serious about this.

Navarre: This is Rep. Navarre. On the agenda it shows at noon tomorrow, there's nothing in the afternoon. I'm going to amend the agenda tomorrow afternoon beginning at 1:00, there'll be a discussion of the options and I would ask the administration and I will also forward to the Governor the request that if he has a proposal that he has prepared, to give us next Monday, we would like to have it tomorrow afternoon if possible. I'd like to have personally time to consider it and discuss it before we go to Juneau, otherwise it just makes a further delay. And I don't think that's a reflection on you sitting here. I will make that request to the governor. I have one questions with respect to a constitutional amendment - there was a comment that with respect to the Kenaitze decision which is of particular importance to me because its in my district, if the federal regs are implemented then the Kenaitze decision or the Kenaitze fishery goes away. What happens if we pass a constitutional amendment that ratifies the '86 law? Does that also result in a fishery, a resolution of the Kenaitze issue on the Kenai?

Cohen: Mr. Chairman. The federal definition of "rural", which we discussed earlier, if you're in aggregate, if the area is over 7,000, you're probably not rural. The probable implication of that is that the communities of Kenai, Soldotna, North Kenai and Nikiski, maybe down to Clam Gulch,

will be considered in the aggregate and are well in excess of 7,000 and there would have to be a finding by the board that it still is a rural area despite that. That is a probably difficult jump to make. So, in terms of resolving the issue it will be - the rules will be in place to enable the issue to be resolved with a constitutional amendment. If the legislature restates in its intent that it wants the 1986 law except for what is inconsistent with ANILCA to be reinstated and at least gives intent for adopts by statute, the federal subsistence rule definition found in the federal program. It would be obviously if the state adopted the exact federal definition it would be cleaner. If the legislature didn't it, but it showed its intent that that's what you mean by the term rural, then the boards could adopt that by regulation. So, it'd sort of be an option there, but at least the ability to deal with the Kenaitze case would be completed at that time.

Koester:

In terms of information of the next item on the agenda is sort of a history of the legal cases and I think it would perhaps be useful to address that in a very brief fashion and then perhaps a discussion of some of the options that were looked at early on following the McDowell case.

There are basically four tiers of legal cases, if you will. The first tier addresses specifically the state's power to enact legislation. Its really what does the state constitution allow the legislature to do. That's really McDowell, the McDowell case. And for information I'd like to go through the McDowell case in some detail. But first, let me outline the Tiers.

1. What does the constitution enable the legislature to do in terms of legislating on this subject? That's the first tier.

2. The second tier is what state legislation is consistent with federal legislation? Or inconsistent? And that's really the Kenaitze case - is the definition of rural consistent with ANILCA? There are other possible iterations of that. Is the preference the state is granting consistent with ANILCA and so on? But that's sort of a second tier. The first one is what is the state's constitution authority? The second is it consistent with federal law? What the state legislates consistent with federal law.

3. A third tier - once a state law is in place and state agencies start making decisions, like the Board of Fisheries - determining what are traditional and customary uses. Are those consistent with state and federal law? One of the big issues there or one of the cases is in Southeast Alaska a number of communities disagree with the Board of Fisheries' determinations with respect to traditional and customary use of fish. The Board of Fisheries in many instances found that certain communities did not have traditional and customary uses of fish. And issues in the legal case then are those administrative decisions consistent with state law and with ANILCA.

4. And then finally there are questions of individual management decisions. Is an opening of a certain length of time consistent with the requirement that subsistence have a priority over other uses? Or should it be a longer opening for subsistence? The sort of specific management decisions on the ground.

So there are these four tiers, four levels of subsistence cases. The legislature can most effectively deal only with the first two. Because the bottom two tiers relate basically to challenges to administrative decisions applying what this legislature can do. But the legislature does have

the authority to address the issue of what is the legislature's authority. It can do that through looking at McDowell and seeing whether there should or should not be a constitutional amendment. The second tier: is state law consistent with federal law? Assuming that state legislature has the power to enact a law that is consistent with federal law, then the legislature has the discretion to do that or not do that. So those are really the two levels where the legislature has the authority to deal. The other two, there may still be court cases, but they're basically court cases involving administrative application state statutes or federal law.

In the McDowell case which really is sort of the fundamental reason where here. We had thought in '86 that we enacted a law which was consistent with ANILCA would prevent a federal takeover. The Kenaitze decision held that the state statute was inconsistent but that was a matter that could be dealt with legislatively. Before we had an opportunity to do that though, the McDowell case came down and basically said you can do all you want trying to become consistent with federal law, but the constitution precludes you from making the basic policy decision in state law that is required in federal law to retain state management. And that is to prefer rural residents over urban residents for subsistence uses of fish and wildlife. In the McDowell case Justice Matthews wrote the plurality opinion for the court. Joining him in that decision was Justice Burke. Joining him in the first half of that decision was Justice Compton. Joining him in the second half of that decision was Justice Moore. And Justice Rabanowitz dissented. So we know that three justices agree with the first half of the opinion, three justices agree with the second half of the opinion, and one justice doesn't agree with either half of the opinion. The court held that the rural preference violates the Alaska constitution. The common use section, Article 8, Section 3;

the no exclusive right of fishery, Article 8, Section 15, and the equal application article, Article 8, Section 17. The cases brought in 1983 challenging the Tier II criteria in the 1978 subsistence law. The '78 law established a subsistence priority over all other uses and said when you have to cut back even on the subsistence uses, that you establish priorities by customary direct dependance upon the resource, local residency and availability of alternative resources. So that was the basic challenge brought in 1983. Before that decision came down, the Madison decision was handed down which invalidated the regulations the Board of Fish and the Board of Game had developed giving rural residents a priority for subsistence. That resulted in the 1986 Subsistence Law. Now the basic objection after a number of amendments to the complaint - following the '86 law the basic objection was that the rural preference excludes urban subsistence users and includes rural non-subsistence users. So it was under inclusive in that it shut out urban subsistence users. It was over-inclusive in that it included rural people who do not take advantage of subsistence. The court cited a study which in its view supported that conclusion that the plaintiffs were in fact right, held that the Article 8 provisions are designed to ensure the public the broadest possible access to wildlife; that the constitution authorized preferences among uses - that is you can say subsistence has a priority over commercial or vice versa - the constitution allows that. But it does not allow you, once you've established a use to start saying well you people here have a higher priority for this use than these other people. So that there's equal access, all Alaskans, if subsistence has a priority then all Alaskans are entitled to participate in subsistence. The court basically said that what this clearly does is give everyone an equal right to participate in hunting and fishing regardless of where they live. Where you live can not be used as a way of saying that someone has a preference

over someone else for a particular use. The court went on to say, Justice Matthews went on to say that this doesn't mean that everybody gets to participate. Only that using the location of where a person lives to decide who has a priority over someone else is unconstitutional. Now they said, we're not called on to say what might be constitutional. If in fact you even had to cut back on subsistence so you wanted to say that maybe some residents ought to have a preference over some other residents. But it did say that any system that classifies within a use and says one person has a preference over another person, would be subject to close scrutiny because preferring one person over another creates a tension with this equal access to the resources provision. So the court said demanding scrutiny is appropriate of any classification scheme. And any classification scheme must impose the least possible infringement on the open access clause. The court noted that the purpose of the '86 law was to ensure that those who need to hunt and fish for basic necessities are able to do so. It also noted that one purpose was to retain state management in fish and wildlife, but it basically dismissed that as not being important. I'm sure that came as a surprise to the people that were here during the statehood deliberation when state management of fish and wildlife was incredibly important. It was one of the primary motivating factors of statehood. But that's what the court said. The court did say that ensuring that those who rely on these resources have access to them is an important interest. But its a crude, using the word "urban" classification is too crude. It excludes too many people on the one hand and includes too many people on the other hand. Justice Compton agreed with the open access analysis. He thought the inclusion/exclusion was not necessary. Justice Moore agreed with the inclusion/exclusion, wasn't quite as certain about the open access analysis. And then Justice Rabanowitz of dissented. The Madison decision came out right before

Christmas of last year -- I mean the McDowell decision came out right before Christmas last year. Up until then I'd had very minimal involvement with subsistence and was quickly pressed into service to try to figure out if there was a way out.

We looked at a number of possible options as to how to respond or react to the Madison decision. I mean to the McDowell Decision. The McDowell decision basically said whatever the state does, you cannot enact a law which will be consistent with ANILCA and prevent a federal takeover of at least some management of fish and wildlife - the amount remaining to be seen. But the constitution currently doesn't allow you to do that. We started to look for options. What can the state do as a consequence? One was to ask the State Supreme Court to reconsider its decision and say that maybe the constitution will allow us to do this. We asked the Supreme court to reconsider. The Supreme court denied our reconsideration motion. Now what about amending ANILCA to prevent a federal takeover - to change the provisions of ANILCA. Three possible amendments were discussed: eliminate the subsistence priority for rural residents in ANILCA; amend ANILCA to totally pre-empt state management altogether; amend ANILCA to give a preference to Alaska Natives. Well, amending ANILCA first, the delegation said you can't amend ANILCA. Its not going to happen. If ANILCA proved anything in 1980 is that you're going to have to get some kind of a consensus anyway, and that certainly didn't seem possible to get a consensus as to how to amend ANILCA. The only agreement that had been reached up to that point at least as expressed through the political process, was the rural preference that the court had struck down in McDowell. In addition, we were warned that amending ANILCA might have a substantial cost in terms of amendments to other provisions of ANILCA. Certainly the debate over the Tongass has shown that anytime you open

ANILCA all the interest groups swoop in and try to extract their price for allowing legislation to go through. So who could tell what the additional price might be for amending ANILCA.

The other alternative we looked at was the statutory scheme based on giving a preference to those most dependent on the resource. After trying to walk it through, it was obvious that that would be very burdensome and intrusive on the public to file affidavits and so on. A large bureaucracy would be required. The Limited Entry Commission dealing with 10,000 commercial fishermen spawned at least a 1,000 lawsuits. If we're dealing with 500,000 Alaskans and we had a parallel amount of litigation it would be tremendous litigation. It would take a substantial time to gear up any kind of a bureaucratic system that was designed to try and measure individual dependence. No certainty that that would be constitutional because the plurality of opinions in the McDowell case. And finally it would be inconsistent with ANILCA. It would not prevent a federal takeover. Another alternative was to interpret ANILCA as pre-empting state management just as it was, or pre-empting the state constitution. I don't think anyone is isn't in simply rolling over to the federal government. So that option was not really given too much credence. Another option was to enter into a cooperative agreement with the federal government so that the state would administer most of the federal government's plan. Well the feds have made it clear, they want to do what they call a stand-alone program. They'll use the state to get information and coordinate with us, but they feel under the federal law they need to be in charge and they can't delegate to the state.

How about using current management tools to try to avoid the priority or the preference? Well it basically doesn't work on the ground. And, the use of the management tools that we

currently have were those that we had back when this whole process got started, and were leading to results that many people in Rural Alaska found insignificant as Rep. Boucher said, by doing that we sent them to Washington to get what they could get. What they got was ANILCA. So that's not a viable option at least in terms of addressing fundamental concerns.

Litigate. Challenge ANILCA. There has been substantial discussion of that. Our view is that its a difficult case to win. I've not heard anyone say it is an easy case to win. But the question is sure to be brought. And I think there are a number of policy reasons that counts for bringing such a lawsuit - vindicating state's rights; eliminating the threat of federal takeover. There are also policy reasons which counts against filing a lawsuit - it prolongs the uncertainty during which time the federal government gets a foothold at least with respect to management. Its a reversal of what has been the policy of the state at least to challenge the rural preference, what's been state policy for a decade. It makes it difficult for the state to go back to Congress to negotiate if Congress feels that we'll negotiate what we think is a good deal and then challenge the parts of it we don't like. It jeopardizes our negotiating position with Congress and success may lead to a worse result. We don't know what the alternative, the Congressional alternative will be if we're successful in throwing it out. We looked at other statutory schemes - possible statutory schemes. Like a preference for local residents with respect to resources within their area. First you need a constitutional amendment. Because in quoting in McDowell said, you can't establish a preference based on residence - period! That's what the open-access provisions provide. Its also not consistent with ANILCA, and you do have some practical problems on the ground of trying to say what is local for a given community and what

is not. How about a subsistence law that applies only to federal land? Well, its not consistent with ANILCA because you still have to have the real preference, and we can't have a real preference even on federal land. It also produces a split jurisdiction where you have one management regime on state lands with no preference for subsistence; a different one on federal land which creates difficult administrative problems in trying to accommodate different management regimes for resources that don't respect boundary lines.

Finally, how about a state-wide subsistence priority over all other uses. Clearly constitutional, but the Madison case established in effect a statewide subsistence priority. That's when the user conflicts between subsistence uses by all Alaskans and the other uses of fish and wildlife, particularly commercial and sport, caused a political problem in that the commercial and sport users felt they were being given too much of a back seat if they had to be lower in priority to subsistence uses by every Alaskan as opposed to the 20% or so that live in rural areas. That resulted in the 1986 law.

What about the option of just letting the feds have it? Nobody really liked that idea. That was what prompted statehood in the first place, was federal management of fish and wildlife. That brought the administration around ultimately during the session to the idea that a constitutional amendment allowing the legislature to enact a rural preference - not mandating it - but allowing the legislature to do that was the preferable solution. What that did is it allowed any lawsuit that someone wanted to bring to challenge ANILCA to go forward, even though the state may or may not want to bring that lawsuit. It does not require a preference. If someone were to sue to challenge ANILCA and was successful, then the legislature

could repeal the preference because it is not mandated. Coupled with the federal definition of rural, it would be consistent with ANILCA, prevent a federal take over. At the end of the session the idea that maybe a constitutional amendment with a sunset clause to allow a law suit to go forward perhaps, or some other kind of consensus to be developed within the state - maybe approach Congress with a statewide consensus saying "Amend ANILCA" to our new idea of what we think is the best way, best policy choice would be an approach. In the meantime the state would retain management because the state would have constitutional authority and statutory authority to administer a program consistent with ANILCA. Passage out of the legislature would give the people the right to vote. This is a statewide issue of statewide significance. People ought to be heard on this issue. And not passing a constitutional amendment virtually assures, at least for a short period, federal management. And without either an amendment to ANILCA or a constitutional amendment, a long-term federal management presence in the state.

So those were basically the options that we looked at including statutory proposals and constitutional amendments.

Rep. Sabo: You said that you considered like a regional or local management and resource subsistence. And you said a constitutional amendment would be required to do that. Is the draft of this constitutional amendment broaden enough to allow the legislature by statute to do that sort of thing later?

Koester: I don't believe so. None of the versions that were presented during the session would authorize the legislature to do that, although possibly the Senate Resource Committee version. But that would be another possibility. If it only authorized that though, it would be inconsistent with ANILCA

and an ANILCA change would be necessary. But certainly something could be done that would authorize initially a rural preference and then a local preference as well. That would be a possibility.

Rep. Hudson: Tom, you said that the Supreme Court said that the State of Alaska cannot under its constitution fashion any kind of a rural preference. Did they say that? Or did they simply say that the rural preference in existing laws are unconstitutional? Has every thought, every possibly conceived mechanism that we might be able to either through different means and methods - for example, are they all out? Are they absolutely precluded from happening because of the Supreme Court's findings on that? Or were they only dealing with the law that was on the books at that time?

Koester: They were dealing with the law that was on the books at that time, which basically established a preference on the basis of residence. The residence involved was rural residence versus urban residence. But what the court, and this is a quote from the opinion, the court stated that the equal access sections, Article 8, Sections 3, 15, and 17 "ensure an equal right to participate in hunting and fishing regardless of where one resides." So using residence of any kind whether it be rural/urban or local with relation to the resources, in my view has been precluded by the McDowell decision.

Hudson: Even local.

Koester: Equal access regardless of where one resides. That's the phrase the court used.

Hudson: Which would imply that someone from Southeast should have equal access to game resources regardless of where they're located in the State of Alaska.

Koester: That's what the language says, and the court cited with approval a number of cases from other states where, for example, people in one county were charged only a dollar for a hunting license, but people from another county were charged three dollars. And the court in that state threw that out as being a denial of equal access to the resource because it cost more for a non-county resident to go into the county to hunt. And the Alaska Supreme Court seemed to say, that's what we mean. Is that in this state the equal access clauses mean that someone from one county has just as much as right to go somewhere else in this state and hunt as a resident of that other area. I'm not sure you can read the McDowell decision as saying anything else than that.

Hudson: The federal regulations, proposed federal regulations might continue. Are they not setting up a differential, that is some gray areas as to where people will be determined upon their long-term customary and traditional uses? I mean, that is one of the in between the populations - the 2,500 and 7,000, aren't there some gray areas that the federal regulators and managers are now setting up.

Cohen: Rep. Hudson, yes. There are to be developed criteria for the federal subsistence board to determine which of the 14 communities are rural that fit within 2,500 to 7,000. But there will be a definitive decision at some point saying which ones are in and which ones are out. In terms of customary and traditional, even if the community is determined to be rural, then that community is only eligible for hunts for which there are customary and traditional uses of that game resource by people who live in that community. And again, hunts only within that area.

Hudson: Aren't the federal regulations going to preclude one from say moving from one region to the other region?

Cohen: Basically it will be the same system as we have now, where the community residents are eligible in the areas in which that community has customary and traditional uses, not in other areas for subsistence. So somebody from Angoon who has customary and traditional uses on Admiralty Island and the near islands to Admiralty - have customary and traditional uses there but they don't have them up in the Copper River Basin. So they are, by the federal program, similar to the state's program prior to McDowell, they will be limited in subsistence to those areas near to where they live.

Hudson: So residency in that area is the key criteria, right?

Cohen: And the term that - its basically a domiciliary idea instead of a residency idea. So if you look at the persons where the driver's license says where they live, where the kids go to school, where they own a home, where they pay taxes - all that kind of stuff, and you determine at that point whether someone resides in the community or whether they reside somewhere else. There's a lot of people live in two places. They may have a summer fishing operation and live somewhere during the summer, but they own a home in Anchorage. They send their kids to school in Anchorage, they get most of their mail in Anchorage. At that point whether you're a resident of that community or not is based upon those kind of individual determinations. And you really have to do - I mean pretty well know where they live and from time to time we do get people who want it to be checked out and so there is a form that we have that you fill in all the answers to these questions and then a determination is made as to whether they are domiciled in a rural area or urban area.

Hudson: So its domicile, not residence?

Cohen: I think they use the term in the federal program "residence" but the characteristics are a domicile type characteristics.

Hudson: The federal law of the U.S. constitution has been tried and challenged many times and residency is indicative of intent to remain or to make that residence in one particular area. And 30 days in most cases is all that it takes.

Cohen: And the issue is that you can move around from place to place and live somewhere else and your residency goes with you.

Hudson: The question is whether you're a resident at the particular time you're trying to participate in one of these hunts and....

Cohen:as opposed to if you want to move somewhere else as that community is eligible.

Hanley: When you were describing the options Mr. Koester you talked statutory scheme, litigate challenge ANILCA, and then you said something about that we could let the federal government have it, but that wasn't really a viable option because we didn't want federal management of our fish and wildlife. Once again are we talking about fish or are we talking simply about subsistence use of wildlife on public lands?

Koester: I think we're talking subsistence use of wildlife on public land and to the extent ANILCA may ultimately be construed to include waters and fish because waters then would be public land.

Hanley: Ultimately, but at the present we're talking about subsistence use on public land.

Koester: We're talking about subsistence use on public land. The difficulty is that once you begin to give one use a priority over other uses, its difficult to do that without impacting in some fashion remaining uses. In other words, if you have a harvestable surplus of a population, then the question is how do you divide up that harvestable surplus? And if the federal government is going to have the legal authority to establish a preference for a portion of that harvestable surplus, of necessity that dictates what remains of the harvestable surplus for other user groups. So in that sense, while its not total management, if you will, because the state would have discretion to make allocation decisions of the remaining portion of the harvestable surplus. In large part you're giving the first cut, as it were, to the federal government in terms of management because in order to ensure that that first portion of harvestable surplus that's subsistence preference is utilized appropriately, the federal government would be establishing or will at least have the power to establish the methods, the means, the seasons, the bag limits, and so on to accomplish that part of its, what it views as its responsibility under ANILCA. The state would then have residual management authority may be one way of looking at it because we would have discretion to manage the remainder of the harvestable surplus, if any. But the first management decisions would be made by the federal government because they would be making the first allocation.

Cohen: Mr. Chairman, we have a little time before 12:00 but I guess we haven't talked much about the federal program. And, there's a couple or examples that I think may be useful for people to think about over lunch time as to what this means in terms of wildlife. Basically, the program is irrational.

It doesn't make sense. It changes the way things are done now. And this is despite the fact that the federal program applies only to wildlife in that they are including, they are adopting by reference basically the state regulations. Even with that, this thing, the way its going to work does not make any sense. And I want to give you two examples on why it doesn't make any sense and why the people who are intended to be protected by ANILCA are the ones who are - actually the ones to get the worse deal out of the situation, and it is really counterproductive the way this work.

The first example is the Nelchina caribou. The state has over the past several years allocated a portion of the permits for the Nelchina caribou herb to people who live in the Copper River. They are rural residents who have customary and traditional uses of those resources. And some number (350-450) of the 1900 or so permits have been given out to people who live in the Copper River. So there's use by everybody but there is a set-aside for the local use. That has been the state's response to the subsistence priority in the area. You look at the map over here, you'll see, you've got to look at yellow lands within the area of the Copper River. You'll see that the yellow is the - very few yellow places here in the area where the herd is going to be hunted. In fact, if you have state-selected and native-selected lands not being considered to be public lands, what you'll find is that there is virtually no federal land within the Copper River area. The federal program is going to issue 1300 permits to the local residents, residents of the Copper River, but they don't have anyplace to hunt those. All of the other permits are going to go into a lottery. One of the problems that there was in the Copper River is that when there was a lottery only, and there wasn't a set-aside for residents of the area, none of the - very few of the local residents got any

permits because they were such a small population compared to all of the interest that there is in hunting Nilchina herd. So basically, and with the understanding in rural areas right now, that you are going to be protected by the federal program on federal land, people probably did not apply, or I think its still open now, but people have not been applying, I assume, for the state permits figuring they're going to get taken care of. The result is going to be those 1300 permits are probably going to be virtually worthless in the Copper River cause you're going to have to wait until see a Caribou on that little piece of federal land before you're going to be able to go hunting, and none of the permits are going to be, or very few of them, that are actually going to allow you to hunt on state or native corporation land are going to be available to people from the local area. In Unit 25-D West, which is up here in this big brown and pink area (Birch Creek, Beaver, and Stephens Village) and you'll see its all federal land except for some native land. The villages there where we see probably under the federal program the 60 moose permits that are available. Subsistence priority for rural residents, the state will probably not have a season there - won't have anything to allocate. The native corporation land will be closed. The only place they're going to be able to hunt, people from those villages is going to be able to hunt is going to be on federal lands in the Yukon Flats Refuge, and the lands that they selected for subsistence, among other reasons under the claims act, is going to be closed to them for hunting because of this jurisdictional problem between federal and state lands. And, I mean, there is no way that people can view this as having any rationality at all. And it is the problem that we are going to have because federal management is only going to apply to public lands in Alaska, and the state rules are going to be different on state land. We have not changed the state rules yet. We will be doing that as soon as we get a decision from the Superior Court on the

severability of the rural eligibility rules from the remainder of the state's subsistence law. Basically I think what you're going to find, and I'll really shortcut this discussion on the federal plan, where there is a lot of state land around, rural residents who were protected to some degree by state law are going to lose. Where there is a lot of federal land around, non-rural residents are going to lose opportunities. And I think that's going to be pretty much the breakdown that we're going to see in terms of use of wildlife. And obviously if this ever got applied to fish, all of the rules would be the federal rules for subsistence because all of the waters would be considered. But in terms of wildlife it is, it's basically going to be if there's a lot of state land opportunities for rural Alaskans that have been the mandate of the legislature and the policy of the boards is going to be reduced. And when there's more federal lands other residents will have their opportunities reduced.

Rep. McLean: Mr. Chairman, this is Rep. McLean again. I'd like to ask a question. Okay. Is this Norm?

Cohen: Yes it is.

McLean: Norm, on the state procedures and regulations, the federal government and the State of Alaska's relationship - I have a question. There's a statement has been written down by the temporary regulations by the federal government, and it says that if the board finds it necessary to promulgate regulations to supercede regulations in order to ensure the opportunity for subsistence to take official wildlife on public lands. Can they then just supercede any state regulations with regards to the state regulations?

Cohen: Rep. McLean, it's sort of a - as I understand how this will work. If there is a federal priority - implementing the

federal priority on federal lands will mean the federal agencies will allocate the subsistence use. If they determine that non-subsistence uses that have been allocated by the State of Alaska are inconsistent with what they view the rural priority is - in other words, if the State has allocated a 1,000 moose to non-subsistence use and the federal government has allocated 1,000 moose to subsistence use in the same area for the same herd, and there's only a 1,000 to go around, what happens? The situation that we're trying to work out with the federal government is that the federal government would request the Board of Game to take action to amend the state rule, and if they didn't then the federal agency probably would close the area to non-subsistence use, or use basically by non-local, non-rural residents of the local area. What we're trying to do is coordinate board meetings of the federal board and the state boards so that these things get worked out before they actually go into final regulations on both sides.

Taylor:

Thank you. I have a real brief question and hopefully you can give me a brief answer on this. When I asked you would you file suit against the federal government to challenge them, or someone else here did, on the question of fish - and I think we resolved the fact that you concluded that there was no case or controversy at this time on fish that the state could bring. Now you've told us that the federal governments intended regulation of our game population is ludicrous when actually applied on the map and that this is a travesty. Surely you're now going to file suit on behalf of the State of Alaska and surely there is a case or controversy right now on the question of game management in Alaska. Is that correct? Or are we not filing suit on that one either? I want to know what your department is going to do. We've got about three weeks here before you have to make a decision.