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FEDERAL SUBSISTENCE BOARD

WORK SESSION

VOLUME I

U.S. FISH AND WILDLIFE SERVICE
REGIONAL OFFICE
GORDON WATSON CONFERENCE ROOM
ANCHORAGE, ALASKA

SEPTEMBER 13, 2007
8:30 o'clock a.m.

MEMBERS PRESENT:

- Mike Fleagle, Chair
- Gary Edwards U.S. Fish and Wildlife Service
- George Oviatt, Bureau of Land Management
- Judy Gottlieb, National Park Service
- Wini Kessler, U.S. Forest Service
- Niles Cesar, Bureau of Indian Affairs
- Ralph Lohse - Southcentral RAC
- John Hilsinger, State of Alaska Representative
- Ken Lord, Solicitor's Office

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P R O C E E D I N G S

(Anchorage, Alaska - 5/8/2007)

(On record)

CHAIRMAN FLEAGLE: Good morning. I'd like to call this work session to order and begin with introductions. I'm Mike Fleagle, the Chairman of the Federal Subsistence Board. And I'll begin on my left.

MR. OVIATT: George Oviatt representing the Bureau of Land Management.

MS. GOTTLIEB: Judy Gottlieb, National Park Service.

MR. LORD: Ken Lord with the Solicitor's Office.

MR. PROBASCO: Pete Probasco with the Office of Subsistence Management.

MR. EDWARDS: Gary Edwards representing the U.S. Fish and Wildlife Service.

MR. CESAR: Niles Cesar with the Bureau of Indian Affairs.

DR. KESSLER: Wini Kessler, U.S. Forest Service.

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

MR. LOHSE: Ralph Lohse, Chair, Southcentral Regional Advisory Committee.

MS. CUNNING: Tina Cunning, Alaska Fish and Game Staff.

CHAIRMAN FLEAGLE: Thank you. And then if we can get the Staff behind us to stand up and introduce themselves as well, please.

MR. KESSLER: Steve Kessler with the Forest Service.

MR. CHEN: Glenn Chen with the Bureau of Indian Affairs.

1 MR. BERG: Jerry Berg, U.S. Fish and
2 Wildlife Service.
3
4 MR. JACK: Carl Jack, OSM.
5
6 MS. SWANTON: Nanci Swanton, National
7 Park Service.
8
9 MR. ARDIZZONE: Chuck Ardizzone, Bureau
10 of Land Management.
11
12 CHAIRMAN FLEAGLE: Thank you. And then
13 the remainder of our support Staff.
14
15 MR. MCLAIN: Vince McClain, OSM.
16
17 MS. RAY: Diane Ray, OSM.
18
19 MR. MATUSKOWITZ: Theo Matuskowitz,
20 OSM.
21
22 REPORTER: I'm Nathan, I'm the court
23 reporter.
24
25 MR. EDENSHAW: Cliff Edenshaw with OSM.
26
27 MS. B. ARMSTRONG: Barb Armstrong with
28 OSM.
29
30 CHAIRMAN FLEAGLE: Good morning,
31 welcome. The purpose -- a couple of purposes of the
32 meeting here today. One is to -- I don't have a copy
33 of the agenda, do we have one -- okay, the Partner's
34 Program and we're going to have a presentation on that.
35
36 Thank you.
37
38 First up, though, is to review the
39 agenda and information exchange, do we have any topics
40 for discussion on that. Wini, your microphone is still
41 on.
42
43 DR. KESSLER: Okay.
44
45 CHAIRMAN FLEAGLE: Pete.
46
47 MR. PROBASCO: Mr. Chair. At this time
48 I don't have anything to exchange.
49
50 CHAIRMAN FLEAGLE: Anybody else.

1 (No comments)

2

3 CHAIRMAN FLEAGLE: All right. Let's go
4 ahead and move on to the first item of business then,
5 is the presentation on the Partner's for Fisheries
6 Monitoring Program. Good morning, Steve.

7

8 MR. KLEIN: Good morning. Mr. Chair
9 and Board Members. First off we have a presentation on
10 the Partner's Program. I'm Steve Klein, the chief of
11 the Fisheries Division within OSM and our briefing
12 today, I'm going to call on Beth Spangler, who's been
13 coordinating the Partner's Program for the past five
14 years, she's with my staff. And then we're fortunate
15 today to have Ralph Andersen with Bristol Bay Native
16 Association, and Ralph is the Chief Executive Officer.
17 So we're going to have Beth do a short overview of the
18 Partner's for Fisheries Monitoring Program, and then
19 we'll get Ralph's perspective, kind of a CEO
20 perspective of one of the Alaska Native Organizations
21 that's had partners within their organization.

22

23 So, Beth, would you start us off,
24 please.

25

26 MS. SPANGLER: Good morning everyone.

27

28 The Partner's for Fisheries Monitoring
29 Program was established in 2003 with Special Assistant
30 Mr. John Berry who requested a program in Alaska
31 through our office that would allow for proactive in-
32 season -- or in-region management of subsistence
33 fisheries. So the program was designed to help Alaska
34 Natives and rural organizations participate more fully
35 in fisheries research and management.

36

37 The program funds the hiring of social
38 scientists, fisheries biologists and student interns
39 and they work in the regions that they serve. The
40 positions are located throughout Alaska, they represent
41 about 146 villages. It encompasses over 50 percent of
42 the land mass of Alaska. And this was the programs
43 that were positioned in the first five years of the
44 program and they were with the Council of Athabascan
45 Tribal Governments, the Tanana Chiefs Conference, the
46 Association of Village Council Presidents, the
47 Kuskokwim Native Association, the Bristol Bay Native
48 Association and the Native Village of Eyak. The
49 positions work collectively to participate in the
50 Fisheries Resource Monitoring Program. They provide

1 community outreach and education and they mentor
2 student interns. And they all do this while focusing
3 on issues that address key issues that face subsistence
4 users in their regions.

5
6 Participating in the Fisheries
7 Monitoring Program they accumulatively work on
8 approximately 24 monitoring projects each year, which
9 is about 30 percent of our monitoring program. They
10 have been able to hire over 120 rural technicians as a
11 result and this really leads to being able to get local
12 buy-in and participation at the community level. They
13 also have been working on educational and outreach
14 opportunities. They've reached about a thousand rural
15 Alaskans by participating at Regional Advisory Council
16 meetings, science camps, different in-school programs,
17 once again a great way to increase awareness at the
18 local level.

19
20 And, lastly, the third objective,
21 mentoring student interns. It's a privilege to be able
22 to say we've been able to sponsor 81 college interns,
23 all from rural communities, about 35 rural communities
24 to-date. We also have had the opportunity to have
25 matching funds through the National Science Foundation
26 and also have been partnered with the University of
27 Alaska-Fairbanks, School of Fisheries and Ocean
28 Sciences where they have provided adjunct professors
29 where we've been able to offer two classes for the
30 students during the summertime where they've been able
31 to receive college credit during that time. We also
32 have been able to sponsor over 200 high school students
33 to-date being able to encourage them and make them
34 aware of different fisheries opportunities that they
35 will have.

36
37 Participating in fisheries projects,
38 community outreach and education and also mentoring
39 opportunities is vital to achieving all of our ultimate
40 goal of obtaining sustainable fisheries. But in order
41 to do this we not only need sound management, sound
42 research, we also need the buy-in from the local
43 community, we need their participation as well. This
44 program is one way in which we can generate awareness
45 and communication and buy-in so that we can better
46 achieve our ultimate goal of healthy sustainable
47 fisheries.

48
49 With that I'd like to turn it over to
50 Ralph, who is with our Bristol Bay Native Association

1 and he's going to share some of the advantages and
2 accomplishments that they've had through one of our
3 partners over the last five years.

4

5 MR. ANDERSEN: Thank you, Beth. Mr.
6 Chairman. Members of the Board. It's good to see you
7 again, Mr. Chairman. This is really my first time
8 interaction really with the Federal Subsistence Board
9 and let me tell you this is a real pleasure.

10

11 For just a little bit of my background,
12 before becoming the Chief Executive Officer of BBNA, I
13 was the director of Natural Resources at BBNA for eight
14 years. And during like my first two years is when the
15 Federal government took over the management of
16 subsistence fisheries. That caused quite a stir in the
17 region, caused quite a stir in the state because I
18 think generally our people who depend on subsistence
19 were really afraid of the change. There was a lot of
20 fear of loss and that seems to be the biggest fear that
21 we seem to face every day, is the fear of losing
22 something. In this case, in the Partner's Program, we
23 found a way to gain something. It's something that we
24 absolutely say yes to. Because there are other issues
25 that we really must say no to, but this is one that we
26 can say yes to and I really applaud the Fish and
27 Wildlife Service and Department of Interior and this
28 office, specifically. The operations in Alaska,
29 because the Board and the Fish and Wildlife Service
30 really cut new ground with the Partner's Program. It's
31 right at the leading edge.

32

33 Because when I first started working at
34 BBNA, one of the real lackings that I found is that we
35 didn't have trained scientist, our people, in our
36 region, we didn't have educated folks that called
37 Dillingham or Bristol Bay home that were from the
38 villages. And, you know, in trying to find some way to
39 build, get students interested, people interested in
40 science. Because I mean for a long time and still yet
41 there's the impression that, I mean among some, you
42 know, that decisions and regulations are built or could
43 be built from anecdotal information when really there's
44 some real solid science behind all of the regulations
45 that are put forth.

46

47 You know, in beginning the program, I
48 mean when I saw, first read the request for proposal I
49 mean I about did back flips because I was thinking this
50 is something we can really set, build a legacy on. I

1 mean it shows cooperation, it shows our commitment to
2 capacity building, it shows our commitment to
3 education. So I'm proud to say that BBNA was among the
4 first to respond to the request for proposals, that the
5 proposal that we had put forth back then was used as a
6 model for others. In fact, our cooperative agreement
7 was the first one that was established with the Fish
8 and Wildlife Service and that really makes me feel
9 proud of our work and our ability to work together.
10 But in the area of capacity building, you know, this is
11 an absolute dynamite program, you know, because too
12 many times we have a lot of our people feel like
13 they're being left out of processes, are being left out
14 of projects, you know. For a long time there's been a
15 history in Alaska of folks, the Federal government, the
16 State government agencies coming into a village and
17 doing something and not letting the residents know
18 exactly what they're doing. This way they're directly
19 involved.

20
21 I really applaud, again, the Board for
22 implementing the program. Tom Boyd and Taylor
23 Brelsford, years ago, really led the charge and I
24 really got to give them great big kudos too, and Steve
25 and Beth are doing an absolutely fabulous job in
26 implementing and continuing the program.

27
28 BBNA, for the past five years had been
29 involved in six projects that have been completed so
30 far, ranging all the way from 00-31, that's the project
31 number, which is the sockeye salmon estimation on the
32 Alagnak River. And it turns out that that project had
33 revealed something that the people in our region knew
34 for a long time, that there are a lot of fish going up
35 -- a lot of salmon going up the Alagnak River, but
36 nobody was really counting, I mean there was a counting
37 tower there previously and it had been demobilized, the
38 project we were able to get a counting tower back in
39 there. The first year we counted more fish than
40 anybody ever expected to ever swim up the river. So
41 that really confirmed a couple of things for me, real
42 science. We need science to confirm our anecdotal
43 information. The folks from Levelock, right down the
44 river from the Alagnak River were saying for years that
45 we're getting a lot of fish up there but they didn't
46 know how much, but this confirmed it.

47
48 The final report was prepared for that
49 project in '04. We did a number of projects that were
50 done, that were completed in '04. We currently have

1 five projects that are ongoing and in each of those
2 projects we have local hire, we involve student interns
3 and we're -- we've learned that -- one of the lessons
4 that we learned is that we really need to work together
5 on these things. That our capacity, BBNA, we don't
6 have the real sound or capacity or capability of
7 monitoring or managing projects independently without
8 the co-sponsorship or co-working with the Fish and
9 Wildlife Service. I mean you guys have armies of
10 scientists that we can really use.

11
12 The current ongoing projects are pretty
13 wide and varied, you know, we've focused for some time
14 on TEK, traditional knowledge and gathering of
15 traditional knowledge. And our philosophy is that out
16 of the gathering of TEK that we're able to build some
17 hard science projects because in gathering the TEK
18 we're finding out that a lot of the anecdotal
19 information can really be developed into some real
20 science research projects, I mean like the Alagnak
21 project. I mean hearing from the folks at Levelock
22 that there are a lot of fish swimming up the Alagnak
23 River, that helped us to do another project.

24
25 One of the real focuses of our efforts
26 in the past five years has really turned into -- has
27 really focused on developing our interns. We've had a
28 very sound internship program. Again, it's wanting to
29 build capacity in our region, wanting to have home
30 grown scientists. I mean otherwise we'll be taking
31 scientists from the Fish and Wildlife Service or from
32 the Alaska Department of Fish and Game and trying to
33 keep those, you know, the folks that are not from the
34 region or not from the villages in the region is really
35 difficult, you know, because there's always -- they're
36 not -- I mean, again, and maybe I'm talking out of line
37 here but the conditions in our villages aren't very
38 comfortable, maybe, is a good word. So I mean trying
39 to keep folks, you know, in our villages and at the
40 same time building a real sound educated work force is
41 something that we're trying to accomplish.

42
43 We've had a total of 23 interns in the
44 past five years. In fact I was just sitting in the
45 back here speaking with one of our former interns, Kay
46 Larson Blair, who works here now at the Fish and
47 Wildlife Service, OSM, with the Partner's Program. The
48 program has turned around -- has had a really big
49 effect on a lot of our student's lives. Kay started
50 her career in fisheries when she was an intern back in

1 her freshman year, she's now going to be finishing up
2 her Master's in Science in fisheries. Now that's
3 something that makes me feel really proud that we've
4 had -- the program has had an impact on students
5 throughout our region. Those that have participated in
6 the program. You know I could go through the list of
7 the other people, other students that know who have
8 graduated and have since gone on to careers with ADF&G
9 in science. One guy, one student especially sticks in
10 my mind because he was one of our first, Timmy Dyasek
11 (ph) was our lone student intern one year and he's gone
12 on now, he's graduated, he's now working for the Alaska
13 Department of Fish and Game. We hope that we'll be
14 able to attract back Kay and Timmy and others that can
15 work for us in our region.

16
17 You know one of the real benefits of
18 the whole Subsistence Fisheries Monitoring Program is
19 that we're -- you know, Beth mentioned something, you
20 know, something about communication, getting people
21 involved in projects, and one of the benefits of the
22 whole Subsistence Program is that that facilitates the
23 exchange of information. That facilitates the
24 involvement of local residents in projects. That also
25 facilitates the communication between the agencies.

26
27 During the past five years, geez, I can
28 list -- I have seven listed here of the partners that
29 we have, the partnerships that we've built and because
30 I think the success of the program really depends on
31 the partners and it's working together as partners
32 because protecting and providing for our sustainable
33 use of, and continuation of our subsistence practices
34 is something that we all have in common.

35
36 So we've worked with the Fish and
37 Wildlife Service, the Togiak National Wildlife Refuge,
38 the National Park Service, the USGS, ADF&G, University
39 of Washington Fisheries Research Institute and the
40 Hamline University in Minnesota. I mean so we have a
41 far ranging -- over the years, BBNA, we've built far
42 ranging lists of partners that are really helping us to
43 advance and to help us to reach our goals and helping
44 the Service to reach its goals with the Fisheries
45 Program. But really the Partner's Program is
46 something, I see, that we can -- we're building a
47 legacy and I think by continuing it we can make it
48 better.

49
50 There are, you know, some areas, I mean

1 with just like everything else, there are some areas
2 that need improvement but the only way you can really
3 improve on them is by continuing the program and as
4 that happens this process of carrying out the program
5 continues and those improvements will naturally be made
6 in order for it to be more effective.

7

8 That's really all that I have. Geez, I
9 have a lot in here that I could say good about the
10 program because it is good and I don't know how best to
11 capture it in this short period of time.

12

13 But, you know, just looking at the
14 results, looking at where we came from, how this
15 program started, how the Partner's Program started. It
16 started really from scratch and we built it into
17 something that is affecting people's lives, that is
18 involving our Native people in the collection of
19 science. It's changing our student's lives. They're
20 building careers based on involvement in the student
21 internship program. They're going on to successful
22 careers. I mean Kay is a good example working at the
23 OSM, I'm very proud of her.

24

25 I was here talking a couple weeks ago
26 to the student intern day talking about my experiences,
27 which are pretty humble, I mean it came out of a pretty
28 humble place, with a humble background. And I think
29 that as we, you know, go about building the program we
30 got to remember where it came from, it has some pretty
31 humble beginnings. There were a lot of problems that
32 had to be overcome. But I think really the Board, in
33 your wisdom, you were able to carry it through. I
34 think now this is something that we need to continue,
35 that we should continue because it's benefitting all of
36 us, you know, it's going to benefit us for generations
37 because if building a work force, building capacity to
38 allow our people, our agencies, our organizations to
39 reach their goals, I think collectively, and as
40 partners, really benefits us all.

41

42 That's all I have.

43

44 Thank you.

45

46 CHAIRMAN FLEAGLE: Thanks, Ralph.

47 Steve.

48

49 MR. KLEIN: I wanted to thank Ralph,
50 too, for his leadership with BBNA, and they're really

1 grooming some future leaders that are working with the
2 Fish and Wildlife Service now and the State and we'll
3 be working with Alaska Native Organizations in the
4 future, so there's been up to 12 interns per summer
5 where they're grooming them for our future leaders.

6

7 So I wanted to thank Ralph, especially,
8 for that.

9

10 And then also note that it's not just
11 one way where BBNA is benefiting. Me, personally, I've
12 benefitted by relationships with these CEOs and the
13 partners they've hired, both fish biologists and
14 anthropologists, my Staff have. You see it in the
15 field camps where they're working as well, we gain a
16 lot from these organizations as well. Their knowledge,
17 their expertise, their communication, and it's a two
18 way street. So I'm very proud of our accomplishments
19 in the first five years.

20

21 I did kind of want to touch on where
22 we're going with the program. Our budget in 2008 has
23 been a question mark for some time but we do know we're
24 going to be continuing the Partner's Program, we
25 started it with five year agreements, those agreements
26 are ending the end of this year. And we've already had
27 a request for proposals to continue the program. And
28 we've made some adjustments where it's kind of really
29 focused on the Monitoring Program and adding value to
30 the monitoring projects that we're conducting, as well
31 as focusing on the intern program, which I think is --
32 with Ralph's program as an example, has really been one
33 of our big successes.

34

35 So that's the way the RFP was
36 structured. We've received over a dozen proposals to
37 that RFP. We're waiting for our final budget which
38 will be somewhere between \$500,000 and a full funding
39 level of 900,000 and there's still a lot of hoops the
40 2008 budget has to go through. We're hoping they don't
41 reach any resolution and our budget stays flat, which
42 would continue the current program. So we should know
43 that sometime this fall and as soon as we know that
44 we've gone through the proposals that were submitted
45 and we'll be ready to make selections as soon as our
46 budget is final and we'll start awarding those three
47 year cooperative agreements for 2008, '09 and '10.

48

49 And Beth, Ralph or I would be happy to
50 take any questions.

1 CHAIRMAN FLEAGLE: All right, thanks,
2 Steve. Board members questions for any of the three.

3
4 (No comments)

5
6 CHAIRMAN FLEAGLE: Really appreciate
7 the presentation and also I reiterate it's good to see
8 you Ralph. Good to interact with you again. We've
9 been in the public forum together in years past, and
10 this is the first time we've ran into each other for
11 awhile so it's good to see you.

12
13 Thank you.

14
15 (Pause)

16
17 CHAIRMAN FLEAGLE: All right. We're
18 going to move into the next item of business.

19
20 And this is, I think, what the bulk of
21 the people in the room are interested in being here
22 for. I'm going to read some comments as to what the
23 purpose of readdressing this situation.

24
25 The Board action on Fisheries Request
26 for Reconsideration 06-09, FRFR06-09. In January 2006
27 the Board acted on Fisheries Proposal 06-09 making a
28 positive C&T determination for Hope and Cooper Landing
29 for all fish species for waters north of and including
30 the Kenai River drainage within the Kenai National
31 Wildlife Refuge and the Chugach National Forest and for
32 Ninilchik for all fish species for waters within the
33 Kasilof River drainage within the Kenai National
34 Wildlife Refuge. These were described as interim
35 determinations.

36
37 In May 2006, the Board received
38 requests for reconsideration from ADF&G and from
39 Ninilchik Tribal Council. The Alaska Department of
40 Fish and Game asked that the determination for
41 Ninilchik be reexamined and that was the Fisheries
42 Request for Reconsideration 06-02, and that the
43 determination for Hope and Cooper Landing be reexamined
44 under FRFR06-03. NTC asked that the determination for
45 Ninilchik be expanded under FRFR06-08 to include all
46 fish in the waters north of and including the Kenai
47 River drainage within the Kenai National Wildlife
48 Refuge and the Chugach National Forest.

49
50 In November of '06, and this is my

1 first interaction in this scenario here, in November of
2 2006 the Board took up deliberations on accepted claims
3 in FRFR06-02, 03, and 08 in a work session. Board
4 action at that meeting resulted in the determination
5 for Ninilchik being expanded to include all fish in the
6 waters north of and including the Kenai River drainage
7 within the Kenai National Wildlife Refuge and the
8 Chugach National Forest.

9
10 In January of 2007 the Board received
11 another request for reconsideration from the Alaska
12 Department of Fish and Game on how the Board had
13 addressed FRFR06-02, 03 and 08, in particular, on the
14 issue of how the fish stocks related to a positive C&T
15 determination for all fish. FRFR06-09 reference.

16
17 In May of 2007 the Board took up
18 deliberations on the accepted claim in FRFR06-09 in a
19 work session. Board action at that meeting resulted in
20 no changes to the fish C&T determination for Ninilchik.

21
22 In June 2007 the Board received a
23 request for reconsideration from ADF&G on Fisheries
24 Proposal 07-28 and on how the Board had conducted
25 motion-making and voting on FRFR06-09. The aspect of
26 the request dealing with Fisheries Proposal 07-28 was
27 assigned to the RFR process, FRFR07-05 -- I'm sorry if
28 these FRFR's and FPF, everything are confusing, but we
29 do have a pretty clear record of how we came to this
30 point, and these are all referencing those documents
31 that were used along the way. While the aspect dealing
32 with motion-making and voting on FRFR06-09 was ruled as
33 a point of order to be rectified at the September 13,
34 2007 work session, which is why we're here today.

35
36 And I'd like to take a break in the
37 talking points and just turn it over to Ken Lord as to
38 how we reached that determination, to treat this as a
39 point of order, rather than another request for
40 reconsideration.

41
42 Ken.

43
44 MR. LORD: Well, I guess this points to
45 trying to work through procedural issues like this on
46 the fly. I made a bad call in May, basically, in that,
47 on the request for reconsideration I stated that the
48 Board had to make its determination by a majority vote
49 because we have a regulation that says all Board
50 actions will be by majority vote. Well if you refer to

1 Robert's Rules of Orders and how it discusses requests
2 for reconsideration, what it says is, that the original
3 vote, which in this case would be back in November
4 2006, is essentially wiped out, you go back and you
5 hold that vote over again, which means that my call in
6 May was incorrect and that we have to hold this vote
7 over again as if this were the vote back in November of
8 2006.

9

10 So that's what we're here today to do.

11

12 CHAIRMAN FLEAGLE: Thank you, Ken. And
13 we've tried to recreate everything just as it was in
14 November. We've got all the same players, I don't
15 think we're all in the same seats but we're at the same
16 table in the same room and we're going to move forward.

17

18 So that brings us to the next stage of
19 discussion and I'm just going to lay out a few more
20 talking points.

21

22 At the May 2007 meeting that Ken
23 referred to, we incorrectly began with a new motion for
24 a positive C&T determination for Ninilchik in waters
25 north of and including Kenai River drainage within the
26 Kenai National Wildlife Refuge and the Chugach National
27 Forest for salmon only. When that motion failed on a
28 tie vote we were left with the existing C&T
29 determination in regulation but it did not have support
30 of the majority of the Board, that put us in a
31 situation that we couldn't resolve at that meeting. We
32 did pass a regulation that reflected that the Board's
33 desires but we still have conflict between the decision
34 and the regulations. Okay. The lack of majority Board
35 support for the resident fish component imbedded within
36 the determination which could not be resolved within
37 that motion-making context.

38

39 As Ken stated we are now going to
40 return, correctly, to the issue by returning to the
41 motion that was before us and that we voted on in
42 November 2006 in the context of FRFR06-09, and I'll
43 read that motion in a moment. But before doing so, I
44 want to remind everyone of what stage we are at in the
45 process and the rules of conduct for that stage.

46

47 This point of order puts us back to the
48 motion that was before us prior to the final vote at
49 the November 2006 meeting. We are still now,
50 currently, in Board deliberations. We have the motion

1 before us, which I'll read in a moment. The Staff
2 analysis report, public testimony, Alaska Department of
3 Fish and Game comments, InterAgency Staff Committee
4 comments and the Southcentral Council recommendation
5 have all been heard and entered into the record, the
6 issue is now before the Board.

7

8 I will and can recognize the Council
9 Chair, the State liaison, Federal Staff and other
10 parties at my discretion to assist the Board further in
11 its deliberations and Board members may ask for such
12 assistance to gather additional information or to
13 resolve questions. Obviously it's going to be open for
14 continuing discussion.

15

16 The motion before the Board from the
17 November 17, 2006 transcript reads as follows:

18

19 Made by Dr. Kessler of the Forest
20 Service:

21

22 I move to adopt the Southcentral
23 Regional Advisory Council
24 recommendation to provide a customary
25 and traditional use determination for
26 the community of Ninilchik in the
27 Federal waters of the Kenai Peninsula
28 District, including the Kenai River
29 drainage and those areas to the north.

30

31 Now, this isn't exactly what the
32 Council's recommendation was but it
33 addresses the only issues that we need
34 to with this request for
35 reconsideration.

36

37 And if there is a second to the motion
38 I will provide my rationale.

39

40 And it was seconded by Mr. Cesar.

41

42 So we do have the motion standing
43 before us again. At this point there are a couple of
44 options that we can take to redo this vote and in
45 reviewing the options -- I'll read the options.

46

47 1. A motion to divide that motion
48 that's before us into two
49 parts. One part for salmon and
50 the other part for all other

1 fish and take those in that
2 order that I just stated,
3 salmon first and then all other
4 fish and vote on each section
5 separately.
6

7 2. The other approach would be to
8 call for the question or move
9 to amend the motion before us.
10 If the question is called and
11 the motion passes, we are
12 concluded. If the question is
13 called and the motion fails, a
14 new motion could be made. If a
15 motion to amend passes we could
16 have before us the main motion
17 as amended upon which the
18 question could be called or
19 which could be subject to
20 further amendment. If the move
21 to amend fails we would have
22 before us the main motion upon
23 which the question could be
24 called or which, could, again,
25 be subject to a move to amend.
26

27 My preferred course of action would be
28 to take option one, and that would be to split the vote
29 and we do have that option available to us under
30 Robert's Rules, and reading from the handbook that we
31 have here is to divide a motion that has several topics
32 that can stand as separate motions is the purpose,
33 members can apply this motion to main motions and their
34 amendments. This type of a motion would need a second,
35 it's amendable, it's not debatable and it requires a
36 majority vote to pass and it cannot be reconsidered.
37 The end result of a motion to split the motion, I use
38 the term, split, Robert's Rules uses the term, divide,
39 the end result would be the motion is divided into its
40 separate parts and this Board can then consider each
41 part individually without affecting the other parts,
42 and that would be my recommended course of action.
43

44 So is there discussion or anybody ready
45 to make a motion.
46

47 Board members.
48

49 MR. EDWARDS: Mr. Chairman. When you
50 say discussion are you referring to discussion on what

1 you just talked about, the two approaches or are you
2 talking about discussions going back to November on the
3 original motion?

4

5 CHAIRMAN FLEAGLE: It's all -- we're
6 open for anything at this point, Gary. We have the
7 motion as I read and is available on the screen before
8 us, so we're back open for discussion, deliberations.
9 We can talk about options, we can talk about
10 amendments, motions, we can talk about the proposal
11 itself, whatever we want to do.

12

13 So Board members.

14

15 MR. EDWARDS: Well, Mr. Chairman, you
16 know, if we're back on the original motion one thing I
17 would like to, and maybe the State can provide some
18 insight, if I recall a lot of the discussion in
19 November had to do with stocks of fish and part of the
20 rationale that was given at that time or was brought up
21 in the discussion was the fact that the fish that pass
22 in front of the community of Ninilchik that were
23 harvested there for subsistence purpose, given that
24 they were also the same fish that went up the Kenai,
25 therefore, they were the same stocks and therefore part
26 of the rationale then would be that if they were
27 harvesting those stocks and they were the same stocks,
28 why wouldn't they have C&T. I guess one of the
29 questions, I mean, it was never really asked, I mean
30 what data do we have that actually supports that the
31 stocks that were harvested there in front of the
32 village are, in fact, the same stocks that go up to the
33 Kenai. And so I guess I'd like to refer to the State
34 as to what their view, as to where those stocks that
35 were harvested probably do, what percentage may or may
36 not go up the Kenai and what percentage of those may go
37 other places, including the Susitna, for example.

38

39 CHAIRMAN FLEAGLE: Okay, thanks, Gary.
40 Before I call on the State, the discussion at the
41 November 17 did center around fish stocks and that term
42 was used very generally and a couple of us Board
43 members, myself included, were thinking salmon as we
44 said fish, and did not agree that the whole
45 determination should apply to the other fish that are
46 available in that river, just to salmon, and that's why
47 the whole issue is back before us. So now you're
48 referring to salmon, obviously, but the motion is for
49 all fish.

50

1 So John Hilsinger.

2

3 MR. HILSINGER: Thank you, Mr.
4 Chairman. The State did provide quite a bit of
5 information -- supplemental information on the resident
6 species and it's fairly clear that with regard to the
7 resident species those are not the same stocks that you
8 would find at Ninilchik and Deep Creek, the ones in the
9 upper Kasilof, the upper Kenai, are different stocks,
10 and in fact there are identified stocks even within the
11 upper Kenai and probably the upper Kasilof as well.

12

13 Salmon -- with regard to salmon there
14 wasn't a lot of information presented. And a lot of
15 tend to think of salmon as kind of an amorphous stock
16 of fish going by a point in time but that's not really
17 accurate. Each of these salmon runs has specific
18 characteristics in terms of run timing, their migration
19 routes, the -- you know even the size and some of the
20 other characteristics and then where they spawn within
21 the river systems, and that's highly recognized in
22 upper Cook Inlet, probably more so than any other
23 fishing area in the entire state. And recognizing
24 those differences in those stocks, we've got, I think
25 it's about 18 different management plans that govern
26 how those stocks are managed, and they're all managed
27 individually. You've got different seasons, some cases
28 in upper Cook Inlet, besides different seasons you may
29 have -- you may have different gear possibilities,
30 you've got -- and particularly within the rivers you've
31 got different sportfishing regulations that recognize
32 those differences in those stocks. So using that
33 information, the State's been able to manage these
34 fisheries in a very precise manner. I was thinking
35 about this this morning and sockeye salmon, late run
36 sockeye salmon go to the Kasilof River and the Kenai
37 River and utilizing the differences in the
38 characteristics of those runs we're able to put
39 different harvest rates on the different stocks in
40 order to achieve our escapement goals given different
41 run sizes.

42

43 And so, for example, this year we put a
44 -- there was about a 72 percent exploitation rate on
45 the Kasilof stock, while on the Kenai it was only about
46 65 percent. And we did that because those fish are
47 available at different times, they're available in
48 different locations and we utilize those. And in my
49 mind that clearly identifies those fish as different
50 stocks.

1 The same thing works with regard to
2 some of the other species, like chinook salmon. And in
3 order to understand chinook salmon harvest you have to
4 also understand how they move into the Inlet. The vast
5 majority of chinook salmon come into the Inlet out in
6 the middle rip, where, primarily the drift fleet
7 operates, and the drift fleet catches very few chinook
8 salmon and that's because those fish are out there in
9 that area, they're likely traveling deep, they're not
10 susceptible to those nets and a small portion of them
11 move in along the beach. But the majority of the fish
12 that come into the river come in at the mouth of the
13 river and a lot of those fish then, if they're
14 harvested, in the beach fisheries, are harvested right
15 around the mouth of the river. The same is true at the
16 Kasilof and the other river systems.

17
18 And so a person fishing on the beach in
19 the area of Ninilchik and Deep Creek would be primarily
20 targeting fish bound for that river. There are a
21 small, relatively small proportion of the chinook that
22 are caught in the setnet fishery but you have to
23 remember that the setnet fishery goes out to a mile and
24 a half. So the catch of fish in that fishery is not
25 similar to the catch that would occur by people fishing
26 on the beach at the mouth of the river around Deep
27 Creek and Ninilchik.

28
29 The other thing, of course, is what
30 stocks are available at that time. And most of that
31 harvest occurs early in the season when the primary
32 species available is chinook salmon and so there's
33 limited chinook salmon stocks available at that time.
34 The late run Kenai chinook stock for instance, which is
35 the largest one in that area is not present so you
36 reduce even further any possibility that those fish
37 could be bound for other areas.

38
39 So between all the management plans,
40 the ability of individuals to really target specific
41 stocks and you certainly see this with the community of
42 Ninilchik, their harvest is targeted on chinook salmon
43 and coho salmon and to a lesser extent, some sockeye,
44 and other fisheries, but you don't see a large harvest
45 of pinks or chums or -- which indicates to me that it
46 is a very stock specific harvest and those stocks are
47 most likely the ones bound for Ninilchik and Deep
48 Creek.

49
50 Thank you, Mr. Chairman.

1 CHAIRMAN FLEAGLE: Thank you, John.
2
3 Gary, you want to continue.
4
5 MR. EDWARDS: Yeah, Mr. Chairman, if I
6 could follow up.
7
8 But what we don't seem to have is kind
9 of any quantified data as to, if you were asked, you
10 know, what is the percentage of the fish harvested, you
11 know, that go up the Kasilof for Ninilchik as opposed
12 to the percentage that goes up the Kenai, we're really
13 not in a position to provide that kind of information.
14
15 MR. HILSINGER: Mr. Chairman. Mr.
16 Edwards. That's correct. We have -- eventually I
17 think we will have some of that type of information but
18 even at that it will be for the fishery as a whole.
19 But at the current time we cannot give you quantifiable
20 proportions of the catch that go to different river
21 systems.
22
23 DR. KESSLER: Mr. Chair.
24
25 CHAIRMAN FLEAGLE: Wini.
26
27 DR. KESSLER: Thanks. I'm a bit
28 confused. You know we started out by putting the
29 original motion on and then we've flown off on a
30 tangent that may or may not result in possibly
31 splitting this motion. I'm thinking that folks in the
32 room that weren't here in November must be pretty
33 confused being devoid of any kind of context or
34 rationale for this motion. It seems remiss not to at
35 least allow the opportunity to follow this motion with
36 the rationale that was provided, to provide some
37 context.
38
39 CHAIRMAN FLEAGLE: That's a good point,
40 Dr. Kessler, and if you're prepared to do that I'd like
41 to offer you the opportunity. It is all a matter of
42 record, we're just rehashing it. But I think that's a
43 good point.
44
45 Go ahead.
46
47 DR. KESSLER: Okay, thank you. So in
48 following up this motion back in November I recognize
49 that there was a huge amount of input that we had
50 received from the public on this proposal. I also

1 recognize that the Kenai River receives a tremendous
2 amount of use by sportfishers directly and by
3 commercial fishers, primarily in Cook Inlet. I
4 recognize that we often heard the phrase used that the
5 fish are full allocated. And also that the people of
6 Ninilchik have not been able to fully exercise their
7 traditional ways of harvesting fish for over 50 years,
8 which is an unfortunate circumstance.

9
10 Then I spoke to ANILCA Title VIII,
11 which makes it very clear that the continuation of
12 subsistence opportunity for rural residents is the top
13 priority for the use of fish and wildlife resources.
14 Just because there's controversy or because a fishery
15 is fully allocated is not relevant in providing the
16 ANILCA priority for subsistence.

17
18 I explained that I'd reviewed the Staff
19 analysis, listened and read comment from agencies, from
20 the public, considered the new information summarized
21 in the Staff analysis, and had come to the conclusion
22 that there is substantial evidence that a customary and
23 traditional use determination should be made for
24 Ninilchik in the Kenai River drainage and in other
25 areas north of the Kenai as reflected in the motion.

26
27 I referenced one particular table, I
28 think in the current volume we have, it's Page 165,
29 that shows the number, the data that exists for this
30 use by Ninilchik. These numbers indicated to me that
31 there is a long-term use by Ninilchik residents of the
32 Federal waters.

33
34 I recognized that Ninilchik residents
35 will certainly more often fish closer to home and often
36 in saltwaters, but, again, that really doesn't matter
37 in these particular considerations pertinent to this
38 motion.

39
40 Although there's no threshold number to
41 simplify the task before us with this decision, I do
42 believe that there is sufficient use of these Federal
43 waters for a customary and traditional use
44 determination. In fact, concerning Ninilchik's use of
45 the Kenai River, we have a huge amount of information
46 and all that information, of course, was considered
47 during the prior meeting of November 13th and before
48 that.

49
50 I'm told that there's more information

1 for this issue than for practically any customary and
2 traditional use determination we or the State has ever
3 made. And, in total, when I looked at the data it
4 seemed clear that Ninilchik residents used the Federal
5 waters portion of the Kenai River, as well as the
6 Swanson River area and do so in fairly substantial
7 numbers over a long period of time. And, therefore,
8 for me, each of the eight factors in our regulations
9 for making customary and traditional use determinations
10 are either specifically or generally met, which, of
11 course, is the requirement, that they're generally met
12 and that they describe an overall pattern of use by
13 Ninilchik residents.

14

15 Thank you, Mr. Chair.

16

17 CHAIRMAN FLEAGLE: Thank you, Wini.

18 Other comments.

19

20 MS. GOTTLIEB: Mr. Chairman.

21

22 CHAIRMAN FLEAGLE: Judy.

23

24 MS. GOTTLIEB: Well, I'd like to speak
25 in support of the motion and then also a couple
26 comments on the issue of stocks.

27

28 I want to remind everybody today, as
29 we've heard, that we've been discussing this specific
30 C&T determination for Ninilchik since at least January
31 2006, if not for at least four or five years before
32 that. I'm on the record in January and November 2006
33 as well as at our April and May meetings this year we
34 have had before us and I've stated on the record, that
35 the record is full, and full of valid, scientific
36 information, maps, credible testimony, written
37 comments, recommendations and deliberations that show
38 customary and traditional use of all fish by Ninilchik
39 in the Kenai River drainage and those areas to the
40 north under discussion today.

41

42 In reviewing our evaluation it's
43 thoroughly complete.

44

45 To comply with our mandate which is to
46 promote subsistence uses, I will be voting in favor or
47 a C&T determination for all fish.

48

49 The Southcentral RAC has been
50 consistent, clear and strong on their recommendations

1 to us on this issue. They've heard testimony, reviewed
2 the record and provided personal experiences to us
3 about the customary and traditional use of all species
4 of fish on the Kenai Peninsula waters under discussion
5 by the community of Ninilchik.

6
7 While technically we may not be
8 obligated to give them deference in this issue, I
9 challenge anyone to provide a justification in this
10 instance for not following the Regional Council's
11 advice. Why would we not listen to them and be
12 consistent with their findings and all the work that
13 they've done? The RAC recommendation is consistent
14 with the District Court Decision of June 27th of this
15 year.

16
17 As to the issue that has come up before
18 and may well come up today about sporadic use. I've
19 heard members state that they are concerned about this.
20 Salmon has been the main fish resource used by
21 subsistence users on the Kenai Peninsula. But as part
22 of their subsistence activities they've told us, and
23 studies have shown they take other freshwater fish,
24 they use other freshwater fish. While we might not
25 have as detailed or specific information on resident
26 species and while they may not be a staple they were
27 used, either opportunistic or as part of a pattern and
28 a variety of resources that people used. After all
29 resident species would be the main source of freshwater
30 fish in the winter and people like to eat fresh fish.

31
32 Methods to fish, resident species,
33 preserve them, cook them, were passed down by
34 generations just like for salmon. As we've heard from
35 Ninilchik, the Kenaitze Indian Tribal Council and
36 others, it's about sharing, it's not about numbers
37 taken or harvest. Patterns of use of resident species
38 will differ from those of salmon, but occasional use is
39 part of that pattern of use. Salmon are more abundant
40 and usually larger and when people are salmon fishing
41 surely there've been some resident species that can be
42 and have been used as well. There's no reason to limit
43 Ninilchik's opportunity to use all available resident
44 species for subsistence purposes. We haven't done so
45 in other areas of the state and the Court has told us
46 to be broad and permissive.

47
48 The Court said the definition of
49 pattern is frequent or, or widespread incidents. We
50 have evidence of widespread use. The where component

1 is not necessary, the stock component is not necessary.
2 Our program is set up to allow the continuation of the
3 opportunity for subsistence uses. Subsistence use is a
4 priority on Federal public lands where such uses are
5 allowed. This is our job, is to provide that
6 preference.

7
8 With respect to stocks, broad
9 definition of stocks is in keeping with how this Board
10 has approached C&T determinations to-date. Of
11 relevance is that the subsistence uses of the Kenai
12 River fish by Ninilchik has occurred. And I just feel
13 that the Courts and Congress never intended a C&T to be
14 such a hurdle or a barrier to subsistence uses, a
15 narrow definition, I think, would be very contrary to
16 what the Court has recently told us.

17
18 Thank you.

19
20 CHAIRMAN FLEAGLE: Thank you, Judy.
21 Other Board comments, discussion.

22
23 MR. EDWARDS: Mr. Chairman.

24
25 CHAIRMAN FLEAGLE: Gary.

26
27 MR. EDWARDS: While I would agree with
28 Ms. Kessler about the fact that we have had a lot of
29 information provided to this, I guess I draw a totally
30 different conclusion and my conclusion would be that it
31 does not provide substantial evidence. So that's why
32 I've been trying to go back and maybe re-look at some
33 of the information we discussed. And as we just heard
34 from the State, you know, there is, you know, some
35 question about whether the stocks that are actually
36 harvested have been harvested close to the village, in
37 fact, are the same stocks that were going up the Kenai.

38
39
40 Also was brought into question, this
41 table on 165 and I believe that was the table that is
42 the results of Dr. Fall's study and I notice that Dr.
43 Fall's in the audience, and I guess I'd like, since
44 that was brought up as evidence of, you know, kind of
45 consistent pattern of use I'd like maybe if Dr. Fall
46 could come forward, I'd like to ask him a couple
47 questions, if I may.

48
49 CHAIRMAN FLEAGLE: Jim Fall. Good to
50 see you again, welcome.

1 DR. FALL: Thank you, Mr. Chair.

2

3 MR. EDWARDS: You know.....

4

5 CHAIRMAN FLEAGLE: Microphone.

6

7 MR. EDWARDS: Dr. Fall kind of looking
8 back to November and trying to remember how the
9 discussions went, if I recall there was some concerns
10 that were expressed that the studies that the State did
11 were just kind of one year snapshots and, therefore,
12 weren't indicative of long-term use, and the other
13 evidence we had was a separate study that the tribal
14 council in Ninilchik had done and we also had evidence
15 that folks felt that the study they did, as far as
16 following proper procedures and everything were
17 appropriate, I think they had an affidavit from Dr.
18 Wolfe saying, yeah, your methods of collecting this
19 information was correct. So we kind of had that
20 information and then we had your kind of individual
21 snapshots.

22

23 And I guess my question is, do the two
24 single years your studies that showed this low level of
25 use as being about the same provided a better
26 assessment of actual use than the one question of
27 lifetime use, which seems to somewhat conflict with
28 that information?

29

30 DR. FALL: Mr. Chair. Mr. Edwards.
31 Just for the record my name is Jim Fall and I work for
32 the Division of Subsistence, the Department of Fish and
33 Game.

34

35 In preparing our comments and our
36 background for the deliberations on this particular,
37 specific question, we drew from two studies that the
38 Division of Subsistence conducted, both with funding
39 from the Office of Subsistence Management. There was
40 Technical Paper 253, which was a comprehensive harvest
41 survey that pertains to 2000, the year 2000 -- or 1999,
42 I believe, too, for Ninilchik and other communities.
43 And then we updated information on fish use in
44 Technical Paper 285. So our information isn't a single
45 -- is not a single snapshot and the information that
46 we've provided has information on two specific years,
47 where we asked very similar questions about where
48 people had fished for various resources and various
49 fisheries in those two years.

50

1 In addition, we, in the second study,
2 in 285, asked about lifetime use also and, that,
3 indeed, is the information that's in the table that was
4 referenced earlier.

5
6 I should point out that our study was
7 designed to try to depict the pattern of use by the
8 community of Ninilchik as it exists now and then
9 stretching that back in the past in terms of
10 experiences of people who live in Ninilchik now. So we
11 actually have several pieces of information, some about
12 specific years and some about lifetime uses of an area.
13 And our conclusion, as you've seen in our submission,
14 including the submission that we prepared in October
15 2006 was that the information was generally consistent
16 for those questions and those studies that we had done,
17 that the single year studies for two different years
18 found similar patterns, that most of the fishing, the
19 salmon fishing and other fishing that the community of
20 Ninilchik was engaged in presently took place near the
21 community, that there were relatively low levels of
22 participation in fisheries in the Kenai River. When we
23 looked at lifetime experiences, the percentages
24 obviously were higher but they were much higher, again,
25 in areas near the community and lower in the -- in the
26 Kenai River to the -- to the north.

27
28 And as far as comparing our information
29 and our studies with the study that the Ninilchik Tribe
30 conducted, there are some difficulties in comparing the
31 two studies. Ours was a random sample of everybody who
32 lives in the community, it wasn't designed to depict
33 specifically patterns by tribal members. The tribal
34 study was not a random sample, as I understand it, it
35 was an opportunity sample seeking out the experiences
36 of longer term residents and knowledgeable residents
37 and their lifetime use of the area. So there are some
38 difficulties in comparing those -- those two.

39
40 I'm going to stop there and you can
41 tell me whether I answered your question or not.

42
43 MR. EDWARDS: Well, I'm going to kind
44 of give a follow up and then maybe we can go back.

45
46 You know one of the things that in kind
47 of my mind kind of muddies the whole water on this C&T
48 is that we went through a 50 year period where actually
49 people were not allowed to participate so it's really
50 unclear, I think, to all of us as to what would have,

1 or would not have occurred if that period was open,
2 particularly once the road system was put in and other
3 opportunities to make it much easier for people to get
4 back there. But trying to go back in -- even further
5 in the historical data and I don't know if you've had a
6 chance or have read Dr. Boraas' paper on, you know,
7 Tribal Territories of the Kenai Peninsula, but in that
8 he seems to, you know, make a very strong case that
9 there were really very definitive areas set aside from
10 the -- between the Kenaitzes and the people who had
11 moved in and established Ninilchik and even used the
12 term, intrusive, in his report. But it does seem that
13 there were these clear delineated boundaries where --
14 which were more -- one was limited to, let's say the
15 Kenaitzes and another was to Ninilchik, and it's
16 unclear, you know, how far those boundaries, you know,
17 and that -- and those boundaries were kind of in
18 existence, but certainly, you know, when the closure
19 was put in in the '50s it, again, like I said, would be
20 difficult to determine, but are you familiar with that
21 study and -- and if you go back historically, back into
22 the -- to the late '80s or through the early '90s, do
23 we have any data other than his data that would seem to
24 indicate that these -- of these specific boundaries?

25
26 DR. FALL: Mr. Chair. Mr. Edwards.
27 Yes, I have read Dr. Boraas' paper. I first became
28 aware of the paper at -- in this room, actually, I
29 think it was last October when the paper was
30 distributed, and Dr. Boraas who's a professor of
31 anthropology for the University of Alaska does review a
32 set of historical documents to address tribal, what he
33 calls tribal territories on the Kenai Peninsula. Most
34 of the sources that he cites in his paper I am familiar
35 with and, in fact, many, if not most of those sources
36 we did cite ourselves in our earlier Technical Paper
37 253. And I'd have to say that I'm in agreement with
38 Alan on his points that he reviews the history of the
39 community of Ninilchik, which is well documented and I
40 don't think there's any controversy over that history,
41 that it was established as a retirement settlement for
42 former employees of the Russian/America Company and
43 their families, which included Alaska Native people.

44
45 What we noted in Technical Paper 253,
46 which Boraas also notes and makes the point is that,
47 for one thing, in the 19th and most of the 20th
48 Century, it cannot be said that Ninilchik was a
49 Dena'ina Athabascan community, unlike the Kenaitze
50 Tribe, which is a Dena'ina Athabascan community. And

1 Ninilchik, when it was founded, it's pretty clear from
2 the work of Katherine Arndt and others that just the
3 location of that settlement was selected so that it was
4 distinct from the Kenaitze territory and that their
5 activities would not interfere with the established
6 subsistence activities of the established Dena'ina
7 communities in that area.

8

9 We also note, as does Alan Boraas, that
10 over time intermarriage occurs, including intermarriage
11 between the Ninilchik community and other Alaska Native
12 people living on the Kenai Peninsula including Kenaitze
13 people. However, his conclusion that there was
14 recognized in the 19th and much of the 20th Century
15 boundaries between two distinct communities is one that
16 I support. I think he's right that the evidence
17 demonstrates that.

18

19 MR. EDWARDS: With that said would then
20 -- could one say that the result of your two year
21 studies are probably more reflecting of contemporary
22 time than historical time?

23

24 DR. FALL: Mr. Chair. Mr. Edwards.
25 Absolutely. Again, our focus has been on the Ninilchik
26 community now and trying to project that back in the
27 past and as we note, Ninilchik has changed greatly over
28 the last 50 years. The population has expanded
29 rapidly, most people who live in Ninilchik now are not
30 from Ninilchik originally, they've moved there for a
31 variety of purposes and we've tried to describe that
32 pattern. We also tried to describe how that pattern
33 has -- has changed and developed over time looking at
34 history and certainly the community of Ninilchik in the
35 '40s and '50s was different than today and from our
36 understanding and from what we've described in our
37 report, the -- the pattern of uses for that community
38 at the time was largely focused in the areas near that
39 community. Did -- did some level of use occur in other
40 portions of the Kenai Peninsula, of course, that --
41 that's been testified to in this forum and in others.
42 But as we concluded, the pattern of use that
43 characterized that community 50 years ago was one
44 focused to the south -- to mid-southern portions of the
45 Kenai Peninsula and today that it's still the case, of
46 course, uses of most of the Kenai Peninsula are now
47 facilitated by roads and -- and other forms of
48 transportation. But I think that the information that
49 we've collected accurately reflects that pattern of use
50 as it exists now.

1 MR. EDWARDS: Thank you, very much.

2

3 MS. GOTTLIEB: Mr. Chairman.

4

5 CHAIRMAN FLEAGLE: Judy.

6

7 MS. GOTTLIEB: Thank you. I think,
8 again, to bring back focus on what our decision is
9 today, our program doesn't use traditional territories
10 to strictly to define or determine C&T boundaries
11 because this would eliminate other users who never had
12 a traditional territory. And, you know, an extension
13 of that, as we all know, is that ANILCA is not strictly
14 Indian Legislation, we're looking at all users and all
15 uses.

16

17 Just a reminder of what Keith, our
18 solicitor, told us at one of our previous discussions,
19 that a meaningful use preference is not necessarily the
20 same as a historical preference. The meaningful use
21 preference is applied in context, conditions change and
22 people change.

23

24 Thank you.

25

26 MR. CESAR: Mr. Chairman.

27

28 CHAIRMAN FLEAGLE: Niles.

29

30 MR. CESAR: I agree with Dr. Kessler
31 and Ms. Gottlieb in terms of our original motion and I
32 believe the Court is giving us guidance of late as to
33 how we look at the use and I think it does talk --
34 well, I know it does talk about sporadic and
35 widespread. And if you look at the use by Ninilchik
36 and try to postulate how it could have changed over the
37 last 50 years had they had the opportunity to use the
38 Peninsula, I mean that's anybody's guess, but I don't
39 think that that's what we're here to do. We're here to
40 establish and insure that Ninilchik has the ability to
41 subsist. And I think that the information that I've
42 seen, read, listened to over the last seven or eight
43 iterations of this question over the last five or six
44 years leads me to believe and, I maintain, that the C&T
45 determination for residents of Ninilchik for resident
46 species was the right decision and I intend to support
47 that.

48

49 So I am not in favor of splitting the
50 vote. I think we ought to vote it up, vote it down and

1 get on with it.

2

3 CHAIRMAN FLEAGLE: Other comments.

4

5 George.

6

7 MR. OVIATT: Mr. Chairman. We've had
8 an awful lot of data presented to us over the last year
9 or so and I'm more on the page of what Gary is. When
10 you look at the amount of data that has come in as to
11 how much the Ninilchik has utilized or fished in the
12 Kenai River, especially for resident fish, even
13 resident fish within their own areas and in their own
14 backyard is very limited as to what they took,
15 especially trout.

16

17 When I look at this data and I believe,
18 you can correct me if I'm wrong, Dr. Fall, and I'll
19 bring you up to the mic if I am wrong, but it's my
20 understanding that when you do these calculations you
21 take your samples, that normally you'll have a
22 confidence interval which can be calculated as to how
23 accurate that information is and it's my understanding
24 that you were not able to give a confidence factor of
25 this information simply because of the low estimates or
26 the low number of sampling that was taken which would
27 not give you a confidence factor, so I don't know if --
28 if there's just -- that two or three, or four or five
29 people that said they fished there and -- or whether
30 it's more than that and whether your extrapolations of
31 using the 5.77 is really valid or isn't valid. Could
32 you address that for me, please?

33

34 CHAIRMAN FLEAGLE: Dr. Fall.

35

36 DR. FALL: Mr. Chair. Mr. Oviatt. We
37 do calculate confidence intervals for certain findings
38 in our work. Both of our reports include confidence
39 ranges for harvest estimates. And we're basically
40 developing a sample to get a fairly tight estimate of
41 pounds of harvest and -- and numbers of fish harvested
42 and -- and so forth. We don't calculate, although we
43 probably could try, but we don't calculate confidence
44 intervals for locations. We didn't -- we didn't look
45 at that.

46

47 However, like I said before we do have
48 two years now of information looking at location
49 information. Now, two years is better than one, one
50 year is better than none, but two years isn't as good

1 as three or four or five. If those two numbers were
2 radically different I'd say we really don't know what
3 the -- what the pattern of fishing in different areas
4 is, that they are similar suggests to me that we're --
5 we're -- we are doing a pretty good job of
6 characterizing the location of fishing in our study
7 years. That sampling is not an issue here. That we --
8 our sample was good enough to give us a pretty good
9 idea of where -- of what the pattern is of -- for
10 fishing locations for Ninilchik.

11
12 MR. OVIATT: Thank you. So, Dr. Fall,
13 I'm really talking about the resident species. So what
14 would be your estimate of poundage take in the Kenai
15 River of resident species by Ninilchik?

16
17 DR. FALL: Could you repeat the
18 question?

19
20 MR. OVIATT: I'm talking about resident
21 species. And so what would be your estimate based upon
22 your studies as to what the take of the resident
23 species would have been by Ninilchik in and the
24 confidence factor that you would apply to that?

25
26 DR. FALL: Mr. Chair. Mr. Oviatt. I'd
27 -- I'd need to go back to the report to take a look. I
28 don't recall that we actually recorded harvest by
29 location, it was more whether people fished there or
30 not. But I think if we look in the report you'll see
31 that the percentage of Ninilchik residents fishing for
32 resident species in the -- in the Kenai River was
33 relatively small. It was a couple of -- of percentage
34 points of the sample, that the majority, the vast
35 majority of the -- the harvest effort and, therefore, I
36 think it's fair to say the harvest itself was in
37 streams and in waters much closer to the community. As
38 a general statement I'm confident that that is the
39 case.

40
41 MR. OVIATT: Thank you, Dr. Fall. I
42 think that's all I have for you, thank you very much.

43
44 And when I look at customary and
45 traditional, you know, maybe I have a higher threshold
46 than some of my colleagues, but, you know, one percent
47 or two percent is not, to me, render that threshold
48 that gets us into customary and traditional use. And I
49 know we've had a big break between the 1950 and today
50 and our studies are based upon what people are telling

1 us that they do today or have done in the recent past
2 but when you go back to prior to 1950, to me, there was
3 some definite boundaries as to where people
4 traditionally fished and hunted in Ninilchik. And that
5 was demonstrated both in -- in fishing and hunting but
6 also in trapping. And I think it was Dr. Kalifornsky
7 -- Peter -- Peter, who -- I think it was from his
8 studies that he talks about the areas that people
9 trapped and I know this trapping issue has come up
10 because if somebody was trapping they may have taken
11 some fish from the ice to subsist on and he goes
12 through and he names people's names and the creeks that
13 they fished in -- or that they trapped in. And then at
14 the conclusion of all of that he says, the Ninilchik
15 people trapped -- trapping areas was south of Tustumena
16 Lake and Kasilof River. He takes it all the way down
17 to Anchor Point and he said they may have even gone
18 south to Homer.

19

20 To me those are distinct boundaries and
21 my studies of trappers tells me that they don't get
22 into each others boundaries, they -- they have their
23 area that they trap and they stay in those areas. And
24 so, you know, when I look at old customary and
25 traditional uses by Ninilchik I just don't believe they
26 were in the Kenai area and Kenai area drainage. Now,
27 recently they may have and with the road system, were
28 they up there sportsfishing, were they recreating, what
29 were they doing and it just doesn't reach the threshold
30 for -- for me to get into all resident fish for
31 Ninilchik in the Kenai area.

32

33 CHAIRMAN FLEAGLE: Thank you. Let's
34 take a break. I'll call you directly after the break,
35 Niles.

36

37 MR. CESAR: Okay.

38

39 CHAIRMAN FLEAGLE: 10 minutes Board.

40

41 (Off record)

42

43 (On record)

44

45 CHAIRMAN FLEAGLE: We're back on
46 record. Up next I had recognized for discussion, for
47 further discussion. Niles.

48

49 MR. CESAR: Thank you, Mr. Chairman. I
50 just wanted to make a couple points and hopefully,

1 briefly.

2

3 You know, I agree that with Judy that
4 we need to bring our focus back on the motion and, you
5 know, it's almost like turning into an evidentiary
6 hearing. We're bringing folks out and that kind of
7 bothers me because in a situation like that, you would
8 think that opposing sides would have full -- you know,
9 I -- why didn't we invite Dr. Wolfe to come forward and
10 present his side of the story? It just doesn't seem
11 like we're on focus to what we're supposed to be doing.
12 We're supposed to have a vote on the motion.

13

14 I'm, as I've stated, in favor of voting
15 it up or down. As I understand it the Chair will allow
16 new motions if it doesn't pass and I'm comfortable with
17 that. And I think that we're starting to get back into
18 what we've been going through for so long and I hear no
19 new evidence coming forward.

20

21 Thank you.

22

23 CHAIRMAN FLEAGLE: Thank you, Niles.
24 But I would point out that we are back in deliberations
25 and a Board member requested further discussion which I
26 allowed and I think is appropriate. And we do want to
27 make sure that we have as good a record as possible on
28 this action because the next step in this process, I
29 see that the State is exhausting their administrative
30 process, the next step is the legal circuit and we need
31 to have a good record for whatever decision we do make.

32

33 So I understand your concern and I'm
34 ready to move forward. My whole point is either of the
35 option that the Board chooses to move forward with will
36 ultimately get us to where this Board is going to get.
37 And, if, however, the motion that's before us now were
38 to be called for a question I could not vote against it
39 -- I mean I could not vote for it, I'm sorry, to
40 restate that, because I do not support the C&T for all
41 other fish that is rolled into this motion.

42

43 The discussion in November, in my mind,
44 was centered about salmon, salmon species and salmon
45 stocks and I still feel strongly that I can warrant, in
46 my mind, finding a positive C&T for those salmon
47 stocks, even with the additional comments that Gary
48 elicited from Dr. Fall. But I -- I cannot vote for the
49 all fish. And so if this motion does come before us I
50 will be a negative vote and the motion, I'm pretty

1 certain, is destined to fail.

2

3 So with that I want to open it back up
4 for Board discussion.

5

6 MS. GOTTLIEB: Mr. Chair.

7

8 CHAIRMAN FLEAGLE: Judy.

9

10 MS. GOTTLIEB: I was just going to ask
11 two things, please, I wonder if we could have some
12 comments from the RAC Chair and then perhaps followed
13 by our solicitor to summarize the recent court decision
14 on Chistochina C&T for us.

15

16 CHAIRMAN FLEAGLE: And the comments
17 from the -- would you specify what you're asking of the
18 RAC Chair, like we did of.....

19

20 MS. GOTTLIEB: Well, based on some of
21 the deliberations that have been done today.

22

23 CHAIRMAN FLEAGLE: Ralph, do you have
24 any comments.

25

26 MR. LOHSE: I have comments. And I can
27 address -- keep them to some of the things that have
28 come up on the table today.

29

30 I think that if you all read Pages 161
31 to 163 in the transcript you have here on a brief
32 history of fishing on the Kenai Peninsula it will
33 answer some of your questions.

34

35 I know boundaries and movement and
36 intermarriage and change has come up time and time
37 again and as a RAC we deal with rural people who are
38 qualified for subsistence on the Kenai. And as a RAC
39 we never considered it as a salmon or resident species
40 thing, we considered it as all fish. I think that that
41 RAC has been very, very clear about that. I can read
42 you some quotes from our past transcripts if you would
43 want me to, but I won't necessarily do that, but I
44 would suggest that you read Mr. Bunch's [sic] quote on
45 Page 21 if you need some clarity and you need some
46 information from somebody who lives there and is a
47 member of the RAC, I think it will address the thing
48 about who the people of Ninilchik are, currently are.
49 We're not talking about historically. Ninilchik is a
50 Creole population, we talk about that and I don't mean

1 that derogatory. We, as a nation are a Creole
2 population. I take a look at -- I'll take a look at my
3 own family who -- part of which is married into the
4 Athabascans in the upper Copper and with that marriage
5 comes the opportunity to go places and do things on
6 land that would be, you know, if they were recognizing
7 tribal boundaries, wouldn't have been available. That
8 same thing happened in Ninilchik with the intermarriage
9 between the Kenaitzes and the Ninilchik people.

10

11 And if you'd go back to history you
12 find that most of the marriages to begin with in
13 Ninilchik were Creole marriages, they were Native
14 Dena'ina's married to Russian fur traders for a lack of
15 a better way of putting it and they didn't just come
16 from the Kenai Peninsula, they came from all over.
17 They came from Kodiak. They came from the other side
18 of the Sound -- I mean the other side of the Arm. And
19 so what you're dealing with is you're dealing with a
20 people that were influx and in change and if you look
21 at Pages 161 to 163, a brief history on the Kenai
22 Peninsula, we had testimony in our meetings and in
23 front of this Board by people who said that the people
24 that live in Ninilchik today, some of them are direct
25 decedents from people who lived on the Kenai, that ran
26 trap lines on the Kenai. And I know what you mean by
27 trap lines, I run a trap line, I know how we honor each
28 other's trap lines, but I also know how things change
29 over time on trap lines.

30

31 So I would just have to stick with the
32 RAC's original and consistent and constant
33 recommendation that Ninilchik, as rural residents of
34 the Kenai Peninsula, entitled to subsistence, are, from
35 our standpoint, entitled to a customary and traditional
36 finding for the Kenai River.

37

38 Thank you.

39

40 CHAIRMAN FLEAGLE: Thank you, Ralph.

41 Board members.

42

43 Wini.

44

45 DR. KESSLER: I'd like to bring up some
46 points but I think the other part of Judy's request was
47 some legal advice with respect to Chistochina; was that
48 right, Judy?

49

50 MS. GOTTLIEB: (Nods affirmatively)

1 CHAIRMAN FLEAGLE: All right, thank you
2 for that reminder. Ken, would you like to speak that
3 request.

4
5 MR. LORD: Well, sure. What Judy is
6 referring to is a lawsuit that we are engaged in
7 regarding the scope, or the original question was the
8 scope, the appropriate scope of -- geographic scope of
9 C&T determinations. Whether it's appropriate for the
10 Board to make a C&T use determination on a GMU wide
11 basis or whether they have to be more narrow, narrowed
12 to a specific drainage if -- if the information is
13 available to do so.

14
15 In June we got a decision from the
16 District Court that basically affirmed the way the
17 Board has been doing business. The judge basically
18 said that as long as there is a -- some consideration
19 in the administrative record of the eight regulatory
20 factors for C&T and as long as the Board's decision is
21 reasonable in geographic scope and in it's nature and
22 that there's some evidence to support its decision on
23 the record, that decision will be upheld.

24
25 Now, you know, our friends at the State
26 still disagree with that so the decision is on appeal,
27 but in the meantime the decision of the District Court
28 is the law of the District of Alaska.

29
30 That's probably the quickest summary I
31 can offer.

32
33 Mr. Chair.

34
35 CHAIRMAN FLEAGLE: Thank you.

36
37 MS. GOTTLIEB: Mr. Chair.

38
39 CHAIRMAN FLEAGLE: Judy.

40
41 MS. GOTTLIEB: Just one follow up
42 question for Ken, please, you said that some evidence
43 is needed. We've heard from others that substantial
44 evidence is not apparent to them in this case, what's
45 the correct term for this Board to follow?

46
47 MR. LORD: The phrase substantial
48 evidence is actually a term used in judicial review.

49
50 If a -- an administrative agency's

1 decision is supported by admin -- by substantial
2 evidence, the court won't touch that -- let me back up.
3 If a factual determination made by an administrative
4 agency is supported by substantial evidence, the court
5 won't question it. If it's not supported by
6 substantial evidence, then the court will look more
7 closely. It won't necessarily overturn it but it will
8 look more closely. And that's basically what the judge
9 is saying here.

10

11 The substantial evidence standard, if a
12 RAC recommendation is not supported by substantial
13 evidence, the Board may overturn, not must, but may
14 overturn it. If the Board's factual determination is
15 not supported by substantial evidence a court may
16 overturn it, but not necessarily. It doesn't -- the
17 fact that there's not substantial evidence doesn't
18 prevent the Board from making a decision. So we don't
19 absolutely need substantial evidence to make a decision
20 but when we do have it a court won't touch that factual
21 determination.

22

23 MR. EDWARDS: Mr. Chairman.

24

25 CHAIRMAN FLEAGLE: Gary.

26

27 MR. EDWARDS: If I can, since we've
28 opened this area then, I guess.....

29

30 CHAIRMAN FLEAGLE: Go ahead, Gary.

31

32 MR. EDWARDS:I'd like to follow
33 up with some questions.

34

35 I mean in the judge's determination
36 where he basically concurred that the Board was within
37 its scope in making its decision, he also, I thought,
38 implied that -- he didn't say that -- well, let me
39 rephrase it. He did not restrict the Board from taking
40 a more restrictive look at C&T, he just said that the
41 way the Board did look at it in this case was
42 appropriate.

43

44 And then he also went on to say, I
45 believe, that -- that the geographic extent of C&T was
46 not unlimited. So it certainly kind of implies that
47 there are some -- there are some limitations to C&T and
48 that the Board has the discretion within looking at
49 those to either said -- maybe look at it narrowly or in
50 this case, in the Chistochina, very broadly.

1 MR. LORD: Well, that's true, the Court
2 was, in effect, saying that the Board has considerable
3 discretion in how it makes its C&T determinations.

4
5 The -- when I mentioned that the
6 Board's decision should be reasonable in geographic
7 scope, that was my interpretation of what you just
8 referred to in the decision. I think that's basically
9 what the judge was saying.

10
11 CHAIRMAN FLEAGLE: And as we are
12 reasonable in everything.

13
14 (Laughter)

15
16 CHAIRMAN FLEAGLE: Now, we need to do
17 something. And by my calculations I think we're pretty
18 much in the same place we were in November where -- and
19 testimony that I've heard here -- well, not testimony,
20 but further deliberations here reiterating positions
21 from the November meeting, I have three Board members
22 that are supportive of a determination for all fish, I
23 have two that are supportive of salmon only and I have
24 one that's not supportive of any.

25
26 So my reasonable conclusion is that
27 we're going to walk out of here with just salmon if we
28 just start taking some motions here or nothing and
29 that's the Board's choice so, again, I laid some
30 options at the beginning of the motion -- or at the
31 beginning of the session and I'm just going to open it
32 up to Board members, if, you know, I think we've got
33 adequate positioning and statements to base our
34 decision on; let's hear a motion or -- or call for the
35 question or something.

36
37 George.

38
39 MR. OVIATT: Mr. Chairman, I'll call
40 for a question.

41
42 CHAIRMAN FLEAGLE: All right,
43 question's called on the motion.

44
45 The question is recognized. Pete, on
46 the motion, please poll the Board.

47
48 MR. PROBASCO: Thank you, Mr. Chair.
49 We're referring to the motion on the screen that was
50 made in November of 2006 by Dr. Kessler.

1 Dr. Kessler.
2
3 DR. KESSLER: Aye.
4
5 MR. PROBASCO: Mr. Cesar.
6
7 MR. CESAR: Aye.
8
9 MR. PROBASCO: Mr. Edwards.
10
11 MR. EDWARDS: No.
12
13 MR. PROBASCO: Mr. Fleagle.
14
15 CHAIRMAN FLEAGLE: No.
16
17 MR. PROBASCO: Ms. Gottlieb.
18
19 MS. GOTTLIEB: Aye.
20
21 MR. PROBASCO: And Mr. Oviatt.
22
23 MR. OVIATT: No.
24
25 MR. PROBASCO: Mr. Chair. Motion fails
26 three/three.
27
28 CHAIRMAN FLEAGLE: Motion fails. And
29 as read into the record earlier with the opening
30 statements, if the question is called and the motion
31 passes we are concluded, which didn't happen. If the
32 question is called, the motion fails a new motion could
33 be made.
34
35 George.
36
37 (No comments)
38
39 CHAIRMAN FLEAGLE: Anybody.
40
41 (No comments)
42
43 CHAIRMAN FLEAGLE: I can't make a
44 motion. Judy.
45
46 MS. GOTTLIEB: Mr. Chairman. I'll move
47 that we provide a C&T determination for the community
48 of Ninilchik for salmon in those areas to the north of
49 the -- I just want to read it correctly and make sure
50 we have this correct -- by Ninilchik in the Kenai River

1 drainage and those areas to the north within the
2 Chugach National Forest and Kenai National Wildlife
3 Refuge.

4
5 CHAIRMAN FLEAGLE: And in the event
6 that's not entirely completely 100 percent accurate,
7 we're referencing the same geographical area that was
8 in the original motion.

9
10 MS. GOTTLIEB: Correct.

11
12 CHAIRMAN FLEAGLE: Thanks, Judy.

13
14 MR. CESAR: I'll second that.

15
16 CHAIRMAN FLEAGLE: We got a second.
17 Further discussion.

18
19 MR. CESAR: Call for the question.

20
21 CHAIRMAN FLEAGLE: Question's called.
22 Any -- any objection?

23
24 MR. EDWARDS: So it's really an
25 amendment?

26
27 CHAIRMAN FLEAGLE: No, it's not an
28 amendment, it's a new motion. New motion.....

29
30 MR. PROBASCO: It's a new motion,
31 salmon only.

32
33 CHAIRMAN FLEAGLE:C&T for salmon
34 only.

35
36 I opened it for discussion, I heard a
37 question, do you want -- if you want to talk I'll put
38 the question on hold, Gary.

39
40 MR. EDWARDS: I just -- I just want to
41 understand exactly what we're voting on. So this vote
42 would be to provide C&T for salmon only?

43
44 CHAIRMAN FLEAGLE: Affirmative.

45
46 MR. EDWARDS: Right. I guess what I'm
47 just -- I guess I would like to hear some -- some
48 rationale based upon, you know, the maker of the motion
49 and maybe the second, why -- why they feel that we
50 should go forward and do the salmon. I guess I didn't

1 hear any -- since it's a different motion, shouldn't we
2 have some discussion and lay some groundwork for why
3 we're making -- making that motion?

4

5 CHAIRMAN FLEAGLE: I think we have
6 adequate record that supports this decision. I think
7 it's the same decision we were discussing in November
8 that got -- somehow it got entrapped with all other
9 fish, I mean if other Board members want to reiterate a
10 position I'd certainly be willing to entertain that but
11 you want to.....

12

13 MR. EDWARDS: Well, Mr. Chairman, I
14 guess I -- you know, where I guess I was trying to get
15 at with my original question to the State, back in
16 November the decision on whether -- when you and -- and
17 I think George were voting and voting on stocks, you
18 were -- you -- it's -- it's my understanding and
19 looking back at the record the assumption was that
20 somehow as long as people fished on these particular
21 stocks, therefore, that C&T should extend to -- to
22 wherever those stocks go and -- and I guess I still
23 continue to -- to question that. As -- as we heard
24 earlier from the State, I think, there's some real
25 question whether these are the same particular stocks
26 that -- that are harvested there in front of the
27 community that ultimately make their way up to the --
28 to the Kenai. And so -- and, in fact, if they weren't
29 the same stocks then it seems to me that brings --
30 brings that -- that rationale into somewhat question.

31

32 And I guess my other question is, is
33 that, at what point do we draw limitation on these
34 stocks. One could argue that that fish that -- that go
35 up to the Yukon or the Kuskokwim, into Bristol Bay are
36 harvested in the Area M fishery, but I don't think we
37 would look at giving a, you know, King Cove or False
38 Pass, you know, C&T for the Yukon. So I mean the
39 question is if -- if this -- if the -- the decision is
40 going to be based upon the harvesting of stocks in
41 front of Ninilchik then I don't think that we've
42 provided substantial evidence that would support that.

43

44 CHAIRMAN FLEAGLE: Thank you, Gary.

45

46 DR. KESSLER: Mr. Chair.

47

48 CHAIRMAN FLEAGLE: Dr. Kessler.

49

50 DR. KESSLER: This very topic was

1 widely discussed in the meeting of April 30th and there
2 are transcripts from that meeting, Page 92 to 94, in
3 particular, the Forest Service representative, Steve
4 Kessler, discussed it in great detail.

5
6 He began by talking about what ANILCA
7 says and just to cut to the chase here because you have
8 all the information before you:

9
10 ANILCA doesn't say anything about
11 specific species, population, stocks,
12 just fish and wildlife. Is there
13 customary and traditional use of that
14 resource. This resource, in this case,
15 is fish.

16
17 He also goes on to explain, he says, I
18 cannot understand, given the broad
19 direction of ANILCA how it would be
20 intended that specific stocks should be
21 a narrow meaning. ANILCA says, the
22 taking for subsistence uses shall be
23 accorded priority on the public lands
24 over other uses. To me this means that
25 where there are subsistence uses they
26 should be allowed to continue.
27 Subsistence uses are taking of fish and
28 wildlife for food and other uses. If a
29 rural resident desires to take fish for
30 food on the public lands they must be
31 allowed to unless there are
32 conservation concerns or some other
33 narrow reasons not to allow it.

34
35 He, furthermore, describes how, in our
36 view, stocks pertain to broad areas.
37 So, for example, we talk about stocks
38 on the Kenai Peninsula area versus
39 Norton Sound area or Prince William
40 Sound versus the Yukon River, and
41 certainly each of these is very
42 different, but we have no basis or no
43 precedent in how we've handled
44 subsistence to try to carve up these
45 broad stocks into a more narrow
46 definition and that goes contrary to
47 ANILCA.

48
49 I, personally, am baffled by this sort
50 of second guessing about what subsistence users might

1 have wanted to target or target or use or what flows in
2 front of them and what doesn't, I mean to me that is
3 besides the issue, that the use of the resource, the
4 resource is the fish, the stock is the fish, and in
5 this case, for this motion, salmon on the Kenai
6 Peninsula.

7

8 We don't need to specifically ask
9 whether Ninilchik used one specific species or run or
10 stock or in one stream or one upper third of that
11 stream or whatever, we need to make a much broader
12 determination consistent with ANILCA.

13

14 Thank you.

15

16 CHAIRMAN FLEAGLE: Niles.

17

18 MR. CESAR: Yeah. I mean I agree 100
19 percent with Dr. Kessler. And in terms of Gary's, you
20 know, point about someone in King Cove having access to
21 the Yukon, I think the Court is real clear that we must
22 be reasonable. Now, if that doesn't pass the
23 reasonable test then no one's going to make that
24 motion. So, you know, we keep trying to confuse the
25 issue.

26

27 You know, the issue is, should they
28 have C&T for salmon, I say, yes, and that's why I
29 called for the question. I thought this had been
30 thoroughly debated in past meetings.

31

32 CHAIRMAN FLEAGLE: I agree. But we've
33 got one more comment, Gary.

34

35 MR. EDWARDS: I'm going to respond, I
36 mean, if you take -- when Dr. Kessler [sic] gave his
37 testimony, if you take that to its farthest extent it
38 would basically seem to me that it would say that we
39 really shouldn't have C&T for anything, because
40 obviously people harvested everything that walked or
41 crawled or flied or swam in this.....

42

43 MR. CESAR: I'll make that motion.

44

45 MR. EDWARDS:state at one point
46 or another.

47

48 (Laughter)

49

50 MR. EDWARDS: But -- but I do think

1 when Congress passed ANILCA, when they didn't use just
2 the term, subsistence use, but they said that that use
3 must be customary and traditional, then they did set
4 some parameters on it, unfortunately they didn't define
5 that and we have tried to define it through our
6 regulatory process and through our eight factors. So
7 -- so I do think that the intent, the original intent
8 of ANILCA was to set some parameters on what the extent
9 of that use could be and I do recognize that even
10 though stock is not a term used in ANILCA, it is
11 certainly a term that's used in our regulations.

12

13 MS. GOTTLIEB: Mr. Chair.

14

15 CHAIRMAN FLEAGLE: Judy.

16

17 MS. GOTTLIEB: Well, I'm glad we're
18 getting back to the eight factors because I think
19 that's what we are supposed to be doing today. And I
20 believe that we make customary and traditional use
21 determinations based on a holistic application of those
22 eight factors as outlined in our regulation and whether
23 a community generally exhibits them. Those factors
24 help make clear for us the economic, nutritional,
25 cultural and social character of customary and
26 traditional resource harvest and use. The factors are
27 not intended to be a formula that quantifies or assigns
28 numbers, they help us see patterns or the big picture.
29 This isn't a real site specific analysis.

30

31 I mean we have information from other
32 studies that show a use area, and we've all seen this
33 map before by Ninilchik of all over the Peninsula and
34 across the Inlet.

35

36 I think what the Court's told is that
37 there's no rigid regulatory requirement that a C&T
38 determination be made only for that area which actual
39 use has been demonstrated.

40

41 So, I think, again, we've been directed
42 to be broad and permissive and for that reason I would
43 support the motion.

44

45 CHAIRMAN FLEAGLE: The question is now
46 recognized.

47

48 Pete.

49

50 MR. PROBASCO: Thank you, Mr. Chair.

1 The new motion to find a positive C&T for the community
2 of Ninilchik for salmon only, Kenai Peninsula district,
3 waters north of and including Kenai River drainage
4 within the Kenai National Wildlife Refuge and the
5 Chugach National Forest.

6

7 That's the intent of the motion.

8

9 Mr. Cesar.

10

11 MR. CESAR: Yes.

12

13 MR. PROBASCO: Mr. Edwards.

14

15 MR. EDWARDS: No.

16

17 MR. PROBASCO: Mr. Fleagle.

18

19 CHAIRMAN FLEAGLE: Yes.

20

21 MR. PROBASCO: Ms. Gottlieb.

22

23 MS. GOTTLIEB: Aye.

24

25 MR. PROBASCO: Mr. Oviatt.

26

27 MR. OVIATT: Yes.

28

29 MR. PROBASCO: And, Dr. Kessler.

30

31 DR. KESSLER: Aye.

32

33 MR. PROBASCO: Mr. Chair. Motion

34 carries, five/one.

35

36 CHAIRMAN FLEAGLE: Thank you. That

37 concludes the action on that issue. Board members,

38 closing comments.

39

40 MS. GOTTLIEB: Mr. Chair, are we

41 available for another motion or not necessary?

42

43 CHAIRMAN FLEAGLE: Do you want another

44 motion?

45

46 (No comments)

47

48 CHAIRMAN FLEAGLE: Okay, yes, we're

49 open for another motion.

50

1 MS. GOTTLIEB: Well, I'll move
2 similarly that we provide a customary and traditional
3 use determination for Ninilchik for resident species on
4 the similar waters of the Kenai Peninsula, north of the
5 Kenai River drainage and those areas under discussion
6 today in the Chugach National Forest and Kenai National
7 Wildlife Refuge.

8
9 (No comments)

10
11 CHAIRMAN FLEAGLE: Okay, thank you,
12 motion dies for lack of a second.

13
14 And I understand the formality that
15 you're attempting to use there. I think it was pretty
16 clear from the vote on the main motion that there
17 wasn't support from the Board to do that, but I
18 understand your request for the formality to put it out
19 for another vote.

20
21 With that we're going to go back to the
22 agenda, Item No. 4, other business.

23
24 We didn't have anything raised at the
25 start of the meeting. Board members, anything else.

26
27 Okay, Pete, comment.

28
29 MR. PROBASCO: Thank you, Mr. Chair. I
30 don't have any new business. We've got the calendars
31 out to the Board members and we've got a lot on our
32 plate. But I think it's important that we thank our
33 Southcentral Council Chair for taking time from his
34 busy commercial season to make this one day meeting
35 and, thanks, Ralph, for doing that. I know you had to
36 juggle your schedule but we appreciate that.

37
38 CHAIRMAN FLEAGLE: Thank you. Comment.

39
40 MR. LOHSE: May I respond to Pete.

41
42 CHAIRMAN FLEAGLE: You may.

43
44 MR. LOHSE: Thank you. It was
45 worthwhile coming. I have a question I'd like to ask
46 the Board now, when I go to my RAC, we've seemed to
47 define Ninilchik and the Kenai much, much finer than
48 we've defined anything else and I was just thinking of
49 the freshwater species up in the rest of Southcentral,
50 for instance, in Unit 11 and Unit 13 and I know we

1 haven't gone through all of the communities there and
2 decided what streams they've fished Dolly Vardens on
3 and rainbows on before we gave them a preference for
4 all freshwater fish in Unit 11 and 13, and is it the
5 instructions that I'm getting from this Board then that
6 in the future, when we look at fish stocks like that in
7 other areas of Southcentral, we need to look at them as
8 individual streams and individual stocks and not as a
9 use pattern from the residents that live in the area?
10 Is that the kind of instruction I'm getting from this
11 Board?

12

13 CHAIRMAN FLEAGLE: Not from me. I
14 think that we all recognize the complexity of the
15 Kenai, given the fact that it hasn't been subsistence
16 -- recognized for subsistence use for over 50 years and
17 the fact that the State recognizes that the entire
18 Peninsula is non-subsistence, it's just such a
19 controversial area that this required a lot more
20 discussion and finesse and I think that there's another
21 factor that come into play is the connectivity between
22 the community and the Federal lands, it's not adjacent
23 or really even near, I think you see some differences
24 in Unit 13 and 11 there, but, anyway, no, Ralph, I
25 wouldn't say that this is precedent setting or ground-
26 breaking, but I think that it's appropriate for -- for
27 this decision.

28

29 MR. LOHSE: Thank you.

30

31 CHAIRMAN FLEAGLE: Do we have any other
32 final closing comments, Board members.

33

34 (No comments)

35

36 CHAIRMAN FLEAGLE: Is there a motion
37 for adjournment?

38

39 MR. CESAR: So moved.

40

41 CHAIRMAN FLEAGLE: It's been moved.

42

43 MR. OVIATT: Second.

44

45 CHAIRMAN FLEAGLE: All right, meeting's
46 adjourned. Thank you everyone.

47

48 (Off record)

49

50 (END OF PROCEEDINGS)

C E R T I F I C A T E

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

I, Joseph P. Kolasinski, Notary Public in and for the State of Alaska and reporter for Computer Matrix Court Reporters, do hereby certify:

THAT the foregoing pages numbered 2 through 47 contain a full, true and correct Transcript of the FEDERAL SUBSISTENCE BOARD WORK SESSION, VOLUME I taken electronically by Nathan Hile on the 13th day of September 2007, beginning at the hour of 8:30 o'clock a.m. at the Gordon Watson Conference Room, 1011 E. Tudor Road, Anchorage, Alaska;

THAT the transcript is a true and correct transcript requested to be transcribed and thereafter transcribed by 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 15th day of September 2007.

Joseph P. Kolasinski
Notary Public in and for Alaska
My Commission Expires: 03/12/08