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FEDERAL SUBSISTENCE BOARD

PUBLIC WORK SESSION MEETING

VOLUME I

GORDON WATSON CONFERENCE ROOM
U.S. FISH AND WILDLIFE SERVICE BUILDING

ANCHORAGE, ALASKA

November 9, 2010
10:00 o'clock a.m.

MEMBERS PRESENT:

- Tim Towarak, Chairman
- Kristin K'eit, Bureau of Indian Affairs
- LaVerne Smith, U.S. Fish and Wildlife Service
- Beth Pendleton, U.S. Forest Service
- Sue Masica, National Park Service
- Julia Dougan, Bureau of Land Management
- John Hilsinger, State of Alaska Representative
- Keith Goltz, Solicitor's Office
- Jim Ustasiewski, DOG, Office of General Counsel

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P R O C E E D I N G S

(Anchorage, Alaska - 11/9/2010)

(On record)

CHAIRMAN TOWARAK: Good morning. I'm going to call this meeting to order. My name is Tim Towarak. I was recently appointed as Chairman for the Federal Subsistence Board. Just by way of introduction, I'm from Unalakleet which is in the Norton Sound just southeast of Nome. I want to welcome everyone here. This is not a sign of the new Chair. It's a replacement. Couldn't find the regular Chair's -- the gavel, so -- we're going to begin with introductions and I'm going to ask the Board and those on the table starting from my right, your left, to introduce themselves and we'll work our way down to the left.

MR. HILSINGER: My name is John Hilsinger with the Alaska Department of Fish and Game.

MS. MASICA: Sue Masica with the National Park Service.

MS. SMITH: LaVerne Smith with the Fish and Wildlife.

MS. PENDLETON: Beth Pendleton with the Forest Service.

MR. GOLTZ: Keith Goltz, Solicitor's Office.

MR. PROBASCO: Good morning. I'm Pete Probasco, the Assistant Regional Director for the Office of Subsistence Management and I'll have numerous staff here that will be speaking and I'll ask them to introduce themselves at that time. I also have my Deputy, Polly Wheeler, here.

MS. DOUGAN: Good morning. I'm Julia Dougan with the Bureau of Land Management.

MS. K'EIT: I'm Kristin K'eit with Bureau of Indian Affairs.

MS. STICKWAN: Gloria Stickwan, Southcentral Regional Advisory County.

1 CHAIRMAN TOWARAK: Thank you. I'd like
2 to introduce Pat Pourchot with the Secretary of Interiors
3 Office. Welcome, Pat. And Tina Hile is our court
4 reporter, making sure everything's written on the record.

5
6 MR. PROBASCO: Mr. Chair, if I may, I
7 would like to ask John to introduce some new staff
8 members and current staff members.

9
10 MR. HILSINGER: Thank you, Mr. Chairman.
11 From the Department of Fish and Game, we have Special
12 Assistant for Federal Issues, Tina Cuning, and a new
13 staff that I would like to introduce, our new Subsistence
14 Liaison Team Leader, Ms. Jennifer Yuhas. She started on
15 November 1st and so we welcome her. And, Mr. Chairman,
16 also I might introduce Mike Mitchell from the Department
17 of Law.

18
19 Thank you.

20
21 CHAIRMAN TOWARAK: Thank you.

22
23 MR. PROBASCO: Thank you, Mr. Chair. And
24 we found the original gavel. Mr. Chair, I know we're
25 going to as -- because we have new Board members and our
26 new Chair, I'll do my best to help as well and at this
27 time, we usually let the Staff committee behind us
28 introduce themselves.

29
30 CHAIRMAN TOWARAK: Okay.

31
32 MR, CHEN: Good morning. My name is Glen
33 Chen, Staff committee member for the Bureau of Indian
34 Affairs.

35
36 MR. SHARP: My name's Dan Sharp. I'm
37 with Bureau of Land Management.

38
39 MR. LORD: Ken Lord. I'm with the
40 Solicitor's Office.

41
42 MR. KESSLER: Good morning. I'm Steve
43 Kessler with the Forest Service.

44
45 MR. BERG: Jerry Berg with the U.S. Fish
46 and Wildlife Service.

47
48 MS. SWANTON: I'm Nancy Swanton with the
49 National Park Service.

50

1 MR. USTASIEWSKI: I'm Jim Ustasiewski
2 with the Department of Agriculture. Office of the
3 General Counsel.

4
5 (Laughter)

6
7 CHAIRMAN TOWARAK: Thank you. The next
8 item on our agenda is information exchange. Pete, would
9 you -- oh, I'm sorry. We need to review the agenda and
10 I'm going to ask the Board if there's any other agenda
11 topics that need to be added on. If.....

12
13 MR. PROBASCO: Mr. Chair. I do have one.
14 It's going to be an update and it's under other business.
15 When we get to it, I just want to give the Board an
16 update on a process that the Office of Subsistence
17 Management working with Mr. Pat Pourchot and the
18 Solicitor's Office as it deals with tribal consultation
19 and it's just an FYI item, but it's a very important item
20 that we will be addressing in the very near future.

21
22 Mr. Chair.

23
24 CHAIRMAN TOWARAK: Thank you. Any other
25 -- Mr.....

26
27 MR. HILSINGER: Thank you, Mr. Chairman.
28 I just wanted to convey Commissioner Lloyd's apologies
29 for not being able to be here. He was already committee
30 at this time when this meeting was scheduled. Also as
31 I'm sure you've all heard, Commissioner Lloyd as well as
32 myself and Tina Cunning are retiring here fairly soon and
33 so there will be somebody else sitting in these chairs at
34 your January meeting and it remains at this time to be
35 seen who that might be, but we do expect to have people
36 in acting positions by the first of December, so some of
37 that should be clarified in the next few weeks.

38
39 Thank you.

40
41 CHAIRMAN TOWARAK: Thank you. Is there
42 a motion to approve the agenda as it is.

43
44 MS. PENDLETON: Motion that we approve
45 the agenda as stated.

46
47 MS. K'EIT: Second

48
49 CHAIRMAN TOWARAK: You heard the motion
50 and the second. Any discussion.

1 (No comments)
2
3 CHAIRMAN TOWARAK: If there isn't any
4 discussion, all those in favor of the motion say aye.
5
6 IN UNISON: Aye.
7
8 CHAIRMAN TOWARAK: Any opposed say nay.
9
10 (No opposing votes)
11
12 CHAIRMAN TOWARAK: Motion passes. The
13 agenda is approved. And Item No. 3 is an information
14 exchange. Pete.
15
16 MR. PROBASCO: Mr. Chair. This is an
17 opportunity for myself and the Board members to share
18 information. I just want to do a clarification for on
19 the record. As the Board members know that anytime the
20 Board deals with regulatory issues and making a decision
21 on a regulatory proposed change as Agenda Item 7 is, that
22 has to be conducted in a public meeting. If you look at
23 our news releases, it did announce it as such. However,
24 if you look at our agenda, it speaks to work session and
25 that's a typo on our part. It's should say work
26 session/public meeting. So just a clarification for the
27 record.
28
29 Mr. Chair.
30
31 CHAIRMAN TOWARAK: Thank you. We will
32 move forward. Just one item of our lunch break today.
33 We're going to take a break at noon until about 1:15 or
34 so especially considering the driving conditions out
35 there. I think we'll try to reconvene at 1:15 or as soon
36 as possible thereafter. So -- we forgot to introduce
37 those of you on line -- on the phone. Would you please
38 introduce yourselves.
39
40 MR. NICK: Alex Nick, Council Coordinator
41 for YK RAC.
42
43 MR. BUE: Fred Bue, Fish and Wildlife
44 Service Subsistence Management, Yukon, Fairbanks, and
45 Gerald Maschman. Thank you.
46
47 CHAIRMAN TOWARAK: Is that it?
48
49 (No comments)
50

1 CHAIRMAN TOWARAK: Thank you. We will
2 reconnect with those of you on line prior to our request
3 for reconsideration Item No. 9 on the agenda for public
4 testimony. Is there any additional information exchange
5 that the Board would like to make.

6
7 MS. PENDLETON: This is Beth Pendleton
8 with the Forest Service. I'd like to just introduce a
9 new person who's here with us, our new Wildlife Fish
10 Ecology, Watershed, and Subsistence Director replacing
11 Wini Kessler and that's Wayne Owen. Wayne, if you could
12 stand up please and -- so folks can see you. And Wayne
13 would be serving as my official alternate as well.

14
15 And then also just wanted to let folks
16 know that we do have a new Forest Supervisor on the
17 Chugach National Forest and that's Terry Marsron and
18 today is her first day here in our Region 10. And I also
19 wanted to let folks know that the Forest Service has
20 recently completed an internal review of our -- of the
21 subsistence program here in the region and that the key
22 focus of that was really to look at issues around funding
23 levels and helping to stabilize those at the historic
24 levels as well as looking at internal staffing needs. So
25 that report should be available shortly if folks are
26 interested.

27
28 We are also, as part of the
29 recommendations, looking at opportunities to expand our
30 partnerships with our sister agencies and in USDA,
31 particularly the NRCS, and looking at some opportunities
32 to leverage long-term funding for activities that will
33 help contribute to rural communities' sustainability. So
34 just want to let folks know of that.

35
36 And thank you.

37
38 CHAIRMAN TOWARAK: Thank you, Beth. Any
39 other Board members with updates.

40
41 MS. DOUGAN: Mr. Chair. I'd just like to
42 say I've greatly enjoyed being part of the Board these
43 last few months and wanted to let you know the new State
44 Director for the Bureau of Land Management will arrive
45 later this month. His name's Bud Cribley, so he will be
46 joining you for the January meeting.

47
48 CHAIRMAN TOWARAK: Any other.

49
50 (No comments)

1 CHAIRMAN TOWARAK: Go ahead.

2

3 MR. PROBASCO: Mr. Chair and Board
4 members, if you would bear with me, I would like to
5 recognize a Staff member who has played a key role in our
6 program particularly as it deals with some of our more
7 contentious issues like extraterritorial jurisdiction as
8 well and rural determinations and I'd just like to
9 recognize Larry Buklis. He's recently recognition of 10
10 years of service to the Government and U.S. Fish and
11 Wildlife Service.

12

13 So Larry Buklis, congratulations.

14

15 (Applause)

16

17 MR. PROBASCO: And we'll be hearing more
18 from Larry later on in the meeting, so -- thank you.

19

20 CHAIRMAN TOWARAK: Thank you. If there
21 aren't any other items of information on No. 3, we'll
22 move onto No. 4, public testimony opportunity for non-
23 agenda items. This would be opening the floor for any
24 non-agenda items except for Item No. 7 which is the
25 Forest Service request coming up. And I apologize for
26 making it feel a little awkward here. This is my first
27 meeting and I'm going to learn the ropes gradually, but
28 Pete is going to be directing me as we go along.

29

30 (No comments)

31

32 CHAIRMAN TOWARAK: It doesn't appear that
33 there's anyone that would like to address the Board on
34 any other issues other than Item No. 7. Polly. It's
35 Item No. 9 that we're going to be opening up the public
36 testimony later on in the day.

37

38 We will then move on to Item No. 5 which
39 is introduction and overview of Board functions process.
40 Pete.

41

42 MR. PROBASCO: Thanks, Mr. Chair. I
43 don't plan on spending a lot of time on this. It'll be
44 done both by myself and Ken Lord. I want to draw the
45 Board's attention to this document. This is a key
46 document for Board members as they deal with the various
47 issues that are before the Board and I want to draw their
48 attention to Page 48, meeting guidelines. And Ken will
49 get in a little bit later after I finish my brief points
50 I want to emphasize on the importance and tasks before

1 the Board members to establish an administrative record.

2

3

4 This is on Page 48. It's Federal
5 Subsistence Board meeting guidelines and I'm just going
6 to hit the high points for you Board members that are
7 finding this either your first meeting or your second
8 meeting. We follow -- our meeting guidelines follows
9 Robert's Rules of Order and between myself and legal
10 counsel, when we get into issues, we refer to Robert's
11 Rules to give us guidance.

12

13 We are going to have an analysis on a
14 regulatory proposal dealing with the Ninilchik RFR and
15 that process, we will review summary of written public
16 comments. We'll give an opportunity of public testimony
17 and in the past, we try to give the public the
18 opportunity to speak and we have only limited the
19 opportunity time for public to testify is when there's a
20 great number of public to testify and time is important
21 to administer properly. So we ask public to testify and
22 try to keep it short and to the point and the Chair is
23 responsible for monitoring that.

24

25 After public testimony, we hear from our
26 Regional Advisory Councils. At this meeting, we have one
27 Regional Council. That's our Southcentral and Gloria
28 Stickwan who's the secretary of that Council will be
29 speaking on behalf of that Council as it deals with the
30 Ninilchik RFR. Your InterAgency Staff Committee which
31 reviews the issues for Board members will also develop
32 their comments on the issues and we'll refer to them and
33 give them the opportunity. They do a lot of work behind
34 the scenes on the issues and we'll bring their results
35 forward.

36

37 And then we go to the Department of Fish
38 and Game who provides their comments and then we have a
39 Board discussion with the Council Chairs and Fish and
40 Game and at that time, it's prior to a motion being made,
41 that we use this opportunity to answer questions, to
42 clarify issues prior to a motion being made which gives
43 the opportunity for both the Councils and the State to
44 interact directly with the Board.

45

46 Once a Board member makes a motion, then
47 both the State and the Regional Advisory Councils can
48 only speak if they're recognized by the Chair. That's
49 after a motion is being made. And within your packet, we
50 have found through trial and error the best way to make
51 motions is in the positive and so the Chair will be

1 looking for a Board member -- usually it's the Agency
2 that the proposal being addressed is -- resides, in other
3 words, their land status, and we ask that the Agency
4 makes the motion in the positive, in other words, I move
5 to accept Proposal number so-and-so. So all motions are
6 made in the positive and then we work from there. And
7 that fact -- that one brief reminder is in your packet.

8
9 Our meeting formats for our Board falls
10 in three types. We have public meetings. We have work
11 sessions and executive sessions. Public meetings, at a
12 minimum, the Board has two a year. Sometimes depending on
13 the issues, we have more because the issue requires more.
14 Public meetings are the opportunity where the Board makes
15 their decisions as they pertain to regulatory matters and
16 only in public meetings can the Board take regulatory
17 action. The other two work sessions and executive
18 sessions, it cannot take action on regulatory proposals
19 and that's why I wanted to clarify today's agenda is
20 meant to be both a work session and then when we get to
21 the Ninilchik RFR, that's when it becomes a public
22 meeting.

23
24 And public meetings, like I said, we
25 schedule two in advance. We usually have one in January.
26 Sometimes that occurs in December. Then we have one in
27 either April or May and at the Board's discretion, we can
28 add others as well.

29
30 Now, work sessions are an opportunity for
31 the Board to gather information and for some of you, I
32 think the rule process that we just went through is a
33 good example. We had numerous work sessions to take the
34 information, to discuss it amongst the Board members and
35 Staff and the public and it's a great opportunity to use
36 that time to better understand issues. We can also use
37 it to address administrative problems and issues and we
38 can also use it to develop policies as how the Board
39 wants to work and function.

40
41 Unlike a public meeting, a quorum is not
42 necessary, but a quorum is recommended and work sessions
43 are open to the public.

44
45 Now, executive sessions is a meeting that
46 is conducted for the purpose of reviewing proprietary
47 data or private information, engage in attorney-client
48 communications, or making decisions on personnel matters
49 and we have strived to try to keep these to a minimum.
50 We have been critiqued that we do too many of them. So

1 we have to keep that in mind as we work and we elect to
2 go in executive sessions, to make sure if it's -- that we
3 meet the criteria that it's warranted and necessary.

4
5 An issue that you're going to be dealing
6 with at the request of the Forest Service later on is
7 what we call in-season management authority or the
8 ability for an in-season manager to take some of the
9 Board's authority to issue in-season management actions
10 and that falls under special actions which are two types.
11 There's the regular special action which is 60 days or
12 less or what we call a temporary special action which is
13 greater than 60 days. Now, an in-season manager, once
14 given that authority that's clearly articulated can act
15 on behalf of the Board's special actions of 60 days or
16 less.

17
18 If it exceeds 60 days, it falls under the
19 category of temporary special actions. Then that in-
20 season manager working with the Office of Subsistence
21 Management would schedule a meeting -- a timely meeting
22 because usually these are time sensitive -- where the
23 Board would act on it. Now, if we get a special action
24 request outside of an in-season manager, i.e., from the
25 public, one of our Regional Advisory Councils, and it
26 falls under 60 days, that special action can be acted on
27 through the Staff committee. If there's a unanimous
28 consent by the Staff committee on that issue, then it
29 does not need to have a special Federal Board meeting and
30 can be acted on and that's utilized so that we can act on
31 a proposal in a very timely manner, in other words, you
32 just have a number of days to react and a good example is
33 in-season action on the Yukon River.

34
35 And finally voting, decisions of the
36 Board on agenda items are majority votes. If you've
37 reviewed your Ninilchik information, you'll see that
38 we've had a couple votes that were tied three-three
39 resulting in the motion being defeated, but it's based on
40 the majority. Ken, you want to take it from here.

41
42 MR. LORD: Because we do have new Board
43 members, Pete and I thought it might be helpful to give
44 you guys a quick crash course in Federal administrative
45 law and before your eyes glaze over, I promise it'll be
46 about three minutes and I'll be done. And just a couple
47 of key points I want to make so that we're all on the
48 same page.

49
50 The Federal Subsistence Board is what we

1 call an administrative rule-making body and the key point
2 in that is that what it means is that you all are
3 developing an administrative record. Everything is
4 recorded and transcribed and that transcript along with
5 the OSM analysis and RAC transcript, the RAC
6 recommendation, the State comments, the public comments,
7 and any materials before the Board when it makes its
8 decision all become part of the administrative record.

9
10 That administrative record is important
11 because that's what a judge will look at when any
12 decisions of the Board are challenged. We cannot later
13 add materials to that administrative record. We can't
14 call witnesses. There's none of that in what we call an
15 administrative review proceeding. So for that reason,
16 it's imperative that your reasoning -- your decision-
17 making process be on that transcript, that the judge, who
18 may have very little background information in these
19 kinds of materials, understands why you did as a Board
20 what you did.

21
22 Typically what that means is that a Board
23 member when he or she makes a motion and gets a second
24 will then explain his or her reason for making that
25 motion and that may be as simple as saying for the
26 reasons as set forth by the Regional Advisory Council or,
27 you know, it doesn't have to be complicated or long. It
28 may be something more involved than pointing to the RAC's
29 recommendation, but as long as a judge can look at that
30 and understand why you did it, then that's key.

31
32 Now what will the judge be looking for.
33 You'll hear lots of words like substantial evidence and
34 arbitrary and capricious and things, but the bottom line
35 is that if there is information in that administrative
36 record such that a reasonable person could reach the
37 conclusion that you all reach, the judge will uphold what
38 you did. There will be what we call deference to your
39 expertise in making that decision by the judge. So as
40 long as you're -- and we know we're all rational,
41 reasonable people. As long as you continue being that
42 way, we should be in good shape.

43
44 Now I know that was a lot to absorb and
45 I -- maybe I was even under three minutes, but I'm always
46 here to answer questions if there's anything I can do.

47
48 CHAIRMAN TOWARAK: Any questions.

49
50 (No comments)

1 CHAIRMAN TOWARAK: Thank you very much.
2 Are there any other -- other information.

3
4 MR. PROBASCO: Mr. Chair, that's what
5 both Ken and I planned. We wanted to keep it short and
6 concise and we can move on.

7
8 CHAIRMAN TOWARAK: Thank you. Item No.
9 7 than is a Forest -- or I mean Item No. 6. I'm getting
10 ahead of myself here. I must be trying to get to the end
11 as fast as possible.

12
13 (Laughter)

14
15 CHAIRMAN TOWARAK: We're going to have a
16 subsistence review and direction by the Secretary's
17 Special Assistant, Pat Pourchot. Pat, you've got the
18 floor.

19
20 MR. POURCHOT: Thank you, Mr. Chair and
21 members of the Board, for the opportunity to give again
22 as others have done a very brief presentation. As you
23 all know, the Secretary of Interior launched a review of
24 the Federal Subsistence Program last -- almost a year ago
25 and that review culminated in a press release outlining
26 some directives from both the Secretary of Interior
27 Salazar as well as Secretary of Agriculture Vilsack at
28 the end of August of this year and that was followed by
29 a public report summarizing those recommendations and
30 directives. I believe it was put on the Federal
31 Subsistence Review Website in mid September.

32
33 It was my fondest hope as I say to bring
34 to you or to have delivered to the Board by now a signed
35 letter to Board members from the Secretary of Interior
36 following up on that press release and that public report
37 with the specific directives that were aimed for most --
38 you know, suitably for the Federal Subsistence Board.
39 There were a number of recommendations that dealt some
40 internally with the Department of Interior, sorts of
41 budgeting and personnel actions, but there were 10 or 11
42 actions directed that were really directed at the Board
43 for implementation. There's probably the classic long
44 story and the short story, but the short story is that
45 letter has not yet been signed by the Secretary and as
46 all of you know probably better than I, that's a long and
47 torturous process and I'm personally very frustrated to
48 not bring you the signed letter or have available that
49 signed letter today. It's day to day, week to week, and
50 it's the surnaming process and all that entails which is

1 a bit of a mystery to me, again probably more familiar to
2 you all, has just not been completed.

3

4 Mr. Chair, what I've brought with me
5 though are the 11 items that were in the public report
6 and most of which were referenced in a general way in the
7 press release to the Board and with your permission, I'd
8 just like to -- I've got 25 copies or so, enough for the
9 Board and staff and others. I'd like to just hand that
10 out if I might. And I would just call your -- and again
11 this -- I would hope that these would be accurately
12 reflected in the subsequent letter to the Board. I --
13 you know, it's hard to tell what may end up in a final
14 letter. Again the assumption -- the hope would be these
15 are the same items that have been discussed and by the
16 way, discussed throughout earlier this year with
17 individual Board members and I'm sure these are of no
18 secret to anybody at this point.

19

20 Mr. Chair, I would like to point out
21 though the first three items. One is probably the most
22 significant -- or the directive is the desire to expand
23 the current Board for the inclusion of two additional
24 members representing rural subsistence users. This does
25 require a regulatory change. It's something that I and
26 members of -- the leadership of OSM and the Solicitor's
27 Office have met on already. There is draft regulatory
28 language being worked up and discussed.

29

30 The assumption here would be that this a
31 Part A/Part B secretarial regulatory function and, you
32 know, I even hate to say this, but in the interest of
33 time, which may or may not prove to be true, I think the
34 desire would be for this to be carried forward as a
35 secretarial regulatory change. Obviously that language
36 was pretty simple and straightforward, pretty much
37 reflecting the language here, would be reviewed by the
38 Board, by the RACs or at least the RAC Chairs, and as I
39 think Pete is going to discuss later, a tribal
40 consultation process and then moving as quickly as we can
41 to a Federal registered notice and publication which
42 would probably involve a 30- or 60-day formal public
43 review and then, you know, a rule-making adoption or
44 modification at that time.

45

46 Clearly the sooner that would be
47 implemented, the better. It's hard to tell what the time
48 frame is, but it's certainly months and that's probably
49 if everything goes right. So that's something I would
50 certainly call to the Board's attention.

1 The second thing is again what is
2 probably a general sort of desire and that's to provide
3 additional deference to the RACs in the rule-making
4 process. As most of you know, there -- over the years,
5 there's been a fairly strict interpretation of when
6 deference and when the exemption or the caveats to the
7 deference applies. It's taken from one specific section
8 in Title VIII of ANILCA that speaks to this deference
9 given in the taking of wildlife resources and the taking
10 -- so-called takings has been the limitation on the
11 deference. There are a number of other things involved
12 in the subsistence program as you all know that aren't
13 strictly takings and the desire here was to expand the
14 deference to the RACs for recommendations on a wider
15 range of issues rather than just this strictly that a
16 taking regulation.

17
18 I think at the same time it was
19 appreciated by the secretaries that there is
20 interpretation in that and the Board will, you know, have
21 a -- kind of a say in what that means and properly so in
22 that it's the Board's, you know, kind of discretion to
23 further define what items this includes or would not
24 include. Obviously there are internal things that the
25 Board does that perhaps are not subject to that kind of
26 deference, but there may be other things -- fairly large
27 things, for example, rural/nonrural determinations that
28 strictly aren't takings but certainly are key to the
29 regulatory process affecting subsistence -- the
30 subsistence program.

31
32 So again there was very much I think a
33 recognition that the Board may have further decisions or
34 limitations that they might wish to imply in further
35 defining that directive.

36
37 And then the third thing, the review of
38 the 2008 memorandum of understanding with the State,
39 again to nobody's surprise, in the subsistence review,
40 that turned out to be one of several items that
41 consistently was raised as problematic. Different people
42 probably had different interpretations of which parts
43 were problematic, but I think again subject to what the
44 Board views as a procedure that would accommodate this
45 review and obviously on your agenda there's the annual
46 getting together with the State to review the MOU and
47 obviously there are opportunities to initiate that
48 discussion and there's probably a role for the Board to
49 decide amongst themselves what are the things that -- or
50 the procedure that they would wish to follow in

1 initiating these further discussions with the State on
2 the MOU. And again to -- it is general and it's subject
3 to further interpretation or procedural decisions by the
4 Federal Subsistence Board.

5
6 The other things, as you know and read
7 through, are longer-term projects. I mean there are
8 things that need some, you know, thoughtful attention to.
9 They are things that have been chronic complaints and
10 chronic problems by constituent groups, things dealing
11 like rural/nonrural determinations and the procedure for
12 that and obviously that's something that's going to be
13 keying off of the new census which I think should be out
14 in the spring. And the Board's probably going to want to
15 do some thinking about how to start in on that next round
16 using the new census figures for those determinations and
17 there's other things also that the secretaries have
18 called for a review of on traditional and customary uses,
19 things like that that, you know, are not snap judgments
20 or instantaneous things that do require some review and
21 some study.

22
23 So, Mr. Chair, I would leave it at that
24 unless there are questions and again the hope would be
25 that you all would be receiving a letter from the
26 Secretary in the very near future, probably containing
27 virtually the same list, but again subject to various
28 people's thoughts and edits probably back in D.C.
29 somewhere.

30
31 Thank you very much.

32
33 CHAIRMAN TOWARAK: Thank you, Pat. Are
34 there any questions of Mr. Pourchot on his review.

35
36 MS. K'EIT: Pat, considering the order of
37 these items -- I'm looking at No. 2 and No. 3, and also,
38 Mr. Chair, I'm wondering if there will be an opportunity
39 for discussion on the review of the memorandum with the
40 State of what exactly our process will be today or
41 tomorrow actually for that and considering the direction
42 to provide more deference to the RACs and also allow them
43 opportunity to provide input into that agreement. Will
44 we have any clarification today or tomorrow on the
45 process for that review?

46
47 CHAIRMAN TOWARAK: With myself being
48 brand new, I personally would like to have a discussion
49 with the rest of the Board in this particular issue and
50 where and when we could do it, you know, I'm open to any

1 suggestions, as it is -- appear to be going and I have no
2 idea how long No. 9 is going to take, but it looks like
3 we might have some time either later today or the first
4 thing tomorrow morning before our 1:30, our review with
5 the -- scheduled review with the State on the MOU. So I
6 -- if it's agreeable with the rest of the Board, I'd like
7 to leave an open slot for our discussion on where do we
8 want to go with the MOU in the future.

9

(Council nods affirmatively)

10

CHAIRMAN TOWARAK: Pete. Directive from

11
12 Pete.

13

14

(Laughter)

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meeting, that we identify and dedicate some time to

1 really flush out to Staff, to figure out how we're going
2 to accomplish this work, and set some priorities, and as
3 you've identified, some high priorities, but be able to
4 go through and identify a process for working through
5 this list of recommendations.

6

7 MR. PROBASCO: Mr. Chair and Ms.
8 Pendleton, I think that's a good segue. I was going to
9 bring that to the Board's attention that I think it would
10 be to our advantage because I think our January meeting
11 particularly we deal with tribal consultation at the
12 January meeting that we may be struggling for time. So
13 once we receive that letter, I envision sending an email
14 out to each Board member trying to find a date prior to
15 the January meeting to do exactly what you just stated.
16 You know, but I'm looking for Board's direction if that
17 would be acceptable.

18

19 MS. MASICA: Mr. Chair.

20

21 CHAIRMAN TOWARAK: Yes.

22

23 MS. MASICA: Pete, I would just put out
24 there I wonder if -- since we're together today and
25 tomorrow if we -- even without the letter in hand, we
26 know what's on the list. We ought to maybe start that
27 conversation. The calendar between now and the end of
28 the calendar year I suggest is going to be very difficult
29 to massage with everybody and I'd hate to see us lose
30 another couple months if we don't have to. You know, we
31 might need to hold off on finalizing it till we get the
32 actual letter from the Secretary, but we sort of know
33 from what was published what the Board's expected to do.
34 So my two cents' worth.

35

36 MR. PROBASCO: Mr. Chair.

37

38 CHAIRMAN TOWARAK: Go ahead.

39

40 MR. PROBASCO: Thank you, Mr. Chair. Ms.
41 Masica, I would agree with that to use our time, but as
42 you and I both know, we're not -- I hope that we can
43 complete this agenda and carve out at least a half a day.
44 I think that's reasonable to assume. And if we do find
45 ourselves in that, I would think your counsel is good.

46

47 CHAIRMAN TOWARAK: Go ahead.

48

49 MS. K'EIT: Thank you, Mr. Chair. Just
50 for the record and further consideration that, you know,

1 we did schedule this meeting to review the MOU before the
2 review process really got going and obviously before we
3 received these recommendations or directions. So I'm
4 just concerned that it might be premature to do a lot of
5 editing or other type work tomorrow in our meeting with
6 the State, you know, unless we decide to use this
7 material from Pat as some guidelines of that review
8 tomorrow. But it is -- it's still -- again it's unclear
9 to me what -- if there's more expected of the Board for
10 action tomorrow at the MOU review than just commenting
11 and suggestions for editing.

12

13 So thanks.

14

15 CHAIRMAN TOWARAK: Pete, you have
16 comments.

17

18 MR. PROBASCO: Thank you, Mr. Chair. I,
19 too, share those concerns. Our opportunity to meet with
20 the State is clearly outlined in the current MOU. I
21 think -- from my viewpoint, I think tomorrow we use that
22 opportunity to inform the State our direction from the
23 secretaries, maybe share with them some of the concerns,
24 have a dialogue with the State on how they perceive we
25 should proceed, how we might perceive we want to proceed.
26 I don't think it's an opportunity based on the direction
27 from the secretaries that we're going to have any
28 decision making tomorrow. I think it's going to result
29 in identifying the need to meet at a later date.

30

31 I think the Board -- that both Chairs for
32 the Board of Fish and Board of Game are not changing, but
33 we do know the Commissioner -- we'll have a new
34 Commissioner sometime down the road. So I think that's
35 where we're at.

36

37 MS. K'EIT: Okay.

38

39 CHAIRMAN TOWARAK: And in my view too
40 especially with the directive on more deference to the
41 RACs, I would like to see some recommendations from the
42 RACs on how they would perceive as -- that MOU to be
43 designed. Just a note from my standpoint.

44

45 MS. DOUGAN: Mr. Chair.

46

47 CHAIRMAN TOWARAK: Yes.

48

49 MS. DOUGAN: I share some of Kristin's
50 concerns and feel that the discussion with the State

1 tomorrow would be almost inappropriate if we did not have
2 the opportunity to discuss our approach to that meeting
3 before tomorrow. So if we can have that time as a Board
4 to talk about that, think a little about the direction and
5 what our intent of the meeting and so we understand that
6 and can clearly communicate that to the State, I think
7 that would be helpful to me.

8
9 CHAIRMAN TOWARAK: Okay. Let's go ahead
10 and discuss a time and place where we could get together
11 and if Mr. Pourchot is available and someone's going to
12 have to tell me the procedures of getting the Board to
13 meet and is it a public meeting and could you explain how
14 we go through that process.

15
16 MR. PROBASCO: Mr. Chair. If I may and
17 then, Keith, correct me if I'm -- you think I'm out of
18 bounds. I think we will have time in the morning -- we
19 have half a day tomorrow. We have this room tomorrow.
20 I think since it's a directive from the Secretary and
21 there may be issues of concern that it might be advisable
22 to have that as an executive meeting initially to discuss
23 the directive from the Board.

24
25 Mr. Goltz.

26
27 MR. GOLTZ: I think that's legally
28 permissible. I think we've been criticized for having
29 executive sessions. I think whether or not we make an
30 executive session is going to be at the call of the
31 Chair, but I think legally you could do it.

32
33 CHAIRMAN TOWARAK: Well, if that's the
34 case, then I -- would 9:00 o'clock tomorrow morning work
35 for the Board if -- and have we got a time and place --
36 or a place we could meet?

37
38 MR. PROBASCO: Here.

39
40 CHAIRMAN TOWARAK: Okay. We'll meet here
41 and if we could ask Mr. Pourchot to join us in that
42 executive session. Is there anyone else -- plus the.....

43
44 MR. GOLTZ: No. I think that's fine.

45
46 CHAIRMAN TOWARAK: Okay. Okay. We'll
47 plan on having an executive session tomorrow morning at
48 9:00 o'clock to review the directives addressed to the
49 subsistence board.

50 (No objections)

1 CHAIRMAN TOWARAK: No objections. Then
2 we will so move. Are there any other questions of Mr.
3 Pouchot before he leaves.

4
5 (No comments)

6
7 CHAIRMAN TOWARAK: I want to thank you,
8 Pat, for your time.

9
10 Item No. 7 is Forest Service request,
11 expanded delegation of authority for Tongass National
12 Forest District Rangers to issue emergency and temporary
13 special actions and I believe we're having Mr. Kessler to
14 guide us through this item.

15
16 MR. PROBASCO: Mr. Chair. Mr. Lord, just
17 whispered in our ear for the benefit of the public to
18 help understand the executive meeting tomorrow would be
19 for Board members only and requested Staff, so it would
20 not be open to the public. Just as a clarification.

21
22 MR. GOLTZ: And the purpose of that
23 meeting would be to discuss internal staff direction from
24 the Secretary of the Interior.

25
26 CHAIRMAN TOWARAK: Thank you. Mr.
27 Kessler.

28
29 MR. KESSLER: Thank you very much, Mr.
30 Chairman, and members of the Board. On October 7th,
31 2010, Forest Supervisor Forrest Cole for the Tongass
32 National Forest sent to you a letter requesting expanded
33 delegation of authority for our rangers on the Tongass
34 National Forest. So you should all have a copy of that
35 letter in your packet.

36
37 I'm going to discuss some of the
38 background, some of the need for this, and some of the
39 sideboards that would be associated with this and I also
40 would like to point out that similar letters of
41 delegation are in your packet already, shown as examples
42 here. I'm going to go over some of the material that's
43 in this letter and then at the end, if there are any
44 questions, I can try to respond to those and then the
45 Board can make a decision whether to move forward with
46 concurring with the request or whatever the Board so
47 chooses.

48
49 Subsistence regulations allow delegations
50 from the Board to Agency field managers. So to quote the

1 regulation, the Board may delegate to Agency field
2 officials the authority to set harvest and possession
3 limits, define harvest areas, specify methods or means of
4 harvest, specify permit requirements, and open or close
5 specific fish or wildlife harvest seasons within the
6 frameworks established by the Board, unquote. Since
7 inception of the Federal anadromous fisheries regulations
8 in the year 2000, in-season authority has been delegated
9 to Federal in-season managers for all areas of the State
10 for fish, including seven of the 10 district rangers on
11 the Tongass National Forest.

12
13 For wildlife, through piecemeal adoption
14 of various regulations, eight of the 10 district rangers
15 on the Tongass now have delegated authority to open or
16 close seasons and/or set harvest limits or quotas for
17 various species. So the need for this as expressed in
18 the letter is the ability to respond more quickly to
19 conservation concerns, and just as an example of
20 something that happened a couple years ago, there was an
21 immediate need for a goat harvest closure on the Tongass
22 mainland due to overharvest. The State in this situation
23 was able to immediately issue an emergency order to close
24 while our action was delayed about four or five days,
25 which could have been critical for that population.

26
27 With the delegated authority, we can take
28 much quicker action. Current delegations are also
29 inconsistent with our organizational and line authority
30 structure, so we have in the case of fish, seven of the
31 10 district rangers have delegated authority, and for
32 wildlife, it's just really scattered, but eight of our 10
33 district rangers have some sort of authority for
34 in-season actions.

35
36 The Forest Supervisor would like all
37 rangers to have delegated authority and be accountable
38 for the subsistence priority and conservation on their
39 area of the National Forest. So what is the request for
40 this delegated special action authority? For fish, it's
41 to expand delegated authority to all 10 district rangers
42 from the seven that we have now and then there would be
43 no other changes. For fish, only emergency action is
44 delegated and remember from what Pete said, the emergency
45 action or for special actions, less than 60 days in
46 length.

47
48 For wildlife, the request is to expand
49 delegation for all in-season actions for deer, moose, and
50 goats. Those are the principal species that we generally

1 have to issue special actions for. To provide -- for
2 wildlife, delegation to all 10 district rangers for the
3 land they manage and delegate authority for both
4 emergency and temporary special actions. We do have a
5 temporary special action authority delegated for deer in
6 Unit 4 and I believe a couple other units already. So
7 the temporary special actions are those that are over 60
8 days in length. And the reason that's needed for
9 wildlife is because often the seasons are greater than 60
10 days in length.

11
12 And finally the request is to transfer
13 delegation for wolf and that's to set quotas and to close
14 from the Forest Supervisor of the Tongass National Forest
15 to two Prince of Wales Island district rangers. Those
16 are the Thorne Bay and Craig Districts.

17
18 So there are some sideboards for these
19 letters of delegation. The first one would be
20 delegations do not increase harvest limits, seasons,
21 methods, or means that are established in regulations.
22 Prior to action, delegation requires consultation with
23 the Regional Advisory Council, the Alaska Department of
24 Fish and Game, and where appropriate the National Park
25 Service. And third, closures to all users would be
26 authorized. However, closures to only non-Federally-
27 qualified users would be withheld to the Federal
28 Subsistence Board.

29
30 Just as a little bit of background and
31 consistency with your previous action and Council
32 recommendations, at your last Board meeting -- and that
33 was I guess in May -- in Proposal WP10-22, the Southeast
34 Council proposed similar action. The Council's
35 recommendation to the Board was to adopt its proposal; so
36 adopt the proposal essentially like is in this request.
37 The Board chose to adopt with modification to remove
38 specified named managers from the regulations and in the
39 motion justification language, the Board member also
40 stated that the Board would entertain requests for
41 further delegations of in-season management authority
42 such as this.

43
44 Now, as far as Council action, at the
45 Southeast Council's meeting last month that was held in
46 Hoonah, the Council reviewed a draft of this letter
47 that's before you, requested a modification which has
48 been made, and voted unanimously to support this request
49 to the Federal Subsistence Board. The modification
50 specifically addressed consultation with the Regional

1 Advisory Council and its local members -- and that was to
2 add the local members on -- prior to the in-season
3 manager taking action.

4
5 So this action request is to expand
6 delegation via letters to the Forest Service District
7 Rangers consistent with previous delegations and the
8 sideboards included in this letter. Again examples of
9 these types of letters are included in your packet.
10 Thank you.

11
12 I guess I'm ready for any questions.

13
14 CHAIRMAN TOWARAK: Are there any
15 questions from the Board.

16
17 MS. DOUGAN: Mr. Chair, I do have a
18 question.

19
20 CHAIRMAN TOWARAK: Go ahead.

21
22 MS. DOUGAN: I'm sorry. Could you repeat
23 again what the Southeast RAC's provisions were that they
24 wanted to have added to that -- the consultation with the
25 -- was it the -- I didn't catch the part about local
26 members.

27
28 MR. KESSLER: Yeah.

29
30 MS. DOUGAN: Thank you.

31
32 MR. KESSLER: Through the Chair. Ms.
33 Dougan. When the Council reviewed this letter, they said
34 that it's okay that you have in here that you need to
35 consult with the Chair of the Council prior to taking
36 action, but we also want added in here that you should
37 consult with any local members. So, for instance, if the
38 action -- special action would be on Prince of Wales
39 Island, the members of the Council that reside on Prince
40 of Wales action[sic] would be conferred with prior to
41 this action occurring. And that's what we've always done
42 in the past. It just hasn't been sort of specified in
43 the letter before.

44
45 CHAIRMAN TOWARAK: Go ahead.

46
47 MR. PROBASCO: Thank you, Mr. Chair. I
48 think that the point of clarification is it's the Council
49 members not others outside of that.

50

1 MS. DOUGAN: Not other locals. Local
2 residing Council members.
3
4 MR. KESSLER: Right. Council members.
5
6 MS. DOUGAN: Thank you.
7
8 CHAIRMAN TOWARAK: Any other questions
9
10 (No comments)
11
12 CHAIRMAN TOWARAK: If not, is the Board
13 ready to act on this request.
14
15 MS. PENDLETON: Mr. Chairman, I would
16 move that we support the request of the Tongass National
17 Forest for additional and streamlined delegated authority
18 as described in the letter of October 7th, 2010, from
19 Forest Supervisor Cole. This action would be consistent
20 with the recommendation of the Southeast Subsistence
21 Regional Advisory Council. If there's a second on that
22 motion, I could give you a brief rationale for this
23 motion.
24
25 CHAIRMAN TOWARAK: Is there a second to
26 the motion.
27
28 MS. MASICA: I'll second it.
29
30 CHAIRMAN TOWARAK: Seconded.
31
32 MS. PENDLETON: My rationale, you know,
33 briefly the letter and Steve's presentation I think have
34 done a very good job in laying out the authority and the
35 rationale for this request and I feel comfortable with
36 this request because of our delegations to follow the
37 guidelines that are set out in our special action
38 regulations, also the requirement for consultation with
39 the Regional Advisory Council Chair and any local members
40 and a consultation with the Alaska Department of Fish and
41 Game. Also requires that we keep an administrative
42 record, requires a public hearing for any action that
43 would extend over 60 days, and also it places the
44 authority closer to the ground, to those line officers
45 with the most knowledge for a given area and who are also
46 accountable to the local users.
47
48 In addition, if there's any discomfort
49 with the local action, members of the public can always
50 come to the Board and ask for our oversight and if the

1 delegated official is uncomfortable making a decision
2 because of local issues, that official can always elevate
3 the special action decision to the Board. Any action
4 taken is in place no longer than to the end of the
5 regulatory cycle and then finally in the long run, I
6 expect that this action should better ensure the
7 conservation of fish and wildlife and the continuation of
8 subsistence uses for rural residents that reside in the
9 Tongass National Forest.

10

Thank you.

12

13 CHAIRMAN TOWARAK: Thank you very much.
14 Any other comments by Board members, any contrary
15 recommendations or positions.

16

17 (No comments)

18

19 CHAIRMAN TOWARAK: If not, is the Board
20 ready to vote on the motion.

21

22 (Council nods affirmatively)

23

24 CHAIRMAN TOWARAK: All those in favor of
25 the motion, say aye.

26

27 MR. PROBASCO: Roll call vote.

28

29 CHAIRMAN TOWARAK: Oh, I'm sorry. We're
30 going to have a roll call.

31

32 MR. PROBASCO: Thank you, Mr. Chair.
33 Roll call vote. And just to remind Board members, we
34 randomly draw who goes in order and so the first person
35 to vote on final action on Agenda Item 7, Ms. Dougan.

36

37 MS. DOUGAN: Yes.

38

39 MR. PROBASCO: Ms. K'eit.

40

41 MS. K'EIT: Yes.

42

43 MR. PROBASCO: Mr. Towarak.

44

45 CHAIRMAN TOWARAK: Yes.

46

47 MR. PROBASCO: Ms. Pendleton.

48

49 MS. PENDLETON: Yes.

50

1 MR. PROBASCO: Ms. Masica.
2
3 MS. MASICA: Yes.
4
5 MR. PROBASCO: And Ms. Smith.
6
7 MS. SMITH: Yes.
8
9 MR. PROBASCO: Motion carries, Mr. Chair,
10 six/zero.
11
12 CHAIRMAN TOWARAK: Thank you. The motion
13 passes unanimously. We've been in session for about an
14 hour and we have I think two items on the next agenda
15 that's going to probably take a considerable amount of
16 time. I'd like to ask for about a 15-minute recess.
17
18 MR. PROBASCO: Okay.
19
20 CHAIRMAN TOWARAK: Okay. We'll take a
21 15-minute recess then.
22
23 (Off record)
24
25 (On record)
26
27 CHAIRMAN TOWARAK: Can we call this
28 meeting back to session here.
29
30 (Pause)
31
32 CHAIRMAN TOWARAK: I will call our
33 meeting back to order. We're on Item 8 on our agenda,
34 customary trade enforcement briefing and Stan
35 Pruszenski's going to lead us through that discussion.
36 Stan.
37
38 MR. PRUSZENSKI: Good morning, Mr. Chair.
39 Very good on the name. I appreciate that. We haven't
40 met before and now you did an awesome job. My name is
41 Stan Pruszenski. I'm the Special Agent in charge for the
42 U.S. Fish and Wildlife Service here in Anchorage, Alaska.
43
44
45 The briefing that I'm going to give you
46 will be fairly brief, not because we haven't been busy
47 looking at the issue, but because of some of the
48 information that we have is still being actively looked
49 at by ourselves and the U.S. Attorney's Office, so I will
50 not be able to go into a lot of the specifics and details

1 of what we did. But I would like to talk a little bit
2 about what we did and why we did it and what we think
3 potentially the next steps might be.

4
5 Most of you probably have heard that the
6 Fish and Wildlife Service was looking into potential
7 abuses of customary trade of subsistence harvested fish
8 as a result of some activities that we did in mid
9 October. Mid October, what we did was we concluded a
10 covert portion of an investigation and switched from
11 covert to overt. We conducted quite a few interviews.
12 We served some search warrants and made people aware of
13 what we had been doing over the last couple years.

14
15 To step back and say what we did, we
16 looked for again potential abuses of customary trade and
17 in that was exchange of subsistence taken -- subsistence
18 harvested fish for cash. We attempted to look at
19 primarily the Yukon River, but the -- our activities led
20 us to the Copper River as well. We didn't try to
21 redefine significant commercial enterprise. Some of the
22 Regional Advisory Councils are attempting to do that on
23 their own. We've had some previous investigations
24 decades ago that ran into some issues with significant
25 commercial enterprise, so we were not -- we didn't feel
26 that we wanted to go into that side of the issue. And we
27 didn't try to quantify any potential abuses or how many
28 fish may be illegally harvested or illegally sold. We
29 just don't have the -- at this time the means to quantify
30 something like that.

31
32 Just in summary -- and many of you know
33 the rules, the regs, the laws much better than I, but to
34 kind of put sideboards on what I'm talking about today is
35 customary trade in this instance subsistence harvested
36 fish and primarily in the form of salmon strips. What
37 the Federal law allows is customary trade which is again
38 exchange fish for money -- sales from user to user. That
39 goes on as we know in rural Alaska quite frequently. The
40 other side of that is sales from users to others and when
41 that occurs, it -- if we look at the regulations and the
42 laws, it becomes complicated pretty quickly. Again sales
43 from users to others, it can constitute a significant
44 commercial enterprise, can be sold to businesses, and the
45 user who purchases it can only use it for personal
46 consumption, so again no resale, so you can't sell it to
47 a middleman. So subsistence user to others would be
48 presumably to the end user.

49
50 And again a couple of areas have

1 attempted to limit -- self-limit themselves or attempt to
2 quantify potentially what a significant commercial
3 enterprise. That would be Bristol Bay region and the
4 Copper River region.

5
6 What we did was we set up a situation in
7 which we were out of state and we solicited fish from
8 subsistence users, again primarily on the Yukon, but our
9 inquiry bled over into the Copper River. Set up a
10 situation when we were buying fish from out of state to
11 a fish business, to someone who would resell it. Had the
12 operation ongoing for a number of years.

13
14 Why we did this was we, through OSM,
15 through fisheries monitoring, observed that the -- the
16 fish returns of course as we all know in 2007, '08, 2009
17 had been significantly reduced, so much in fact that they
18 had to eliminate commercial harvest of chinook, eliminate
19 the sport harvest of chinook, and restrict the
20 subsistence opportunity for users on the Yukon. There's
21 also a perceived increase in the availability in some
22 areas of strips. We had went to AFN last couple years
23 and in effect to actually get into the building, you had
24 to go through this maze of fish boxes in the -- at the
25 front door with people selling strips that they
26 advertised as subsistence harvested fish in the form of
27 strips from the Yukon River, from the Copper River, from
28 the Kenai River, from many other rivers in the State that
29 provide a subsistence opportunity to harvest fish.

30
31 We had heard from rural users in some of
32 the RAC meetings and in some informal discussions with me
33 and my staff that the feeling on the river was that there
34 may be a level of customary trade that people are
35 starting to feel uncomfortable with. And also last year
36 and I believe the year before, some of the communiques
37 that came out of the Alaska Federation of Natives
38 meetings and conferences that wanted enforcement to be
39 focused on illegal methods and means and commercial
40 activity dealing with fish. So we felt that there was
41 support from that arena and again as well as quite a few
42 well-known users on the river.

43
44 What did we find? What we found was that
45 a significant -- and I shouldn't use that term because
46 that's -- a large portion of the fish that are being sold
47 from the Yukon River are harvested from State waters.
48 Anecdotally we have come up with a figure of about 80
49 percent of the fish are harvested in State waters. State
50 regulations don't provide for the sale of subsistence

1 harvested fish. Again we look primarily at salmon
2 strips, not with the idea that whole fish sales don't
3 occur. They probably do and again probably user to user
4 is more common or what we did find is actually on the
5 Copper, that was fairly common that whole fish may be
6 sold, but again I think that's a reflection of
7 transportation issues that the fish on the Copper can be
8 transported whole fairly easily.

9
10 So again not that we were -- didn't
11 expect to see whole fish being sold in customary trade.
12 We just tried to focus on the strip side of it. What we
13 did find was that there's -- a lot of people engage in
14 this activity. From a few pounds, you know, a Baggie of
15 a couple of pounds to relatives in Anchorage or Fairbanks
16 or other areas of urban Alaska to a few people selling
17 significant quantities of fish for a lot of money with
18 the idea that strips in this past year was going for \$35
19 a pound. So many hundreds of pounds of fish for again
20 many thousands of dollars of cash.

21
22 I guess the other issue too -- and this
23 is a side issue from the Federal side of it is that when
24 we did buy these strips, we did not buy from anyone that
25 we knew was following the State health regs to sell a
26 processed product. So what's next for the Fish and
27 Wildlife Service in the investigation? Again on
28 October 14th, we transitioned from the inquiry from
29 covert to overt. We're going to continue doing
30 interviews with users, with sellers, with buyers, trying
31 to track the money, trying to track the fish, see where
32 it was going. Again we're not trying to quantify either
33 the level of activity -- level of illegal activity or the
34 numbers of fish that are being put into commerce this
35 way. Again this is just a snapshot in time and the time
36 being 2008, 2009, and 2010.

37
38 So the Fish and Wildlife Service -- we're
39 coordinating with the United States Attorney's Office.
40 We'll again be working closely with them. Any other
41 information that the -- you know, that -- down the road
42 that comes forth will be coming from them most likely.
43 I'll be able to answer a few questions for you folks, but
44 I'm not at liberty to go into a whole of detail about who
45 and how much and that sort of thing.

46
47 I think the other thing that -- and this
48 is not an editorial, but I think it's a fact is that the
49 regulations are very complex and it was clear to us when
50 we were dealing with people on the river, you know, the

1 idea of State waters and Federal waters, State laws,
2 Federal laws, you know, the idea was that everybody's
3 doing it and it's that where your customary and
4 traditional fishing location was back when the Refuges or
5 Parks were created, you know, it was luck of the -- you
6 know, luck of the draw for you whether you were in State
7 waters or Federal waters and if you wanted to continue
8 this -- you know, your subsistence activity in this
9 manner. So we found that a lot of people continue to do
10 their activity either in spite of the regulations or the
11 laws or in some instances, you know, within the laws and
12 regulations if they were on Federal lands and waters.

13

14 And again I think the -- and this is not
15 news to anybody. I mean there's a lot of literature out
16 there about the level and extent of strip sales. If the
17 Federal Subsistence Board -- if we want that to continue,
18 we're going to have to figure out a way to make that
19 work, to legalize that both in the Federal regime and the
20 State regime. If the Board and the Fish and Wildlife
21 Service and the Park Service and the BLM, you know, want
22 the enforcement to -- you know, to take a strict view of
23 the regulations and be more proactive in this arena, we
24 can certainly do that, but, you know, I don't know if
25 that's the right answer for us to continue catching
26 people doing something that they're doing and have been
27 doing for a while.

28

29 Again the reason why we looked at it was
30 fish returns were going down and a perceived or real
31 increase in the availability of strips. So -- and then
32 with the people on the river saying that we haven't got
33 enough of our fish and the fish seemed to be going to
34 town, you know, in fish boxes for sale at large events.
35 So we thought it was time. We had been part of the
36 customary trade task force in 2000, 2001, 2002, that
37 tried to address this. When fish returns were good,
38 there was no restrictions on commercial and no
39 restrictions on sport harvest and certainly no
40 restrictions on subsistence harvest. The Fish and
41 Wildlife Service Office of Law Enforcement, we did make
42 this priority, but we felt that the time was right for us
43 to -- at this time to take a look at it.

44

45 Thank you, Mr. Chair.

46

47 CHAIRMAN TOWARAK: Thank you. Are there
48 are questions of the Board members.

49

50 (No comments)

1 CHAIRMAN TOWARAK: I have a couple of
2 questions and I was approached -- well, as you know, the
3 AFN convention is broadcast on a statewide basis, so
4 there was a lot of coverage when the undersecretary for
5 the BIA addressed the convention and there was some
6 fairly serious allegations made about the method used in
7 the overt operation that you call and you stated that all
8 of the violations appear to have taken place in the State
9 waters?

10

11 MR. PRUSZENSKI: No. I think what I said
12 was that we've noticed that fishers take fish from both
13 State waters and Federal waters legally, but when they
14 use those fish in customary trade, the only legal
15 customary trade that we've come across or we know of is
16 from Federal waters. And when we were tracking some of
17 these fish, we had noticed that upwards of 80 percent of
18 the fish were actually caught from State waters.

19

20 CHAIRMAN TOWARAK: Okay. And you had
21 stated earlier that you didn't find any violations for
22 those that followed State regulations?

23

24 MR. PRUSZENSKI: No. I think what I --
25 if I did, I apologize, Mr. Chair. What I think I said
26 was I was talking about the State of Alaska's health
27 regulations that they need to be -- the processing of
28 fish has to go through stringent health standards and we
29 don't believe any of the strips that we purchased were
30 from individuals who followed those rules.

31

32 CHAIRMAN TOWARAK: Including commercial
33 operators?

34

35 MR. PRUSZENSKI: We did not buy any fish
36 from any commercial operators that we knew of.

37

38 CHAIRMAN TOWARAK: Any questions from
39 anyone else.

40

41 (No comments)

42

43 CHAIRMAN TOWARAK: The reason I bring the
44 undersecretary for the BIA process up was it appeared to
45 be a -- it was a public -- oh, I don't want to say it was
46 an embarrassment to the undersecretary, but he didn't
47 have any answers for the allegations and I'm wondering if
48 there's going to be any attempt by enforcement to give
49 this information out that you gave us to justify the work
50 that you did.

1 MR. PRUSZENSKI: With respect to the
2 specific allegations that were made at AFN?

3
4 CHAIRMAN TOWARAK: Not specific, but I
5 think the generalizations that you made on this report,
6 is that possible to make that information public?

7
8 MR. PRUSZENSKI: Again the information
9 that I'm giving, I'm trying to be as generic as I can
10 because we do have an ongoing investigation into this and
11 we haven't charged anybody and anybody that I may, you
12 know, talk about here, you know, hasn't -- again hasn't
13 been charged with any violations of any crime. Again
14 we're still in the investigation stage, but I'm -- the
15 investigation was actually conducted out of Fairbanks.
16 Our folks have visited with people in the Interior and
17 briefed them on the activity. I'm briefing you. You're
18 more than able to pass on the information that I'm giving
19 to you and I think at the end -- and as we know, the
20 Federal criminal system, the end is often not always in
21 sight. It'll take a while for us to get through this.
22 But at the proper time, both the U.S. Attorney's Office
23 and our office with and through you will provide this
24 information to the public.

25
26 I think what's good for us and for the
27 process is that, you know, there are groups primarily
28 again on the Yukon River that may see this as an issue
29 and as a problem and are willing to -- you know, to put
30 forth a process on the table to address it. And we'd
31 certainly be more than willing to participate in that as
32 we can.

33
34 CHAIRMAN TOWARAK: And I appreciate that.
35 I think, you know, it's a problem that I think has
36 solutions and I think that should be our goal is to work
37 on solutions and not problems. And I respect the process
38 that you have to go through. I was a military policeman
39 in Vietnam and I understand, you know, your restrictions
40 on what information you can give out and I appreciate
41 that.

42
43 Go ahead.

44
45 MS. K'EIT: Thank you, Mr. Chair. Mr.
46 Pruszenski, I have a few questions and I realize that you
47 may not be able to answer all of them or answer
48 specifically. My first question is regarding a timeline
49 for the next steps. Let's see. My notes say that the
50 next steps are tracking the money, tracking the fish but

1 not trying to quantify certain aspects at this point. So
2 what is the process that will take place with the U.S.
3 Attorney's Office such as pressing charges, going to
4 court, presenting a case, and so on?

5
6 MR. PRUSZENSKI: Again what I think I've
7 tried to indicate is that for the most part, we have
8 identified individuals that we're going to follow up on.
9 Initial indications are that what they were doing was
10 illegal. We'll need to follow that up. We'll need to
11 track some of the fish, make sure that they were Federal
12 fish/State fish, track the money to us, track the money
13 to others. The charging is done in several different
14 manners. For some it can be as simple as a notice of
15 violation, a citation. Others, it would be the form of
16 an information that is filed by the United States
17 Attorney's Office and then for potentially the more
18 serious offenders, it would be an indictment by a grand
19 jury, and again all that takes time. I'm at the mercy of
20 the United States Attorney's calendar and the court's
21 calendar as to when all that might happen.

22
23 MS. K'EIT: So do you have any rough
24 estimate, you know, like this year, 10 years, this
25 lifetime, you know?

26
27 MR. PRUSZENSKI: I'm hoping less than our
28 lifetimes.

29
30 MS. K'EIT: Obviously.

31
32 (Laughter)

33
34 MR. PRUSZENSKI: I'm hoping less than 10
35 years, but I would say probably some of the initial
36 activities could be as early as, you know, next year and
37 then -- I mean that is my time frame is -- the sooner the
38 better. The sooner we can have information brought out
39 -- all the information brought out to the public, the
40 better. Oftentimes wildlife investigations that we've
41 handled through the United States Attorney's Office,
42 although we have great support, again we're at their
43 mercy and they have priorities as well and if we have an
44 operation, it makes a local splash. You know, everybody
45 is aware of it, understands the potential need for a
46 change, and then -- you know, as this drags on, you know,
47 that sense of needing change kind of goes away and we
48 just go back to the status quo and again I'm thinking --
49 I'm hoping that my process may be independent of a
50 process that this Board has direct control over, so we

1 can do that simultaneously. You know, if we -- if you
2 think that there's need for change that you have
3 mechanisms at the -- that you can start that irrespective
4 of my time frame and when I am able to conclude the
5 inquiry.

6
7 MS. K'EIT: Okay. Mr. Chair, my other
8 questions -- thank you.

9
10 CHAIRMAN TOWARAK: Go ahead.

11
12 MS. K'EIT: I am curious how do you tell
13 -- when you receive or when your agents are buying fish,
14 how do you tell this fish is from State waters, this fish
15 is from Federal waters?

16
17 MR. PRUSZENSKI: A lot of it is as simple
18 as asking the person.

19
20 MS. K'EIT: Asking them what?

21
22 MR. PRUSZENSKI: Where they caught the
23 fish.

24
25 MS. K'EIT: Okay. And then our Chair
26 brought up the information presented to the Assistant
27 Secretary of Indian Affairs at AFN by former Senator
28 Lincoln and her description of what the person
29 experienced when their -- when agents went to her home
30 and took numerous things: fish, coolers, jars, feather,
31 tapes, and so on. I -- it wasn't clear to me in that
32 information and anything I've read since if all of her
33 fish or that family's fish was taken, if there's any
34 quantity that could be identified as, you know, needed
35 for the year. I understand the focus of your
36 investigation, but I also understand that -- and I
37 believe that a good portion of that fish at her home was
38 for her use, her family's use. How do you distinguish --
39 how do you decide that you take it all or you leave some
40 or what?

41
42 MR. PRUSZENSKI: Mr. Chair. I'll respond
43 to that in the most generic way that I can and I won't
44 speak to any specifics that was either alluded to by the
45 Senator or others. During the course of many of the
46 contacts, we -- on the 14th of October, we did find quite
47 a bit of fish in people's homes, in people's freezers,
48 and whatnot, and we did make a very concerted effort to
49 distinguish between what was available for customary
50 trade and what was to be used for personal consumption.

1 I'll leave it there.
2
3 MS. K'EIT: Thank you. Thank you, Mr.
4 Chair.
5
6 CHAIRMAN TOWARAK: Thank you. Any other
7 questions.
8
9 (No comments)
10
11 CHAIRMAN TOWARAK: Go ahead.
12
13 MR. PROBASCO: Mr. Chair. Just to also
14 bring to your attention, in your packet are two letters,
15 one from the Western Interior Regional Advisory Council
16 and then one from a former Council member, Mr. Gerald
17 Nicholia, both requesting future action by the Councils
18 and subsequently the Board and we'll discuss this when we
19 get to other issues. But it's focusing on the need to
20 get the three Councils on the Yukon together to start
21 looking at solutions, one of which addresses customary
22 trade. So I just wanted to draw your attention to that
23 and then when we get to other issues, there's a course of
24 action the Board needs to address and then how we would
25 proceed through the winter.
26
27 Mr. Chair.
28
29 CHAIRMAN TOWARAK: Thank you. And thank
30 you for your updating us on this issue and we will have
31 further discussions regarding, you know, the notion of
32 working on direction from this Board so that your
33 enforcement division will have maybe more clear
34 guidelines as to how, you know, the future is handled.
35
36 MR. PRUSZENSKI: Thank you, Mr. Chair.
37
38 CHAIRMAN TOWARAK: Thank you. That
39 concludes discussion on Item 8. What I'd like to do for
40 now if it's okay with the rest of the Board, we had
41 public testimony opportunity for non-agenda items earlier
42 this morning and we didn't have anyone with any issues,
43 but we did not check our board -- our box -- our inbox
44 and we have a request from Floyd M. Kookesh from Juneau
45 wanting to address the Board on a non-agenda Ninilchik
46 proposal and I'd like to give him the floor if there's no
47 objections from the Board to address us on his issue.
48 Mr. Kookesh.
49
50 MR. KOOKESH: Good morning. Mr.

1 Chairman, I don't know if I can do this in 10 minutes
2 because I know you -- hopefully you're not sticklers for
3 time. One of the positions I have is I felt that the
4 issue was that important, then we really take the time to
5 listen. And so with that said, as I was looking around,
6 I did.....

7

8 CHAIRMAN TOWARAK: We'll go on Indian
9 time.

10

11 MR. KOOKESH: Oh, we'll go on Indian
12 time? Okay. Okay. For the record, my name is Floyd
13 Kookesh. I work for Central Council, Tlingit Haida
14 Indian Tribes of Alaska, as their Subsistence
15 Coordinator, and Tlingit Haida Central Council, we
16 represent over 27,000 Tlingit Haida Indians worldwide.
17 And one of my reasons for coming here to speak to you is
18 I recognize in all my years of being a member of the
19 Southeast Regional Advisory Council that there's a lot of
20 people out there that subsist that don't come up and
21 speak to you. I'm sure Mr. Probasco has never met them
22 -- a lot of them that I know when it comes to the issues
23 of subsistence.

24

25 So I have to be the voice for them and I
26 also have to be the voice for my children and my
27 grandchildren and also for those that can't afford to
28 come to speak. Although my discussion was limited to
29 non-agenda items, I do have to say that since I've heard
30 the discussion of the gentleman just before me, I would
31 like to make a few comments in their defense, you know,
32 for the Native community because, you know, to us
33 subsistence, you know, it's our traditional way of life.
34 It's what we do no matter what happens. In my opinion
35 and I'm sure in a lot of other's in the Native community,
36 this is what we're going to continue to do. No matter
37 what law enforcement does to us, it's not going to deter
38 us. It's just going to criminalize us. And by
39 regulation, we shouldn't be killing communities.

40

41 The communities that were targeted, it's
42 unfortunate they did this. They're probably poor,
43 depressed communities and we know that for a fact that
44 when we talk about village survival like they did at
45 Alaska Federation of Natives, that was the issue. This
46 idea that we're out there hunting them down, it was bad
47 enough when the State of Alaska was doing this. That was
48 one thing, but now we have the Feds doing it. Next thing
49 we'll have Federal Staff saying that they don't think
50 subsistence is broken and then where do we go from there.

1
2 But I have to say that -- in their
3 defense that we have to allow for this customary trade
4 and when you start doing this, I believe that it is
5 wrong, that when I subsist I know that the seine I use --
6 you're aware of my brother Albert's issue with having
7 more than 15. I know for a fact that when we make our
8 seine, we make our sets, our seines don't know about the
9 regulation that it could only take 15 per person. And we
10 can't help the way we do our subsistence, but a lot of
11 what we do is not wasted. That's the best part. If
12 you're going to target anything, you should be targeting
13 wanton waste. Fish and Wildlife Service should be
14 focusing on more important issues instead of petty crime.
15 You know, that's pretty petty especially when you're
16 talking about depressed communities.

17
18 That's what I'd to talk about on this
19 issue, this customary trade issue. When I first came to
20 town this morning, I had a short presentation. A lot of
21 change since I came here. I came here on short notice,
22 but I am here to represent the views of Central Council.
23 You do have two seats -- two rural seats that are being
24 considered and at a presentation I did in Saxman, my
25 recommendation was to be very careful that when you make
26 -- when you put yourselves out there making
27 recommendations for two rural seats, make sure that
28 they're Native seats because that's the voice that's
29 missing here.

30
31 It's good to have -- you know, we're
32 getting two rural seats, but we're to be putting our
33 Natives in there, someone who -- no disrespect -- doesn't
34 have a clue as to what we're really dealing with here.
35 We're talking about a people's way of life. We're
36 talking about it would be like taking an Oriental
37 person's food and prohibiting them from eating it. So
38 you know we have to draw the line somewhere and when I
39 think about it -- the more I think about it, that's what
40 it amounts to. We're taking a lifestyle that we've lived
41 and a lifestyle I want to teach my grandson to live and
42 we take it and twisted it and just throwing it all over
43 the place and creating regulations and criminalizing it,
44 which is wrong.

45
46 So with that said, while I was sitting
47 back there waiting and listening to the gentleman talk,
48 there's a sign right over here that says I can and maybe
49 a lot of people should read it and take from it because
50 when you read the sign, it says empower the poor and

1 these are good points. Maybe it's -- it may be a small
2 sign, but it does mean something and it says care for the
3 elderly, feed the hungry, educate the children. Maybe
4 that's what Fish and Wildlife Service should be doing is
5 educating us. Maybe there's some things -- some good can
6 come out this wrong action. And it says enrich countless
7 lives and preserve freedom. It's right there. Right
8 there just on the side wall. People should take the time
9 to read it. There's some very good information and I
10 think it's very relevant to what we're discussing.

11
12 Like I said, you know, I've been on the
13 RAC for 11 years. I'm going on my fourth term and I've
14 proudly served. I -- we all have our lumps and bumps.
15 We tend to make mistakes. Like you were saying this
16 morning, you need to learn the ropes and I understand
17 that. Yeah, you do need to learn the ropes before you
18 start swinging. There's no doubt about that. You know,
19 because we are going to stumble and there's nothing wrong
20 with that.

21
22 But I did want to make a few more
23 comments. I'll keep it down to two minutes.

24
25 CHAIRMAN TOWARAK: You can take time.

26
27 MR. KOOKESH: Yeah. I was lying.

28
29 (Laughter)

30
31 MR. KOOKESH: I lied. From the Central
32 Council, what we'd like to see presented -- and I'm sure
33 everybody here feels the same way -- is we'd like to see
34 a resolution to the issues that are before us. When I
35 put my report into the president of Central Council, it
36 was three pages of bullets on issues that are unresolved.
37 When I did my presentation at Central -- at Grand Camp,
38 I told them I have good news. The good news is
39 subsistence is broken. The bad news is subsistence is
40 broke. And you and I both know in the Native community,
41 we don't have these wonderful war chests, you know, like
42 other non-Native organizations where we can just
43 literally keep on coming till we tear your soul out of
44 your heart. But what I'm talking about here is in
45 Southeast, a lot of land is managed by the United States
46 Department of Agriculture. We don't have -- we have very
47 little Interior. And what's being discussed out there,
48 I call it a rumble in the forest, is the need for more
49 community-based management which we need to start looking
50 at.

1 You can't manage -- you know, like they
2 would say in the czars in Russia, that's how we feel
3 about the Federal Subsistence Board. You're way up here;
4 we're way down there. We need to really look at the
5 subsistence and the management approach we're taking to
6 it. We want to secede from the Federal Subsistence Board
7 is basically the language that I'm hearing coming out of
8 Grand Camp and all of -- and the Native community.
9 They're not satisfied with this process. It's a
10 Department of Interior process in our opinion.

11
12 I do note that when I had the last
13 meeting that Tlingit do read and we have been watching
14 the news and for a lot of us on this Federal review,
15 we've been noticing that with the news we've been
16 receiving that it's not new news. We call it olds not
17 news anymore. So which brings to the point of that we do
18 have a lot of issues out there. We're very -- we're very
19 happy that you're sitting in your position. I sense --
20 and just from listening to you, you're a very -- you have
21 a very -- you're wise, you know, there's a wisdom to you.
22 Must have been your being a mayor or being a subsistence
23 user, but there's something in you that's -- that's good
24 for our people and I believe you'll be a very good Chair
25 for us.

26
27 I had thought that in my time that I --
28 that I would have -- I thought about taking -- you know,
29 I've been on the RAC for 11 years and doing this battle
30 of subsis -- I thought about moving on and doing
31 something else. But -- but I realized the other day when
32 I ran into an Eskimo in Juneau who was from White
33 Mountain, he said we're never going to win this fight on
34 subsistence. And that's when I -- that's when he put the
35 old spark back into me and I said okay, 50 to 1, I can
36 handle those odds. So -- but I realize -- I realize that
37 because of what he said that -- that the odds are against
38 us, but I also thought about my grandson. I want my
39 grandson and his mother and my daughters all to learn
40 this -- our traditional way of life. They can do all the
41 things they want. I'm sure we'll have criminal records,
42 you know, the long ones. They'll be so long, they'll --
43 they'll probably become impressive when you look at them,
44 you know.

45
46 But hopefully we'll get to a time in our
47 life and I'm hoping in my lifetime that we can resolve
48 these subsistence issues and learn to recognize that it
49 is our traditional way of life, that we're not asking for
50 anything else. We're not wanton waste. We're not raping

1 and pillaging. I know that there are many organizations
2 out there and I'm speaking to as I -- because I -- I
3 sense that you still have a contact with AFN, but I sense
4 that the -- the way we're going, I sit there and watch
5 you from afar down in Juneau because not all of us have
6 the opportunity to come up there.

7
8 But the one message that I believe that
9 I need to leave with you is that -- is that all of the
10 organizations out there Sealaska, Central Council, AFN,
11 NARF. The one thing we're not doing is -- is -- is we're
12 not -- we're not really coming together the way we should
13 be. We're not putting our money where our mouth is and
14 our people need to really start backing us up. And I'm
15 really hoping that we can get to this point because I
16 know you did village survival out there at AFN and being
17 a former mayor, I talked to you earlier about it, and
18 when you talk about village survival, just from someone
19 who's sitting there on the outside watching everybody
20 talk, I realize that as a mayor that the State of Alaska
21 created us. They made us municipalities. We had the
22 Federal Government come and put water and sewer projects
23 in our communities. We got 24-hour lights and we got our
24 infrastructure put in place for us. But the one thing
25 that's missing from the State of Alaska being big brother
26 to the little municipalities is they never -- we never
27 finished teaching each other what our roles were in terms
28 of becoming self-sustaining.

29
30 I talked about an arbitrary action of
31 just throwing out money to communities and saying, okay,
32 managing on you easier, revenue sharing and municipal
33 assistance, here's your borough, start up your borough
34 money -- here's your start-up borough monies and -- but
35 we never really had a good solid infrastructure in our
36 communities and that's where village survival is --
37 really needs that little shot in the arm.

38
39 I did reserve some time to talk a little
40 bit about the MOU which will come later and I do have
41 some other items I'd like to talk which is the -- is the
42 customary -- the C&T for Ninilchik.

43
44 I want to discuss those items also.

45
46 And also I note that last time I was up
47 here I had lunch with Carl Jack and I know that Carl Jack
48 is gone and I recognize the value of your position and
49 I'd really like to believe and I truly hope that this --
50 the case is that you get a strong -- what I call a strong

1 liaison with you. I really believe it'll be
2 complementary to the work you need and -- and then help
3 us as -- resolve the issue of subsistence.

4
5 We're not going to wake up in the morning
6 and it's going to be gone, but I do know that we can't
7 give up on what we're doing.

8
9 Thank you.

10
11 CHAIRMAN TOWARAK: Thank you. You will
12 get a chance to discuss the reconsideration request from
13 Ninilchik. There's a section for comments. Yeah. And
14 the MOU plan is to have an executive session in the
15 morning and if you have comments that you would like to
16 make, I'd like to hear them now.

17
18 MR. KOOKESH: Yeah. Mr. Chairman. On
19 the MOU issue -- excuse me -- I really believe that there
20 is no need for an executive session, that what you need
21 to do in my -- well, in everyone's opinion, is this needs
22 to go back to the Regional Advisory Councils and allow
23 for their input. I believe you're -- I think you're
24 being a little premature by going into executive session.
25 I've even questioned those -- the reasoning for that.
26 You know -- because, you know, executive sessions -- by
27 the way, you can have two kinds -- there are two kinds of
28 executive sessions, you know. There is an open and there
29 is a closed one. If you do have one, it would be nice if
30 you can keep it as an open one that we're able to hear
31 because this is a public process.

32
33 But I would ask that you send this back
34 to the RACs and let us look at it because this did kind
35 of pass us in the night. So those are my comments on the
36 MOU and I think you need to defer this one.

37
38 CHAIRMAN TOWARAK: I appreciate your
39 comments, but my reason for wanting to have this
40 discussion is because -- primarily because of my newness
41 on the whole issue and I've never reviewed the MOU and
42 personally I'd like to get some direction and a get a
43 feel from the Board internally as to where we are going
44 to position ourselves.

45
46 I expressed earlier too that I would
47 prefer that the whole question goes back to the RACs and
48 have the RACS give us their recommendations before we
49 finalize anything. We're not going to finalize anything
50 in the next day or so. My purpose for the executive

1 session is to sit down and figure out where we're at with
2 the whole issue as far as the Board is concerned,
3 without -- and I think -- I would prefer that, you know,
4 when we get the RACs' recommendations, it will be part of
5 a public process.

6
7 MR. KOOKESH: Yeah. And, Mr. Chairman,
8 and I can respect that. There's nothing wrong with you
9 having the learning curve you're going to have, so -- and
10 you are right, so.....

11
12 CHAIRMAN TOWARAK: And part of the other
13 reason was that the State was going to do it in private,
14 so we wanted to do our part in private too.

15
16 MR. PROBASCO: Mr. Chair. In the State
17 meeting, I was going off earlier information and travel
18 arrangements preclude the State from meeting tomorrow,
19 but that doesn't preclude us from meeting.

20
21 Mr. Chair.

22
23 CHAIRMAN TOWARAK: Thank you, Mr.
24 Kookesh, and we'll hear from you again on the Ninilchik
25 issue later today.

26
27 MR. KOOKESH: Okay. Thank you very much,
28 Mr. Chairman. I take it I have no more questions or.....

29
30 (No comments)

31
32 CHAIRMAN TOWARAK: Not hearing any, thank
33 you. We're planning -- we'd like to take a lunch break
34 -- recess for lunch until let's say 1:30. Give us a
35 little time to drive in the customary and traditional
36 weather.

37
38 (Off record)

39
40 (On record)

41
42 CHAIRMAN TOWARAK: I'm going to call this
43 meeting back to order. The first item on our agenda this
44 afternoon is the Request for Reconsideration RFR09-01.
45 We're going to first go through an analysis presentation
46 by Helen Armstrong. Oh, and if anybody wants to testify,
47 we've got testimony request forms on the front desk for
48 those that will want to testify for the Request for
49 Reconsideration.

50

1 Table's yours.

2

3 MS. H. ARMSTRONG: Thank you, Mr. Chair.
4 Members of the Board. My name is Helen Armstrong. I'm
5 the Chair of the Anthropology Division at OSM and I'll be
6 giving you this presentation today.

7

8 The executive summary for the Request for
9 Reconsideration 09--1 is on Page 1 of your books of the
10 materials on the RFR. This RFR was submitted by the
11 Ninilchik Traditional Council. It requests that the
12 Federal Subsistence Board reconsider its decision on
13 January 14th, 2009, on Proposal FP09-07 which requests
14 that Ninilchik be added to the communities with a
15 positive customary and traditional use determination for
16 all species of fish in the Kenai River area.

17

18 And when I refer to all fish, this refers
19 to salmon plus the resident species of fish which
20 includes those fish that are harvested by people in
21 Ninilchik: Dolly Varden, rainbow trout, lake trout,
22 steelhead trout, Arctic char, burbot, grayling, and pike.
23 The Kenai River area is defined as the Kenai River
24 Peninsula District waters north of and including the
25 Kenai River Drainage within the Kenai National Wildlife
26 Refuge in the Chugach National Forest. You can find a
27 map of this area on Page 8 in your materials and the
28 shaded areas indicate the Kenai Refuge in the Chugach
29 National Forest.

30

31 In the Ninilchik Traditional Council's
32 view, the Board's interpretation of information,
33 applicable law, or regulation was in error or contrary to
34 existing law. The Board met in a public work session
35 November 12th, 2009, and after much discussion, the Board
36 voted to consider this issue again, Proposal FP09-07,
37 which is why we're here today. There is no new
38 information to consider for Proposal FP09-07 since it was
39 last addressed by the Board in January of 2009. The
40 information presented in that analysis remains unchanged
41 and stands in its entirety.

42

43 There's a long regulatory history for the
44 issue of customary and traditional use for fish on the
45 Kenai Peninsula. I'm not going to go through all of
46 this. It is in your analysis on Page 9 of your
47 materials, but I've also included a table that summarizes
48 the history of the issue. It's been going on so long it
49 became a little easier to present it in a table as well.
50 That table can be found on Page 3 of your Board

1 materials. Suffice it to say it's been around for about
2 10 years, and if you have any questions on the regulatory
3 history, I'm glad -- I'm happy to address those later
4 through your questions, but I'm not going to go through
5 it here.

6
7 So if you turn to Page 4 of your Board
8 materials, you'll find the executive summary of FP09-07
9 and that includes the Southcentral Council's
10 recommendation to the Board at that time, the InterAgency
11 Staff Committee comments and the ADF&G recommendation.
12 The Southcentral Council met recently on October 9th,
13 2010, and reaffirmed their recommendation. This
14 recommendation, the InterAgency Staff Committee comments,
15 and ADF&G new comments will be provided after my
16 presentation.

17
18 I'll now present a summary of the Staff
19 analysis for Proposal FP09-07 which the Board is
20 reconsidering today. This analysis begins on Page 7 of
21 your materials. Proposal FP09-07 was submitted by the
22 Ninilchik Traditional Council. It requests that
23 Ninilchik be added to the communities with a positive
24 customary and traditional use determination for all fish
25 in the Kenai River area. In the Kenai River area, the
26 Federal Subsistence Board has already recognized the
27 customary and traditional uses of salmon but not resident
28 species by Ninilchik residents. Ninilchik also has a
29 positive customary and traditional use determination for
30 all fish in the Kasilof River Drainage. The proponent of
31 Proposal FP09 [sic] requests that the Board recognize the
32 community of Ninilchik's customary and traditional uses
33 of all fish in the Kenai River area similar to its uses
34 of salmon and comparable to the customary and traditional
35 use determination finding for the Kasilof River Drainage.

36
37
38 Ninilchik is the only community whose
39 uses are under consideration in this analysis. Ninilchik
40 is comprised of two census designated places. What I
41 mean is that when we talk about Ninilchik, this includes
42 two designated -- census designated places, Ninilchik and
43 Happy Valley. And if you want to look at the description
44 of those places, that can be found in the analysis.

45
46 The Federal Subsistence Board has already
47 recognized the customary and traditional uses of
48 residents of Hope and Cooper Landing for all fish in the
49 Kenai River area. Until 1952, freshwater streams in the
50 Kenai Peninsula were open to subsistence fishing. In

1 1952, all streams and lakes of the Kenai Peninsula were
2 closed to subsistence fishing under Territory of Alaska
3 regulations. Only rod and reel or hook or line were
4 allowed for personal use. From 1952 until 2002 when
5 Federal management began in Federal waters, Ninilchik
6 residents were not allowed to subsistence fish for
7 resident species in the Kenai River area. Because such
8 prohibition constitutes an interruption beyond the
9 control of Ninilchik residents, which is one of the eight
10 factors the Federal Subsistence Board considers when
11 making a customary and traditional use determination, the
12 Board necessarily must make its decision on the best
13 available information concerning historical patterns of
14 use prior to the imposition of the prohibition or
15 contemporary patterns of use under existing regulations.

16
17

18 This analysis goes through an analysis of
19 the eight factors used in the Federal Subsistence
20 Management Program to determine customary and traditional
21 use. These are factors. They are not a checklist. They
22 are described on Page 13 of your Board materials. The
23 Board makes customary and traditional use determinations
24 on a holistic application of the eight factors. For the
25 benefit of the new Board members, I would like to
26 emphasize that the subsistence way of life is based on
27 contingencies and opportunity to harvest what is
28 available. Many but not all subsistence harvests include
29 the bulk harvest and processing of large quantities of
30 fish and wildlife for long-term consumption. However,
31 subsistence harvest may also include small, incidental
32 harvests that have occurred during travel or while
33 harvesting other resources, perhaps hunting moose or
34 berry picking.

35
36

37 Because the subsistence way of life is
38 based on contingencies and opportunity, the fact that a
39 harvest is quite -- may be quite low does not indicate
40 that these fisheries are not customary and traditional.
41 I'm not going to provide a presentation to you on all the
42 eight factors as these are presented in the analysis and
43 the information supporting these as a central part of the
44 administrative record. Rather I will focus my
45 presentation on the issue of where Ninilchik residents
46 have harvested resident species of fish. This is really
47 the crux of the issue not whether or not Ninilchik
48 residents have harvested resident species.

48
49

50 The Board has already recognized
51 Ninilchik residents' customary and traditional uses of

1 all fish in the Kasilof River Drainage. The question
2 before the Board today is whether or not this use extends
3 into the Kenai River area. We have a fair amount of
4 information on this issue. There's information regarding
5 Ninilchik's more recent harvest of resident fish species
6 in the Kenai River area provided by a study done by Fall
7 and others in 2000, 2004, 2006. The Ninilchik
8 Traditional Council had a study done in 1994 and 1999.
9 Chen in 2005, Wolfe in 2006, and then we had significant
10 public testimony at three Southcentral Council meetings
11 and five Federal Subsistence Board meetings over the
12 years.

13
14 Information provided by Fall in 2006 and
15 Ninilchik Traditional Council in 1994 and Wolfe in 2006
16 documented the lifetime uses of fish species by Ninilchik
17 residents of the Kenai River area. Fall and others found
18 that 28 percent of Ninilchik households had fished for
19 either salmon or resident species in the Federal public
20 waters of the Kenai River area or the Swanson River areas
21 in their lifetime; 17 percent frequently, 4 percent
22 intermittently, and less than 6 percent infrequently.
23 This information was not broken down by species of fish.
24 It was just a question on fishing, so we don't really
25 know how much of that was salmon and how much of that was
26 resident fish species.

27
28 The Ninilchik Traditional Council's
29 research of uses from 1994 to 1999 showed that the Upper
30 Kenai River and Kenai Lakes were used by 28 percent of
31 Ninilchik residents to harvest non-salmon and then Skilak
32 Lake and other areas were used by 16 percent to harvest
33 non-salmon. The information in this analysis in total
34 indicates that residents of Ninilchik have harvested fish
35 in the Kenai River area since the community was settled
36 in the mid 1800s. Mapping of Ninilchik's subsistence use
37 area for fish was conducted by Ninilchik Traditional
38 Council and indicated that the entire Kenai Peninsula was
39 used in the respondents' lifetimes for harvesting non-
40 salmon. There was no indication of which types of --
41 which species of non-salmon.

42
43 We also know that the Kenai River area
44 use has decreased in recent years due to changes in
45 regulations, competition with other users, and population
46 changes. Two studies conducted by Fall and others in
47 2000 and 2004 documented Ninilchik residents' recent
48 harvest and use of resident fish in the Kenai River area.
49 This study reported that less than 1 percent of
50 households harvested rainbow trout and lake trout in

1 Kenai Lake or Kenai Mountain streams on the Kenai Refuge.
2 Based on Fall's research in each of the two years of
3 study, although levels were low, there was some level of
4 use by Ninilchik residents in the Kenai River area for
5 harvesting resident fish. While Ninilchik's use of the
6 Kenai River area were not substantial during the study
7 years, there are no unimportant uses -- subsistence uses
8 in ANILCA.

9
10 The opportunistic nature and associated
11 values of subsistence hunting and fishing is that it does
12 not limit harvest to a specific species. Specifically if
13 a Ninilchik resident were fishing in the Kenai River for
14 salmon for which they have a positive customary and
15 traditional use determination and instead harvested a
16 rainbow trout, it is the nature of this subsistence user
17 to use what is harvested. They wouldn't throw it back.
18 They would take it home. This is the pattern throughout
19 Alaska subsistence hunting and fishing. The pattern of
20 harvesting resident fish species also is quite different
21 from the pattern of harvesting salmon. Resident species
22 are usually harvested in much smaller quantities. The
23 harvest of resident fish species in the Kenai River area
24 are more likely to occur when associated with hunting or
25 harvesting other activities.

26
27 This pattern of use where multiple
28 activities occur, berry picking, fishing for Dolly Varden
29 and rainbow trout while hunting is common amongst
30 subsistence users. Based on the available history of the
31 pattern of Ninilchik's use of resident fish species in
32 the Kenai River area, the opportunistic nature of
33 subsistence uses, and the demonstrated history of fishing
34 activities by Ninilchik residents, it is reasonable to
35 conclude that Ninilchik residents have customary and
36 traditionally used resident fish species in the Kenai
37 River area. Thus there is a reasonable basis for a
38 positive customary and traditional use determination for
39 the community of Ninilchik and the Kenai River area for
40 all fish with no distinction between salmon and resident
41 fish species.

42
43 Finally, I would just like to note that
44 conservation concerns are not part of the decision
45 process for making customary and traditional use
46 determinations. Such concerns for conservation are
47 properly addressed through the implementation of seasons,
48 harvest limits, and methods and means of the harvest. To
49 conclude, the OSM conclusion is to support Proposal FP09-
50 07. Based on the holistic application of the eight

1 factors presented in the analysis, Ninilchik residents
2 have a pattern of customary and traditional use of using
3 resident species in the Kenai River area.

4
5 Thank you, Mr. Chair. That concludes my
6 presentation.

7
8 CHAIRMAN TOWARAK: Thank you. Are there
9 any questions.

10
11 (No comments)

12
13 CHAIRMAN TOWARAK: Not hearing any, then
14 we will thank you for your presentation. We'll get a
15 summary of the written public comments from Polly
16 Wheeler.

17
18 DR. WHEELER: Thank you, Mr. Chair.
19 Polly Wheeler with the Office of Subsistence Management.
20 Mr. Chair and Board members, there's actually one public
21 comment that was submitted in response to Proposal 09-07.
22 You can find it in your materials on Page 36. Number's
23 in the lower left-hand corner of the page. And I will
24 just read it to you in case you can't get to it.

25
26 The comment was submitted by the Kenai
27 River Sportfishing Association and the recommendation of
28 that organization was to oppose and the rationale
29 basically in summary, it was based on the prior analysis
30 of the historic pattern of use and the eight criteria
31 that are required under ANILCA and the decision to not
32 grant the customary and traditional use determinations
33 for freshwater species to residents of Ninilchik. Kenai
34 River Sportfishing Association strongly opposes this
35 expansion of subsistence opportunity. As is the case in
36 this situation, we simply cannot afford additional
37 opportunity to a community that cannot demonstrate a
38 pattern of use of those resources present within the
39 Federally-managed waters. Adoption of this proposal will
40 detrimentally impact other uses -- or I'm sorry -- other
41 users and other uses of these resources.

42
43 Subsistence opportunities for residents
44 of Ninilchik exist under State regulations. This
45 proposal revisits decisions already made by the Federal
46 Board in November 2006 and would grant residents of
47 Ninilchik a Federal Subsistence priority for freshwater
48 species occurring in the Kenai River within the Kenai
49 National Wildlife Refuge and the Chugach National Forest.
50 Central to those earlier decisions was the fact that C&T

1 could not -- customary and traditional use could not be
2 demonstrated for freshwater species within the Federally-
3 managed waters.

4
5 The justification provided for this
6 proposal recognizes that this activity did not occur on
7 the allowable Federal property but asked that it be
8 allowed anyway because the Federal boundaries are not
9 consistent with their historic patterns or areas of use.
10 Mr. Chair, again that's the only public comment --
11 written public comment that we received.

12
13 Thank you.

14
15 CHAIRMAN TOWARAK: Any questions of the
16 Board.

17
18 (No comments)

19
20 CHAIRMAN TOWARAK: Not hearing any, thank
21 you, Polly. We will now open to public testimony. Pat.
22 Okay. The first testimony is from Ivan Encelewski.

23
24 MR. I. ENCELEWSKI: Thank you, Mr.
25 Chairman. Members of the Board. My name is Ivan
26 Encelewski. I am the Executive Director for the
27 Ninilchik Traditional Council and also a
28 Federally-qualified subsistence user. I'm here today to
29 speak in support of the Request for Reconsideration and
30 a positive C&T determination for the residents of
31 Ninilchik for resident species on the Kenai.

32
33 I'm not going to get into all the
34 historical details. As we know, this has been a very
35 lengthy proposal going on almost back a decade now. The
36 record is exhaustive and extensive. I don't think any
37 proposal in my mind has more actual recorded
38 documentation for a positive C&T determination. I think
39 Mr. Lohse at the RAC meeting in Tazlina identified and we
40 all know that Mr. Lohse's been around the process for a
41 long time, has stated on record that he's not seen in his
42 time a C&T request that has more documented evidence to
43 support that positive C&T determination.

44
45 I want to point out some of the simple
46 facts. Obviously as we all know, this proposal is
47 supported by OSM, a majority of the InterAgency Staff
48 Committee, and I believe the RAC on three different
49 occasions, most recently unanimously here in Cordova the
50 last month. As we know and we heard, the C&T

1 determinations for Ninilchik in this area are for salmon,
2 moose, bear. So we have a recorded documented use of
3 other species and harvests.

4
5 One of the things that I'd like to point
6 out on the -- as we consider maybe not new information
7 but new concepts or things that I would like to present
8 here today in my testimony, we've had the secretarial
9 review process and as part of that process, we've had --
10 one of the recommendations now given to the Federal
11 Subsistence Board is to give deference to the RACs, not
12 just on taking decisions but also on C&T determinations,
13 but other decisions other than just taking. And so I
14 think that really should play into part of the process.
15 As you guys -- as we -- as Federally-qualified
16 subsistence users look to see if this process is working
17 for us, will that be implemented today, to take those
18 deference to the RAC decisions, not just on taking
19 decisions.

20
21 Helen mentioned the conservation concerns
22 that shouldn't be applicable, we've heard over the years
23 because this is a C&T determination not a -- those can be
24 addressed through bag limits, methods and means, and
25 those kind of other things. Another idea that's come
26 about over this proposal is that this is the Kenai River.
27 You know, it's this, you know, profound river for a lot
28 of different hunting and -- or for fishing activities.
29 And I think this has been time tested in the last couple
30 years. Something new for you to consider is, is that,
31 you know, there's this paranoia about, you know, how is
32 the subsistence users going to be integrated on this
33 world-class fishery. We've seen this now with the salmon
34 C&T determination. We've seen an absolutely minuscule
35 impact. We've seen it integrated very well and that's
36 something that was really I know on the Board's concerns
37 over the years was how this would really be affected.
38 And I think you can look at the record now and look at
39 how that's been implemented for Federally-qualified
40 subsistence users and there's been no negative impacts,
41 nothing that can really be brought up to not support the
42 decision for having additional resident species for the
43 residents in Ninilchik.

44
45 Another thing I'd like to touch on is
46 that, you know -- and Helen mentioned this, is that, you
47 know, it's not just the Native way, but the subsistence
48 way of life is not throwing fish back. We don't throw
49 fish back. When you're fishing for salmon and other
50 species, it's an opportunistic harvest. You know, we

1 don't want to concentrate on the surveys that might show
2 a lower percentage uses for resident species. I don't
3 think that's really applicable to what we're asking for.
4 I mean there's other activities that are going on as I
5 previously mentioned, other C&T activities and we feel
6 that the record stands very clearly to support continued
7 -- or an expansion to resident species on the Kenai
8 River.

9
10 So anyway, I'll kind of conclude my
11 testimony here and just on a personal note, you know, I
12 know this has been -- you know, Ninilchik's been here
13 over the years a lot. This has been a proposal, it's
14 going on 10 years. We've had -- the proponents of this
15 was the Ninilchik Traditional Council, Steven Vanek and
16 Fred Bahr. Fred Bahr is now deceased. He did not see
17 this come to fruition over this past decade. This is a
18 long time going. We really feel like it's time for the
19 Subsistence Board to really take this -- take into
20 consideration and to move forward on this proposal in a
21 positive way.

22
23 As you know, we've requested injunctive
24 relief on the special action request in the Kasilof River
25 and one thing that came about that was kind of profound
26 and while we may not have won on certain specific issues,
27 we did -- you know, Judge Sedwick recognized that there
28 could be no doubt that the residents in Ninilchik have
29 been shabbily treated for over 50 years and I think
30 that's -- that's not just me, you know, up here
31 complaining as a subsistence user. That's a Federal
32 district court judge who sees that -- you know, the
33 subsistence users of Ninilchik really -- really need to
34 have some of their issues addressed and I really implore
35 the Board to really wholeheartedly consider this proposal
36 and move forward and support our request when the
37 documentation, everything, the evidence is there. And
38 with that, I'll conclude my testimony.

39
40 Thank you.

41
42 CHAIRMAN TOWARAK: Thank you. Are there
43 any questions.

44
45 (No comments)

46
47 CHAIRMAN TOWARAK: Thank you for your
48 presentation. Floyd Kookesh.

49
50 MR. KOOKESH: Mr. Chairman.

1 CHAIRMAN TOWARAK: Yes.

2

3 MR. KOOKESH: Floyd Kookesh, Central
4 Council. Down at Southeast, we did a C&T determination
5 for a community and this was a community that was less
6 than a hundred years old and they have very little
7 documentation and demonstrated very little use, but yet
8 we did make -- go ahead and make a determination and I
9 always struggled with this issue and then when this issue
10 came up, I always saw this says why isn't this so.
11 What's holding up this issue. And it bothers me that we
12 are so easily -- we could so easily make determinations
13 at one time that had some kind of like a double standard
14 and I'm struggling with this. So hopefully when you go
15 -- you work your way through this and hopefully you're
16 educated enough on this process, even though you're a new
17 Chair, to help them with this.

18

19 It's my understanding that the
20 Southcentral Regional Advisory Council has continuously
21 supported this and with the issue of due deference being
22 out there that maybe it's time to exercise that option
23 because that's all we've always asked for as RACs is to
24 give due deference to our recommendations even though
25 we're Advisory Councils. But I was hoping that that
26 could always be the case.

27

28 And then there's the idea that we need to
29 be specific about the salmon species because I know that
30 when we did C&T, we just only weighed the criteria and
31 it's always my understanding of Title VIII of ANILCA that
32 the idea was to provide for an opportunity and not
33 restrict one. So I'm wondering where we're going with
34 this and hopefully I can lend some weight to what you're
35 -- with the decision you're coming to.

36

37 And I'm also -- I also have to say in
38 closing is as when we're so complicated about an
39 indigenous -- you know, the Aboriginal indigenous people
40 of the area getting something they've always had access
41 to -- doing something before the non-Native came.
42 Because, you know, that's what we saw with the issue down
43 in Southeast, a community less than a hundred years old
44 giving them customary and traditional use determination.

45

46 Thank you.

47

48 CHAIRMAN TOWARAK: Thank you, Floyd. Any
49 questions from the Board.

50

1 (No comments)

2

3 CHAIRMAN TOWARAK: Not hearing any, thank
4 you. Ricky Gease.

5

6 MR. GEASE: Good afternoon. My name is
7 Ricky Gease. I actually sit on the Southcentral RAC and
8 I'm also the Executive Director of Kenai River
9 Sportfishing Association. As we've heard through the
10 analysis, there's no new information being presented to
11 the Board in terms of what the record is, but there was
12 a court case that did come up, the Chistochina court
13 case, which I think is new information in terms of the
14 context of how the analysis has been in the past and
15 typically when we look at C&T determinations, I think
16 we're looking at who, where, and what are the three
17 questions that you're asked to look at when we do C&T
18 determinations.

19

20 Who is what community. Where is where on
21 qualified Federal property has the hunting or fishing
22 taken place and for what species. And in the court case,
23 they were very clear that those three questions needed to
24 intersect in time and space. So if you had a community
25 that was hunting and fishing for resident species
26 someplace that wasn't on Federal land, I didn't really
27 qualify it for that. The reason why the decision on the
28 Chistochina case was upheld is because there was
29 documentation that showed that there was user of a
30 community for a species, not just a species but a
31 population -- a wildlife population, a moose
32 population -- and it was documented three times. So the
33 Board and the RAC following that process then, that was
34 a legal process, and when you go to court, that's what
35 you're arguing over is your administrative record.

36

37 The administrative record in this case to
38 say the least is there's a lot of information there, but
39 at the end of the day, did they ask those three
40 questions, who, what, and where, and did they get a
41 positive affirmative in all three instances; was it tied
42 together. Now, on the Southcentral RAC, the Southcentral
43 RAC relied more on I believe oral history, people saying
44 I live in this community, I hunt or I fish in this area.
45 Subsistence is opportunistic. If I was hunting, I'd go
46 -- you know, also use resident species.

47

48 There's also a quantitative approach to
49 it. Quantitative approach is you go out into a community
50 during a one-year or a two-year period of time and you do

1 survey and you ask comprehensive questions in a
2 randomized manner. That type of survey is on Page 24 of
3 the RFR and it shows -- and this is what the Board had to
4 work through at the last time because it was faced with
5 two decisions. It was faced with the decision of what do
6 we do with salmon and it was faced with the decision of
7 what do we do with resident species.

8
9 And if you look at that survey, that was
10 done in 2002 and 2003 and that gives a snapshot -- one of
11 the reasons why these type of surveys are valuable, it
12 gives a snapshot of saying who's fishing. This is in
13 Ninilchik. What are they fishing for: chinook, sockeye,
14 coho, chums, pinks, Sally Vardens, rainbow trout,
15 steelhead, lake trout, and hooligan and where are they
16 fishing. And you see it's divided up into Federal public
17 lands and waters and other lands and waters.

18
19 The issue with your lifetime surveys that
20 you did is that you don't have this detailed information.
21 With a lifetime survey as a technique, you don't know
22 where somebody was fishing in particular. You don't know
23 exactly what they were fishing for, and you don't know
24 how often it was. So it's not really -- it's more like
25 an oral history, yes, I fished in this region, but it
26 doesn't give you the quantitative detail that you're also
27 tasked to make an administrative record for.

28
29 So what the Board did last time and kind
30 of coming to a stalemate is they looked at salmon and
31 they looked at sockeye salmon on the Russian River and
32 they said 4 percent, but if you look down on these other
33 lands and waters, for chinook salmon off of Deep Creek,
34 there was 12 percent; 19 percent at the Ninilchik River.
35 Being an anadromous fish, what the Board -- the narrative
36 that the Board took was that when residents of Ninilchik
37 are fishing in the saltwater in Cook Inlet, they're
38 catching stocks of fish that ultimately end up in Federal
39 land.

40
41 That's basically what the Board decided
42 was how it was going to justify the Kenai River Drainage
43 for salmon in the Kenai River Watershed for Ninilchik.
44 It wasn't based on the 4 percent on the Russian River.
45 So they said based on quantitative data, we're going to
46 have to extend the boundaries of that who, where, and
47 what was fishing and the where was in State waters. And
48 they were saying that the fish that are caught in State
49 waters because they spawn and part of it is rearing on
50 Federal lands, that's going to qualify.

1 Well, then the Board looked at, well, can
2 we make that same justification for resident species and
3 if you go further over, there are very low numbers of
4 harvest for resident species on Federal lands. Now
5 obviously resident species are freshwater species.
6 They're not going out into the saltwater and the State
7 waters and there's not harvest there. If you look down
8 on other lands and other areas where residents of
9 Ninilchik were harvesting fish, resident species there at
10 Kasilof River, on Crooked Creek, and on the Ninilchik
11 River, those are not on Federal lands.

12
13 So then the Board was faced with an issue
14 of, well, if we're saying up here 4 percent or less is
15 not enough to justify in and of itself quantitatively for
16 a positive C&T for salmon, we're going to say -- we're
17 going to allow in these other uses in State waters,
18 that's how we're going to justify salmon and that's
19 basically the line of reasoning that the Board used when
20 it granted C&T for salmon on the Kenai River. And it
21 could use that same reasoning for freshwater species.

22
23 So what do you do in an instance where
24 you have really low recorded quantitative data saying
25 that, yeah, it's opportunistic, we don't do it very
26 often, but some days we go out hunting and we gather
27 rainbow trout or a lake trout or a steelhead or a Dolly
28 Varden. Does that qualify holistically in the eight
29 criteria of sustained -- you know, all the different
30 eight criteria that you're supposed to judge that on.

31
32 If you look just on the numbers, I would
33 say that is a very low bar, that's a very low threshold
34 for any community to jump over. There are new
35 communities on the Kenai Peninsula. We have eight
36 different Russian Orthodox communities that have been
37 established in the last hundred years. They're rural
38 communities. Do we set the bar that their hunting and
39 fishing on Federal lands was blocked by the same block of
40 subsistence and that we allow them to qualify -- those
41 communities to qualify even though they would have very
42 low rates of harvest. What about Tyonek which is a rural
43 community on the west side of Cook Inlet. There are
44 stories that my mother-in-law Claire talks about in her
45 childhood where they had relatives from Tyonek come over.
46 Do we do the same thing. It's opportunistic. If they
47 were over on the Kenai Peninsula and they're hunting and
48 fishing, it may not -- if you do the same lifetime
49 histories of other communities, they'll have similar
50 rates of hunting and fishing on Federal lands on the

1 Kenai Peninsula, but do we want the consistent, year-to-
2 year subsistence use to be so low that any community can
3 almost qualify anywhere in the State.

4

5 There's a reason why there's 230 some
6 villages and tribes in Alaska. It's because they did
7 hunt and fish in an area for a species with knowledge
8 through time. There's not one tribe in Alaska. If you
9 set the bar so low that anybody in any community could
10 qualify anywhere in the State, in some instance, it goes
11 against -- it's too low. So there's a tuning here that
12 happens.

13

14 Now, if we're going to give deference to
15 RACs and conditions, my recommendation -- where I have
16 heartburn is what the Board did of saying we're going to
17 go qualify hunting and fishing on non-Federal lands and
18 specifically with salmon, we're going to have an
19 anadromous fish moving through an area and harvest of
20 that fish is going to qualify us for Federal use on
21 Federal lands when it was in actuality done on State
22 lands.

23

24 You might do the same thing for caribou.
25 And the court looked at that and the court said you can't
26 do that. It's got to be on Federal lands by a village or
27 a community consistent on a specific species or stock
28 population. So just put that out there. My
29 recommendation, this has been going on for a very long
30 time and I'd like to see you base it on solid policies
31 and procedures so you don't have confusion on both the
32 RAC level, on the Board level when new people come on.
33 What are your policies and procedures for kind of the
34 qualitative information that comes to a RAC, whether
35 through storytelling or whether it's life history data or
36 -- and then how much do you put on quantitative data in
37 terms of actual surveys that go out into communities on
38 a five to 10 year basis where they get annually surveyed.

39

40

41 As you go forward in time, that's going
42 to be an important issue for this Board to work with and
43 this is your first opportunity to deal with that issue.

44

45

46 CHAIRMAN TOWARAK: Thank you. Any
47 questions of the Board.

48

49

(No comments)

50

1 CHAIRMAN TOWARAK: Thank you very much.
2 And the last one that we have is Sky Starkey.

3
4 MR. STARKEY: Thank you, Mr. Chairman.
5 And thank you Board members and thank you Staff. Staff
6 again supported the RFR and the recommendation to accept
7 the all-fish designation that Ninilchik's proposed. I
8 wanted to just -- before I'd get into the Ninilchik RFR
9 though, I did want to -- since this would probably be my
10 only opportunity to comment, I want to comment on the
11 agenda just for a second and -- on No. 9, the list of how
12 the reconsideration, public testimony and I note that
13 usually during the Southcentral RAC meetings and the
14 other RAC meetings that I've been to, they have a
15 specific item for tribal comments and I know that the
16 Secretary of Interior is interested in tribal
17 consultation and it would seem appropriate to have below
18 ADF&G, the last word be tribal comments. They are after
19 all a government here. So I would suggest that in the
20 future that might be an appropriate thing to add to the
21 agenda.

22
23 Turning to the matter at hand though, I
24 am a lawyer and I've represented Ninilchik throughout
25 this long and somewhat discouraging process and so here
26 we are again. Now I wanted to -- there's a lot of new
27 faces, so there's a few things that I wanted to highlight
28 that I don't think have really been highlighted. And one
29 of the things that I noted in this morning's presentation
30 was this RFR was used as an example of where the Board's
31 locked three-three, where it takes four to pass a vote.

32
33 I will note -- and it's noted on your
34 report -- that actually the fact is that this -- the
35 Board voted four to three the first time it considered
36 this -- not the first time it considered, but the first
37 time it adopted this to agree that all fish were
38 customary and traditionally used by Ninilchik throughout
39 the Kenai and it was only after two or three meetings
40 later and after some what I would -- you know, what my
41 clients perceived as some fancy footwork that a four-
42 three vote -- or excuse me -- a four-two vote was
43 actually undone by a three-three vote. So that's -- you
44 know, and it's things like that that I think got
45 subsistence users to the point where they just threw up
46 their hands and said it's broken.

47
48 You know, it's easier to fulfill the
49 mission of this program which we view as providing
50 opportunities for subsistence uses. You know, being

1 advocates and providing opportunities for subsistence
2 uses. It's easier in places that are more remote where
3 you don't have the competition, where you don't have the
4 Kenai River. It's the places like the Kenai, like the
5 AHTNA Region where the rubber hits the road when you've
6 got all this pressure, political pressure and other
7 things, where people look to see what kind of decision's
8 been made and this has been a -- you know, this has been
9 an example of it. So that vote overturning a four-two
10 positive determination was a three-three vote and some of
11 the other things that have happened I think were part of
12 the reason for the review and as Ivan pointed out, the
13 strong statements that were made by Ralph Lohse and other
14 Regional Council Chairs including the Chair from
15 Southeast Alaska first time this issue came up about the
16 lack of deference given to the Board on this issue was
17 another big push and the reason for the secretarial
18 review.

19
20 So just a little background. Another
21 little piece of background, you know, that's important
22 here there are other communities on the Kenai Peninsula
23 that have been given customary and traditional use for
24 all fish on the North Kenai and that's Hope, you know, a
25 gold mining community. Cooper Landing, now Cooper
26 Landing's ironic because Cooper Landing was first
27 established by people from Ninilchik. David Cooper was
28 the lead plaintiff for the case that we brought early on
29 in here and his family established Cooper Landing. So it
30 was people from Ninilchik up there and that's what
31 customary and traditional use is about. It's about a
32 long-term pattern of use where people from Ninilchik, the
33 tribal community use these lands, you know, throughout
34 history.

35
36 One thing that I think, you know, where
37 subsistence users really -- the ones I represent,
38 Ninilchik and others, really have a problem is this
39 business of getting into 4 percent, of 1 percent, and
40 percentages that are derived from harvest surveys that
41 are conducted by people that aren't familiar with the
42 villages -- or may be. You know, but anyway you get
43 these percentages and then they start getting batted
44 around and I think in this case it's particularly
45 important to remember that the history here is that
46 Ninilchik for 50 years -- for 50 years -- now actually 60
47 years were -- you know, were denied their subsistence
48 opportunity. It was illegal for them to subsistence
49 fish. They sat on their -- in their houses and watched
50 everybody else fish legally while they went underground

1 to survive as a way of life, while they fished at night,
2 while they did whatever they could to get the fish that
3 they needed.

4
5 And, you know, that's a strangling effect
6 on a community. They either go underground -- and some
7 people don't fish and so -- you know, 4 percent's not
8 accurate because of course people aren't going to
9 acknowledge what they did when they think it was illegal
10 as many subsistence users are familiar with, and the
11 second thing is, so what if it was 4 percent. I mean
12 after 50 years of not -- being told that you can't do it,
13 yet I commend the 4 percent that were out there still
14 doing it after that period of time. I mean they almost
15 strangled it out but not quite.

16
17 And so, you know, the whole -- this whole
18 percentage business, it's just the typical kind of last
19 straw when you don't what a subsistence user to get an
20 opportunity. You start throwing percentages out and
21 arguing them one way or another, but when you're dealing
22 with a tribe, I mean a common knowledge of tribal people,
23 the subsistence people, the anthropologists, OSM Staff,
24 and everybody is -- you know, they've used this territory
25 for fishing and hunting. They took what they needed. It
26 was opportunistic. When they fish for salmon, they are
27 fishing. They catch -- whatever fish they catch, they
28 use them and, you know, I know that many of the people
29 that I represent, you could make it illegal and you could
30 shout and scream from the treetops and tell them they can
31 catch salmon, but you can't catch -- if you catch a trout
32 in that net, you got to throw it away and they're not
33 going to throw it away.

34
35 They'll risk your citations. They'll
36 risk whatever. They're not going to throw that fish
37 away. They're going to use it and that's the position
38 that this Board put Ninilchik in when it said okay, now
39 you get salmon but you don't get anything else. And it's
40 just contrary to every -- there's not a study out there
41 that will verify that subsistence -- that's any part of
42 the subsistence way of life to not use the resource that
43 you've harvested.

44
45 So, you know, really everything is
46 overwhelming. It's stunning to me really that we've
47 failed on this vote several times. So -- but anyway,
48 let's turn to what's new and there are things that's new.
49 So why should you change your vote if -- you know, what
50 could you base a vote on that's new.

1 Well, you know, I think there's a lot of
2 things that are new here. First of all, there's the --
3 what's new is that, you know this Board is more familiar
4 with the C&T determination process now than it was the
5 last time it considered this issue. You're more familiar
6 with hopefully the subsistence way of life and the way it
7 works and what is involved in harvesting fish and
8 wildlife resources opportunistically and it's a pattern
9 of use. You're more familiar with subsistence uses on
10 the Kenai. You've had -- you know, you've had three or
11 four years now to see how it works for people to have
12 subsistence use of freshwater fish on the Kenai and I
13 think you've discovered that really the impacts are very
14 -- are minimal. Probably nonexistent is a better way to
15 put it.

16
17 You've had -- I hope that you're more
18 familiar with tribal uses of subsistence uses and that,
19 you know, tribes -- the last speaker talked about 228
20 tribes and whatnot and -- but it is worth noting and for
21 those of you who are knew that the Kenaitze Tribe
22 actually, you know, testified in support of the customary
23 and traditional use of Ninilchik and how their families
24 interrelated and used similar territories. So whatever
25 validity there is in this tribal theory that the tribes
26 were -- you know, didn't share across and whatnot is not
27 born out on the Kenai.

28
29 So hopefully you're more familiar with
30 tribal patterns of use and understand that these tribal
31 patterns of use essentially extend throughout areas to
32 every single subsistence resource in that area and
33 hopefully as you develop this customary and traditional
34 use process, in order to get rid of this 4 percent
35 business and all this stuff, you'll come to realize that,
36 you know, once a tribe is established the customary and
37 traditional use of an area, all the resources in that
38 area are customary and traditional use for subsistence.
39 That's just the way it works.

40
41 And you've -- I think -- hopefully you've
42 developed a greater familiarity with just subsistence
43 uses as being opportunistic, that people don't throw
44 things away, that they take what they need and see that
45 born out time and time again. And hopefully you've
46 become more familiar with the Regional Advisory Committee
47 system and seen the wisdom in this system and
48 particularly on issues like customary and traditional
49 use. I mean I think it was important what the last
50 speaker said, a member of RAC, and that the RAC has a

1 role of relying on the historical oral traditions and
2 their knowledge of what happened in their territory. I
3 mean many people on these RACs are tribal members, what
4 happened in their countries and how subsistence works.
5 I mean that is the intent of ANILCA that these people
6 bring this local knowledge to the table and that they're
7 given deference and they're supposed to be given
8 deference except in times when there's lack of
9 substantial evidence and in this case, there's more than
10 substantial evidence. OSM is in favor of the proposal or
11 the Staff Committee back when they made recommendations
12 which I understand may have changed, but anyway
13 recommended you pass and so there's way beyond
14 substantial evidence. There's no threat to this
15 conservation or subsistence uses, so the RACs are due
16 deference. So hopefully you've become more familiar with
17 that, more comfortable with that.

18

19 And I think -- the other thing that I
20 hope is new and -- is that if the review -- if the
21 secretarial review did anything -- and it did a lot, but
22 I think the -- I think one of the overwhelming messages
23 that I hope came through and I hope will come through
24 louder and be realized more is that really OSM's job and
25 the Federal Subsistence job is to provide subsistence
26 opportunity. I mean it's to be -- you know, it's to
27 provide for subsistence uses. It's not to make
28 subsistence users jump through hoops and hoops and hoops
29 and hoops and look at 4 percent and 1 percent and these
30 kind of things. It's to provide opportunity and it's to
31 do so when it's reasonable to do so and it certainly is
32 here.

33

34 So I hope all those things have changed.
35 They're new and I hope that you will all see your way to
36 voting for Ninilchik to join the two other communities
37 who are tribes in this. I would finally note that even
38 the State of Alaska in passing the last Subsistence Act
39 of 1992 in the findings -- the findings to that
40 Legislative enactment say that the State of Alaska
41 recognizes its subsistence uses began with Alaska Natives
42 and that other people joined those subsistence uses as
43 they came, but subsistence uses began with Alaska Natives
44 and continue to exist there. And so I think it's
45 important when we look at this situation to understand
46 that it's a bit ironic to have Hope and Cooper Landing
47 with customary and traditional use and the tribes that
48 established those uses to be without.

49

50 So thank you, Mr. Chairman.

1 CHAIRMAN TOWARAK: Thank you, Sky. Any
2 questions of Sky.
3
4 (No comments)
5
6 CHAIRMAN TOWARAK: Not hearing any, thank
7 you very much.
8
9 MR. STARKEY: Thank you.
10
11 CHAIRMAN TOWARAK: That concludes the
12 open floor public testimony on RFR09-01. We will next
13 hear from the Department of Fish and Game. Tom. I'm
14 sorry. Oh, Regional -- I'm sorry. Here I go again
15 jumping. Regional Council comment -- recommendations.
16 Gloria.
17
18 MS. STICKWAN: The Council reaffirms its
19 decision that we made for positive C&T for the Ninilchik.
20 We heard a tremendous amount of public testimony from
21 people's use and we've had it come before us three times.
22 We voted yes three times. So there was no new
23 information provided that would have changed our mind.
24 We said yes. We made a modification in 2007. It's in
25 your packet. You can read what those modifications are,
26 but we heard that people through intermarriages, they
27 went up to fishing those waters and it's just like Native
28 people all over the State of Alaska here. If you
29 intermarriage, you use our resources.
30
31 And that was our position was that -- we
32 heard it three times and we wanted to be given C&T and we
33 hope that the Board will consider our -- and give us
34 positive C&T and give us deference. This would be a good
35 opportunity for the Board to show that they are going to
36 use -- going to give us deference. This will be the
37 first meeting that you will do that if you do and it will
38 show to the public that you are going to -- you're taking
39 the Secretary's words seriously, that you are going to
40 give deference other than just taking, but to C&T. That
41 would be good opportunity for you to show that.
42
43 There's tremendous amount of evidence in
44 the written reports. We've heard stories. We've heard
45 reports from Ninilchik. We heard reports from Fish and
46 Game. We heard reports from U.S. Fish and Wildlife about
47 the C&T of --from Ninilchik. There's no reason
48 whatsoever why they can't be granted a C&T today.
49 There's -- in the past you looked at percentages. That
50 I don't think -- because they were shut down in '50s from

1 fishing, I think that had a lot of impact on their
2 ability to go out and fish and that's why those numbers
3 are zero or very small is because they didn't have the
4 opportunity to go and fish and those numbers are the
5 reason why it's like that, but you shouldn't be looking
6 at numbers. You ought to be looking customary and
7 traditional use of the resources, have they used it.
8 Have they handed down traditional lores and stories and
9 all of those criterias. Look at them and read the
10 record. You've heard this before, as many times as we've
11 had, I'm sure. And the record proves they've had C&T.
12 There's no question at all that they don't have C&T.

13

14 So it would be -- I don't understand why
15 -- if you don't pass this, I would be really questioning
16 why you didn't and I would like -- I'm sure it will be
17 brought back to the Council and we'll ask -- you know, I
18 will as a Council member ask why didn't you pass the C&T
19 for Ninilchik when there's enough evidence to prove that
20 they have C&T.

21

22 CHAIRMAN TOWARAK: Thank you, Gloria.
23 Any questions from the Board.

24

25 (No comments)

26

27 CHAIRMAN TOWARAK: I'm not hearing any.
28 That concludes our -- that portion of the agenda. We
29 will now go to the Department of Fish and Game comments.

30

31 MR. HILSINGER: Thank you, Mr. Chairman.
32 For the record, my name is John Hilsinger with the Alaska
33 Department of Fish and Game. We did provide a letter
34 with updated comments that you were provided this
35 morning. It's as of November 8th and I apologize that we
36 missed the deadline for getting that in the packets and
37 I would ask that the letter be included in the transcript
38 of the meeting.

39

40 Normally I don't do this, but since this
41 is my last meeting, I did want to point out that I noted
42 in reading the Staff analysis again that on Page 9 it
43 states that those rivers and streams were closed to
44 subsistence fishing under Territory of Alaska regulations
45 and I just wanted to clarify for everyone that actually
46 the territory itself did not have regulatory authority in
47 those days. So it wasn't territorial regulations. Those
48 regulations were likely promulgated by the Fish and
49 Wildlife Service which used to incorporate the Bureau of
50 Commercial Fisheries as well as the Bureau of Sportfish

1 and Wildlife.

2

3 So I apologize for that history lesson,
4 but like I said, it's my last chance.

5

6 (Laughter)

7

8 MR. HILSINGER: As you note, this
9 proposal would grant all residents of Ninilchik and Happy
10 Valley community a positive C&T determination, thus
11 establishing a priority by those communities for the
12 harvest of resident species in the Kenai River Drainage
13 within Federal public land. The Board has twice rejected
14 this proposal and as you've heard, there's no new
15 information on the harvest that's come since the time of
16 that rejection.

17

18 So in order to pass this proposal, you
19 would have to find that there's a customary and
20 traditional use of those resident species which must be
21 a long-term, consistent pattern of use by the community
22 of those specific fish stocks from that specific area
23 recurring in specific seasons for many years. The Board
24 previously determined that stocks of rainbow trout, lake
25 trout, Dolly Varden, char, and other resident species
26 within the Federal boundaries of the Kenai River area
27 constitute distinct stocks and that residents of
28 Ninilchik have not customarily and traditionally taken
29 significant numbers of those distinct stocks from that
30 area.

31

32 There is a lack of substantial evidence
33 of that harvest. The only documented use of resident
34 species including Dolly Varden, char, rainbow, lake trout
35 by Ninilchik from the Federal public lands indicates that
36 zero to 1 percent of the households of the community
37 harvested those stocks in the two years surveyed.

38

39 If you were to grant this C&T, you would,
40 for instance, grant a customary and traditional use
41 determination for Dolly Varden where the available data
42 shows that there were no households that fished for that
43 species in those years. So the evidence of usage for all
44 the resident species is light.

45

46 Another issue is the nature of the
47 surveys which by their nature do not differentiate as the
48 regulations require between the use of different species
49 or the specific Federal lands where the harvest occurred,
50 nor do they identify how often the use occurred. So it's

1 difficult if not impossible to use that data to draw a
2 conclusion of a long-term, consistent pattern of use of
3 specific stocks in specific areas.

4
5 We note that the scientific evidence is
6 that, for example, with rainbow trout, there are two
7 genetically distinct stocks of rainbow trout, on upstream
8 of Skilak Lake and one downstream of Skilak Lake. You've
9 heard of course that the Regional Advisory Council has
10 supported this proposal in the past, but we note that the
11 legal counsel for the Board has stated that we have not
12 been granting deference to Councils on the question of
13 C&T, only on the question of taking.

14
15 Finally since this action also reopens
16 the entire issue of the customary and traditional use
17 determination for all fish on the Kenai River by
18 residents of Ninilchik, we believe that the Board should
19 also reconsider and reverse its previous decision
20 relative to salmon which was made, as you've heard, based
21 on the idea that the harvest of salmon in the Ninilchik
22 and Deep Creek area included some of those fish which
23 may have ultimately been moving into drainages in the
24 Upper Kenai to spawn and so therefore constitutes a
25 customary and traditional use even though that use
26 occurred on State land and State waters not on Federal
27 public lands.

28
29 So in conclusion, Mr. Chairman, we fully
30 support granting positive customary and traditional
31 determinations for rural communities that can demonstrate
32 a consistent pattern of use of a specific fish stock
33 within the specific geographic area which is according to
34 the Board's regulations, but we believe that the use
35 that's been demonstrated in this case is not sufficient
36 to justify a customary and traditional use determination.

37
38 *****
39 STATE OFFICIAL WRITTEN COMMENTS
40 *****

41
42 Alaska Department of Fish and Game
43 Comments to the Federal Subsistence Board

44
45
46 November 8, 2010

47
48 Federal Subsistence Board
49 1011 E. Tudor Road
50 Anchorage, AK 99503

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Dear Board members:

The Federal Subsistence Board meeting materials were distributed ahead of the deadline we were given for submitting comments to include in your packet. We discussed with the Office of Subsistence Management our desire to provide supplemental comments directly to the Board. As a result of that discussion, we are providing this direct mailing for your consideration before the Board meeting on November 9-10, 2010.

Please carefully consider the following concerns regarding the requested Board reconsideration in RFR 09-01 of customary and traditional (C&T) determination in proposal FP09-07, twice rejected by the Board. There is no substantial evidence that Ninilchik customarily and traditionally harvested either resident fish stocks or salmon from the upper Kenai River area, as discussed below.

Proposal FP09-07 would grant all residents of the Ninilchik and Happy Valley community (Ninilchik) a positive C&T determination, thus establishing a priority by that community for the harvest of resident species of fish in the Kenai River drainage area within federal land. These distinct resident stocks include rainbow trout, lake trout, and Dolly Varden char currently subject to nonbait, catch-and-release restrictions to conserve these easily over-harvested fish. A positive C&T determination establishes a use priority of the resource for that community. When resources are inadequate to provide that harvest to all communities with a positive C&T, the designation also necessitates additional Board action to limit uses among those communities with a positive C&T and to close federal areas to others.

The Board twice rejected this proposal

1 for resident fish (September 13, 2007,
2 and January 14, 2009) based on the
3 Board s regulations and the lack of
4 evidence of C&T use by Ninilchik in the
5 Kenai River area (chiefly the upper
6 Kenai River). Those Board regulations
7 establish standards for C&T proposals,
8 as discussed in our May 14, 2010, letter
9 to the Board (enclosed) and our December
10 1, 2008, comments on FP 09-07 (in your
11 Board meeting materials). In Alaska v.
12 Federal Subsistence Board (9th Cir.
13 2008), the Ninth Circuit Court confirmed
14 that these standards must be followed.
15 The Court instructed that, when
16 reviewing FSB decisions, the Court
17 inquiry into the facts is to be
18 searching and careful to make sure that
19 the FSB has properly applied the
20 standards based on substantial evidence
21 found in the record.

22
23 Specifically, the Board regulations and
24 the Court s decision provide that a
25 community may only obtain a C&T
26 determination if evidence demonstrates
27 that the community has customarily and
28 traditionally harvested the specific
29 resident fish stocks (not just species)
30 in the upper Kenai River area within
31 federal areas. A customary and
32 traditional use must be a long-term
33 consistent pattern of use by that
34 community of those specific fish stocks
35 from that specific area recurring in
36 specific seasons for many years. The
37 Board previously determined that stocks
38 of rainbow trout, lake trout, Dolly
39 Varden char, and other resident species
40 within federal boundaries in the Kenai
41 River area constitute distinct stocks
42 and that residents of Ninilchik have not
43 customarily and traditionally taken
44 significant numbers of those distinct
45 stocks from that area.

46
47 The only documented use of resident
48 species, including Dolly Varden char,
49 rainbow trout, and lake trout, by
50 Ninilchik from the federal lands in the

1 Kenai area was by 0-1% of the community
2 for the two years surveyed. The Board
3 concluded that salmon migrating by
4 Ninilchik in marine water and caught
5 there included salmon from stocks which
6 eventually reached the upper Kenai River
7 where federal lands exist, and so same
8 stocks of those salmon were involved to
9 some degree. However, the Board
10 correctly concluded this same reasoning
11 cannot apply to the resident species of
12 the Kenai River area and that
13 Ninilchik s take of those resident
14 stocks from upper Kenai waters was too
15 small and infrequent to demonstrate a
16 consistent, long-term pattern of use of
17 those distinct stocks.
18

19 Ninilchik Traditional Council requests
20 that the Board make a different decision
21 based on the same available evidence and
22 information. As the Office of
23 Subsistence Management Executive Summary
24 for RFR 09-01 reports, There is no new
25 information to consider for Proposal
26 FP07-09 since it was last addressed by
27 the Federal Subsistence Board in January
28 2009. Ninilchik Traditional Council
29 relies on a survey methodology that has
30 never been used in any other C&T
31 determination. Those surveys are not
32 substantial evidence under the
33 regulatory C&T standard because they are
34 for use of all species and stocks of
35 fish from various locations over the
36 entire lifetime of the respondents. The
37 surveys do not differentiate, as the
38 regulations require, between use of
39 salmon and resident stocks, do not
40 specify use from federal lands, and do
41 not identify how often the use occurs.
42 The surveys do not show a long-term
43 consistent pattern of use of the
44 resident stocks within federal
45 boundaries. These deficiencies and the
46 different types of information available
47 were more thoroughly explained at the
48 Board meetings on September 13, 2007,
49 and January 14, 2009, and in papers
50 presented to the Board dated March 8,

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2007, and April 30, 2007.

Ninilchik Traditional Council also argues that subsistence users are opportunistic and that releasing a caught fish is repulsive so a C&T should be granted Ninilchik for taking any resident species in the Kenai River area, along with the C&T priority they already have to take salmon in the area. That boot-strap argument is contrary to the Board's regulations and to the Court decision in Alaska v. Federal Subsistence Board (9th Cir. 2008). The Ninilchik Traditional Council also argues that the Board's prior rejections of its proposal failed to defer to the recommendation of the regional advisory council, but legal counsel to the Board has repeatedly advised that, under ANILCA, we have not been granting deference to Councils on this question of C&T, only on the question of take.

By regulation, the Board will accept a request for reconsideration only if it (1) is based upon information not previously considered by the Board, (2) demonstrates that the existing information used by the Board is incorrect; or (3) demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law. The apparent basis given for reconsideration at the Board's November 12, 2009, meeting was that the Board's previous interpretation was incorrect. That interpretation was correct and consistent with the Board's regulations as to the lack of evidence of a customary and traditional use by Ninilchik of Kenai River area resident fish.

Finally, since the Board's November 12, 2009, action to review its prior decision re-opens the entire issue of the customary and traditional use determination of all fish in the Kenai

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River area by residents of Ninilchik, according to the Executive Summary for RFR 09-01, the Board should reconsider and reverse the positive C&T determination for Ninilchik use of salmon in the federal areas of the Kenai River drainage. That determination was speculative and unsupported by substantial evidence. There is no evidence of what percentage, if any, of the separate and distinct salmon stocks customarily and traditionally caught by Ninilchik close to home are actually headed for the Kenai River area. The Board should reject the proposal as to resident stocks and also as to salmon stocks.

In conclusion, we fully support granting a positive C&T determination for any rural community that can demonstrate a consistent pattern of use of a specific fish stock within a specific geographic area, according to the Board s regulations. The level of use demonstrated by available evidence for this C&T determination is insufficient to meet the Board s regulations. We urge the Board to carefully consider these concerns and act to consistently apply the criteria in the Board s regulations.

Sincerely,

Tina Cunning
Special Assistant
Enclosure

May 14, 2010
Mr. Michael R. Fleagle, Chair
Federal Subsistence Board
1011 E. Tudor Road
Anchorage, AK 99503

Dear Mr. Fleagle:

1 At the May 2010 meeting, the Federal
2 Subsistence Board will be making eleven
3 determinations on whether residents of
4 some communities are found to have
5 evidence of customary and traditional
6 use of certain wildlife populations.
7 Information regarding which communities
8 have customary and traditional use of
9 wildlife populations is not only
10 necessary in determining which
11 communities have a subsistence priority
12 but also in restricting uses among such
13 communities under Section 804 of the
14 Alaska National Interest Lands
15 Conservation Act when wildlife
16 populations are insufficient to provide
17 for all such communities. I urge the
18 Federal Subsistence Board's careful
19 consideration of the following concerns
20 regarding the sufficiency of information
21 and legal guidance upon which you will
22 be basing your decisions.
23

24 The Ninth Circuit Court of Appeals
25 established legal requirements for
26 federal customary and traditional
27 determinations in its opinion in State
28 of Alaska v. Federal Subsistence Board,
29 544 F.3d 1089 (9th Cir. 2008). The
30 Court held that the Federal Subsistence
31 Board's customary and traditional
32 determinations must be supported by
33 substantial evidence relevant to the
34 customary and traditional standards,
35 including substantial evidence of a
36 specific rural community's or area's
37 demonstrated customary and traditional
38 taking of a specific wildlife population
39 or specific fish stock (not species)
40 within specific geographic locations.
41 The Court made this clear in the
42 following comments, which were essential
43 to the Court's decision and were not
44 merely dicta or unrelated observations.
45

46
47 Customary and traditional determinations
48 must be based on substantial evidence
49 that the customary and traditional
50 standards are met. The Court required

1 that the Federal Board s customary and
2 traditional determination have
3 substantial basis in fact, required
4 that the FSB s fact finding [be]
5 supported by substantial evidence, and
6 required that the FSB properly
7 consider the customary and traditional
8 standards, including the eight-factor
9 analysis that the FSB is directed to
10 apply. 544 F.3d at 1094-96, 1098.
11 Thus, in making each customary and
12 traditional determination, the Federal
13 Subsistence Board must consider all of
14 the customary and traditional standards,
15 must find facts relevant to those
16 standards, and must base its factual
17 findings on substantial evidence
18 contained in the record.

19
20 Substantial evidence is required of a
21 specific rural community's or area's
22 customary and traditional taking. The
23 Court observed that the regulations
24 provide that the C&T determination
25 shall identify the specific community s
26 or area s use of specific fish stocks
27 and wildlife populations. Id. at 1096
28 (emphasis added). In applying these
29 regulations, each C & T determination
30 must be tied to a specific community or
31 area and a specific wildlife
32 population. Id. at 1097 (underlined
33 emphasis added). Thus, each customary
34 and traditional determination must be
35 based on substantial evidence in the
36 record of a specific rural community s
37 or area s customary and traditional
38 taking.

39
40 Substantial evidence is required of the
41 rural community s or area s customary
42 and traditional taking of a specific
43 wildlife population or specific fish
44 stock (not just taking of that species).
45 The Court rejected the Federal
46 Subsistence Board s view that population
47 can mean species, stating that the
48 addition of the terms stock and
49 population in 50 C.F.R. 100.16(a)
50 denotes a group smaller than a species.

1 Id. at 1096. The Court held: In order
2 for the FSB to have considered the
3 relevant factors when making the C & T
4 determination, the FSB must have
5 considered Chistochina s subsistence use
6 of specific moose populations, and not
7 Chistochina s use of moose in general.
8 Id. (emphasis added).
9

10 Substantial evidence is required of the
11 rural community s or area s customary
12 and traditional taking of a wildlife
13 population or fish stock in a specific
14 geographic area. The Court found the
15 regulations clearly tie C & T
16 determinations to the specific locations
17 in which wildlife populations have been
18 taken. Id. at 1097. It added:

19 Specific communities and areas and
20 specific fish stocks and wildlife
21 populations are, by definition, limited
22 to specific geographic areas. Id.
23 Therefore, the Court emphasized, a C &
24 T determination is a determination that
25 a community or area has taken a species
26 for subsistence use within a specific
27 area. Id. at 1097-98 (emphasis in
28 original). Looking beyond the use of
29 the terms stocks and populations ,
30 the court reasoned: Additionally, the
31 eight-factor analysis . . . requires the
32 FSB to consider the geographic reach of
33 the community and the community's use
34 activities. Id. at 1098. The Court
35 found that [g]ranteeing C & T
36 determinations that are limited to the
37 areas in which communities have
38 traditionally harvested a resource
39 serves both purposes [of ANILCA]. The
40 geographic limitation protects the
41 subsistence activities traditionally
42 practiced by rural Alaskans and protects
43 species by ensuring that only those
44 communities that have traditionally
45 taken from a population are given a
46 priority to do so in the future. Id.
47 (emphasis added). This geographic
48 limitation is at the core of the Court s
49 decision.
50

1 These requirements were not, as some
2 have suggested, unnecessary comments by
3 the Court. They are holdings and
4 directives essential to the Court s
5 decision. The Court also instructed
6 that, when reviewing Federal Subsistence
7 Board decisions, the Courts inquiry
8 into the facts is to be searching and
9 careful to make sure that the Federal
10 Subsistence Board has properly applied
11 the standards based on substantial
12 evidence found in the record. Id. at
13 1094. The available information for the
14 eleven proposed determinations before
15 the Federal Subsistence Board at this
16 meeting varies widely in providing
17 evidence of use, interpreting court
18 direction, and application of federal
19 regulations. I request that the
20 additional necessary information be
21 discussed by the Board consistent with
22 the Court s directions for each
23 determination.

24
25 Sincerely,

26
27 Denby S. Lloyd
28 Commissioner

29
30
31 Thank you.

32
33 CHAIRMAN TOWARAK: Thank you. Are there
34 any questions from the Board.

35
36 (No comments)

37
38 CHAIRMAN TOWARAK: We will then go the
39 ISC comments.

40
41 DR. WHEELER: Thank you, Mr. Chair. In
42 addition to serving as the Deputy Assistant Regional
43 Director of OSM, I also serve as the Chair of the
44 InterAgency Staff Committee. So in this and subsequent
45 meetings when we have comments from the staff committee,
46 I will be reading them into the record for you, Mr. Chair
47 and fellow Board members.

48
49 You can see the comments on Page 33 in
50 your materials. The InterAgency Staff Committee,

1 otherwise known as the ISC, found the Staff analysis for
2 the proposal FP09-07 to be a thorough and accurate
3 evaluation of the proposal. The majority of the Staff
4 Committee noted that a holistic application of the eight
5 factors demonstrates that residents of Ninilchik have a
6 customary and traditional pattern of use of resident fish
7 species in the Federal public waters of the Kenai
8 Peninsula District, while a minority of the State
9 Committee noted that there is not a pattern of use by the
10 community of Ninilchik for resident fish species in these
11 same waters.

12

13 The majority also believed that there is
14 insufficient information to distinguish between
15 individual species and that use of a species cutoff date
16 prior to 1952 could be detrimental to subsistence --
17 Federally-qualified subsistence users. In reaching its
18 conclusion, the minority believes that a customary and
19 traditional use determination for residents of Ninilchik
20 for any resident fish species in this area is not
21 supported by substantial evidence.

22

23 Mr. Chair.

24

25 CHAIRMAN TOWARAK: Thank you, Polly. Are
26 there any questions from the Board.

27

28 (No comments)

29

30 CHAIRMAN TOWARAK: Not hearing any, thank
31 you very much.

32

33 I'd like to take maybe a 10-minute break
34 for everyone. Recess for 10 minutes.

35

36 (Off record)

37

38 (On record)

39

40 CHAIRMAN TOWARAK: I'll call the meeting
41 back to order. Pete's got an announcement to make.

42

43 MR. PROBASCO: Okay. For the public as
44 well as any Board members or staff, if you find yourself
45 wearing a blue visitor's card, security asks that you
46 stop at their desk between 4:00 and 4:30 to get your
47 license -- whatever you had to give to get that blue card
48 because the security officer goes home at 4:30. So we'll
49 be unsecured after that point.

50

1 Thank you, Mr. Chair.

2

3 (Laughter)

4

5 CHAIRMAN TOWARAK: Thank you. While
6 we're on a -- we're waiting for some documents. During
7 the break, I had a question to Keith about a reference in
8 the State's letter of a court case and I asked him to
9 update me on it, but we thought maybe it might be good
10 for the record to have a brief explanation from Keith on
11 what that court case says and what it does.

12

13 MR. GOLTZ: The State in May gave us
14 their views of what Chistochina said. We answered that
15 letter and I'm having copies made now and they should be
16 here shortly. We'll distribute that. But for the
17 purposes today, there are a couple points I think I'd
18 like to make. One is this question of thresholds and
19 whether or not there is a certain quantum of evidence
20 that is required before we can find a C&T use. I don't
21 find any such requirement in Chistochina. In fact the
22 court went over that point relatively rapidly. They
23 simply found that there had been uses in three areas and
24 that was it. So if the question is do we need a certain
25 percentage to establish a C&T use, my answer would be no.

26

27

28 The other predominant point that both the
29 district court and the Ninth Circuit did was repeat that
30 the primary function of the Board is to come to a
31 rational decision based on the evidence before it.
32 That's not a high -- particularly difficult standard.
33 It's probably the way we all conduct our lives anyway and
34 it's fully consistent with what the State courts have
35 said about the State system.

36

37 The problem we get into is that we
38 sometimes fail to articulate what it is we did and why we
39 did it and so it's going to be important on the record to
40 state what it is we did and as Ken said this morning,
41 that can sometimes be quite simple. In fact most of the
42 time, it usually is based on the Staff recommendation,
43 but it's a critical element that we have to do in all
44 cases.

45

46 And that's -- it's basically not rocket
47 science. It doesn't take a lot, but you do have to do it
48 and as I think Sky or somebody said, most of the
49 litigation time is spent with the administrative record.
50 So it's important that whatever we do we base it on the

1 record before us.

2

3 CHAIRMAN TOWARAK: Thank you. Are there
4 any questions from the Board or from the State.

5

6 (No comments)

7

8 CHAIRMAN TOWARAK: We're not wanting to
9 create a debate or anything. We just would like to lay
10 down the information in front of us so that we have it
11 understood by every -- all the Board members.

12

13 And as soon as the documents come from
14 the printer, they'll be available for distribution for
15 those that would like a copy. I know I would. Item G is
16 Board discussion with Regional Council Chair and State
17 liaison.

18

19 MR. PROBASCO: Thank you, Mr. Chair.
20 This is the opportunity for the Board to discuss any
21 other relevant information pertaining to the analysis.
22 We use this opportunity to clarify positions, ask Staff
23 for clarification or additional information. It's an
24 opportunity to dialogue with the State and the Chair and
25 so that's that opportunity. Once we're completed with
26 that, then we'd go to Item H where the Board would --
27 where the Chair would ask for a motion and once we reach
28 a motion, then it's before the Board and the Chair and
29 the State can only be recognized at that point in time by
30 the Chair to speak.

31

32 Thank you, Mr. Chair.

33

34 CHAIRMAN TOWARAK: The floor is open for
35 discussions.

36

37 MS. PENDLETON: I had just one question
38 if perhaps, Gloria, if you could help me understand the
39 Regional Council's recommendation on limiting the fish
40 species in the recommendation and what that justification
41 was.

42

43 MS. STICKWAN: It was based on what they
44 used prior to 1952 and that's what we based it on.

45

46 CHAIRMAN TOWARAK: Did that answer your
47 question.

48

49 MS. PENDLETON: Yes, it helps. Thank
50 you.

1 CHAIRMAN TOWARAK: Further discussion.
2
3 (No comments)
4
5 CHAIRMAN TOWARAK: Not hearing any, are
6 we ready for Item H, Board deliberation and action.
7
8 (Council nods affirmatively)
9
10 CHAIRMAN TOWARAK: We will move on to
11 that agenda topic. The floor is open.
12
13 MS. K'EIT: Mr. Chair.
14
15 CHAIRMAN TOWARAK: (Chair nods
16 affirmatively)
17
18 MS. K'EIT: Thank you. I've been on this
19 Board a pretty short time, although a little longer than
20 you now, but not much. My predecessor, Mr. Cesar, as you
21 know had been on the Board for quite a while and would
22 have lots of wisdom and experience to share, but I have
23 good discussions with him and have good support from my
24 Staff and also want to thank the ISC for their work in
25 putting together the documentation for us. It is
26 important for me to put on the record for our Bureau what
27 our evidence -- the evidence that we're considering as we
28 -- as BIA makes our decision and provides our input to
29 this Board and this long process of getting to this
30 point, the -- over a decade now that's been referenced to
31 many times.
32
33 It reminded me of a book that I picked up
34 early on when I was taking some GIS training and the book
35 was called How to Lie with Maps and I bring that up
36 because I'm -- although in my engineering program, we had
37 to take statistics classes -- excuse me.
38
39 CHAIRMAN TOWARAK: Could I break in for
40 a second.
41
42 MS. K'EIT: Sure.
43
44 CHAIRMAN TOWARAK: Let's have a motion to
45 put the question on the floor.
46
47 MS. K'EIT: Oh.
48
49 CHAIRMAN TOWARAK: And then we will get
50 into.....

1 MS. K'EIT: To discussion.
2
3 CHAIRMAN TOWARAK:discussion.
4
5 MS. K'EIT: Okay. Thank you.
6
7 MS. PENDLETON: Mr. Chairman, I'd like to
8 make a motion and move to adopt the proposal. And if
9 there's a second on that, I'd be happy to share some of
10 the rationale.
11
12 CHAIRMAN TOWARAK: Is there a second to
13 the motion.
14
15 MS. K'EIT: Second.
16
17 CHAIRMAN TOWARAK: Seconded by Kristin.
18
19 MS. PENDLETON: Thank you, Mr. Chairman.
20 First I'd like you to know that my motion is a little bit
21 different from the Council's recommendation and the
22 Council excluded certain species from the customary and
23 traditional use determination in their recommendation.
24 And functionally I really see no difference between the
25 proposal and their recommendation, but I do believe that
26 the proposal as submitted by the Ninilchik Traditional
27 Council is simpler. It's more encompassing and would
28 align with the customary and traditional use
29 determination already in place for Hope and Cooper
30 Landing.
31
32 I plan on voting affirmatively for my
33 motion and would like to just share a few of the key
34 points that I thought about and ask that you consider in
35 your voting. First of those is that Ninilchik residents
36 have consistently harvested all food fish available on
37 the Kenai Peninsula since the community was settled in
38 the mid 1800s. Second, information and analysis shows
39 that lifetime use of fish species by Ninilchik residents
40 in the Kenai River area is about 28 percent of the
41 households and that's a pretty high number actually.
42 Recent use has decreased some, but that could be due to
43 regulations and competition with other users.
44
45 The third point is that although recent
46 use of resident fish has been relatively low, the data
47 also show what I consider to be a consistent pattern of
48 use. Further as explained in the analysis, there are no
49 unimportant uses. A holistic view using the eight
50 factors in regulation as described in the analysis leads

1 me to the resident fish positive customary and
2 traditional use determination.

3

4 We know that people fishing are
5 opportunistic. They'll take fish when doing other
6 activities, such as hunting, berry picking, and
7 especially when fishing for salmon. We should allow that
8 opportunistic use to continue and it generally makes
9 little sense to limit it just to specific species. We
10 could adopt the Council's recommendation, but my
11 rationale really doesn't take me there because of this
12 opportunistic nature.

13

14 I think it would be detrimental to
15 subsistence users and is not based on substantial
16 information. Further, it doesn't make sense to provide
17 Hope and Cooper Landing a customary and traditional use
18 determination for all resident fish while those residents
19 that live in Ninilchik would be excluded from taking some
20 species like burbot, grayling, and pike. And I also just
21 wanted to point out too for the record that the
22 justification that was provided in the OSM conclusion I
23 think does a really excellent job in highlighting these
24 key points that I've made.

25

26 Thank you.

27

28 CHAIRMAN TOWARAK: Thank you. Go ahead.

29

30 MR. PROBASCO: Mr. Chair. Ms. Pendleton.
31 Just for clarification, I follow your motion, but I want
32 it to be clear for the record.

33

34 MS. PENDLETON: Uh-huh.

35

36 MR. PROBASCO: And I conferred with Mr.
37 Kessler. I think you're referring to the proposed
38 language as we find on Page 4 of the analysis.

39

40 MS. PENDLETON: That's correct. And that
41 would be -- that was submitted by the Ninilchik
42 Traditional Council.

43

44 MR. PROBASCO: Thank you.

45

46 MS. PENDLETON: Uh-huh.

47

48 CHAIRMAN TOWARAK: Thank you. Any other
49 discussion. Go ahead.

50

1 MR. GOLTZ: I just want to point out on
2 the record that the letter in response to the State's
3 view of Chistochina is being distributed. It was given
4 to all the Board members before so they have it, but the
5 reason I'm doing this now is to make sure that it's part
6 of the administrative record and that it's part of the
7 Board deliberations today.

8

9 CHAIRMAN TOWARAK: Thank you. Any
10 further discussion on the motion. Go ahead.

11

12 MR. PROBASCO: Thanks, Mr. Chair. And to
13 the Board members, I think it's very important for
14 establishing this record. I want to take us back to the
15 last time that the Board acted on this where it ended up
16 defeating the motion on a three to three. I think it's
17 very important just like Ms. Pendleton did and that
18 Ms. K'eit started out doing to clarify their position on
19 either which way they're going to vote. So I think it's
20 important that each Board member states that including
21 the Chair.

22

23 Thank you, Mr. Chair.

24

25 CHAIRMAN TOWARAK: Go ahead.

26

27 MS. K'EIT: Thank you. So where was I.

28

29 MS. PENDLETON: Lying with maps.

30

31 MS. K'EIT: Lying with maps.

32

33 (Laughter)

34

35 MS. K'EIT: I was going to say that I
36 didn't quite enjoy statistics in college and we had to
37 take a couple of those classes, but I think I learned
38 enough to realize that data and statistics can tell
39 different stories depending on how they're presented.
40 And in our deliberation and going back to our own
41 regulations, we are told, which I appreciate ISC's
42 material that they've provided to us because they
43 specifically quote both our 50 CFR and the 36 CFR which
44 refers to a customary and traditional use determination
45 only has to, quote, generally exhibit, unquote, the eight
46 factors.

47

48 So while I appreciate and I actually
49 enjoy looking at the numbers and percentages of things,
50 I don't see that those data are necessarily applicable

1 and part of why I say that is based on our eight factors
2 and what those exactly are and also because we have
3 enough other evidence, written testimony -- or excuse me
4 -- oral testimony and written reports of research in this
5 area that specifically note that subsistence use was --
6 subsistence harvest was conducted by Ninilchik people in
7 this area. So there is sufficient evidence that there is
8 customary and traditional use here by Ninilchik people.

9
10

11 Also we are not called on as the Board to
12 make our determination based on short snapshots of
13 information, that we are supposed to look for information
14 that establishes that pattern over time, and the idea
15 that -- and this has been -- this is just a restatement.
16 But the idea that subsistence users would only target a
17 specific species and then throw back something that is
18 not what they initially were looking for, whether fishing
19 or hunting or even, you know, gathering plants, is a very
20 absurd idea and it's been stated both in public comment
21 and by Staff that subsistence use is not -- does not
22 demonstrate a pattern of waste. So that idea that
23 Ninilchik users would only take salmon is not supported.

24

25 And in short in finishing, I will be
26 voting in support of the motion that was presented.

27

28 Thank you.

29

30 CHAIRMAN TOWARAK: Thank you. Go ahead.

31

32 MS. SMITH: Okay. I probably was remiss
33 in not pointing out this morning where Geoff Haskett, our
34 Regional Director, is today. He's back in Washington,
35 D.C., with Gary Edwards who I know has worked with the
36 Board on many different issues. Gary's receiving the
37 Distinguished Service Award today from the Secretary of
38 Interior and it's actually the highest award that
39 government employees receive, signed by the President.
40 So part of that justification was all of Gary's work on
41 subsistence issues and I probably should have said that
42 earlier, but I did want to say before I talk about where
43 the Fish and Wildlife Service is on this particular issue
44 is that Geoff and Gary and all of us in the Fish and
45 Wildlife Service had long and very spirited discussions
46 about this topic and I would like to say that I think
47 that OSM work and the work of the Council and others has
48 been very informative and really helps to I think clarify
49 the issue.

50

1 I think that after our exhaustive
2 reevaluation, we do believe that lifetime use data is
3 compelling and that the 17 percent of communities using
4 the Federal waters of the Upper Kenai about every year
5 appears to demonstrate a pattern of use for all fish
6 species in waters north of and including the Kenai River
7 Drainage for the residents of Ninilchik. For this
8 reason, the Fish and Wildlife Service will support the
9 Ninilchik Tribal Council language and support the motion
10 made by the Forest Service.

11
12 We believe the primary rationale that has
13 become paramount in our decision is that you don't have
14 to have -- a percentage is not as important as the
15 pattern of use and we believe there is a pattern of use
16 and so after much debate within our own Agency, that's
17 the decision the Fish and Wildlife Service has made at
18 this point and we support the motion.

19
20 MS. MASICA: Mr. Chairman. Based on the
21 available information on Ninilchik's use of resident fish
22 species in the Kenai River area, the opportunistic nature
23 of subsistence uses, and the demonstrated history of
24 fishing activities by Ninilchik residents, I believe it
25 is reasonable to conclude that Ninilchik residents have
26 customarily and traditionally used resident fish species
27 in the river and will be voting in support of the motion.

28
29 CHAIRMAN TOWARAK: Thank you. I myself
30 am in favor of the motion and I apologize for not being
31 able to reference a lot of the reading material because
32 some of this I've only received in the last few days.
33 But I've looked at the long history, the 10-year history
34 of the issue, and it appears that this has been worked
35 over many times and in every case, the Regional Councils
36 have come up with the same recommendation and I think
37 that in itself is reasonable for supporting the motion.

38
39 In everything else that I've been reading
40 through the Staff reports, the holistic and the
41 opportunistic use is always there. I relate to that
42 because we do the same type of subsistence fishing for
43 salmon and we also get trout. We get white fish. We get
44 burbot. We get everything else and it's -- nine times
45 out of 10, those fish are already dead when you get them
46 out of our nets and it's not good use of fish to throw in
47 a dead fish. So I'd just as well take it home and use it
48 or give it to someone else.

49
50 So I support the motion to approve the

1 request and -- go ahead.

2

3 MS. DOUGAN: Mr. Chair. Given this
4 issue's history, it's clear this Board has really
5 struggled with defining what constitutes a long-term,
6 consistent pattern of subsistence use especially in areas
7 like the Kenai Peninsula where subsistence fishing's been
8 closed since 1952. And I really want to commend the
9 Ninilchik Traditional Council and the RAC for keeping
10 this issue in front of us. I think it would have been
11 very easy to give up over 10 years and I commend your
12 tenacity there.

13

14 There's been a lot of discussion about
15 numbers and percentages, and I believe it's valid to
16 place emphasis on the reported lifetime use of resident
17 fish species rather than just focus on that recent
18 history of low level use. I found the information
19 describing the lifetime uses of fish species by Ninilchik
20 residents and the use of public waters to be compelling.

21

22

23 Recent harvests have been low. That's
24 true. Nevertheless, there has been a consistent pattern.
25 Once could speculate that had the Peninsula remained open
26 to subsistence since 1952, the patterns would have been
27 evolved very differently. I believe there's sufficient
28 documentation and justification to recognize Ninilchik's
29 use of all fish, so I support the Forest Service's
30 version of the motion and I intend to vote in favor.

31

32

Thank you.

33

34 CHAIRMAN TOWARAK: Thank you. Any other
35 questions before calling the motion on the floor for
36 action. Could we have a roll call, please.

37

38 MR. PROBASCO: Thank you, Mr. Chair.
39 Final action on RFR09-01 as outlined on Page 4 based on
40 the recommendation from the proponent. Ms. K'eit.

41

42

MS. K'EIT: Yes.

43

44

MR. PROBASCO: Mr. Towarak.

45

46

CHAIRMAN TOWARAK: Yes.

47

48

MR. PROBASCO: Ms. Pendleton.

49

50

MS. PENDLETON: Yes.

1
2 MR. PROBASCO: Ms. Masica.
3
4 MS. MASICA: Yes.
5
6 MR. PROBASCO: Ms. Smith.
7
8 MS. SMITH: Yes.
9
10 MR. PROBASCO: And Ms. Dougan.
11
12 MS. DOUGAN: Yes.
13
14 MR. PROBASCO: Mr. Chair, motion carries
15 six/zero.
16
17 CHAIRMAN TOWARAK: Thank you. Is it put
18 to rest after 10 years.
19
20 (Laughter)
21
22 CHAIRMAN TOWARAK: Okay. Well, I
23 appreciate all the input that has been put into us. You
24 know, looking at the record, it's been a long while
25 coming in making a final decision. I assume that's a
26 final decision.
27
28 (Laughter)
29
30 CHAIRMAN TOWARAK: But we will continue
31 on. I think we have a couple of more items before we --
32 the rural briefing from Larry Buklis.
33
34 DR. WHEELER: Mr. Chair, Mr. Buklis is
35 going to give the rural briefing. We need to turn the
36 machine back on that you guys so carefully turned off 10
37 minutes ago ignoring my pleas to do otherwise, but if you
38 could bear with us so we can turn the machine on and let
39 it warm up and get started. Maybe you might want to take
40 a five-minute break here so we can.....
41
42 MR. PROBASCO: Polly, if you wouldn't
43 mind, while that's warming up, why don't you just go
44 through the reference to Redfish Subcommittee status
45 report, what you want the Board to do.
46
47 CHAIRMAN TOWARAK: Could I make a real
48 quick announcement first. Many of you know Weaver
49 Ivanoff -- Ralph Weaver Ivanoff. He was the RAC Chair for
50 the Seward Peninsula Advisory Committee. He suffered a

1 stroke about 10 days ago and it was a major stroke. He
2 was very lucky according to the medical people to have
3 survived his stroke. He's currently in the Alaska
4 Regional Hospital going through physical therapy and my
5 understanding is he also is going to need speech therapy
6 and I just wanted to real quickly explain that according
7 to his brothers, who I grew up with those boys, he is
8 making day-to-day progress and is recuperating and is
9 doing better on a daily basis. It's going to be a long
10 haul for him to recuperate from the stroke.

11
12 My wife personally had a stroke last
13 February and we're still working with her on doing the
14 physical and speech therapy, so I understand what Weaver
15 is going through right now, and I just wanted to announce
16 to those of you that know him that he is in decent shape
17 for the conditions that he went through.

18
19 DR. WHEELER: Projector's warmed up. I
20 overestimated the time it would take to warm up, so why
21 don't we just go ahead with Larry and then we can do the
22 redfish after that.

23
24 MR. PROBASCO: And also to follow up on
25 Mr. Towarak, we will have a card tomorrow circulating
26 amongst the Board that we will send over to Mr. Ivanoff,
27 so we'll pass that around tomorrow as well.

28
29 CHAIRMAN TOWARAK: Go ahead. Thank you.

30
31 MR. BUKLIS: Thank you, Mr. Chairman. My
32 name's Larry Buklis. I'm with the Office of Subsistence
33 Management. The title of this briefing is Briefing on
34 Requirements for the 2010 Census Review of Rural/Nonrural
35 Determinations and because of the way the room is
36 arranged, you can't see the PowerPoint behind you. We
37 have paper copies for the Board members and Staff
38 Committee members, but I'll follow from the paper
39 presentation as well, so you don't need to turn around if
40 you don't want to.

41
42 The intent of this briefing is to help
43 Board members better anticipate the upcoming rural review
44 process. Once underway, this process will require
45 sustained attention. With the Census 2000 process so
46 recently completed, the Census 2010 review may not
47 require as much work on the front end as we experienced
48 with that first review process. So once again the main
49 points to retain are the census review is upcoming. Once
50 underway it's going to take sustained attention by Staff

1 and the Board and the Councils and finally the process in
2 this second review may not require as much front-end work
3 as the first review.

4
5 This is a short presentation. I will
6 touch on four main points. First will be a brief mention
7 of the regulatory requirements. Second, I'll touch on
8 the initial determinations that were made in 1990-1991.
9 Third, we'll talk about the 2000 Census review and
10 finally the 2010 Census review.

11
12 In terms of the regulatory requirements,
13 there are two relevant parts of the regulations. Part B
14 is under Secretarial authority not delegated to this
15 Board. Part B does address the rural determination
16 process. So the process is in Part B, Secretarial.
17 Those regulations address that communities or areas are
18 considered in the aggregate, so it addresses the grouping
19 of communities and areas. It notes population thresholds
20 that are identified. These regulations address the role
21 of community characteristics as an adjunct or modifier to
22 be considered with population levels. And finally the
23 Part B regulations stipulate that there will be a review
24 based on each decennial census and that's in recognition
25 of the fact that circumstances may change.

26
27 Part C of the regulations has been
28 delegated to the Board and that part of the regulations
29 includes the rural determinations. So process is
30 Secretarial. The determinations are delegated to the
31 Board. The form of those regulations on the
32 determinations are that all places, communities in Alaska
33 are rural except and then the regulation lists the
34 nonrural places.

35
36 The initial determinations: When the
37 program started with the shift to Federal implementation,
38 the rural determinations were made by the Federal
39 program. Those were made in 1990 and 1991. In 1990, the
40 procedures were developed, determinations were proposed,
41 and public comment was considered. In 1991, the final
42 rule was published on the determinations.

43
44 The procedures and regulation: The
45 procedures address considering integrated communities in
46 the aggregate. Now there are no specifics in the
47 regulation on how to consider communities in the
48 aggregate, how to group communities. The Board is
49 provided guidance both initially and with the first
50 review we did with the year 2000 Census. The Board is

1 provided guidance on how to consider grouping of
2 communities and provided some criteria for analysis.

3
4 Secondly, the procedures and regulation
5 address the population levels. Those regulations
6 stipulate that a community or area is to be considered
7 rural if the population is less than or equal to 2,500
8 people unless there are significant characteristics of a
9 nonrural nature. So there's a threshold, but there's a
10 qualifier. These regulations stipulate that a place or
11 area that has a population of greater than 7,000 people
12 is to be considered nonrural unless there are significant
13 characteristics of a rural nature.

14
15 Those places or areas that are
16 intermediate in size, between those two levels, has no
17 particular presumption of rural or nonrural and its
18 determination is based on its characteristics.

19
20 Finally the regulations spoke to those
21 community characteristics. Those are the use of fish and
22 wildlife, the economy, the infrastructure,
23 transportation, and educational institutions. These are
24 characteristics used to better determine a place's rural
25 or nonrural determination.

26
27 As I said, the regulations require a
28 review of the initial determinations every 10 years based
29 on the census. So we've had one such review. That was
30 the Census 2000 review. There was a significant effort
31 in the very late 1990s and into the 2000s to look at
32 alternative perhaps improved analytical methods to pursue
33 the review of determinations. That was concluded in
34 about 2003. In fact, the program did not embrace those
35 new initiatives, but instead essentially implemented the
36 original procedure with some enhancements, and that work
37 was initiated in about 2004.

38
39 The process or sequence of that work was
40 first Staff-reviewed groupings and populations. So we
41 took a look at the groupings that had been made in 1990-
42 '91, and the population levels then and with the Census
43 2000 and we reported back to the Board on any significant
44 areas for consideration in our analytical view. The
45 Board took that information and proposed a tasking for
46 further analysis. That proposal of future work was put
47 out for public comment and based on the comment received,
48 the Board charged the Staff with specific analytical work
49 for their consideration.

50

1 The Staff reported back to the Board on
2 those assigned analyses and the Board considered this and
3 public comment in developing a proposed rule. We then
4 went through the rule-making process and the Board
5 considered comments on the proposed rule and landed on a
6 final rule for which there were some changes in
7 determinations based on the analyses and the public input
8 and the Council recommendations.

9
10 That final rule of the year 2000 review
11 was published in May 2007. So the lag time between
12 Census 2000 and the final rule of 2007 is due only in
13 part to the time it takes for the census to report the
14 data. That's usually a couple of years to get the
15 population data, the economic data, and then the commuter
16 -- the worker commuter data lags a little bit even
17 further. It takes a little bit longer. But in addition
18 to those inherent timelines, as I said, there was an
19 effort to look at analytical alternatives and then to
20 establish this first ever review process.

21
22 So all that taken together, we did not
23 arrive at a final rule until May 2007. There were six
24 requests for reconsideration of that final rule and those
25 were addressed and dispensed with in July of 2008. So as
26 of July 2008, we've concluded the process and all the
27 requests for reconsideration.

28
29 That brings us to the work ahead. The
30 Census 2010 review: I should remind the Board that there
31 is an unresolved petition to the Secretaries from the
32 Southeast Alaska Regional Advisory Council. That
33 petition raises questions about the presumptive nonrural
34 threshold. I mentioned it's greater than 7,000 in
35 regulation. The Southeast Council filed a petition in
36 2006 raising questions about that threshold and urging
37 that it be raised to 11,000.

38
39 That petition has not been resolved and
40 so in our view the petition on the nonrural presumptive
41 population threshold needs to be addressed before we
42 proceed with the review so we have our boundaries
43 defined.

44
45 This is how we could approach the Census
46 2010 review once that is cleared. After the petition is
47 resolved, we could publish a proposed rule to solicit
48 proposals on procedures and the current determinations.
49 Rational for this approach: First, it's only been a few
50 years since the Census 2000 review was actually

1 completed. Secondly, there is a sufficient basis for
2 Council and public input. Given the record of that work,
3 it's perhaps not necessary for the intensive advance
4 Staff work that we did with the first review, which took
5 a couple of years. Thirdly, the Staff analyses that would
6 unfold from the 20 [sic] Census review pursued this way
7 would respond to proposals on procedures and then on
8 determinations. So it'd be an approach that was
9 responsive to what has been raised and we would envision
10 analyses being assigned first on issues that are raised
11 on the procedures and then tackle the determinations.

12
13 And those procedures would be within the
14 constraints of Part B of the regulations unless the
15 Secretaries want to revisit Part B. And then finally,
16 the final rule process could conclude with the Board
17 review of comments on the proposed rule.

18
19 Mr. Chairman, that concludes my brief
20 overview of the process we went through and the process
21 we envision ahead and I'd be prepared to answer any
22 questions.

23
24 Thank you.

25
26 CHAIRMAN TOWARAK: Thank you very much.
27 Are there any questions about the process. Go ahead.

28
29 MS. MASICA: I'm just trying to reconcile
30 and maybe you could help me with this. Is the petition
31 to the Secretaries likely to be resolved -- as I
32 understood this slide that was presented is that has to
33 happen first before these other things that were listed
34 under it could occur. But then I'm reading the language
35 that's in the recommendation from the Secretary following
36 the subsistence review and it's talking about RAC input.
37 So is there really likely to be any resolution on the
38 petition until we go through a RAC input process because
39 I'm trying to figure out -- are we waiting on something
40 to happen first that may not happen first?

41
42 And if I'm misunderstanding, I'm happy to
43 be corrected.

44
45 MR. BUKLIS: Mr. Chairman. Ms. Masica.
46 The status of the petition, the -- this Board did review
47 the information relevant to the petition as requested by
48 the Secretaries. The Secretaries responded to the
49 Council by saying that the issue they raised did not
50 compromise the year 2000 review that had not quite

1 concluded at that point. When the Council raised this,
2 their letter of 2006 was before the final rule of May
3 2007. So their petition was before your Census 2000
4 review was concluded.

5
6 The Secretaries' response was that that
7 petition, with all due respect, did not need to be
8 resolved before the Census 2000 review could be
9 concluded. So the Secretaries did not stay that process.
10 But they did say they wanted this Board to consider the
11 concern and get back to the Secretaries with a
12 recommendation. This Board did that. This Board
13 provided a recommendation to the Secretaries on the
14 petition post-Census 2000 review. That resides with the
15 Secretaries and the Secretaries said they're going to
16 hold that in abeyance pending the subsistence program
17 review, which is now being concluded.

18
19 MS. MASICA: Okay.

20
21 MR. BUKLIS: So we are standing by for
22 Secretarial direction in the face of the Board's
23 recommendation.

24
25 MS. MASICA: Hum.

26
27 CHAIRMAN TOWARAK: Does that answer your
28 question.

29
30 MS. MASICA: I think so. I'm not
31 convinced we're at a spot where nothing's going to
32 happen. I mean I'm sort of worried about the surnaming
33 hell that Pat referred to earlier about who's going to do
34 something first and that we don't find ourselves several
35 years having gone by and not having moved from that spot.

36
37 CHAIRMAN TOWARAK: Go ahead.

38
39 MR. PROBASCO: Mr. Chair. Ms. Masica.
40 I appreciate your comments and I understand where you're
41 coming from and I think we're looking too far ahead right
42 now. The whole purpose of Larry's presentation is this
43 rural process is something we need to get on the table
44 and start thinking because there are steps that we're
45 going to have to start implementing to make sure that
46 we're more timely in our rural review versus what we did
47 in 2000. Once we get the letter from the Secretaries on
48 the Secretarial review, that would prompt me to engage
49 with Mr. Pourchot again to seek the Secretarial's
50 direction on the letter that the Board has already

1 submitted to the Secretary on the rural threshold issue.

2

3

And so it's in the Secretary's office.

4

Mr. Strickland has responded to the Board. Larry articulated reasons why and that's based on the subsistence review. Once that's concluded, then we would pursue further direction.

8

9

Thank you, Mr. Chair.

10

11

CHAIRMAN TOWARAK: Any further questions.

12

13

MS. DOUGAN: Mr. Chair.

14

15

CHAIRMAN TOWARAK: Yes.

16

17

MS. DOUGAN: I have one. Larry, maybe I missed it in your presentation. The petition requesting the threshold be moved to 11,000, was that petition something that the RACs had an opportunity to comment on or give input on or was it reviewed by the RACs?

22

23

MR. BUKLIS: Mr. Chairman. Ms. Dougan.

24

The petition came from the Southeast Alaska Regional Advisory Council. The Southeast RAC submitted the petition, and it was to the Secretaries for their consideration.

28

29

MS. DOUGAN: Mr. Chair,

30

31

CHAIRMAN TOWARAK: Go ahead.

32

33

MS. DOUGAN: Maybe I was a little vague.

34

Have all the RACs had an opportunity to comment on that petition?

36

37

MR. BUKLIS: Mr. Chairman. To this point in the process, the Secretary or nor the Board has gone through a public process on the petition. The Secretary charged the Board to make a recommendation. That's been made and we're awaiting further directions. But the petition came from one of the 10 Councils and how other Councils would be a part of a larger process is awaiting direction from the Secretary.

45

46

CHAIRMAN TOWARAK: Go ahead.

47

48

MR. PROBASCO: So, Mr. Chair and Board members, we will be keeping you up to speed on this rural issue and like I said, I'm repeating myself, but this is

50

1 just to get ourselves engaged, where we're at since the
2 2010 Census has been completed and there's work ahead
3 that we're going to have to start tackling within the
4 next two years.

5

6 Mr. Chair.

7

8 CHAIRMAN TOWARAK: Thank you very much.
9 Thank you for your report. The next item on the agenda
10 is Bristol Bay Redfish Subcommittee status report.
11 Polly.

12

13 DR. WHEELER: Thank you, Mr. Chair. In
14 the interest of time, I'll make this very, very brief
15 hopefully. In your packet on the right-hand side towards
16 the back, you'll see a report with the heading Bristol
17 Bay, Alaska, Subsistence Regional Advisory Council. It's
18 a report of the Bristol Bay RAC Subcommittee. And I just
19 wanted to touch on a few key points mostly because this
20 may be a new issue to many of you and we wanted to just
21 give you a status report and let you know where we were
22 going with this.

23

24 Back in October of 2009, this issue came
25 before the Bristol Bay RAC where some local residents of
26 the communities of Naknek and King Salmon were harvesting
27 spawned-out red salmon as they've traditionally done for
28 generations. There were some enforcement involved. It
29 was in the Katmai Park. There were some enforcement
30 involved and people were very unhappy. So they came to
31 the Bristol Bay RAC in the fall of 2009. As is the case
32 when you have a FACA chartered committee, they have to
33 get permission to form a subcommittee. So the Bristol
34 Bay Regional Advisory Council came to this Board to ask
35 if they could form a subcommittee to address this issue.
36 This Board gave its approval, thumbs up, yup, you can
37 develop a subcommittee.

38

39 The subcommittee met in February of 2010
40 and developed its recommendation for the Council to
41 consider. At its March 2010 public meeting in
42 Dillingham, the Council took up the report and approved
43 the report. You can find the recommendations of the
44 subcommittee in the back of this on Page 1, 2. It starts
45 at the bottom of the second page and goes over into the
46 third page.

47

48 We unfortunately missed the deadline for
49 submitting a proposal to the Board of Fish, so we're in
50 the process of developing an emergency petition to the

1 Board of Fisheries to address this issue, the
2 recommendations that are within the purview of the Alaska
3 Board of Fisheries. Whether or not the Board will take
4 that up, we don't know, but they have 30 days from the
5 time they get it to when they will take it up.

6
7 And also the Park Service is involved.
8 The Chief Ranger at the Katmai National Park is
9 developing a written protocol with tribal representatives
10 from King Salmon, Naknek, and South Naknek to maintain a
11 Katmai descendants list and so that's -- we just wanted
12 to give you an update of that just to let you know the
13 status of the subcommittee and kind of how that went
14 through the process since you had originally approved the
15 formation of the subcommittee.

16
17 And once the Board approves the formation
18 of a subcommittee, its work is done and then the
19 subcommittee can go and work with the Council and the
20 Council can go off and do its business. But we just
21 wanted to close that loop, Mr. Chair, and give some
22 background for folks that may not remember or weren't
23 around when this action took place.

24
25 That's all I had, Mr. Chair.

26
27 CHAIRMAN TOWARAK: Thank you, Polly.
28 That concludes Item No. 11. We'll go on to Item No. 12
29 which is other business and we have an update on.....

30
31 MR. PROBASCO: Mr. Chair. I have two
32 items that I'd like to speak. One is the tribal
33 consultation issue and where we're currently at and
34 future plans as an FYI for the Board. And also in your
35 packet, you're going to see that you have two letters,
36 one from the Western Interior Regional Advisory Council
37 signed by the Chair, Jack Reakoff, and also followed by
38 a letter from the Tanana Tribal Council signed by Gerald
39 Nicholia.

40
41 The importance of the Western Interior
42 Subsistence Regional Advisory Council is they're
43 requesting the Board to form two subcommittees much like
44 Polly just described dealing with the redfish issue. And
45 of course it's up to the Board to review that and either
46 honor the request or deny it.

47
48 What's problematic here is that the
49 committees that they're asking to form involves the two
50 other Yukon Councils, the Eastern Interior and the YK

1 Council. Those Councils did not address this issue at
2 their fall meeting and what we envision doing prior to
3 the Board taking action on this is to take this letter
4 from the Western Interior Regional Advisory Council and
5 present it to the other two Councils during their winter
6 meetings and ask for their action on the item which maybe
7 we agree with Western Interior and we want to participate
8 and/or they say they don't want to participate. We don't
9 know what action they will take.

10
11 So it's an incomplete action at this
12 point in time and we just wanted to draw the Board's
13 attention that there's an effort at least on the Western
14 Interior's part to try to get the three Councils together
15 to start dealing with some of the Yukon River issues:
16 customary trade, the abundance chinook, et cetera.

17
18 So from my view and, Council, please
19 correct me if I'm wrong, I think at this time it would be
20 premature for the Board to endorse Western Interior's
21 request without action from the Eastern and the YK
22 Council.

23
24 Mr. Chair.

25
26 CHAIRMAN TOWARAK: Okay. So with the
27 concurrence of legal counsel, we're taking this
28 information as information as it is right now and we'll
29 act on it after the other RACs are involved.

30
31 MR. PROBASCO: That is my recommendation
32 at this time, Mr. Chair, and I look for Keith to see if
33 I'm on track. We have the Western Interior's request.
34 I think in concept you could endorse that request, but to
35 act on forming the committee with all three Councils,
36 you'd have to have the other two to agree to it.

37
38 Mr. Chair.

39
40 CHAIRMAN TOWARAK: That's correct.

41
42 MS. MASICA: I have a question. So is
43 there -- how do we make sure that that happens?

44
45 MR. PROBASCO: Well, if everybody says,
46 Pete, sounds good, then I would draft a letter back to
47 Chairman Reakoff for Mr. Towarak's signature. It would
48 be reviewed by the Staff Committee and that letter would
49 also be forwarded to the two other Councils and also
50 placed on their agenda.

1 MS. SWANTON: Pete, I was at the Eastern
2 Interior meeting and they did pass a motion to establish
3 a similar committee. If we reviewed the transcripts
4 you'd see that's true. They just haven't sent a letter
5 yet to the Board. Just as a point of clarification.

6
7 MR. PROBASCO: Okay. That's news to me,
8 Ms. Swanton. We do not have a letter to support that at
9 this time. We would still pursue that as we currently
10 have it, so I will look into that transcripts and that
11 time. If it turns out, Mr. Chair, that Eastern Interior
12 has that same request, we still don't have the YK action
13 on this, but if things change, we also can deal with this
14 as an administrative item where I could send out emails
15 to each of the Board members, if we need to act on it
16 prior to.

17
18 Mr. Chair.

19
20 CHAIRMAN TOWARAK: Okay. That concludes
21 -- are there any other business that the Board members
22 would like to bring up.

23
24 MR. PROBASCO: I have one more.

25
26 CHAIRMAN TOWARAK: Go ahead.

27
28 MR. PROBASCO: Mr. Chair. The tribal
29 consultation issue has been before us now -- first we saw
30 it when we went through a little over a year ago with the
31 wildlife proposed rule and regulations where we actually
32 had to go back and start the process again dealing --
33 because of the issue of tribal consultation. Everybody
34 recall that the President through Executive Order asked
35 all programs/agencies to beef up their tribal
36 consultation process and this was actually followed by
37 the Secretarial's direction to do that particularly as it
38 pertains to our Federal Subsistence Program.

39
40 We -- when I say we, my Staff, Mr.
41 Pourchot's office, and Keith and Ken have been discussing
42 how best to meet this directive and starting next week,
43 we'll be working -- finalizing on a draft letter that we
44 would share with each of the respective Board members
45 outlining how we see it for their comment and direction
46 on dealing with this tribal consultation. Essentially in
47 a nutshell, any rule-making process is going to have to
48 adopt a process that's above and beyond what we've been
49 currently doing as it pertains to the tribes and it can't
50 just simply be a dear tribal letter. We would probably

1 have to provide some other types of opportunities for
2 tribal input.

3
4 Overlaid on top of that is also we still
5 have our Regional Advisory Councils that play very
6 important and as articulated very clearly in legislation
7 that Regional Advisory Councils are a key component of
8 our Federal Subsistence Program. And so we've got to
9 take our Regional Advisory Council process and bring in
10 now a more directed tribal consultation process and how
11 that will look at this time, we still need to do a little
12 more work on that, but that will be forthcoming.

13
14 Where I see it first coming to light will
15 in itself going back out to the tribes and asking them
16 how they envision a tribal consultation process. So I
17 think that will be our first step to ask them to come to
18 the table and help us design that process. And then
19 subsequently once that's agreed upon, then we would go
20 from there dealing with the rest of our regulatory
21 processes.

22
23 So, Mr. Chair, that's a heads-up to the
24 Board members that we're currently working on a draft and
25 I want to underline it's just a draft and you and your
26 respective Staffs will get an opportunity soon to provide
27 us further guidance. And if necessary, if the Board
28 feels that we need to conduct a future work session to
29 address that, we'll do that at that time.

30
31 Mr. Chair.

32
33 CHAIRMAN TOWARAK: Thank you. Are there
34 any questions on the issue.

35
36 (No comments)

37
38 CHAIRMAN TOWARAK: If not, then the next
39 item on the agenda is meeting of the MOU signatories, the
40 State of Alaska, and Federal Subsistence Board, which we
41 will plan to take at 1:30 p.m. tomorrow afternoon. We
42 will recess until 9:00 o'clock when the Board will
43 discuss the MOU amongst ourselves. We're going to invite
44 the Regional RAC Chair people and Pat Pourchot.

45
46 Is there anyone else?

47
48 MR. PROBASCO: Mr. Chair, in addition to
49 the -- my understanding in addition to the MOU
50 discussion, we will also have a discussion on the points

1 that Mr. Pourchot pointed out on the Secretarial review
2 as well starting at 9:00 tomorrow and the only Council
3 representative at this point in time would be
4 Ms. Stickwan.

5
6 CHAIRMAN TOWARAK: Okay. With that,
7 unless there's any other business that the Board would
8 like to bring, we're going to recess until 9:00 a.m.
9 tomorrow morning.

10
11 (Off record)

12
13 (END OF PROCEEDINGS)

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C E R T I F I C A T E

UNITED STATES OF AMERICA)
)ss.
STATE OF ALASKA)

I, Salena A. Hile, Notary Public, State of Alaska, reporter for Computer Matrix Court Reporters, do hereby certify:

THAT the foregoing pages numbered 2 through 99 contain a full, true and correct Transcript of the FEDERAL SUBSISTENCE BOARD WORK SESSION, VOLUME I taken electronically by Computer Matrix Court Reporters on the 9th day of November 2010, beginning at the hour of 10:00 o'clock a.m. at the Gordon Watson Conference Room, U.S. Fish and Wildlife Service Building in Anchorage, Alaska;

THAT the transcript is a true and correct transcript requested to be transcribed and thereafter transcribed under my direction and reduced to print to the best of our knowledge and ability;

THAT I am not an employee, attorney, or party interested in any way in this action.

DATED at Anchorage, Alaska, this 17th day of November 2010.

Salena A. Hile
Notary Public, State of Alaska
My Commission Expires: 09/16/2014