

Southeast Alaska Subsistence Regional Advisory Council

January 22, 2013

Customary and Traditional Use Determination Recommendation Briefing

Issue:

The Southeast Alaska Subsistence Regional Advisory Council (SESRAC) does not agree that the current process of restricting access to fish and wildlife resources through a customary and traditional use (C&T) determination process was intended in ANILCA.

Although SESRAC recognizes that there are a number of possible solutions, its preferred solution is to eliminate the C&T determination regulations (36 CFR 242.16 and 50 CFR 100.16) and allocate resources as directed in section 804 of ANILCA.

Background:

The current Federal C&T determination regulations, including the eight factors, were adopted from pre-existing State regulations. The Federal program adopted this framework, with some differences, when it was thought that Federal subsistence management would be temporary.

The primary purpose of C&T determinations by the State is to limit the subsistence priority by adopting "negative" determinations for specific fish and wildlife species in specific areas. The C&T determination process is also used to establish non-subsistence use areas where NO species are eligible for subsistence use.

A "positive" C&T determination in State rules recognizes subsistence use and provides residents with a legal protection to engage in priority subsistence activities.

Unlike the State process, in which some lands are excluded from subsistence use (non-subsistence use areas); all Federal lands are available for subsistence use by rural residents.

The Federal program uses the C&T determination process to restrict which rural residents can participate in subsistence. The abundance of fish or wildlife is not the primary factor in deciding which rural residents can participate in subsistence and some residents may be restricted in times of abundance.

The Federal C&T determination process is actually a means of closing an area to some rural residents but there are no provisions for periodic review of this action similar to the review policy on other closures.

A draft policy on C&T determinations was subject to public comment during the fall 2007 Regional Advisory Council meeting window. The Federal Subsistence Board deferred finalization on the policy in March of 2008.

In October of 2009, Secretary of the Interior Ken Salazar announced that there would be “a review of the Federal subsistence program to ensure that the program is best serving rural Alaskans and that the letter and spirit of Title VIII are being met”.

In a detailed report from the U.S. Department of the Interior in September 2010, the Secretary of the Interior with concurrence of the Secretary of Agriculture, directed the subsistence Board to do several tasks.

The first relevant task was to “review, with RAC input, federal subsistence procedural and structural regulations adopted from the state in order to ensure federal authorities are fully reflected and comply with Title VIII (changes would require new regulations)”.

The second relevant task was to “review customary and traditional determination process to provide clear, fair, and effective determinations in accord with Title VIII goals and provisions (changes would require new regulations)”.

In a letter to Mr. Tim Towarak in December 2010, Secretary of the Interior Ken Salazar requested that the FSB; “review, with RAC input, the customary and traditional use determination process and present recommendations for regulatory changes”.

In their 2011 Annual Report, the SESRAC suggested that the Board consider modifying current regulations to be more representative of the way people use subsistence resources. The SESRAC suggested the following specific regulatory change:

*Modify 50 CFR 100.16 (a). The regulation should read: “The Board shall determine which fish and wildlife have been customarily and traditionally used for subsistence. These determinations shall identify the specific community’s or area’s use of ~~{specific fish stocks and wildlife populations}~~ **all species of fish and wildlife that have been traditionally used, in their (past and present) geographic areas.**”*

In the Annual Report reply, the Board encouraged the SESRAC to develop recommendations in a proposal format for additional review. The Office of Subsistence Management pledged staff assistance if the Council wished to pursue the matter further.

During the March 2012 meeting in Juneau, an update on the Secretarial Review stated that 9 Councils felt the C&T determination process was adequate and only the SESRAC had comments for changes to the process.

The SESRAC formed a workgroup to review materials and provide a report on the issue during the March 2012 SESRAC meeting and develop a recommendation for consideration by the SESRAC at the September 2012 meeting.

Southeast Council Findings:

An eight factor framework for Federal C&T determination analysis was first adopted by the Alaska Board of Fisheries and is not found in ANILCA.

Although there are clearly some instances where it is appropriate to provide a preference to local residents (for instance, an early start to the moose season in Yakutat), the SESRAC has a history of recommending C&T determinations for a large geographic area.

When necessary, the Federal Subsistence Board can restrict who can harvest a resource by applying ANILCA Section 804 criteria:

- Customary and direct dependence upon the populations as the mainstay of livelihood;
- Local residency; and
- The availability of alternative resources.

The ANILCA Section 804 process is a management tool that allows seasons on Federal public lands and waters to remain open to all rural residents until there is a need to reduce the pool of eligible harvesters.

Replacing the Federal C&T determination eight factors with ANILCA Section 804 three criteria may be a preferred method of restricting who can harvest a resource.

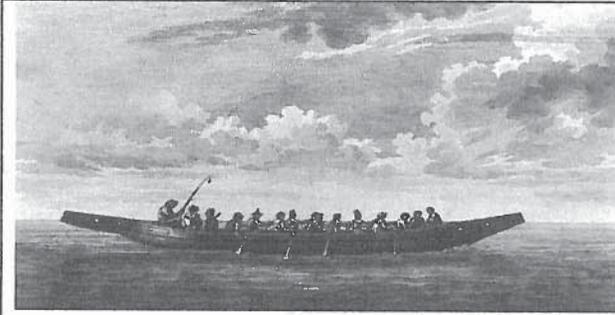
Action:

In January 2013, the SESRAC sent a letter to the other Federal regional advisory councils regarding the deficiencies in the current C&T determination process. This letter asks the other councils to review, during their fall 2013 meetings, whether the process is serving the needs of the residents of their region and report their findings to the SESRAC. If it is the desire of the other councils, a proposal for amending or eliminating current regulations could be developed for consideration by all the councils.

Key Contacts:

Bert Adams, Chair SESRAC – 907-784-3357

Robert Larson – SESRAC Coordinator – 907-772-5930



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**Mr. Harry K. Brower, Jr., Chair
North Slope Alaska Subsistence
Regional Advisory Council
P.O. Box 712
Barrow, Alaska 99723**

Dear Mr. Brower:

During the spring of 2011, pursuant to the Secretarial Review of the Federal Subsistence Program, the Federal Subsistence Board (Board) sought input from the Federal Subsistence Regional Advisory Councils (Councils) on the current customary and traditional use determination process. The Board subsequently reported to the Secretaries that 9 of the 10 Councils thought the process was working. The Southeast Alaska Subsistence Regional Advisory Council (SE Council) does not agree that the process is being implemented as intended in the Alaska National Interest Lands Conservation Act (ANILCA). We are asking your Council to review your evaluation of the current customary and traditional use determination process (36 CFR 242.16 and 50 CFR 100.16) and join with us in crafting a petition to the Secretaries to address deficiencies in the current regulations. The SE Council's preferred solution is to eliminate the customary and traditional use determination regulations and allocate resources as directed in Section 804 of ANILCA.

The SE Council has formed a workgroup to assist us in evaluating the current customary and traditional use determination process. The workgroup reviewed the 2007 draft Customary and Traditional Use Determination Policy, the public comments to this policy, the 2011 transcripts from all 10 Council meetings, and the 2012 Board transcripts where each of the Councils' input was summarized. The 2007 draft Customary and Traditional Use Determination Policy and the public comments to this policy are enclosed with this letter.

The SE Council workgroup noted that there were inconsistent briefings in 2011 regarding the input sought from the Councils. Different staff presented different levels of information, and in some instances Councils were led to believe other Councils thought the process was working.

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In addition, there was a lack of direction or background information provided to the Councils that would be necessary to formulate an informed opinion. There was no mention or discussions of the strengths and deficiencies of the current customary and traditional use determination process as detailed in the review of the 2007 draft Customary and Traditional Use Determination Policy.

During its March 2011 meeting, the SE Council included the topic in its 2011 Annual Report. The SE Council made the following recommendation to the Board:

Given that ANILCA does not require the Board make customary and traditional use determinations, the Council recommends the Federal Subsistence Board eliminate the current regulations for customary and traditional use determinations, and task the Office of Subsistence Management (OSM) with drafting regulations which adhere to provisions contained within Section 804 of ANILCA.

The current Federal customary and traditional use determination regulations (and the eight factors) were based on pre-existing State regulations. Customary and traditional use determinations are a necessary step in State of Alaska management because only fish and wildlife with a “positive” determination are managed for the subsistence preference and those with a “negative” determination do not have the preference. The decision whether there is or is not a subsistence priority is not necessary under Federal rules because ANILCA already provides rural residents a preference for subsistence uses on Federal public land. The current customary and traditional use determination process is being used to allocate resources between rural residents, often in times of abundance. This is an inappropriate method of deciding which residents can harvest fish or wildlife in an area and may result in unnecessarily restricting subsistence users. The SE Council has a history of generally recommending a broad geographic scale when reviewing proposals for customary and traditional use determinations. Subsistence users primarily harvest resources near their community of residence and there is normally no management reason to restrict use by rural residents from distant communities. If there is a shortage of resources, Section 804 of ANILCA provides direction in the correct method of allocating resources.

The SE Council has determined that the Office of Subsistence Management did not give the directive from the Secretaries the due diligence it deserves and the program would benefit from additional evaluation and dialog. We request your Council reconsider its recommendation to the Board on how well the current customary and traditional use process is serving the needs of the residents in your region. The SE Council is interested in either eliminating or improving the process but, since this is a statewide issue, we do not want to propose a solution that is not supported by the other Councils. We encourage your Council to read the briefing paper provided to you by the SE Council at i winter 2013 Council meeting and review the enclosed background information. We would like your Council to consider what would be most beneficial to your region: eliminate customary and traditional use determinations, change the way customary and traditional use determinations are made, or make no change. After reviewing these materials, we

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encourage your Council to include this subject as an agenda action item at its fall 2013 meeting. The Office of Subsistence Management has committed personnel to help in your further consideration of the customary and traditional use process at your fall 2013 meeting.

Please address any questions and report any actions taken regarding this request either directly to me or through Mr. Robert Larson, Council Coordinator, U. S. Forest Service, Box 1328, Petersburg, Alaska 99833, 1-907-772-5930, robertlarson@fs.fed.us.

Gunalchéesh (thank you).

Sincerely,
/S/

Bertrand Adams Sr., Chair

Enclosures

**cc: Peter J. Probasco, Assistant Director, OSM
Kathy O'Reilly-Doyle, Deputy Assistant Director, OSM
Federal Subsistence Board
Interagency Staff Committee
Administrative Record**