

THE RIGHT TO SUBSIST

Federal Protection of Subsistence in Alaska



“What we now call subsistence is not a relic from the past— a holdover from previous times that will inevitably disappear as market conditions take over—it continues to be the foundation of Alaska Native society and culture.”

—Julie Kitka, President, Alaska Federation of Natives

SUBSISTENCE



SUBSISTENCE

The word "subsistence" in modern Alaska refers to the hunting, fishing and gathering activities that have provided food and other necessities to Alaska's Native peoples for thousands of years - practices that flourish throughout rural Alaska today. Before the arrival of non-Natives, subsistence was the only form of economic production by which aboriginal populations fed, clothed and housed themselves. Conducted in seasonal cycles by small communities and semi-nomadic bands within recognized territories, subsistence has always utilized traditional, small-scale technologies for harvesting and preserving foods and communal networks of sharing and barter for distribution of the resulting product.

In the past 250 years, technologies of Native subsistence have changed, as people have adjusted to modern tools of harvest, transportation and storage. So, on the surface, today's subsistence looks very different from that of pre-contact times. But beneath this visible level, with its manufactured equipment and store-bought supplies, older patterns of behavior continue. How Native people practice subsistence has changed, but what they are doing is mainly what they have always done. And what they have always done is a different kind of behavior from the modern mass culture of America.

Fish and game resources have always been the subject of political competition. Where there are not enough animals to satisfy all human demands, governments must hand out the available surpluses to certain groups - by laws, regulations and treaties. Competing human uses of wild, renewable resources in Alaska are:

- **Commercial fishing**, an industry in which large companies process and sell fresh, smoked and canned products for cash profit;
- **Commercial hunting** (e.g., trapping and guiding) for cash profit;
- **Sport fishing** (mainly rod and reel and dip-nets), done for personal recreation, even if the product is taken home and eaten;
- **Sport hunting** with rifles and shotguns, done for personal recreation, even if the product is taken home and eaten;
- **Personal use fishing** (dip-nets or rod and reel) for food;
- **Subsistence fishing** (mainly by nets) for food and by-products (e.g. crafts);
- **Subsistence hunting** for food and by-products (e.g., clothing, umiaks)
- **Subsistence gathering** of plant products for food and crafts (e.g., berries, greens, medicinal herbs, bark, etc.).

1959 TO 1978

Between Alaska Statehood (1959) and the first subsistence law enacted by the Alaska Legislature (1978), most species of fish and game were open to residents on a "first come, first served" basis: the seasons opened; users harvested; and, when the harvestable surplus had been taken, the seasons closed. The total number of residents was small enough that no defined user-group had to be given a legal priority over any other.

ALASKA NATIVE CLAIMS SETTLEMENT ACT, 1971

When the United States bought Alaska from Russia in 1867, it did not buy the land. It bought legal sovereignty: the right to govern by law. The indigenous peoples had a prior claim to ownership of every square foot of Alaska's lands, surface and sub-surface, by virtue of their aboriginal use and occupancy of it; and no treaties had extinguished that right.

In the last third of the 19th Century and well into the 20th, as non-Native migration into Alaska increased (mainly from the Lower 48 states), various acts of Congress provided a Territorial government, property rights, law enforcement, and other benefits to the new, non-Native arrivals. In addition, Congress began withdrawing huge blocks of land to create national forests, wildlife refuges, petroleum reserves, parks and monuments, etc. The combination of private, non-Native tracts of land (e.g., for mining claims, commercial sites, church construction, school buildings, town-sites, etc.), plus huge public land classifications, seriously disrupted the subsistence habitats and practices of local Native communities.

Alaska's new territorial government was completely controlled by non-Natives, and Natives generally remained outside the arena of non-Native law and politics. Consequently, the legal question of prior aboriginal land title kept being postponed, decade after decade, until the 1960's. Such acts as the Treaty of Cession (1867), the First Organic Act (1884), the Second Organic Act (1912), and the Alaska Statehood Act (1958) paid lip service to the nagging question of who actually owned the land - but refused to take action on it. (For example, the First Organic Act of 1884 said: "*...the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them; but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.*") Postponement of that issue began with the Treaty of Cession with Russia and lasted until 1971 – a period of 104 years. The national government didn't want to deal with such a complex, misunderstood issue; and there was no political pressure on Congress to address any Native concerns about securing land title.

The long-standing land issue came to a head with congressional passage and administrative implementation of the Alaska Statehood Act (1958-59). In this

legislation Congress allowed the new state to select 103 million acres of land that it would own, as well as govern. But, in the 1960's, the State's enormous land selections began to impinge heavily on hunting and fishing grounds around Native villages; and a young, educated Native leadership coalesced in a political movement for congressional settlement of their claim of land ownership. In 1966, the Alaska Federation of Natives was formed to pursue that settlement.

What finally forced Congress to act, after a century of procrastination, was the 1968 discovery of immense oil reserves at Prudhoe Bay. Because the crude oil had to be transported by pipeline to the south coast of Alaska, the pipeline's right-of-way had to be free of any "cloud" (i.e., any doubt) on title. If Congress had failed to settle the long-pending aboriginal claims now, Alaska Natives could have sued, tying up oil development in federal court for decades. Congress acted, not out of any great desire for justice, but in order to get at the oil.

On December 18, 1971, after years of Native lobbying and congressional debate, President Nixon signed into law the Alaska Native Claims Settlement Act (ANCSA). This landmark legislation extinguished aboriginal title to all of Alaska's 374 million acres and allowed Natives to select 44 million acres that they would keep. It also paid Natives \$962.5 million in compensation for the lands that were being taken from them. What happened in 1971 was no "welfare giveaway;" it was a negotiated real estate sale that settled the claims, opened the pipeline corridor, created an economic boom and made modern Alaska possible.

SUBSISTENCE HUNTING AND FISHING IN ANCSA, 1971

Throughout the four-year process of drafting the Alaska Native Claims Settlement Act (ANCSA), the congressional focus was on land title - in order to settle the pending claims. But subsistence was also of concern to federal lawmakers. One of the Senate bills emphasized protection of "...Native subsistence hunting, fishing, trapping and gathering rights..." If those words had been included in the final Act, they would have required the Secretary of the Interior to designate public lands around Native villages as "subsistence use areas..." and, under certain circumstances, to close them to non-subsistence uses. But such provisions were dropped from the law - because Congress, the State and the oil companies didn't want to delay the pipeline for another year or two to work on intricate subsistence protections.

So, ANCSA extinguished aboriginal land title and replaced it with fee title and money; but it also extinguished aboriginal hunting and fishing rights - and took no statutory action to protect Native subsistence uses of fish and game. The text of the Act is silent on the issue, and the Conference Report offered only its concern for subsistence and an "expectation" that it would be protected:

"The conference committee...believes that all Native interests in subsistence resource lands can and will be protected by the Secretary

through exercise of his existing withdrawal authority. The Secretary could, for example, withdraw appropriate lands and classify them in a manner which would protect Native subsistence needs...by closing appropriate lands to entry by non-residents when the subsistence resources of these lands are in short supply or otherwise threatened. The conference committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."

As the 1970's unfolded, Congress's failure to enact statutory protections of subsistence, after having erased its aboriginal protections, was made worse by rapid population growth and the creation of a huge, non-Native political majority in Alaska's cities. Against the power of that demographic shift, the rhetorical concern expressed in ANCSA's legislative history gave little protection. In the nine years between ANCSA (1971) and the Alaska National Interest Lands Conservation Act (1980), Alaska's population grew by 36%; and a series of state laws, regulations and court decisions began to take fish and game away from the most traditional people in the United States, handing them to the urban, non-Native majority that controlled state policy. Here are two classic examples:

- The population of the Northwest Arctic Caribou Herd crashed in 1976, causing food shortages in local villages; but when the State Board of Game allocated the remaining tiny surplus to locals subsistence needs, non-Native hunters sued to reverse this action as an unconstitutional "discrimination;" and they won. The outcome was that urban sport users got their caribou, and the State had to spend taxpayers' money to fly store-bought replacement foods into Eskimo villages.
- In 1978, the State arrested a number of Indian elders for the crime of operating traditional subsistence fish-wheels on the Upper Tanana River during a period exclusively reserved for sport dip-netting by the urban RV crowds that lined the bank.

Clearly, the optimistic expectation articulated by ANCSA's legislative history was not being fulfilled, and there would never be adequate protections of village subsistence economies unless Congress specifically enacted them in law.

THE FIRST STATE SUBSISTENCE LAW, 1978

The Alaska Legislature then enacted a state subsistence statute, giving a priority to subsistence use (over sport, personal and commercial uses.) But state law made no distinction between users, defining all Alaskans (regardless of their cultural and economic differences) as subsistence users who could hunt and fish in any subsistence area of the state. Thus, the burgeoning urban majority, under the protected label of "subsistence," could go into rural areas and compete with local villagers for the latter's food supplies. If something were not done soon, the economic and cultural foundation of Native village life would be wiped out by the sheer weight of the urban, non-Native population.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT, 1980

ANILCA, signed into law by President Carter on December 2, 1980, was the second chapter of the same book of land and resource policy that Congress had begun writing in ANCSA (1971). Its main purpose was to classify large blocks of federal land for national purposes (e.g., parks, monuments, forests, refuges, wild and scenic rivers and the open public domain). But Congress, reacting to the State's treatment of subsistence users in the 1970's, also felt that it now had to enact federal statutory protections of subsistence, which it had failed to do nine years earlier in ANCSA. This was done, in Title VIII of ANILCA, by giving a user priority to subsistence takings by rural residents on federal lands and waters.

ANILCA did not enact subsistence protections by race or by a government-to-government relationship (e.g., a Native priority or a tribal priority). An original ANILCA bill had contained a Native priority; but this was changed to "rural" because the State objected, claiming that a Native priority would violate the Alaska Constitution, preventing the State from complying with Title VIII. Thus, the priority was based on place of residence, reflecting the fact that the economies and cultures of rural Alaska are qualitatively different from those in the state's urban locations. The Senate bill's Report described subsistence as "... by its very nature something done only by Native and non-Native residents of rural Alaska." It defined subsistence as "...the customary and traditional uses by rural Alaska residents of wild, renewable resources for such direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles...; for barter or sharing for personal or family consumption; and for customary trade."

ANILCA's Title VIII offered the State the option of managing subsistence on federal public lands (in addition to its own jurisdiction over state and private lands), if the Legislature would enact a law of general applicability containing the same rural priority. The desire to manage a unified, statewide system, without federal interference, was the State's incentive to comply with Title VIII's offer.

STATE COMPLIANCE, 1981 to 1989

In an attempt to comply with the federal law, the Alaska Boards of Fisheries and Game jointly adopted a regulation in 1982 giving a statewide rural subsistence priority; but the Alaska Supreme Court later ruled that state compliance must be done by statute, rather than by regulation. So, in 1986, the Legislature passed a law giving a rural subsistence priority, as in ANILCA. The State was now in compliance with ANILCA; and the system worked. But anti-subsistence interests hated the priority and were determined to remove it from state and federal laws.

A few years earlier, a coalition of sport interests had gathered enough petition signatures to place a "subsistence repeal" initiative on the 1982 general election

ballot. If adopted by a majority of the votes cast, Ballot Measure 7 would have prohibited state law from giving a subsistence priority based on virtually any criterion. On November 2, 1982, that repeal initiative was defeated, 111,770 (58.38%) to 79,679 (41.62%). So, the rural subsistence priority remained in state law, Alaska stayed in compliance with Title VIII of ANILCA, and state regulation of all subsistence harvesting continued.

This political event taught anti-subsistence forces two lessons. First, they realized that a clear majority of the electorate did not agree with them on the issue. [In public opinion polls during the 1990's, about 60% of respondents consistently favored having a rural priority in state law.] Second, they learned that putting subsistence on the ballot would bring out Native voters, potentially affecting important contests for public office. [On the 1982 ballot, the Democratic candidate for Governor was aided by the Native subsistence turnout.] Urban legislative majorities never again allowed the electorate to vote on subsistence - because they suspected what the voters would do if they ever got the chance.

STATE NON-COMPLIANCE, 1989-90

State compliance with Title VIII of ANILCA came to an abrupt halt on December 22, 1989, when the Alaska Supreme Court, ruling in *McDowell v. State of Alaska*, struck down the 1986 state law's rural priority as a violation of the Alaska Constitution. [This suit had been brought by anti-subsistence leaders who had failed in 1982 to remove the priority by the ballot box - and had then turned to the courts.] *McDowell* struck down only the rural standard for defining subsistence users, but the priority given to subsistence use over other uses remained in force. This initiated the State's "all Alaskans" subsistence policy, which gives the priority to every one of today's 665,000 residents, in violation of Title VIII on federal lands and waters. The State was again out of compliance and vulnerable to losing subsistence management on federal lands and waters

Federal and state subsistence laws were now in conflict, and the central question was whether the impasse should be resolved by:

- 1) amending the Alaska Constitution** to allow the rural priority back into state law (by a 2/3 vote of each legislative house and a majority of the votes cast in the subsequent general election); or
- 2) amending Title VIII of ANILCA** to remove or gut the federal rural priority; or
- 3) some combination of these two**, in which Congress would weaken ANILCA's enforcement sufficiently that anti-subsistence forces in the Alaska Legislature would permit a state constitutional amendment to comply with a pallid federal law.

Governor Cowper called a special session of the Alaska Legislature in June, 1990, proposing a state constitutional amendment which would allow a state statute that complied with ANILCA's rural priority. The Senate passed its version of the bill; but the House failed to pass any constitutional amendment, by a vote of 26 YEA's and 14 NAY's, falling one vote short of the required 2/3 (27 votes). This was the first of twenty-one legislative sessions to date that have refused to resolve the legal conflict by giving state subsistence protections to villages: 17 regular sessions and five special sessions (one previously called by Governor Cowper, one called by Governor Hickel, and three called by Governor Knowles).

KATIE JOHN, 1990-95

After the State failed to come into compliance with ANILCA in 1990, the federal government took over subsistence management on public lands in Alaska. But its regulations applied only to hunting on land and excluded navigable waters from the Secretaries' jurisdiction. That left fishing, which provides 59% of the rural subsistence diet, without protection by ANILCA's rural priority. Native plaintiffs brought suit in federal court (*Katie John, et al. v. U.S.*), claiming that ANILCA's term "public lands" included navigable waters. The Hickel administration counter-sued (*State of Alaska v. Babbitt*), claiming that ANILCA gave the Secretaries no power of direct management on any lands or waters in Alaska. (This specious suit was later withdrawn by the Knowles administration.)

On March 30, 1994, the U.S. District Court ruled for the *Katie John* plaintiffs, holding that all navigable waters in Alaska were under ANILCA's protections. In 1995, the State's appeal to the Ninth Circuit reduced this federal fishing jurisdiction to those navigable waters "reserved to the United States" (because they pass through, or touch, or otherwise affect major federal lands and Conservation System Units - e.g., parks, monuments, wildlife refuges, forests). A later attempt to appeal this ruling to the U.S. Supreme Court was denied.

Implementation of the *Katie John* decision was then blocked for three years by a succession of congressional moratoria arranged by Alaska's Congressional Delegation. The stated reason for each successive delay was to give the Alaska Legislature more time to resolve the subsistence impasse, but this merely encouraged anti-subsistence legislators to dig in their heels.

STATE NON-COMPLIANCE, 1997

During 1997, Governor Knowles created his Governor's Subsistence Task Force, which drafted a new state law that would comply with ANILCA, a constitutional amendment to permit that statute, and a list of congressional amendments that would weaken the federal law. It was a political compromise. A Native Subsistence Summit, attended by more than 900 people, rejected the ANILCA changes that would have weakened the definitions and enforceability of Title VIII. But at the end of September, Congress, in response to the Alaska Delegation,

passed several of these ANILCA amendments, which would take effect only upon legislative passage of a subsistence constitutional amendment (and would otherwise "sunset" on December 1, 1998).

STATE NON-COMPLIANCE, 1998

Two components of the Knowles package (a constitutional amendment and a state statute complying with Title VIII) were then introduced in the regular legislative session and died there when the session ended. Instead, both houses passed a complex, unworkable bill that failed to resolve the impasse, and the Governor vetoed it in June. [The Legislature's continued refusal to enact a rural priority proved that even the 1997 congressional amendments to ANILCA had not harmed federal protections sufficiently to buy a constitutional amendment from state legislators.]

Governor Knowles called a special legislative session on May 26, 1998. He introduced only his constitutional amendment, rather than including the other two components, and the former failed to pass either house. Several anti-subsistence constitutional amendments with complex conditions also failed to pass before the Legislature went home on June 1.

Governor Knowles called a second special session for July 20, 1998. It rejected his package from the first special session and went home in two days.

In January of 1998, the Alaska Legislative Council had sued the United States in federal court, claiming (as had the earlier *State v. Babbitt*) that Congress' enactment of Title VIII violated the U.S. Constitution and the "Statehood Compact" - and that the Secretaries had exceeded their regulatory authority under Title VIII. This suit (*Alaska Legislative Council v. Babbitt*) was dismissed by the District Court on July 24. Plaintiffs appealed to the District of Columbia Court of Appeals, which upheld the District Court's dismissal, although on different grounds. This ruling was not appealed to the U.S. Supreme Court, and the Legislative Council's suit was over.

In late September, Senator Stevens and Secretary Babbitt reached a compromise that extended the congressional moratorium:

- If there were no state legislative approval of a constitutional amendment, \$11 million in federal funds would go to the Secretaries on September 1, 1999 for federal management - and the congressional moratorium against implementing *Katie John* would expire, bringing in direct federal management on October 1.

- If the Legislature approved a constitutional amendment by October 1, 1999, the State would get all the federal money to support its statewide subsistence management.

Following this, the deadline on the 1997 congressional amendments expired, and its proposed weakening of federal protections vanished. Neither federal money nor reduced federal guarantees had worked, and the impasse continued.

STATE NON-COMPLIANCE, 1999

In January, Governor Knowles urged the Legislature to address subsistence in his State of the State address - but introduced no legislation. Native legislators pre-filed SJR 1, a constitutional amendment. Various bills for new state subsistence statutes, some accompanied by constitutional amendments, were filed. (HCR 2 urged the Governor to take the impasse between federal and state laws directly to the U.S. Supreme Court. That resolution did not pass but articulated a judicial agenda of anti-subsistence legislators.)

On February 19, Senator Murkowski warned a joint session of the Legislature that 1999 was its last chance to avoid federal management, that there would be no further moratoria, and that getting rid of Title VIII itself was not politically possible. But he left the door open to possible amendments to "clarify" Title VIII. On April 8, Senator Stevens spoke to the Legislature, saying only that the ball was now in the Legislature's court and that the people were waiting.

In mid-April, a subsistence package (statute, constitutional amendment and amendments to Title VIII of ANILCA) was floated in the House. The draft law paralleled the 1997 Governor's Task Force; and the constitutional amendment allowed a priority by place of residence. But its ANILCA amendments would overrule *Katie John*, removing fishing from Title VIII's protections. Regional advisory councils would be weakened; federal monitoring would be eliminated; court oversight would be limited; and future intervention in response to state non-compliance would be made almost impossible. The bill was not introduced: pro-subsistence legislators would not support it, and anti-subsistence legislators wanted the federal law repealed without any constitutional amendment.

No subsistence legislation passed the regular session. Despite the October 1 threat of federal management of subsistence fisheries, the Legislature adjourned in May without resolving the conflict. In late August, Governor Knowles called a special session of the Alaska Legislature, to convene in Juneau on September 22, 1999, as a last chance to stop a federal takeover. The House held committee hearings; and for five days, its Resources Committee refused to pass a constitutional amendment. This led the Speaker and members of the House majority to "roll the Chair" of the committee by yanking the bill out of committee on the 28th, a move that caused four House members to withdraw from the majority. After passing Judiciary and Finance, a constitutional amendment

passed on the House floor, 28 Yes -12 No (27 being a two-thirds majority). After two more days of caucuses and meetings, the Senate brought a version of the House resolution to the floor, where it failed, 12 Yes - 8 No (14 being a two-thirds majority). Both houses adjourned on September 30.

With the expiration of the last congressional moratorium, the federal government finally had to comply with the *Katie John* ruling and took over subsistence fishing on reserved navigable waters on October 1. The Federal Subsistence Board (composed of a Chairman appointed by the Secretaries of Interior and Agriculture and of representatives of the Bureau of Land Management, Bureau of Indian Affairs, U.S. Fish and Wildlife Service, National Park Service and National Forest Service) immediately set up regulations and staffing for federal management during the 2000 fishing season.

STATE NON-COMPLIANCE, 2000

In a move that shocked the Native community, the Governor of Alaska announced on January 26 that he would appeal the 1995 Ninth Circuit ruling in *Katie John*. He planned first to ask the Ninth Circuit to reconsider its own finding. Failing that, he would petition the U.S. Supreme Court to reverse the decision that had put subsistence fishing under the protections of Title VIII. Since this move struck at the heart of their ten-year struggle, Natives reacted swiftly. The Alaska Federation of Natives called a Special Convention in Anchorage on February 15. Attended by more than 1,000 delegates from every part of the state, the Convention adopted resolutions condemning the Governor's action and appealing to Congress for amendments to strengthen Title VIII of ANILCA.

The first result of this planned *Katie John* appeal was that all pressure for state compliance with ANILCA had been lost. A constitutional amendment requires a 2/3 vote of each legislative chamber; and that needs support from the Republican majorities, as well as Democratic minorities, in order to put the issue on the general election ballot. The only reason why there were enough majority votes to pass such a measure in the House in September, 1999 was because legislators cared about keeping management in state hands. Absent the leverage of *Katie John* (i.e., the pain of losing state control to the federal government), there could never be a constitutional amendment. It became clear that, if the Governor's appeal prevailed, in the Ninth Circuit or in the Supreme Court, the future of most traditional Native villages would be threatened.

On June 1, the State of Alaska filed its Petition for Rehearing with the Ninth Circuit, suggesting that the action be done *en banc* (i.e., by an 11-judge panel, rather than another three-judge panel). In July, the Ninth Circuit agreed to an *en banc* rehearing. The State was joined by an array of anti-subsistence groups: 1) the Alaska Legislative Council; 2) the Mountain State's Legal Foundation (a conservative coalition of western states, then headed by future Secretary of the Interior Gale Norton, dedicated to fighting federal land policies); 3) 14 state

governments in the Lower 48; 4) the Alaska Outdoor Council; and 5) the Alaska Constitutional Legal Defense Fund (a group with another suit in federal court challenging the constitutionality of ANILCA's rural priority). Oral arguments were heard by the *en banc* appeals panel on December 20.

STATE NON-COMPLIANCE, 2001

The Ninth Circuit handed down its *en banc* decision on May 7. A majority of the judges upheld the Court's 1995 ruling, finding that ANILCA gives the federal government the power to manage subsistence on navigable waters reserved to the United States. The Natives had won the first round of the Knowles appeal.

In July, the State asked for and was granted an extension of time (to October 4, 2001) to ask the U.S. Supreme Court to hear an appeal of *Katie John* and to reverse the Ninth Circuit's *en banc* ruling. The Governor cited his intention to call a statewide Subsistence Summit to obtain recommendations on how he should regain state management - and more specifically, what he should do about appealing *Katie John* to the highest court.

On August 15 and 16, 42 Alaskan political, business and civic leaders, including several Natives, gathered in Anchorage to find solutions to the subsistence impasse, based on three goals set by the Governor: 1) protecting subsistence as the economic and cultural base of life in rural villages; 2) returning subsistence management from the federal government to the State; and 3) healing the "urban-rural divide" that the subsistence issue had created during the preceding years. With two dissenting votes, the Summit called on the Alaska Legislature to pass a constitutional amendment that would allow a rural subsistence priority and a statute containing both the priority and a system of subsistence co-management that would include significant participation by Natives. The Summit did not call for weakening amendments to Title VIII of ANILCA.

On August 27, the Governor announced that he would not ask the U.S. Supreme Court to review the Ninth Circuit's *en banc* holding in *Katie John*. He then appointed 11 individuals, most of whom had been participants in the Summit, to draft the language of a proposed solution. The drafting committee met six times, producing on November 6 a constitutional amendment that would require a priority for customary and traditional subsistence uses in rural Alaska. The proposed amendment would also permit the Legislature to create additional classes of non-rural subsistence users who could meet certain criteria of eligibility. The drafters recommended changes in the state management system, including improved definitions of key terms in the statute and the creation of local/regional advisory committees in the regulatory regime. They did not recommend any amendments to Title VIII of ANILCA. The Governor submitted a version of this plan to the next regular legislative session (January, 2002), and the Legislature ignored it.

The reason why this legal chronology of the federal-state subsistence impasse ends with the 2002 state legislative session is that no significant action on it has been taken since then. Conflicts over federal and/or state management have arisen with a vengeance, but a solution to the legal conflict between state and federal laws has remained on the political back burner. Legislative sessions have come and gone without action, no important judicial ruling has occurred on the state-federal conflict, and we haven't seen much comment in the media.

Although subsistence had sat on the back burner for several periods between 1989 and 2002, it never really goes away; and it can erupt at a moment's notice. It continues today in the judicial and regulatory arenas - especially in the State's intense effort, in cooperation with the administration, to subvert the processes of the Federal Subsistence Board during the past five to six years. (Please see June 1, 2009 AFN letter to Secretary Salazar for details.)

HISTORICAL PERSPECTIVE

As one reads the foregoing chronology, patterns of Indian policy that are as old as the United States emerge. For three decades, federal and state subsistence laws have been marked by unreliability. As in the case of Lower 48 Indian tribes, the greatest danger to Alaska Natives is that they cannot get non-Native governments to hold to whatever was agreed to just a few years earlier. Nothing can be counted on over time - because the demands of the burgeoning non-Native majority increase with population. Consider the sequence:

- In ANCSA, Natives had wanted federal protections of subsistence placed in the statute, didn't get them, and were stuck with a statement of intent that the state and federal governments ignored.
- In the early 1970's, Natives politically supported construction of the Trans-Alaska Pipeline, in return for promises of subsistence protections and jobs - which were never fulfilled.
- In ANILCA, when Congress finally legislated subsistence protections, Natives had wanted a "Native" priority, didn't get it because the State objected, but did get a "rural" priority and tried to make it work.
- In 1989, the State Supreme Court unilaterally dumped even the rural priority, which Alaska had agreed to nine years before, putting the State out of compliance with the federal subsistence law.
- For 20 years (through 20 regular legislative sessions and six special sessions), conservative minorities and majorities of the Alaska Legislature have refused to let the rural priority back into state law, by refusing to allow the people to vote on a constitutional amendment and by demanding evisceration of the federal law, which is the Natives' last defense.
- Faced with the State's refusal to comply, the federal agencies took over subsistence management on the national domain in 1990; but they did so

only for hunting, leaving the richer and more powerful fishing industry in state hands, despite the obvious requirements of ANILCA.

- In response to that, Natives had to go to the federal courts, which ruled in 1995 that subsistence fishing on reserved navigable waters was also under the federal protections in Title VIII.
- Faced with imminent federal takeover of fishing, the Alaska Delegation got Congress to enact three successive moratoria against implementing its own law - to give the Legislature more time to come into compliance.
- In 1997, determined to buy a constitutional amendment from the Legislature by handing it pieces of the federal law, the Governor negotiated a package of ANILCA amendments that would have left the form of a rural priority in place, while crippling its enforceability.
- In 1999, intransigent anti-subsistence legislators refused to accept even the Governor's ANILCA amendments and dared the United States to take over subsistence fishing in federal waters.
- In January, 2000, shortly after the federal government began managing subsistence fishing, the Governor announced that he would appeal the *Katie John* ruling, striking a body blow against federal protections of 3/5 of the village subsistence diet. In 2001, he changed his mind, since nothing that he had tried worked, with either the Natives or the Legislature.
- The ultimate irony is that, in the late 1960's, Natives had pressed their valid claims of aboriginal land title and used the oil pipeline to win a landmark settlement from Congress. ANCSA also extinguished aboriginal hunting and fishing rights, leaving subsistence without statutory protection. By 1980, when Congress finally acted, the whole political landscape of Alaska had been permanently changed by massive non-Native immigration to urban Alaska that accompanied the oil boom. All the good congressional intentions in ANILCA ran into an enormous urban majority that wants the fish and the game.
- Now, in the past five to six years, Natives face a concerted attempt to reverse the purposes of Title VIII by subversion of the federal management system on which they have counted for so long.
- **What is happening in modern Alaska happened in every territory and state west of the Appalachians during the 19th Century. In earlier military and political battles between Indians and state governments (over railroad rights-of-way, homesteads, town-sites, water rights, minerals, timber or other land uses), the power of the local non-Native majority and the unreliability of federal protections gradually pushed Native Americans back, taking more at each step, until their world came to an end. If you are Native American, the expropriation is never done to you all at once; it always comes piecemeal, over time, and it stops only when everything is gone.**



“Subsistence defines our people. The ability to subsist for our families and communities is the fabric that holds us together. It is who we are, and it is worth fighting for.”

– *Rex Rock, Sr., Board Chair
Arctic Slope Regional Corporation*

AFN RECOMMENDATIONS



SUBSISTENCE

RECOMMENDATIONS

NARF COMMENTS

HISTORY

PRESS



**ALASKA FEDERATION
OF NATIVES**

January 7, 2010

Honorable Kenneth Salazar
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Alaska Subsistence Review

Dear Secretary Salazar:

The Alaska Native community greatly appreciates your review of the subsistence management program in Alaska. We have been working with the Department for many years to implement the program, but it is apparent that there are fundamental flaws in the existing program and that it needs to be reformed. Changes are needed both in the governing federal statute and in the program itself.

We are mindful of, and support, the remarks of Special Assistant to the Secretary, Kim Elton, to the 2009 annual convention of the Alaska Federation of Natives including, specifically, the recognition that, under federal law, subsistence management is a Secretarial responsibility. We also agree with the commitments to implement the federal subsistence mandate of the Alaska National Interest Lands Conservation Act (ANILCA) and promptly put in place a system that does not anticipate a return to State management, to recognize and respect (1) the voice of subsistence users in subsistence management, (2) traditional knowledge and (3) the overriding importance of subsistence to the lives of Alaska Natives. We also welcome the pledge that this issue "will not be compromised or relegated to a low-priority status in this administration."

Title VIII, with its priority for subsistence is, of course, a federal law, which has a clear purpose to protect the subsistence uses of Alaska Natives, along with those of other rural residents. It must be administered as a federal law, under federal standards, without improper deference to state law or state management issues and objectives, which are inconsistent with federal requirements. While we will submit a separate response to the comments of the State of Alaska, through the Commissioner of Fish and Game, calling for widespread and specific deference to the State of Alaska's subsistence determinations, practices and policies, we note here our specific objection to deferring key subsistence policies and practices away from the federal government, where they belong, to the State. Our concern over deference on such a fundamental matter as our food supply is particularly meaningful in Alaska, which is one of only a handful of states where special protections are still in place to protect the civil rights of a minority population under the Voting Rights Act.

As noted in the attached history of litigation involving subsistence, and in its own comments calling for deference, the State of Alaska has a long history of opposition to a Native or rural subsistence priority in favor of one for all residents of Alaska, which of course, amounts to no preference at all. This approach is fundamentally inconsistent with ANCSA and ANILCA, and cannot properly be deferred to in administering a federal program of fundamental importance to Native people. After falling out of compliance with Title VIII in 1989, and thus losing authority to manage subsistence uses on federal lands, the State has steadfastly refused to amend its constitution to allow its laws to conform to the compromise reached in ANILCA in 1980, despite the best efforts by the Native community, our Congressional delegation and many Alaskans.

Summarized below are our primary policy suggestions for the Department. Attached is a more detailed memorandum in support of our request that the Obama Administration advance action by Congress to secure Native hunting, fishing and gathering rights. In addition, we recommend administrative changes in the federal subsistence program as currently structured under Title VII of ANILCA.

The issue is whether our country can learn from its own past - and whether it will finally deal honorably with Alaska's indigenous peoples by giving them meaningful protections for their way of life. What we now call subsistence is not a relic from the past - a holdover from previous times that will inevitably disappear as market conditions take over - it continues to be the foundation of Alaska Native society and culture. A vast majority of Alaska's 120,000 Native people (nearly 20% of the total population of Alaska) still participate in hunting, fishing and gathering for food during the year. The subsistence harvests remain central to the nutrition, economies and traditions of Alaska's Native villages.

Protection of Native hunting, fishing and gathering rights is a part of federal law throughout the United States. The right to food security for oneself and one's family is a human right enumerated in the Universal Declaration of Human Rights of the United Nations Charter. The only reason that there is a priority for subsistence uses in Alaska is because of Alaska Native ownership of the territory transferred from Russia to the United States in 1867. The Treaty with Russia recognized that as the original occupants, Alaska Native peoples had continuing rights to use and occupy all of Alaska. Art. III, Treaty of March 30, 1867, 15 Stat. 539. Those rights were largely ignored until the Statehood Act of 1959, 72 Stat. 339, and the discovery of vast oil reserves at Prudhoe Bay in the 1960s ran up against Alaska Native aboriginal rights. In response to the conflict, Congress in 1971 passed the Alaska Native Claims Settlement Act (ANCSA), Act of December 18, 1971, Pub. L. NO. 92-203, 85 Stat. 689, 43 U.S.C. §§1601 et seq. Although Congress did not expressly protect Native hunting and fishing rights in ANCSA, that Congress expected both the Secretary of the Interior and the State of Alaska to "take any action necessary to protect the subsistence needs of the Natives." S. Rep. No. 581, 92nd Cong., 1st Sess, 37 (1971). Their expectation was not fulfilled and the current program was established in Title VIII of the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. §§ 3111 et seq. (ANILCA), a cornerstone title of that major federal conservation and land management law.

ANILCA's scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the rural priority. That system operated for a

mere seven years before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the cooperative federalism program. After initial efforts to amend the State Constitution to comply with the ANILCA's compromise and thus have a unified management regime, the State has undermined the system through litigation and by gutting its own subsistence law applicable to state and private lands.

Rather than simply defending a system that no longer serves its intended function, we believe it is time to consider options that reach back to Congress's original expectation that Alaska Native hunting, fishing and gathering rights be protected. Alaska Native peoples have submitted many wise and informative suggestions to you as part of this review process. We held numerous meetings with our constituents in our process of developing these recommendations.

We recommend that the Obama Administration ask Congress to replace the present rural preference with a priority for all Alaska Natives to engage in subsistence uses in Alaska, in addition to maintaining the current rural priority, *i.e.*, a "Native plus rural" or a "tribal plus rural" priority. Congress has the authority to enact legislation, based on the supremacy clause and on its plenary authority to regulate Indian affairs, to provide a Native or tribal subsistence preference on all lands and waters of Alaska. There are already variations of a Native priority in Alaska with respect to marine mammals, halibut and migratory birds. A Native plus rural preference would fulfill the promises of ANCSA and ANILCA, and would be consistent with settled principles of federal Indian law followed elsewhere in the United States. It would also put an end to the otherwise endless litigation concerning the implementation of the current rural priority.¹

The Secretary should create an Alaska Native Fund, as part of the BIA Rights Protection Program to reimburse the Native community for the millions of dollars we have had to spend defending our aboriginal and human rights. As demonstrated in the attached addendum, many of the subsistence court cases were directly related to forcing the federal agencies to take their responsibilities under Title VIII seriously. One of our most costly cases, the Katie John litigation, was necessitated by the federal government's initial refusal to assert management authority over fishing. Congress very clearly intended our subsistence fishing in Alaska to be protected by Title VIII, and the agencies knew that fishing is the very lifeblood of our traditional way of life. We continue to this day to participate in the litigation to defend the federal regulations put in place to implement that decision.

Congress should extend the geographical scope of ANILCA's jurisdiction to include all marine and navigable waters in Alaska, and all lands conveyed to and owned by Native corporations pursuant to ANCSA as well as the thousands of Native allotments in Alaska.

Cooperative management of fish and game populations with tribal governments has been successful in the implementation of Indian treaty rights in other states and should be replicated in ANILCA as amended.

The Regional Advisory Councils are in need of reform. At a minimum, they should be exempted from the requirements of the Federal Administrative Committees Act (FACA). Section 805 of

¹ See attached summary of litigation involving the interpretation and implementation of Title VIII of ANILCA.

ANILCA mandates that the secretaries establish regional advisory councils, composed of local subsistence users, with the authority to devise and submit to the Federal Subsistence Board recommendations on proposed regulations. Today, because of FACA, the RACs are required to be composed on at least 30% sport and commercial users. While not a majority, the sport and commercial interests do their best to water down the subsistence priority rather than implementing it.

While our primary focus is on achieving fundamental structural changes to the law, administrative and regulatory changes in the current management system are needed. We stress, however, that a band-aid approach to a system that is broken and that has never worked is not acceptable to the Native community.

We look forward to working with you, the Department of Agriculture, the Congress and the White House to make the changes needed to provide lasting protections for our way of life. We are confident that with your help meaningful changes can be made that will ensure the promises of ANCSA and ANILCA are finally fulfilled.

Sincerely,



Julie Kitka, President
Alaska Federation of Natives

cc:

The Honorable Tom Vilsack, Secretary, U.S. Department of Agriculture
The Honorable David Hayes, Deputy Secretary, U.S. Department of the Interior
The Honorable Larry Echohawk, Assistant Secretary for Indian Affairs, U.S. Department of the Interior
The Honorable Kim Elton, Director, Alaska Affairs, U.S. Department of Interior
The Honorable Pat Pourchot, Special Assistant to the Secretary for Alaska
The Honorable Sean Parnell, Governor, State of Alaska
The Honorable Mark Begich, U.S. Senator, Alaska
The Honorable Lisa Murkowski, U.S. Senator, Alaska
The Honorable Don Young, U.S. Congressman, Alaska
The Honorable Byron Dorgan, Chair, U.S. Senate Indian Affairs Committee, U.S. Senate

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RECOMMENDATIONS
SECRETARIAL REVIEW OF FEDERAL SUBSISTENCE MANAGEMENT PROGRAM

General Recommendations concerning the review itself: The Review should be thorough and not constrained by an arbitrarily short deadline. It should integrate the Regional Advisory Councils into the review and recommendation process. Special standing should not be given to comments from the Territorial Sportsmen, the Alaska Outdoor Council and other anti-subsistence groups or to the State of Alaska. An Alaska Native advisor should be hired to assist in the review of the comments and to assist in making the recommendations to the Secretary.

The Secretary and Deputy Secretary of the Department should meet with key Native leadership after all comments are submitted. There should be at least two such meetings to discuss the views of the Department as it develops its position, and there should be full consultation with the Native community on legal and policy issues.

In addition, the Secretary should convene a meeting with key White House officials, including the Domestic Policy Council, and the Department of Agriculture to participate in the Review and in the crafting of a legislative proposal to provide meaningful protections for Native hunting, fishing and gathering rights.

AFN's recommendations and comments are set out below. While many represent views on how to reform the existing system, it is critical to note that fundamental change in the priority from one based on rural residence to a Native priority is essential. The comments are based on the following principles, which are foundational to a successful subsistence program:

1. The subsistence management system must recognize the overriding importance of meeting the needs of subsistence users, over other management issues and objectives.
2. Subsistence is a Native issue - a critical part of the larger historical question about the status, rights and future survival of Alaska's aboriginal peoples. The economic and cultural survival of Native communities is the principal reason why Congress enacted its rural subsistence preference in 1980. By articulating the federal government's traditional obligation to protect indigenous citizens from the political and economic power of the non-Native majority, Title VIII of ANILCA constitutes a landmark of Indian law, but one that has failed to deliver the protection promised.
3. The Obama Administration (the Secretaries of Interior and Agriculture, along with senior White House officials) should press Congress to introduce a legislative package that includes a Native plus "rural", or "tribal plus rural" priority for Alaska Native subsistence uses.
4. The federal system must not defer to the State government on management policies. This is a federal system, to implement established federal priorities in support of Native hunting, fishing and gathering rights.

5. The heart of Title VIII is the local and regional participation system, the mechanism by which Congress ensured local subsistence users would be given a “meaningful role” in subsistence management. The federal system must recognize the fundamental importance of the input from the Regional advisory Councils, separate from any other “stakeholder” input.
6. The Secretary should undertake a survey of the amount of money spent on litigation involving the interpretation and implementation of Title VIII since 1980, by both the federal government and Alaska Natives that can be used to demonstrate to Congress the need for fundamental statutory changes.

TITLE VIII OF ANILCA IS INDIAN LEGISLATION: The Secretary should encourage President Obama to issue an Executive Order that advises the Federal Subsistence Board and the Office of Subsistence Management that Title VIII is Indian legislation, enacted under the plenary authority of Congress over Indian Affairs, and directs OSM and the FSB to implement a subsistence management program in accordance with the Executive Order. Title VIII was enacted to protect the subsistence way of life of rural Alaska residents, including residents of Native villages. It implements Congress’ long-standing concern for, and obligation to protect subsistence uses of Alaska Natives, and serves to fulfill the purpose of the Alaska Native Claims Settlement Act (ANCSA). 16 U.S.C. § 3111(4). Although the statute provides for a “rural” preference, it is important to remember that the subsistence title would never have been added to ANILCA had it not been for the efforts of Alaska Natives. The Justice Department and the Interior Solicitor’s office should also be directed to take this position in all litigation surrounding Title VIII.

Title VIII expresses an overriding congressional policy of protecting the subsistence rights of Alaska Natives. Congress found that because “continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska . . . [and] by increased accessibility of remote areas containing subsistence resources,” 16 U.S.C. §3111(3) it was necessary and in the national interest “to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.” 16 U.S.C. § 3111(4) (5). Title VIII reflects recognition of the ongoing responsibility of Congress to protect the opportunity for continued subsistence uses in Alaska by Native people, a responsibility consistent with the federal government’s well-recognized constitutional authority to manage Indian Affairs. For that reason, the FSB should construe Title VIII and the regulations implementing it broadly to accomplish Congress’ purposes, which were, *inter alia*, to ensure that the subsistence way of life would be protected for generations to come.

While the FSB takes the position that ANILCA is not Indian legislation,¹ there is no question but that Title VIII is “remedial” legislation. It was intended to remedy the failure of the State and Federal

¹ See, e.g., 72 Fed. Reg. 25688, 25691 (May 7, 2007). The FSB takes the position that Title VIII of ANILCA is not Indian legislation for the purpose of statutory construction based on *dicta* in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228 (9th Cir. 1999). However, that *dicta* is in direct conflict with *Village of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984), *rev’d on other grounds sub. nom. Amoco Production Co. v. Village of Gambell*, 107 S.Ct. 1396 (1987). The Supreme Court in *Amoco* implicitly accepted the Ninth Circuit’s holding in *Gambell* that Title VIII is Indian legislation; it simply

governments to protect the subsistence rights of Alaska Natives and other rural residents who live off the natural resources. And because it is “remedial” legislation, the rules of statutory construction require that Title VIII be broadly construed to accomplish its purposes, *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 504 (1999), which were to ensure that the subsistence way of life would be protected for generations to come.

AMEND TITLE VIII of ANILCA as follows:

- Replace the “rural” priority with a “Native,” or “Native plus rural” or “tribal plus rural” subsistence priority. ANILCA’s rural preference does not protect legitimate subsistence needs of many Native people who still occupy their ancestral homelands, but whose communities are now designated nonrural due to the influx of people into the surrounding areas. Congress has the authority, based on the supremacy clause and on its plenary authority to regulate Indian affairs rooted in the Indian commerce clause of the United States Constitution, to enact legislation that imposes a Native or tribal subsistence preference on all lands and waters of Alaska. This could be in addition to protecting the legitimate needs of non-Natives who live in rural Alaska who also dependent upon subsistence. Protection for Native hunting and fishing rights in Alaska are already contained in numerous other federal laws, including the Marine Mammal Protection Act, the Migratory Bird Treaty Act, the Fur Seal Treaty, the Endangered Species Act, and the International Whaling Convention. In 2000, the North Pacific Fishery Management Council (NPFMC) authorized a subsistence fishery for halibut in Alaska for rural residents and members of Alaska’s federally recognized tribes. A Native subsistence preference for hunting, fishing and gathering would fulfill the promises of ANCSA and ANILCA, and would be consistent with settled principles of federal Indian law. It would also put an end to the otherwise endless litigation concerning the implementation of the current rural priority.
- Mandate tribal compacting and contracting of subsistence programs in order to give Alaska Natives a more meaningful role in the management of subsistence uses on federal and Native lands. Here again, examples abound. The Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. §§703 et seq., and the treaties with Canada and Mexico provide for subsistence uses of migratory birds by the indigenous inhabitants of Alaska and provide for a federal-state-tribal co-management regime to manage the subsistence harvest. The Marine Mammal Protection Act, as amended, 16 U.S.C. §§1361 et seq., governs the management of marine mammals in Alaska and authorizes the Secretaries of Interior and Commerce to enter into cooperative agreements with Alaska Native Organizations to conserve marine mammals and provide co-management of subsistence use of marine mammals by Alaska Natives. One of the earliest examples of co-

found that there were no ambiguities to interpret with respect to whether Title VIII applied to waters beyond Alaska’s territorial sea. The case was reversed on other grounds, so the Ninth Circuit’s conclusion in *Gambell v. Clark* on this issue remains good law. Moreover, prior to *Hoonah*, the Court had consistently held that Title VIII of ANILCA is legislation intended to benefit Indians through preservation of Alaska Native hunting and fishing rights and the cultural aspects of the subsistence way of life. See, e.g., *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997), citing *Gambell v. Clark*; *Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994); *United States v. Alexander*, 938 F.2nd 942, 945 (9th Cir. 1991). The *dicta* in *Hoonah* does not overrule this prior precedent.

management in Alaska involves the Alaska Eskimo Whaling Commission, which under the authority of a cooperative agreement between AEWC and the National Oceanic and Atmospheric Administration (NOAA), has taken responsibility for conducting its own research, developing whaling regulations, allocating the national whale quota among participating villages, and enforcing both the quota and the regulations. The North Pacific Fishery Management Council has also authorized agreements with tribal governments for harvest monitoring, local area planning and other issues affecting subsistence uses of halibut.

- Exempt the Regional Advisory Councils from the requirements of the Federal Administrative Committees Act (FACA). Section 805 of ANILCA mandates that the secretaries establish regional advisory councils, composed of local subsistence users, with the authority to devise and submit to the Federal Subsistence Board recommendations on proposed regulations. Today, because of the requirements of FACA, the RACs are required to be composed on at least 30% sport and commercial users. Congress never intended the RACs to be composed of anyone other than local subsistence users. Application of FACA's membership requirements contradicts and frustrates the purposes of §805 of ANILCA. Congress should amend FACA (or Title VIII of ANILCA) to exempt the RACs from the requirements of FACA, and the Secretaries should advance such an amendment.

AMEND THE DEFINITION OF PUBLIC LANDS: Extend the geographical scope of ANILCA jurisdiction to include all marine and navigable waters in Alaska, and Native allotments. Provide Alaska Native Corporations the authority to opt into a provision ensuring a federally protected customary and traditional hunting and fishing right on ANCSA fee lands and associated waters for Alaska Natives. ANCSA lands and Native allotments were often selected for their value to the subsistence economy and culture, yet jurisdiction to regulate hunting and fishing on these lands presently lies with the State. Congress obviously intended to provide protection to subsistence uses of fish, which for the most part occurs in navigable waters. Indian treaty rights in the lower 48 states often extend to state and private lands. The Administration should consider this possibility in the review.

ALASKA NATIVE FUND: The Secretary should create an Alaska Native Fund, as part of the BIA Rights Protection Program, to reimburse the Native community for the millions of dollars we have had to spend defending our aboriginal and human rights. As demonstrated in the attached addendum, many of the subsistence court cases were brought by Alaska Natives and were directly related to forcing the federal agencies to take their responsibilities under Title VIII seriously. One of our most costly, the Katie John litigation, was necessitated by the federal government's initial refusal to assert management authority over fishing. Congress very clearly intended our subsistence fishing in Alaska to be protected by Title VIII, and the agencies knew that fishing is the very lifeblood of our traditional way of life. That case took years to litigate and involved several appeals, not to mention the time that was spent in the regulatory processes. We continue to this day to participate in litigation to defend the federal regulations put in place to implement the *Katie John* decision.

COMPREHENSIVE REVIEW OF ALL SUBSISTENCE REGULATIONS. When the federal subsistence program was adopted, the federal managers blindly incorporated into federal law all existing

State license, permit, harvest-ticket and tag requirements – without any assessment of the propriety of imposing these requirements on subsistence users. These types of restrictions should not be imposed upon subsistence users unless necessary under §804 to protect the viability of a species and/or the continuation of subsistence uses.

The Federal Subsistence Management system was also put into place before the Secretaries established the local and regional participation scheme mandated by §805(a)-(c). We believe Congress intended that the development of a “permanent” subsistence management program would derive from the local and regional participation system, and would be based on the recommendations flowing through that system. Congress gave the Councils the explicit authority to engage in “the review and evaluation of proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish and wildlife” in each region of the State. Yet, the regional councils had no input (since they were not formed at the time) in important questions like (1) whether the program should be implemented by a federal subsistence board, and if so what its composition should be; (2) the critical “rural” eligibility determinations; (3) the proper approach for determining C&T uses of resources; (4) the content of the initial hunting and fishing regulations that govern the day-to-day resource harvest activities of subsistence users, and many other vital questions important to the management of subsistence. All of these important questions need to be revisited with input from the RACs.

As noted by the Northwest Arctic Borough, by the wholesale incorporation of the State’s regulations, the federal system also incorporated the State’s long history of commercial hunting/fishing biases. The FSB needs to start fresh with the idea of fulfilling the full intent of ANILCA, which was allow Native communities to be able to retain the opportunity to maintain local subsistence practices and customs.

During the last Administration, in particular, the FSB more often than not aligned its hunting seasons and bag limits with the State’s rather than based on subsistence users needs and customary practices. As a result, in many cases the regulations do not reflect the customary and traditional values of subsistence users. Every regulation should be necessary, consistent with Title VIII, and cause the least adverse impact possible on subsistence uses. Finally, in adopting regulations, local traditional knowledge should be incorporated into the analysis.

COMPOSITION OF THE FEDERAL SUBSISTENCE BOARD: The Federal Subsistence Board should be replaced with a federally-chartered or authorized entity composed of twelve (12) subsistence users from the 12 ANCSA regions or the chairs of each of the Regional Advisory Councils. There is nothing in Title VIII of ANILCA that prohibits the federal government from creating a Federal Subsistence Board structure composed of non-federal members – in fact there is nothing in the statute that mandates the establishment of a Federal Subsistence Board at all. At the very least the Secretaries should increase the size of the Board and make at least 50% of the membership rural residents. The North Pacific Fisheries Management Council is composed of a mix of federal, state and public members.

RURAL/NON-RURAL DETERMINATIONS:

- Amend the regulatory definition of “rural”. As noted earlier, we believe the rural preference should be amended to expressly protect Native subsistence use. But until that happens, the

current definition of rural should be amended and defined as broadly as possible so as to benefit the greatest number of Alaska Natives who wish to continue to pursue a subsistence way of life. The only court decision addressing the question did so in the context of the State of Alaska's definition of rural, which excluded the entire Kenai Peninsula. *Kenaitze Indian Tribe v. Alaska*, 860 F.3d 312 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3187 (1989). In rejecting the State's definition, the court of appeals cited a number of definitions of rural, ranging from the one used by the census bureau (places with a population of less than 2,500) to one used by Congress in the National Housing Act of 1949, 42 U.S.C. 1490, as amended November 28, 1990 (rural defined to include communities with a population of up to 25,000). Residents of communities on the Kenai Peninsula were thus entitled to financial assistance for a number of rural housing programs but not to the subsistence priority. In light of the federal government's trust responsibility to Alaska Natives, ANILCA's rural definition should surely be construed at least as broadly as the National Housing Act.

- Revise the FSB criteria for assessing rural characteristics in making its decennial reviews of communities' rural status. The FSB needs to identify fair and workable criteria for making rural determinations. Following the first decennial review the USFWS contracted with the University of Alaska Anchorage's Institute of Social and Economic Research (ISER) to develop methodologies for identifying rural and non-rural areas, but the FSB arbitrarily rejected the scientific method recommended by ISER which would have used clear, effective and defensible criteria to distinguish between rural and non-rural populations. The FSB's rejection was due to political pressure from the State to avoid the potential impact the methodology would have on the Kenai Peninsula. The regulations need to be amended to ensure that future rural status reviews do not result in the elimination of rural, subsistence-dependent communities.
- Military bases should not be considered "rural" but rather separate communities, so that sparsely populated areas such as Delta Junction are not bumped out of the rural priority due to the presence of self-contained military installations like Fort Greely;
- The FSB should reconsider its decision finding the Organized Village of Saxman to be socially and communally integrated with Ketchikan, and reinstate Saxman's rural status; alternatively, the Secretary should direct the FSB to reconsider its decision to classify Saxman as nonrural. Saxman has little economic development and few cash jobs – its economic and cultural characteristics are more akin to those of other small rural communities across Alaska.

CUSTOMARY AND TRADITIONAL USE DETERMINATIONS: The federal subsistence regulations adopted the State's eight criteria for determining customary and traditional uses (C & T) on a species-by-species basis. See 50 C.F.R. § 101.16(b). This means that a community may have C&T use of moose but not sheep, for example, even though sheep are located within that community's traditional uses areas.

We believe a species-by-species approach to C&T determinations is inconsistent with Title VIII of ANILCA. The policy goal of ANILCA is to preserve cultural systems and activities which underlie subsistence uses. A primary component of subsistence use patterns involves opportunistic taking of fish or game *as needed and as available*. Congress fully expected Native communities to be able to retain the opportunity to maintain local subsistence practices and customs and understood that subsistence use activities were grounded in and by local self-regulating forces:

[T]he phrase “customary and traditional” is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources in areas of, and by persons (both Native and non-Native) resident in, areas of Alaska in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation. H.R. No. 96-97, 96th Cong., 1st Sess. Part I at 279 (1979).

Subsistence uses historically took place within particular areas customarily used by the Villages. In other words, Alaska Natives used all the resources available to them within their community’s traditional use area. Rather than focusing on whether particular species are the subject of C&T use, the regulations should focus on C&T use areas, and provide that all species found within those areas are subject to the subsistence priority, including indigenous, reintroduced and introduced species. Federal district court Judge H. Russel Holland employed the proper methodology in striking down restrictive state regulations in the landmark case of *Bobby v. Alaska*.

Because many Villages are now surrounded by state and private lands, the FSB should implement its C&T regulations and determinations in such a way that ensures communities surrounded by State and private lands will have reasonable access to federal “public lands” in order to harvest all subsistence resources that were customarily and traditionally used by the Native Villages.

TRIBAL COMPACTING AND CONTRACTING: As noted earlier, we believe this should be included in a legislative package in order to ensure meaningful participation in management of subsistence in Alaska. Significant aspects of the federal subsistence program in Alaska could be compacted to tribal organization in Alaska. Meanwhile, Section 809 of ANILCA provides some authority for contracting OSM and FSB functions. It has not been fully utilized and needs to be expanded.

OFFICE OF SUBSISTENCE MANAGEMENT:

- Remove OSM from USF&WS to the Secretary’s office, and consider contracting with a Native organization pursuant to ANILCA §809 to perform the functions the OSM currently operates. Under the current system, the USFWS is designated as the lead agency and as such has too much control over the federal subsistence program. The federal subsistence management program is supposed to be a multi-agency effort, yet USF&WS has garnered almost total control over subsistence management because it receives the funding and hires the personnel to run the OSM. The subsistence management program could be operated out

of the Secretary's office in a way similar to the Indian water rights settlement program. In both cases multiple agencies are involved and central coordination is essential.

- **OSM Director.** Since the OSM is included in the budget of the USFWS, the Director is hired and answers to the Regional Director of USFWS. In the past, there has been no consultation with the Native community and apparently none or very little with the other federal partners or the Regional Advisory Committees in the recruitment and hiring of key positions within the OSM. In the future, USFWS should consult with the Native community, the RACs and the other federal partners in the hiring of the Director and Deputy Director. Those positions should be filled with individuals who are highly qualified, and who have an understanding and appreciation of the importance of subsistence to the economy and way of life of our people. They should also be committed to meaningful participation and consultation with Alaska Native Tribes and organizations on all issues that impact them. Finally, we recommend consideration of Native candidates for these positions.
- **Native Hire:** Increase the number of Alaska Natives in management positions in OSM and the federal agencies. Under the previous administration, the number and authority of Alaska Native OSM employees steadily decreased, reaching a point in June, 2009, where only six Natives, of more than 45 OSM employees remained, and none have an effective role in policymaking decisions. The Secretaries of Interior and Agriculture should conduct an analysis of federal hiring practices in Alaska at USFWS, OSM, NPS, BLM, BIA the Forest Service to determine whether there are inherent barriers to the hiring of Alaska Natives, and address the cause of underrepresentation of Alaska Natives within the agencies.

FEDERAL SUBSISTENCE BOARD

- **Appoint a new FSB Chair,** after consultation with tribes & Native organizations and include the RAC's in the nomination and selection process.
- **Revoke the 2008 MOA between the FSB and the State of Alaska** and renegotiate it with input from RACs and Alaska's tribes. The agreement was signed in the final days of the Bush Administration and purports to establish guidelines to coordinate the management of subsistence uses on federal public lands. It imports state law requirements into the federal management program. For example, under subparagraph IV(3) of the MOU, the FSB and the State agree to "provide a priority for subsistence uses of fish and wildlife resources and to allow for other uses of fish and wildlife resources when surpluses are sufficient, consistent with ANILCA and AS 16.05.258 (emphasis added). Alaska's statute only requires the State to "provide a reasonable opportunity for subsistence uses," while §802(1) of ANILCA requires that "[t]he use of the public lands in Alaska is to cause the least adverse impact possible on residents who depend upon subsistence uses of the resources of such lands." This is but one example of the problem. It is simply impossible for the FSB to provide a subsistence priority consistent with *both* federal and state law. It is notable that Alaska law provides for the creation of "non-subsistence use areas," which is nothing more than a

vehicle for excluding subsistence uses when politically powerful sport or commercial interests feel the priority interferes unduly with their activities.

- **Revoke Secretary Kempthorne's Letter of June 28, 2007**, requiring Regional Directors to be present at key meetings and allow them to decide if they want to serve on the Board or delegate that responsibility to staff who can devote more time to the Federal Subsistence Management System.
- **The FSB should hold some of its meetings in regional locations.** Given the importance of subsistence to Alaska Natives living closest to the land and subsistence resources, and the fundamental significance of input of real-life subsistence users, FSB meetings should be held in regional locations to maximize the opportunity for input from subsistence users and real-time, experiential resource evaluations.
- **Make FSB deliberations transparent and eliminate excessive use of Executive Sessions.** Executive sessions should be limited to issues involving personnel, litigation and other issues that require confidentiality as a legal matter; deliberations on regulatory matters -- no matter how contentious -- should never take place in executive session. In the past, the Board has held regulatory discussions in executive session simply because the issue was "controversial." What made the issue controversial were objections and pressures coming from non-subsistence users and the State of Alaska. The FSB was created to implement Title VIII of ANILCA and to protect subsistence users -- not to cater to or negotiate with competing users of fish and game or the State of Alaska.
- **The Federal Subsistence Board Regulatory Cycle:** Until 2007, the FSB regulatory cycle was conducted yearly, with annual deadlines for recommendations from RACs and the public. Citing budgetary constraints, the FSB switched to 2-year cycles. This change has meant more "out-of-cycle" and emergency Openings/Closures, which means there is no time to seek RAC recommendations or pay them any deference. Decisions on these actions are made at FSB work sessions or by email, with no or minimum input from the RACs or the public. The RACs should not be limited to participation in the federal regulatory process to only one time every two years. Excluding their input on out-of-cycle and emergency proposals abrogates the role of the RACs and is arguably a violation of Title VIII of ANILCA. The Secretary should direct the FSB to return to an annual cycle, and to seek RAC recommendations on all proposals, including out-of-cycle and emergency openings and closures.
- **Non-voting Seats on the FSB.** The State of Alaska has a non-voting seat on the FSB, and its representative has been allowed to sit at the table with the FSB and participate in Board discussions and deliberations. While not entitled to vote, the State is being given too much influence over the decision-making process. We believe the position should be eliminated.

- **Deference to Regional Advisory Council Recommendations:** Section 805 is the heart of the reform program designed by Congress to protect subsistence uses of Alaska Natives and other rural Alaskans. It mandates a viable regional participation scheme and requires that deference be given to Regional Advisory Council (RAC) recommendations. The Secretary must follow these recommendations unless he determines a recommendation is “not supported by substantial evidence, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of subsistence needs.” The FSB has interpreted §805(c) as only requiring deference on regulatory proposals involving the “taking” of fish and wildlife and not on important policy decisions.

The Secretaries should direct the FSB to give deference to the recommendations of the RACs on (1) rural determinations; (2) customary and traditional use determinations; (3) out-of-cycle; and (4) special actions and emergency regulations, as well as any other matter that impacts rural subsistence users’ ability to subsistence hunt and fish on federal public lands and waters. Examples of where the RACs were not given deference include the proposal to close Mahknati Island to commercial herring harvest & the decision to reclassify Saxman as non-rural.

- **Discontinue the use of RAC subcommittees and/or Working Groups** unless called for by the RACs themselves. These work groups tend to circumvent the RACs and are usually formed at the request of the State. The FSB has allowed Workgroup reports to become part of its record and deliberation regardless of the RAC response to the Workgroup’s recommendations.
- **Petitions for Reconsideration:** Reinstate the Board’s policy of allowing RACs to submit requests for reconsideration of FSB decisions. The SE RAC denied right to request reconsideration of the Saxman nonrural determination. RFRs should be posted on the OSM website prior to the meeting where the issue will be decided.

The FSB should adopt a policy that prevents opponents of subsistence from filing repeated requests for reconsideration of the FSB’s positive C&T determinations. The Policy should state that the Board will only consider a proposal to modify or rescind a positive C&T determination if the proponent of the proposal has demonstrated substantial new information supporting the claim.

REGIONAL ADVISORY COMMITTEES:

- **The Regional Advisory Committees (RACs) need more support and funding.** Congress gave the regional councils explicit authority to engage in “the review and evaluation of proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish

and wildlife.” §805(a)(3)(A). The full advisory role of the RACs set forth in §805 needs to be recognized in the public hearing, consultation and regulatory process. Instead, the RACs are largely on their own, with little or no professional expertise or sources of information necessary to carry out their role of making recommendations to the FSB and reporting to the Secretaries. This has weakened the grassroots input to the federal system. Despite today’s obvious constraints on the federal budget, the Secretaries should review the budgetary needs of an adequate federal system, which includes a well-funded RAC system, and restore as much of the recent reductions as is fiscally possible. The Councils, to be effective, need to have a separate pool of funding to hire their own staff and participate as full and independent partners with the agencies and their staff.

- Currently, the RACs can no longer hold meetings in rural communities so that affected subsistence users can provide input on issues that will come before the FSB. This policy should rescinded.
- Contract management of the RACs to an Alaska Native tribally authorized entity.
- Members of the RACs should be appointed by their tribal governments & should be subsistence users.

SCIENTIFIC RESEARCH AND DATA COLLECTION: Additional funding is needed for scientific research and data collection, including for the partnership program and fisheries information service projects. Currently, too much of the federal research funding is going to the State of Alaska. That funding could go to a statewide Native organization. The Secretary should direct OSM and the various agencies to contract and/or compact with Alaska’s Tribes and their organizations to conduct more of this research and data collection. Alaska Natives and their organizations need to be able to participate as full partners. More involvement by Alaska Natives can only improve the overall research.

In fact, given the complexity of dual management now in place in Alaska, depressed stocks and the need to scrutinize diverse fishing pressures on a large number of different stocks and species, there is a need for a statewide Alaska Native umbrella organization that can monitor and coordinate activities statewide, and provide technical assistance to regions and localities that have not yet developed their own resource management capacity. There are numerous working groups, task forces and committees that the State and the Federal Government have established to address natural resource issues that do not have meaningful Native participation because no one is paying attention or has the time or staff to offer the follow-through needed. A well-staffed statewide Native Subsistence Commission could monitor efforts to undermine federal protections for subsistence, act as a clearinghouse on subsistence-related information, and provide administrative and professional help to Alaska tribal governments and their organizations on fish and wildlife issues. While some regions and tribes have begun to develop modern resource management capacity, there is no statewide coordination and no uniform approach on many fish and wildlife issues. Such a Commission would serve to clearly demonstrate the capacity within the Alaska Native community to manage resources using appropriate science and management regimes, including traditional knowledge, so as to disprove the prevailing belief among policy makers and resource managers that there can be no meaningful role for Alaska Natives.

OSM also needs to obtain RAC, tribal and local input into research priorities so they reflect issues of importance at the local level, and then avail themselves of local, traditional knowledge and expertise in conducting subsistence research.

TRIBAL CONSULTATION: FWS and the OSM has given a very narrow interpretation to EO 13175 in Alaska. They limit consultation to only those issues that affect tribal trust lands or resources that impact tribal self-governance or treaty rights, and see no need to consult on regulations that impact subsistence users and uses. Each of the federal agencies, including the OSM, need to create a meaningful public consultation process which honors the federal government's trust responsibility to Alaska's tribes and that includes consultation on all subsistence policies and regulations.

ANILCA SECTION 810 REVIEWS: Section 810 requires federal agencies to analyze the effect of non-subsistence uses allowed by federal decisions that "withdraw, reserve, lease, or otherwise permit the use, occupancy or disposition of public lands" if those uses would "significantly restrict subsistence uses." Both the National Park Service ("NPS") and Bureau of Land Management ("BLM") have permitted a rapidly increasing number of transporters and outfitters and their growing numbers of sport hunting clients to have almost unregulated access to the federal public lands and waters in the northwest arctic that are under NPS and BLM management. The NPS last performed an 810 analysis in 1986 when it found that the northwest arctic region was too remote for sport hunting to have any adverse effects on subsistence uses. The BLM recently completed an Environmental Impact Statement and a massive Resource Management Plan reaching from the Kobuk Valley north of Kotzebue to the Seward Peninsula south of Nome where it took the position that since the Resource Management Plan did not specifically "withdraw, reserve, lease, or otherwise permit the use, occupancy or disposition of public lands" it did not "significantly restrict" subsistence. It is now preparing a more localized Resource Management Plan for the Squirrel River drainage, which reportedly will include an 810 analysis on the effect of permitted sport hunting on subsistence. The NPS is also reportedly completing a long delayed concession permitting plan for the Noatak Preserve, but has previously taken the position that in part as long as "some" species were available for subsistence uses (such as rabbits or ptarmigan) sport hunting could not be said to "significantly restrict" subsistence uses of caribou. It is probable that these are not isolated lapses.

The Secretary should direct all federal land management agencies to review, the agencies' process for the implementation of Title VIII, Section 810. The review should be conducted with the full participation and consultation of the RACs and subsistence users. The review should lead to the adoption of regulations that meaningfully protect the opportunity for customary and traditional subsistence patterns and practices of taking and use, and the opportunity to harvest subsistence resources, as well as the availability of subsistence resources and the maintenance of healthy fish and wildlife populations. The regulations should require an 810 process and analysis that is designed to protect the opportunity to continue the subsistence way of life rather than the narrow and cramped interpretation the agencies currently subscribe to section 810. The regulations and policy should be consistent among all the federal agencies.

ENFORCEMENT: Citations should be given for wanton waste, illegal methods and means and commercial sale of subsistence taken fish, but not for subsistence users who responsibly follow their customary and traditional practices. The federal subsistence regulations establishing seasons, methods & means and bag limits need to legalize customary and traditional practices and set realistic harvest quotas.

All enforcement actions on federal lands and waters should be suspended pending a complete regulatory review, and violations that were issued pursuant to erroneous policies prior to the review should be dismissed, and law enforcement agents directed to return individual's nets, small fishing gear and other essential equipment needed to feed their families.

We also recommend the Department undertake an investigation and report on Federal and State law enforcement aimed at subsistence activities undertaken in 2008 and 2009. We have seen a significant increase in enforcement actions against Alaska Natives. Finally, we recommend that the MOU between the State of Alaska and the FSB that allows the State to carry out enforcement actions on federal lands be reviewed and possibly suspended.

INTENSIVE MANAGEMENT OF PREDATORS ON FEDERAL LANDS: The FSB has refused to adopt regulations that would allow for predator control. It adopted a policy in 2004 that states that it has no authority to adopt such measures. The policy states that the FSB is authorized only to administer the subsistence taking and uses of fish and wildlife on federal public lands for rural residents and that the authority over predatory control and habitat management rests with the various land managers (FWS, NPS, BLM, BIA and the Forest Service). The Secretaries of Interior and Agriculture should direct the various agencies to incorporate predator control measures into their wildlife management plans, and to ensure that decisions are based on local and traditional knowledge as well as the more general biological and social impact data. Section 815(1) of Title VIII of ANILCA infers that the "conservation of healthy populations" is not the same as the "conservation of natural and healthy populations," which is the standard required for the national parks and monuments. ANILCA §801(4) provides that Congress invoked its constitutional authorities to protect and provide the opportunity for continued subsistence uses on the public lands by rural residents. ANILCA refers to using sound management principles, in accordance with recognized scientific principles and the purposes of each conservation unit. Predator control is a legitimate wildlife management tool and in situations where it does not conflict with the stated purposes of the federal land unit, could be used to manage ungulate populations at a healthy level to "provide the opportunity for continued subsistence uses on the public lands by rural residents."

Subsistence in the Courts

***Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (1985):** The Alaska Supreme Court overturned the state regulations that limited subsistence uses to rural residents on the grounds that the Alaska subsistence statute did not limit eligibility to rural residents. The decision placed the State out of compliance with Title VIII of ANILCA.

Kenaitze Indian Tribe v. Alaska, 860 F.2d 312 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989): The State amended its subsistence statute in 1986 to limit the state subsistence priority to "residents of a rural area," and defined "rural area" to mean "a community or area of the state in which noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." The definition had the effect of excluding Native communities located on the Kenai Peninsula. The Kenaitze Indian Tribe sued. The Court of Appeals rejected the State's definition of rural, concluding that the State was simply trying to find a way to "take away what Congress had given, adopting a creative redefinition of the word rural, a redefinition whose transparent purpose is to protect commercial and sport fishing interests.

Bobby v. Alaska, 718 F. Supp. 764 (D. Alaska 1989): This case helped define and clarify the requirements of Title VIII by establishing that the state subsistence regulations (seasons, bag limits, means and methods of harvest) had to be consistent with local, customary and traditional subsistence uses and that regulatory restrictions had to result in the minimum adverse impact possible upon rural residents' customary and traditional uses. The court also held that neither state law nor ANILCA precludes a defendant from challenging the validity of a state hunting regulation as a defense to a criminal prosecution.

***McDowell v. State of Alaska, 785 P.2d 1 (Alaska 1989):** The Alaska Supreme Court invalidated the state subsistence statute's rural residency preference as unconstitutional under several clauses in article VIII of the Alaska Constitution. The decision meant that the State could not comply with the basic requirement in Title VIII that it provide a priority for subsistence uses of Alaska's rural residents. In response to the McDowell ruling and Alaska's inability to comply with the requirements of Title VIII, the federal agencies took over management of subsistence uses on federal lands in 1990. 55 Fed. Reg., 27,114 (1990).

***McDowell v. United States, A92-0531-CV, (D. Alaska, filed June 22, 1990):** The same plaintiffs in the earlier State court McDowell case brought a facial challenge to ANILCA in federal court challenging the constitutionality of Title VIII's rural preference. The district court upheld the constitutionality of Title VIII, and rejected equal protection and 11th amendment challenges, but on reconsideration determined that the plaintiffs' original complaint had been filed prior to the effective takeover of management of the subsistence program and dismissed the case on procedural grounds. The plaintiffs appealed, but voluntarily dismissed their appeal in early 1998.

Kwethluk IRA Council v. Alaska, 740 F. Supp. 765 (D. Alaska 1990): The court struck down state regulations governing subsistence hunting of caribou in western Alaska as inconsistent with customary and traditional harvest patterns of Yupik natives.

*Denotes those cases in which AFN has intervened to defend the federal priority.

***John v. Alaska*, Civ. No. A85-698 (D. Alaska Jan. 19, 1990)(Order on cross motions for summary judgment):** The court struck down state regulations that restricted subsistence fishing at historic native fish camp on a Native allotment on the Copper River.

***U.S. v. Alexander*, 938 F.2d 942 (9th Cir. 1991):** The court set aside a federal Lacey Act prosecution on the ground that the state subsistence law prohibiting cash sales from being considered subsistence uses was in conflict with ANILCA's protection of customary trade as a subsistence use.

***Peratrovich v United States*, No. 92-0734-CV (D. Alaska):** At issue in this case, which is still being litigated, is whether the definition of public lands in Alaska should include the waters within the Tongass National Forest. The plaintiffs claim that the US owns the submerged lands within the Forest as a result of a pre-statehood withdrawal. The case was stayed for years pending a decision in *Alaska v. United States*, 546 U.S. 413 (2006) (No. 128 Original), and was jointly managed with the *Katie John* case. The court in *Alaska v. US* approved the federal government's disclaimer of interest in the Tongass submerged lands, but the plaintiffs argue that the submerged lands within the exterior boundaries of the Forest are either subject to the exceptions in the disclaimer or that the US did not disclaim title to those waters.

***State of Alaska v. Morry*, 836 P.2d 358 (Alaska 1992):** The Alaska Supreme Court held that "all Alaskans," regardless of where they live or what their circumstances, are eligible to travel anywhere in the State and participate in subsistence hunting and fishing on equal terms with local subsistence users. It also held that the "customary and traditional uses" standard does not provide any basis for distinguishing among users, nor does it protect "traditional patterns and methods of taking fish and game for subsistence purposes," or "traditional and customary methods of subsistence takings."

***Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994):** Several Alaska Native villages were granted preliminary injunctive relief from state regulations that prevented them from fishing for rainbow trout in the navigable portions of rivers in the Togiak National Wildlife Refuge. At the time, the federal government took the position that it did not have jurisdiction over navigable waters. In reversing the lower court's refusal to grant a preliminary injunction, the Court of Appeals found that the district court erred in focusing on whether people were going hungry in weighing the harm to the villages, and held that "the court should have focused on the evidence of the threatened loss of an important food source and destruction of their culture and way of life."

****Olsen v. United States*, A97-0031CV (D: Alaska, filed January 30, 1997):** This case alleged the same issues that were plead in *McDowell v. United States* and involved largely the same group of plaintiffs. The case was voluntarily dismissed without prejudice on March 13, 1998, in order to allow the Alaska Legislative Council's case to proceed in the DC Circuit. The DC Circuit had issued an order stating that it would transfer that case to Alaska unless the Olsen case was dismissed.

****Katie John v. United States*, A90-0484-CV (HRH), 1994 WL 487830 (D. Alaska March 30, 1994), consolidated with *Alaska v. Babbitt*, Nos A92-0264-CV, 94-35480 (D. Alaska, April 20, 1995):** In response to the federal agencies decision not to assume management over most navigable waters (only those overlying submerged lands withdrawn before Statehood), Alaska Native elders fishing near the Copper River from a Native allotment

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near Batzulnetas challenged the Secretary's position. They sought to extend federal subsistence management to all navigable waters in Alaska. The State sued, alleging that the federal regulations impermissibly diminished the State's authority to manage fish and game. The two cases were consolidated. Before oral argument on cross-motions for summary judgment, the federal government changed its position and conceded that the priority should extend to waters in which the US has a reserved water right. The district court concluded, based on the federal navigational servitude that federal management should extend to all navigable waters in Alaska in order to fulfill Congress' intent to provide for subsistence needs of rural Alaska residents. Both the State and the plaintiffs appealed.

The court also rejected Alaska's claim that the federal government lacked authority to manage subsistence uses on federal public lands. The State did not appeal this ruling and stipulated to a dismissal with prejudice. The State legislature, along with a group of anti-subsistence advocates attempted to intervene in the Ninth Circuit in order to appeal this ruling, but the Court denied their motion.

***Alaska Legislative Council v. Babbitt, 181 F.3d 1333 (DC Cir. 1999):** A group of Alaska legislators, having failed in their attempt to intervene in the appeal of the Katie John decision, attempted to challenge the federal exercise of management authority in a separate lawsuit. The case was dismissed on the ground that the Legislature lacked standing to vindicate an alleged injury to the State's sovereignty interests, and the individual plaintiffs had not established their standing to bring their claims.

***Alaska v. Babbitt (Katie John II), 72 F.3d 698 (9TH Cir. 1995):** The Ninth Circuit reversed as to the navigational servitude and agreed with the plaintiffs' alternative theory that the federal public lands include all federally reserved waters in the State.

Totemoff v. State of Alaska, 905 P.2d 954 (Alaska 1995), cert. denied, 517 U.S. 1244 (1996): The Alaska Supreme Court, in *dicta*, expressed disagreement with the *John* ruling, creating a conflict between state and federal law on the issue of whether the reserved rights doctrine applies to the state's navigable waters. The court also rejected the argument that *Alexander* and *Bobby* should be read to invalidate the State law that purports to strip subsistence users of "a defense [to a prosecution for a taking violation] that the taking was done for subsistence uses." AS 16.05.259. The court held that only the US Supreme Court can control the decisions of state courts, even on questions of federal law.

State of Alaska v. Kenaitze Indian Tribe, 894 P.2d 632 (1995): Since Alaska fell out of compliance with Title VIII of ANILCA in 1989, its statutory scheme maintains a subsistence priority in name only, as demonstrated by a series of State court decisions. In this case, the Supreme Court upheld the constitutionality of the state's creation of vast non-subsistence areas (Alaska Sta. 16.05.258(c)). The court also unanimously invoked *McDowell's* construction of the "equal access" clauses of the State Constitution to prohibit the Legislature from using "local residency" for any subsistence-priority purpose, even as one of the three "Tier II" criteria of dependence and need to determine which subsistence users should be preferred when a particular fish or wildlife resource is not sufficiently abundant to satisfy all subsistence uses. Section 804 of ANILCA imposes local residency in its scheme to differentiate between subsistence users in times of shortages.

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***Native Village of Elim v. State of Alaska*, 990 P.2d 1 (Alaska 1999):** This case interpreted the state-law subsistence priority as not applying to subsistence fish and wildlife resources throughout their migratory range. The ANILCA priority, by contrast, clearly attaches to such resources throughout their migratory travels. That is, the ANILCA priority prevents resources from being taken for non-subsistence uses in one part of their range if that would deprive rural residents in another part of the range of sufficient resources to satisfy subsistence uses. See, e.g., 50 C.F.R. §§100.10(a) (the Secretary retains “existing authority to restrict or eliminate hunting, fishing, or trapping activities [outside of the] public lands when such activities interfere with subsistence fishing, hunting or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority.”)

***Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000):** The Court deferred to the Federal Subsistence Board’s application of restrictions on subsistence users—ostensibly for conservation purposes, but without first eliminating non-subsistence users. The court found it permissible for the FSB to balance competing aims of subsistence use, recreation, and conservation, but noted that the Board must provide subsistence users with a meaningful use preference, and found the two-day opening for subsistence hunters insufficient.

****John v. US*, 247 F.3d 1032 (9th Cir. 2001) (en banc):** Following publication of the agencies final determination of which waters are subject to the federal reserved water rights doctrine, 64 Fed. Reg. 1276 (January 8, 1999), the State appealed the Secretaries’ action to federal district Judge Holland, who affirmed the Secretarial action as consistent with the Ninth Circuit’s 1995 decision. On appeal, an *en banc* panel of the court upheld the federal regulations, holding that “the judgment rendered by the prior panel, and adopted by the district court should not be disturbed or altered by the en banc court.” Governor Knowles decided against petitioning for certiorari to the US Supreme Court.

***State v. Kenaitze Indian Tribe*, 83 P.3d 1060 (Alaska 2004):** The Supreme Court rejected a challenge to the implementation of the State’s non-subsistence areas (Alaska Sta. 16.05.258(c), and found that the Joint Boards of Fisheries and Game did not act arbitrarily or capriciously in including Native, subsistence-dependent communities within a large non-subsistence area encompassing almost half the state (Anchorage, the Kenai Peninsula and the Mat-Su Borough).

****Alaska Constitutional Legal Defense Conservation Fund v. Kempthorne*, 2006 US App. LEXIS 21570 (9th Cir. 2006), cert. denied, January 22, 2007:** In an unpublished decision, the Ninth Circuit affirmed the district court’s dismissal of plaintiffs’ challenge to the federal regulations implementing Title VIII’s rural priority. The court held that the Federal Subsistence Board acted within its statutory authority under ANILCA by enacting regulations that grant a preference for subsistence hunting to rural Alaskans, and that the preference does not violate the federal Equal Protection guarantee.

***Safari Club International v. Dementieff*, 227 F.R.D. 300 (D. Alaska 2005):** The court ruled that the exclusion of non-subsistence users from regional advisory councils violated the requirement of the Federal Advisory Committees Act (FACA) that committees subject to FACA be “fairly balanced.” The Secretary in October, 2004 adopted a rule that required the RACs to be composed of 30% sport and commercial users. Native tribes and individuals intervened to challenge the rule on the grounds that it violated ANILCA. The Court ultimately ruled that the RACs are subject to FACA, and after additional rulemaking, the FSB adopted a final rule that asks the Board to achieve 30% sport and/or commercial users on each of the RACs.

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***Ninilchik Traditional Council v. Fleagle*, No. 3:06 CV 213 JWS, 2006 U.S. District LEXIS 67753 (D. Alaska 2006):** This lawsuit challenged the failure of the Federal Subsistence Board to provide for a subsistence fishery on federal waters on the Kenai Peninsula. The federal district court denied the tribe's request for a preliminary injunction to set aside the FSB's decision not to approve the Southcentral Regional Advisory Council's recommendation to create the temporary subsistence fishery requested by the Tribe. The Court held that the regulations do not clearly require the FSB to give deference to RAC recommendations when considering a request for special action for a temporary change under 50 C.F.R. 100.19(e), i.e., concluding that 805(C) Of ANILCA only applies to recommendations on actions taken during the annual regulatory cycle.

***Alaska v. Federal Subsistence Board*, 544 F.3d 1089 (9th Cir. 2008):** The Ninth Circuit affirmed the district court's summary judgment dismissal of the State of Alaska's challenge to the FSB's customary and traditional use determination for moose hunting for the relevant game management unit near Chistochina. The State had alleged that because harvest data indicated that customary and traditional use occurred in only a very small portion of the unit, the Board's decision to extend the C&T finding to the whole unit was made without substantial evidence. The Cheesh-na Tribal Council in Chistochina intervened in the case to defend the FSB's C&T determination.

****Katie John v. U.S.*, NO. 3:05-cv-0006-HRH, consolidated with *State of Alaska v. Salazar*, NO. 3:05-cv-0158-HRH) (Order on Cross Motions for Summary Judgment, September 29, 2009):** The State filed suit in federal court in 2005 to challenge regulations adopted by the federal agencies in 1999 to implement the Ninth Circuit Court of Appeals decision (in the original Katie John case), holding that the definition of "public lands" for purposes of Title VIII of ANILCA includes navigable waters in which the US has reserved water rights. AFN intervened on the side of the federal government to support the existing regulations. Katie John filed a separate lawsuit arguing that the federal regulations should have defined water upstream and downstream from Conservation System Units (CSUs) and waters adjacent to Native allotments as public lands for purposes of ANILCA. The cases were consolidated and jointly managed with *Peratrovich v. US*, which asserted that certain marine waters within the boundaries of the Tongass National Forest should have been included within the definition of "public lands."

In May 2007, Judge Holland upheld the federal rulemaking process for determining which waters in Alaska are subject to federal jurisdiction, and on September 29, 2009, issued an order deciding all of the remaining issues in these cases regarding which waters have federal reserved water rights and are thus subject to federal jurisdiction. The court upheld the agencies' regulations which define "public lands" to include (1) waters bordering CSUs, even if they are outside the CSU; and (2) waters adjacent to in-holdings within CSUs. The court also held that selected but not conveyed lands within CSUs are properly treated as public lands until conveyed; and that the method for determining where a river ends and marine waters begin (headland to headland) was reasonable. Unfortunately, the court rejected the claims raised in both *Katie John* and *Peratrovich*, and held that federal reserved water rights do not exist, as a matter of law, in marine waters. In addition, the court upheld as "reasonable" the Secretaries' decision to exclude waters upstream and downstream of CSUs, and waters adjacent to Native allotments that are outside of CSUs from the definition of public lands. The State has appealed the decision to the Ninth Circuit.

*Denotes those cases in which AFN has intervened to defend the federal priority.



**ALASKA FEDERATION
OF NATIVES**

Honorable Kenneth Salazar
Secretary of the Interior
1849 C Street
Washington, D.C. 20240

January 21, 2010

Dear Mr. Secretary:

This letter supplements our earlier comments concerning the federal subsistence management program in Alaska, and responds to the comments filed by the State of Alaska on January 5, 2010. As we noted in our original comments, the federal subsistence management program is founded in well-established federal law, and should be thoroughly and effectively implemented as a federal priority. The State actively supported Title VIII of ANILCA when it was first adopted and objected to a Native preference on the ground that it preferred a rural preference in order to manage a state-wide subsistence priority. Since 1990, the State has steadfastly refused to amend its constitution to obtain management authority on federal lands and has gutted its own priority to the extent that it would take major revisions in state law to even resemble the priority provided in Title VIII.

The Administration has properly called for a new approach to subsistence management, one that strengthens the management and coverage of the program, rather than weakening the implementation of the law through neglect, deference to others, or underfunding. We support the Administration's expressed intent to improve federal subsistence management based on the recognition that there will be no return to state management. Management decisions should be based on science and traditional knowledge and there must be a strong commitment to fulfilling the ANILCA subsistence mandate. We commend you for basing your review of the program on these principles, and ask that another be added. We ask that you acknowledge that the input from subsistence users will be respected and formally incorporated into federal subsistence management decisions and policies at all levels.

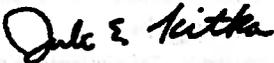
As noted in our earlier comments, we strongly object to the State's calls for deference to its subsistence programs and policies on major subsistence program management actions. The State's subsistence program is fundamentally inconsistent with Title VIII of ANILCA. State law provides only a priority for subsistence *uses*, not *users*. See, e.g., *State v. Morry*, 836 P.2d 358, 368 (Alaska 1992). By contrast, federal law provides a user priority over other individual users. ANILCA defines "subsistence uses" as "customary and traditional uses by *rural Alaska residents*," 16 U.S.C. § 3113, while a similar limitation under state law was declared unconstitutional in *McDowell v. State*, 785 P.2d 1, 11 (Alaska 1989). No program, particularly one as foundational as subsistence hunting, fishing and gathering, can serve two differing fundamental priorities. We urge you, in the strongest possible terms, to reject the State's call for

deference to its subsistence management program in implementing the federal subsistence management program.

While some aspects of the subsistence and fish and wildlife management programs can be coordinated, and the process made more open to public review and input in the affected communities, there is no basis for deferring management and implementation of the federal subsistence priority to an inconsistent state priority. Requests by the State to expand the role of the State liaison, to "give deference" in federal board deliberations to the position of the State on "conservation", to implement the ill-advised 2008 MOU of the prior Administration, to use analyses by State fish and game staff in lieu of federal analyses, to require federal regulators to respect State conservation measures unless they "make specific findings of error in the State determinations" are all requests for inappropriate deference to State policies and practices. Most importantly, they are inconsistent with the mandate of federal law. There are numerous other requests by the State that are overt, or, in some cases, more subtle, forms of calling on the Administration to defer to the State on a myriad of subsistence decisions, spanning from day-to-day harvest decisions to fundamental decisions as to whom the subsistence priority actually applies. These requests are inconsistent with the implementation of Title VIII of ANILCA, and the history accompanying ANCSA, and they must be rejected for what they are.

Attached are responses to the specific requests filed by the State of Alaska. We would be pleased to provide any further information that you may require. On behalf of the Native people of Alaska, we thank you for your consideration.

Sincerely,



Julie Kitka, President
Alaska Federation of Natives

Cc: The Honorable Tom Vilsack, Secretary, U.S. Department of Agriculture
The Honorable David Hayes, Deputy Secretary, U.S. Department of Interior
The Honorable Tom Strickland, Asst. Secretary for Fish, Wildlife and Parks
The Honorable Larry Echohawk, Asst. Secretary for Indian Affairs
The Honorable Kim Elton, Director, Alaska Affairs, U.S. Department of Interior
The Honorable Pat Pourchot, Special Assistant to the Secretary for Alaska
The Honorable Sean Parnell, Governor, State of Alaska
The Honorable Mark Begich, U.S. Senator, Alaska
The Honorable Lisa Murkowski, U.S. Senator, Alaska
The Honorable Don Young, U.S. Congressman, Alaska

AFN's Response to Comments by the State of Alaska

State Recommendation #1: *Modify the federal subsistence regulatory process to provide the State of Alaska a consequential role in decisions involving conservation of fish and wildlife, in compliance with ANILCA Section 1314 and Title VIII.*

AFN Response:

Title VIII must be administered as a federal law, in accordance with federal standards, without improper deference to state law or state management issues and objectives which are inconsistent with federal requirements. As such, AFN objects to the calls by the State to defer, in large part, major subsistence program management actions to the State's subsistence programs and policies. Specifically, the State has requested that, for harvest decisions, the Federal Subsistence Board rely on: (1) State fish and wildlife data and analyses of data, harvests, and populations, and (2) recommendations by the State, as the sovereign trustee for fish and wildlife, to modify or reject harvest proposals based on identification of conservation issues and impacts on sustainable management. Further, the State suggests that the federal process should use analyses of fish and wildlife proposals by State fish and wildlife managers in lieu of federal analyses, allow ADF&G staff to present state data to the Regional Advisory Councils (RACs) and Federal Subsistence Board, and defer to State conservation assessments.

Beginning in 1989, the federal government has managed subsistence uses on public lands and, in accordance with Title VIII, assumed management and oversight of subsistence uses on federal lands because of the State of Alaska's failure to provide a state-law priority of subsistence uses by rural residents. Since that time, the State has remained out of compliance with the Title VIII requirements because the State's management program is based upon a different subsistence priority, one which is inconsistent with ANILCA's rural resident priority. Rather than revise its subsistence policies and amend its constitution to get back in compliance with Title VIII, the State has continued to advocate for greater deference to it within the existing federal management structure. This is contrary to the clear intent of ANILCA and relevant court decisions, which have found that "unlike a federal agency, the State is delegated no authority under ANILCA."¹

For example, § 812 of ANILCA, 16 U.S.C. § 3122 provides that "The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary." This provision demonstrates that, the State, along with various federal agencies, and subsistence users, should be asked to provide information regarding general research. It does not suggest, must less mandate any deference to State recommendations regarding subsistence regulations. The federal government has primary authority for the management of subsistence

¹ *Kenaitze Indian Tribe v. State of Alaska*, 860 P.2d 312, 316 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

uses under Title VIII. As such, AFN urges the rejection of the State's requests for federal deference to the State's subsistence management program.

The State's reliance on the general savings clause in § 1314 of ANILCA, 16 U.S.C. § 3202(a) throughout its submission is similarly misplaced. As Judge Holland concluded in his Order rejecting the same argument:

Section 1314 recognizes that the State's traditional authority over fish and wildlife management may be diminished 'as . . . provided in subchapter II of this chapter[.]' 16 U.S.C. § 3202(a). Subchapter II refers to the codified form of the subsistence provisions which are Title VIII of ANILCA. Thus, Section 1314 recognizes that in implementing Title VIII the Secretaries may have to take action that impinges on the State's traditional authority over fish and wildlife management. The Secretaries' use of rulemaking to identify reserved waters for purposes of Title VIII of ANILCA falls within the "except[ion]" to section 1314.

Katie John v. Salazar, Order at 31 (May 17, 2009 No. 3:05-cv-0006-HRH).

In short, in the absence of state compliance with § 805 of ANILCA there is no reason for the Secretary to "provide a consequential role" for the State, since Congress has clearly set forth the terms under which the State may have a substantive role – terms which the State has rejected.

State Recommendation #2: *Expand the role of the State of Alaska liaison to the Federal Subsistence Board, to coordinate and consult in decisions involving subsistence use and conservation of fish and wildlife, consistent with ANILCA Section 1314 and Title VIII.*

AFN Response:

In addition to the reasons provided in our response to Recommendation #1, AFN rejects the State's request for deference in Federal Subsistence Board deliberations. The State has a non-voting seat on the Federal Subsistence Board, and has been given too much influence already over the decision-making process. AFN believes that the State's position should be eliminated. In addition, the State's request for deference in this situation is contrary to Section 805(c) of ANILCA, which requires that deference be given to the recommendations of the RACs. Instead of deferring to the State, deference should be given to the recommendations of the RACs as required by § 805 of ANILCA, 16 U.S.C. 3115(c). ("The Secretary may choose not to follow any recommendation [of a RAC] which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.")

State Recommendation #3: *Implement the 2008 Memorandum of Understanding, which commits to consultation with the State of Alaska in decisions involving subsistence use and conservation of fish and wildlife and to coordination of the state and federal regulatory programs, in compliance with ANILCA Section 1314 and Title VIII.*

AFN Response:

The Memorandum of Understanding should be revoked and renegotiated to incorporate input from the RACs and Alaska tribes. As written, the Memorandum of Understanding impermissibly imports state law requirements into the federal management program. For example, the Memorandum of Understanding requires the Federal Subsistence Board to provide a subsistence priority consistent with both federal and state law, the relevant provisions of which are inconsistent with each other. It is inappropriate and contrary to the provisions of Title VIII for the federal government to defer subsistence management authority to the State as it does in the Memorandum of Understanding.

A MOU should not provide the State with any substantive or procedural decision-making powers regarding subsistence uses on the public lands. The State has lost its right to have any meaningful role in subsistence management on the public lands through its continuing failure to adopt a subsistence law consistent with ANILCA. In fact, a MOU should explicitly acknowledge the preemptive power the Federal Board has over the State Boards, especially in cases where the Federal Board must limit non-subsistence uses of migratory species on State lands in order to ensure satisfaction of subsistence uses on public lands.

The Federal Board's determination to enter into a MOU with the State on critical issues is misplaced. ANILCA is clearly intended to ensure extensive involvement by local subsistence users in decisions which affect their lives. Yet, so far the Federal Subsistence Board has not reached similar agreements with local subsistence users. The Board should be expressly allowed to enter into MOUs and section 809 agreements with organizations such as Native tribes and non-profits. Such agreements are necessary to advance cooperation, communication, effective data gathering, effecting administration and to enact subsistence regulations that are consistent with the needs and customs and have the least adverse impact on local subsistence users. The emphasis of Federal subsistence management should be to empower local subsistence users in the decisions that are so important to their way of life. State involvement must not supplant local participation.

State Recommendation #4: Implement measures for the Federal Board to determine whether subsistence use amounts necessary to fulfill the ANILCA-required subsistence priority are being adequately provided for rural residents, as Congress envisioned in Titles I and VIII.

AFN Response:

The State's comments are based on a fundamental and long-standing misinterpretation of the Congressional intent in ANILCA, where Congress intended to protect the *qualitative* aspects of a subsistence way of life.² Conversely, State law embodies a management approach that determines the *quantitative* amount of fish and game that will provide subsistence users with a

² See *Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994) (ANILCA provides "a clear congressional directive to protect the cultural aspects of subsistence living").

“reasonable opportunity” to satisfy their customary and traditional consumptive uses. State law “does not require that the boards preserve a *qualitative* way of harvesting these resources.”³

The “priority opportunity” described by the State is not enough to ensure compliance with ANILCA, where “[n]eed is not the standard.”⁴ Unlike state law, federal law protects not just the quantity or volume of use but the duration of the use as well.⁵ While ANILCA requires a balancing of “minimum adverse impact upon rural residents who depend upon subsistence use of resources” in management decisions,⁶ a similar “least intrusive” standard does not exist in state law.⁷ The State’s “opportunity” standard has the effect of protecting subsistence only in times of shortage,⁸ but ANILCA contains a number of provisions that protect subsistence at *any* time, such as protections against unnecessary restrictions on subsistence takings.⁹ The State’s “opportunity” approach is really nothing more than a method for watering down the priority in order to accommodate sport and commercial uses.

The State’s recommendation is an attempt to revise the federal management regime to be as similar as possible to the management structure implemented by the State. The result would be an inappropriate restriction on the Title VIII preference for Native and rural subsistence use on public lands for nonsubsistence uses by other Alaska residents. As discussed above, in Title VIII, Congress clearly intended to prioritize and protect Native and rural subsistence uses on public lands.

State Recommendation #5: Modify the federal regulatory process to evaluate and avoid unnecessary impacts on subsistence uses provided by the State and non-subsistence uses, and to balance competing purposes of ANILCA while providing the “priority opportunity” for customary and traditional subsistence use, in compliance with Section 815.

AFN Response:

In *Ninilchik*, the Ninth Circuit court of appeals deferred to the Federal Subsistence Board’s application of restrictions on subsistence moose hunters – ostensibly for conservation purposes. The court found it *permissible* – not mandatory – for the FBS to balance competing aims of subsistence use, recreation, and conservation, but noted that the Board must provide subsistence hunters with a *meaningful* use preference. In that case, a two day opening for moose for subsistence hunters (prior to the general hunt) was found not to provide a meaningful use

³ *State v. Morry*, 836 P.2d 358, 369 (Alaska 1992).

⁴ *Bobby v. State of Alaska*, 718 F.Supp. 764, 778 (D.Alaska 1989).

⁵ *Id*

⁶ *Kwethluk I.R.A. Council v. State of Alaska*, 740 F.Supp. 765, 767 (D.Alaska 1990)

⁷ *Morry*, 836 P.2d at 365.

⁸ Alaska Stat. 16.05.258.

⁹ 16 U.S.C. § 3114; see *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000) (“subsistence uses may not be restricted unless necessary to protect the continued viability of fish and wildlife populations”); *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (accord).

preference. We believe this decision did not give effective meaning to the term “priority” and was wrongly decided.

As for the savings clause, it states that nothing in Title VIII shall be construed as “authorizing” a restriction on nonsubsistence uses on the public lands unless necessary for conservation purposes or to continue subsistence uses of such populations. The courts have held that this does not mean the Federal Subsistence Board cannot regulate subsistence, even if it has an impact on nonsubsistence uses. *See Alaska v. Federal Subsistence Board*, 543 F.2d 1089, 1100 (9th Cir. 2008). In that case the State pointed to Section 815 to argue that a C&T finding for residents of Chistochina for moose in GMU 12 placed restrictions on nonsubsistence taking because it increased moose taking in GMU 12, and thus necessitated greater conservation efforts by the State. The court rejected that argument and held that “ANILCA’s limitation provision does not prevent the Federal Subsistence Board from regulating subsistence use simply because a collateral effect of regulation might cause a separate regulatory body to place restrictions on nonsubsistence use. It only prohibits the agency itself from limiting nonsubsistence use.”

State Recommendation #6: Revise the federal regulatory process to correctly interpret ANILCA Section 805 in context with other portions of ANILCA and other Federal law regarding the role of Regional Advisory Council recommendations; clarify the appropriate level of consideration of RAC recommendations by the Federal Board.

AFN Response:

The State is impermissibly advocating to reduce the role of the RACs in the management of subsistence uses on public lands. The RACs are primarily comprised of rural subsistence users, and their participation and recommendations are central to the management structure created by Title VIII. Section 805(c) states that the Secretary “shall consider the report and recommendations of the [RACs] concerning the taking of fish and wildlife on the public lands . . . [unless] the Secretary . . . choose[s] not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs.” As such, the Secretary must follow or defer to RACs recommendations unless he determines that one of the three criteria exists. The State’s attempt to minimize the role of the RACs in protecting the subsistence uses of Alaska Natives and other rural Alaskans must be rejected.

In addition, the deference provided to the RACs should be expanded to include recommendations on all matters relating to rural subsistence users’ ability to subsistence hunt and fish on federal public lands and waters. This should include deference on recommendations regarding: (1) rural determinations; (2) customary and traditional use determinations; (3) out-of-cycle proposals; and (4) special actions and emergency regulations, as well as any other matter that impacts rural subsistence users’ ability to subsistence hunt and fish on federal public lands and waters.

Finally, the RACs should be exempted from complying with FACA. Section 805 mandates the creation of the RACs, to be composed of residents of the region, with the authority to devise and submit to the Federal Subsistence Board recommendations on proposed

regulations. FACA has required the inclusion of sport and commercial users and not just the local subsistence users as intended by Congress. The Secretary should support efforts to amend either FACA or ANILCA to exempt the RACs from the requirements of FACA.

State Recommendation #7: Establish steps to avoid adoption of federal regulations that largely duplicate State of Alaska regulations where the State is already providing the federal priority subsistence opportunity.

AFN Response:

As we noted in our responses above, ANILCA does not permit the federal government to defer to State management of subsistence uses on public lands. Thus, the State's request is for action that is unlawful under Title VIII. Congress, in Section 805(d), provided the State with an opportunity to manage subsistence uses on public lands. The applicable federal regulations provide a procedure by which the State can petition for the repeal of federal subsistence rules and regulations.¹⁰ Importantly, the State can only make use of this procedure when the State has enacted and implemented subsistence laws which are both consistent with Sections 803, 804, and 805 of ANILCA and provide for the subsistence definition, preference, and participation specified therein. To date, the State continues to implement a management program that contains a subsistence priority that is inconsistent with ANILCA's rural resident priority. As a result, and as required by ANILCA, the federal government retains management authority for subsistence uses on public lands. The State's attempts to reduce the federal role to merely supplement State management of subsistence is contrary to the clear mandate of Title VIII.

State Recommendation #8: Apply consistent definitions and criteria throughout the federal regulatory process.

AFN Response:

The State argues that the Federal Subsistence Board needs to consistently apply its customary and traditional uses regulations. The federal regulations adopted the State's eight criteria for determining customary and traditional uses on a species-by-species basis.¹¹ The eight criteria provide considerable detail for determining whether a community or area's use of a fish stock or wildlife species exemplifies a customary and traditional subsistence use. Contrary to the State's allegations, the current regulations ensure that customary and traditional use determinations will be "based on supporting evidence" and will be "limited to those specific uses" for which these customary and traditional use factors are generally present. If the regulations are to be changed, they should be revised to reflect that subsistence use patterns involve the opportunistic taking of fish or game as needed and as available. As such, instead of a species-by-species determination, the regulations should focus on customary and traditional use areas, and provide that all species found within those areas are subject to the subsistence priority. This revision would more closely align the intent of ANILCA with Native and rural subsistence practices.

¹⁰ See 50 C.F.R. § 100.14(d).

¹¹ See 50 C.F.R. § 101.16(b).

The State's concerns about placing enforceable limits on what constitutes customary trade are unfounded. The broader management restrictions placed on the subsistence use of species provide an enforceable limit on the scope of customary trade, specifically that the species must be from a federal subsistence harvest in a designated area. Further, the scope of "significant commercial enterprise" is not as broad or ambiguous as the State asserts. The regulatory definition also limits customary trade to that necessary to "support personal and family needs."¹² Therefore, the practice of customary trade is not as unregulated as the State suggests.

AFN agrees that the designation of rural communities should be conducted as soon as possible following the upcoming census. Further, AFN urges the federal government to address the procedures by which it determines which communities are considered rural. Specifically, the current definition of rural should be amended and defined as broadly as possible so as to benefit the greatest number of Alaska Natives who wish to continue to pursue a subsistence way of life. Further, the Federal Subsistence Board should develop methodologies for identifying rural and non-rural areas in a way that does not result in the elimination of rural, subsistence-dependant communities.

The State argues that actions should be based on substantial evidence on the record.

The State made this same argument with respect to the customary and traditional use determination in favor of residents of Chistochina in *Alaska v. Federal Subsistence Board*. Throughout the litigation, the State "vociferously" argued that the Chistochina determination was "not supported by substantial evidence." There was some evidence of use but it was limited to about ¼ of the 10,000 square miles within GMU 12. The Ninth Circuit dealt with the State's argument quickly, without imposing thresholds, or discussing quanta of proof. The record showed hunting activity in each of three areas within the GMU, and nothing more was required. The court's decision is supported by the definition of "substantial evidence". Black's Law Dictionary defines it as "Evidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla." Moreover, it is a well-established standard regularly applied by federal agencies and courts under the Administrative Procedures Act.

State Recommendation #9: Improve participation of local rural residents in the federal regulatory process by utilizing local Fish and Game Advisory Committees and revising the process for selection of Regional Advisory Council members by the committees they represent.

AFN Response:

The Secretary has not established local advisory committees, to our knowledge. When the federal program was set up, the Secretaries viewed the federal system as temporary, even though a viable local and regional participation scheme is mandated by Section 805(A) – (c). The Secretaries determined that the existing State Fish and Game Advisory Committees could submit proposals through the Federal Regional councils for any matters that concerned subsistence management on federal lands. It noted in the final Record of Decision that federal local advisory committees would be formed if, after notice and hearing, the Board determined

¹² 50 C.F.R. § 100.4.

that the existing State committees were not fulfilling the requirements of ANILCA Section 805 or, if in the judgment of the Board, a Federal Advisory Committee is needed or warranted in a specific geographic area. In that case, the Federal Land Advisory Committees and their membership would be formed based on the recommendations of the Regional Councils. The formation of local advisory committees has not occurred.

The Secretary of the Interior should contract with the Regional Native nonprofit corporation in each of the twelve regions to survey the committees and villages in their regions to determine whether subsistence users are satisfied with their existing Local Advisory Committees, and to assist in establishing new ones for those villages desiring their own advisory committee.

Title VIII and the relevant regulations establish how RAC members are to be selected. Section 805(a) states that each RAC shall be established by the Secretary in consultation with the State and be composed of residents of the applicable region. There is no express authorization in ANILCA allowing the Fish and Game Advisory Committees to select RAC members. The regulations specify that the Federal Subsistence Board will accept nominations and make recommendations to the Secretary for membership on the RACs.¹³ Further, RAC membership is limited to residents of the applicable region with knowledge about the region and subsistence uses of the public lands therein.¹⁴ The State's concerns are unfounded.

State Recommendation #10: Conduct a separate, systematic assessment of: (1) responsibilities and funding of the Office of Subsistence Management, federal subsistence-related staff in the federal agencies, the Interagency Staff Committee, and legal counsel in order to reduce redundancy in staff work and costs and to clarify authorities among the federal agencies in the regulatory process; (2) review decision processes for funding fisheries monitoring projects, wildlife populations, and harvest data; and (3) assure adequate funding for State participation.

AFN Response:

AFN agrees that the Federal Subsistence Board needs to make its deliberations more transparent. Currently, the Federal Subsistence Board improperly uses executive sessions to resolve controversial issues when, instead, deliberations should be transparent and on the record. Instead, the use of executive sessions should be limited to resolving issues involving personnel, litigation, and other confidential matters. The Federal Subsistence Board, as stated in AFN's response to Recommendation # 6, should defer to the recommendations provided to the RACs and not rely as heavily on staff recommendations or proposals. AFN believes that the purpose of Title VIII would best be served by strengthening the role of the RACs. The role of the RACs in the subsistence management process has been weakened by a lack of support and federal funding. To be most effective, the RACs need to have additional funding to hire their own staff and participate as full and independent partners with the federal agencies and their staff. Also, as noted in our original comments, AFN requests that the Office of Subsistence Management should be moved to the Office of the Secretary. It should not be lodged in, and required to report through, the U.S. Fish and Wildlife Service.

¹³ 50 C.F.R. § 100.11(b).

¹⁴ *Id.*



**ALASKA FEDERATION
OF NATIVES**

Honorable Kenneth Salazar
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

January 21, 2010

Re: Additional Alaska Subsistence Issues

Dear Secretary Salazar:

In the context of meetings held with our leadership in Alaska, to develop recommendations on the Secretarial Review of the federal subsistence management program in Alaska, a number of other important issues were raised that impact the ability of Alaska Natives to continue to engage in subsistence uses in Alaska. We would like to bring those issues to your attention and ask for your support in our efforts to address them.

1. **Marine Mammal Protection Act (MMPA).** We are requesting your support for a bill that would amend the co-management provisions of the MMPA, to better ensure a sustainable subsistence harvest for our people. We also urge the Department to increase the funding being provided for the co-management activities of Alaska Native organizations pursuant to their co-management agreements with the U.S. Fish and Wildlife Service (USFWS). These issues are summarized below.

Subsistence hunting of whales, walrus, seals and other marine mammals has sustained Alaska Natives and their coastal communities for thousands of years. The species of greatest importance to contemporary Alaska Natives are the bowhead whale, beluga, seals, polar bear, sea otters and walrus – all of which provide significant sources of food as well as materials for handicrafts and clothing, and sustain a centuries-old culture. In recognition of the importance of marine mammals to Alaska Natives, Congress provided an exemption in the MMPA to the near universal moratorium on the taking of marine mammals for Alaska Natives. The Act permits Alaska Natives who dwell on the coast of the North Pacific Ocean or the Arctic Ocean to take marine mammals for “subsistence purposes” or to create “authentic Native handicrafts and clothing.”

When the MMPA was reauthorized in 1994, Congress amended the statute to authorize the Secretaries of Interior and Commerce to enter into Marine Mammal Cooperative Agreements in Alaska with Alaska Native organizations (ANO's) “to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.” 16 U.S.C. § 1388 (Section 119 of the MMPA). Congress authorized appropriations of \$1 million annually to the Secretary of Interior for implementation of this new authority. Implicit in Section 119 is the belief that a cooperative effort to manage subsistence harvests that incorporate the knowledge, skills and perspectives of Alaska Natives is more likely to achieve the goals of the MMPA than in management by the federal agencies alone. And that has proved to be the case.

Since 1994, NMFS and the USFWS have entered into a total of 14 agreements involving 12 species. The USFWS has co-management agreements with Alaska Native organizations pursuant to Section 119, covering most, if not all of the marine mammal species under its jurisdiction. Under these agreements, the Alaska Native organizations have committed to collect and analyze data, monitor and report the subsistence harvest of marine mammals, and participate in marine mammal research conducted by the Federal Government, the State of Alaska, academic

institutions and private organizations. These agreements have led to development of monitoring strategies, gathering and exchanging information based on traditional ecological knowledge, research and bio-sampling programs. Alaska Natives are now helping design research projects, collecting tissue samples, carrying out tagging projects, and making valuable observations of population numbers and behavior. The results have contributed to information needed for management of a number of species, including stock identification (genetics); status and trends; movement patterns and distribution; natural history, including foraging behavior; mortality (including harvests); habitat-use patterns; responses to habitat change, including climate change; animal health, condition and disease; and contaminant levels. The bio-sampling of Native-harvested animals for scientific purposes has provided a particularly important opportunity for collaboration between scientists and Alaska Natives by making tissues from harvested animals available for research purposes. The harvest monitoring data continues to be essential to the accuracy of the stock assessments required by Section 117 of the MMPA.

Unfortunately, the co-management efforts of Alaska Native organizations are severely undercut by the lack of sufficient funding. Alaska Native organizations engaged in co-management activities have had to seek congressional earmarks from Alaska's congressional delegation on an annual basis to supplement funding provided by USFWS in order to cover the activities outlined above that are essential to the long-term health of marine mammals and their continued availability to our people for subsistence uses. The earmark process does not ensure sustainable, recurring funding, and is under strict scrutiny by Congress.

We are requesting that USFWS review the amount of funding that it includes in its annual budget for implementation of Section 119 co-management agreements, and to ensure that sufficient funding is requested on an annual basis to allow Alaska Native organizations to fully engage with the agency as co-management partners. We believe an annual budget of at least \$2 million should be provided, and request that the FWS consult with the Native community in its review.

We also ask your support for a bill to reauthorize the MMPA. During the Clinton Administration, the agencies worked with the Native community in Alaska to reach agreement on a package of amendments to Section 119, that would have strengthened its provisions by providing for harvest management plans that would be enforceable by both the federal government and Alaska Native organizations. The amendments we seek would allow the agencies, in coordination with Native organizations, to jointly develop harvest management plans within existing or newly developed cooperative agreements. These plans would implement measures taken by Native organizations and their member tribes to regulate subsistence takings of marine mammals for conservation purposes prior to a finding of depletion, and would avoid situations like that which has occurred in Cook Inlet with regard to the beluga.¹ The proposed amendments would also provide for an increase in the annual amount authorized for implementation of Section 119.

Reauthorization of the MMPA was not a priority for the last Administration, so despite our best efforts and those of the agencies, we were not able to move forward with this package of amendments. We strongly believe these amendments are needed and urge you and the appropriate members of your Department to work with us on a bill to amend the MMPA in a way that will enhance co-management in Alaska. With climate change impacting marine mammals and more and more species being considered for listing as threatened or endangered under the Endangered Species Act, there is a greater need than ever for the USFWS to work with Native organizations to ensure the conservation of marine mammals and the continuation of sustainable subsistence harvests.

¹ In 1999 Congress enacted P.L. 106-31, to prohibit the taking of Cook Inlet beluga whales unless authorized by a cooperative agreement between affected Alaska Native organizations, thus establishing an enforceable mechanism to control the subsistence harvest, which was the only factor found to be directly linked to the decline in beluga. Prior to this law, the Federal government could not restrict the harvest, and the local tribal authority was unable to prevent Alaska Natives from other regions of Alaska from harvesting the whales. Although the subsistence hunt was curtailed in 1999, the anticipated recovery has not occurred. As a result, NMFS has recently proposed listing Cook Inlet beluga as endangered under the Endangered Species Act.

2. Federal Migratory Bird Hunting and Conservation Stamps. We are requesting that you direct the USFWS to amend its regulations to exempt the customary and traditional harvests of migratory birds in Alaska from the requirements of the federal Duck Stamp Act, 16 U.S.C. §718a. That law requires all hunters of migratory birds to purchase and carry federal duck stamps. Alternatively, we ask your support for legislation that would amend the federal Duck Stamp Act to exempt these harvests.

The Federal Migratory Bird Hunting and Conservation Stamps, commonly known as "Duck Stamps," are pictorial stamps produced by the U.S. Postal Service for the USFWS. They were originally created in 1934 as the federal licenses required for hunting migratory waterfowl. At the time this legislation was enacted, Alaska Natives were prohibited, by the migratory bird treaty between the United States and Canada from engaging in their customary and traditional spring and summer subsistence harvest of migratory birds. In 1996, however, the migratory bird treaty between the U.S. and Canada was amended to recognize a customary and traditional spring and summer subsistence harvest of migratory birds and their eggs in Alaska. The protocol that amended the treaty required that any "regulations implementing the non-wasteful taking of migratory birds and the collection of their eggs by indigenous inhabitants of the State of Alaska *shall be consistent with the customary and traditional uses* of such indigenous inhabitants for their own nutritional and other essential needs." Canada Protocol, Art. II, § 4(b)(1). The Migratory Bird Treaty Act, 16 U.S.C. § 708 implements the Treaty.

The purchase of duck stamps is not consistent with the customary and traditional subsistence harvest of migratory birds by Alaska Natives. Native hunters across Alaska have long viewed the subsistence harvest of migratory birds and their eggs as a community tradition, and not as an individual entitlement that can be reduced to a system of individual stamps or permits. People often engage in hunting or egg gathering as family units, and often some people in a village community hunt for many others. Migratory birds and their eggs are widely shared and distributed throughout the community, as when a child traditionally gives his first bird to a village elder. Requiring the purchase of duck stamps is entirely alien to these traditions.

Despite the fact that the duck stamps are inconsistent with custom and tradition, and therefore inconsistent with the Canada Protocol, the U.S. Fish & Wildlife Service has insisted on grafting the requirements of the 1934 Migratory Bird Hunting and Conservation Stamp Act as amended into the regulations governing the subsistence hunt in Alaska. Requiring the purchase of duck stamps for the customary and traditional harvest of migratory birds and their eggs subjects Alaska Natives to a regulatory requirement that makes little sense in the context of this unique harvest, and subjects those who do not purchase the stamps to federal charges. The USFWS should be directed to amend its regulations to be consistent with the protocol. Alternatively, we request your support for legislation to amend 16 U.S.C. §718a to add "eligible indigenous inhabitants of the State of Alaska engaged in the customary and traditional harvest of waterfowl and their eggs" to the list of exceptions to the Act.

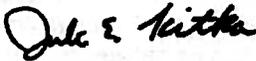
3. Tribal Compacting and Funding for Treaty Implementation. The protocol in the amended treaties between the United States, Canada and Mexico recognizes the traditional subsistence harvest of migratory birds by indigenous inhabitants of Alaska and provides that they "shall be afforded an effective and meaningful role" in "the development and implementation of regulations affecting the nonwasteful taking of migratory birds and the collection of eggs" through their participation in co-management bodies. In 2000, the USFWS established the Alaska Migratory Bird Co-Management Council and 12 regional management bodies. By regulations, the Council and regional bodies were tasked with collecting and analyzing information regarding bird population trends, past harvest levels, and local traditional knowledge to ensure that harvest regulations and limits are appropriate to maintain healthy populations. Neither the Council nor the regional bodies have been adequately funded. Moreover, funding is directed through USFWS, allowing the agency to control the purse and thereby inhibiting the growth, independence and capacity building of Alaska's co-management bodies. We request that you support the inclusion of funding for treaty implementation in USFWS' annual budget, with directions that the funding be included in a compact or contract with a Native Organization representing those involved in migratory bird management.

In conclusion, we urge you, as we have the Secretary of Commerce, to convene a high-level meeting between you, the Secretary of Agriculture and the Secretary of Commerce on all aspects of subsistence hunting, fishing and gathering in Alaska, and to include in that meeting the Alaska Native leadership. Such a meeting would be an excellent way to engage all of the parties in a meaningful review of the federal policies that impact the ability of Alaska Natives to sustain their way of life.

You have the opportunity to foster transformative change in federal policy by using and expanding cooperative agreements with the Alaska Native community, and encouraging the Secretaries of Commerce and Agriculture to do the same. Your leadership can change and modernize federal policy which could drive better interactions with the Native community, engage more Alaska Natives in research, foster new Alaska Native scientists, and assure that science provides information to Alaska Natives in a meaningful way. An expansion of the incorporation of science and traditional-knowledge into resource management will help sustain the resources for the future. Opening up the opportunity for more Alaska Native scientists will also create real jobs for Alaska Natives.

Thank you for your consideration. Please let me know if you would like additional information on any of these issues.

Sincerely,



Julie Kitka, President
Alaska Federation of Natives

Cc: The Honorable Tom Vilsack, Secretary, U.S. Department of Agriculture
The Honorable David Hayes, Deputy Secretary, U.S. Department of Interior
The Honorable Tom Strickland, Asst. Secretary for Fish, Wildlife and Parks
The Honorable Larry Echohawk, Asst. Secretary for Indian Affairs
The Honorable Kim Elton, Director, Alaska Affairs, U.S. Department of Interior
The Honorable Pat Pourchot, Special Assistant to the Secretary for Alaska
The Honorable Sean Parnell, Governor, State of Alaska
The Honorable Mark Begich, U.S. Senator, Alaska
The Honorable Lisa Murkowski, U.S. Senator, Alaska
The Honorable Don Young, U.S. Congressman, Alaska
The Honorable Byron Dorgan, Chair, U.S. Senate Indian Affairs Committee, U.S. Senate



“Subsistence is not only a way of life. It defines us as a people and is our spiritual connection to the land and sea. It is instilled in us and is a part of our inner being. It is essential to our survival as a people, and no one can ever take that away.”

– Marie Greene, President and CEO
NANA Regional Corporation

NARF COMMENTS



SUBSISTENCE

RECOMMENDATIONS

NARF COMMENTS

HISTORY

PRESS

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December 28, 2009

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Pat Pourchot, Special Assistant for Alaska
Office of the Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Comments on Federal Subsistence Management Review Process

Dear Pat:

I appreciate the opportunity to submit comments to assist your Department in undertaking its comprehensive overview of the Federal Subsistence Management Program. As you know, the Alaska Native community has repeatedly requested that the federal agencies tasked with implementing Title VIII of ANILCA review the changes that have taken place to the program during the past eight years and strengthen independent federal protections for the subsistence way of life as originally intended by Congress. The comments offered here are not intended to be exhaustive. Many of the recommendations contained here have previously been brought to your attention by the RACs, AFN, individual Tribes, AI-TC, Native non-profit organizations and by NARF.

I. GUIDING PRINCIPLES:

In reviewing the purpose of Title VIII of ANILCA to protect subsistence uses, and in assessing the success of the federal agencies in implementing a program consistent with Congress' intent, the Department's review should be informed by the following guiding principles:

- President Obama's campaign commitment that his Administration would protect Native American hunting and fishing rights;
- The United States' government-to-government relationship with Native American Tribes requires that all federal agencies treat and consult with federally recognized Tribes as sovereigns;
- Title VIII of ANILCA establishes a comprehensive statutory federal management scheme that is mandatory and independent of state law. It should therefore not be viewed from, nor shaped through, the lens of existing Alaska law.

- Increase the OSM's budget to adequately fund sufficient personnel to carry out federal obligations related to subsistence management. Increased funding should include monies to contract with Tribal governments for fish and game management and research initiatives.
- Reinststate the "Partners Program" which was defunded during the Bush years. During the initial phase of federal take-over, 30% of the budget was allocated to the "Partners Program" which authorized contracting with Tribes and the State of Alaska for data related to subsistence management of fish and wildlife. The "Partners Program" provided necessary capital in cash strapped communities and contributed to collaborative efforts between users and managers in the management of subsistence resources.
- Provide adequate training on Title VIII to all agency personnel who are engaged in decision making with respect to proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish and wildlife. Such training should emphasize that the work of agency personnel is not dictated by a balancing of federal interests with state interests, but on honoring, protecting and implementing a federal subsistence priority for rural residents on public lands.
- Return to an annual cycle of decision making by the FSB and RACs. The change to the two-year regulatory cycle has severely limited the RACs from being able to deliberate on important issues on a timely basis and has just as severely limited public input into the regulatory process. The two-year cycle has also increased the number of "special actions" and "emergency actions" that are taken during in-season periods – actions which are subject to much less deliberation and public review.
- Discontinue the use of select "working groups." Title VIII vests authority in the RACs to review proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish and wildlife. The creation of "working groups" has subverted the RAC process and provided another means for improperly elevating state interests.
- Discontinue the practice of making critical decisions on matters relating to subsistence uses of fish and game in "executive sessions." Closed door decision making is at odds with the Administration's goal of providing governmental transparency. All regulatory discussion and votes of the FSB should be held in open session in order to facilitate public understanding of the Board's decision.
- Reconsider and adopt ISER's "Criterion-Referenced" methodology for making rural/urban determinations. The status quo method relies upon population size for

catch so that future closures are unnecessary and to provide a subsistence priority for chinook in federal waters.

- The FSB should initiate rule-making to enforce the federal subsistence priority on (1) Alaska Native allotments; and (2) reserved waters upstream and downstream from the CSUs. In recent litigation, Judge Holland of the Alaska District Court acknowledged that the FSB possesses authority to determine that federal waters associated with federal lands extend to waters upstream and downstream from Conservation Units created by ANILCA. Thus, the FSB should undertake a rule-making to extend federal jurisdiction to these waters to guarantee a subsistence priority for subsistence uses.

III. CONGRESSIONAL REFORM

ANILCA was crafted with the expectation that the State of Alaska would conform its laws to federal requirements, alleviating the need for active federal management. Had Congress contemplated a federal regime operating alongside a state regime that does not prioritize protections for the subsistence way of life, Congress would have considered additional measures to assure that federal law under federal management fully protected subsistence activities. Since it is now apparent that the State of Alaska will never bring its law into compliance with Title VIII of ANILCA, the Secretaries should acknowledge that existing federal protections are inadequate to protect fully the subsistence way of life. Today, those rural residents that by happenstance live on or near state lands are denied the subsistence protections that others are afforded by virtue of living on or near public lands. This checkerboard system of protection was not what Congress envisioned when it enacted Title VIII. Indeed, it was because Congress recognized that "the continuation of the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional, and cultural existence" that the State of Alaska was encouraged to likewise adopt subsistence protections consistent with Title VIII so that all rural residents would be eligible for a subsistence priority. The Secretaries should direct staff to work with the Native community and Congress to adopt the following legislative initiatives:

- Amend Title VIII of ANILCA to add a "Native" priority.
- Exempt the RACs from the Federal Advisory Committee Act.
- Create a subsistence priority for fish and game on ANCSA lands.
- Preempt state law on all navigable waters in Alaska so that fish stocks are regulated under one management system and rural residents are eligible for a subsistence priority for fisheries even where a navigable river flows through or adjacent to state land.

I thank you again for the opportunity to submit these recommendations. Please feel free to contact me at (907) 257-0505 if you have any questions related to any of these



“We must fix subsistence within this generation. Growing up, we didn’t call it ‘subsistence,’ we called it ‘gathering’ and it was a way of life and a vital tie to our culture. Let’s stop perpetuating subsistence problems, so future generations of Alaskans can move forward.”

– *Alaska State Representative Bill Thomas
Board Member, Sealaska Corporation*

HISTORY



SUBSISTENCE HISTORY

- **Time Immemorial** – For thousands of years, Alaska Native people have survived by living from Alaska’s land and waters. Hunting, fishing and gathering constitute the spiritual, medicinal, nutritional and cultural foundation of Alaska’s indigenous peoples and our village cultures.
- **1867: Treaty of Cession.** The United States purchased Alaska from Russia. Art. III provided that “[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country,” thus applying the whole body of federal Indian and statutory law to the “tribes of Alaska.”
- **1940: Native Majority Displaced by New Alaskans.** Natives were a majority of the population prior to 1940. During World War II they became a minority and today represent about 19% of the total population.
- **1959: Alaska Statehood.** The Alaska Statehood Act gave the new State of Alaska the right to regulate hunting and fishing for all Alaskans, including Natives.
- **1971:** Congress enacted ANCSA, addressing Native claims to ownership of Alaska’s lands, based on “aboriginal use and occupancy.” The Act extinguished all aboriginal land title; it allowed Natives to select 44 million acres in fee title; and it paid \$962.5 million in compensation for lands taken. It also extinguished aboriginal hunting and fishing rights - but did not protect subsistence in the text of the Act. Instead, a mere statement of expectation appeared in the Conference Report: “The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.”
- **1971 - 1980:** The state and federal governments did not protect subsistence. [In 1978, the Legislature passed a law giving subsistence use a priority over all other uses of fish and game. But it did not distinguish between competing users (e.g., urban and rural residents), defining them all as subsistence users. Urban residents, under the protected label of subsistence, could go into rural areas and compete for local villagers’ most basic food resources.]
- **1980:** Recognizing that rural subsistence was not being protected, Congress had to act. In adopting ANILCA, it included Title VIII, which gave a priority to rural subsistence users on federal lands and waters. And it offered the State the right to continue managing subsistence on federal lands and waters, if the State would pass its own law giving the same rural priority on state lands.
- **1980’s:** The State acted to comply with federal law, first by a Board regulation in 1982, and later by a state statute adopted in 1986. In 1982, anti-subsistence forces

tried to get rid of the State's rural priority by a ballot measure in the November election. That repeal attempt was defeated, the rural priority remained in state law, and Alaska remained in compliance with Title VIII of ANILCA.

- **1989:** The Alaska Supreme Court, in *McDowell v. State of Alaska*, ruled the rural priority unconstitutional and threw it out of state law. State and federal laws were now in conflict, and the State was out of compliance with Title VIII. Pro-subsistence advocates wanted the Legislature and the people to amend the Alaska Constitution to permit a rural priority in state law. Anti-subsistence advocates opposed any change in the Constitution and wanted Title VIII of ANILCA repealed or made unenforceable.
- **1990:** The Alaska Legislature failed to adopt a constitutional amendment, and the federal government took over management of subsistence - but only on federal lands, not on federal waters. This meant that subsistence fishing (fish comprised 59% of the rural subsistence diet) was not protected by ANILCA. Native Elders Katie John and Doris Charles, joined by the Mentasta Village Council, stood up for all Native villages throughout the state. They sued the United States in federal court, saying that ANILCA's term "public lands" included federal waters. And in 1995, they won, when the Ninth Circuit Court of Appeals ruled that ANILCA's rural priority covers fishing in navigable waters reserved to the U.S.
- **1990 - 2002:** For 13 years, Alaska failed to bring state and federal subsistence laws into agreement. In 1990, Governor Cowper submitted a constitutional amendment to a special legislative session; and it failed by one vote in the House. In 1992-2003, Governor Hickel proposed two different systems of subsistence licensing, neither of which complied with ANILCA, and both of which were likely unconstitutional. The Legislature failed to adopt either version -- neither during the regular legislative session nor in a special session. Between 1994 and 2002, Governor Knowles worked with eight regular sessions and four special sessions, offering a constitutional amendment and weakening amendments to ANILCA. By 2002, 23 legislative sessions (17 regular and six special) had failed to resolve the impasse.

Throughout the entire process, anti-subsistence groups and legislators tried every available maneuver to keep the voters of Alaska from settling the subsistence question through a constitutional amendment: several specious lawsuits over the constitutionality of Title VIII, delays in implementing the *Katie John* decision, public decisions taken in secrecy, and media attacks on the U.S. government under the guise of "states' rights."

- **2006-2008:** Since the Knowles administration left office in late 2002, the main subsistence issue (the impasse between federal and state laws, which has brought on dual management) has seen no major action by Governor Murkowski or Governor Palin, by the Legislature or by Congress. The battleground has shifted to the courts and to the administrative process.

While subsistence is not being fought in the same arenas as in the 1990's, the new threat to the village food base is taking place in the regulatory process. The State of Alaska realizes that it is stuck with dual management for the foreseeable future; and, in cooperation with its federal allies in the administration, it has worked to subvert the purposes, standards and procedures of the Federal Subsistence Board.



“Subsistence is the heart of our traditions, providing the means to survive in this great land. Alaska Natives settled for rights to continue their way of life that should be recognized and protected.”

– Sheri Buretta, Board Chair
Chugach Alaska Corporation

PRESS



Feds seek to reshape hunting and fishing rules

'SYSTEM IS BROKEN': Interior Secretary proposes to revamp oversight of subsistence in Alaska.

By KYLE HOPKINS
khopklins@adn.com

(10/23/09 11:03:13)

The Obama administration is launching a rapid, sweeping review of the way the federal government manages subsistence hunting and fishing in Alaska, Interior Department officials said Friday.

"The system, frankly, today is broken," Interior Secretary Ken Salazar announced in a video shown at the annual Alaska Federation of Natives convention in downtown Anchorage.

Subsistence rights -- the battle over who gets the first opportunity to hunt and fish on state or federal land -- is a headline issue at this year's convention. For decades, the debate has pitted rural Alaskans and Alaska Natives, who say they hunt and fish to survive, against sports groups and urban hunters and fishermen, who argue everyone should have equal access to fish and game.

The state makes hunting and fishing rules across Alaska. But the feds regulate subsistence on federal lands, creating a confounding, overlapping system.

In contrast to the state Constitution, a 1980 federal law guarantees rural Alaskans priority when it comes to subsistence. Some Alaska Native leaders say the feds haven't done enough to protect that right, and are proposing a resolution at the convention today that calls for broad changes to subsistence management.

AFN leaders met with Interior officials at least twice in the past four months, outlining some of those requests, said state Sen. Albert Kookesh, an AFN co-chairman who praised Friday's announcement.

"We couldn't have asked for more," he said.

Gov. Sean Parnell couldn't be reached for comment Friday afternoon. Parnell served as lieutenant governor to Sarah Palin before inheriting the job in July. Palin opposed a rural preference for subsistence hunting and fishing. Parnell's rural affairs adviser, John Moller, answered an interview request with an e-mail:

"The administration is interested in hearing more about the suggested federal review," he wrote. "We plan to take an active role in the review and look forward to hearing details on what changes the federal government believes would make the existing dual-management system more workable."

In a statement explaining Friday's announcement, the Interior Department said subsistence is vital to the physical and spiritual culture of Alaska Natives, and federal oversight needs to be retooled to

better meet the needs of Native communities.

AGGRESSIVE, DIFFICULT

Kim Elton, Salazar's top aide for Alaska, told the AFN convention crowd that the feds would be asking for their help crafting the new subsistence plan over the next three months. That means meeting in Alaska with unspecified subsistence "stakeholders" in hopes of implementing changes before the federal subsistence board's next meeting in January. That board sets subsistence regulations for federal land, which encompasses more than 60 percent of Alaska.

"We want you all to feel comfortable that you've had a hand in shaping the policies that you're going to have to live with," Elton told delegates from villages and cities across the state. The AFN convention is the largest gathering of Alaska Natives in the state.

The process will be a fast one and likely won't include any single town hall meeting or summit, he told reporters later.

"It's going to be very aggressive. It's going to be very difficult," he said.

U.S. Sen. Lisa Murkowski, R-Alaska, spoke at the convention, too, welcoming the review.

"Right now we've got a lot of complaints. We've got a lot of 'it's not working,'" she later told reporters. "But let's really take the opportunity to do a fair assessment."

Still, Murkowski said she's surprised at how quickly the Interior Department is trying to finish the review.

"Say they do a quick-and-dirty assessment in a couple months, come out with their recommendations, but then the people who don't like it say, 'Well it's because you didn't take enough time.'"

In the meantime, Elton asked the crowd for recommendations on who should chair the subsistence board. The current chairman is Michael Fleagle, a Native and former state Game Board chairman who was appointed to the board in 2006 by the former Bush administration.

FEDS IN FOR LONG TERM

The Interior Department review will consider whether subsistence regulators need more money to do their job, including collecting data on Alaska fish and wildlife. Elton said the new plan will be based on science as well as traditional knowledge, and it will keep the federal promise to give a rural residents priority on federal land.

The Alaska Outdoor Council, a sportsmen's group, has long opposed a rural preference for subsistence hunting and fishing, but executive director Rod Arno said any move to review the way the feds manage subsistence is good.

That's because some of the changes to management that AFN leaders have been calling for go beyond the rural priority guaranteed under federal law, he said.

"They made it pretty damn clear in the lands claim act about extinguishing -- in the Alaska Native Claims Settlement Act -- extinguishing aboriginal hunting and fishing rights in exchange for land and money," Arno said.

Elton told the AFN crowd that as the feds assumed subsistence authority on federal land in the 1990s they thought it would be temporary.

Not anymore.

"A fundamental premise of this review is going to be that we can no longer expect the state to regain subsistence management on federal lands. Can't do it," Elton said, drawing scattered applause.

Delegates from Western Alaska, the site of a subsistence fishing protest this summer, listened to the speech through headphones, translated into Yup'ik.

"The Department of Interior is here to stay, so we have the obligation to provide the best management system that we possibly can," Elton said.

WHAT AFN WANTS

In Alaska, where hunting and fishing for food is still a common-sense alternative to grocery stores in many villages, managing fish and game is a tricky balancing act for public officials.

Kookesh, the AFN co-chair, is facing a subsistence fishing ticket and has used the case as a platform to reignite the subsistence debate.

The AFN board is proposing a resolution today that calls for a 14-step shake-up of subsistence management. For example, the proposal calls for an overhaul of the federal subsistence board, which Kookesh says is now mostly made up of federal agency heads rather than subsistence hunters and fishermen.

"The closest they get to subsistence is buying fish in Safeway," Kookesh said Friday.

The Interior secretary can indeed change the makeup of the subsistence board by proposing regulations, said Pat Pourchot, Salazar's special assistant for Alaska.

But other changes proposed at this year's convention would take congressional action. They include a call for the federal government, rather than the state, to manage subsistence on 45.5 million acres of Native-owned land, and a push for Alaska Natives who move to cities to retain a subsistence priority.

The Alaska Supreme Court has ruled that it's against the state Constitution to favor Alaska hunters and fishermen based on where they live, which is why the state doesn't give rural residents preference on state land.

But under a 1980 federal law, rural residents must have subsistence hunting and fishing priority on federal land. Elton told the crowd that the subsistence management plan the department implements within the next few months will uphold that preference.

Interior Department officials said they didn't want to speculate on what might change as a result of the review. But getting rid of one of Alaskans' major complaints about subsistence management, the overlapping state and federal rules, won't change without an amendment to the state Constitution.

That could put all subsistence management back in the state's hands.

But efforts to give rural hunters priority have proved divisive. Attempts to put an amendment before voters have failed in the state Legislature.

"I don't see that happening," said Pourchot, a former state senator. "Nobody I've talked to in years sees that happening."

Read The Village, the ADN's blog about rural Alaska, at adn.com/thevillage. Twitter updates: twitter.com/adnvillage. Call Kyle Hopkins at 257-4334.

The state's largest gathering of Alaska Natives began Thursday at the Dena'ina Civic and Convention Center in Anchorage. The convention ends today. Sessions are open to the public, although seating is sometimes limited. Here's how to follow the action if you can't make it to the convention center:

TV: Watch the convention live on GCI Channel 1 today from 9 a.m. to 4 p.m., according to GCI.

RADIO: Listen to the convention live on KNBA 90.3 FM.

ONLINE: Watch the convention streaming online, and find the daily agendas, at the Alaska Federation of Natives site, NativeFederation.org. KNBA also plans to stream its radio broadcast at KNBA.org.

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Published on February 17th, 2010

Opinion: Sustaining subsistence for the people

By JULIE KITKA



Kitka

Several years ago, at a statewide subsistence summit hosted by AFN, the late Eddie Hopson, chairman of the Arctic Slope Regional Corp., stated, "Hunger knows no law." This expression of the clear and unwavering voice of the Alaska Native people reverberated throughout the room that day. This simple message continues to drive our collective efforts to protect our people's way of life.

Our federal and state governments' lack of understanding is no longer acceptable. The United States Congress clearly wanted our federal and state governments to do everything in their power to allow our hunting, fishing and gathering to continue to sustain our cultures and our people. The fact that the intent of Congress has been thwarted time and again, despite the best efforts of the Native leadership and many outside the Native community, is a stain on our country's honor.

The secretary of Interior will soon outline his response to the full review he initiated. AFN's formal input into the secretarial review process, including contributions from you, is printed with this edition of the paper. We will judge the success of the review measured against our people's demands.

The on-going process of federal review and action will take some time. The Congress will hold oversight hearings on the results of the secretary of Interior's review and his recommendations. The Alaska Native community, along with the National Congress of

American Indians and all our national allies, will continue to participate fully to ensure that we have the legal protections we need in federal law.

Thank you for your continued support - both in the form of your participation in regional and village meetings on these issues, and in the form of financial contributions. Without your active involvement we will never accomplish our goals. Please continue to help in any way you can.

Please take a moment to learn more about the details of AFN's recommendations to Secretary Kenneth Salazar by reading the subsistence insert included with this edition of the paper. On Jan. 21, AFN also submitted two sets of supplementary recommendations to the secretary:

- In response to comments from the State of Alaska; and
- Providing further details with respect to the Marine Mammal Protection Act, federal migratory bird hunting and conservation stamps and tribal compacting and funding for treaty implementation.

You can download these supplemental comments anytime at www.nativefederation.org.

We have urged the secretary of the Interior to convene a high-level meeting involving himself, the secretary of Agriculture, the secretary of Commerce and the Native leadership to discuss all aspects of subsistence hunting, fishing and gathering in Alaska. We hope you will lend your voice in support of such a meeting, and that you will encourage your tribe, nonprofit or corporation to donate to the Subsistence Defense Fund to support AFN's work on behalf of our Native communities' subsistence rights. It will take all of us working together to win this fight.

Julie Kitka is president of the Alaska Federation of Natives.

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Subsistence rule review not likely to bring 'major overhaul'

Recommendations for hunting, fishing rules expected soon

Monday, February 22, 2010

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Subsistence rule review not likely to bring 'major overhaul'
Recommendations for hunting, fishing rules expected soon

By Kim Marquis | JUNEAU EMPIRE

Sweeping changes in federal subsistence hunting and fishing rules are not likely to come from an Alaska review ordered last fall by Secretary of the Interior Ken Salazar.

"We found a number of things that could improve the system," said Pat Pourchot, who is heading the review, which is still underway. "Some of those are more than tweaks, but at the same time most would not be what you might call a major overhaul of the system."

Pourchot is special assistant for Alaska affairs to the Department of the Interior, which ordered the review in October.

In announcing the review, Salazar called the program "broken" in a video conference at the Alaska Federation of Natives.

Subsistence rules are long unsettled in Alaska. A ticket charging state Sen. Albert Kookesh for overfishing near his home in Angoon last summer placed the issue in the spotlight.

Since the review began, Pourchot and a staff of four collected 115 written comments and hours of public testimony in a whirlwind trip around the state.

The staff is working on draft recommendations for Salazar's review, and Pourchot said he could get a briefing in the next few weeks.

The federal government manages subsistence uses on more than 60 percent of land within the state.

"I think we found there was some significant, meaningful changes that could be made to improve the federal program," Pourchot said.

The recommendations had been expected early this year but took a few months longer than planned.

Salazar also announced that a new head of the Federal Subsistence Board would be appointed. That process also is still underway.

Issues raised during the review were published into categories on the federal Web site. The department does not plan to make the comments public.

- Contact reporter Kim Marquis at 523-2279 or kim.marquis@juneauempire.com.

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- Contact reporter Kim Marquis at 523-2279 or kim.marquis@juneauempire.com.

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“The protection of subsistence rights and practices is something sacred to all Alaska Natives and their descendents. It requires vigilance and the commitment of multiple generations.”

– *Robert L. Brean, Board Chair
Doyon, Limited*



“Subsistence is not just a way of life, it is life itself.”

– *Tim Towarak, President
Bering Straits Native Corporation &
Co-Chair, Alaska Federation of Natives*



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