FEDERAL SUBSISTENCE BOARD
PUBLIC WORK SESSION
VOLUME II
GORDON WATSON CONFERENCE ROOM
ANCHORAGE, ALASKA
July 12, 2011
8:30 o’clock a.m.

MEMBERS PRESENT:

Tim Towarak, Chairman
Gene Virden, Bureau of Indian Affairs
Larry Bell, U.S. Fish and Wildlife Service
Steve Kessler, U.S. Forest Service
Deb Cooper, National Park Service
Bud Cribley, Bureau of Land Management
Craig Fleener, State of Alaska Representative
Keith Goltz, Solicitor's Office

Recorded and transcribed by:

Computer Matrix Court Reporters, LLC
135 Christensen Drive, Second Floor
Anchorage, AK  99501
907-243-0668; sahile@gci.net
PROCEEDINGS

(Anchorage, Alaska - 7/12/2011)

(On record)

CHAIRMAN TOWARAK: I'm going to call this meeting back to session. We were on a recess.

OPERATOR: At this point, your participants are not hearing you. It will take me just one moment, please.

DR. WHEELER: Okay.

OPERATOR: Good morning and thank you for standing by. I would like to remind all telephone parties that your lines are on listen only until the question and answer segment of today's conference. At that time, if you're wishing to ask a question, please press star 1 on your touchtone phone and record your name when prompted. Your name is necessary in order to introduce your question. At this time, it is my pleasure to turn the call over to Mr. Tim Towarak, Federal Subsistence Board Chairman.

Thank you, sir. You may begin.

CHAIRMAN TOWARAK: Thank you very much. We will call this work session back to order. Before we get started on the agenda we've got a couple of announcements.

DR. WHEELER: Thank you, Mr. Chair.

We've received -- yesterday, if you remember, we had Janice Jackson speaking to a resolution that was passed by the ANB and ANS Grand Camp. We did get it, so I have copies of that resolution here, which I can hand out.

Also yesterday we received two letters and the Board members have them and they're out at the table. We received one letter from Sitka Tribe of Alaska and one letter from Douglas Indian Association tribal government, both in support of revisiting or staying the Saxman decision. These will all be entered into the administrative record, but I just wanted everybody to know there's copies of all of those out there.

Just as a personal note, I did get a message from Pete Probasco's wife last night. He got
through surgery fine. He's not going to have to have another surgery, at least at this point, and he was recovering well. He's still not up for visitors, but they'll let us know when he is. So that's a good thing. Not that he's not ready for visitors, but that he got through surgery fine.

Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Thank you. Our first agenda topic this morning is an update from Tribal Consultation Work Group and Crystal Leonetti and Della Trumble will handle that portion of the agenda.

MS. TRUMBLE: Good morning, Mr. Chair. My name is Della Trumble. I represent the Agdaagux Tribe of King Cove. I am the co-chair with Crystal on the committee and I'm also the vice-chair on the Kodiak/Aleutian Federal Subsistence Advisory Council and I work part time as the administrator for the Agdaagux Tribe of King Cove and part time as a finance manager for the King Cove Corporation, so I kind of have a split personality.

Like I say, we're on the committee and I represent the Agdaagux Tribe of King Cove. We also have John Andrew, who is with the Organized Village of Kwethluk, George Carlson Yaska, Jr. with Huslia Village, Richard Peterson, Organized Village of Kasaan, Rosemary -- I'm sorry, I can't pronounce her last name -- Inupiat Community of the Arctic Slope, Shawna Larson, Chickaloon Native Village and Pacific Environment, Bobby Andrew, Ekwok Village; Crystal as Fish and Wildlife; Gene Gamache with National Park Service; Lillian Petershoare, U.S. Forest Service; Brenda Takeshorse from BLM; Pete Probasco and Andrea, Office of Subsistence Management; Glenn Chen, Bureau of Indian Affairs; Nancy Swanton, National Park Service; and Andrea Medeiros, OSM.

With that, I'm going to turn it over to Crystal.

MS. LEONETTI: Good morning. My name is Crystal Leonetti. I'm the Alaska Native Affairs specialist for U.S. Fish and Wildlife Service and the co-chair with Della on this consultation workgroup for the Federal Subsistence Board.

Just to let you know, the packets that we handed out yesterday, there are six different documents
in that packet. The first one is a meeting summary of our June 21st to 22nd workgroup meeting, which was held in Anchorage at the Park Service building. The second document is the introduction packet for the workgroup members, including an agenda for that meeting, a list of the members and a timeline for the workgroup process. The third document is an interim protocol for government-to-government consultation. The fourth document is an interim protocol for government-to-ANCSA-corporation consultation. The fifth document is a list of values important to consider in the protocol. And the sixth document is a revised draft tribal consultation protocol still in progress, definitely not finished yet and a lot of work still to be done on that.

I wanted to give an overview of our June 21st and 22nd meeting of the workgroup. The beginning of the meeting was about getting to know each other, so there were a lot of introductions and discussions. The next step was to have a good baseline understanding of the Federal subsistence management processes and of government-to-government consultation and of the legal requirement to consult with ANCSA corporations.

The third thing we worked on after taking a brief look at the draft tribal consultation protocol was listing the values that the workgroup believed to be important to consider in a consultation protocol and that's what that list of values is in your packet. We then started wordsmithing the draft document, but when the workgroup took an hour to wordsmith one paragraph, we realized we should probably begin working on the interim protocols instead and that's what we did. We wanted to create something that was a simple, easy to understand protocol for your consideration.

So there are two stand-alone protocols. One is for government-to-government consultation. That's with the Federally recognized tribes. The other one is for consultation with the ANCSA corporations. The workgroup proposes the two interim protocols to be stand-alone in order to recognize the inherent sovereignty of tribes and to distinguish that from the statutory requirement to consult with ANCSA corporations. I'll present the ANCSA protocol after Della presents the government-to-government consultation protocol for you.
MS. TRUMBLE: I'll work off the document. I think there's some changes from the one that's in the packet. I don't know if you have them. United States government has a unique relationship with American Indian governments as set forth in the Constitution of the United States, treaties, statutes, court decisions and executive orders and policies.

In recognition of that special relationship on November 6, 2000, the President issued Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, which provided guidelines to all Federal agencies for establishing regular and meaningful consultation with tribal officials in decision-making processes that may have tribal implications.

On November 5th, 2009, a presidential memorandum was issued pursuant to Executive Order 13175 reaffirming the Federal government's commitment to operate within a government-to-government relationship with Federally-recognized tribes. Pursuant to the direction provided by the Secretaries of Interior and Agriculture, this document lays out an interim protocol for consultation between the Federal government and Federally-recognized tribal governments located in Alaska for the Federal Subsistence Board processes.

The following interim protocol sets out a framework for consultation during the 2011 cycle of the Federal subsistence management program with respect to, number one, the 2012-2014 wildlife proposals and, number two, the government-to-government subsistence consultation protocol.

Number one. Each Federally-recognized tribe will be sent a letter from the Federal Subsistence Board inviting consultation on all 2012 to 2014 wildlife proposals. This letter will, A, explain the interim consultation process and the need for this interim consultation effort regarding the 2012 to 2014 wildlife regulatory proposals. B, explain the final consultation protocol is expected to be in place by May 2012, in time to be implemented for the fisheries regulatory cycle process. C, inform the tribes of the face-to-face consultation opportunity, focusing on the consultation protocol during the tribal service providers conference on the afternoon of December 1, 2011 in Anchorage.

Number two. Government-to-government
consultation will take place during the 2012-14 wildlife proposals during the August 15 through August 16, 2011 timeframe. A, conduct a consultation via teleconference for each Federal Subsistence Regional Advisory Council area prior to the Regional Advisory Council meeting. At least four Federal Subsistence Board members or their designees will participate in each teleconference.

Federal officials will receive training on principals and practices of government-to-government consultation prior to participating in the teleconference. Following each consultation a tribal official and Federal official will be selected to jointly report the results of the consultation to the Federal Subsistence Regional Advisory Council. An in-person government-to-government consultation will be held a day prior to the January Federal Subsistence Board meeting regarding wildlife proposals and the May Federal Subsistence Board meeting regarding the consultation protocol.

Crystal.

MS. LEONETTI: Unless there's any questions on that, I'll move forward to the ANCSA consultation protocol.

MR. BELL: Mr. Chairman. Larry Bell, Fish and Wildlife Service. Just one question on the part about at least four Federal Subsistence Board members on Section 2(a)(i). Is that a quorum of the Board and, if so, is that going to be problematic if a quorum of the Board comes together to conduct a consultation as far as needing to notice that as a meeting or any of those kind of issues?

MS. LEONETTI: Can I defer that to Keith?

MR. GOLTZ: I don't know. I haven't thought about that. I'll work with Crystal on that.

MS. LEONETTI: The workgroup did discuss that. The workgroup felt that it was important to have a majority of the Federal agencies represented at the consultations. They felt that it didn't have to be one of the Board members. It could be their designee and could be any employee from those agencies.

MR. VIRDEN: I just had one comment on here. I noticed you're going to send a letter to all the
recognized tribes. Will the regional non-profits be notified? The only reason I'm bringing it up, there's a couple of them -- some tribes that we've not been able to get a hold of. They don't have a phone or office anymore and they've been under one of those regional non-profits forever. I'm just curious if they're included. Like BBNA or TCC.

MS. TRUMBLE: Oh, the regional non-profits themselves. That's actually an interesting question that came up with one of our regional represented groups and it's something I think we're going to have to discuss. They should probably get copied -- I would say copied. Maybe recommend they get copied on it and then just by mail. It's going to be -- I'd say regional organizations should maybe be copied on it so they're aware. They have access to be able to get information out to their tribes over and above what we can do.

MS. LEONETTI: Okay. I'll move forward to the government-to-ANCSA-corporations consultation interim protocol. Pursuant to the direction provided by the Secretaries of Interior and Agriculture, this document lays out an interim protocol for consultation between the Federal government and Alaska Native Claims Settlement Act corporations, otherwise known as ANCSA corporations, to be utilized during the Federal Subsistence Board process.

ANCSA corporations, by a mandate of 25 USC Section 450 note 2010 must be consulted with by the Federal Subsistence Board with respect to, number one, the 2012-2014 wildlife proposals and, number two, the government-to-ANCSA-corporation subsistence consultation protocol.

The interim consultation protocol is as follows: Number 1, each ANCSA corporation will be sent a letter from the Federal Subsistence Board inviting consultation on all 2012-2014 wildlife proposals. The letter will (a) explain the interim consultation process and the need for this interim consultation effort regarding the 2012-2014 wildlife regulatory proposals, (b) explain the final consultation protocol that's expected to be in place by May 2012, in time to be implemented for the fisheries regulatory cycle process, (c) mention the Board's interest in having a presentation made about the consultation protocol at the Alaska Federal of Natives convention in 2011.
Number 2, two dates will be scheduled for government-to-ANCSA-corporations consultation teleconference opportunity prior to August 22, 2011. Consultation topics include the 2012-2014 wildlife proposals and the development of a long-term government-to-ANCSA-corporation consultation protocol.

(a) ANCSA corporations can choose to participate in either or both teleconferences, (b) at least four Federal Subsistence Board members or their designees will participate in each consultation teleconference, and (c) ANCSA corporations and Federal agencies each will appoint a representative to report the results of consultation to each of the 10 Federal Subsistence Regional Advisory Councils during the fall 2011 Regional Advisory Council meeting cycle.

That's all we have unless you have anything to add.

CHAIRMAN TOWARAK: I've got a question regarding the process. Was there a request by any particular organization or group at the meeting that suggested that there be a separation of tribes versus village corporations?

MS. LEONETTI: At the workgroup meeting?

CHAIRMAN TOWARAK: Yes.

MS. TRUMBLE: Can you repeat your question.

CHAIRMAN TOWARAK: I was wondering if anyone suggested that the tribe be separated from village corporations.

MS. TRUMBLE: We discussed this, I think, at length in the meeting. Not only in part of the values, but given that the tribes are a different government structure and technically do have the sovereign immunity, whereas the ANCSA corporations are recognized but, however, don't have the same powers that a tribe has, we felt that it may be best to separate the two and not to have the conflict.

The other issue, I think, that came up a number of times was in some cases the tribes don't necessarily work closely with their ANCSA corporations, so we felt it was best to try to treat them separately.
MS. LEONETTI: Also we're sort of following a couple of different approaches both by the Forest Service and by Department of Interior. The Forest Service has a term called government-to-corporation consultation, which maybe Ms. Pendleton can answer this better, but a bit different than government-to-government consultation, as well as the DOI process, which is in process right now to create a separate, stand-alone Department of Interior consultation policy for ANCSA corporations.

We hope that -- because these policies and protocols, the Department of Interior policy and its Federal Subsistence Board protocol are being developed simultaneously that we can coordinate those efforts and make them so that they're compatible.

We hope to talk more about that with the ANCSA corporations in our August teleconference with them because this is a pretty short and sweet protocol. We didn't add a lot of verbiage or details to it on purpose and that's because we wanted to get direct input form the ANCSA corporations themselves.

CHAIRMAN TOWARAK: When you say ANCSA corporations, is this both regional and village corporations?

MS. TRUMBLE: Yes. We have tentative dates we've set for August 16th or 17th to try to do this by teleconference.

MS. PENDLETON: Mr. Chair. Just to be clear, I appreciate your remarks, Crystal, we do recognize -- the Forest Service has recognized ANCSA corporations from tribal governments. However, I will say that we have done a number of consultations where both ANCSA corporations and tribes have been present in those meetings and I think there have been some benefits to that to hear different issues, different concerns and points of use, but we do recognize certainly the differences.

MR. BELL: Mr. Chairman.

CHAIRMAN TOWARAK: Go ahead.

MR. BELL: Larry Bell, Fish and Wildlife Service. I'd first of all like to thank BIA. I know it was important to the group to be able to come together in
a face-to-face meeting initially to learn from each
other, to get to know each other and without BIA's
assistance I know that wouldn't have happened. Also to
the other Federal agencies for their support.

Then I would also like to thank the
workgroup. I know this is probably not an easy task for
you. I think the interim protocol that you developed is
a very good approach. I personally like simple. I think
it's very understandable. I think you're on the right
track. I think you're going in a very good direction and
I think getting a protocol out that provides meaningful
input while not overly complicating the situation or
adding such an excessive work load to the subsistence
program is exactly the way it should be going.

So I commend the workgroup for getting it
this far and I look forward to your final product. From
my point of view, you're on the exact right track in
developing a protocol that's workable and meets the need
intent and provides an opportunity for meaningful input
into the process, so thank you for your work.

MS. LEONETTI: Thank you. I just have
one more comment. I think it's really -- what the
Federal Subsistence Board is doing by having an interim
protocol and then consulting on it after that interim
protocol is put to test, I think it will allow the
Federal Subsistence Board to have a stronger, long-term
protocol because we're able to test it out first and then
consult on it and see how it went and then make that
longer-term protocol stronger.

MS. COOPER: Mr. Chair. I'd like to
first of all recognize Crystal and other tribal
representatives for coming up on short notice and
spending a couple days in Anchorage and doing such a
thorough job and good job developing these protocols. I
appreciate that.

I'd like to ask through the Chair if
Counselor Goltz might have some insight he might share on
where bureaus have a trust responsibility to protect
tribal interests. If there's anything he can share on
the differences there between trust responsibilities to
tribal entities and responsibilities to ANCSA
corporations.

Thank you.
MR. GOLTZ: I think Della expressed it more than adequately. There are differences. We don't know at this point what all those differences are. We really haven't tested to see what the interest of the corporate entities would be. At this point, I'm simply following the national lead, which is still in flux.

When this is done, we're going to have to assure Washington that whatever we've done locally is consistent with the national policies. In some sense, we're out ahead of the curve. But all I've done so far is to try to learn and stay in contact with both the local and national interests. I haven't tried to direct or judge the result at all.

MS. COOPER: Thank you.

CHAIRMAN TOWARAK: Is that it?

MS. LEONETTI: That's all we've got.

MS. PENDLETON: Mr. Chair. Just a question. Are we going to then motion to accept the interim protocol for use or what would be the next step there?

CHAIRMAN TOWARAK: I think that's a good question. I think we should sit here and chat a little bit about where we see this heading and where we might be able to give some direction to the workgroup of where we would like to see it.

MS. PENDLETON: Okay. I was also -- just about the capacity too to move forward on this protocol and who would, I guess, take the lead as far as noticing and setting this up, the Office of Subsistence Management, or how that would work.

CHAIRMAN TOWARAK: I think these are all good questions. I think everyone here realizes that this whole process is a new process for everyone. As Keith said, in some cases we're almost ahead of the curve in setting up policies and a process. With that, I'd like to hear from other Board members or the Staff on the direction being driven by this workgroup and what kind of a process do we actually want to put in place. I'm impressed with the direction that the workgroup is taking this tribal consultation process through and we should at least acknowledge that.
I don't have any problem accepting the
interim consultation process. I think it at least gives
us a guideline to begin with, which I think is a long
ways from where we were from the last meeting that we had
regarding the tribal consultation process. I think by
accepting it would give us a first step in setting a
practice of how we bring the protocol forward.

MR. BELL: Mr. Chairman.

CHAIRMAN TOWARAK: Sure.

MR. BELL: I think something that will help me with that would be if I could ask Crystal, is
this what the workgroup considers to be your final
interim protocol or is the group still intending on
working that and presenting to the Board a second time or
are we looking at the final?

MS. LEONETTI: We consider this the final
interim protocol.

MR. BELL: Okay. And then if I understood some of the timelines correctly, Mr. Chairman,
or maybe didn't understand the timelines, if we consider
this or were to adopt this as the Board's interim
protocol, looking at the government-to-government
consultation interim protocol, it said we would send a
letter to the tribes regarding the 2012-2014 wildlife
regulatory process. So what's the timeframe for getting
those letters out in a timely manner to meet the
protocol? If maybe Dr. Wheeler could address that.

DR. WHEELER: As a first order of
business, OSM will take care of the public notice
requirements, assuming that there are any. We still need
to investigate with Keith. If four members of the Board
is a quorum, does that mean we have to do public notices.
We will investigate that and we will -- although I'm
seeing a slight shake no of the head over there. So I'm
thinking maybe we don't have to publicly notice it. But
if we do, we'll deal with it and we will do it.

In terms of getting the letters out, you
probably all remember right around Christmas last year we
sent out letters to Federally-recognized tribes inviting
them to consult on the fisheries regulations prior to the
Board meeting and also to come after the meeting. So we
are prepared to do that and I guess time is of the
essence, so we would need to do it sooner rather than
later, so I will add it to my list. I guess we probably
won't wait for Pete to come back to do that one.

So we'll get it done sooner rather than
later. I can't tell you exactly when we'll get it done
by, but we can certainly fairly easily explain the
process and what we're doing and I would envision that we
would include this packet of material as well just
because. Probably a lot of tribes have it already, but
it doesn't hurt to duplicate -- kill a few trees, I
guess, to keep people informed. So OSM will take care of
that and we will be working closely with the committee
too if we have any questions or issues that come up or
pop up, then we will deal with that.

I will say that when we -- it's a little
bit frustrating to me because when we sent the set of
letters out last Christmas a lot of the things came back.
For whatever reason we couldn't find a current list of
tribes and addresses and that sort of thing. We've been
refining the list as we've gone along. Village
corporations is the same kind of thing. So I would say
that it seems amazing to me that the Department of the
Interior doesn't have such a list or at least doesn't
have a current list. I recognize that contacts change,
but still that's something that we probably all need to
collectively work on because it's not rocket science,
it's just keeping track of things. I know Crystal was
working on a share point database and trying to keep that
up to date. So we'll be working on that, but it is a
work in progress. Even with the regional corporations a
lot of the letters came back. So that is something that
we can all collectively work on.

Mr. Chair.

MR. BELL: Thank you, Dr. Wheeler. Mr.
Chairman, that was probably a lot more answer than I was
expecting, but good information. So if I read this
correctly in interim protocol, we're then looking at an
August 15th start date according to protocol number two
and running the consultation process then through
September 16th. So August 15th is, for practical
purposes, upon us.

So that means we need to start getting
letters out almost immediately, notifying the tribes and
given what I know of the workload and the staffing issues
with OSM, I would make a suggestion, Mr. Chairman, that
perhaps, if not at this meeting then soon thereafter,
that each Federal agency take the lead in establishing and setting up two of the teleconferences and then, of course, that lead agency would automatically then be one of the participants -- one of the four needed participants on the teleconference.

I just don't think OSM can entirely take on the burden of getting these consultations going, at least for this first round. So I think it's an area where we need other Federal agency support from the representative agencies. Certainly getting the letters out, you know, something maybe OSM in association with Crystal can do, but I think we're going to need some help on the lead agency.

Again, I think the timeframe works. I think we can begin doing it. Again, I'm supportive of the protocol as it stands and we just need to work out some of the details of how we'd make that happen.

Thank you, Mr. Chairman.

DR. WHEELER: Mr. Chair. I appreciate Mr. Bell's concern over OSM. I think that the first order of business is writing the letter. I would ask the Board to help us get that letter written. Obviously OSM can write the draft, then the draft needs to go out to the Staff Committee. I would ask that the Board make sure that the Staff Committee reviews it in a very quick fashion so that we can just get it moving forward. In terms of getting the meeting set up, I guess I would look to the committee and some of the key players in the Federal agencies, the Native liaisons in the Federal agencies.

I think that would be a completely appropriate role and I'm not assigning work here. I recognize I have no authority to do that, but I guess I would ask the Board to think about that in terms of -- it seems like a logical link. It keeps the work within the committee and it also utilizes the people that have the skill set that is needed here.

Mr. Chair.

CHAIRMAN TOWARAK: Thank you. To an earlier question, personally I feel that it would be in order for the Board to accept the interim protocol to get the process going.
MS. COOPER: Mr. Chair. I was just wondering if we could revisit the language about Federal Subsistence Board members or their designees. Mr. Chair, I'd just like to ask Crystal if there had been any discussion about who their designees may be and whether or not tribal liaisons might be able to fulfill that role.

Mr. Chair, thank you.

MS. LEONETTI: Mr. Chair. We did talk about that and we talked about what the wildlife proposals entailed, who those designees might be. They could be a wildlife biologist from the agency, they could be a Refuse manager depending on where that consultation is held. They could be a Native liaison. They could be one of the Staff Committee members. It's totally up to that agency. I think it makes sense to ensure that whoever the person is they can relevantly speak to what they're consulting about.

MS. COOPER: Thank you, Mr. Chair. That answers my question perfectly.

DR. WHEELER: Mr. Chair. I think it's important -- you know, it's great to be able to reach out and get Staff in attendance at these meetings, but we also need to have somebody at those meetings that's prepared to speak to ANILCA because they are wildlife proposals. Yes, it is wildlife biology or, in many cases, anthropological in nature, but our statute is ANILCA. So whoever is there representing as a Federal Board designee has to be prepared to speak to ANILCA because that's the framework within which we're operating here.

Mr. Chair.

MR. BELL: Mr. Chairman. Sensing that we may be getting ready to work on the interim protocol or perhaps make other suggestions or amendments, I would offer a motion that the Board adopt the Federal Subsistence Board interim protocol for government-to-government consultation and the Federal Subsistence Board interim protocol for government-to-ANCSA-corporation consultation as presented by the workgroup to the Board at today's meeting.

MS. COOPER: I second that motion.
CHAIRMAN TOWARAK: There's a motion and a second on the floor. Any discussion on the motion, questions.

MR. BELL: Mr. Chairman. The only discussion I would have is that in adopting this that the Board give itself latitude to make any necessary amendments as to on the government-to-government consultation protocol, protocol number 2(a)(i), to address the concern about whether that's a quorum of the Board and that in adopting they can make necessary changes to that if need be after advice from legal counsel. Then the same would apply, Mr. Chairman, to the government-to-ANCSA corporation consultation protocol number 2(b). That we allow ourselves to make those changes in adoption after consultation with legal counsel.

Thank you.

CHAIRMAN TOWARAK: Thank you. If the second concurs, we will include that....

MS. COOPER: I do.

CHAIRMAN TOWARAK: .....in the main motion. Any further discussion.

(No comments)

CHAIRMAN TOWARAK: Not hearing any. 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 unanimously. Thank you for your presentation this morning. If the group could be asked to give us direction as we go along on the process of accepting, we would like to hear your recommendations on what we, as a Board, should do to make sure that the process continues and that we eventually come up with a workable tribal consultation process. I appreciate all the work that you're doing. Go ahead.

DR. WHEELER: Sorry, Mr. Chair. One more
question for the group. In the interim protocol it says inform the tribes of the face-to-face consultation opportunity, focusing on consultation protocol during the service provider's conference on December 1, 2011. I would think that that would probably be a time where Federal Subsistence Board members themselves should think about attending so that they can actually -- the Board members can consult directly with the tribes.

Just a note to self. Put that on your calendar, December 1st. If you weren't already planning on attending the provider's conference, it would probably be a good opportunity. So I would think that that would be something that you all want to put on your Blackberry or your paper calendar if you're using one of those these days.

Mr. Chair.

CHAIRMAN TOWARAK: Thank you. I'll make a note of that. If there aren't any other discussions or questions on the tribal consultation process, we will move on then to item number 7, an update on wildlife hunting closures with Mr. Ardizzone.

MR. ARDIZZONE: Mr. Chair, Board members, good morning. For the record, Chuck Ardizzone. This morning I'm just going to give you a quick update briefing on where we are in our closure reviews for this three-year cycle. For this presentation there's two documents. There's the closure policy for your review if we need to go to it and then there's a one-page table, front and back. It's just a quick summary of the actions by the RACs and their recommendations on the closures.

Based on the closure review policy that was adopted in 2007, we're tasked to review at least a third of all the wildlife closures every three years. This past review we reviewed 15 of the closures.

The purpose of the reviews are to ensure that Federal public lands and waters do not remain closed beyond the time necessary to assure conservation of healthy populations of fish and wildlife resources or to provide a meaningful preference for qualified subsistence users. These analyses were reviewed by the OSM leadership team, the inter-agency staff committee and subsequently they were taken to the affected Regional Advisory Councils.
At the Council meetings, the Councils provided the recommendations as whether or not to retain the closure or to lift the closures or to take other actions on the closures. In the table, there's a summary of all those recommendations by the Councils.

Based on local knowledge, the Southcentral Regional Advisory Council submitted one proposal to lift the closure in Kings Bay, which is closure number three. The public submitted two proposals to open areas to non-Federally-qualified users, which was closure number 34. The Eastern Interior Regional Council submitted one proposal to add additional areas to a closure and that would be closure 21.

Those proposals are in the process of being analyzed. They will be reviewed by the Staff Committee shortly, then they will go back out to the Regional Advisory Councils for their recommendations on the proposals, and then those proposals will be before the Board in January 2012 to vote on whether those closures should be lifted or those areas should be added to the remaining closure.

Since the removals of closures or additional areas added to closures are an action that falls under subpart D of our regulations, that's the reason it must go through the public process and go through the RACs and then be voted on at your public meeting.

As an aside, anyone, including the Councils, the State or the public, has an opportunity to submit a proposal at any time during a call for wildlife proposals to remove an existing closure or it can be done through special action if need be. That would be the purview of the Board if they would like to lift it during a special action request.

That concludes my presentation. If there's any questions I can answer.

CHAIRMAN TOWARAK: At this point there aren't any required actions by the Board.

MR. ARDIZZONE: No, Mr. Chair. Action on any closures that were submitted for proposal would be taken in January 2012.

CHAIRMAN TOWARAK: Okay. Go ahead.
MR. VIRDEN: I have a question about if there's a proposal or something that's in place that's going to limit the antler size in the Kenai. Is that something you're going to talk about next?

DR. WHEELER: Mr. Chair. As you may remember or maybe don't remember, we added that to the agenda under item 9 for other business. That was added to the agenda yesterday, so we'll give you an update on that later on today.

Mr. Chair.

CHAIRMAN TOWARAK: Any further questions from the Board regarding this update on the wildlife hunting closures.

(No comments)

CHAIRMAN TOWARAK: Thank you very much, Chuck. We're going to declare maybe a 15-minute break before we take the next agenda topic.

(Off record)

(On record)

CHAIRMAN TOWARAK: I'd like to call us back into session. We are on item number 8, review of threshold analysis of the request for reconsideration RFR 11-01 of the Ninilchik customary and traditional use determination. We've got Helen Armstrong here to walk us through the process. We'll turn the mic over to you, Helen.

MS. ARMSTRONG: Thank you, Mr. Chair.

For Board members, in your packet it's the rather large document. The analysis I'm going through is just a small portion of that document. There are a lot of appendices, so this is what I'll be walking you through. This is an action item. You will be asked to come to some kind of vote at the end of this presentation.

This request for reconsideration was submitted by the State of Alaska, Alaska Department of Fish and Game in January of 2011. The actual request can be found in Appendix A. The request asks that the Federal Subsistence Board reconsider its decisions of November 12, 2009 and November 9, 2010 on Fisheries Request for Reconsideration (FRFR) 09-01 and related
Fisheries Proposal FP09-07.

Proposal FP09-07, which is Appendix B in your packet, requested that the community of Ninilchik be added to the communities with a positive customary and traditional use determination for all fish in the waters north of and including the Kenai River drainage, within the Kenai National Wildlife Refuge and Chugach National Forest within the Kenai Peninsula district. I will refer to that as the Kenai River Area.

The Request for Reconsideration RFR09-01, which is Appendix C in your packet, reconsidered the Board's action on Proposal FP09-07. The State maintains that reconsideration of the Board's action on RFR09-01 is warranted because the Board's actions were based on incorrect information and/or because, in taking those actions, the Board's interpretation of information, applicable law, or regulation was in error or contrary to existing law.

I'm going to go through a little bit of the regulatory history. I'm not going to go through all of it. It is in your packet. There's a table summarizing it. I don't know if yours is in gray shades, but it actually has it in yellow. You can see from the table that it has a rather long history starting when we adopted those C&T determinations in 1999 and then in December of 2000 there was a request for C&T for salmon and then in 2001 a request for all fish. So we started in 2001. I'm going to jump forward -- just so you know it's been around for a long time -- to 2008 when the Ninilchik Traditional Council submitted Proposal FP09-07, the proposal they're asking for reconsideration of today.

That requested a positive C&T use determination for Ninilchik for all fish in the Kenai River area. The Board rejected Proposal FP09 in January of 2009 and that resulted in no change to Ninilchik's positive C&T determination for salmon only in the Kenai River area.

Then the Ninilchik Traditional Council submitted FRFR09-01 in May of 2009 and the Board considered the threshold analysis on November 12, 2009, much as you're considering it here, and they voted to reconsider the decision on FP09-07.

Then they met November 9th, 2010 to reconsider the decision on Ninilchik Traditional
Council's Proposal FP09-07 and after reconsidering all the information and data that had previously been submitted for Proposal FP09-07, the Board reversed its earlier decision on Proposal FP09-07 and unanimously supported the Ninilchik Traditional Councils request for positive customary and traditional use determination for Ninilchik for all fish in the Kenai River area. If you look at the analysis, you can see a rationale on Page 4 for why they made that decision.

I'd also like to note that in 2008 the courts affirmed the Board's general approach to doing customary and traditional use determinations as evidenced by the Ninth Circuit's decision in the State of Alaska vs. Federal Subsistence Board, Cheesh-Na Tribal Council.

Are there any questions about the history before I go on? At any point, because this is a long analysis and I am going to summarize. Just let me know if you have questions.

So to assess whether or not a request for reconsideration meets the threshold for further consideration -- and we're not actually voting on the new -- if you choose to address the analysis, that will come later. What we're doing today is only looking at did these claims pass the threshold for further consideration.

So the Board evaluates a request using three criteria based upon information not previously considered by the Board -- and there were no claims under that criteria. The second is the existing information used by the Board is incorrect and the third is the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law.

So the request for reconsideration from ADF&G submitted January 6, 2011 included a letter and it had three claims. These three claims are in the threshold analysis I've listed as being Part I of the threshold analysis. Then there were two other supplemental documents that they submitted. One was dated March 8, 2007 and the other April 30, 2007. These were in support of previous requests for reconsideration. The supplemental from March 8, 2007 has already been addressed by the Board, but I did include it just for documentation. That I have as Part 2. Then Part 3 is the document from April 30th.
So Part 1 responds to the letter the State submitted. I'm going to provide a little more detail on these than the others because two of the three were issues that have not been addressed by the Board previously.

In the first part, there were no claims for the first and second criteria, but in criterion 3, the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law, there were three claims.

Claim 3.1 was that the Board improperly accepted a request for reconsideration on November 12, 2009 contrary to the analysis and recommendation of its staff and without any basis satisfying the Board's regulation on reconsideration.

Our response is that the criteria established in our regulations for accepting requests for reconsiderations provide guidance to the public regarding what the Board might or might not accept for reconsideration. However, the criteria are not intended to limit the Board's discretion for reconsidering a decision the Board made previously. The Board retains complete discretion over whether or not to accept requests for reconsideration. Our conclusion is that there does not appear to be merit to this claim.

The second one is one that has been submitted, the content and the issue, previously. It's the claim that the Board's action on November 9, 2010 was contrary to the Board's own regulations and unsupported by substantial evidence and that Ninilchik residents have not harvested resident species in meaningful numbers and that Ninilchik's take of resident species stocks has been too small and infrequent to demonstrate a consistent, long-term pattern of community use.

In our response, we note that the Board makes its decisions on customary and traditional use determinations based on an assessment of the community's pattern of use in accordance with the eight factors set forth in the Federal subsistence management regulations. These factors are treated as general guidelines to assist the Board in making a decision based on a totality of the evidence.

When making a customary and traditional
use determination, one of the factors considered by the
Board is a long-term consistent pattern of use, excluding
interruptions beyond the control of the community or
area. The residents of Ninilchik have been prevented
from engaging in subsistence activities since 1952
because of prohibitions imposed by the government.
Because such a prohibition constitutes an interruption
beyond the control of Ninilchik residents, the Board
necessarily makes 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 sport regulations.

In this instance, the available
information shows that Ninilchik residents did indeed
subsistence fish in the Kenai River Area prior to 1952
and that they continue to fish in the area. There was a
survey in 1994 that showed subsistence use areas by
Ninilchik residents covering the entirety of the Kenai
Peninsula prior to 1952.

There was a study done by the ADF&G
Subsistence Division in 2002 and 2003 that showed that
Ninilchik residents continued to harvest fish in the
Kenai River drainage under State sport fishing
regulations. This information indicated that 28 percent
of all Ninilchik households harvested fish in the Federal
waters in the Kenai River Area. Of these, 17 percent
harvested fish with frequent use in the Federal waters
and the amount of use could not be considered
insignificant.

This information provided a sound basis
for Board decision making. Then we went on to talk about
that the determination of all fish is consistent with
other customary and traditional use
determinations statewide and that even though the number
of fish that are harvested in the Kenai River area may be
low, that it's the nature of subsistence that subsistence
users utilize all resources harvested and occasionally
fish species may be harvested incidentally while
harvesting another species.

The Board’s determination of all fish
recognizes that subsistence users harvest the fish that
are available and that fish are harvested
opportunistically. Specifically, if a subsistence user
is fishing for salmon, but harvests a rainbow trout
instead, the trout would be harvested. This is the nature
of subsistence fishing.
We again commented that the courts have affirmed the Board’s general approach to doing customary and traditional use determinations. There does not appear to be merit to this claim.

Claim 3.3 in Part 1. The Board’s action on November 9, 2010 was unfairly predisposed in its customary and traditional use determination by an internal July 12, 2010 memorandum of its legal counsel that was prejudicial against the State.

Our response to that is that the internal memorandum dated July 12, 2010 from the Department of the Interior, Office of the Regional Solicitor to the Chair of the Federal Subsistence Board was an internal attorney-client communication that was not intended for release to the public, as noted on the top of the memorandum, nor has it actually been released to the public. Because this memorandum is subject to the attorney-client privilege, it is inappropriate for the requestor, who obtained a copy by unknown means, to rely on it when presenting its position.

Furthermore, simply because the requestor disagrees with the content of a legal memorandum, it does not mean that the opinions in that memorandum are improperly prejudicial. It is the legal counsel’s job to provide advice and opinions to the Board, and he or she must be free to respond to the Board’s questions without fear that his or her words will be misused to undermine the Board’s decision-making process.

Finally, it appears that the requestor has either misinterpreted the contents of the memorandum or taken quotations out of context. The memorandum itself is the best evidence of its own content, and we find nothing in that memorandum that appears to be anything more than an attorney’s legal analysis and opinion rendered in response to questions raised by the Board.

There does not appear to be any merit to this claim. So in the letter our Staff conclusion was that there didn’t appear to be any merit to the claims in the letter.

Then in Part 2, this was the supplement from March 8, 2007, there were eight claims. None claimed that there is new information that was previously
considered by the Board, one claimed that existing
information used by the Board was incorrect and seven
were under criterion 3, the Board's interpretation of
information, applicable law, or regulation is in error or
contrary to existing law.

All of these claims, as I said
previously, were previously addressed by the Board and
one claim in those was actually found by the Board
previously to have merit and the Board did revisit the
proposal.

I'm not going to go through the claims.
I'll just say that the gist of the claims were that there
wasn't substantial evidence to support the customary and
traditional use determinations, that there wasn't a
consistent recurring pattern of use for the community of
Ninilchik that's customary and traditional use
determination was arbitrary and capricious, that there
weren't written procedures and policies for rendering
customary and traditional use determinations and that the
Board violated its own procedures by denying ADF&G the
ability to provide information to the Board and discuss
relevant issues during deliberations. The last one was
a question that is in the litigation regarding Federal
jurisdiction.

In Part 3, these were again supplemental
materials submitted April 30th, 2007 and they were
submitted just prior to a Board meeting, so they weren't
ever responded to directly but they are claims that
mostly were in the Part 2, so I'm not going to go through
those. There were a couple of exceptions I'm just going
to note.

The State claimed in Part III, Claim 3.1
that Federal subsistence policy guidelines in the OSM
2005 Technical Writing Guide and other Staff analyses
support the State's position that it matters where the
harvest customarily and traditionally occurred, and that
the use must be consistent, long-term, and recurring.

Our response is that the OSM 2005
Technical Writing Guide is an internal writing guide and
not a policy guideline, as noted by the State, and it's
not a guideline that's been approved by the Board. The
Board does not have a policy guideline for customary and
traditional use determinations.

Additionally, the 2005 Technical Writing
Guide and the analysis referred to in this claim were written prior to the 2008 Ninth Circuit's decision in State of Alaska v. Federal Subsistence Board, Cheesh-na Tribal Council. As I noted earlier, the courts affirmed the Board's general approach to doing customary and traditional use determinations in this decision.

Along that same theme about policies in Claim 3.3, the State claimed that the Board has failed to develop written procedures and policies for making further customary and traditional use determinations.

We note that the Administrative Procedure Act does not require the development of a policy prior to rulemaking as long as the agency acts in accordance with its regulations, based on substantial evidence, the APA is not violated. In addition, there was nothing in the direction from the Secretary of the Interior in a letter dated October 27, 2005 that obligated the Board to complete written procedures or policies before acting on customary and traditional use determination requests.

That concludes my summary and the OSM preliminary conclusion is do not support reconsideration of any of the claims in request for reconsideration FRFR11-01.

Are there any questions? I made it shorter. I didn't go through every claim.

CHAIRMAN TOWARAK: Are there any questions from the Board.

(No comments)

CHAIRMAN TOWARAK: If there aren't any questions, I'm going to ask to hear comments from the Southcentral Council. Judy Caminer.

MS. CAMINER: Thank you, Mr. Chair and Board members. For the record, my name is Judy Caminer. I'm the representative from the Southcentral Regional Advisory Council today. I just wanted to mention as a former Board member I certainly appreciate and commend your actions yesterday with regard to Saxman and look forward to more discussions along those lines.

Our Council has not made a recommendation on this request for reconsideration because we haven't met since these materials have been prepared, but the
Council has consistently, over many many years, supported Ninilchik’s customary and traditional use of the Kenai waters.

We also were ably represented by Ms. Gloria Stickwan at your November meeting where you did discuss the RFR and she presented her views -- our views and recommendations quite ably. She said the Board and the Staff did a very thorough job in the analysis and that, of course, we supported your conclusion from that meeting.

I looked over the transcripts and certainly would agree with her that you discussed the issues very objectively and thoroughly and you have a copious administrative record to back up your decisions.

During our March meeting we were, in fact, informed about the RFR and I believe the members have been sent copies of it. So we did have a little bit of a discussion about it at that point. One of our members from Clam Gulch said that he had read the RFR and he went through with some of our new members how we had come to the conclusion about the C&T and how C&T was, in fact, warranted and disagreed with the points brought up by the State regarding fish off Ninilchik and Deep Creek. Our Ninilchik representative asked that the RFR be rejected and that was during our March meeting.

Our Chairman, Mr. Lohse, who is very busy with fishing at this part of the year, has been part of the process since the beginning. Since the beginning of the subsistence program and since the beginning when Ninilchik first asked for this C&T. As we discussed any comments we might make on how the C&T policies in general might change, Ralph said our Council has always been inclusive and not excluding people based on the evidence presented to us. The Council has recognized the value of personal knowledge and just recognition of subsistence characteristics of a community.

I reviewed all the analytical materials that are in your packet today, find them to be of very high quality and accurate. I certainly agree with the conclusion on Page 18 as well as the justification and urge you to end this very lengthy process. Do not support reconsideration of any claim and continue to provide for the positive customary and traditional use determination for all fish in the waters that are described for Ninilchik.
Thank you very much.

CHAIRMAN TOWARAK: Thank you. Are there any questions of Judy.

(No comments)

CHAIRMAN TOWARAK: Thank you very much for your presentation. Is there anyone else that would like to -- come on up.

MR. WILLIAMS: Thank you, Mr. Chairman. My name is Darrel Williams. I spoke yesterday. I'm a rural resident. I work for Ninilchik Traditional Council and I'm here to represent them today. In the rural community, I believe it's interesting to provide a little bit of insight for you. I also sit on the Citizen's Advisory Council for State Parks and I'm also the vice president of Ninilchik Emergency Services. Where in the incorporated community we have to make things work and we discuss issues like this.

Our position is that we do not support the RFR. We support the threshold analysis. I believe Helen summarized it the best in saying there's a very long history in all this and paraphrasing is probably the best way to go.

Is everybody up to date on the fishery proposal? I assume you are. I think it's important to be able to express how important this fishery is to the people in Ninilchik. This fishery is used. The impact is very very small and it allows the meaningful preference that is mandated in this particular system.

Please don't support the RFR. Thank you.

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

(No comments)

CHAIRMAN TOWARAK: Thank you for your presentation. Anyone else? It's my understanding that we will not be hearing from the State because it is their request for reconsideration. Is that your understanding?

(No comments)

CHAIRMAN TOWARAK: That concludes then
this step. The next step is for the Board to either accept any of the State's claims or a motion to adopt the Staff's recommendation, which is that there is no merit to any of the claims in the request for reconsideration. Go ahead.

MR. FLEENER: Thank you, Mr. Chair.
Perhaps you could indulge my ignorance of the proper process. I was, I guess, a little curious as to maybe why we can't at least give a summary or perhaps present a little bit on some of the -- or I guess reiterate some of the analysis just for the benefit of the Board. Maybe you have something in your process that doesn't allow for that. I'm not sure. It seems that it would be beneficial to at least hear a recap from our Staff if possible, Mr. Chair.

Thank you.

CHAIRMAN TOWARAK: This is a discretionary decision and I'm going to allow you to summarize the State's position.

MR. FLEENER: Thank you, Mr. Chair. We will keep it brief and do appreciate the opportunity.

MS. YUHAS: Thank you, Mr. Chairman. For the record, my name is Jennifer Yuhas and I am the State/Federal subsistence liaison team leader. I will keep things very brief.

Staff analysis says that there's no merit to our request and that's Staff's job to support the Board's original decision and to leave no room for admitting an error may have been made and that a reconsideration may be necessary. That's the way things operate once we enter into a legal proceeding like this. I apologize that our counsel is not here. We really clipped along our agenda and he's not out of court yet, so Mike Mitchell is not here sitting next to me while I go through this. I will keep things brief.

Our main complaint was that a blanket finding was made for all species after the Board had prohibited Staff from Fish and Game to fully explain that some species are not found in this area and we had petitioned during the long course of this discussion for a separation between the stocks rather than this all fish finding.
The Board doesn't have a policy guideline for C&T, but you have maintained a criteria and our understanding at the State is that that's included four major things. That a use of a species occurred over time by a people. The State is quite confused as how a people can use a species over time if it's not present and we'd like to see a reconsideration so that those can be better defined rather than this blanket finding.

While it was stated by Staff that the legal opinions were an internal document and that they contained simply legal opinions, the State finds that those were personal opinions and that they were prejudicial. Some of the content of that was actually quite derogatory and is included in your packet. Those are not actually legal opinions that were included and we think that that does bring merit to our complaint that we were treated prejudicially even though the Staff analysis says we have no merit.

That's about what I have to add, Mr. Chairman, unless Mr. Fleener has something else.

MR. FLEENER: I have nothing more to add other than thank you for allowing us to give that recap. I'll leave it at that. Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Thank you.

MR. LORD: Mr. Chair. With your permission, I'd like to respond to one thing that Ms. Yuhas said, which concerned the Staff's job. The Staff's job is not to support a Board's decision once it's made. The Staff's job is to make sure that the Board makes the correct decision based on the facts and the law and they are well aware of that. I'm well aware of that and that's always our goal. We recognize the Board is not infallible, which is why we have an RFR process. We are willing to change our minds if we find that we've been wrong.

Thank you.

CHAIRMAN TOWARAK: Thank you for that. Are there questions.

MR. BELL: Mr. Chairman. Larry Bell, Fish and Wildlife Service. A follow-up question for Ms. Yuhas if I may. I read the documents thoroughly last night. Actually took homework home, which I seldom, if
ever, do, but I wanted to be as best prepared as I could
for today's meeting. Your statement about your concern
about a blanket finding for all fish, I think that's
directed at the various stocks that occur on the Kenai
Peninsula, the State's claim that the stock in the
Kasilof River would not be the same stock of fish that
would be in the Kenai River.

So I guess what I'm unclear on, if there
has been shown a customary use by Ninilchik residents on
the Kenai River and on the Kasilof River and on Deep
Creek and on the Anchor River, I'm not sure how the stock
plays in. It seems like our role is to determine if
there's been a use of the various waters regardless of
what stock of fish might be in there and that our burden
is to show the customary use of whatever fish occur in
those waters. So help me understand that. What am I
missing from the State's perspective?

MS. YUHAS: Through the Chairman. Thank
you for taking the packet home and being fully prepared.
We appreciate you reading our materials. The State
maintains that there has not been a finding of use for
each of those species and each of those stocks in that
area. Although I don't have the history that Mr. Lord
may be able to contribute to previous decisions by the
Board, it's my understanding that the Board has made
differentiation between stocks in the Yukon; redfish,
sockeye, chum, kings, have been treated differently for
different findings. The State maintains that all fish is
not an appropriate finding for this area.

MR. BELL: Thank you for that response.
Following up then on that, in the Staff analysis were
provided information that in Alaska Department of Fish
and Game's own report from 2002 and 2003 indicate that 28
percent of all Ninilchik households harvested fish. So
can you elaborate on that finding. Did that finding
break it down as to the stocks of fish in the waters or
did it just encompass all fish?

MS. YUHAS: Through the Chairman. I
cannot break it down. Our biologist could have broken it
down at the previous meeting and that's part of the
reason why we've requested the reconsideration.

MR. BELL: Thank you, Mr. Chair. Maybe
Subsistence Staff also knows the answer to that if they
could help guide me.
Thank you.

MR. LORD: Mr. Chairman. I just wanted to remind the Board that we're at the threshold stage, which means we didn't come armed with all the facts. We haven't done a full analysis. We're just here to decide whether or not to accept this RFR for that full analysis that would come later and, if so, which elements of those arguments laid out in the RFR we would accept. So I wouldn't expect the Staff to have all the information right at their fingertips at this point.

MR. BELL: Thank you.

MS. ARMSTRONG: But I do know the answer to that question.

(Laughter)

MS. ARMSTRONG: We've been doing this long enough. That study that was done by Jim Fall and others at the Subsistence Division, they did not ask the specific question about which fish. The question was on use in the past, so it was done for all fish. They didn't break it down. For whatever reason, that part of the questionnaire wasn't included in the original report that they did, but we knew that the information had been asked, so we ended up asking them to pull that out and they prepared a separate document for us and that was presented at one of the Board meetings on this issue in this very same room along the way. So it wasn't asked.

I think you have to -- we have to reiterate that subsistence users, when they're fishing, they may be targeting salmon, but they may get something else and if they get something else, then they're going to eat it. I would bet that most of the people in this room have been fishing on the Kenai River and have had that experience upon occasion where they've maybe been targeting rainbow trout but gotten a salmon or vice versa or some other fish. So it happens when you're fishing. It's a little different when you're hunting.

MR. BELL: Mr. Chairman. Helen, thank you for that. I would just clarify for counsel my purpose in asking the questions is simply to help me determine if the RFR has merit and if we should proceed further, so I'm taking it within that context, so thank you very much.
CHAIRMAN TOWARAK: Any further questions or discussions.

(No comments)

CHAIRMAN TOWARAK: Is the Board ready to submit a motion?

MS. PENDLETON: I would motion that there isn't sufficient merit to reconsider the RFR.

MR. BELL: Mr. Chairman, I'll second for discussion purposes.

CHAIRMAN TOWARAK: You heard the motion and the second. The floor is open for discussion.

MS. PENDLETON: In looking at the reconsideration and also the extensive, I think, deliberations of the Board back in November in considering my comments relative to Ninilchik, I still maintain that the proposal that was submitted by the Traditional Council is simpler. Furthermore, the fact that all food fish have been consistently harvested since the 1800s and, furthermore, the information indeed provided by ADF&G that the use of fish species by Ninilchik residents in the Kenai River area is at approximately 28 percent, which is, you know, still a fairly high number. Also, as Helen has discussed, Ms. Armstrong has discussed, that fishing is opportunistic and that it's not unusual for other fish to be taken and, of course, used.

Furthermore, we have a similar finding for Hope and Cooper Landing for C&T determination for all resident fish and it still remains for me very plausible that we maintain this C&T determination for Ninilchik for all species.

Thank you.

CHAIRMAN TOWARAK: Further questions or discussion. Go ahead.

MR. BELL: Mr. Chairman. Again, having looked at the information on the request for reconsideration, as to the parts laid out in Staff analysis on the threshold analysis in Parts II and III, I'm thoroughly convinced that the Board has done its diligence in those matters and that the claims relating
to that have been fully addressed by the Board and
decisions rendered appropriately, leaving me then to just
address the issues in Part I under the threshold analysis
where the State claims that the Board improperly accepted
a request for reconsideration of November 12th contrary
to the analysis and recommendations of its Staff.

I think in looking at the materials I
agree with the threshold analysis, that the Board did
adequately address that. They followed the procedures
for accepting requests. Since the criteria are not
intended to limit the Board's discretion for
reconsidering a decision that the Board made previously,
that the Board acted appropriately.

Then looking at Claim 3.2 where the State
contends that the Board's own regulations are unsupported
by substantial evidence. The stocks of rainbow trout,
lake trout, Dolly Varden, and other resident species
within Federal boundaries in the Kenai River Area
constitute distinct stocks which Ninilchik residents
have not harvested in meaningful numbers.

I think the issue for me here is it's not
so much the numbers that's important as establishing the
use and I think in the information provided that the use
has been well established that Ninilchik residents do, in
fact, use all species of fish within those waters. While
I recognize fully there are different stocks within those
drainages, I think our burden is to determine whether use
has occurred and not particular use of stock.

I understand the State's concern for
instance in the Yukon River, but in that instance we're
talking about very different stocks of fish within the
same drainage. I think that's a different analogy or
analysis than would occur of stocks of fish within
different drainages used by the same groups of people.
So I'm not sure that's a parallel kind of analysis in my
mind.

And then relative to the State's claim in
Part I, Claim 3.3, that's the issue that addresses
perhaps attorney/client privileged document. I would
just say on the record that it's always been my belief
that even when we receive a document from the attorneys
on an issue those are advisory in nature and I don't
think that an advisory memo reflects a decision of the
Board. I've dealt with many, many of these issues in the
past where we seek advice from counsel. We often take
that advice, but we're not mandated in which to do so.

Furthermore, since the memo went only to the Chairman of the Board, perhaps with copies to other Board members, again I don't think that reflects a decision on the Board, merely advice from counsel that the Board is free to accept or reject. So even if that memo were to be held to be completely accurate and not to the discretion of the Board, I think the Board exercised appropriately its discretion addressing that.

With that, Mr. Chairman, certainly I would offer my vote to reject the request for reconsideration.

Thank you.

MR. CRIBLEY: Mr. Chairman. After having reviewed the documentation that's been provided to us previous to the meeting today, being briefed on this by my staff on the history of this issue and the information that was presented and then also listening to the testimony in discussion today, I'm not hearing a compelling reason of why we should reconsider or accept this reconsideration.

I agree with other Board members about the fact that I don't think we should accept this or move forward with doing a reconsideration on the previous Board decisions. If that makes sense. I don't know if I said that right.

CHAIRMAN TOWARAK: You did.

MR. CRIBLEY: Okay. Thank you.

CHAIRMAN TOWARAK: In my analysis, and I don't have as much history with this issue as some of the other Board members have or the Staff, from the public I haven't heard any support for the State's RFR request, but we did hear from the Regional Advisory Council to oppose RFR. Based on directions from the Secretary of Interior of deferring as much as possible to the Regional Advisory Councils, I personally will vote in favor of rejecting the RFR based on the recommendations from the Regional Advisory Council.

Further discussion.

MS. COOPER: Yeah, Mr. Chair. I have one
other follow-up question based on the information provided by Alaska Department of Fish and Game, Division of Subsistence, indicating that 28 percent of all Ninilchik households harvested fish in Federal waters in the Kenai area. It says of these 17 percent harvested fish with frequent use. Is that 17 percent of the 28 percent?

Through the Chair.

MR. FLEENER: Not having read the report, I can't say definitively, but I'm pretty darn sure that that is normally how that's written, that it would be 17 percent of the 28 percent.

MS. COOPER: That actually uses it frequently?

MR. FLEENER: That's correct.

MS. COOPER: Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Is there a call for the question if there are no further discussions on the motion. The motion in review then is to reject the State's request for reconsideration.

MR. BELL: Mr. Chairman. Call for the question.

CHAIRMAN TOWARAK: The question has been called for. All those in favor of the motion say aye.

IN UNISON: Aye.

CHAIRMAN TOWARAK: Any opposed say nay.

(No opposing votes)

CHAIRMAN TOWARAK: The motion passes unanimously. That concludes item number 8. We have item number 9, other business, Kenai moose. Go ahead.

DR. WHEELER: Thank you, Mr. Chair. This is, again, a heads up to the Federal Subsistence Board. There's no action needed at this time, but it's just to give you a heads up. A wildlife special action was submitted by the Kenai National Wildlife Refuge a month or two ago, I think. I wasn't here. It requests that the Federal moose regulations for Units 7 and 15 be
changed to align with recent changes made by the Board of
Game in those units.

The current Federal regulation is one
antlered bull with spike fork or 50-inch antlers or with
three or more brow tines on either antler by Federal
registration permit.

The request submitted by the Kenai
National Wildlife Refuge would eliminate the spike fork
harvest, it would remove the harvest of three brow tine
moose, changing it to moose with four brow tines and it
would add an antler sealing requirement.

There are conservation concerns for the
moose populations in both Units 7 and 15. There's low
and declining bull/cow ratios. The intent of the
regulatory change is to reduce the harvest of bulls to
address these conservation concerns. Again, in March of
2011, the Alaska Board of Game made these regulatory
changes and without similar action in Federal regulations
any conservation gains may be compromised as the majority
of lands in Unit 7 and 15 is Federal public land.

So why am I telling you this. Well, I'm
telling you this because we had the special action
request. An analysis is being developed by Staff as we
speak. The Staff Committee met last week and recommended
further additions to the analysis. So Cole Brown is
upstairs working away on the particular changes. She's
adding some options, she's looking at -- well, she's
adding some options and making some other changes
requested by the Staff Committee.

Once the analysis is complete, which
we're hoping will be done by the end of this week, it
will go out to the Federal Subsistence Board so that you
all can take action on this. It wasn't unanimous. As
you probably remember, with special actions, if there's
unanimous consent of the Staff -- or if the Staff
Committee can reach a unanimous decision, then it doesn't
need to go to the Federal Board, but this issue is pretty
complicated, somewhat controversial, as you might
imagine. Anything that has Kenai attached to it, it
seems to be controversial. So the analysis will be going
to the Federal Subsistence Board for its deliberation and
action.

Mr. Chair.
The reason why it's sort of on the fast track is that the moose season starts August 10 and registration permits, if these changes were to be made, would need to be issued, so we need to have as much lead time as possible, but we also want to have as solid an analysis as possible.

I would also add this is a wildlife special action, but we also have a proposal that's going to be before you for action in January to make these changes permanent. So you've got a special action to carry through this fall season and then there will be a proposal to make these regulatory changes permanent.

So, Mr. Chair, I don't have -- this isn't an issue for Board action at this time, but by the end of the week or early next week it will be an issue for Board action. So it's just reminding you to -- we'll keep you apprised of what's going on with this and as soon as we have the analysis completed and ready to go as per the Staff Committee and my review, then it will be going out and the Board will be expected to take action. This is an issue that can be done electronically. We've done electronic polling on wildlife special actions before and on fishery special actions, so it wouldn't require necessarily -- it wouldn't require an in-person meeting.

And your Board guidelines, that's all legal. Just for the record, for the public, this is how wildlife special actions can be addressed by the Board.

Mr. Chair, I know this isn't an issue that the Board is being expected to take action on today, but Ms. Caminer did ask if she could say a few words on behalf of the Council. The Council did discuss this issue at its meeting here in town in March. So that's up to the Board, Mr. Chair, if you are so inclined, but she looks anxious.

Mr. Chair.

(Laughter)

CHAIRMAN TOWARAK: Consistent with my views, I'd like to hear from the Regional Advisory Council.

MS. CAMINER: This is Judy Caminer. I'm sorry, I didn't mean to look anxious or sound anxious. I did just want to speak to you because we did receive a
copy of this special action through our council
coordinator a few weeks ago and our council was briefed
by the Fish and Game biologist as well as the Refuge
manager and Jerry Berg at our March meeting, as Polly
said. So we were told that the moose population was
decaying, that there could be a special action this fall
or a new proposal might be in front of us at our fall
meeting, so this is a bit of a different schedule than I
suppose everybody anticipated when we were briefed.

The question was how many moose were
taken through subsistence permits this last year and this
was to the Refuge manager and the answer was four. So
people didn't feel like there was a need to change the
regulation in terms of the size of the moose taken and
that there would be many opportunities for in-season
management. So that was kind of the gist of our
discussion that people really emphasized the desire to
have in-season management, more careful management by the
Refuge and the Forest Service.

One of our people who hunt on the Refuge
was concerned that hunters who have been using State
regulations would, if restricted, then use the Federal
regulations and that's something that I'm sure will be
brought out in the analysis as well because they would be
eligible for Federal and that could give subsistence
users, as he said, a bit of a black eye if it were
perceived that subsistence users were the cause of these
decreases.

Our representative from Ninilchik was
absolutely opposed to eliminating the spike fork hunt and
I'm sure that will come out in the analysis as well. Our
vice chair said, as I mentioned before, just manage the
hunt. That was his advice. I believe you can accomplish
that through your registration system. Our Chair
said that his expectation of the new Refuge manager was
to, of course, protect the resources but also protect
subsistence rights.

We were also told that there is a model
by Fish and Game, but that would be an important tool but
that was not available at our meeting, so perhaps that
will be available when you have your further discussions.

So my comments would be that I'm not sure
if the special action will also apply to the later season
hunt. I didn't see that exactly. It also mentioned a
sealing requirement, but I'm not sure -- and maybe this
is something you can find out, whether that's part of the
State regulation now.

I think, you know, don't have to exactly
mirror the State. I think there are ways to still
provide a meaningful preference for subsistence users but
be mindful of the conservation and that could be through
this permit and reporting system. So we'll look forward
to working with you further.

Thank you.

CHAIRMAN TOWARAK: Thank you for your
comments. Mr. Fleener.

MR. FLEENER: Thank you, Mr. Chair.

MS. YUHAS: Thank you, Mr. Chairman.

Jennifer Yuhas at the State of Alaska. Thank you for
adding this agenda item because we come to these Board
meetings and one item can be contentious and then we have
an opportunity to wrap a meeting up saying that we're in
agreement with something and thank our Federal
counterparts for a positive working relationship.

There will actually be two proposals on
this at the upcoming Subsistence Board meeting. They
aren't identical, but our Staff has worked
collaboratively with the Refuge Staff in trying to find
a solution for this issue and we've been generally
supportive of the concept that's moving forward and I
just wanted to put that on the record.

Mr. Chairman.

MR. FLEENER: Thank you, Mr. Chair. I
wanted to add something. Ms. Caminer said that the
proposals don't necessarily have to mirror one another,
but I think down through the ages you've heard from
subsistence users, I've heard from subsistence users,
hunters across the state, that they would prefer things
to be as closely aligned as possible. There are times,
there are places where there can be differences, but I
think as much alignment as possible is going to be best
for the users and the managers.

Thank you, Mr. Chair.

CHAIRMAN TOWARAK: Thank you for those
comments. I think that reflects my own personal
philosophy also. Just having heard a lot from subsistence users both from the State and the Federal government. The more alignment that we could find, I think the better off our users will be and I think reach conservation goals also. So I appreciate your comments.

Anything else? Go ahead, Mr. Virden.

MR. VIRDEN: My name is Gene Virden, Bureau of Indian Affairs. I just wanted to make one point. What Staff presented me was that there were 24 bulls harvested last year down there that would qualify in the future if this goes through. There's concern by one of the tribal councils down there that they may not get any that qualify in that size range. You know, they've been harvesting down there for generations.

That's all I have for comment.

CHAIRMAN TOWARAK: Thank you.

MR. ARDIZZONE: Mr. Chair. This will be clarified in the analysis, but the 24 bulls was four brow tines. There are plenty of other bulls that are 50 inches or more that were also harvested, but it will all be in the analysis for your review.

CHAIRMAN TOWARAK: Okay. Well, I guess we could look forward to receiving your analysis. I assume if there's a decision that we would probably do it telephonically.

DR. WHEELER: Yes, Mr. Chair. If that's the request of the Chair, we can do it telephonically, we can do it electronically. I guess what I will promise you is that you will get the analysis by the end of the week and it may require more homework, Mr. Bell. Sorry. But you can take the analysis and look at it and you may prefer to have a discussion over the phone or do it electronically. I guess that's your call. We will stand by. We will get you the analysis by the end of the week and then we'll stand by as to what your preference is, Mr. Chair.

CHAIRMAN TOWARAK: Thank you. I'll ask the Board to convey their wishes on how the decision will be made after receiving the analysis. If there's no other discussion -- I've got a question. It's not on the agenda, but I'm wondering where the process is for
appointing two new Board members.

DR. WHEELER: Fortunately Pat Pourchot's
in the room, so Pat Pourchot can -- I'll punt that one to
you, Mr. Pourchot.

MR. POURCHOT: Mr. Chairman, thank you
very much. As you know, you, on behalf of the Board,
sent a letter to the Secretary making some
recommendations to the draft regulation, which was
published in the Federal Register I think back in
February and then your comments and the Board's comments
came after quite a bit of written testimony, in-person
testimony, there was tribal contacts. So in our internal
Secretarial process, what we do to get things moving is
send a decision memo with backup information to the
Secretary.

That memo has been sent. So the
Secretary, hopefully soon, will be looking at that and
when he makes a final decision on the language of the
regulation that would be then, thanks to OSM Staff, they
will and Theo will put that in a final regulatory format,
send it back up for required surnaming, I assume, again.
We will try to expedite that and it will have to be
published in final in the Federal Register, then the
Secretary will initiate a process to make the
appointments.

It's certainly my recommendation to
utilize the kind of criteria in the selection process
that the Board and others had testified to. I think all
those considerations are appropriate and then, of course,
those appointments are coordinated through the Forest
Service and the Department of Agriculture for Secretarial
concurrence by the Secretary of Agriculture.

I would remind the Board of our
experience, much to some of our frustrations last go
around, it turned out to be a lengthy process. There's
a required vetting process, background check of
appointments. Not everybody passes those background
checks for a variety of reasons. I'm recommending that
we would pursue a process similar to the appointment of
the Chair last year for widespread advertisement if you
will, but letters to rural user groups, tribal groups,
soliciting names for nomination or self-nomination and
then those names would be considered, maybe a short list
developed, RAC consideration given, then move to a
recommendation or short list to present to the Secretary
for approval.

I think we've all looked ahead and as a goal, certainly my goal and I'm sure the Board's goal that we would have two new public members in place in time for some orientation and briefing and certainly for attendance at the January Board meeting for consideration in the next regulatory process. So, with that, we will do all we can to kind of advance this process knowing that sometimes it bogs down from time to time.

CHAIRMAN TOWARAK: Thank you. I was just curious where the process is at and you've answered my question. Anything further. Go ahead.

MR. BELL: Mr. Chairman. I apologize, but just going back to the special action request that will be coming before the Board on the Kenai moose situation. Just to let the Board know that the Refuge is currently receiving requests for permits and they have, in fact, issued three permits. We've asked them to put any additional issuance of those permits on hold until such time as the Board can reach its decision. So I think time is of the essence has been expressed.

In addition, I think it is important that we, in going forward on this issue in particular, allow some form of public participation. I would certainly support a teleconference or something in that nature within the next week or so and encourage the Board to make available in their scheduled time within the next week or so that we can let the public participate somewhat and then reach some kind of Board decision after we have had a chance to deliberate on the issue.

Thank you, Mr. Chairman.

CHAIRMAN TOWARAK: Go ahead, Gene.

MR. VIRDEN: Mr. Chair. I just have a couple questions for OSM. I'm curious on the Native liaison position, which will be key in the consulting process of the tribes here, the status of that. And also Mr. Lee Wallace yesterday asked I believe who did the summary for the June 8th executive session.

DR. WHEELER: I'm sorry. I'm going to have to plead ignorance on both counts and I will get back to you on that. We have had a lot of difficulty advertising positions through OSM or through HR. I don't
believe that that position has been advertised, so that's
the answer to your first question.

In answer to your second question, I
don't know, but I will get back to you on that. I don't
know if -- I don't even know of the session -- I don't
know about the session of which you speak. So once I do
know I will get back to you on that.

Mr. Chair.

CHAIRMAN TOWARAK: Thank you.

MS. COOPER: Mr. Chair. I apologize.
Also going back to the special action. I would just like
to the Chair to request of the acting lead for OSM
if it is possible in the analysis for that special action
to include any type of analysis so we can gain
understanding on what was behind the Board of Game's
decision for any changes, whether it's transcripts from
the Board of Game or just so that we can understand where
they were coming from to help our analysis on that
special action.

Thank you, Mr. Chair.

DR. WHEELER: Mr. Chair. Actually, the
Board of Game doesn't do transcripts. They tape their
meetings, but they don't do transcripts. They will do
them if you ask specifically, but since time is of the
essence we're probably not going to do that. What we do
have is that Mr. Ardizzone has the dubious distinction of
sitting at the table of every Board of Game meeting that
happens, so he is well connected with this issue and is
very familiar. We have to be careful in speaking about
another agency -- you know, why another body did what a
body did.

We can speak to what they did and I think
the over-arching issue for the Board of Game and for the
Federal Subsistence Board is and should be conservation
of the resource and I think that the Board of Game is
very concerned about conservation of the resource of
moose in Unit 7 and 15 and particularly that spike fork
component.

So we will do the best we can, but we do
have to be careful about implying rationale to another
body. It's hard enough with Federal Subsistence Board
let alone another body that we don't have a real clear
connection with. But we'll do our best.

MS. COOPER: Thank you, Mr. Chair. Just as much insight as we can have would be appreciated. Thank you.

CHAIRMAN TOWARAK: That seems to, I think, take care of all the questions of the Board. We have an executive session scheduled for 1:00 to review our Council membership applications. If there is no further business to handle this morning. I don't know if anybody is interested in going to the executive session now or do you want to wait until 1:00? Wait until 1:00? Oh, do it now? Okay. We'll take a five-minute break and then we'll reconvene our executive session to review the applications for RACs.

(Off record)

(End of proceedings)
CERTIFICATE

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I, Salena A. Hile, Notary Public in and for the State of Alaska and Owner of Computer Matrix, do hereby certify:

THAT the foregoing pages numbered 44 through 89 contain a full, true and correct Transcript of the FEDERAL SUBSISTENCE BOARD WORK SESSION MEETING, VOLUME II taken electronically on the 12th day of July 2011, beginning at the hour of 8:30 a.m. at the Gordon Conference Room, Anchorage, Alaska;

THAT the transcript is a true and correct transcript requested to be transcribed and thereafter transcribed under my direction;

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

DATED at Anchorage, Alaska, this 20th day of July 2011.

Salena A. Hile
Notary Public, State of Alaska
My Commission Expires: 9/16/14