FEDERAL SUBSISTENCE BOARD

PUBLIC WORK SESSION MEETING

VOLUME I

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

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

MEMBERS PRESENT:

Tim Towarak, Chairman
Kristin K'eat, Bureau of Indian Affairs
LaVerne Smith, U.S. Fish and Wildlife Service
Beth Pendleton, U.S. Forest Service
Sue Masica, National Park Service
Julia Dougan, Bureau of Land Management

John Hilsinger, State of Alaska Representative

Keith Goltz, Solicitor's Office
Jim Ustasiewski, DOG, Office of General Counsel

Recorded and transcribed by:

Computer Matrix Court Reporters, LLC
135 Christensen Drive, Second Floor
Anchorage, AK 99501
907-243-0668
sahile@gci.net
CHAIRMAN TOWARAK: Good morning. I'm going to call this meeting to order. My name is Tim Towarak. I was recently appointed as Chairman for the Federal Subsistence Board. Just by way of introduction, I'm from Unalakleet which is in the Norton Sound just southeast of Nome. I want to welcome everyone here. This is not a sign of the new Chair. It's a replacement. Couldn't find the regular Chair's -- the gavel, so -- we're going to begin with introductions and I'm going to ask the Board and those on the table starting from my right, your left, to introduce themselves and we'll work our way down to the left.

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

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

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

MS. PENDLETON: Beth Pendleton with the Forest Service.

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

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

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

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

MS. STICKWAN: Gloria Stickwan, Southcentral Regional Advisory County.
CHAIRMAN TOWARAK: Thank you. I'd like to introduce Pat Pourchot with the Secretary of Interiors Office. Welcome, Pat. And Tina Hile is our court reporter, making sure everything's written on the record.

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

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

Thank you.

CHAIRMAN TOWARAK: Thank you.

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

CHAIRMAN TOWARAK: Okay.

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

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

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

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

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

MS. SWANTON: I'm Nancy Swanton with the National Park Service.
MR. USTASIEWSKI: I'm Jim Ustasiewski with the Department of Agriculture. Office of the General Counsel.

(Laughter)

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

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

Mr. Chair.

CHAIRMAN TOWARAK: Thank you. Any other

-- Mr.....

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

Thank you.

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

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

MS. K'EIT: Second

CHAIRMAN TOWARAK: You heard the motion and the second. Any discussion.
(No comments)

CHAIRMAN TOWARAK: If there isn't any discussion, all those in favor of the motion say aye.

IN UNISON: Aye.

CHAIRMAN TOWARAK: Any opposed say nay.

(No opposing votes)

CHAIRMAN TOWARAK: Motion passes. The agenda is approved. And Item No. 3 is an information exchange. Pete.

MR. PROBASCO: Mr. Chair. This is an opportunity for myself and the Board members to share information. I just want to do a clarification for on the record. As the Board members know that anytime the Board deals with regulatory issues and making a decision on a regulatory proposed change as Agenda Item 7 is, that has to be conducted in a public meeting. If you look at our news releases, it did announce it as such. However, if you look at our agenda, it speaks to work session and that's a typo on our part. It's should say work session/public meeting. So just a clarification for the record.

Mr. Chair.

CHAIRMAN TOWARAK: Thank you. We will move forward. Just one item of our lunch break today. We're going to take a break at noon until about 1:15 or so especially considering the driving conditions out there. I think we'll try to reconvene at 1:15 or as soon as possible thereafter. So -- we forgot to introduce those of you on line -- on the phone. Would you please introduce yourselves.

MR. NICK: Alex Nick, Council Coordinator for YK RAC.

MR. BUE: Fred Bue, Fish and Wildlife Service Subsistence Management, Yukon, Fairbanks, and Gerald Maschman. Thank you.

CHAIRMAN TOWARAK: Is that it?

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

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

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

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

And thank you.

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

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

CHAIRMAN TOWARAK: Any other.

(No comments)
CHAIRMAN TOWARAK: Go ahead.

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

So Larry Buklis, congratulations.

(Applause)

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

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

(No comments)

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

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

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

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

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

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

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

Once a Board member makes a motion, then both the State and the Regional Advisory Councils can only speak if they're recognized by the Chair. That's after a motion is being made. And within your packet, we have found through trial and error the best way to make motions is in the positive and so the Chair will be
looking for a Board member -- usually it's the Agency
that the proposal being addressed is -- resides, in other
words, their land status, and we ask that the Agency
makes the motion in the positive, in other words, I move
to accept Proposal number so-and-so. So all motions are
made in the positive and then we work from there. And
that fact -- that one brief reminder is in your packet.

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

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

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

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

Now, executive sessions is a meeting that
is conducted for the purpose of reviewing proprietary
data or private information, engage in attorney-client
communications, or making decisions on personnel matters
and we have strived to try to keep these to a minimum.
We have been critiqued that we do too many of them. So
we have to keep that in mind as we work and we elect to
go in executive sessions, to make sure if it's -- that we
meet the criteria that it's warranted and necessary.

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

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

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

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

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

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

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

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

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

CHAIRMAN TOWARAK: Any questions.

(No comments)
CHAIRMAN TOWARAK: Thank you very much.

Are there any other -- other information.

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

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

(Laughter)

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

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

It was my fondest hope as I say to bring to you or to have delivered to the Board by now a signed letter to Board members from the Secretary of Interior following up on that press release and that public report with the specific directives that were aimed for most -- you know, suitably for the Federal Subsistence Board. There were a number of recommendations that dealt some internally with the Department of Interior, sorts of budgeting and personnel actions, but there were 10 or 11 actions directed that were really directed at the Board for implementation. There's probably the classic long story and the short story, but the short story is that letter has not yet been signed by the Secretary and as all of you know probably better than I, that's a long and torturous process and I'm personally very frustrated to not bring you the signed letter or have available that signed letter today. It's day to day, week to week, and it's the surnaming process and all that entails which is
a bit of a mystery to me, again probably more familiar to you all, has just not been completed.

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

Mr. Chair, I would like to point out though the first three items. One is probably the most significant -- or the directive is the desire to expand the current Board for the inclusion of two additional members representing rural subsistence users. This does require a regulatory change. It's something that I and members of -- the leadership of OSM and the Solicitor's Office have met on already. There is draft regulatory language being worked up and discussed. The assumption here would be that this a Part A/Part B secretarial regulatory function and, you know, I even hate to say this, but in the interest of time, which may or may not prove to be true, I think the desire would be for this to be carried forward as a secretarial regulatory change. Obviously that language was pretty simple and straightforward, pretty much reflecting the language here, would be reviewed by the Board, by the RACs or at least the RAC Chairs, and as I think Pete is going to discuss later, a tribal consultation process and then moving as quickly as we can to a Federal registered notice and publication which would probably involve a 30- or 60-day formal public review and then, you know, a rule-making adoption or modification at that time.

Clearly the sooner that would be implemented, the better. It's hard to tell what the time frame is, but it's certainly months and that's probably if everything goes right. So that's something I would certainly call to the Board's attention.
The second thing is again what is probably a general sort of desire and that's to provide additional deference to the RACs in the rule-making process. As most of you know, there -- over the years, there's been a fairly strict interpretation of when deference and when the exemption or the caveats to the deference applies. It's taken from one specific section in Title VIII of ANILCA that speaks to this deference given in the taking of wildlife resources and the taking -- so-called takings has been the limitation on the deference. There are a number of other things involved in the subsistence program as you all know that aren't strictly takings and the desire here was to expand the deference to the RACs for recommendations on a wider range of issues rather than just this strictly that a taking regulation.

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

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

And then the third thing, the review of the 2008 memorandum of understanding with the State, again to nobody's surprise, in the subsistence review, that turned out to be one of several items that consistently was raised as problematic. Different people probably had different interpretations of which parts were problematic, but I think again subject to what the Board views as a procedure that would accommodate this review and obviously on your agenda there's the annual getting together with the State to review the MOU and obviously there are opportunities to initiate that discussion and there's probably a role for the Board to decide amongst themselves what are the things that -- or the procedure that they would wish to follow in
initiating these further discussions with the State on
the MOU. And again to -- it is general and it's subject
to further interpretation or procedural decisions by the
Federal Subsistence Board.

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

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

Thank you very much.

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

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

CHAIRMAN TOWARAK: With myself being
brand new, I personally would like to have a discussion
with the rest of the Board in this particular issue and
where and when we could do it, you know, I'm open to any
suggestions, as it is -- appear to be going and I have no
idea how long No. 9 is going to take, but it looks like
we might have some time either later today or the first
ing tomorrow morning before our 1:30, our review with
the -- scheduled review with the State on the MOU. So I
-- if it's agreeable with the rest of the Board, I'd like
to leave an open slot for our discussion on where do we
want to go with the MOU in the future.

(Council nods affirmatively)

CHAIRMAN TOWARAK: Pete. Directive from
Pete.

(Laughter)

MR. PROBASCO: Mr. Chair, you're looking
at me. I think that would be good. I know the State
plans on meeting in the morning separate from us. I
think it would be good to -- for the Board to meet to
discuss it. I wanted to remind the Board that the MOU is
in place. It's a signed document and that we agreed in
July to meet with the State tomorrow. What I view No. 3
is it's open for discussion on where we go from here.
It's very clear to me that they want us again, whatever
the MOU is, to -- if we agree to go forward is to put it
back out to the Councils for input.

I know myself some of the other agencies'
representatives have been working with the State to look
at areas of clarification. We will be ready to discuss
that both with the State as well as independently with
you. So I think it's a topic that we need to explore and
see where we go from here.

Mr. Chair.

CHAIRMAN TOWARAK: Thank you, Pete. Any
other questions of Mr. Pouchot. Go ahead.

MS. PENDLETON: Mr. Chairman. Pat. In
looking at this list, there's quite a number of items and
I'm just thinking about, you know, timelines and
priorities and I appreciate, you know, identifying some
of the highest priorities, but it strikes me that this
-- these items are the most important thing that this
Board needs to take on this next year collectively. And
I think there would be some advantage, whether we do it
at this meeting or in conjunction with our January
meeting, that we identify and dedicate some time to
really flush out to Staff, to figure out how we're going
to accomplish this work, and set some priorities, and as
you've identified, some high priorities, but be able to
go through and identify a process for working through
this list of recommendations.

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

MS. MASICA: Mr. Chair.

CHAIRMAN TOWARAK: Yes.

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

MR. PROBASCO: Mr. Chair.

CHAIRMAN TOWARAK: Go ahead.

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

CHAIRMAN TOWARAK: Go ahead.

MS. K'EIT: Thank you, Mr. Chair. Just
for the record and further consideration that, you know,
we did schedule this meeting to review the MOU before the
review process really got going and obviously before we
received these recommendations or directions. So I'm
just concerned that it might be premature to do a lot of
inging or other type work tomorrow in our meeting with
the State, you know, unless we decide to use this
material from Pat as some guidelines of that review
tomorrow. But it is -- it's still -- again it's unclear
to me what -- if there's more expected of the Board for
action tomorrow at the MOU review than just commenting
and suggestions for editing.

So thanks.

CHAIRMAN TOWARAK: Pete, you have
comments.

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

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

MS. K'EIT: Okay.

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

MS. DOUGAN: Mr. Chair.

CHAIRMAN TOWARAK: Yes.

MS. DOUGAN: I share some of Kristin's
concerns and feel that the discussion with the State
tomorrow would be almost inappropriate if we did not have the opportunity to discuss our approach to that meeting before tomorrow. So if we can have that time as a Board to talk about that, think a little about the direction and what our intent of the meeting and so we understand that and can clearly communicate that to the State, I think that would be helpful to me.

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

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

Mr. Goltz.

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

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

MR. PROBASCO: Here.

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

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

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

(No objections)
CHAIRMAN TOWARAK: No objections. Then we will so move. Are there any other questions of Mr. Pourchot before he leaves.

(No comments)

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

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

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

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

CHAIRMAN TOWARAK: Thank you. Mr. Kessler.

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

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

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

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

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

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

For wildlife, the request is to expand
delegation for all in-season actions for deer, moose, and
goats. Those are the principal species that we generally
have to issue special actions for. To provide -- for
wildlife, delegation to all 10 district rangers for the
land they manage and delegate authority for both
emergency and temporary special actions. We do have a
temporary special action authority delegated for deer in
Unit 4 and I believe a couple other units already. So
the temporary special actions are those that are over 60
days in length. And the reason that's needed for
wildlife is because often the seasons are greater than 60
days in length.

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

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

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

Now, as far as Council action, at the
Southeast Council's meeting last month that was held in
Hoonah, the Council reviewed a draft of this letter
that's before you, requested a modification which has
been made, and voted unanimously to support this request
to the Federal Subsistence Board. The modification
specifically addressed consultation with the Regional
Advisory Council and its local members -- and that was to add the local members on -- prior to the in-season manager taking action.

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

I guess I'm ready for any questions.

CHAIRMAN TOWARAK: Are there any questions from the Board.

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

CHAIRMAN TOWARAK: Go ahead.

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

MR. KESSLER: Yeah.

MS. DOUGAN: Thank you.

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

CHAIRMAN TOWARAK: Go ahead.

MR. PROBASCO: Thank you, Mr. Chair. I think that the point of clarification is it's the Council members not others outside of that.
MS. DOUGAN: Not other locals. Local residing Council members.

MR. KESSLER: Right. Council members.

MS. DOUGAN: Thank you.

CHAIRMAN TOWARAK: Any other questions

(No comments)

CHAIRMAN TOWARAK: If not, is the Board ready to act on this request.

MS. PENDLETON: Mr. Chairman, I would move that we support the request of the Tongass National Forest for additional and streamlined delegated authority as described in the letter of October 7th, 2010, from Forest Supervisor Cole. This action would be consistent with the recommendation of the Southeast Subsistence Regional Advisory Council. If there's a second on that motion, I could give you a brief rationale for this motion.

CHAIRMAN TOWARAK: Is there a second to the motion.

MS. MASICA: I'll second it.

CHAIRMAN TOWARAK: Seconded.

MS. PENDLETON: My rationale, you know, briefly the letter and Steve's presentation I think have done a very good job in laying out the authority and the rationale for this request and I feel comfortable with this request because of our delegations to follow the guidelines that are set out in our special action regulations, also the requirement for consultation with the Regional Advisory Council Chair and any local members and a consultation with the Alaska Department of Fish and Game. Also requires that we keep an administrative record, requires a public hearing for any action that would extend over 60 days, and also it places the authority closer to the ground, to those line officers with the most knowledge for a given area and who are also accountable to the local users.

In addition, if there's any discomfort with the local action, members of the public can always come to the Board and ask for our oversight and if the
delegated official is uncomfortable making a decision because of local issues, that official can always elevate the special action decision to the Board. Any action taken is in place no longer than to the end of the regulatory cycle and then finally in the long run, I expect that this action should better ensure the conservation of fish and wildlife and the continuation of subsistence uses for rural residents that reside in the Tongass National Forest.

Thank you.

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

(No comments)

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

(Council nods affirmatively)

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

MR. PROBASCO: Roll call vote.

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

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

MS. DOUGAN: Yes.

MR. PROBASCO: Ms. K'eit.

MS. K'EIT: Yes.

MR. PROBASCO: Mr. Towarak.

CHAIRMAN TOWARAK: Yes.

MR. PROBASCO: Ms. Pendleton.

MS. PENDLETON: Yes.
MR. PROBASCO: Ms. Masica.

MS. MASICA: Yes.

MR. PROBASCO: And Ms. Smith.

MS. SMITH: Yes.

MR. PROBASCO: Motion carries, Mr. Chair, six/zero.

CHAIRMAN TOWARAK: Thank you. The motion passes unanimously. We've been in session for about an hour and we have I think two items on the next agenda that's going to probably take a considerable amount of time. I'd like to ask for about a 15-minute recess.

MR. PROBASCO: Okay.

CHAIRMAN TOWARAK: Okay. We'll take a 15-minute recess then.

(Off record)

(On record)

CHAIRMAN TOWARAK: Can we call this meeting back to session here.

(Pause)

CHAIRMAN TOWARAK: I will call our meeting back to order. We're on Item 8 on our agenda, customary trade enforcement briefing and Stan Pruszenski's going to lead us through that discussion. Stan.

MR. PRUSZENSKI: Good morning, Mr. Chair. Very good on the name. I appreciate that. We haven't met before and now you did an awesome job. My name is Stan Pruszenski. I'm the Special Agent in charge for the U.S. Fish and Wildlife Service here in Anchorage, Alaska.

The briefing that I'm going to give you will be fairly brief, not because we haven't been busy looking at the issue, but because of some of the information that we have is still being actively looked at by ourselves and the U.S. Attorney's Office, so I will not be able to go into a lot of the specifics and details.
of what we did. But I would like to talk a little bit about what we did and why we did it and what we think potentially the next steps might be.

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

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

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

And again a couple of areas have
attempted to limit -- self-limit themselves or attempt to quantify potentially what a significant commercial enterprise. That would be Bristol Bay region and the Copper River region.

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

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

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

What did we find? What we found was that a significant -- and I shouldn't use that term because that's -- a large portion of the fish that are being sold from the Yukon River are harvested from State waters. Anecdotally we have come up with a figure of about 80 percent of the fish are harvested in State waters. State regulations don't provide for the sale of subsistence
harvested fish. Again we look primarily at salmon strips, not with the idea that whole fish sales don't occur. They probably do and again probably user to user is more common or what we did find is actually on the Copper, that was fairly common that whole fish may be sold, but again I think that's a reflection of transportation issues that the fish on the Copper can be transported whole fairly easily.

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

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

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

I think the other thing that -- and this is not an editorial, but I think it's a fact is that the regulations are very complex and it was clear to us when we were dealing with people on the river, you know, the
idea of State waters and Federal waters, State laws, Federal laws, you know, the idea was that everybody's doing it and it's that where your customary and traditional fishing location was back when the Refuges or Parks were created, you know, it was luck of the -- you know, luck of the draw for you whether you were in State waters or Federal waters and if you wanted to continue this -- you know, your subsistence activity in this manner. So we found that a lot of people continue to do their activity either in spite of the regulations or the laws or in some instances, you know, within the laws and regulations if they were on Federal lands and waters.

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

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

Thank you, Mr. Chair.

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

(No comments)
CHAIRMAN TOWARAK: I have a couple of questions and I was approached -- well, as you know, the APN convention is broadcast on a statewide basis, so there was a lot of coverage when the undersecretary for the BIA addressed the convention and there was some fairly serious allegations made about the method used in the overt operation that you call and you stated that all of the violations appear to have taken place in the State waters?

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

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

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

CHAIRMAN TOWARAK: Including commercial operators?

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

CHAIRMAN TOWARAK: Any questions from anyone else. (No comments)

CHAIRMAN TOWARAK: The reason I bring the undersecretary for the BIA process up was it appeared to be a -- it was a public -- oh, I don't want to say it was an embarrassment to the undersecretary, but he didn't have any answers for the allegations and I'm wondering if there's going to be any attempt by enforcement to give this information out that you gave us to justify the work that you did.
MR. PRUSZENSKI: With respect to the specific allegations that were made at AFN?

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

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

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

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

Go ahead.

MS. K'EIT: Thank you, Mr. Chair. Mr. Pruszenski, I have a few questions and I realize that you may not be able to answer all of them or answer specifically. My first question is regarding a timeline for the next steps. Let's see. My notes say that the next steps are tracking the money, tracking the fish but
not trying to quantify certain aspects at this point. So
what is the process that will take place with the U.S.
Attorney's Office such as pressing charges, going to
court, presenting a case, and so on?

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

MS. K'EIT: So do you have any rough
estimate, you know, like this year, 10 years, this
difetime, you know?

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

MS. K'EIT: Obviously.

(Laughter)

MR. PRUSZENSKI: I'm hoping less than 10
years, but I would say probably some of the initial
activities could be as early as, you know, next year and
then -- I mean that is my time frame is -- the sooner the
better. The sooner we can have information brought out
-- all the information brought out to the public, the
better. Oftentimes wildlife investigations that we've
handled through the United States Attorney's Office,
although we have great support, again we're at their
mercy and they have priorities as well and if we have an
operation, it makes a local splash. You know, everybody
is aware of it, understands the potential need for a
change, and then -- you know, as this drags on, you know,
that sense of needing change kind of goes away and we
just go back to the status quo and again I'm thinking --
I'm hoping that my process may be independent of a
process that this Board has direct control over, so we
can do that simultaneously. You know, if we -- if you
think that there's need for change that you have
mechanisms at the -- that you can start that irrespective
of my time frame and when I am able to conclude the
inquiry.

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

CHAIRMAN TOWARAK: Go ahead.

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

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

MS. K'EIT: Asking them what?

MR. PRUSZENSKI: Where they caught the
fish.

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

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

MS. K'EIT: Thank you. Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Thank you. Any other questions.

(No comments)

CHAIRMAN TOWARAK: Go ahead.

MR. PROBASCO: Mr. Chair. Just to also bring to your attention, in your packet are two letters, one from the Western Interior Regional Advisory Council and then one from a former Council member, Mr. Gerald Nicholia, both requesting future action by the Councils and subsequently the Board and we'll discuss this when we get to other issues. But it's focusing on the need to get the three Councils on the Yukon together to start looking at solutions, one of which addresses customary trade. So I just wanted to draw your attention to that and then when we get to other issues, there's a course of action the Board needs to address and then how we would proceed through the winter.

Mr. Chair.

CHAIRMAN TOWARAK: Thank you. And thank you for your updating us on this issue and we will have further discussions regarding, you know, the notion of working on direction from this Board so that your enforcement division will have maybe more clear guidelines as to how, you know, the future is handled.

MR. PRUSZENSKI: Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Thank you. That concludes discussion on Item 8. What I'd like to do for now if it's okay with the rest of the Board, we had public testimony opportunity for non-agenda items earlier this morning and we didn't have anyone with any issues, but we did not check our board -- our box -- our inbox and we have a request from Floyd M. Kookesh from Juneau wanting to address the Board on a non-agenda Ninilchik proposal and I'd like to give him the floor if there's no objections from the Board to address us on his issue.

Mr. Kookesh.

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

CHAIRMAN TOWARAK: We'll go on Indian time.

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

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

The communities that were targeted, it's unfortunate they did this. They're probably poor, depressed communities and we know that for a fact that when we talk about village survival like they did at Alaska Federation of Natives, that was the issue. This idea that we're out there hunting them down, it was bad enough when the State of Alaska was doing this. That was one thing, but now we have the Feds doing it. Next thing we'll have Federal Staff saying that they don't think subsistence is broken and then where do we go from there.
But I have to say that -- in their
defense that we have to allow for this customary trade
and when you start doing this, I believe that it is
wrong, that when I subsist I know that the seine I use --
you're aware of my brother Albert's issue with having
more than 15. I know for a fact that when we make our
seine, we make our sets, our seines don't know about the
regulation that it could only take 15 per person. And we
can't help the way we do our subsistence, but a lot of
what we do is not wasted. That's the best part. If
you're going to target anything, you should be targeting
wanton waste. Fish and Wildlife Service should be
focusing on more important issues instead of petty crime.
You know, that's pretty petty especially when you're
talking about depressed communities.

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

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

So with that said, while I was sitting
back there waiting and listening to the gentleman talk,
there's a sign right over here that says I can and maybe
a lot of people should read it and take from it because
when you read the sign, it says empower the poor and
these are good points. Maybe it's -- it may be a small
sign, but it does mean something and it says care for the
elderly, feed the hungry, educate the children. Maybe
that's what Fish and Wildlife Service should be doing is
educating us. Maybe there's some things -- some good can
come out this wrong action. And it says enrich countless
lives and preserve freedom. It's right there. Right
there just on the side wall. People should take the time
to read it. There's some very good information and I
think it's very relevant to what we're discussing.

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

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

CHAIRMAN TOWARAK: You can take time.

MR. KOOKESH: Yeah. I was lying.

(Laughter)

MR. KOOKESH: I lied. From the Central
Council, what we'd like to see presented -- and I'm sure
everybody here feels the same way -- is we'd like to see
a resolution to the issues that are before us. When I
put my report into the president of Central Council, it
was three pages of bullets on issues that are unresolved.
When I did my presentation at Central -- at Grand Camp,
it's the president of Central Council, it
was three pages of bullets on issues that are unresolved.
I told them I have good news. The good news is
subsistence is broken. The bad news is subsistence is
broke. And you and I both know in the Native community,
we don't have these wonderful war chests, you know, like
other non-Native organizations where we can just
literally keep on coming till we tear your soul out of
your heart. But what I'm talking about here is in
Southeast, a lot of land is managed by the United States
Department of Agriculture. We don't have -- we have very
little Interior. And what's being discussed out there,
I call it a rumble in the forest, is the need for more
community-based management which we need to start looking
at.
You can't manage -- you know, like they would say in the czars in Russia, that's how we feel about the Federal Subsistence Board. You're way up here; we're way down there. We need to really look at the subsistence and the management approach we're taking to it. We want to secede from the Federal Subsistence Board is basically the language that I'm hearing coming out of Grand Camp and all of -- and the Native community. They're not satisfied with this process. It's a Department of Interior process in our opinion.

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

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

But hopefully we'll get to a time in our life and I'm hoping in my lifetime that we can resolve these subsistence issues and learn to recognize that it is our traditional way of life, that we're not asking for anything else. We're not wanton waste. We're not raping
and pillaging. I know that there are many organizations out there and I'm speaking to as I -- because I -- I sense that you still have a contact with AFN, but I sense that the -- the way we're going, I sit there and watch you from afar down in Juneau because not all of us have the opportunity to come up there.

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

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

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

I want to discuss those items also.

And also I note that last time I was up here I had lunch with Carl Jack and I know that Carl Jack is gone and I recognize the value of your position and I'd really like to believe and I truly hope that this -- the case is that you get a strong -- what I call a strong
liaison with you. I really believe it'll be
complementary to the work you need and -- and then help
us as -- resolve the issue of subsistence.

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

Thank you.

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

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

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

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

I expressed earlier too that I would
prefer that the whole question goes back to the RACs and
have the RACS give us their recommendations before we
finalize anything. We're not going to finalize anything
in the next day or so. My purpose for the executive
session is to sit down and figure out where we're at with the whole issue as far as the Board is concerned, without -- and I think -- I would prefer that, you know, when we get the RACs' recommendations, it will be part of a public process.

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

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

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

Mr. Chair.

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

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

(No comments)

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

(Off record)

(On record)

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

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

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

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

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

There's a long regulatory history for the issue of customary and traditional use for fish on the Kenai Peninsula. I'm not going to go through all of this. It is in your analysis on Page 9 of your materials, but I've also included a table that summarizes the history of the issue. It's been going on so long it became a little easier to present it in a table as well. That table can be found on Page 3 of your Board
So if you turn to Page 4 of your Board materials, you'll find the executive summary of FP09-07 and that includes the Southcentral Council's recommendation to the Board at that time, the InterAgency Staff Committee comments and the ADF&G recommendation. The Southcentral Council met recently on October 9th, 2010, and reaffirmed their recommendation. This recommendation, the InterAgency Staff Committee comments, and ADF&G new comments will be provided after my presentation.

I'll now present a summary of the Staff analysis for Proposal FP09-07 which the Board is reconsidering today. This analysis begins on Page 7 of your materials. Proposal FP09-07 was submitted by the Ninilchik Traditional Council. It requests that Ninilchik be added to the communities with a positive customary and traditional use determination for all fish in the Kenai River area. In the Kenai River area, the Federal Subsistence Board has already recognized the customary and traditional uses of salmon but not resident species by Ninilchik residents. Ninilchik also has a positive customary and traditional use determination for all fish in the Kasilof River Drainage. The proponent of Proposal FP09 [sic] requests that the Board recognize the community of Ninilchik's customary and traditional uses of all fish in the Kenai River area similar to its uses of salmon and comparable to the customary and traditional use determination finding for the Kasilof River Drainage. Ninilchik is the only community whose uses are under consideration in this analysis. Ninilchik is comprised of two census designated places. What I mean is that when we talk about Ninilchik, this includes two designated -- census designated places, Ninilchik and Happy Valley. And if you want to look at the description of those places, that can be found in the analysis.

The Federal Subsistence Board has already recognized the customary and traditional uses of residents of Hope and Cooper Landing for all fish in the Kenai River area. Until 1952, freshwater streams in the Kenai Peninsula were open to subsistence fishing. In
1952, all streams and lakes of the Kenai Peninsula were closed to subsistence fishing under Territory of Alaska regulations. Only rod and reel or hook or line were allowed for personal use. From 1952 until 2002 when Federal management began in Federal waters, Ninilchik residents were not allowed to subsistence fish for resident species in the Kenai River area. Because such prohibition constitutes an interruption beyond the control of Ninilchik residents, which is one of the eight factors the Federal Subsistence Board considers when making a customary and traditional use determination, the Board necessarily must make its decision on the best available information concerning historical patterns of use prior to the imposition of the prohibition or contemporary patterns of use under existing regulations.

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

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

The Board has already recognized Ninilchik residents' customary and traditional uses of
all fish in the Kasilof River Drainage. The question before the Board today is whether or not this use extends into the Kenai River area. We have a fair amount of information on this issue. There's information regarding Ninilchik's more recent harvest of resident fish species in the Kenai River area provided by a study done by Fall and others in 2000, 2004, 2006. The Ninilchik Traditional Council had a study done in 1994 and 1999. Chen in 2005, Wolfe in 2006, and then we had significant public testimony at three Southcentral Council meetings and five Federal Subsistence Board meetings over the years.

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

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

We also know that the Kenai River area use has decreased in recent years due to changes in regulations, competition with other users, and population changes. Two studies conducted by Fall and others in 2000 and 2004 documented Ninilchik residents' recent harvest and use of resident fish in the Kenai River area. This study reported that less than 1 percent of households harvested rainbow trout and lake trout in
Kenai Lake or Kenai Mountain streams on the Kenai Refuge. Based on Fall's research in each of the two years of study, although levels were low, there was some level of use by Ninilchik residents in the Kenai River area for harvesting resident fish. While Ninilchik's use of the Kenai River area were not substantial during the study years, there are no unimportant uses -- subsistence uses in ANILCA.

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

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

Finally, I would just like to note that conservation concerns are not part of the decision process for making customary and traditional use determinations. Such concerns for conservation are properly addressed through the implementation of seasons, harvest limits, and methods and means of the harvest. To conclude, the OSM conclusion is to support Proposal FP09-07. Based on the holistic application of the eight
factors presented in the analysis, Ninilchik residents have a pattern of customary and traditional use of using resident species in the Kenai River area.

Thank you, Mr. Chair. That concludes my presentation.

CHAIRMAN TOWARAK: Thank you. Are there any questions.

(No comments)

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

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

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

Subsistence opportunities for residents of Ninilchik exist under State regulations. This proposal revisits decisions already made by the Federal Board in November 2006 and would grant residents of Ninilchik a Federal Subsistence priority for freshwater species occurring in the Kenai River within the Kenai National Wildlife Refuge and the Chugach National Forest. Central to those earlier decisions was the fact that C&T
could not -- customary and traditional use could not be
demonstrated for freshwater species within the Federally-
managed waters.

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

Thank you.

CHAIRMAN TOWARAK: Any questions of the
Board.

(No comments)

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

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

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

I want to point out some of the simple
facts. Obviously as we all know, this proposal is
supported by OSM, a majority of the InterAgency Staff
Committee, and I believe the RAC on three different
occasions, most recently unanimously here in Cordova the
last month. As we know and we heard, the C&T
determinations for Ninilchik in this area are for salmon, moose, bear. So we have a recorded documented use of other species and harvests.

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

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

Another thing I'd like to touch on is that, you know -- and Helen mentioned this, is that, you know, it's not just the Native way, but the subsistence way of life is not throwing fish back. We don't throw fish back. When you're fishing for salmon and other species, it's an opportunistic harvest. You know, we
don't want to concentrate on the surveys that might show a lower percentage uses for resident species. I don't think that's really applicable to what we're asking for. I mean there's other activities that are going on as I previously mentioned, other C&T activities and we feel that the record stands very clearly to support continued -- or an expansion to resident species on the Kenai River.

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

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

Thank you.

CHAIRMAN TOWARAK: Thank you. Are there any questions.

(No comments)

CHAIRMAN TOWARAK: Thank you for your presentation. Floyd Kookesh.

MR. KOOKESH: Mr. Chairman.
CHAIRMAN TOWARAK: Yes.

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

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

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

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

Thank you.

CHAIRMAN TOWARAK: Thank you, Floyd. Any questions from the Board.
(No comments)

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

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

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

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

There's also a quantitative approach to it. Quantitative approach is you go out into a community during a one-year or a two-year period of time and you do
survey and you ask comprehensive questions in a randomized manner. That type of survey is on Page 24 of the RFR and it shows -- and this is what the Board had to work through at the last time because it was faced with two decisions. It was faced with the decision of what do we do with salmon and it was faced with the decision of what do we do with resident species.

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

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

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

That's basically what the Board decided was how it was going to justify the Kenai River Drainage for salmon in the Kenai River Watershed for Ninilchik. It wasn't based on the 4 percent on the Russian River. So they said based on quantitative data, we're going to have to extend the boundaries of that who, where, and what was fishing and the where was in State waters. And they were saying that the fish that are caught in State waters because they spawn and part of it is rearing on Federal lands, that's going to qualify.
Well, then the Board looked at, well, can we make that same justification for resident species and if you go further over, there are very low numbers of harvest for resident species on Federal lands. Now obviously resident species are freshwater species. They're not going out into the saltwater and the State waters and there's not harvest there. If you look down on other lands and other areas where residents of Ninilchik were harvesting fish, resident species there at Kasilof River, on Crooked Creek, and on the Ninilchik River, those are not on Federal lands.

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

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

If you look just on the numbers, I would say that is a very low bar, that's a very low threshold for any community to jump over. There are new communities on the Kenai Peninsula. We have eight different Russian Orthodox communities that have been established in the last hundred years. They're rural communities. Do we set the bar that their hunting and fishing on Federal lands was blocked by the same block of subsistence and that we allow them to qualify -- those communities to qualify even though they would have very low rates of harvest. What about Tyonek which is a rural community on the west side of Cook Inlet. There are stories that my mother-in-law Claire talks about in her childhood where they had relatives from Tyonek come over. Do we do the same thing. It's opportunistic. If they were over on the Kenai Peninsula and they're hunting and fishing, it may not -- if you do the same lifetime histories of other communities, they'll have similar rates of hunting and fishing on Federal lands on the
Kenai Peninsula, but do we want the consistent, year-to-year subsistence use to be so low that any community can almost qualify anywhere in the State.

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

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

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

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

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

(No comments)
CHAIRMAN TOWARAK: Thank you very much.

And the last one that we have is Sky Starkey.

MR. STARKEY: Thank you, Mr. Chairman.

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

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

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

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

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

One thing that I think, you know, where subsistence users really -- the ones I represent, Ninilchik and others, really have a problem is this business of getting into 4 percent, of 1 percent, and percentages that are derived from harvest surveys that are conducted by people that aren't familiar with the villages -- or may be. You know, but anyway you get these percentages and then they start getting batted around and I think in this case it's particularly important to remember that the history here is that Ninilchik for 50 years -- for 50 years -- now actually 60 years were -- you know, were denied their subsistence opportunity. It was illegal for them to subsistence fish. They sat on their -- in their houses and watched everybody else fish legally while they went underground
to survive as a way of life, while they fished at night, while they did whatever they could to get the fish that they needed.

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

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

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

So, you know, really everything is overwhelming. It's stunning to me really that we've failed on this vote several times. So -- but anyway, let's turn to what's new and there are things that's new. So why should you change your vote if -- you know, what could you base a vote on that's new.
Well, you know, I think there's a lot of things that are new here. First of all, there's the -- what's new is that, you know this Board is more familiar with the C&T determination process now than it was the last time it considered this issue. You're more familiar with hopefully the subsistence way of life and the way it works and what is involved in harvesting fish and wildlife resources opportunistically and it's a pattern of use. You're more familiar with subsistence uses on the Kenai. You've had -- you know, you've had three or four years now to see how it works for people to have subsistence use of freshwater fish on the Kenai and I think you've discovered that really the impacts are very -- are minimal. Probably nonexistent is a better way to put it.

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

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

And you've -- I think -- hopefully you've developed a greater familiarity with just subsistence uses as being opportunistic, that people don't throw things away, that they take what they need and see that born out time and time again. And hopefully you've become more familiar with the Regional Advisory Committee system and seen the wisdom in this system and particularly on issues like customary and traditional use. I mean I think it was important what the last speaker said, a member of RAC, and that the RAC has a
role of relying on the historical oral traditions and their knowledge of what happened in their territory. I mean many people on these RACs are tribal members, what happened in their countries and how subsistence works. I mean that is the intent of ANILCA that these people bring this local knowledge to the table and that they're given deference and they're supposed to be given deference except in times when there's lack of substantial evidence and in this case, there's more than substantial evidence. OSM is in favor of the proposal or the Staff Committee back when they made recommendations which I understand may have changed, but anyway recommended you pass and so there's way beyond substantial evidence. There's no threat to this conservation or subsistence uses, so the RACs are due deference. So hopefully you've become more familiar with that, more comfortable with that.

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

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

So thank you, Mr. Chairman.
CHAIRMAN TOWARAK: Thank you, Sky. Any questions of Sky.

(No comments)

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

MR. STARKEY: Thank you.

CHAIRMAN TOWARAK: That concludes the open floor public testimony on RFR09-01. We will next hear from the Department of Fish and Game. Tom. I'm sorry. Oh, Regional -- I'm sorry. Here I go again jumping. Regional Council comment -- recommendations.

MS. STICKWAN: The Council reaffirms its decision that we made for positive C&T for the Ninilchik. We heard a tremendous amount of public testimony from people's use and we've had it come before us three times. We voted yes three times. So there was no new information provided that would have changed our mind. We said yes. We made a modification in 2007. It's in your packet. You can read what those modifications are, but we heard that people through intermarriages, they went up to fishing those waters and it's just like Native people all over the State of Alaska here. If you intermarriage, you use our resources.

And that was our position was that -- we heard it three times and we wanted to be given C&T and we hope that the Board will consider our -- and give us positive C&T and give us deference. This would be a good opportunity for the Board to show that they are going to use -- going to give us deference. This will be the first meeting that you will do that if you do and it will show to the public that you are going to -- you're taking the Secretary's words seriously, that you are going to give deference other than just taking, but to C&T. That would be good opportunity for you to show that.

There's tremendous amount of evidence in the written reports. We've heard stories. We've heard reports from Ninilchik. We heard reports from Fish and Game. We heard reports from U.S. Fish and Wildlife about the C&T of -- from Ninilchik. There's no reason whatsoever why they can't be granted a C&T today. There's -- in the past you looked at percentages. That I don't think -- because they were shut down in '50s from
fishing, I think that had a lot of impact on their ability to go out and fish and that's why those numbers are zero or very small is because they didn't have the opportunity to go and fish and those numbers are the reason why it's like that, but you shouldn't be looking at numbers. You ought to be looking customary and traditional use of the resources, have they used it. Have they handed down traditional lores and stories and all of those criterias. Look at them and read the record. You've heard this before, as many times as we've had, I'm sure. And the record proves they've had C&T. There's no question at all that they don't have C&T.

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

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

(No comments)

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

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

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

(Laughter) 

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

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

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

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

Another issue is the nature of the surveys which by their nature do not differentiate as the regulations require between the use of different species or the specific Federal lands where the harvest occurred, nor do they identify how often the use occurred. So it's
difficult if not impossible to use that data to draw a conclusion of a long-term, consistent pattern of use of specific stocks in specific areas.

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

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

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

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STATE OFFICIAL WRITTEN COMMENTS
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Alaska Department of Fish and Game
Comments to the Federal Subsistence Board

November 8, 2010

Federal Subsistence Board
1011 E. Tudor Road
Anchorage, AK 99503
Dear Board members:

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

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

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

The Board twice rejected this proposal
for resident fish (September 13, 2007, and January 14, 2009) based on the Board’s regulations and the lack of evidence of C&T use by Ninilchik in the Kenai River area (chiefly the upper Kenai River). Those Board regulations establish standards for C&T proposals, as discussed in our May 14, 2010, letter to the Board (enclosed) and our December 1, 2008, comments on FP 09-07 (in your Board meeting materials). In Alaska v. Federal Subsistence Board (9th Cir. 2008), the Ninth Circuit Court confirmed that these standards must be followed. The Court instructed that, when reviewing FSB decisions, the Court inquiry into the facts is to be searching and careful to make sure that the FSB has properly applied the standards based on substantial evidence found in the record.

Specifically, the Board regulations and the Court’s decision provide that a community may only obtain a C&T determination if evidence demonstrates that the community has customarily and traditionally harvested the specific resident fish stocks (not just species) in the upper Kenai River area within federal areas. A customary and traditional use must be a long-term consistent pattern of use by that community of those specific fish stocks from that specific area recurring in specific seasons for many years. The Board previously determined that stocks of rainbow trout, lake trout, Dolly Varden char, and other resident species within federal boundaries in the Kenai River area constitute distinct stocks and that residents of Ninilchik have not customarily and traditionally taken significant numbers of those distinct stocks from that area.

The only documented use of resident species, including Dolly Varden char, rainbow trout, and lake trout, by Ninilchik from the federal lands in the
Kenai area was by 0-1% of the community for the two years surveyed. The Board concluded that salmon migrating by Ninilchik in marine water and caught there included salmon from stocks which eventually reached the upper Kenai River where federal lands exist, and so same stocks of those salmon were involved to some degree. However, the Board correctly concluded this same reasoning cannot apply to the resident species of the Kenai River area and that Ninilchik’s take of those resident stocks from upper Kenai waters was too small and infrequent to demonstrate a consistent, long-term pattern of use of those distinct stocks.

Ninilchik Traditional Council requests that the Board make a different decision based on the same available evidence and information. As the Office of Subsistence Management Executive Summary for RFR 09-01 reports, there is no new information to consider for Proposal FP07-09 since it was last addressed by the Federal Subsistence Board in January 2009. Ninilchik Traditional Council relies on a survey methodology that has never been used in any other C&T determination. Those surveys are not substantial evidence under the regulatory C&T standard because they are for use of all species and stocks of fish from various locations over the entire lifetime of the respondents. The surveys do not differentiate, as the regulations require, between use of salmon and resident stocks, do not specify use from federal lands, and do not identify how often the use occurs. The surveys do not show a long-term consistent pattern of use of the resident stocks within federal boundaries. These deficiencies and the different types of information available were more thoroughly explained at the Board meetings on September 13, 2007, and January 14, 2009, and in papers presented to the Board dated March 8,
Ninilchik Traditional Council also argues that subsistence users are opportunistic and that releasing a caught fish is repulsive so a C&T should be granted Ninilchik for taking any resident species in the Kenai River area, along with the C&T priority they already have to take salmon in the area. That boot-strap argument is contrary to the Board’s regulations and to the Court decision in Alaska v. Federal Subsistence Board (9th Cir. 2008). The Ninilchik Traditional Council also argues that the Board’s prior rejections of its proposal failed to defer to the recommendation of the regional advisory council, but legal counsel to the Board has repeatedly advised that, under ANILCA, we have not been granting deference to Councils on this question of C&T, only on the question of take.

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

Finally, since the Board’s November 12, 2009, action to review its prior decision re-opens the entire issue of the customary and traditional use determination of all fish in the Kenai
River area by residents of Ninilchik, according to the Executive Summary for RFR 09-01, the Board should reconsider and reverse the positive C&T determination for Ninilchik use of salmon in the federal areas of the Kenai River drainage. That determination was speculative and unsupported by substantial evidence. There is no evidence of what percentage, if any, of the separate and distinct salmon stocks customarily and traditionally caught by Ninilchik close to home are actually headed for the Kenai River area. The Board should reject the proposal as to resident stocks and also as to salmon stocks.

In conclusion, we fully support granting a positive C&T determination for any rural community that can demonstrate a consistent pattern of use of a specific fish stock within a specific geographic area, according to the Board’s regulations. The level of use demonstrated by available evidence for this C&T determination is insufficient to meet the Board’s regulations. We urge the Board to carefully consider these concerns and act to consistently apply the criteria in the Board’s regulations.

Sincerely,

Tina Cunning
Special Assistant
Enclosure

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

Dear Mr. Fleagle:
At the May 2010 meeting, the Federal Subsistence Board will be making eleven determinations on whether residents of some communities are found to have evidence of customary and traditional use of certain wildlife populations. Information regarding which communities have customary and traditional use of wildlife populations is not only necessary in determining which communities have a subsistence priority but also in restricting uses among such communities under Section 804 of the Alaska National Interest Lands Conservation Act when wildlife populations are insufficient to provide for all such communities. I urge the Federal Subsistence Board's careful consideration of the following concerns regarding the sufficiency of information and legal guidance upon which you will be basing your decisions.

The Ninth Circuit Court of Appeals established legal requirements for federal customary and traditional determinations in its opinion in State of Alaska v. Federal Subsistence Board, 544 F.3d 1089 (9th Cir. 2008). The Court held that the Federal Subsistence Board's customary and traditional determinations must be supported by substantial evidence relevant to the customary and traditional standards, including substantial evidence of a specific rural community's or area's demonstrated customary and traditional taking of a specific wildlife population or specific fish stock (not species) within specific geographic locations. The Court made this clear in the following comments, which were essential to the Court's decision and were not merely dicta or unrelated observations.

Customary and traditional determinations must be based on substantial evidence that the customary and traditional standards are met. The Court required
that the Federal Board's customary and
traditional determination have
substantial basis in fact, required
that the FSB's fact finding [be]
supported by substantial evidence, and
required that the FSB properly
consider the customary and traditional
standards, including the eight-factor
analysis that the FSB is directed to
apply. 544 F.3d at 1094-96, 1098.
Thus, in making each customary and
traditional determination, the Federal
Subsistence Board must consider all of
the customary and traditional standards,
must find facts relevant to those
standards, and must base its factual
findings on substantial evidence
contained in the record.

Substantial evidence is required of a
specific rural community's or area's
customary and traditional taking. The
Court observed that the regulations
provide that the C&T determination
shall identify the specific community's or
area's use of specific fish stocks
and wildlife populations. Id. at 1096
(emphasis added). In applying these
regulations, each C & T determination
must be tied to a specific community or
area and a specific wildlife
population. Id. at 1097 (underlined
emphasis added). Thus, each customary
and traditional determination must be
based on substantial evidence in the
record of a specific rural community's or
area's customary and traditional
taking.

Substantial evidence is required of the
rural community's or area's customary
and traditional taking of a specific
wildlife population or specific fish
stock (not just taking of that species).
The Court rejected the Federal
Subsistence Board's view that population
can mean species, stating that the
addition of the terms stock and
population in 50 C.F.R. 100.16(a)
denotes a group smaller than a species.
Id. at 1096. The Court held: In order
for the FSB to have considered the
relevant factors when making the C & T
determination, the FSB must have
considered Chistochina's subsistence use
of specific moose populations, and not
Chistochina's use of moose in general.
(Id. (emphasis added)).

Substantial evidence is required of the
rural community's or area's customary
and traditional taking of a wildlife
population or fish stock in a specific
geographic area. The Court found the
regulations clearly tie C & T
determinations to the specific locations
in which wildlife populations have been
taken. Id. at 1097. It added:
Specific communities and areas and
specific fish stocks and wildlife
populations are, by definition, limited
to specific geographic areas. Id.
Therefore, the Court emphasized, a C &
T determination is a determination that
a community or area has taken a species
for subsistence use within a specific
area. Id. at 1097-98 (emphasis in
original). Looking beyond the use of
the terms stocks and populations, the court reasoned: Additionally, the
eight-factor analysis . . . requires the
FSB to consider the geographic reach of
the community and the community's use
activities. Id. at 1098. The Court
found that [g]ranting C & T
determinations that are limited to the
areas in which communities have
traditionally harvested a resource
serves both purposes [of ANILCA]. The
geographic limitation protects the
subsistence activities traditionally
practiced by rural Alaskans and protects
species by ensuring that only those
communities that have traditionally
taken from a population are given a
priority to do so in the future. Id.
(emphasis added). This geographic
limitation is at the core of the Court's
decision.
These requirements were not, as some
have suggested, unnecessary comments by
the Court. They are holdings and
directives essential to the Court’s
decision. The Court also instructed
that, when reviewing Federal Subsistence
Board decisions, the Court’s inquiry
into the facts is to be searching and
careful to make sure that the Federal
Subsistence Board has properly applied
the standards based on substantial
evidence found in the record. Id. at
1094. The available information for the
eleven proposed determinations before
the Federal Subsistence Board at this
meeting varies widely in providing
evidence of use, interpreting court
direction, and application of federal
regulations. I request that the
additional necessary information be
discussed by the Board consistent with
the Court’s directions for each
determination.

Sincerely,

Denby S. Lloyd
Commissioner

Thank you.

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

(No comments)

CHAIRMAN TOWARAK: We will then go the
ISC comments.

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

You can see the comments on Page 33 in
your materials. The InterAgency Staff Committee,
otherwise known as the ISC, found the Staff analysis for
the proposal FP09-07 to be a thorough and accurate
evaluation of the proposal. The majority of the Staff
Committee noted that a holistic application of the eight
factors demonstrates that residents of Ninilchik have a
customary and traditional pattern of use of resident fish
species in the Federal public waters of the Kenai
Peninsula District, while a minority of the State
Committee noted that there is not a pattern of use by the
community of Ninilchik for resident fish species in these
same waters.

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

Mr. Chair.

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

(No comments)

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

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

(Off record)

(On record)

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

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

(Laughter)

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

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

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

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

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

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

(No comments)

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

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

MR. PROBASCO: Thank you, Mr. Chair.

This is the opportunity for the Board to discuss any other relevant information pertaining to the analysis. We use this opportunity to clarify positions, ask Staff for clarification or additional information. It's an opportunity to dialogue with the State and the Chair and so that's that opportunity. Once we're completed with that, then we'd go to Item H where the Board would --

where the Chair would ask for a motion and once we reach a motion, then it's before the Board and the Chair and the State can only be recognized at that point in time by the Chair to speak.

Thank you, Mr. Chair.

CHAIRMAN TOWARAK: The floor is open for discussions.

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

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

CHAIRMAN TOWARAK: Did that answer your question.

MS. PENDLETON: Yes, it helps. Thank you.
CHAIRMAN TOWARAK: Further discussion.

(No comments)

CHAIRMAN TOWARAK: Not hearing any, are we ready for Item H, Board deliberation and action.

(Council nods affirmatively)

CHAIRMAN TOWARAK: We will move on to that agenda topic. The floor is open.

MS. K'EIT: Mr. Chair.

CHAIRMAN TOWARAK: (Chair nods affirmatively)

MS. K'EIT: Thank you. I've been on this Board a pretty short time, although a little longer than you now, but not much. My predecessor, Mr. Cesar, as you know had been on the Board for quite a while and would have lots of wisdom and experience to share, but I have good discussions with him and have good support from my Staff and also want to thank the ISC for their work in putting together the documentation for us. It is important for me to put on the record for our Bureau what our evidence -- the evidence that we're considering as we -- as BIA makes our decision and provides our input to this Board and this long process of getting to this point, the -- over a decade now that's been referenced to many times.

It reminded me of a book that I picked up early on when I was taking some GIS training and the book was called How to Lie with Maps and I bring that up because I'm -- although in my engineering program, we had to take statistics classes -- excuse me.

CHAIRMAN TOWARAK: Could I break in for a second.

MS. K'EIT: Sure.

CHAIRMAN TOWARAK: Let's have a motion to put the question on the floor.

MS. K'EIT: Oh.

CHAIRMAN TOWARAK: And then we will get into.....
MS. K'EIT: To discussion.

CHAIRMAN TOWARAK: ....discussion.

MS. K'EIT: Okay. Thank you.

MS. PENDLETON: Mr. Chairman, I'd like to make a motion and move to adopt the proposal. And if there's a second on that, I'd be happy to share some of the rationale.

CHAIRMAN TOWARAK: Is there a second to the motion.

MS. K'EIT: Second.

CHAIRMAN TOWARAK: Seconded by Kristin.

MS. PENDLETON: Thank you, Mr. Chairman. First I'd like you to know that my motion is a little bit different from the Council's recommendation and the Council excluded certain species from the customary and traditional use determination in their recommendation. And functionally I really see no difference between the proposal and their recommendation, but I do believe that the proposal as submitted by the Ninilchik Traditional Council is simpler. It's more encompassing and would align with the customary and traditional use determination already in place for Hope and Cooper Landing.

I plan on voting affirmatively for my motion and would like to just share a few of the key points that I thought about and ask that you consider in your voting. First of those is that Ninilchik residents have consistently harvested all food fish available on the Kenai Peninsula since the community was settled in the mid 1800s. Second, information and analysis shows that lifetime use of fish species by Ninilchik residents in the Kenai River area is about 28 percent of the households and that's a pretty high number actually. Recent use has decreased some, but that could be due to regulations and competition with other users.

The third point is that although recent use of resident fish has been relatively low, the data also show what I consider to be a consistent pattern of use. Further as explained in the analysis, there are no unimportant uses. A holistic view using the eight factors in regulation as described in the analysis leads...
me to the resident fish positive customary and
traditional use determination.

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

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

Thank you.

CHAIRMAN TOWARAK: Thank you. Go ahead.

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

MS. PENDLETON: Uh-huh.

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

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

MR. PROBASCO: Thank you.

MS. PENDLETON: Uh-huh.

CHAIRMAN TOWARAK: Thank you. Any other
discussion. Go ahead.
MR. GOLTZ: I just want to point out on the record that the letter in response to the State's view of Chistochina is being distributed. It was given to all the Board members before so they have it, but the reason I'm doing this now is to make sure that it's part of the administrative record and that it's part of the Board deliberations today.

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

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

Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Go ahead.

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

MS. PENDLETON: Lying with maps.

MS. K'EIT: Lying with maps.

(Laughter)

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

So while I appreciate and I actually enjoy looking at the numbers and percentages of things, I don't see that those data are necessarily applicable
and part of why I say that is based on our eight factors
and what those exactly are and also because we have
enough other evidence, written testimony -- or excuse me
-- oral testimony and written reports of research in this
area that specifically note that subsistence use was --
subsistence harvest was conducted by Ninilchik people in
this area. So there is sufficient evidence that there is
customary and traditional use here by Ninilchik people.

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

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

Thank you.

CHAIRMAN TOWARAK: Thank you. Go ahead.

MS. SMITH: Okay. I probably was remiss
in not pointing out this morning where Geoff Haskett, our
Regional Director, is today. He's back in Washington,
D.C., with Gary Edwards who I know has worked with the
Board on many different issues. Gary's receiving the
Distinguished Service Award today from the Secretary of
Interior and it's actually the highest award that
government employees receive, signed by the President.
So part of that justification was all of Gary's work on
subsistence issues and I probably should have said that
earlier, but I did want to say before I talk about where
the Fish and Wildlife Service is on this particular issue
is that Geoff and Gary and all of us in the Fish and
Wildlife Service had long and very spirited discussions
about this topic and I would like to say that I think
that OSM work and the work of the Council and others has
been very informative and really helps to I think clarify
the issue.
I think that after our exhaustive reevaluation, we do believe that lifetime use data is compelling and that the 17 percent of communities using the Federal waters of the Upper Kenai about every year appears to demonstrate a pattern of use for all fish species in waters north of and including the Kenai River Drainage for the residents of Ninilchik. For this reason, the Fish and Wildlife Service will support the Ninilchik Tribal Council language and support the motion made by the Forest Service.

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

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

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

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

So I support the motion to approve the
request and -- go ahead.

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

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

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

Thank you.

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

MR. PROBASCO: Thank you, Mr. Chair.

Final action on RFR09-01 as outlined on Page 4 based on the recommendation from the proponent. Ms. K'eit.

MS. K'EIT: Yes.

MR. PROBASCO: Mr. Towarak.

CHAIRMAN TOWARAK: Yes.

MR. PROBASCO: Ms. Pendleton.

MS. PENDLETON: Yes.
MR. PROBASCO: Ms. Masica.

MS. MASICA: Yes.

MR. PROBASCO: Ms. Smith.

MS. SMITH: Yes.

MR. PROBASCO: And Ms. Dougan.

MS. DOUGAN: Yes.

MR. PROBASCO: Mr. Chair, motion carries six/zero.

CHAIRMAN TOWARAK: Thank you. Is it put to rest after 10 years.

(Laughter)

CHAIRMAN TOWARAK: Okay. Well, I appreciate all the input that has been put into us. You know, looking at the record, it's been a long while coming in making a final decision. I assume that's a final decision.

(Laughter)

CHAIRMAN TOWARAK: But we will continue on. I think we have a couple of more items before we -- the rural briefing from Larry Buklis.

DR. WHEELER: Mr. Chair, Mr. Buklis is going to give the rural briefing. We need to turn the machine back on that you guys so carefully turned off 10 minutes ago ignoring my pleas to do otherwise, but if you could bear with us so we can turn the machine on and let it warm up and get started. Maybe you might want to take a five-minute break here so we can.....

MR. PROBASCO: Polly, if you wouldn't mind, while that's warming up, why don't you just go through the reference to Redfish Subcommittee status report, what you want the Board to do.

CHAIRMAN TOWARAK: Could I make a real quick announcement first. Many of you know Weaver Ivanoff -- Ralph Weaver Ivanoff. He was the RAC Chair for the Seward Peninsula Advisory Committee. He suffered a
stroke about 10 days ago and it was a major stroke. He
was very lucky according to the medical people to have
survived his stroke. He's currently in the Alaska
Regional Hospital going through physical therapy and my
understanding is he also is going to need speech therapy
and I just wanted to real quickly explain that according
to his brothers, who I grew up with those boys, he is
making day-to-day progress and is recuperating and is
doing better on a daily basis. It's going to be a long
haul for him to recuperate from the stroke.

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

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

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

CHAIRMAN TOWARAK: Go ahead. Thank you.

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

The intent of this briefing is to help
Board members better anticipate the upcoming rural review
process. Once underway, this process will require
sustained attention. With the Census 2000 process so
recently completed, the Census 2010 review may not
require as much work on the front end as we experienced
with that first review process. So once again the main
points to retain are the census review is upcoming. Once
underway it's going to take sustained attention by Staff
and the Board and the Councils and finally the process in
this second review may not require as much front-end work
as the first review.

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

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

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

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

The procedures and regulation: The
procedures address considering integrated communities in
the aggregate. Now there are no specifics in the
regulation on how to consider communities in the
aggregate, how to group communities. The Board is
provided guidance both initially and with the first
review we did with the year 2000 Census. The Board is
provided guidance on how to consider grouping of communities and provided some criteria for analysis.

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

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

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

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

The process or sequence of that work was first Staff-reviewed groupings and populations. So we took a look at the groupings that had been made in 1990-'91, and the population levels then and with the Census 2000 and we reported back to the Board on any significant areas for consideration in our analytical view. The Board took that information and proposed a tasking for further analysis. That proposal of future work was put out for public comment and based on the comment received, the Board charged the Staff with specific analytical work for their consideration.
The Staff reported back to the Board on those assigned analyses and the Board considered this and public comment in developing a proposed rule. We then went through the rule-making process and the Board considered comments on the proposed rule and landed on a final rule for which there were some changes in determinations based on the analyses and the public input and the Council recommendations.

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

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

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

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

This is how we could approach the Census 2010 review once that is cleared. After the petition is resolved, we could publish a proposed rule to solicit proposals on procedures and the current determinations. Rational for this approach: First, it's only been a few years since the Census 2000 review was actually
completed. Secondly, there is a sufficient basis for
Council and public input. Given the record of that work,
it's perhaps not necessary for the intensive advance
Staff work that we did with the first review, which took
a couple of years. Thirdly, the Staff analyses that would
unfold from the 20 [sic] Census review pursued this way
would respond to proposals on procedures and then on
determinations. So it'd be an approach that was
responsive to what has been raised and we would envision
analyses being assigned first on issues that are raised
on the procedures and then tackle the determinations.

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

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

Thank you.

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

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

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

MR. BUKLIS: Mr. Chairman. Ms. Masica.
The status of the petition, the -- this Board did review
the information relevant to the petition as requested by
the Secretaries. The Secretaries responded to the
Council by saying that the issue they raised did not
compromise the year 2000 review that had not quite
concluded at that point. When the Council raised this, their letter of 2006 was before the final rule of May 2007. So their petition was before your Census 2000 review was concluded.

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

MS. MASICA: Okay.

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

MS. MASICA: Hum.

CHAIRMAN TOWARAK: Does that answer your question.

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

CHAIRMAN TOWARAK: Go ahead.

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

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

Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Any further questions.

MS. DOUGAN: Mr. Chair.

CHAIRMAN TOWARAK: Yes.

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

MR. BUKLIS: Mr. Chairman. Ms. Dougan.
The petition came from the Southeast Alaska Regional
Advisory Council. The Southeast RAC submitted the
petition, and it was to the Secretaries for their
consideration.

MS. DOUGAN: Mr. Chair,

CHAIRMAN TOWARAK: Go ahead.

MS. DOUGAN: Maybe I was a little vague.
Have all the RACs had an opportunity to comment on that
petition?

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

CHAIRMAN TOWARAK: Go ahead.

MR. PROBASCO: So, Mr. Chair and Board
members, we will be keeping you up to speed on this rural
issue and like I said, I'm repeating myself, but this is
just to get ourselves engaged, where we're at since the
2010 Census has been completed and there's work ahead
that we're going to have to start tackling within the
next two years.

Mr. Chair.

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

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

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

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

We unfortunately missed the deadline for
submitting a proposal to the Board of Fish, so we're in
the process of developing an emergency petition to the
Board of Fisheries to address this issue, the recommendations that are within the purview of the Alaska Board of Fisheries. Whether or not the Board will take that up, we don't know, but they have 30 days from the time they get it to when they will take it up.

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

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

That's all I had, Mr. Chair.

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

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

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

What's problematic here is that the committees that they're asking to form involves the two other Yukon Councils, the Eastern Interior and the YK
Council. Those Councils did not address this issue at their fall meeting and what we envision doing prior to the Board taking action on this is to take this letter from the Western Interior Regional Advisory Council and present it to the other two Councils during their winter meetings and ask for their action on the item which maybe we agree with Western Interior and we want to participate and/or they say they don't want to participate. We don't know what action they will take.

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

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

Mr. Chair.

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

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

Mr. Chair.

CHAIRMAN TOWARAK: That's correct.

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

MR. PROBASCO: Well, if everybody says, Pete, sounds good, then I would draft a letter back to Chairman Reakoff for Mr. Towarak's signature. It would be reviewed by the Staff Committee and that letter would also be forwarded to the two other Councils and also placed on their agenda.
MS. SWANTON: Pete, I was at the Eastern Interior meeting and they did pass a motion to establish a similar committee. If we reviewed the transcripts you'd see that's true. They just haven't sent a letter yet to the Board. Just as a point of clarification.

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

Mr. Chair.

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

MR. PROBASCO: I have one more.

CHAIRMAN TOWARAK: Go ahead.

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

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

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

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

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

Mr. Chair.

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

(No comments)

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

Is there anyone else?

MR. PROBASCO: Mr. Chair, in addition to the -- my understanding in addition to the MOU discussion, we will also have a discussion on the points
that Mr. Pouchot pointed out on the Secretarial review as well starting at 9:00 tomorrow and the only Council representative at this point in time would be Ms. Stickwan.

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

(Off record)

(END OF PROCEEDINGS)
CERTIFICATE

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) ss.

STATE OF ALASKA )

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

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