

**Final Rule and  
Requests for Reconsideration of**

***Decennial Review of  
Rural/Nonrural Determinations  
by the  
Federal Subsistence Board***

**Fall 2007**



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## Preface

The Final Rule and six requests for reconsideration (RFRs) regarding the decennial review of rural/nonrural determinations in Alaska by the Federal Subsistence Board are provided herein for the information of the Subsistence Regional Advisory Councils. Councils may wish to discuss these RFRs at their fall 2007 meetings.

Subsistence management regulations at 36 CFR Part 242 and 50 CFR Part 100 state the following regarding requests for reconsideration at § \_\_\_\_\_.20(d):

*It is your responsibility to provide the Board with sufficient narrative evidence and argument to show why the action by the Board should be reconsidered. The Board will accept a request for reconsideration only if it is based upon information not previously considered by the Board, demonstrates that the existing information used by the Board is incorrect, or demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law.*

The first step in the review of an RFR is for a staff threshold analysis to be considered by the Board. This is an administrative and legal step to evaluate whether any of the claims in the request meet the criteria for acceptance as noted in the above-referenced regulation. If any claims are accepted by the Board through the threshold consideration process, the relevant Councils will again be notified, and may wish to make recommendations on the accepted claims.



# **Final Rule**



**DEPARTMENT OF AGRICULTURE****Forest Service****36 CFR Part 242****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 100****RIN 1018-AT99****Subsistence Management Regulations for Public Lands in Alaska, Subpart C; Nonrural Determinations**

**AGENCIES:** Forest Service, Agriculture; Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the list of nonrural areas identified by the Federal Subsistence Board (Board, we, us). Only residents of areas identified as rural are eligible to participate in the Federal Subsistence Management Program on Federal public lands in Alaska. We are changing Adak's status to rural. We also are adding Prudhoe Bay to the list of nonrural areas. The following areas continue to be nonrural, but we are changing their boundaries: the Kenai Area; the Wasilla/Palmer Area, including Point McKenzie; the Homer Area, including Fritz Creek East (except Voznesenka) and the North Fork Road area; and the Ketchikan Area. We have also added Saxman to the Ketchikan nonrural area. We are making no other changes in status. This final rule differs from the proposed rule relative to the Kodiak area and Saxman: For reasons set forth below, we did not change the status of the Kodiak area from rural to nonrural, as we had proposed, and we included Saxman in the nonrural Ketchikan area, which we had not proposed. Residents of those areas changing from rural to nonrural have 5 years to come into compliance with this rule.

**DATES:** *Effective Date:* This rule is effective June 6, 2007. *Compliance Date:* Compliance with the nonrural determinations for Prudhoe Bay, Point MacKenzie, the expanded portion of Sterling, Fritz Creek East, North Fork Road area, Saxman, and the additions to the Ketchikan nonrural area is required by May 7, 2012.

**FOR FURTHER INFORMATION CONTACT:** Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Peter J. Probasco, Office of Subsistence Management; 3601 C Street, Suite 1030, Anchorage, AK 99503, telephone (907) 786-3888. For questions

specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region, (907) 786-3888.

**SUPPLEMENTARY INFORMATION:****Background**

In Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111-3126), Congress found that "the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses \* \* \*" and that "continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened. \* \* \*" As a result, Title VIII requires, among other things, that the Secretary of the Interior and the Secretary of Agriculture (Secretaries) implement a program to provide rural Alaska residents a priority for the taking of fish and wildlife on public lands in Alaska for subsistence uses, unless the State of Alaska enacts and implements laws of general applicability that are consistent with ANILCA and that provide for the subsistence definition, priority, and participation specified in Sections 803, 804, and 805 of ANILCA.

The State implemented a program that the Department of the Interior previously found to be consistent with ANILCA. However, in December 1989, the Alaska Supreme Court ruled in *McDowell v. State of Alaska* that the rural priority in the State subsistence statute violated the Alaska Constitution. The Court's ruling in *McDowell* caused the State to delete the rural priority from the subsistence statute, which therefore negated State compliance with ANILCA. The Court stayed the effect of the decision until July 1, 1990. As a result of the *McDowell* decision, the Department of the Interior and the Department of Agriculture (Departments) assumed, on July 1, 1990, responsibility for implementation of Title VIII of ANILCA on public lands. On June 29, 1990, the Departments published the Temporary Subsistence Management Regulations for Public Lands in Alaska in the **Federal Register** (55 FR 27114). Permanent regulations were jointly published on May 29, 1992 (57 FR 22940), and have been amended since then.

As a result of this joint process between Interior and Agriculture, these regulations can be found in the titles for Agriculture and Interior in the Code of Federal Regulations (CFR) both in title 36, "Parks, Forests, and Public

Property,” and title 50, “Wildlife and Fisheries,” at 36 CFR 242.1–28 and 50 CFR 100.1–28, respectively. The regulations contain the following subparts: Subpart A, General Provisions; Subpart B, Program Structure; Subpart C, Board Determinations; and Subpart D, Subsistence Taking of Fish and Wildlife.

Consistent with Subparts A, B, and C of these regulations, as revised May 7, 2002 (67 FR 30559), and December 27, 2005 (70 FR 76400), the Departments established a Federal Subsistence Board (Board) to administer the Federal Subsistence Management Program, as established by the Secretaries. The Board’s composition includes a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, U.S. National Park Service; the Alaska State Director, U.S. Bureau of Land Management (BLM); the Alaska Regional Director, U.S. Bureau of Indian Affairs; and the Alaska Regional Forester, USDA Forest Service. Through the Board, these agencies participate in the development of regulations for Subparts A, B, and C, and the annual Subpart D regulations.

#### Rural Determination Process

With a **Federal Register** notice on October 5, 1990 (55 FR 40897), the newly established Federal Subsistence Board initiated the preparation of an Environmental Impact Statement as a vehicle for widespread public review and participation in the development of the final temporary regulations. The rural determination process was included, and subsequently on November 23, 1990 (55 FR 48877), the Board published another notice in the **Federal Register** explaining the proposed Federal process for making rural determinations, the criteria to be used, and the application of those criteria in preliminary determinations. Public meetings were held in approximately 56 Alaskan communities, specifically to solicit comments on the proposed Federal Subsistence Management Program. On December 17, 1990, the Board adopted final rural and nonrural determinations, which were published on January 3, 1991 (56 FR 236). Final programmatic regulations were published on May 29, 1992, with only slight variations in the rural determination process (57 FR 22940).

Federal subsistence regulations require that the rural/nonrural status of communities or areas be reviewed every 10 years, beginning with the availability of the 2000 census data. The Board

evaluated several options for conducting the review and decided to adopt an approach similar to that taken in 1990, which used criteria established in Federal subsistence regulations.

Although the process uses data from the 2000 census for its review, some data were not compiled and available until 2005. Data from the Alaska Department of Labor were used to supplement the census data.

During February–July 2005, the staff of the Federal Subsistence Management Program conducted an initial review of the rural status of Alaska communities, looking at the 2000 census data for each community or area with an emphasis on what had changed since 1990. From this initial review, staff compiled a report that included a proposed list of communities and areas for which further analysis appeared warranted. In addition, the report described the method used to develop this list. In August–October 2005, the public and Federal Subsistence Regional Advisory Councils were invited to comment on the results of this initial review.

At a meeting in Anchorage on December 6–7, 2005, the Board took public testimony and determined that additional information was needed on 10 communities and areas before it decided upon any potential changes.

- For three communities, the further analysis that followed was focused on evaluation of rural/nonrural status, as follows:

*Kodiak, Adak, and Prudhoe Bay:* At that time, Kodiak and Prudhoe Bay were considered rural, and Adak was considered nonrural. These three communities were further analyzed as to their rural/nonrural status.

- For five nonrural groupings of communities and areas, further analysis evaluated the possibility of excluding or including boundary areas, as follows:

*Fairbanks North Star Borough:* Evaluated whether to continue using the entire borough as the nonrural area, or whether to separate some outlying areas and evaluated their rural/nonrural status independently.

*Seward Area:* Evaluated whether to exclude Moose Pass and similarly situated places from this nonrural grouping and evaluate their rural/nonrural status independently.

*Wasilla/Palmer Area:* Evaluated whether to include Willow, Point MacKenzie, and similarly situated places in this nonrural grouping.

*Homer Area:* Evaluated whether to include Fox River, Happy Valley, and similarly situated places in this nonrural grouping.

*Kenai Area:* Evaluated whether to exclude Clam Gulch and similarly

situated places from this nonrural grouping and evaluated their rural/nonrural status independently, and evaluated whether to include an additional portion of the Sterling census designated place in the nonrural Kenai area.

- In addition, two areas were further analyzed as follows:

*Ketchikan Area:* Evaluated whether to include Saxman, and other areas outside the current nonrural boundary, and evaluated the rural/nonrural status of the whole area.

*Delta Junction, Big Delta, Deltana and Fort Greely:* Evaluated whether some or all of these communities should be grouped, and if so, their rural/nonrural status evaluated collectively.

This assignment for additional analysis differed from the proposed list released for public comment in July 2005, in that: (1) The scope of the review was broadened for the Ketchikan area, considered nonrural, to include an analysis of rural/nonrural characteristics of the entire area; (2) the rural/nonrural status of Prudhoe Bay was added; and (3) additional analysis of Sitka was not believed to be necessary.

Sitka, whose population had increased from 8,588 people in 1990 to 8,835 in 2000, had been initially identified as an area possibly warranting further analysis. However, during its December 6–7, 2005, meeting, the Board heard substantial public testimony regarding the rural characteristics of Sitka and determined that no additional analysis was necessary, leaving Sitka’s rural status unchanged.

During January–May 2006, Federal subsistence staff conducted in-depth analyses of each community or area on the Board-approved list of communities and areas identified for further analysis.

On June 22, 2006, the Board met in executive session to develop the list of communities and areas they proposed to be nonrural. Those communities and areas were identified in a proposed rule published in the **Federal Register** on August 14, 2006 (71 FR 46416).

Population size is a fundamental distinguishing characteristic between rural and nonrural communities. Under the current programmatic guidance in Federal subsistence regulations:

- A community with a population of 2,500 or less is deemed rural, unless it possesses significant characteristics of a nonrural nature, or is considered to be socially, economically, and communally part of a nonrural area.

- A community with a population of more than 7,000 is presumed nonrural, unless it possesses significant characteristics of a rural nature.

• A community with a population above 2,500 but not more than 7,000 is evaluated to determine its rural/nonrural status. The community characteristics considered in this evaluation may include, but are not limited to, diversity and development of the local economy, use of fish and wildlife, community infrastructure, transportation, and educational institutions.

Communities that are economically, socially, and communally integrated are combined for evaluation purposes. The Board identified three guidelines or criteria for analysis to assist in its determination of whether or not to group communities in its review of rural determinations. The criteria that were used include: (1) Are the communities in proximity and road-accessible to one another? The first criterion, proximity and road accessibility, is considered a logical first step in evaluating the relationship between communities, and, applied in relation to the other two criteria, is considered a reasonable indicator of economic, social, and communal integration. (2) Do they share a common high school attendance area? The second criterion, regarding sharing a common high school attendance area, is taken to be an indicator of the social integration of communities. This is an improvement by way of modification from the former criterion of a shared school district. The public pointed out in past testimony that attendance in a common school district often reflects political or administrative boundaries rather than social integration. A shared social experience is better captured by the shared high school criterion. (3) Do 30 percent or more of the working people commute from one community to another? This criterion, regarding whether working people commute from one community to another, was identified as providing meaningful information relating to the grouping of communities. Also, the U.S. Census uses this criterion because commuting to work is an easily understood measure that reflects social and economic integration. These criteria were not considered separately, but assessed collectively, with the recommendation to group communities being dependent upon the collective assessment.

Community characteristics and specific indicators that the Board used to evaluate rural/nonrural status included: (1) Economy—wage employment, percent unemployment, per capita income, diversity of services, cost-of-food index, and number of stores of defined large national retailers; (2) Community infrastructure—including the cost of electricity; (3) Fish and

wildlife use—variety of species used per household, percentage of households participating, level of average harvest per capita for all subsistence resources combined, and level of average harvest per capita for salmon and large land mammals only; (4) Transportation—variety of means, predominant means, and length of road system; and (5) Educational institutions present in the community.

The Board's analysis and preliminary efforts to distinguish between rural places and nonrural places were heavily reliant on population size, but when the Board used other characteristics, its approach was based on a totality of the circumstances. Unemployment is generally higher and per capita income is generally lower in rural places than in nonrural places. Cost of food and cost of electricity were generally higher in the rural communities than in the nonrural. Subsistence per capita harvest of all resources shows a pattern of increasing amount with decreasing population size among nonrural areas, and typically higher levels in rural communities. The per capita harvest of salmon and large land mammals also shows a general pattern of increasing amount with decreasing population size among nonrural areas, and typically higher levels in rural communities. The defined large national retailers were concentrated in the nonrural communities.

#### Public Review and Comment

The Board published a proposed rule (71 FR 46416) on August 14, 2006, soliciting comments through October 27, 2006, on the proposed revision to the list of areas designated as nonrural. The Board then held public hearings in Kodiak on September 20–21, 2006, in Saxman on September 25, 2006, in Ketchikan on September 26, 2006, and in Sitka on October 10, 2006. Approximately 230 individuals testified at those hearings. During the public comment period, we received an additional 300 comments from individuals and 31 comments from organizations, agencies and government representatives, as well as 11 resolutions from city, borough, and tribal governments and organizations. Virtually all of the written comments from individuals came from Sitka, Kodiak, Ketchikan, and Saxman. Most expressed a desire for their communities to have a rural designation.

Five of the 10 Regional Councils had comments and recommendations to the Board on the proposed rule on the decennial review of rural/nonrural determinations.

*Southeastern Alaska Federal Subsistence Regional Advisory Council*—The Council concurred with the Board's proposed rule to maintain the rural status of Sitka and Saxman. The Council did not agree with the Board's proposed rule for Ketchikan. The Council was also concerned that the presumptive nonrural population threshold of 7,000 is in error, and recommended a change, if a threshold must be used, to 11,316.

*Southcentral Alaska Federal Subsistence Regional Advisory Council*—The Council supported the proposed rule for all changes in the Southcentral region. The Council also commented that guidelines and criterion need to be reviewed further to clearly address communities surrounding military bases and hub communities on the road system.

*Kodiak/Aleutians Federal Subsistence Regional Advisory Council*—The Council recommended that Kodiak and its road system should remain classified as rural, and that classification of Adak should be changed from nonrural to rural.

*Eastern Interior Alaska Federal Subsistence Regional Advisory Council*—The Council recommended the removal of Fort Greely from the Board's grouping of the four census designated places of Delta Junction, Big Delta, Deltana, and Fort Greely with the intent that the communities retain their rural status.

*North Slope Federal Subsistence Regional Advisory Council*—The Council recommended changing the designation of Prudhoe Bay from rural to nonrural.

We will address the major comments from all sources below:

*Comment:* The Board has failed to provide sufficient information and assurances of consistency regarding the basis for the Board's evaluations of rural status or of the effects of a Board determination. This lack of information has caused unnecessary fear and confusion among Alaskans.

*Response:* The Board has conducted this review of rural/nonrural determinations with substantial opportunities for public involvement, and with substantial informational outreach. The generalized timeline for the process has been previously noted. In the course of this process, there have been public news releases, a question and answer sheet, fact sheet, briefings to Regional Advisory Councils, staff reports, a proposed rule, Board public meetings, and Board public hearings in four communities.

*Comment:* At a minimum, the Federal Subsistence Board is obligated to

construe Title VIII and the regulations implementing it broadly in favor of Alaska Natives.

*Response:* Title VIII and the Federal subsistence management system established to implement it are racially neutral. The Ninth Circuit Court in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228 (9th Cir. 1999) has concluded that Title VIII is not Indian legislation for the purpose of statutory construction.

*Comment:* Communities should not be grouped or are being improperly grouped. The Coast Guard base in Kodiak should not be grouped in the Kodiak area; the Coast Guard base in Sitka should not be grouped in the Sitka area; the Community of Saxman should not be grouped in the Ketchikan area.

*Response:* Section \_\_\_\_ .15(a)(6) requires that communities that are economically, socially, and communally integrated be considered in the aggregate. That means they must be grouped for consideration. It should be noted that places in a grouping need not be economically, socially, or communally homogenous in order to be included. Portions of a nonrural grouping may appear more rural than other portions of the grouping and may have their own community governments and services, but may still be combined or joined in one area.

*Comment:* Many people objected to the use of aggregating communities or to the use of population in making presumptive determinations.

*Response:* The procedure of considering aggregated areas has been in place in Federal Subsistence Management regulations (50 CFR 100.15(a)(6) and 36 CFR 242.15(a)(6)) since 1992 and recognizes the fact that some areas and/or communities are interrelated and should be considered as a whole. The use of population to set presumptive thresholds has also been in regulation (\_\_\_\_.15(a)(1-3)) since 1992 and recognizes the intent of Congress and the Courts in using population as an initial determinant of the rural or nonrural nature of a community or area. The plain meaning of the term "rural" involves population. Since larger population size may be seen as an impediment to maintaining or acquiring rural status for a community or area, there is an incentive to minimize the importance of population size as a factor or to exclude portions of the total population in the assessment of a community's size. The use of a population threshold recognizes that population alone is not the sole indicator of a rural or nonrural community. This flexibility is consistent with approaches other Federal agencies

have used to determine if communities are rural.

*Comment:* The Federal staff analysis ignores the historical context for aggregation. The Board's decision making process should include an evaluation regarding small communities along road systems and their links to larger population centers with services that residents of these small communities regularly use. The 2006 Federal staff analysis should have evaluated the changes throughout the Kenai Peninsula and should provide sufficient analysis to allow the Board to consider reinstating an aggregation of communities on the road-connected Kenai Peninsula.

*Response:* The Board considered grouping issues for some areas, as assigned for further staff analysis in December 2005. The method to be used for the assigned staff analyses was described and subjected to public comment earlier in 2005. An analysis that would evaluate aggregation of the entire road-connected Kenai Peninsula was not proposed by the Board for assignment in July 2005, was not requested by ADF&G at the December 2005 Board public meeting at which the assignments were made, was not requested by the public, and was not assigned by the Board. The staff analysis is consistent with the assignment made by the Board in public session. Further, there was no reason to address the issue further during the December 2006 public meeting.

*Comment:* Testimony and public comments have challenged the appropriateness of the derivation of the 7,000 threshold from the Ketchikan population level. The point made is that the 7,000 level was the approximate size of Ketchikan City at the time of ANILCA passage, but that the greater Ketchikan area had a population of about 11,000 at that time. The concern is that the area population of 11,000 should have been taken to represent Congressional intent, since the approach as implemented requires grouping of economically, socially, and communally integrated places.

*Response:* Whether the regulations should describe a threshold of 11,000 derived from the Ketchikan Area as a whole, or 7,000 derived only from the City of Ketchikan, has no effect on the outcome of this decennial review. Existing population levels identified in regulation provide for a presumption unless a community or area exhibits characteristics contrary to the initial presumption. This provides the Board latitude to deviate from the presumption thresholds as warranted by additional

data. Communities and areas of all sizes were given adequate consideration, and multiple opportunities were provided for review and comment by Regional Advisory Councils, the State of Alaska, and the public. None of the communities or areas (as defined by grouping in the course of this review) that were proposed by the Board for change in status was in the population range of 7,000 to 11,000. For future clarification, the Board will interpret the 7,000 population figure as a figure to be used for an individual community and the 11,000 population figure as a figure to be used when considering aggregated areas.

*Comment:* The Board's decisions for proposing nonrural status for some communities and not others was made in executive session on June 22, 2006.

*Response:* The Board's decisions regarding communities and areas assigned for further analysis were made in a public meeting December 6-7, 2005. At the executive session on June 22, 2006, the Board developed the proposed rule, the release of which activated an extensive public comment period, including Board hearings in four communities.

*Comment:* The Board did not use a consistent process for each community in evaluating whether a community is rural or nonrural. This is most clearly demonstrated in the Board's decision to maintain Sitka's rural status without review or comparison to the standards.

*Response:* To address these concerns, we will need to recall the approach for the initial steps in the review process, which was presented to the Councils for their consideration during the February-March 2005 Council meeting window, coincident with a public comment period. There were 300 communities or areas (as grouped by the Federal Subsistence Management Program) in Alaska in 2000, using data from the 2000 U.S. Census. The initial review work by staff in support of the Board, conducted with an emphasis on what has changed since the initial determinations were made in 1990, was reported to the Board in July 2005. The Board then proposed a list of communities and areas for further analysis, which was subjected to public comment and Council review and recommendation during the September-October 2005 Council meeting window. Sitka was one of the places initially proposed by the Board as a candidate for further analysis because it is rural in status but grew further over the 7,000 threshold between 1990 and 2000, which was one of the triggers for consideration. That growth amounted to 247 people (or 3 percent), from 8,588 in

1990 to 8,835 in 2000 (using Sitka City and Borough as the area of interest). Notably, Sitka's population remains below the 11,000 figure discussed above for aggregated areas. The initial steps in the review process winnowed the number of communities and areas proposed for further analysis from the potential scope of 300 to 10. The public comment period in the fall of 2005, and the Board public meeting in December 2005, provided further information and feedback on the first phase of the review, with the Board seeking to learn more and being open to adding communities and areas to, or removing them from, the list for further analysis. Based on public comments and Regional Council recommendations, and testimony at the December 2005 Board public meeting, the Board added to, and removed from, the list proposed for further analysis in making its assignment to staff for further analysis. In the case of Sitka, the prevailing view of the Board was that sufficient information had been obtained to preclude the need for further staff analysis. The subsequent staff report to the Board on the assigned further analyses included historical and current information on population and community characteristics for Sitka along with other places from around the State, in carrying forward the range of coverage that had been provided in 1990.

*Comment:* The final analysis used by the Board is selective in its use of the regulatory criteria and does not address other communities whose status has significantly changed between the 1990 and 2000 census.

*Response:* The June 23, 2006, Office of Subsistence Management (OSM) report was not selective in its use of the criteria. Tabular appendix tables and in-text graphics presented historical and current population data and indicators for all five community characteristics identified in regulation. In addition, data was presented on population density, which is a characteristic not identified in regulation. Not all data types were available for all communities and areas, but relevant data were provided to the extent available. The June 23, 2006, OSM report was not intended to address all communities or areas within which changes may have occurred, but rather those for which additional staff analysis was assigned by the Board. The Federal review process, from the beginning, involved opportunities for Council, State, and public input. The Board review was intended to progressively winnow the scope of candidate communities for potential change in status, or grouping

and status, from the approximately 300 places in Alaska.

*Comment:* Federal regulations specify that the criteria "shall be considered in evaluating a community's rural or nonrural status." However, the analysis prepared by Federal staff and the Board's preliminary determinations reflected in the proposed rule make selective use of the criteria. Old Believer communities on the Kenai Peninsula and Delta Junction are two examples where consideration of the use of fish and wildlife resources, as well as other factors, are minimized or omitted.

*Response:* The regulatory phrase, quoted above, is taken out of context. The Federal regulations specify that "community or area characteristics shall be considered in evaluating a community's rural or nonrural status. The characteristics may include, but are not limited to: [a list of five characteristics follows]." This regulatory construction provides substantial latitude to the Board in the type of community characteristics used to evaluate rural or nonrural status. All five of the characteristics listed in regulation were addressed with data for one or more indicators in the historical (1990) and current (2006) tables presented in appendices to the June 23, 2006, OSM report to the Board, and selected indicators were also presented in graphs for ease of visual interpretation. Characteristics were evaluated for communities using the data as available. The issue raised regarding the Old Believer communities confuses the community characteristics used to address rural/nonrural status with the grouping of economically, socially, and communally integrated places, for which the Board identified three criteria as indicators. For Delta Junction, data on community characteristics were used to the extent available. Sufficient information on community use of fish and wildlife was not available in a way that would have been reliable for contributing to an assessment of rural/nonrural status.

*Comment:* The June 23, 2006, Federal staff analysis fails to incorporate results of previous statewide analyses. Available comparisons of patterns and their changes between 1990 and the 2000 census, as well as subsequent changes, are not presented consistently for all communities.

*Response:* The June 23, 2006, OSM report is not selective in its use of population data or community characteristics, and both historical and current data are presented. Tabular appendix tables and in-text graphics present historical and current population data and indicators for all

five community characteristics identified in regulation. In addition, data is presented on population density, which is a characteristic not identified in regulation. Not all data types were available for all communities and areas. Current data were presented in a standardized way for those data types for which it was available. Additionally, the analysis never intended to examine all communities statewide, nor the changes for all communities statewide.

*Comment:* There is no need for a nonrural designation because the resources are adequate to support all users.

*Response:* ANILCA requires the Federal Subsistence Board to distinguish between rural and nonrural areas. Availability of resources is not relevant to rural/nonrural determinations.

*Comment:* The analysis for Adak needs to be expanded to evaluate subsistence use of fish and wildlife by the current population, in light of the proposed designation of rural status, rather than just relying on population size, remote location, and salmon harvest data.

*Response:* Adak is a remote community in the Aleutian Islands which has undergone a substantial decrease in population (from more than 4,600 people in 1990 to less than 200 in 2005). The June 23, 2006, OSM report does not present per capita subsistence use information in the appendix database because such data are not available for Adak in a way that would be consistent with other places for which there are household survey data. The report section on Adak does provide some limited information on salmon harvests. However, the main point of relevance for Adak is in the category of population size.

*Comment:* The analysis does not address what, if any, impacts on fish and wildlife uses may result if the Board changes the rural/nonrural status of Prudhoe Bay. The analysis does not describe the result of a nonrural determination for any area that contains limited to no Federal lands. The analysis also does not consider the effects of the nonrural designation on other North Slope resident's customary and traditional uses of the Prudhoe Bay/Deadhorse area. One commentor also claims that it was inaccurate for the June 23, 2006, OSM report to state that "harvest of subsistence resources has never been reported by Prudhoe Bay residents," citing a 2001 ADF&G database.

*Response:* The analysis notes that the permanent population of Prudhoe Bay was 5 in 2000, 2 in 2005, and is now

reportedly 0. With virtually, or literally, no permanent population, there are no impacts to fish and wildlife uses operative with a change in status. A rural/nonrural determination is unrelated to whether Federal lands are present in the vicinity. Use of Federal public lands open to subsistence take by rural residents is not affected by designation of nonrural status for residents of parts of that geographic area. State database updates since 2001 may include harvest data for reported residents of Prudhoe Bay. Because of customary and traditional use determinations, the only large mammals that could have been taken under Federal subsistence regulations by persons claiming Prudhoe Bay residency were black bear, caribou, and sheep. However, given the de minimus residency in Prudhoe Bay, and the other characteristics and restrictions described, subsistence use of fish and wildlife is not a factor.

*Comment:* The analysis for Clam Gulch describes two options—neither of which includes any information on fish and wildlife harvest levels and harvest areas. For the Wasilla, Homer, and Delta Junction areas, fish and wildlife data are not discussed.

*Response:* The analyses for Clam Gulch in relation to the Kenai area and the analyses for the Wasilla and Homer areas were limited in scope to the question of whether they should be grouped with larger nonrural areas. Those analyses were done consistent with the guidelines identified by the Board for evaluating the grouping of communities and areas, the method for which was submitted to public comment in an earlier stage of the process. Adequate information on customary and traditional hunting fishing, and trapping practices for the Delta Junction area was not available to allow for evaluation consistent with other areas of the state for which the staff analysis provides data, nor is use of fish and wildlife resources one of the criteria used for grouping.

*Comment:* The OSM analysis of the Kodiak area does not make a convincing case to disaggregate any portion of the road system from the rest of the road-connected area. The analysis does not discuss Kodiak's role as a regional center and does not mention the ADF&G report on regional centers.

*Response:* The OSM staff analysis laid out options for including, or not including, Chiniak in the Kodiak Area grouping, and related considerations for the Pasagshak portion of the remainder area. The Board exercised its judgment in reviewing the grouping of the remainder area with the City of Kodiak,

and other identified places, including Chiniak and the more distant portions of the road-connected remainder area. The OSM staff analysis provided an historical background of Kodiak Island. The central role of Kodiak City to the region is noted, as is the relationship to outlying areas and the movement of people to, from, and through Kodiak City.

*Comment:* Kodiak has become more rural since 1990. Kodiak's dependence on fisheries is a rural characteristic. The local economic downturn has led to an increase in dependence on fish and wildlife harvest. The cost of living in Kodiak, particularly for food, housing, and electricity, is among the highest in the State. Kodiak is isolated; weather and distance make travel difficult and expensive. There is a high level of sharing.

*Response:* The Board did not make a determination to change Kodiak from a rural area. Further information on the Board's action is provided later in this Preamble.

*Comment:* Testimony and comment letters supported retaining Saxman, and the Waterfall subdivision north of Ketchikan, as rural areas. Saxman is an independent community with its own Tribal government, mayor, and fraternal organizations. Fish and wildlife usage is higher than in Ketchikan City. For Saxman, Tribal culture plays a large role in daily life. Saxman is not integrated with Ketchikan.

*Response:* The Board made a determination to group all of the road-connected areas, including Waterfall subdivision and Saxman, as well as Pennock Island and parts of Gravina Island, in the Ketchikan Area. Further information on the Board's action is provided later in this Preamble.

*Comment:* There was testimony that the entire Ketchikan area should be treated the same and that Ketchikan and Saxman and the outlying areas along the road system should all be rural. People stated that gathering subsistence foods is important not only for nutrition, but also to culture, which is passed on to young children and family members. The island community is very isolated, and the cost of living is high, making it difficult to survive without supplementing incomes with subsistence foods.

*Response:* The Board considered these points, but did not make a determination to change Ketchikan from a nonrural area. Further information on the Board's action is provided later in this Preamble.

*Comment:* If a community is designated nonrural, the residents will

not be able to harvest their traditional subsistence resources.

*Response:* For communities that change from rural to nonrural, the implementation will not occur until 5 years after this date. Additionally, residents of nonrural areas may harvest their traditional subsistence resources from Federal lands under existing State regulations. Many of the resources (e.g. seaweed, seals, migratory birds, cod, halibut, shrimp, crabs, and salmon taken in marine waters) that local people mentioned as being very important to them are currently being taken in areas of State jurisdiction or are not under the jurisdiction of the Federal Subsistence Management Program. Any changes in rural/nonrural determinations would have no impact on the harvesting of these resources.

Summarized below are the Board's final action for each area analyzed and the justification for that action. This final rule differs from the proposed rule relative to the Kodiak area and Saxman. The Board had proposed to add the Kodiak area to the list of nonrural areas but did not, for the reasons set forth below. The Board had also proposed that the nonrural Ketchikan area not include Saxman, but Saxman has been included, for the reasons set forth below.

*Adak:* Change Adak's status from nonrural to rural. Following the closure of the military base, the community of Adak decreased in population by 94 percent between the years 1990 and 2000. It currently has 167 residents (2005), which is well below the presumptive rural threshold of 2,500 persons. Adak is also extremely remote and is accessible only by boat or plane, with the nearest community (Atka) 169 miles away. With the changes that have occurred since the 1990s, Adak now has rural characteristics typical of a small isolated community.

*Prudhoe Bay (including Deadhorse):* Change Prudhoe Bay's status from rural to nonrural. In 2000 Prudhoe Bay had one permanent household comprised of five people. There were reportedly no permanent residents in February 2006. Prudhoe Bay has none of the characteristics typical of a rural community. Prudhoe Bay is an industrial area built for the sole purpose of extracting oil. The oil companies provide everything employees need: Lodging, food, health care, and recreation. The thousands of people in Prudhoe Bay do not live there permanently, but work multiweek-long shifts. They eat in cafeterias and live in group quarters. There are no schools, grocery stores, or churches. Subsistence is not a part of the way of life. Hunting

in the area and possession of firearms and ammunition are prohibited. Based on its industrial characteristics, Prudhoe Bay is now determined to be nonrural.

*Fairbanks North Star Borough:* No changes to this nonrural grouping are being made. In applying the grouping criteria as indicators of economic, social, and communal integration, the Board continues to define the current nonrural boundary of the Fairbanks Area as the boundary of the Fairbanks North Star Borough. No census designated places (CDPs) should be excluded from the nonrural grouping for the following reasons: (1) All CDPs are road accessible to one another. Although the Harding-Birch Lakes and Salcha areas are more sparsely populated than central areas of the borough, both communities include many occasional-use homes owned by Fairbanks residents. Further, both places are home to only a few year-round residents. (2) The majority of the Borough's high school students are bused to one of the schools located in Fairbanks, North Pole, or Eielson. (3) The Remainder area of the North Star Borough should be included in the grouping because the majority of the population is road connected and over half (57 percent) of the workers residing in this area commute to Fairbanks for employment. Additionally, 75 percent of the workers living in Harding-Birch Lakes drive to the City of Fairbanks to work, and 71 percent of the working population in Pleasant Valley commute to the City of Fairbanks.

*Delta Junction Vicinity:* No changes are being made to the rural status of Delta Junction, or the communities in the immediate vicinity. In applying the grouping criteria as indicators of economic, social, and communal integration, the four Delta Junction vicinity CDPs assigned for analysis (Delta Junction, Big Delta, Deltana, and Fort Greely) should be grouped as an area for purposes of rural/nonrural analysis because they fulfill the three guidelines for grouping: (1) All four CDPs are road connected and proximal; (2) the majority of the high school-aged students from Big Delta, Deltana, and Fort Greely attend high school in Delta Junction; and (3) in the two outlying CDPs, over 30 percent of the workers commute within the vicinity (41 percent of the workers living in Big Delta commute to either Delta Junction, Deltana, Fort Greely, or to a Remainder area within the Southeast Fairbanks Census Area, and 45 percent of the workers in Deltana commute to Delta Junction or Fort Greely).

The four places grouped into the Delta Junction Area will remain rural in

status. The population size of the grouping (3,921) places it in the nonpresumptive midrange, and information on the characteristics of the grouping, although somewhat limited, is indicative of a rural character. The recent economic upswing to the area due to construction of the Missile Defense system at Fort Greely and development of the Pogo Mine is thought to be temporary.

*Seward Area:* No changes to this nonrural grouping are being made. In applying the grouping criteria as indicators of economic, social, and communal integration, the Moose Pass, Crown Point, and Primrose CDPs should remain within the Seward Area grouping. Moose Pass, Crown Point, and Primrose CDPs meet all the criteria for grouping: proximity and road-accessibility to the Seward Area; their students attend the high school in Seward; and greater than 30 percent of workers commute to Seward for employment.

*Wasilla/Palmer Area:* Include the Point MacKenzie CDP in the nonrural Wasilla/Palmer Area grouping but do not include the Willow CDP. The Point MacKenzie CDP meets all the criteria for grouping with the Wasilla/Palmer Area. The Point MacKenzie CDP is in proximity to the Wasilla/Palmer Area and road-accessible; their students attend Wasilla High School; and 50 percent of workers commute to the Wasilla/Palmer Area for employment. This change makes Point McKenzie part of a nonrural area, a change from its current rural status. Willow CDP will not be included in the Wasilla/Palmer Area grouping. Students in the Willow CDP are located in two attendance areas for high schools, within and outside of the Wasilla/Palmer Area. The level of commuting for workers to the Wasilla/Palmer Area is at 23.9 percent, which is below the criteria identified for grouping.

*Kenai Area:* Change the boundaries of the nonrural Kenai Area to include all of the current Sterling CDP, and make no change to the current grouping and status of Clam Gulch CDP as part of the nonrural Kenai Area. Clam Gulch CDP will continue to be included in the Kenai Area grouping because, although students of Clam Gulch CDP attend high school outside of the Kenai Area, the commuting of workers to the Kenai Area is on the order of 30 percent, and Clam Gulch is connected by paved highway to the Kenai Area, with which it has been grouped since initial determinations were made in 1990. Cohoe CDP will remain within the Kenai Area grouping. Cohoe students attend a high school in the Kenai Area and the level of work

commuting, at 69.5 percent, is significantly above the minimum criteria for grouping. The Sterling CDP has been part of the nonrural Kenai Area since 1990. During the course of the analysis, it was noted that for the 2000 census, the Sterling CDP had expanded in size, such that a significant portion of the CDP extended beyond the boundary of the nonrural Kenai Area. The Board decided that the boundaries of the Kenai Area should be adjusted to include all of the current Sterling CDP. Students within the Sterling CDP go to high school within the Kenai Area and the level of commuting is at 61 percent of workers, well above the minimum criteria for grouping.

*Homer Area:* Change the boundaries of the nonrural Homer Area to include all of the Fritz Creek CDP (not including Voznesenka) and the North Fork Road portion of the Anchor Point CDP. This change makes Fritz Creek East, except for Voznesenka, and the North Fork Road portion of the Anchor Point CDP nonrural, a change from their current rural status. The Board concluded for Fritz Creek East that, except for Voznesenka, the residents are economically, socially, and communally integrated with the Homer Area. Fritz Creek East is in proximity and road-connected to the Homer Area. The Homer High School attendance area includes their students, and 44 percent of their workers commute to the Homer Area. Voznesenka will not be included in the Homer Area because, while it is in proximity and road-connected to the Homer Area, the number of jobs shown as being located within the Homer Area is only about 20 percent, and Voznesenka students attend high school in Voznesenka.

The Board found that residents of the North Fork Road area fully meet two of the three criteria, proximity and commuting of workers. For the third criteria, although students have the option of attendance in Nikolaevsk School or Ninilchik High School, the vast majority go to Homer High School. This is sufficient basis for considering the North Fork Road area of the Anchor Point CDP to be economically, socially, and communally integrated with the nonrural Homer Area.

The Board found that residents of the Happy Valley CDP fulfill only the proximity criterion for grouping with the Homer Area. Happy Valley students are within the Ninilchik High School attendance area, and less than 30 percent of Happy Valley workers commute to the Homer Area (14.4 percent). The residents of the Happy Valley CDP will not be included with the Homer Area.

Nikolaevsk CDP, north of the Anchor Point CDP and connected to the Homer Area by the North Fork Road, does not warrant inclusion in the Homer Area. There is a K-12 school in Nikolaevsk, and data show that only 22 percent of jobs held by Nikolaevsk residents were located in the Homer Area.

The residents of Fox River CDP, primarily in the communities of Razdolna and Kachemak Selo, do not meet any of the three criteria, which would indicate that Fox River residents are not economically, socially, or communally integrated with the Homer Area.

**Kodiak Area:** The Board defined the Kodiak Area consisting of the road system, the City of Kodiak, the Mill Bay area, Womens Bay, Bell's Flats, the Coast Guard Station, Chiniak, Pasagshak, and Anton Larsen and made no change to its rural status. Although the population of the Kodiak Area was estimated at approximately 12,000 in 2005, the area exhibits strong characteristics of a rural area. The population has increased only slightly since 1990. Kodiak's per capita income is less than many nonrural areas and also many rural areas. The unemployment rate has increased with the decline of the fishing industry. The community is very isolated with no road access. Inclement weather can strand residents for days. The per capita harvest of subsistence resources is higher in the Kodiak Area than in some other rural areas. Based on the marginal population growth since 1988 (1.3 percent), the high cost of food, remoteness, and the high use of subsistence resources, no change will be made to Kodiak's rural determination.

**Ketchikan Area:** The Board defined the Ketchikan Area to include Pennock Island, parts of Gravina Island, and the road system connected to the City of Ketchikan, including the community of Saxman. The Ketchikan Area, as defined, would retain its nonrural status. Saxman is directly adjacent to Ketchikan, connected by road, and surrounded by the outlying Ketchikan development. Visually, the only distinguishing feature to indicate the boundary between Ketchikan and Saxman is a sign on the South Tongass Highway. Saxman has clearly been overtaken and is surrounded by the geographic expansion of Ketchikan; Saxman students attend high school in Ketchikan; and 64 percent of the workers in Saxman commute to Ketchikan for their employment, with another 8 percent commuting to outlying parts of the area. Although a significant percentage of Saxman's population is Native, Ketchikan's Native

population is approximately 10 times the size of Saxman's Native population. Many of the people testifying at the hearing in Saxman live in Ketchikan, but reported having very close family and cultural ties to Saxman. Given comments about the need for consistency of application of the criteria for grouping of communities, and the information on Saxman relative to those criteria, the Board grouped Saxman with the nonrural Ketchikan area.

The Remainder area fulfills all three criteria for grouping with the Ketchikan Area: (1) The Remainder, other than nearby Gravina and Pennock Islands which are connected by a very short skiff ride, is road-connected to the City of Ketchikan; (2) Students in the Remainder attend high school in Ketchikan; and (3) Over 30 percent of the workers from the Remainder commute to work in the City of Ketchikan. Presently, most of the Remainder is included in the nonrural Ketchikan Area, established in 1990. The Board action adds additional areas where development has occurred that is connected to the road system and additional parts of Gravina Island that are being developed. The Board action also treats any future developed areas connected to the road system the same as the existing road system.

The population of the Ketchikan Area was estimated at 13,125 in 2005 (including Saxman), having decreased slightly from 1990. Ketchikan possesses many nonrural characteristics, including having a 2-year college, a large national retailer, car dealerships, fast food restaurants, and roads linking the outlying surrounding area to the city. Ferry service is more dependable with greater frequency of service than in most other locations in Alaska. Although the pulp mill closed, there is still diversity in the economy, with tourism, fishing, fish processing, timber, dry docking services, retail services, and government providing the majority of employment. There is a hospital and a high diversity of services offered. The Ketchikan Area had the sixth highest population in the state in 2005, considering community groupings as defined by the Board. All other areas with higher populations are currently considered nonrural in Federal subsistence regulations. Three areas with smaller populations are currently classified as nonrural and are not being changed in status: the Homer Area, Seward Area, and Valdez. Harvest of subsistence resources in the Ketchikan Area is lower than is characteristic of rural communities.

This Board action changes the status of portions of the road-connected area of

Ketchikan, including Saxman, and additional portions of Gravina Island from their current rural status to a nonrural status.

The revised list of nonrural communities and areas, including other nonrural communities or areas whose status would remain unchanged, is published herein as the final rule. All other communities and areas of Alaska not listed herein will retain their rural determination. We are amending § \_\_\_\_ .23, which identifies those communities and areas of Alaska that are determined to be rural and nonrural. We have made maps available for the nonrural areas. The purpose of these maps is to provide to the public a graphic representation of the extent of the nonrural areas. To view maps, go to the Office of Subsistence Management Web site at <http://alaska.fws.gov/asm/home.html>. If you do not have access to the internet, you may contact the Office of Subsistence Management at the address or phone number shown at **ADDRESSES** or **FOR FURTHER INFORMATION CONTACT**, respectively, and we will send the maps to you.

The effective date of any community or area changing from a rural to nonrural status is 5 years after the date of publication of this final rule in the **Federal Register**. For communities or areas that change from nonrural to rural, the effective date is 30 days after the date of publication of this final rule in the **Federal Register**.

Because the Federal Subsistence Management Program relates to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, we are incorporating identical text into 36 CFR part 242 and 50 CFR part 100.

#### **Conformance with Statutory and Regulatory Authorities**

##### *National Environmental Policy Act Compliance*

A Draft Environmental Impact Statement (DEIS) for developing a Federal Subsistence Management Program was distributed for public comment on October 7, 1991. That document described the major issues associated with Federal subsistence management as identified through public meetings, written comments, and staff analysis, and examined the environmental consequences of four alternatives. Proposed regulations (subparts A, B, and C) that would implement the preferred alternative were included in the DEIS as an appendix. The DEIS and the proposed administrative regulations presented a framework for an annual regulatory

cycle regarding subsistence hunting and fishing regulations (Subpart D). The Final Environmental Impact Statement (FEIS) was published on February 28, 1992.

Based on the public comments received, the analysis contained in the FEIS, and the recommendations of the Federal Subsistence Board and the Department of the Interior's Subsistence Policy Group, the Secretary of the Interior, with the concurrence of the

Secretary of Agriculture, through the U.S. Department of Agriculture—Forest Service, implemented Alternative IV as identified in the DEIS and FEIS (Record of Decision on Subsistence Management for Federal Public Lands in Alaska (ROD), signed April 6, 1992). The DEIS and the selected alternative in the FEIS defined the administrative framework of an annual regulatory cycle for subsistence hunting and fishing regulations. The final rule for

Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, published May 29, 1992, implemented the Federal Subsistence Management Program and included a framework for an annual cycle for subsistence hunting and fishing regulations. The following **Federal Register** documents pertain to this rulemaking:

FEDERAL REGISTER DOCUMENTS PERTAINING TO SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA, SUBPARTS A AND B

Federal Register citation	Date of publication	Category	Details
57 FR 22940 .....	May 29, 1992 .....	Final Rule .....	"Subsistence Management Regulations for Public Lands in Alaska; Final Rule" was published in the <b>Federal Register</b> establishing a Federal Subsistence Management Program.
64 FR 1276 .....	January 8, 1999 .....	Final Rule (amended).	Amended 57 FR 22940 to include subsistence activities occurring on inland navigable waters in which the United States has a reserved water right and to identify specific Federal land units where reserved water rights exist. Extended the Federal Subsistence Board's management to all Federal lands selected under the Alaska Native Claims Settlement Act and the Alaska Statehood Act and situated within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, or any new national forest or forest addition, until conveyed to the State of Alaska or an Alaska Native Corporation. Specified and clarified Secretaries' authority to determine when hunting, fishing, or trapping activities taking place in Alaska off the public lands interfere with the subsistence priority.
66 FR 31533 .....	June 12, 2001 .....	Interim Rule .....	Expanded the authority that the Board may delegate to agency field officials and clarified the procedures for enacting emergency or temporary restrictions, closures, or openings.
67 FR 30559 .....	May 7, 2002 .....	Final Rule .....	In response to comments on an interim rule, amended the operating regulations. Also corrected some inadvertent errors and oversights of previous rules.
68 FR 7703 .....	February 18, 2003	Direct Final Rule .....	Clarified how old a person must be to receive certain subsistence use permits and removed the requirement that Regional Councils must have an odd number of members.
68 FR 23035 .....	April 30, 2003 .....	Affirmation of Direct Final Rule.	Received no adverse comments on 68 FR 7703. Adopted direct final rule.
68 FR 60957 .....	October 14, 2004 ...	Final Rule .....	Established Regional Council membership goals.
70 FR 76400 .....	December 27, 2005	Final Rule .....	Revised jurisdiction in marine waters and clarified jurisdiction relative to military lands.
71 FR 49997 .....	August 24, 2006 ...	Final Rule .....	Revised jurisdiction in marine waters in the Makhnati Island area near Sitka.

An environmental assessment was prepared in 1997 on the expansion of Federal jurisdiction over fisheries and is available from the office listed under **FOR FURTHER INFORMATION CONTACT**. The Secretary of the Interior with the concurrence of the Secretary of Agriculture determined that the expansion of Federal jurisdiction did not constitute a major Federal action significantly affecting the human environment and therefore signed a Finding of No Significant Impact.

*Compliance with Section 810 of ANILCA*

The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other

purposes, unless restriction is necessary to conserve healthy fish and wildlife populations. A Section 810 analysis was completed as part of the FEIS process. The final Section 810 analysis determination appeared in the April 6, 1992, ROD, which concluded that the Federal Subsistence Management Program may have some local impacts on subsistence uses, but that the program is not likely to significantly restrict subsistence uses.

*Paperwork Reduction Act*

This rule contains no new information collection requirements subject to Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1995. The information collection requirements described in the CFR regulations were

approved by OMB under 44 U.S.C. 3501 and were assigned control number 1018-0075, which expires October 31, 2009. We may not conduct or sponsor and you are not required to respond to a collection of information request unless it displays a currently valid OMB control number.

*Other Requirements*

Regulatory Planning and Review (E.O. 12866). In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action. OMB makes the final determination of significance under Executive Order 12866.

a. Analysis indicates this rule will not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the

environment, or other units of government. A full cost-benefit and economic analysis is not required. This rule revises the list of nonrural areas identified by the Federal Subsistence Board. Only residents of areas identified as rural are eligible to participate in the Federal Subsistence Management Program on Federal public lands in Alaska.

b. This rule will not create serious inconsistencies or otherwise interfere with the actions of other agencies.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. This rule raises novel legal or policy issues. This rule raises a novel policy issue in that Federal subsistence regulations require that the rural/nonrural status of communities or areas be reviewed every 10 years, beginning with the availability of the 2000 census data, this thereby being the first such decennial review. Although the process uses data from the 2000 census for its review, some data was not compiled and available until 2005. Data from the Alaska Department of Labor were used to supplement the census data.

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation of regulatory flexibility analyses for rules that will have a significant economic effect on a substantial number of small entities, which include small businesses, organizations, or governmental jurisdictions. The Departments have determined that this rulemaking will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This rulemaking will impose no significant costs on small entities; the exact number of businesses and the amount of trade that will result from this Federal land-related activity is unknown. The aggregate effect is an insignificant positive economic effect on a number of small entities, such as tackle, boat, sporting goods dealers, and gasoline dealers. The number of small entities affected is unknown; however, the fact that the positive effects will be seasonal in nature and will, in most cases, merely continue preexisting uses of public lands indicates that the effects will not be significant.

Title VIII of ANILCA requires the Secretaries to administer a subsistence preference on public lands. The scope of this program is limited by definition to certain public lands. Likewise, these regulations have no potential takings of private property implications as defined by Executive Order 12630.

The Secretaries have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. The implementation of this rule is by Federal agencies, and no cost is involved to any State or local entities or Tribal governments.

The Secretaries have determined that these regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988 on Civil Justice Reform.

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Title VIII of ANILCA precludes the State from exercising subsistence management authority over fish and wildlife resources on Federal lands unless the State program is compliant with the requirements of that Title.

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), 512 DM 2, and E.O. 13175, we have evaluated possible effects on Federally-recognized Indian tribes and have determined that there are no substantial direct effects. The Bureau of Indian Affairs is a participating agency in this rulemaking.

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not a significant regulatory action under Executive Order 13211, affecting energy supply, distribution, or use, this action is not a significant action and no Statement of Energy Effects is required.

William Knauer drafted these regulations under the guidance of Peter J. Probasco of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Chuck Ardizzone, Alaska State Office, Bureau of Land Management; Greg Bos, Carl Jack, and Jerry Berg, Alaska Regional Office, U.S. Fish and Wildlife Service; Sandy Rabinowitch and Nancy Swanton, Alaska Regional Office, National Park Service; Dr. Warren Eastland, and Dr. Glenn Chen, Alaska Regional Office, Bureau of Indian Affairs; and Steve Kessler, Alaska Regional Office, USDA-Forest Service provided additional guidance.

## List of Subjects

### 36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

### 50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

■ For the reasons set out in the preamble, the Secretaries propose to amend title 36, part 242, and title 50, part 100, of the Code of Federal Regulations, as set forth below.

## PART —SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA

■ 1. The authority citation for both 36 CFR part 242 and 50 CFR part 100 continues to read as follows:

**Authority:** 16 U.S.C. 3, 472, 551, 668dd, 3101–3126; 18 U.S.C. 3551–3586; 43 U.S.C. 1733.

### Subpart C—Board Determinations

■ 2. In Subpart C of 36 CFR part 242 and 50 CFR part 100, revise § \_\_\_\_\_.23 to read as follows:

#### § \_\_\_\_\_.23 Rural determinations.

(a) The Board has determined all communities and areas to be rural in accordance with § \_\_\_\_\_.15, except those set forth in this paragraph. You may obtain maps delineating the boundaries of nonrural areas from the U.S. Fish and Wildlife Service, Office of Subsistence Management. The nonrural areas include:

- (1) Anchorage, Municipality of;
- (2) Fairbanks North Star Borough;
- (3) Homer area—including Homer, Anchor Point, North Fork Road area, Kachemak City, and the Fritz Creek East area (not including Voznesenka);
- (4) Juneau area—including Juneau, West Juneau, and Douglas;
- (5) Kenai area—including Kenai, Soldotna, Sterling, Nikiski, Salamatof, Kalifonsky, Kasilof, and Clam Gulch;
- (6) Ketchikan area—including all parts of the road system connected to the City of Ketchikan including Saxman, Pennock Island and parts of Gravina Island;
- (7) Prudhoe Bay;
- (8) Seward area—including Seward and Moose Pass;
- (9) Valdez; and
- (10) Wasilla/Palmer area—including Wasilla, Palmer, Sutton, Big Lake, Houston, Point MacKenzie, and Bodenbug Butte.

**25698** Federal Register / Vol. 72, No. 87 / Monday, May 7, 2007 / Rules and Regulations

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(b) [Reserved]

Dated: April 26, 2007.

**Peter J. Probasco,**

*Acting Chair, Federal Subsistence Board.*

Dated: April 26, 2007.

**Steve Kessler,**

*Subsistence Program Leader, USDA—Forest Service.*

[FR Doc. 07-2205 Filed 5-4-07; 8:45 am]

**BILLING CODE 3410-11-P; 4310-55-P**

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**RFR 07-01**



# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME OFFICE OF THE COMMISSIONER

SARAH PALIN, GOVERNOR

P.O. BOX 115526  
JUNEAU, AK 99811-5526  
PHONE: (907) 465-4100  
FAX: (907) 465-2332

July 6, 2007

Mr. Mike Fleagle, Chairman  
Federal Subsistence Board  
Office of Subsistence Management  
U.S. Department of the Interior  
3601 C Street, Suite 1030  
Anchorage, AK 99503

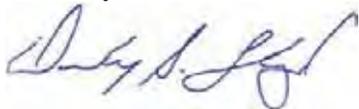
Dear Mr. Fleagle:

As provided in Subpart B, 36 CFR §242.20 and 50 CFR §100.20, of the Subsistence Management Regulations for Public Lands in Alaska, the Alaska Department of Fish and Game hereby requests the Federal Subsistence Board to reconsider its decision on April 26, 2007, first published as final regulations at 72 Federal Register 25688 on May 7, 2007. These final regulations make rural and non-rural determinations pursuant to 50 CFR §100.15 and 36 CFR 242.15 and modify regulations found at 50 CFR 100.23 and 36 CFR 242.23.

Reconsideration is requested because the Board did not review all available information and did not consistently apply regulatory standards in evaluating communities and aggregation of areas throughout the state. As illustrated by readily available information for Ninilchik and Happy Valley, procedural errors limited the communities and areas that were reviewed and the evidence considered in the reviews, resulting in failure to consider readily available information and substantive error in the Board's determinations which do not comply with the Board's regulatory standards.

The enclosed Request for Reconsideration details the reasons that the Federal Subsistence Board should grant our request to more thoroughly and consistently evaluate the treatment and aggregation of communities throughout the state, and in particular Kenai Peninsula road system communities.

Sincerely,



Denby S. Lloyd  
Commissioner

Enclosure



**REQUEST FOR RECONSIDERATION  
OF FEDERAL SUBSISTENCE BOARD RURAL AND NONRURAL  
DETERMINATIONS**

**State of Alaska  
July 6, 2007**

**Introduction**

The State of Alaska, through the Alaska Department of Fish and Game (Department), respectfully requests that the Federal Subsistence Board (Board) reconsider its decision of April 26, 2007, first published at 72 Fed. Reg. 25688 (May 7, 2007), which makes rural and nonrural determinations pursuant to 50 C.F.R. §100.15,<sup>1</sup> and modifies regulations found at 50 C.F.R. §100.23. Reconsideration is required in order for the Board to more thoroughly and consistently evaluate the treatment and aggregation of communities throughout the state and particularly to aggregate additional Kenai Peninsula road system communities.

The Board improperly limited the communities and areas subject to its rural/nonrural review and the scope of that review based on staff recommendations and public comment received prior to noticing of a proposed regulation. During the regulatory comment period, the Board then failed to expand the areas subject to review and the scope of its analysis to comply with its regulatory requirements despite receiving requests to do so and despite the fact that its regulatory notice was broad enough to allow such expansion. As a result of unreasonably limiting the communities and areas subject to analysis and scope of its review, the Board failed to consider important and readily available information indicating that additional communities, particularly communities on the Kenai Peninsula road system, should be aggregated and considered non-rural. The Board's decision was in error, based on incomplete and incorrect information, and was contrary to existing law.

**Record and Grounds for Reconsideration**

This Request for Reconsideration (RFR) is based on the entire public record developed by the Board and all written and oral comments provided to the Board as part of its Decennial Review of Rural Determinations, which culminated in the Board's decision of April 26, 2007, first published at 72 Fed. Reg. 25688 (May 7, 2007). Special emphasis is placed on the Board's proposed rule of August 14, 2006, and those portions of the record responding to the proposed rule. The Board is especially referred to Department written comments of October 26, 2006, (Attachment 1) and Department oral comments (Transcript pp. 132-135). Those entire grounds and comments are incorporated herein by reference and are supplemented by explanations below and by the Affidavit of Dr. James Fall (Attachment 2). The latter explanation and affidavit outline some of the additional information supporting further aggregation of Kenai Peninsula communities that would have been available for the Board had it properly chosen to expand the

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<sup>1</sup> Regulations are mirrored at 50 C.F.R. 100 and 36 C.F.R. 242; all citations herein will be to 50 C.F.R. Part 100 but will apply equally to the mirror regulation at 36 C.F.R. Part 242.

area and scope of its review as requested by public comments.

Without waiving any of the grounds incorporated by reference above, the primary issues requiring reconsideration are as follows:

### **Claim 1 – The Board Improperly Limited the Area of its Review**

Board regulations require periodic review of all rural determinations on a ten-year cycle. 50 C.F.R. §100.15(b). The Board, prior to commencement of the regulatory process, improperly met in executive session and limited the area of its review based on federal staff analysis and nonregulatory scoping,<sup>2</sup> without providing full public notice and comment through federal register publication. The Board then failed to respond reasonably to comments received during the official public notice period which requested evaluation of additional communities and areas.<sup>3</sup> Instead, the Board argued that such comments should have been raised prior to the regulatory notice.<sup>4</sup> The Board cannot reasonably reject comments made during an official regulatory public comment period merely because the comments were not submitted prior to the official public notice of the proposed regulation.

The Board’s regulatory notice clearly communicated that the Board might make changes to the proposed rule as part of developing a final rule. 71 Fed. Reg. at 46421. The Board used this ability inconsistently. For example, the draft rule proposed changes to boundaries of both the Kenai and Homer nonrural areas, but the Board rejected public comments requesting expansion of its consideration in these areas. However, the Board departed from its originally proposed action with regard to aggregation of Saxman into the Ketchikan nonrural area and with regard to aggregation of Chiniak, Pasagshak, and Anton Larson into the Kodiak area.<sup>5</sup> The Board could have responded to comments and departed from its originally proposed action to consider aggregation and rural/nonrural status of other communities. If the Board had engaged in such consideration (illustrated below using the example of Happy Valley and Ninilchik), information was available demonstrating that aggregation of additional communities on the Kenai Peninsula road system is warranted.

### **Claim 2 – The Board Improperly Limited the Scope of its Aggregation Review**

Board regulations require that “communities or areas which are economically, socially, and communally integrated” be considered in the aggregate. 50 C.F.R. §100.15(a)(6). The Board has not adopted more detailed regulations limiting the manner in which economic, social,

<sup>2</sup> See, e.g., Decennial Review of Rural Determinations: A Report to the Federal Subsistence Board on Initial Comments Received and Considerations for Further Analysis (June 22, 2005); 71 Fed. Reg. 46416 (August 14, 2006) (Proposed Rule: Nonrural Determinations); 72 Fed. Reg. 25,688, 25689 (May 7, 2007)(Final Rule).

<sup>3</sup> See, e.g., State Comments (Attachment 1) at 4, 6-7.

<sup>4</sup> See, e.g., 72 Fed. Reg. at 25,691.

<sup>5</sup> Compare 71 Fed. Reg. at 46,420 and 72 Fed. Reg. at 25,695.

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and communal integration can be shown. *See* 50 C.F.R. §100.15. Nevertheless, the Board, prior to commencement of the regulatory process, limited the scope of its analysis by deciding to rely on three criteria without providing full public notice and comment through federal register publication indicating that it intended to modify its regulatory standards.<sup>6</sup> This limitation was, thus, improper. The Board modified one non-regulatory criterion formerly used by the Board<sup>7</sup> and eliminated two others.<sup>8</sup> The Board did not explain how these prior criteria could simply become irrelevant to its analysis; therefore, this modification and elimination of criteria was arbitrary. Then, as described in Claim 1, the Board failed to respond reasonably to comments received during the official public notice period which would have required expansion of the scope of its aggregation analysis to include other measures of whether a community or area is economically, socially, and communally integrated.<sup>9</sup> Instead, the Board argued that the method to be used “had been described and subjected to public comment” prior to the regulatory notice.<sup>10</sup> The Board cannot reasonably reject comments made during an official regulatory public comment period merely because the comments were not submitted prior to the official public notice of the proposed regulation, and the Board cannot reasonably limit its analysis to specific nonregulatory criteria when its regulations require a broader analysis.

**Claim 3 – The Board Did Not Use Available Information to Aggregate Communities and Areas in a Reasonable and Consistent Manner**

As a result of improperly limiting the area and scope of its aggregation review, the Board did not use available information that would have provided evidence of economic, social, and communal integration and did not aggregate communities in a reasonable and consistent manner. For example, the Board did not aggregate some communities on the Kenai Peninsula road system despite the existence of substantial evidence demonstrating that these communities are economically, socially, and communally integrated, but the Board did aggregate other areas on

<sup>6</sup> *See, e.g.*, 71 Fed. Reg. at 46,418. The three criteria chosen by the Board were: (1) proximity and road accessibility, (2) common high school attendance areas, and (3) whether 30% or more of the working people commute from one community to another.

<sup>7</sup> The Board changed the “commuting” criterion from 15% to 30%, doubling the amount of commuting necessary to satisfy the criterion, with no justification other than the fact that 30% is used as a criterion by the U.S.D.A. Economic Research Service. *See* Decennial Review of Rural Determinations, Report of June 22, 2005 at 7.

<sup>8</sup> The Board replaced a criterion of sharing a common school district with sharing a common high school attendance area, based entirely on arguments previously received from the public that that attendance in a common school district “often reflects political or administrative boundaries rather than social integration,” *see, e.g.*, Decennial Review of Rural Determinations, Report of June 22, 2005 at 8, and ignoring the fact that nonrural areas (i.e. Kenai nonrural area) and even individual communities (i.e. Anchorage, Fairbanks) may contain multiple high schools. The Board also eliminated the criterion of “daily or semi-daily shopping trips” arguing that it lacked data on this issue. *Id.*

<sup>9</sup> *See, e.g.*, State Comments (Attachment 1) at 1, 5-10.

<sup>10</sup> *See, e.g.*, 72 Fed. Reg. at 25,691.

the Kenai Peninsula road system that have similar characteristics. This failure to review areas and consistently review aggregation resulted in situations where one household is rural and a neighboring similarly situated household is nonrural and where nonrural students attend rural schools and rural students attend nonrural schools.

***One Example: Information available but not considered or consistently applied for Happy Valley and Ninilchik within the Kenai Peninsula road system area***

In order to demonstrate that additional information relating to social, economic, and communal integration was available but not considered or consistently applied by the Board, the Department commissioned an analysis of the Board's determination with respect to Happy Valley and Ninilchik as examples of Kenai road system communities that were not aggregated. Preliminary findings provided to the Department were reviewed by Dr. James Fall, leading him to conclude that "additional information was available" and that "existing information should have been analyzed further." Attachment 2 at ¶ 5. Dr. Fall also concludes that analysis of this information supports aggregation of Happy Valley and Ninilchik into a Kenai Peninsula road system area, both through the three factors recognized by the Board and through other evidence of economic, social, and communal integration. *Id.* at ¶¶ 6-14. Further, based on his experience and knowledge of the Kenai Peninsula, Dr. Fall indicates that he believes the information which was available but not considered by the Board regarding Happy Valley and Ninilchik "is not unusual for Kenai Peninsula Borough road system communities" and similar information is available for other communities if an analysis is done. *Id.* at ¶ 15.

The Board did not consider whether Ninilchik and Happy Valley were economically, socially, and communally integrated with the rest of the Kenai Peninsula Borough road system. Instead, the Board focused its narrow examination on whether these communities should be aggregated with other specific communities – never getting beyond a preliminary review for Ninilchik and only evaluating Happy Valley with regard to Homer. *See, e.g.,* Decennial Review of Rural Determinations, Report of June 22, 2005 at 14-17; Rural Determinations Decennial Review, Analysis of Communities and Areas at 23-26, 31-36 (June 23, 2006); *see also*, Attachment 2 at ¶ 6. Important information was readily available, which if analyzed, would have provided significant evidence of economic, social, and communal integration by these two communities with the Kenai Peninsula road system area. *See* Attachment 2 at ¶¶ 6-12.

### **1. The "Commuting" Criterion**

First, the Board should fully consider its "commuting" criterion. The Board's analysis provided no reason for considering the prior-used 15% commuting level to no longer be significant or for requiring that the criterion be met with regard to commuting to a single community.

For Ninilchik, available data would have shown at least a 16.2% commuting rate from

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Ninilchik to the Kenai area, exceeding the Board's prior 15% criterion.<sup>11</sup> Available data would also have shown a 5.2% commuting rate from Ninilchik to Homer and a 14.2% commuting rate to other unknown areas in the Kenai Peninsula. Thus, a total of 35.6% of Ninilchik workers commute to areas of the Kenai Peninsula outside of Ninilchik and Happy Valley. An additional 22.4% of Ninilchik residents commute through nonrural areas because their employment is outside the Kenai Peninsula. Attachment 2 at ¶ 8. Available information not considered by the Board shows that only 41.2% of Ninilchik workers are employed within Ninilchik or Happy Valley. *Id.* If the Board's "commuting" criterion had been fully analyzed with respect to Ninilchik, the Board would have recognized that the commuting criterion was not only fully met, it was greatly exceeded.<sup>12</sup>

For Happy Valley, the Board looked only at the possibility of aggregation with Homer and found that the commuting criterion was not met because 14.4% of Happy Valley workers were believed to commute to the Homer Area.<sup>13</sup> The Board did not examine other available information regarding commuting by Happy Valley workers. For example, census data were available showing that 84.7% of Happy Valley workers are employed outside of Happy Valley and 38.9% have a commute of 25 minutes or more while 16.6% have a commute of 45-59 minutes. *See* Attachment 2 at ¶ 8. The high level of commuting and long commute time show that a large percentage of Happy Valley workers must be working in nonrural areas or traveling through nonrural areas to get to their places of work.<sup>14</sup> If the Board's "commuting" criterion had been fully analyzed for Happy Valley with respect to the Kenai Peninsula road system as a whole rather than just commuting to Homer, the Board would have recognized that the commuting criterion was fully met.

## 2. The "School Attendance" Criterion.

Second, the Board's "school attendance" criterion should be considered more fully. The Board's analysis provided no reason for considering the new "common high school attendance area" criterion to the complete exclusion of the prior "common school district" criterion which

<sup>11</sup> Attachment 2 at ¶ 8. Place of work data for Ninilchik is based in part on zip code and thus includes part of Happy Valley. *Id.*

<sup>12</sup> Notably in other areas of the State the Board did not even require that the commuting criterion be fully met; the Board included the Coast Guard Base CDP in the Kodiak area despite evidence indicating that only about 11% of base residents were employed in Kodiak City and only 10% of base workers were residents of Kodiak City. *See* 72 Fed. Reg. at 25,695; Rural Determinations Decennial Review, Analysis of Communities and Areas at 45 (June 23, 2006).

<sup>13</sup> 72 Fed. Reg. at 25,694. Exact place of work is not easily determinable for Happy Valley residents because some of the available information is based on zip code and thus data regarding parts of Happy Valley are aggregated with Ninilchik while other parts are aggregated with Anchor Point.

<sup>14</sup> Mapquest.com shows that Happy Valley is located approximately 28.3 miles (34 minutes) from the actual boundaries of Homer and 46.69 miles (55 minutes) from Soldotna (the Homer and Kenai nonrural areas starting at Anchor Point and Clam Gulch are even closer).

was still relevant. The Board's only explanation for changing this criterion was that the public had commented that the school district boundaries "often reflect political or administrative boundaries rather than social integration." *See, e.g.*, 72 Fed. Reg. at 25,690. The Board ignored the fact that common political and administrative boundaries can be viewed as a strong indicator of social integration, perhaps an even stronger indicator than common high school attendance since many areas have more than one high school. The Board's prior criterion would have been fully satisfied with regard to both Ninilchik and Happy Valley because they are in the Kenai Peninsula Borough School District. *See* Attachment 2 at ¶ 9. Further, an analysis of Ninilchik and Happy Valley<sup>15</sup> with regard to the Kenai Peninsula road system area would have indicated that even the Board's new criterion is met because high school students in the Clam Gulch CDP, which is part of the Kenai nonrural area, are in the attendance area for the Ninilchik high school, and students in a portion of the Homer nonrural area are also within the Ninilchik school attendance area. *Id.* If the Board's "school attendance" criterion had been fully analyzed with respect to Ninilchik and Happy Valley, the Board would have recognized that the criterion was fully met.<sup>16</sup>

### 3. The "Proximity and Road Accessibility" Criterion

The Board's first listed criterion, "proximity, and road accessibility" cannot reasonably be disputed,<sup>17</sup> and the other two criteria recognized by the Board are fully met, as described above. Thus, full analysis of available information would have resulted in aggregation of

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<sup>15</sup> Happy Valley students are within the Ninilchik High School attendance area, but under Kenai Peninsula Borough School District policies may also attend high school in Homer.

<sup>16</sup> Notably in decisions the Board did make, it did not stringently apply the attendance criterion. The Board aggregated the North Fork Road area into the Homer nonrural area based on attendance of a majority of the students, despite the fact that it is in both the Nikolaevsk and Homer school districts and despite the fact that some students attended Ninilchik High School. *See, e.g.*, 72 Fed. Reg. at 25,694; Rural Determinations Decennial Review, Analysis of Communities and Areas at 33 (June 23, 2006). The Board aggregated Chiniak with Kodiak despite the fact that it has its own high school through 10<sup>th</sup> grade, only 40 % of Chiniak high school students attend high school in Kodiak, and this requires a commute of 45 miles one-way including 14 miles of unpaved road. 72 Fed. Reg. at 25,695; Rural Determinations Decennial Review, Analysis of Communities and Areas at 48 (June 23, 2006). Further, the Board aggregated Ketchikan, Saxman, the road connected Ketchikan area, and some nearby areas connected only by boat despite the fact that students within these areas may attend separate high schools within Ketchikan. 72 Fed. Reg. at 25,695; Rural Determinations Decennial Review, Analysis of Communities and Areas at 71 (June 23, 2006).

<sup>17</sup> Ninilchik and Happy Valley are located along the Sterling Highway between Homer and Soldotna with Ninilchik adjacent to Clam Gulch in the nonrural Kenai area and Happy Valley adjacent to Anchor Point in the nonrural Homer area. Mapquest.com searches show that the commute from Ninilchik to either Homer or Soldotna is no longer than the commutes from Palmer to Anchorage; with Happy Valley even closer to Homer and still within less than an hour of Soldotna in the Kenai nonrural area.

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Ninilchik and Happy Valley into a Kenai Peninsula road system area.

#### 4. Other Evidence of Economic, Social, and Communal Integration

Ninilchik's economic, social, and communal integration with the rest of the Kenai Peninsula is further demonstrated by additional information which was available but not analyzed as part of the Board's determination process. As noted by Dr. Fall, the Board did not consider business license data or conduct a population threshold analysis to examine the diversity and economic interdependence of Ninilchik and other Kenai Peninsula road system communities. See Attachment 2 at ¶ 10. An analysis of this information would have shown that Ninilchik has an unusually diverse economy for a community of its size and has experienced a level of economic growth that can only be reached or maintained because of the flow of money from outside the community which results from its integration with the rest of the road connected portion of the Kenai Peninsula.<sup>18</sup>

This demonstration of Ninilchik's integration with the rest of the Kenai Peninsula road system area would have been further bolstered by looking at developed residential property land ownership patterns which show that less than 50% of developed residential properties in Ninilchik and Happy Valley are owned by residents of those communities, with 15% owned by other Kenai Peninsula Borough residents, 21% by other state residents, and 16% by nonresidents. Attachment 2 at ¶ 12.

Similarly, the Board did not consider the economic, social, and communal integration demonstrated by the larger boundaries of the Ninilchik Alaska Native Village Statistical Area (ANVSA) and the "Ninilchik Tribal Territory" or the presence of Ninilchik Tribal members within this larger area. See Attachment 2 at ¶ 11. The ANVSA includes the entire Homer nonrural area and extends north to include the Clam Gulch and Coho CDPs within the Kenai nonrural area. Within this large portion of the Kenai Peninsula road system and nonrural area, the Ninilchik Tribe administers a wide variety of programs and services for Alaska Native and American Indian residents.<sup>19</sup> The "Ninilchik Tribal Territory," described at [www.ninilchiktribe-nnsn.gov](http://www.ninilchiktribe-nnsn.gov) (July 2007), includes everything in the ANVSA and the lands on the west side of Cook Inlet, stretching from the Kasilof River to Kachemak Bay. The Board's own analysis of FRFR06-09 shows that 333 Ninilchik tribal members reside within this larger "tribal territory," while Census 2000 data show that only 108 Alaska Natives or American Indians reside in Ninilchik and 30 in Happy Valley. If the Board's information regarding the number of Ninilchik Tribe members within the larger "tribal territory" is correct, there are more Ninilchik Tribe members within the Kenai Peninsula area outside of the Ninilchik/Happy Valley area than inside

<sup>18</sup> *Id.* This integration and interdependence is further illustrated by the fact that some businesses bill Ninilchik as "the heart of recreation" on the Kenai Peninsula and offer services on the Kenai River and in Homer and Seward, as well as providing services closer to Ninilchik. See, e.g., <http://www.deepcreekcustompacking.com/fishing.html> (July 2007).

<sup>19</sup> See Attachment 2 at ¶ 11. Programs and services include healthcare, vision and dental services, housing and energy assistance as well as other programs and services.

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it, and, given the geography and population patterns of the area, most of those members outside the Ninilchik/Happy Valley area are almost certainly in nonrural areas. Thus, both the larger ANVSA administered by Ninilchik and the larger "Ninilchik Tribal Territory" provide significant evidence, not considered by the Board, of economic, social, and communal integration of the Ninilchik Tribe with Alaska Natives and American Indians in the Kenai Peninsula road system area south of the Kasilof, including portions of the Kenai nonrural area and all of the Homer nonrural area.

As also indicated by Dr. Fall, the Board did not consider a number of other factors demonstrating economic, social, and communal integration. These omitted factors include: (1) reliance on a common utilities for electricity, phone, and internet service; (2) reliance on a common landfill with most of the Kenai Peninsula; (3) reliance on common hospitals and pharmacies with Homer and Soldotna; (4) shared commercial and sport fishing grounds and facilities; (5) common commercial fishing patterns which involve moving vessels from port to port within the Peninsula and using common harbors on a seasonal basis; and (6) common retail shopping and service areas. Attachment 2 at ¶ 13. All of these factors if considered by the Board would clearly demonstrate economic, social, and communal integration and that Ninilchik and Happy Valley should be aggregated into a Kenai Peninsula road system area.

Analysis of other communities on the Kenai Peninsula road system is likely to reveal similar information not previously considered by the Board demonstrating economic, social, and communal integration. See Attachment 2 at ¶ 15. Aggregation of these communities, pursuant to the Board's regulations at 50 C.F.R. §100.15(a)(6) is thus required and will eliminate the arbitrary divisiveness caused by applying one set of rules to one individual and another set of rules to a neighbor or classmate who depends on the same resources for both recreation and food.

### **Regulatory Bases for Reconsideration.**

According to regulation, the Board will reconsider a Board action if any one of three reasons exists: (1) information exists that was not previously considered by the Board; (2) information used by the Board in making its determination was incorrect; or (3) the Board's interpretation of information, applicable law, or regulations was in error or contrary to existing law. The above described claims all involve new information that was not considered by the Board. In addition, all claims involve incorrect information resulting from the Board's arbitrary limitations and inconsistent application of overly restrictive area and scope of analysis. Furthermore, to the extent that the Board considered selective information pertinent to each of these claims, the Board's interpretation of that information, applicable law, or regulations was in error or contrary to existing law and warrants reconsideration on each claim.

### **Conclusion.**

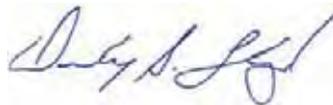
The Board is respectfully requested to reconsider its arbitrary and capricious final

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decision of April 26, 2007,<sup>20</sup> in order to more thoroughly and consistently evaluate the treatment and aggregation of communities, using available information that was previously not considered by the Board and particularly to aggregate additional Kenai Peninsula road system communities.

STATE OF ALASKA  
DEPARTMENT OF FISH AND GAME



DATED: \_\_\_\_\_ July 6, 2007 \_\_\_\_\_  
DENBY S. LLOYD, COMMISSIONER

Attachments

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<sup>20</sup> 72 Fed. Reg. 25,688 (published May 7, 2007) making rural and nonrural determinations pursuant to 50 C.F.R. §100.15 and amending regulations at 50 C.F.R. §100.23.

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI  
GOVERNOR

P.O. BOX 115526  
JUNEAU, AK 99811-5526  
PHONE: (907) 465-4100  
FAX: (907) 465-2332

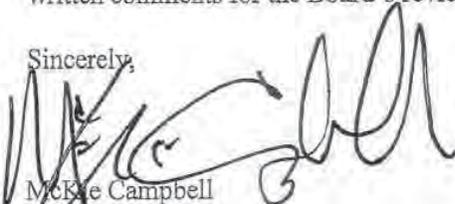
October 26, 2006

Federal Subsistence Board  
Attn: Theo Matuskowitz  
Office of Subsistence Management  
U.S. Fish and Wildlife Service  
3601 C Street, Suite 1030  
Anchorage, AK 99503

Dear Mr. Matuskowitz:

The State of Alaska, through the Department of Fish and Game, has reviewed the proposed rule published in the Federal Register on August 14, 2006 (71 FR 46417) regarding the Federal Subsistence Board's (Board) decennial review of rural determinations and provides the enclosed written comments for the Board's review and consideration.

Sincerely,



McKee Campbell  
Commissioner

Enclosures

cc: Pete Probasco, Acting Assistant Regional Director, Office of Subsistence Management  
Mike Fleagle, Chairman, Federal Subsistence Board  
Tom Melius, Regional Director, U.S. Fish and Wildlife Service  
Gary Edwards, Deputy Regional Director, U.S. Fish and Wildlife Service  
Niles Cesar, Area Director, Bureau of Indian Affairs  
Marcia Blaszkak, Regional Director, National Park Service  
Judy Gottlieb, Associate Regional Director, National Park Service  
Denny Bschor, Regional Forester, USDA Forest Service  
Thomas Lonnie, State Director, Bureau of Land Management  
George Oviatt, Deputy State Director, Bureau of Land Management  
Drue Pearce, Assistant to the Secretary, Alaska Affairs, U.S. Dept. of the Interior  
Hans Neidig, Special Assistant to the Secretary for Alaska, U.S. Dept. of the Interior

**Attachment 1**  
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## State of Alaska Comments on Federal Proposed Rule to Revise Rural/Nonrural Areas

In response to the August 14, 2006, proposed rule (71 FR 46417), the State of Alaska, through the Department of Fish and Game (Department), provides the following comments. The Department is not commenting on whether any particular community should be rural or nonrural but rather in each case, believe such a determination should be made based on a thorough and consistent analysis consistent with 50 CFR 100.15 and 36 CFR 242.15, the applicable federal regulations. What the Department is commenting on is what appear to be significant factual errors and procedural inconsistencies in the Federal Subsistence Board's (Board) decennial review of rural determinations. Unless these errors and inconsistencies are corrected, any decision of the Board will be rendered arbitrary and capricious.

The options presented for consideration by the Board are unduly limited and are based on inconsistent and inadequate application of the Board's regulatory guidelines. The Board's proposed rule and preliminary decisions addressing the rural status of communities reflect factual and analytical errors in federal staff analysis and procedural errors in the Board process. The Board compounded the many factual and analytical errors in the staff analysis through inconsistent interpretation and application of the guidelines established in federal regulations for making rural determinations.

These factual and analytical errors and inconsistencies, discussed below, illustrate the need for the Board to: (1) adhere to statute, regulations, and court direction; (2) develop and follow written policies and procedures for evaluating information and making decisions; and (3) assure that accurate data are available and used. We urge the Board to address these factual and procedural flaws and inconsistencies before making final decisions regarding the rural/nonrural status of Alaskan communities.

### Procedural Inconsistencies

#### Procedural Requirements to Review Rural Status:

The Federal regulations (50 CFR 100.15 and 36 CFR 242.15) ("§ \_\_.15") guide the Board's determination of rural status of communities. The Board initially determined which Alaska communities were rural when the Federal Subsistence Management Program began in 1990 by largely adopting the State's rural determinations. Federal subsistence regulations require that rural/nonrural status be reviewed every 10 years, beginning with the availability of the 2000 census data, or under special circumstances. Those regulations both read as follows:

#### *15 Rural determination process.*

*(a) The Board shall determine if an area or community in Alaska is rural. In determining whether a specific area of Alaska is rural, the Board shall use the following guidelines:*

*(1) A community or area with a population of 2,500 or less shall be deemed to be rural unless such a community or area possesses significant characteristics of a nonrural nature, or is considered to be socially and economically a part of an urbanized area.*

October 26, 2006

(2) *Communities or areas with populations above 2,500 but not more than 7,000 will be determined to be rural or nonrural.*

(3) *A community with a population of more than 7,000 shall be presumed nonrural, unless such a community or area possesses significant characteristics of a rural nature.*

(4) *Population data from the most recent census conducted by the United States Bureau of Census as updated by the Alaska Department of Labor shall be utilized in this process.*

(5) *Community or area characteristics shall be considered in evaluating a community's rural or nonrural status. The characteristics may include, but are not limited to:*

(i) *Use of fish and wildlife;*

(ii) *Development and diversity of the economy;*

(iii) *Community infrastructure;*

(iv) *Transportation; and*

(v) *Educational institutions.*

(6) *Communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate.*

(b) *The Board shall periodically review rural determinations. Rural determinations shall be reviewed on a ten year cycle, commencing with the publication of the year 2000 U.S. Census. Rural determinations may be reviewed out-of-cycle in special circumstances. Once the Board makes a determination that a community has changed from rural to nonrural, a waiting period of five years shall be required before the nonrural determination becomes effective.*

(c) *Current determinations are listed at ' \_\_\_\_\_ .23.*

The Board began its review of the rural/nonrural status of communities on January 31, 2005, by publishing a request for comments on the criteria and process. On June 22, 2005, the Office of Subsistence Management (OSM) released a report entitled, "Decennial Review of Rural Determinations: A Report to the Federal Subsistence Board on Initial Comments Received and Considerations for Further Analysis." In the 2005 report, federal staff identified communities (based upon the 2000 census) whose populations or characteristics had changed and whose status warranted further review by the Board. At its December 6-7, 2005, meeting, the Board officially revised and adopted a list of communities, which significantly departed from the criteria and population numbers established in regulation, for further consideration. On June 23, 2006, OSM released a report entitled "Rural Determinations Decennial Review: Analysis of Communities and Areas as Assigned by the Federal Subsistence Board." This final analysis of communities is selective in its use of the above-mentioned criteria and does not address other communities whose status changed significantly between the 1990 and 2000 census.

### **1. Inconsistent Application of Federal Regulations**

The Board did not use a consistent process for each of the communities in evaluating whether a community is rural or nonrural. That is true in a number of examples, but most clearly in its decision to maintain Sitka's rural status without review or comparison to the standards of

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50 CFR 100.15 and 36 CFR 242.15 (Please see the attached letter dated January 6, 2006, from the Department to former Federal Subsistence Board Chairman, Mitch Demientieff).

In its 2005 report, federal staff at OSM recommended that both Sitka and Kodiak undergo further analysis by the Board. Both communities, which are currently considered rural under the federal system (despite their population levels exceeding the criteria outlined in federal regulation), had population increases between the 1990 and 2000 census. Yet, the Board chose to treat these communities differently.

At its December 6-7, 2005, meeting, the Board voted to remove Sitka from the list of communities to receive further analysis in the rural determination process.<sup>1</sup> Dr. Winnie Kessler, acting Board member for the Forest Service, stated prior to her dissenting vote on the issue, "...dropping Sitka at this juncture... would require drawing conclusions without the benefit of that systematic consideration of the full body of information which is clearly substantial." The Department concurs with Dr. Kessler that excluding Sitka from further analysis was "contrary to the principle and spirit of informed decision-making" and diminished the "Board's access to the full and complete information."<sup>2</sup>

In advising the Board just prior to its decision, Solicitor Keith Goltz said that, in making a rural determination, "the theater of our concerns is defined by regulation. And that regulation focuses on numbers." Goltz continued, "to the extent that you rely on numbers and data as they relate to the landscape and to population density you're defensible."<sup>3</sup> But the Board chose not to follow the Solicitor's advice and made a decision regarding Sitka based not upon numbers or research findings, but upon public opinion. As noted in the proposed rule, "during its December 6-7 meeting, the Board heard substantial public testimony regarding the rural characteristics of Sitka and determined that no additional analysis was necessary."<sup>4</sup>

By prematurely removing Sitka from the list of communities to undergo further review, the Board chose not to apply the established criteria for population numbers specified in federal regulation and discriminated between communities in conducting further evaluation of characteristics.<sup>5</sup> As stated in the beginning of this letter, the Department is not offering an opinion regarding where such an analysis will lead, but simply pointing out that analysis is required by law. The Department urges the Board to adhere to Federal regulations in its

<sup>1</sup> It is worth noting that the Board vote was taken immediately following testimony from the Southeast Regional Advisory Council (RAC), which recommended that Sitka be removed from the list for further analysis. Yet, the 2005 report (referenced above) by OSM clearly stated on page 1 that "Council comments or recommendations on rural determinations are not subject to the deference afforded to Council recommendations on the taking of fish and wildlife, as required by Section 805c of the Alaska National Interest Lands Conservation Act (ANILCA)." Similarly, on page 6 of its letter (attached for reference) responding to the Southeast RAC's 2005 annual report, the Board noted that a "Council recommendation concerning rural or nonrural nature of a community is not entitled to deference by the Board."

<sup>2</sup> Transcript of December 6-7, 2005 Federal Subsistence Board meeting. Comments available at <http://alaska.fws.gov/asrn/FSB.cfm?BMT=1> see December 7, 2005, at page 163.

<sup>3</sup> *Id.* at 150.

<sup>4</sup> *Federal Register*, Vol. 71, No. 156, August 14, 2006 at 46418.

<sup>5</sup> The Board compounded this problem by using Sitka as an example of a rural area in its evaluation of other areas despite its failure to adequately evaluate whether Sitka remains rural.

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upcoming deliberations and apply the regulations consistently to all of the communities initially identified with population changes, including Sitka and Kodiak.

## 2. Selective Use of Criteria Specified in Federal Regulations

Federal regulations 50 CFR 100.15 and 36 CFR 242.15 cite five criteria to be used when making a determination of rural or nonrural status: (i) use of fish and wildlife; (ii) development and diversity of the local economy; (iii) community infrastructure; (iv) transportation; and (v) educational institutions. Federal regulations specify that these criteria “shall be considered in evaluating a community’s rural or nonrural status.” However, the analysis prepared by federal staff and the Board’s preliminary determinations reflected in the subject proposed rule make selective use of these analytical criteria.

In the 2006 analysis prepared by OSM, federal staff arbitrarily limit the evaluation of the above criteria and, thereby, unnecessarily restrict the scope of the analyses. The analysis minimizes other data regarding aggregations and, in some cases, neglects to use some of the explicitly stated criteria, such as fish and wildlife use patterns. Examples where consideration of the use of fish and wildlife resources, as well as other factors, are minimized or omitted include:

- Old Believer communities on the Kenai Peninsula appear to be disaggregated from the Homer Nonrural Area largely because they have their own schools. Criteria such as a shared economy with the Homer aggregation, reliance upon the same retail stores, and the pattern of use for hunting and fishing areas are not considered.
- Delta Junction displays significant characteristics of a nonrural area, yet the analysis does not factor in fish and game use or key features of the local economy that illustrate these characteristics.

According to federal regulations, community or area characteristics shall be considered in evaluating a community’s rural or nonrural status. At a minimum, all five criteria specified in regulation should be applied to each community in the federal analysis, in the Board’s decision-making process, and in the federal proposed rule. The exclusion – intentional or not – of any one of these criteria in the analysis could dramatically alter Board debate and final action on a community’s rural/nonrural status and result in inconsistent, arbitrary, and capricious decision making.

## 3. Preliminary Board Determinations Made in Executive Session

The Department joins with the Ninilchik Tribal Council in objecting to the frequency and subject matter of closed-door Executive Sessions that the Board held this year. At its Executive Session on June 22, 2006, the Board met “to develop the list of communities and areas that it believes to be nonrural.”<sup>6</sup> Neither the public nor the State was able to hear the basis for the Board’s decisions for continuing to analyze the rural status of some communities and not others. The Department contends that such important decisions should be made in meetings that are open to the public and for which there is a documented record of the basis for the Board’s decisions.

<sup>6</sup> *Federal Register* at 46418.

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#### 4. Insufficient Public Information

The Department appreciates that the Board is conducting more public meetings than originally planned during its decennial rural determination review. However, the Board has failed to provide sufficient information and assurances of consistency regarding the basis for the Board's evaluations of rural status or of the effects of a Board determination. This lack of information has caused unnecessary fear and confusion among Alaskans. As a public agency, the Board is obliged to clearly and publicly articulate the basis for its decision making and the possible impacts of its proposed changes.

It is clear from the Board's October 10, 2006, public hearing in Sitka regarding the rural/nonrural determination process that most Alaskans do not understand that the proposed changes only affect a community's status under the federal subsistence program and apply only on federal public lands. Federal staff and Board members have an obligation to explain in detail that even if a community's designation were to change from rural to nonrural, the new designation would not take effect for five years, and even after it became effective, local residents would (in most cases) still be able to hunt and fish on federal land, but would do so under state regulations. The Department requests that the Board clearly articulate in all public information sources that proposed changes only affect a community's status under the federal subsistence program, apply only on federal public lands, identify the lands/waters over which the federal program is claiming jurisdiction, and whether nonrural residents would be excluded from any nearby hunting or fishing areas on federal lands under current regulations, as a result of a change in a rural/nonrural determination.

Finally, it is critically important that Alaska residents and agency personnel clearly understand that, regardless of what the Board decides, subsistence opportunities for Alaskans will continue to be provided under the state subsistence law on all lands outside of state nonsubsistence areas.

#### Factual Concerns

The evaluation of factors that contribute to decisions on rural/nonrural characteristics is extensively documented in numerous studies and previous federal staff reports. The Board needs to base its decisions on factual analyses of fish and wildlife use patterns in Alaska, wherein relationships between fish and wildlife harvest patterns and other criteria (such as sharing and redistribution along non-market networks, taxable income and regional cost of living differentials, the percentage of natives and non-natives in a community, and roads) are explored (see Wolfe 1986; Wolfe and Walker 1987). We note the following examples of significant omissions or errors in the data provided by federal staff to the Board for consideration:

##### 1. Omission of Relevant or Updated Data

The June 23, 2006, federal staff analysis fails to incorporate results of previous statewide analyses. Available comparisons of patterns and their changes between 1990 and the 2000 census, as well as subsequent changes, are not presented consistently for all communities.

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Similarly, the 2006 federal staff analysis makes minimal reference to which relevant conditions have changed in the communities and areas under consideration since the initial federal staff review of the rural status of Alaska communities conducted in 1990. Both of these analyses are based primarily on information from the 2000 census. The analysis does not proceed to systematically identify what has changed in each community under discussion since 1990. While the Federal Subsistence Board purports to follow the approach taken in 1990 and review the rural/nonrural status of communities and areas relying on census data from 2000 “with an emphasis on what has changed since 1990,”<sup>7</sup> the analysis fails to carry out this stated intent and also fails to use available post-census data. The analysis needs to be revised to comply with the Board’s intent and regulatory guidelines with an emphasis on what has changed since 1990. This is especially important when presenting options for changing the rural status of communities and areas.

## 2. Aggregation of Similarly Situated Communities

The 2006 federal staff analysis ignores the historical context for aggregation. This is a continuing issue with the Board’s approach to rural designations.<sup>8</sup> The Board should request that the federal staff analysis be updated to include additional information in time for the Board’s December 12-13, 2006, meeting. The Board’s decision making process should include an evaluation regarding small communities along road systems and their links to larger population centers with services that residents of these small communities regularly use.

The 2006 federal staff analysis notes that where people shop or “daily or semi-daily shopping trips” are no longer considered as criteria for aggregation because objective data on shopping trips were not available.<sup>9</sup> While the department agrees that “proximity and road accessibility” is a more accurate measure of community aggregation, the location of sources of food, supplies and services is still relevant to aggregation questions. Therefore, the Department requests that these factors be considered as part of the analysis for the Board’s consideration.

The Department urges the Board consider the following background on the larger issue – and consider the state’s analyses in its deliberations on the rural or nonrural status of communities. The Alaska Joint Board of Fisheries and Game assessed the rural/nonrural status of the Kenai Peninsula on several occasions. Under both the 1978 and 1986 state subsistence laws, the Joint Board determined that the non-roaded portion of the Kenai Peninsula was “rural,” while the road-connected portion of the Peninsula was “nonrural.” The rural areas included the communities of Port Graham, Nanwalek, and Seldovia, and also Tyonek across the Inlet, which is within the Kenai Peninsula Borough.

<sup>7</sup> *Id.* at 46417.

<sup>8</sup> The Department identified this as a problem in its comments on earlier Kenai nonrural discussions in 2000. See attached letter from Alaska Department of Fish and Game Commissioner Frank Rue to Federal Subsistence Board Chairman Mitch Demientieff dated March 31, 2000, regarding the rural or nonrural status of the Kenai Peninsula.

<sup>9</sup> *Rural Determinations Decennial Review: Analysis of Communities and Areas as Assigned by the Federal Subsistence Board*, June 23, 2006, Office of Subsistence Management, Page 5.

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Under the 1992 state subsistence law, the Joint Board determined that the road-connected portions of the Kenai Peninsula Borough are part of the Anchorage-Matsu-Kenai Nonsubsistence Area (Board Findings No. 92-25-JB). A “nonsubsistence area” is an area where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life, looking at twelve socioeconomic factors listed in statute (AS 16.05.258(c)). Defined in this way, “nonsubsistence areas” are similar to “nonrural areas” in the pre-1992 state statute. The findings of the Alaska Joint Board of Fisheries and Game are appropriate and defensible, and were developed pursuant to an appropriate standard. The findings were based on a detailed set of information on resource use patterns, socioeconomic factors, and information derived from scientific sources and the public. The Joint Board assessed the information against explicit standards in state statute and in the legislative history of ANILCA for identifying rural and nonrural or non-subsistence areas. Given the continuing increase in populations and nonrural economic factors of these closely interrelated communities and the similarity of the federal community characteristics guidelines, a different outcome cannot continue to be justified under federal regulations. The Board should consider the issue before making rural/nonrural determinations.

In assessing the Kenai Peninsula, the roaded area of the Kenai serves as a single population aggregate for the State’s rural and nonsubsistence area determinations. Based on information presented, the Joint Board determined that the populations along the roads in the Kenai Peninsula Borough were *closely linked economically and socially and presented similar resource use patterns*, while the non-roaded portions presented a different economic, social, and resource use pattern (Joint Board Finding No. 92-25-JB). The Federal Board should follow a similar analysis as required by the guidelines in the federal subsistence regulations, and such an analysis supports this aggregation and mandates that “communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate.” (§ \_\_.15(a)(6)). The 2006 federal staff analysis should have evaluated the changes throughout the Kenai and should provide sufficient analysis to allow the Board to consider reinstating an aggregation of communities on the road-connected Kenai Peninsula.

The Department’s position on this issue has been a consistent one, derived from systematic, deliberative work by both state and federal authorities from 1990 to present. One major difficulty in rural determinations for areas like the Kenai Peninsula is how to deal with significant subgroups within a larger population, such as the Kenaitze and Ninilchik tribes. Unlike tribal groups on the lower Kenai Peninsula, the Kenaitze and Ninilchik tribes’ members are not geographically separate – their members live and work dispersed among several communities, just as other tribal members do in Alaska’s largest communities.

Although the tribes have a long history on the Peninsula, there has been a large in-migration of non-tribal members in recent decades. Since federal regulations do not contain a mechanism for applying the subsistence priority to subgroups, the finding of a rural status for a community only a few miles from another community found nonrural is not justified. Recognizing this, the state fish and game management program uses its authorities to issue cultural and educational use permits for fisheries and hunts to certain qualifying groups who request such permits. Educational fishery permits have been issued to a number of qualifying groups, including groups in Kenai, Eklutna, Ninilchik, and Knik. Cultural use hunting permits have been issued elsewhere

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in the state. The state uses these permits to recognize and accommodate a subgroup's special history and use patterns and the desire to pass on cultural traditions. The state also provides personal use fisheries to meet historic food fishery needs in nonrural areas on the Kenai Peninsula and elsewhere.

### 3. Specific Concerns with OSM's 2006 Analysis of Communities and Areas

The analysis for each community should address all five criteria listed in federal regulations and mentioned above. Omissions of fact or errors of interpretation should not form a basis for final decision making. The analysis should be revised before the Board makes final decisions on any rural/nonrural determinations.

#### *Adak*

The analysis mentions only the use of salmon. Uses of fish and wildlife reported for Adak include subsistence harvests of halibut, marine mammals, and waterfowl (Fall et al. 2005; USFWS 2004; Wolfe et al. 2005). The analysis needs to be expanded to evaluate subsistence use of fish and wildlife by the current population, in light of the proposed designation of rural status, rather than just relying on population size, remote location, and salmon harvest data.

#### *Prudhoe Bay*

The analysis states, "Harvest of subsistence resources has never been reported by Prudhoe Bay residents."<sup>10</sup> This is inaccurate. Prudhoe Bay hunters have reported moose harvest from Game Management Unit 26(B). This information can be found in the Statewide Big Game Harvest Database (2006) managed by the Department's Division of Wildlife Conservation.

The analysis does not address what, if any, impacts on fish and wildlife uses may result if the Board changes the rural/nonrural status of Prudhoe Bay. The analysis does not describe the result of a nonrural determination for an area that contains limited or no federal lands. The analysis also does not consider the effects of the nonrural designation on other North Slope residents' customary and traditional uses of the Prudhoe Bay/Deadhorse area.

Presently, residents of the Prudhoe Bay complex cannot hunt brown bear or moose under federal subsistence regulations, and there is very little or no federal land in the area. The analysis needs to be revised to characterize what would change if the Federal Subsistence Board made a nonrural determination for Prudhoe Bay.

#### *Kenai Area*

The analysis for Clam Gulch describes two options – neither of which includes any information on fish and wildlife harvest levels and harvest areas. Residents of this area may have harvest patterns similar to those of Kenai and Soldotna. They also use the stores and services in Kenai and Soldotna, which are a few miles away by road. The analysis should sufficiently address these issues. As discussed above, the analysis should also address the issue of whether aggregation of the road connected communities on the Kenai Peninsula would be appropriate.

<sup>10</sup> *Id.*, at 19.

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***Wasilla Area***

Fish and wildlife data are not discussed or presented. Based upon fish and wildlife use patterns, a case can be made that Willow should be part of the Wasilla area (Fall and Foster 1987). However, these data are not discussed or presented in the analysis. Therefore, it is unclear whether Willow should be part of the Wasilla area. This is another example of how the narrow approach to grouping ignores basic fish and wildlife use information.

***Homer Area***

Similar to the information presented for the Wasilla Area, the analysis is restricted and does not take into account fish and wildlife use information. The analysis should include information on where residents of the Old Believer communities hunt and fish (Fall et al. 2000) and incorporate research that demonstrates the extent to which these communities are integrated into the Homer area (Fall et al. 2000; Wolfe and Ellanna 1983).

***Delta Junction***

The analysis shows the basic military/industrial nature of Delta Junction's economy, with little to no traditional fish and wildlife uses. The analysis should include information on customary and traditional hunting, fishing, and trapping patterns for the region. Harvest report data for Delta Junction are available from the Statewide Big Game Harvest Database (2006) maintained by the Department.

***Kodiak Area***

The analysis does not make a convincing case to disaggregate any portion of the road system from the rest of the road-connected area. People living along the entire road system use the same economic and social services, including stores. They also use the same hunting and fishing areas and have the same hunting and fishing patterns. This is a socially, economically, and communally integrated area. According to criteria on page 46418 of the August 14, 2006, *Federal Register* notice, such integration supports inclusion of the road system in the analysis.

The Alaska Joint Boards of Fisheries and Game classified Kodiak as rural in 1986, not 1988. The analysis notes that the Joint Board decision "was not unanimous."<sup>11</sup> It is not clear why this is relevant.

The analysis states "It is not known how many people in the 'Remainder' lived off the road system in 1988, 1990, or 2000."<sup>12</sup> This is misleading. The Department's Division of Subsistence and the Kodiak Area Native Association collected demographic data for the road system area for 1983 (Kodiak Area Native Association and Alaska Department of Fish and Game 1983). Very few people who do not live in Akhiok, Karluk, Larsen Bay, Old Harbor, Ouzinkie, or Port Lions live off the Kodiak road system. As such, a close approximation of the road connected "remainder" population can be made.

Table 4 on page 57 has an error: footnote "b" errs in stating that resource use information is available only for the Kodiak Road system (excluding Kodiak City) and the Coast Guard Station for 1991. Data are also available for 1983, but are aggregated with Kodiak City in the

<sup>11</sup> *Id.*, at 50.

<sup>12</sup> *Id.*, at 52.

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Community Subsistence Information System (Alaska Department of Fish and Game 2005). The Kodiak Area Native Association and Alaska Department of Fish and Game Resource Guide (1983) separates out these two areas.

The analysis does not discuss Kodiak's role as a regional center and does not mention the Department's report on regional centers (Wolfe et al. 1986). The analysis mentions that there are 1,400 members of the Sun'naq Tribe, and that approximately 5,475 Natives in the area receive medical services from the Kodiak Area Native Association. Yet, there is no discussion of the percentage of Alaska Natives living in Kodiak or the percentage of Alaska Natives from the Kodiak Island Borough who now live in Kodiak. This information is important in order to understand Kodiak's role as the regional center for the entire borough.

While the analysis points out the Kodiak area population's "fairly fluid" nature, an amplified discussion of the demographic relationship between Kodiak and the outlying villages would also be useful. It is important to know that people move back and forth between these areas and that it can be difficult to determine where some people live.

#### *Ketchikan Area*

The analysis states on page 72 that preliminary results of the 2006 Ketchikan Indian Community (KIC) household subsistence survey are now available. However, in June 2006, when this federal staff analysis was completed, the results and methodology of the KIC survey should have been, but were not, available for public review.

#### *Sitka*

The lack of required analysis for Sitka has been discussed in detail in the earlier parts of these comments.

#### Summary

The Department finds that the 2006 analysis is seriously deficient because of its failure to systematically and consistently consider changes that have occurred since 1990 throughout the state and because it excludes or minimizes analysis of information on fish and wildlife uses. The State of Alaska strongly recommends the analysis be revised to address the concerns as described above and anticipates the opportunity to review the revised version of this document. The State of Alaska urges the Federal Subsistence Board not to take any action regarding rural/nonrural determinations without first revising and updating the 2006 analysis to address these deficiencies in order to fully comply with the Board's own regulations.

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# STATE OF ALASKA

DEPARTMENT OF FISH AND GAME  
OFFICE OF THE COMMISSIONER

January 6, 2006

Mitch Demientieff, Chairman  
Federal Subsistence Board  
3601 C Street, Suite 1030  
Anchorage, AK 99503

Dear Mr. Demientieff:

I am deeply concerned that recent decisions affecting the status of subsistence users as rural or non-rural residents, and findings regarding customary and traditional subsistence uses, have been made without strict adherence to established processes and policies. I believe it is essential that a full, thorough, and unbiased review is made of all evidence available to help guide those decisions. Failure to do so is not in the best interest of subsistence users and may lead to unnecessary restrictions on other subsistence and nonsubsistence users.

The December 7, 2005, action of the Federal Subsistence Board preempted consideration of whether Sitka is a rural or urban community. This action occurred without adherence to your standard procedures and without a thorough public review of the characteristics of Sitka. It now appears that you intend to make customary and traditional findings, including findings related to the Kenai River system, at the upcoming January 2006 meeting prior to compliance with Secretarial direction to develop written policies clarifying the Board's process in rendering these decisions. We strongly urge that such decisions should not be made until written procedures and policies to provide for a thorough and consistent approach to customary and traditional (C and T) use determination has been finalized.

The recent action of the Federal Subsistence Board regarding Sitka and the Board's apparent willingness to consider further C and T determinations, including extremely controversial determinations, without first developing policy guidelines, compounds my growing concern that the Federal Subsistence Board is ignoring the intent of the 2000 Interim Memorandum of Agreement (MOA) with the state. These three issues are further described below:

#### (1) Rural Decision Process

Federal regulations (50 CFR 100.15 and 36 CFR 242.15) clearly state: "a community with a population of over 7,000 shall be presumed nonrural, unless such a community or area possesses significant characteristics of a rural nature." The population of Sitka is 8,896, yet the Board made a final decision without allowing the Office of Subsistence Management the opportunity to thoroughly evaluate the characteristics of Sitka.

Federal regulations cite five criteria to be used when making a determination of rural or non-rural status: (i) use of fish and wildlife, (ii) development and diversity of the local economy, (iii) community infrastructure, (iv) transportation, and (v) educational institutions. While individuals

USDOI/FWS/OSM/FSB  
Demientieff, Mitch  
FRANK H. MURKOWSKI  
GOVERNOR  
100,1500 Subsistence

P.O. BOX 25526  
JUNEAU, AK 99802-5526  
PHONE: (907) 465-4100  
FAX: (907) 465-2332  
108.000

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Mitch Demientieff, Chairman  
Federal Subsistence Board

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testified with passion about the importance of fish and wildlife to their way of life and their desire to remain classified as a rural community. There was no comprehensive information provided, nor analyzed pertaining to the extent of fish and wildlife harvest and use. In addition, very limited information was presented on other community characteristics. This information was not comprehensive, nor analyzed. Neither the public nor the state was able to provide such data or comment on these characteristics for Board consideration. There is no record of the Board following a required process for evaluation of criteria and analysis of data during their December 6-7, 2005, meeting. Instead, the Board made a final determination without due process, and made this decision in an arbitrary and capricious manner.

(2) Customary and Traditional Use Determination Process and Criteria

Based upon recommendations by federal and state policy makers, on October 27, 2005, Assistant Secretary Scarlett directed the Federal Subsistence Board to review its current practices regarding customary and traditional determinations and closures of areas to non-federal subsistence uses. The Federal Subsistence Board was directed to develop written policies clarifying the Board's process in rendering these decisions. Specifically, regarding customary and traditional determinations, the Board was instructed to decide if analytical thresholds and benchmarks for certain criteria are needed and appropriate for inclusion into the process.

I urge and request the Federal Board to adhere to its existing process and honor this directive at its upcoming meeting January 10-12, 2006, and defer action on all customary and traditional use proposals until it addresses the process questions raised by the Secretary's office. The proposals we urge be deferred at this time include the Kenai River watershed, portions of the Copper River, the Tanana River drainage, some waters within the Chugach National Forest, and some fishing districts in Southeast Alaska. Several of these decisions potentially affect the conservation of fish and many long-standing uses.

(3) Memorandum of Agreement

The 2000 Interim Memorandum of Agreement (MOA) signed by the Federal agencies, the Federal Subsistence Board, Alaska Board of Fisheries, Alaska Board of Game, and Alaska Department of Fish and Game "establishes guidelines to coordinate in managing subsistence uses of fish and wildlife resources" as a basis for cooperation among the responsible parties under state and federal laws. The purpose of the agreement reflects a federal and state commitment to *coordination* that is essential on federal public lands to "protect and promote the sustained health of fish and wildlife populations, ensure conservation and stability in fisheries and wildlife management, and include meaningful public involvement."

The State is increasingly concerned that significant decisions by the Federal Subsistence Board are inconsistent with the spirit and terms of the MOA. For example, we consider that the Board's recent Sitka rural status decision and the scheduling of a decision on customary and traditional determinations so as to effectively preempt the Secretary's directive to review and improve the process and criteria used in such decisions directly conflict with the MOA's

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Mitch Demientieff, Chairman  
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provisions regarding meaningful public involvement. In order to reduce impacts of the duplicate regulatory programs on subsistence users, the state's management of fish and wildlife resources and their beneficial uses, I urge the Federal Subsistence Board and its member agencies to review the MOA and recommit to its purposes and guiding principles. Without such a commitment, the MOA will become unworkable, with subsequent impacts on each agency's ability to fulfill its respective responsibilities.

Sincerely,



McKie Campbell  
Commissioner

Cc: Henri Bisson, State Director of Bureau of Land Management  
Rowan Gould, Regional Director of U.S. Fish and Wildlife Service  
Marcia Blaszk, Regional Director of National Park Service  
Tom Boyd, Assistant Regional Director of Federal Subsistence  
Cam Toohey, Special Assistant to the Secretary of Alaska  
Drue Pearce, Senior Advisory to the Secretary for Alaska Affairs

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Annual Report Reply



FISH and WILDLIFE SERVICE  
BUREAU of LAND MANAGEMENT  
NATIONAL PARK SERVICE  
BUREAU of INDIAN AFFAIRS

## Federal Subsistence Board

3601 C Street, Suite 1030  
Anchorage, Alaska 99503



FOREST SERVICE

FWS/FSB/OSM/SEArreplies

Dr. Dolores A. Garza, Acting Chair  
Southeast Alaska Subsistence  
Regional Advisory Council  
Marine Advisory Program  
2417 Tongass Avenue, Room 213A  
Ketchikan, Alaska 99901

Dear Dr. Garza:

This letter responds to the Southeast Alaska Subsistence Regional Advisory Council's 2005 Annual Report dated March 29, 2006. The Federal Subsistence Board appreciates your effort in developing the Annual Report and values the opportunity to review the issues brought forward concerning your region. Annual Reports allow the Board to become more aware of the issues which fall outside the regulatory proposal process and affect subsistence users in your region.

The responsibility to respond to these reports has been delegated to the Board by the Secretaries of the Interior and Agriculture. The Board has reviewed your Annual Report and offers the following responses:

### **Issue 1: Chatham Strait sockeye systems**

*The Council is concerned with the ability of Chatham Strait sockeye systems to meet subsistence needs and is frustrated with State of Alaska intransigency in assessing commercial interception of fish bound for subsistence systems or development of escapement goals and management plans for these sockeye systems. The Council requests that the Board contact the Alaska Department of Fish and Game and support the Council's suggestion for a working group. If this approach is not successful before the beginning of the 2007 season, the Council wishes to submit a petition to the Secretaries to selectively close commercial fisheries to allow enough fish to reach terminal areas to provide for subsistence needs and for adequate escapement.*

### **Response**

The Federal Subsistence Board appreciates the Council's concern about maintaining or enhancing terminal area abundance of sockeye salmon sufficient for subsistence needs and for spawning escapement in the Chatham Straits area subsistence fisheries. As the Council is aware, Federal staff attended the State of Alaska Board of Fisheries meeting in January 2006 in Ketchikan where this issue was discussed. Federal staff supported establishing a Chatham Straits

Dr. Dolores A. Garza, Acting Chair

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working group to cooperatively work toward a solution to improve terminal area abundance of sockeye salmon as requested in State Board of Fish proposal 169. The State Board of Fisheries rejected proposal 169. The Board of Fisheries has a Commercial Seine Task Force that is concerned with Chatham Strait fisheries issues; this task force may consider interception questions.

The Fisheries Resource Monitoring Program continues to invest significant funding towards collection of information relevant to subsistence fisheries for, and stock conservation of, Chatham Strait sockeye salmon. The Monitoring Program has provided funding for assessment of escapements and terminal subsistence and sport fisheries at Kanalku, Kook, Sitkoh, Falls, and Kutlaku lakes; 2007 proposals are currently under consideration for many of these systems, including Kanalku Lake. Federal staff believes that sustainability of these stocks and subsistence fisheries would be best served by development of escapement goals.

On March 28, 2006, the Fisheries Information Services division chief sent a letter to the ADF&G director of the Division of Commercial Fisheries regarding project proposals to the Monitoring Program for 2007 from ADF&G Division of Commercial Fisheries. This letter requested development of estimates of stock contribution in mixed-stock commercial fisheries for these sockeye stocks of interest and asked that the ADF&G look at the issue of commercial interception of sockeye in districts 3, 4, 9, and 12 for the purpose of reconstructing total returns and to assist in setting escapement goals. Funds dedicated by the ADF&G to this end would be considered matching funds for their proposals. Development of sustainable escapement goals will be difficult without some idea of total returns, and estimation of commercial catch contributions is a critical data gap that precludes any further assessment of production for these stocks. These data would also provide an important foundation of information for consideration by any working group tasked to address the issue of terminal area abundance.

Division of Commercial Fisheries director, Denby Lloyd, responded in an April 5, 2006 letter stating that, due to cost considerations and incomplete development of the genetics technology necessary to produce such estimates, the Alaska Department of Fish and Game would not undertake the requested work needed to estimate stock-specific commercial harvests of sockeye bound for the sockeye systems of concern to the Council.

Federal staff will continue to work cooperatively with the ADF&G and the Council to resolve the issue of estimating stock contribution of commercial harvests of sockeye from systems important to subsistence users and will report the results of further communication with the ADF&G at the Council's fall meeting in Sitka. Hopefully, a process will be in place by that time to address commercial interceptions of sockeye stocks important for subsistence users. If the Council decides that it is necessary to develop a petition to the Secretaries, Federal staff is available to provide technical assistance in preparing the Council petition.

Dr. Dolores A. Garza, Acting Chair

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**Issue 2: Pre-statehood withdrawals and marine jurisdiction**

*The Council would like further legal review to examine whether nine identified pre-statehood withdrawals include marine waters where Federal subsistence regulations should apply.*

**Response**

The proposed rulemaking for Makinati Island was published in the Federal Register on May 1, 2006 with a comment period extending through June 15, 2006. The Office of Subsistence Management contacted the Department of the Interior's Office of the Solicitor to resolve issues concerning marine waters that may have been included in the other nine areas withdrawn by Executive Orders in the pre-statehood era. On April 26, 2006 the Federal Subsistence Board received a further clarification from Ms. Sleater, attorney, Officer of the Solicitor (copy attached). She reviewed each of the other areas withdrawn by Executive Orders 8877 (six areas: Long Island, Cape Baronof, Peisar Island, Legma Island, Beaver Point, and Cape Edgecombe-Sitka Point), 152 (Forester Island), and 153 (Hazy Island). Her conclusion is that none of these pre-statehood withdrawals include marine submerged lands. In light of this solicitor's opinion, these withdrawals do not include any marine waters or submerged lands that may be subject to Federal subsistence management.

**Issue 3: Appointments to Pacific Salmon Commission Transboundary and Northern panels**

*The Council is concerned that subsistence interests have been poorly represented on the Pacific Salmon Commission Transboundary Panel and its Northern Panel. The Council wishes to recommend Council members Michael Bangs and Richard Stokes for membership on the Transboundary Panel and former Council member John Littlefield for membership on the Northern Panel.*

*The Council requests that these recommendations be made by the Federal Subsistence Board in consultation with the Alaska Department of Fish and Game. If this is an inappropriate action for the Board, the Council would like to forward these recommendations, along with justification, to the Pacific Salmon Commission.*

**Response**

The Northern Panel has two State of Alaska representatives (member and alternate) and two Federal representatives (member and alternate). The Transboundary Panel has one State member and one Federal member. The government representatives are to have fisheries management responsibility. There are four public members and four alternates on the Northern Panel, and five public members on the Transboundary Panel. The public members are to be knowledgeable of the salmon fisheries under the purview of the respective panels.

The appointments of public members to both the Northern and the Transboundary panels are made by the U.S. Secretary of Commerce from recommendations made by the Governor. The Governor directly appoints the State government representatives on the Panels, and the Secretary

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of Commerce appoints the Federal government representatives. The terms are for four years and members may be reappointed.

The seats for the public members and alternates for the Northern Panel are currently filled with terms that expire on September 30, 2009. There is currently one vacancy for a public member on the Transboundary Panel for a term that will expire on September 30, 2008. The terms of the other public members currently serving on the Panel expire on September 30, 2008.

Persons interested in serving on a panel would need to express that interest and provide appropriate information to the Governor's Boards and Commissions Office. Contact information for that office can be found at the bottom of the Panel web pages, accessed through the following links:

<http://gov.state.ak.us/boards/factsheet.php?i=223>

<http://gov.state.ak.us/boards/factsheet.php?i=204>

If the Council so desires, it may prepare a letter of recommendation to be sent through OSM to the Governor's Boards and Commissions Office in support of an interested applicant.

#### **Issue 4: Tribal consultation**

*The Council believes that the Federal Subsistence Management Program is obligated to consult with tribes in Alaska on subsistence issues affecting their members. At the present time, the rural determination process, the development of a subsistence use amounts protocol, and the closure review policy are three areas where consultation may be required. The Council requests the Board to explain how this will be accomplished.*

#### **Response**

The Federal Subsistence Board is strongly committed to a public process that includes input from everyone affected by its decisions. Indeed, the Federal Subsistence Management Program was designed to insure that the public is given every opportunity to provide this input. Nevertheless, the question of whether or not the Board is required to engage in the additional step of formal government-to-government consultation with Alaska's tribal governments is one that arises on a regular basis.

The Board recognizes that Alaska's tribes have a special, unique legal and political relationship with the Federal government as defined by the U.S. Constitution, treaties, statutes, court decisions, and executive orders. Moreover, Congress, when it adopted ANILCA, expressly recognized the importance of subsistence uses by Alaska Natives and on the cultures and traditions of Alaska's tribes. For those reasons, the Board routinely notifies Alaska's tribal entities of proposals and other actions that are important to Alaska Natives, and it actively seeks input from Alaska's tribal governments in its decision-making process. However, because Title VIII of ANILCA applies to all rural Alaskans, rather than just Alaska Natives, actions taken by the Board are not subject to formal government-to-government consultation. In addition, the existing public process provides the opportunity for anyone who wishes to voice his or her opinion to do so.

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**Issue 5: Documents and Correspondence**

*The Council requests the Board to state its operating procedure for circulating documents and correspondence to the Councils. The Council requests open circulation of material.*

**Response**

The Board is committed to openness in the administration of its ANILCA responsibilities. The Board recognizes that, with limited exceptions, the correspondence and documents received or generated by the Federal Subsistence Management Program are public documents and are available for Council and public review. These documents include materials from the Secretaries (or their designees) and from the State of Alaska that discuss, suggest, or propose changes to program policies and direction, as well as other items of Program importance. However, the Board may exercise its discretion regarding distribution of sensitive correspondence and other documents that may require special care and preparation prior to response and distribution.

Office of Subsistence Management and other Federal agency staff distribute key documents and correspondence to the Regional Advisory Councils. The volume of documents and correspondence handled by the Program precludes circulating everything to all Council members. To do so would burden volunteer Council officers and members with an excessive amount of paperwork. Lengthy documents, such as research papers and correspondence, may be placed on the OSM website. The Office of Subsistence Management will insure that Council coordinators are aware of issues facing the Federal Subsistence Management Program and that coordinators distribute to their Council officers and members copies of documents and correspondence that may be of interest to them.

**Issue 6: Rural Determination Process, Deference Due to Councils**

*The Council requests a response to the portion of its October 28, 2005 letter presenting the Council's view that its recommendations concerning rural determination are due deference under Sec. 805(c) of ANILCA.*

**Response**

The scope of Section 805(c) is an issue of legal interpretation. For that reason, the Office of Subsistence Management referred your question to the Office of the Solicitor. Their response is that, even though every Board action could be construed as affecting, in some manner, the taking of fish and wildlife on public land, Section 805(c) should not be interpreted so broadly as to render every Board action subject to deference. Congress could have simply required the Board to "consider the report and recommendations of the regional advisory councils" and ended the sentence at that point. But it chose not to do so, instead conditioning the sentence with the phrase "concerning the taking of fish and wildlife on public lands..." The canon of statutory construction requires that the phrase not be ignored, for to do so would be to render it meaningless.

The plain meaning of the phrase is that it acts as a limit on the scope of the deference requirement. The Solicitor's Office interprets the phrase to constrain deference to those types of Board actions that *directly* affect the taking of fish and wildlife, such as setting season dates.

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establishing harvest limits, and determining permissible methods and means. (This interpretation is based in part on the meaning "take", which is defined in ANILCA Section 102 to mean "to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct." Because this is a statutory definition, we can neither add to nor subtract from it in any way.) Those Board actions that have only an *indirect* effect on the taking of fish and wildlife, such as decisions concerning who is or is not eligible under Title VIII for the subsistence priority, are not subject to deference. In accordance with this interpretation, a Council recommendation concerning rural or non-rural nature of a community is not entitled to deference by the Board.

In closing, I applaud the Council's continuing diligence in raising concerns in order to maintain healthy subsistence resources and adequate subsistence harvest opportunities. I speak for the entire Board in expressing our appreciation for your efforts and our confidence that the subsistence users of the region are well represented through your work.

Sincerely,

—  
Ronald B. McCoy, Interim Chair  
Federal Subsistence Board

Enclosure

cc: SEASRAC  
Federal Subsistence Board  
Interagency Staff Committee  
Southeast Team, OSM  
FACA Coordinator, OSM

Annual Report Reply



## United States Department of the Interior

OFFICE OF THE SOLICITOR  
 Alaska Region  
 4210 University Drive, Suite 100  
 Anchorage, Alaska 99508-4626  
 Tel: (907)271-4131 Fax: (907)271-1433  
 April 26, 2006

FWS.AK.1874

TO: Mitch Dementieff, Chair  
 Federal Subsistence Board

FROM: Regina L. Siewer  
 Attorney

SUBJECT: Identification of Marine Waters Subject to Federal Subsistence Management as Requested by SE Alaska Regional Advisory Council

The Southeast Alaska Regional Advisory Council has requested a specific response to whether there are currently marine submerged lands in nine specified areas that are in federal ownership. These withdrawals were reviewed at the time this office reviewed the Makhnati Island withdrawal and it was our conclusion that the withdrawals themselves did not include marine submerged lands. For purposes of this opinion, marine submerged lands is defined as those lands under tidally influenced waters which are located seaward of the coast line (including seaward of the line between headlands closing river mouths). In order to provide closure on this issue the following specific analysis is provided.

- Executive Order 8877 withdrew, *inter alia*, "Long Island and small islands and rocks," "Cape Buronof and the small islands and rocks," "Peisar Island and the small islands and rocks," and "Legma Island and the small islands and rocks adjacent thereto." These withdrawals included only upland features, *i.e.*, islands and rocks, and not marine submerged land.
- The Mary Island Reservation in Executive Order 153 withdrew a "group of islets" located within an area delineated by a dotted line on a map and not the marine submerged lands within the area encompassed by the dotted line.
- Executive Order 152 withdrew Forester Island, Lowrie Island, Wolf Rock and adjacent rocks within areas specified by dotted lines and did not include marine submerged lands.

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- Beaver Point, Kruzof Island area was withdrawn by metes and bounds description in Executive Order 8877. The description describes land on the island and not marine submerged land.\*
- Executive Order 8877 withdrew land at Cape Edgecombe-Sitka Point, Kruzof Island area and Shaals Point area. Both of these withdrawals describe the withdrawals by metes and bounds descriptions. The official mapping of these descriptions by the Bureau of Land Management describes only uplands as being within these areas.\*

cc: Tim Obst, USDA/GC  
Tom Boyd, FWS/Reg.7

\*The descriptions use as a boundary the "mean high tide line" and often the distinction between retained federal uplands and State ownership of marine submerged lands on the Pacific Ocean is described as the line of high high tide. For purposes of this opinion, this discrepancy is being disregarded.

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

### OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

P.O. BOX 25526  
JUNEAU, ALASKA 99802-5526  
PHONE: (907) 465-4100  
FACSIMILE: (907) 465-2332

March 31, 2000

Mitch Demientieff, Chair  
Federal Subsistence Board  
Office of Subsistence Management  
U.S. Fish and Wildlife Service  
1011 E. Tudor Road  
Anchorage, AK 99503

Dear Mr. Demientieff:

The State of Alaska provides the following comments on the Federal Subsistence Board's proposed rule regarding the rural or non-rural status of the Kenai Peninsula [65 Federal Register 8673 (Feb. 22, 2000)]:

1. Both the proposed rule and staff analysis of the request to declare the entire Kenai Peninsula rural do not recommend changes to existing regulations. The State supports this outcome, and does not believe that additional rural designations are justified for the Kenai Peninsula. We concur with the staff analysis conclusion that, "At the present time there is not sufficient evidence that Seward, the aggregated Kenai/Soldotna area, or the aggregated Homer area exhibit rural characteristics to recommend that their nonrural determinations be changed to rural" (*Staff Analysis Reevaluation of 1990 Rural Determinations for Kenai Peninsula Communities*, Office of Subsistence Management, U.S. Fish and Wildlife Service, February 2000, p. 28).
2. We recommend that the Federal Subsistence Board review the rural and non-rural designations for the Kenai Peninsula following the publication of the year 2000 U.S. Census, which would be consistent with the normal decennial review schedule in regulation [50 CFR 1000.15(b) and 36 CFR 242.15(b)]. The year 2000 U.S. Census will provide accurate and updated information on population, income, employment, and ethnicity for the Kenai Peninsula, superceding the 1990 information contained in the staff analysis (*Staff Analysis Reevaluation of 1990 Rural Determinations for Kenai Peninsula Communities*, Office of Subsistence Management, U.S. Fish and Wildlife Service, February 2000, p. 7, 8, 16-19). Human populations on the roaded portion of the Kenai Peninsula may have increased by 20 percent between 1990 and 1998 (39,759 to 47,760 people), based on estimated trend ratios from the Alaska Department of Labor (*Alaska Population Overview: 1998 Estimates*, Alaska Department of Labor, June 1999, p. 118). A recent economic profile of the Kenai Peninsula also documents increasing employment and economic diversification during this time period (Neal Fried and Brigitta Windisch-Cole, *An Economic Profile: The Kenai Peninsula*, Alaska Economic Trends, 19(10), 1999, p. 3-15) (Attachment A).

**Attachment 1**  
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3. We support the Federal Subsistence Board's direction to staff to develop an improved methodology for making rural determinations, to be applied for the decennial review (*Staff Analysis Reevaluation of 1990 Rural Determinations for Kenai Peninsula Communities*, Office of Subsistence Management, U.S. Fish and Wildlife Service, February 2000, Cover Letter). We recommend that the review should cover: (1) the methodology for aggregating populations; (2) the standards used for assessing factors related to rural and nonrural areas; (3) the range of communities and areas used for comparison when making rural and nonrural findings; and (4) the scientific theory underlying the definition of rural and nonrural for the purpose of the federal subsistence statute.

The State has previously offered comments on methodology and related issues in a letter from James A. Fall to the Office of Subsistence Management dated November 17, 1999 [commenting on the *Draft Staff Analysis: Reevaluation of 1990 Rural Determinations for Kenai Peninsula Communities*, Office of Subsistence Management, U.S. Fish and Wildlife Service (Review draft of 9 November 1999)] (Attachment B). The updated staff analysis does not respond to many concerns listed in the State's comments, including the following: a lack of historic information on the development of the demographic sprawl of the Kenai roaded population produces errors in aggregation of areas (p. 1, ¶ 5); a lack of a theory of what is rural or non-rural in Alaska produces arbitrary standards for identifying rural areas (p. 3-4); a lack of inclusion of Kenai residents outside census designated places produces substantial underestimates of the Kenai population (p. 2, ¶ 3); and an incomplete set of communities considered in analysis produces bias and error in applying the federal rural standards (p. 3, ¶ 1). A new problem in the final draft is the erroneous characterization of census designated places as separated points of equal size, when they are in fact contiguous stretches of road of substantially different sizes and complex boundaries (*Staff Analysis Reevaluation of 1990 Rural Determinations for Kenai Peninsula Communities*, Office of Subsistence Management, U.S. Fish and Wildlife Service, February 2000, p. 14; the correct boundaries are shown in the *Alaska Population Overview: 1998 Estimates*, Alaska Department of Labor, June 1999, p. 117). We support further analysis of the methodology to be applied in rural determinations on the Kenai Peninsula and elsewhere.

4. We recognize that the Kenaitze Tribe has a long historic use of wild resources on the Kenai Peninsula. Like some other Alaska Native populations overwhelmed by rapid urbanization, the Kenaitze Tribe has become a subgroup within a much larger population in the Kenai-Soldotna area. Current federal or state laws do not allow for the rural subsistence priority within urbanized areas. It is not possible to designate the Kenaitze Tribe as a separate rural population because tribal members are geographically dispersed within the greater Kenai-Soldotna population. Given these legal constraints, the State of Alaska has used special educational fishery and cultural use permits as a means for recognizing and providing opportunity for cultural uses of wild resources by subgroups like the Kenaitze Tribe (5 AAC 92.034, 5 AAC 93.200). We are committed to providing opportunity for long historic resource use patterns through mechanisms like the educational fishery and cultural use permits.
5. Applying the federal standard for rural designations, we believe that existing social, economic, and community characteristics continue to justify aggregation of road-connected communities on the Kenai Peninsula and that new rural designations are not supported by the

Mr. Mitch Demientieff

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March 31, 2000

facts. As stated in comments previously submitted to the federal program on this issue, we believe a full and complete analysis of information for the Kenai Peninsula under the federal standard for rural designations would support the rural and non-rural designations for the Kenai Peninsula made by the State Joint Board of Fisheries and Game under the state's 1978 and 1986 subsistence laws, and the Joint Board's 1992 nonsubsistence area finding [Joint Board Anchorage/Matsu/Kenai Nonsubsistence Area Finding, #92-25-JB (Attachment C)]. In 1992, the State Joint Board of Fisheries and Game found that the road-connected population of the Kenai Peninsula was non-rural in character and shared a non-rural demographic, economic, and social pattern which was substantially different from the non-roaded portion of the Kenai Peninsula. The staff report to the Joint Board provides a concise summary of evidence supporting the Board's conclusion [Staff Report on Proposal No. 3, Kenai Peninsula Nonsubsistence Area, Alaska Joint Board of Fisheries and Game, November 1-7, 1992 (Attachment D)]. Detailed information on community patterns on the Kenai Peninsula (p. 124-218) and a socioeconomic theory of rural Alaska communities (p. 248-274) are presented in Robert J. Wolfe and Linda J. Ellana, *Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities*, Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, 1983 (Attachment E). As stated above, since these reports, the Kenai Peninsula's population, economy, and other non-rural characteristics noted in the reports have expanded. A complete analysis of facts would indicate that the population along the roaded portions of the Kenai Peninsula has more in common with the non-rural areas mentioned in the ANILCA legislative history, and less in common with the rural communities mentioned in the ANILCA legislative history.

6. Details in support of these comments may be found in the attached documents, which were previously submitted by the State of Alaska on this issue: a letter from Commissioner Frank Rue to the Federal Subsistence Board dated April 28, 1999 (Attachment F); oral testimony of Deputy Commissioner Rob Bosworth on November 12, 1998 before the Southcentral Regional Advisory Council in Homer (Attachment G); a letter from Commissioner Frank Rue to the Southcentral Subsistence Regional Advisory Council dated December 9, 1998 (Attachment H).

In closing, we urge the Federal Subsistence Board to adopt the staff recommendation that no changes be made to current Kenai Peninsula rural determinations. Pending the results of the 2000 census, we recommend continued analysis and refinement of the methodology to be applied to future reviews of rural determinations.

Sincerely,



Frank Rue  
Commissioner

Attachments

cc: Andy Ebona, Governor's Office

**Attachment 1**  
**Page 27 of 27**

**AFFIDAVIT OF JAMES A. FALL**

STATE OF ALASKA            )  
  ) ss.  
THIRD JUDICIAL DISTRICT    )

James A. Fall, being first duly sworn, testifies to the following, of which he has personal knowledge:

1. I am the Statewide Program Manager for the Subsistence Division of the Alaska Department of Fish and Game. Until May 2007, I was the Regional Program Manager for the Southcentral/Southwest Region, which includes the Kenai Peninsula. I held that position beginning in 1989, and I have worked for the department since 1981. I have a doctorate degree in anthropology from the University of Wisconsin-Madison. As a Program Manager for the Division of Subsistence I have responsibility for supervision of the design and implementation of studies of subsistence uses of fish and wildlife resources, and for advising the State Joint Boards of Fish and Game regarding community and area characteristics for purposes of implementation of the State’s subsistence law. I also work on issues related to the Federal Subsistence program and assist the Department with development of information for use by that program and/or the Department. In both my former position as Regional Program Manager and my current position as Statewide Program Manager, I was and am required to be

familiar with community characteristics and the commercial, sport, and personal use, and subsistence fisheries on the Kenai Peninsula and in other areas of the State and with the status of those communities under state and federal law. I have been involved in development and supervision of a number of studies involving the characteristics and resource uses of Kenai Peninsula communities.

2. In response to the regulatory notice and proposed rule relating to decennial review of rural determination published by the Federal Subsistence Board at 71 Fed. Reg. 46,416, the Department submitted comments noting that the options presented for consideration by the Board were unduly limited and asked the Board to address factual and procedural flaws in its analysis before making final decisions. *See State of Alaska Comments on Federal Proposed Rule to Revise Rural/Nonrural Areas (October 26, 2006)*. One of the issues raised by the State was the arbitrarily narrow focus of staff evaluation which unnecessarily restricted the scope of the analysis. *See, e.g., id.* at 4.

3. A specific example was the unreasonable limitation of the aggregation analysis to the three nonregulatory criteria for aggregation developed by the Staff and Board. The three criteria identified by the Board and staff during the decennial review were (1) Proximity and road accessibility, (2) Common high school attendance areas, and (3) Whether 30% or more of the working people commute from one community to another. *See 71 Fed. Reg. at 46418*. These three criteria differed from criteria previously used by the Board which included (1) Whether 15% or more of the working people commute from one community to

another, (2) Whether the communities share a common school district, and (3) Whether daily or semi-daily shopping trips are made. *See* Decennial Review of Rural Determinations, Report of June 22, 2005 at 7. While a community satisfying the three new criteria could certainly be considered “economically, socially, and communally integrated,” and thus require aggregation under the Board’s regulations, a community that does not satisfy these criteria could also be “economically, socially, and communally integrated,” and the prior criteria should be considered relevant factors for consideration. The State pointed out in its comments that other factors such as a shared history, shared economy, reliance on the same retail stores, shared patterns of use for hunting and fishing areas, and location of sources of food, supplies, and services should also be considered. *See, e.g.* State Comments at 4, 6-7.

4. In its comments, the Department pointed out that the State Joint Board had previously found the roaded portion of the Kenai Peninsula shared similar resource use patterns and were closely linked historically, economically and socially. *Id.* at 7. The Department also pointed out that the “finding of a rural status for a community only a few miles from another community found nonrural is not justified,” and indicated that the Federal Subsistence Board should consider aggregation of the road connected Kenai Peninsula.

5. The Federal Subsistence Board rejected the State’s request for further consideration of the aggregation of the road connected portion of the Kenai Peninsula without any further substantive analysis, relying entirely on the

argument that the State had not raised the issue prior to formal regulatory comment period and on the argument that aggregation would not be warranted under the three criteria used by the Board and Staff in their analysis. 72 Fed. Reg. at 25,691; *see also* Rural Determinations Decennial Review, Summary of November 27, 2006 at 44-45. As a result of this rejection, the State commissioned an analysis of the Board's determination, using Happy Valley and Ninilchik as examples, to determine whether additional information was available that could and should have been considered by the Board. While this analysis is not yet complete, my review of the preliminary draft findings, leads me to conclude both that additional information was available and that existing information should have been analyzed further.

6. My analysis of the Board's determination and available information indicates that if the Federal Staff and Board did not consider the question of whether Ninilchik and Happy Valley should be aggregated with the rest of the Kenai Peninsula Borough road system and instead focused their narrow examination only on whether these communities should be aggregated with either the Kenai nonrural area or the Homer nonrural area.

7. When the question presented is whether this information supports aggregation of Happy Valley and Ninilchik with rest of the Kenai Peninsula Borough road system there is significant information, not previously considered by Board, that would support a finding that the communities are economically, socially, and communally integrated. This additional information

includes additional evidence of integration using the three factors chosen by the Board as well as other information not captured by those criteria.

8. Significant differences in the Board's "Commuting" criterion are evident when the question is integration with the rest of the Kenai Peninsula Borough road system rather than the Homer or Kenai areas separately. As an example, for the community of Ninilchik, Alaska Department of Labor and Workforce Development (ADLWD) data from 2005 indicate that 16.2 % of Ninilchik workers are employed in the Kenai area. (This data is based in part on zip codes and thus includes workers from part of Happy Valley) A 16.2% commuting rate to Kenai would have satisfied the Board's prior related criterion but falls short of the new 30% criterion used by the Board in its analysis.

ADLWD data indicate that 5.2% of Ninilchik workers are employed in the Homer area, 14.2% are employed in unknown areas in the Kenai Peninsula, and 22.4% are employed outside the Kenai Peninsula, areas that they must access by road or by air from or through the Kenai nonrural area or the Homer nonrural area.

According to ADLWD data, only 41.2% of Ninilchik workers are employed in Ninilchik or Happy Valley, 58.8% of Ninilchik workers are employed outside Ninilchik and Happy Valley, and 35.6% are employed in other areas of the Kenai Peninsula. Thus, the Board's 30% commuting criterion is met for Ninilchik when considering the Kenai Peninsula Borough road system as a whole. Similarly, in the Happy Valley CDP, the data considered by the Board noted that 14.4% of Happy Valley workers commute to the Homer area (almost satisfying the Board's

prior related criterion), but failed to look at the overall level of commuting. Census data reveal that 84.7% of Happy Valley residents work outside of Happy Valley. While detailed information regarding place of work is not easily determinable for Happy Valley since much of the available data is aggregated based on zip code with either Anchor Point or Ninilchik, census data for Happy Valley do show that 38.9% of Happy Valley residents have a commute of 25 or more minutes (more than enough time to reach Homer or other nonrural areas), and that 16.6% have a commute of 45-59 minutes (enough time to reach Soldotna or Kenai). Thus it appears almost certain that the Board's 30% criterion is met for Happy Valley when considering the Kenai Peninsula Borough road system as a whole. (This might be confirmed through additional analysis of data from the ADLWD). These data from the census and ADLWD are consistent with the results of a study done for the Office of Subsistence Management by the Division of Subsistence (Technical Paper No. 253), that found that 33.2% of the jobs held by Ninilchik and Happy Valley residents in 1999 were located along the Kenai Peninsula road system in nonrural areas, and 10.9% were located in other areas of the state. This high commuting level is further illustrated by census data indicating the average one way commute for Ninilchik workers is 38.5 minutes and the average one way commute for Happy Valley workers is 30.1 minutes. This information does not appear to have been recognized or evaluated in the Board's determinations; federal staff indicated that commuting data was not available to the research group that helped develop the Board's initial list of

communities and areas for review. *See Decennial Review of Rural Determinations, Report of June 22, 2005 at 9.*

9. Differences in the Board's "High School Attendance" criterion are also evident for the community of Ninilchik when the question is integration with the rest of the Kenai Peninsula Borough road system rather than the Homer or Kenai areas. Ninilchik is within the Kenai Peninsula Borough School District (satisfying the Board's prior criterion), and has overlapping attendance areas with both the Homer and Kenai nonrural areas (satisfying the Board's new criterion). High school students in Clam Gulch CDP, which is part of the Kenai nonrural area, are in the attendance area for the Ninilchik High School. Further, students in a portion of the Homer non-rural area north of the North Fork Road at Anchor Point are also within the Ninilchik School attendance area. These overlaps of "nonrural" students in the attendance area of a "rural" school do not appear to have been analyzed by the Board with respect to whether Ninilchik should be aggregated with the rest of the Kenai Peninsula Borough road system. *See Decennial Review of Rural Determinations, Report of June 22, 2005 (not recommending Ninilchik as a community for analysis); Rural Determinations Decennial Review, Analysis of June 23, 2006 at 24-25, 33.*

10. Particularly striking in analyzing Ninilchik with respect to integration with the rest of the Kenai Peninsula Borough road system is business license data from the Department of Commerce, Community, and Economic Development, which shows an unusually diverse economy for a community of its

Affidavit of James A. Fall Page 7

size, and which when compared to population, shows that the Ninilchik has an high number of businesses for its population in the “Accommodations and Food Services” sector (4.97 per 100 compared to 1.54 in Kenai, 4.78 in Soldotna, and 3.34 in Homer) and in the “Arts Entertainment and Recreation” sector (5.23 per 100 compared to 1.15 in Kenai, 5.41 in Soldotna, and 3.03 in Homer), demonstrating through population threshold analysis that Ninilchik has experienced economic growth because of its integration into the road system, and that Ninilchik’s economy is dependent on the inflow cash from outside the community that results from that integration. It does not appear that the Board’s rural determination process considered business license data or the results of population threshold analysis.

11. Also striking as evidence of economic, social, and communal integration, not considered by the Board, is the fact that the Ninilchik Alaska Native Village Statistical Area (ANVSA) includes the Clam Gulch and Cohoe CDPs within the Kenai nonrural area and includes all of the Homer nonrural area. The Ninilchik Tribe administers a variety of services--including healthcare, vision and dental services, housing and energy assistance, and other programs and services--for Alaska Native and American Indian residents, (not just Ninilchik tribal members) within the ANVSA. Further the “Ninilchik Tribal Territory” as described at [www.ninilchiktribe-nsn.gov](http://www.ninilchiktribe-nsn.gov) (July 2007) includes everything in the ANVSA and the lands on the west side of Cook Inlet, stretching from the Kasilof River to Kachemak Bay--and while available data from the Board’s analysis of

FRFR-06-09 show that 333 Ninilchik tribal members reside within this larger “tribal territory,”-- that same analysis pointed out census data showing only 128 Alaska Natives or American Indians lived in Ninilchik and 46 in Happy Valley in 2006. Census 2000 data show even lower numbers with 108 Alaska Natives or American Indians in Ninilchik and 30 in Happy Valley in 2000. This significant evidence of economic, social, and communal integration of the Ninilchik Tribe with Alaska Natives and American Indians, in nearby areas of the Kenai Peninsula, including portions of the Kenai nonrural area and all of the Homer nonrural area was not considered by the Board.

12. Land ownership patterns provide further evidence of the economic, social, and communal integration of the Ninilchik and Happy Valley areas with the remainder of the Kenai Peninsula Borough road-connected area. According to data provided by the Kenai Peninsula Borough, in 2007, only 48% of improved residential parcels in Ninilchik and Happy Valley were owned by residents of the two communities; 15% were owned by other Kenai Peninsula Borough residents, 21% by other state residents, and 16% by non-residents of the state. Many of these non-locally owned parcels are occupied seasonally as recreational sites for off-road vehicle use, winter snowmobiling, sport fishing, and sport hunting. The influx of seasonal residents evidenced by these land ownership patterns supports local businesses and links Ninilchik and Happy Valley to the growing recreational sector of the Kenai Peninsula economy.

13. Analysis of Ninilchik with respect to integration with the rest of the Kenai Peninsula Borough road system also reveals other evidence of economic, social, and communal integration that appear to have not been considered as part of the Board's rural review. These factors include reliance on a common utilities for electricity, phone, and internet service; reliance on a common landfill with most of the Kenai Peninsula, reliance on common hospitals and pharmacies with Homer and Soldotna, shared commercial and sport fishing grounds and facilities, common commercial fishing patterns which involve moving vessels from port to port within the Peninsula and using common harbors on a seasonal basis, and common retail shopping and service areas. It does not appear that the Board's rural review process involved significant consideration of any of this information.

14. As shown above, even if limited to the three criteria or guidelines for aggregation recognized by the Board, *see* 72 Fed. Reg. 25,690, all three criteria provide support for aggregation of Ninilchik and Happy Valley into a Kenai Peninsula Borough road system area. Consideration of other available information would have provided further evidence that Happy Valley and Ninilchik are economically, socially, and communally integrated with other areas on the Kenai Peninsula Borough road system. This information does not appear to have been considered by the Board.

15. Based on my professional experience with issues involving Kenai Peninsula communities, I believe that much of the new information found

with regard to Happy Valley and Ninilchik is not unusual for Kenai Peninsula Borough road system communities, and that much of the new information will be paralleled in other communities if an analysis of available information is done.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this, 5<sup>th</sup> day of July, 2007.

James A. Fall  
James A. Fall, Ph.D.

SUBSCRIBED AND SWORN TO before me this 5<sup>th</sup> day of July, 2007.

Katie Sechrist  
Notary Public, State of Alaska



My commission expires: with office



**RFR 07-02**





## **Alaska Outdoor Council**

PO Box 73902  
Fairbanks, AK 99707-3902  
Ph: (907) 455-4262 / FAX: 455-6447  
aoc@alaska.net  
[www.alaskaoutdoorcouncil.org](http://www.alaskaoutdoorcouncil.org)

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July 4, 2007

**FAX TO: (907) 786-3898**

**Mike Fleagle, Chair  
Federal Subsistence Board**

Attention: Pete Probasco

**FAXED FROM: (907) 376-7197**

**Rod Arno, Executive Director  
Alaska Outdoor Council**



## Alaska Outdoor Council

PO Box 73902  
 Fairbanks, AK 99707-3902  
 (907) 455-4AOC (4262)  
 aoc@alaska.net  
 www.alaskaoutdoorcouncil.org

July 4, 2007

Mr. Mike Fleagle, Chair  
 Federal Subsistence Board  
 Office of Subsistence Management  
 U.S. Fish and Wildlife Service  
 Attention: Pete Probasco  
 3601 C Street, Suite 1030  
 Anchorage, Alaska 99503  
 E-mail: subsistence@fws.gov.

**RE: Final Rule 36 CFR Part 242; 50 CFR Part 100, Federal Register/ Vol.72, No 87. Subsistence Management Regulations for Public Lands in Alaska, Subpart C; Nonrural Determinations.**

Dear Mr. Fleagle,

Significant factual errors and procedural inconsistencies occurred in the Federal Subsistence Board (FSB) 2006 decennial review of rural determinations (proposed rule 71 FR 46416) and in your final rule making on Nonrural Determinations (36 CFR Part 242.15; 50 CFR Part 100.15). These errors of fact and of process compromise the legitimacy of that regulation.

The FSB's consistent position of refusing to work with the State of Alaska or with organizations representing non-rural Alaskans has contributed to this flawed regulatory decision.

The Alaska Outdoor Council (AOC) requests reconsideration of the final rule 36 CFR Part 242; 50 CFR Part 100, Federal Register/ Vol.72, No 87. Subsistence Management Regulations for Public Lands in Alaska, Subpart C; Nonrural Determinations. Posted in the Federal Register on May 7, 2007.

Population size is a fundamental distinguishing characteristic between rural and nonrural communities. Under the current programmatic guidance in Federal subsistence regulations a community with a population of more than 7,000 shall be presumed nonrural, unless such a community or area possesses significant characteristics of a rural nature. The U.S. 2000 census lists Sitka's pop. at 8,835, well above the cutoff criteria.

## AOC request for Reconsideration of Nonrural Determinations.

Page 2

Nowhere in regulation does it say "if the population increase in the last decade is only 3% it is not necessary to consider the significant characteristics found in 36 CFR 242.15 or 50 CFR 100.15(a)(5)". I attended the December 6-7, 2005 FSB meeting and heard individual residents of Sitka and the Southeast Regional Advisory Council (RAC) give testimony recommending that Sitka be removed from the list of communities for further analysis. The FSB's vote to eliminate further review of Sitka's rural determination was an inconsistent interpretation and application of the guidelines in federal regulations.

Sitka's rural determination should be reconsidered.

The FSB's action to change Adak's status from nonrural to rural is another example of inconsistent interpretation and application of the guidelines in federal regulations for determining rural or nonrural status. Adak's population decline of 94%, because of the closure of the military base, which had no documented characteristics of a rural nature, does not cause the remaining 6% of the population to be federally qualified subsistence users.

An adequate analysis of characteristics under federal regulation 36 CFR 242.15(a)(5)(i) or 50 CFR 100.15(a)(5)(i) *Use of fish and wildlife* could not have been properly made by the FSB under the circumstances. Adak's population was military personal and support staff living in a nonrural area; the area remains nonrural, and the remaining population is nonrural residents.

Adak's nonrural status should be reinstated.

The checkerboard rural/nonrural federal determinations on the Kenai Peninsula are by far the most glaring example of the failure of the FSB to consistently and adequately apply 36 CFR 242.15 or 50 CFR 100.15 to federal public lands in Alaska.

Under the applicable federal regulations there are no substantive differences among the communities and areas that are road connected on the Kenai Peninsula that would allow the FSB to legitimately designate some as rural and some as nonrural.

The FSB can not legitimately give residents living between milepost 125 and 150 on the Sterling Highway a subsistence priority simply because a particular special interest group keeps demanding it. Bear in mind that Title VIII of ANILCA and the Federal subsistence management system established to implement it are supposed to be racially neutral. The Ninth Circuit Court in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228 (9<sup>th</sup> Cir. 1999) has concluded that Title VIII of ANILCA is not Indian legislation for the purpose of statutory construction.

AOC requests the FSB reverse the decision to retain rural status of the communities and areas of Ninilchik, Happy Valley, Cooper Landing and Hope.

AOC request for Reconsideration of Nonrural Determinations.

Page 3

The Alaska Outdoor Council (AOC) is a statewide organization representing 48 Member Clubs and 2,500 individual members totaling 10,000+ Alaskans. Our members hunt, fish, and trap on federal public lands throughout the state. AOC has advocated for conservation of natural resources and equality in access and use of those natural resources since before statehood.

Thank you for your consideration of AOC's comments.



Rod Arno  
Executive Director  
Alaska Outdoor Council  
(907) 841-6849

Cc: The Honorable Sarah Palin, Governor of Alaska  
The Honorable Ted Stevens, U.S. Senator  
The Honorable Lisa Murkowski, U.S. Senator  
The Honorable Don Young, U.S. Congressman  
Talis Colberg, Attorney General, State of Alaska  
Denby Lloyd, Commissioner Alaska Department of Fish & Game

**RFR 07-03**





Mr. Michael R. Fleagle, Chairman  
Federal Subsistence Board  
Office of Subsistence Management  
3601 C Street, Suite 1030  
Anchorage, AK 99503  
[subsistence@fws.gov](mailto:subsistence@fws.gov)

June 30, 2007

Dear Chairman Fleagle,

Please find enclosed a formal request for reconsideration concerning the Rural and Non-Rural Determinations for the Kenai Peninsula.

In accordance with CFR 100.20 the Kenai River Sportfishing Association is requesting the Federal Subsistence Board reconsider their recent actions regarding 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C*.

We believe there were significant procedural and informational issues that were overlooked. In our request we detail the issues into three primary areas of concern:

- Inconsistent Use of Federal Regulations and Selective Use of Criteria
- Inappropriate Use of Executive Session, and
- Data Concerns

We hope the Federal Board will choose to reconsider this past action in an effort to make the best possible decisions regarding Federal Subsistence Management on the Kenai Peninsula.

Sincerely,

Ricky Gease  
Executive Director



*Dedicated to preserving the greatest sportfishing river in the world, the Kenai.*

PO Box 1228 • 224 Kenai Ave., Suite 102 • Soldotna, Alaska 99669  
Phone: (907) 262-8588 • Fax: (907) 262-8582 • [www.kenairiversportfishing.com](http://www.kenairiversportfishing.com) • E-mail: [info@kenairiversportfishing.com](mailto:info@kenairiversportfishing.com)



**Request for Reconsideration of the Rural and Non-Rural Determinations for the  
Kenai Peninsula  
Submitted by  
Kenai River Sportfishing Association**

In accordance with CFR 100.20 the Kenai River Sportfishing Association is requesting the Federal Subsistence Board reconsider their recent actions regarding 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C*.

**1) Name and Mailing Address:**

Kenai River Sportfishing Association  
PO Box 1228  
Soldotna, AK 99669  
(907) 262-8588  
ricky@kenairiversportfishing.com

**2) Requested Action:**

Reconsider and reverse the actions taken by the Federal Subsistence Board designating the communities of Hope, Cooper Landing, and Ninilchik as rural as described in Federal Register/Vol. 72, No. 87/ Monday May 7, 2007 Rules and Regulations. 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C*.

**3) Statement of Adverse Impact**

Application of the Federal subsistence priority within the Kenai Peninsula is a relatively new phenomenon that will have potentially huge economic and social impacts to the residents of the Peninsula as well as those visiting the Kenai Peninsula. Kenai Peninsula fisheries sustain the vast majority of recreational fishing and Personal Use fishing opportunity in Alaska as well as long term historic commercial fisheries. These uses are cornerstone to the regions economic base.

We are concerned that the application of the Federal Subsistence Priority, if applied inappropriately and without complete adherence to Federal regulations and policy, will have disastrous effects on the fishery resources of the Peninsula, the economy of the region, and the cultural fabric of the communities within the Kenai Peninsula. We are therefore vigilant that as the application of this program takes place that Federal Subsistence Board members adhere to applicable legal requirements, policy, procedure and legislative intent.

Carving up the Peninsula into communities which have been designated rural and non-rural and the granting of a subsistence priority to those communities designated rural carries with it the intent that in times of resource shortage subsistence use will be granted a priority over other uses. If applied hastily, and outside the scope of the existing law, the Federal subsistence priority will be misplaced having unintended consequences that are catastrophic. Presently, the FSB has no formal closure policy and previous actions by the FSB in closing other fisheries within the State have not been consistent. We believe the Board must be judicious in its determinations of Rural and Non Rural as each time the FSB grants C&T for a community that action carries with it the potential to restrict other uses. In the case of the Kenai River, the largest sport fishery for salmon in the world, those consequences can have catastrophic political, social, and economic consequences.

#### **4) Detailed Statement of the Facts**

According to 50 CFR 100.15 Rural determination process, the Federal Board shall determine if an area or community in Alaska is rural. A rural determination may be made only for areas with a population of 7,000 or less. An areas characteristic shall be considered in evaluating a community's rural or non-rural status. There are some loosely described characteristics that may be considered which include the use of fish and wildlife, development and diversity of the economy, community infrastructure, transportation and other uses. Additionally, according to subparagraph (6) states that "Communities or areas which are economically, socially, and communally integrated shall be considered as an aggregate".

We believe there were significant deviations from prescribed Administrative Process that make the Boards actions in this matter void and worthy of reconsideration.

##### **A. Inconsistent Use of Federal Regulations and Selective Use of Criteria**

We have reviewed the 2006 analysis of Rural Non-rural issues presented by OSM and believe the federal staff has arbitrarily limited the scope of the evaluations to favor a rural decision for selected the communities on the Kenai Peninsula. The analysis clearly omitted application some of the criteria and the exclusion, intentional or not, could have the effect of dramatically altering the Boards final action.

Additionally, we believe the Board has not used a consistent process for each of the communities when making decisions regarding rural status. In some cases the Board has used empirical information as the basis of its decision and in other cases the board has substituted public testimony as the basis for the decision. The lack of consistent approach gives the appearance of cherry picking information to help support a predisposed decision.

These oversights can be corrected by reconsidering the previous action, aggregating communities, and deliberating the issue while making full use of all five applicable criteria.

##### **B. Inappropriate Use of Executive Session**

Several informal meetings were held within the state and attended by OSM staff where discussions concerning the rural non-rural process took place. Products from these meetings apparently resulted in the formation of criteria and process regarding how the Federal Board would administratively navigate through its decisions concerning rural non-rural determinations for the Kenai Peninsula. Most notably was a session occurring on June 22, 2006 where the Board met to develop a list of communities and areas it believes to be non-rural.

There was insufficient public notice of these meeting as no notice was published in the Federal Register. This in itself is a significant breach of process. The public was excluded from hearing the basis for the Board's decisions on which communities to continue to research and which to omit.

This is a complex process in and of itself. The complexity limits meaningful public involvement. Public involvement is further thwarted when the Federal Board conducts business in inadequately noticed meetings such as this.

This procedural error will be corrected by reconsidering the actions related to rural non-rural and conducting the deliberations in an open public forum with full public notice.

### **C. Data Concerns**

We are extremely concerned that the Board action was apparently based on information that lacked relevant and updated information. The June 23, 2006 analysis provided by OSM staff fails to incorporate comparative changes within communities occurring between 1990 and 2000. The Federal analysis minimizes the changes that have occurred in the past decade and makes little specific reference to specifically what has changed within communities and what has not so that a thoughtful and informed decision can be arrived at by the Board. This oversight is clearly counter to the Board's intent and regulatory guidelines.

There is a recurrent problem with the way the Federal staff are addressing the issue of aggregation of similar communities. The Board action gives the appearance of selectively grouping communities in a manner that arrives at predetermined outcome. Specific criteria once used were selectively omitted from the analysis. For example community residents behavior relative to securing goods and services (shopping) was once considered relevant, has now been dismissed. We believe that the location of food sources, supplies, and services, are elemental when describing the relationship of one community to another.

One major difficulty in rural determinations for Kenai Peninsula communities is how to address subgroups within communities. It is very apparent that the staff analysis concerning the issue of rural determination has placed a very large weight to those factors favoring a rural determination for those sub groups at the expense of looking at the larger picture. The result has been that a community found rural is adjacent to another found non-rural and the difference between these communities is unclear and not documented within the record of decision.

The "analysis" provided by federal staff is full of inconsistencies, errors and omissions. It is intellectually difficult for any objective person to clearly see the distinction between communities deemed to be rural and those deemed to be non-rural based on the information provided by Federal staff, and a review of the Board's record of decision.

The flaw in the analytical procedure has been pointed out by the State of Alaska. The state has recommended the analysis be revised to address deficiencies and failures to consistently consider and present changes that have occurred in the previous decade and address the specific omission of information related to fish and wildlife uses between communities.

The informational errors may be addressed by reconsidering the previous action and requesting Federal staff provide a complete and updated analysis with specific reference to how and on what basis communities are to be considered aggregated.

**5) Requested Action**

Reconsider and reverse the actions taken by the Federal Subsistence Board designating the communities of Hope, Cooper Landing and Ninilchik as rural as described in Federal Register/Vol. 72, No. 87/ Monday May 7, 2007 Rules and Regulations. 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C.*

**\*END\***



**RFR 07-04**





# ALASKA FLY FISHERS

Winners of the 1994 McKenzie Cup



Chair, Federal Subsistence Board  
c/o US Fish and Wildlife Service  
ATTN: Peter J. Probasco  
Office of Subsistence Management  
3610 C Street, Suite 1030  
Anchorage, Alaska 99503

5 July 2007

RE: Final Rule 36 CFR part 242; 50 CFR Part 100, FR Vol 72, No. 87, 7 May 2007  
Subsistence Management Regulations for Public Lands in Alaska, Subpart C;  
Nonrural Determinations

The Alaska Fly Fishers request Reconsideration of the subject final regulations, and particularly to reverse the decision to retain rural status for the communities of Cooper Landing, Hope and Ninilchik/Happy Valley.

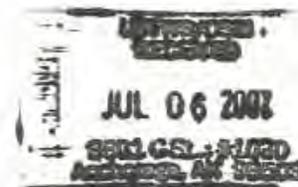
#### RATIONALE:

The Federal Subsistence Board did not systematically and thoroughly evaluate (1) all the communities based on changes in population in the 2000 census under existing federal criteria, (2) did not conduct a fair and even-handed evaluation of all the characteristics described in the federal determination process, and (3) did not consistently apply the same basis for considering aggregation of communities or areas which are economically, socially, and communally integrated, as required under existing federal criteria.

The Board selectively evaluated data from the 2000 general census for only those communities recommended for reevaluation by the federal staff, recommendations which selectively applied characteristics to some communities, ignoring similar characteristics as they applied to other communities. In addition, criteria were selectively applied or presented in the federal analysis so that the Board relied on omissions, inconsistencies and mistakes to support its rural and nonrural determinations. The Board was, as a result, unable to evaluate factual and unbiased information during its deliberations and was instead forced to rely on analytical data which was neither systematic nor complete.

We particularly note the Board failed to consider changes in the social, economic and communal composition along the Cook Inlet coast of the Kenai Peninsula. All these communities are closely linked through business ties, a roadway system equal to or superior to anything in the state save that of the Anchorage Bowl/Matanuska Valley, even a common utilities infrastructure. There seems to be no defensible rationale to justify the finding of Cooper Landing and Happy Valley/Ninilchik and Hope to be rural.

  
Robert J. Wrentmore  
President  
Alaska Fly Fishers

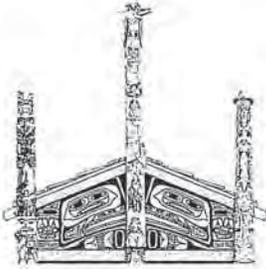


ALASKA FLY FISHERS • 200 W. 34TH AVENUE, SUITE 1233 • ANCHORAGE, ALASKA 99503



**RFR 07-05**





# Ketchikan Indian Community

## Office of the KIC Tribal Council

2960 Tongass Avenue — Ketchikan, AK 99901

(907) 228-4941 Phone

(907) 228-5224 Fax

[www.kictribe.org](http://www.kictribe.org)

### **Request for Reconsideration of the Federal Subsistence Board's Decision to Classify the Ketchikan Area as Non-Rural 72 Fed. Reg. 25688 (May 7, 2007)**

#### **I. INTRODUCTION**

The Federal Subsistence Board (hereinafter 'the Board') published its final rule regarding subsistence management regulations for public lands in Alaska on May 7, 2007. 72 Fed. Reg. 25688-25697 (May 7, 2007). This published rule maintains a 'nonrural' determination for the Ketchikan area, while simultaneously aggregating Saxman into the Ketchikan nonrural area. 72 Fed. Reg. 25697 (May 7, 2007).

Any aggrieved person may file a request for reconsideration with the Board within sixty (60) days of the date of publication. 50 CFR § 100.20 (2006). Comes now:

Richard Jackson, President and Merle N. Hawkins, Secretary  
(for, and on behalf of)  
Ketchikan Indian Community Tribal Council  
2960 Tongass Avenue  
Ketchikan, AK 99901

And hereby files this timely Request for Reconsideration (RFR) of the above-cited regulation determining the Ketchikan Area as nonrural for purposes of the federal subsistence priority under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). The Ketchikan Indian Community (hereinafter, KIC) posits that the Board's selection of information, interpretation of information, applicable laws and regulation was in error or contrary to existing law. Further, new information is now available regarding Ketchikan's economic situation which we urge the Board to review. Specifically, the Board's actions in question include maintaining Ketchikan as a nonrural community as well as grouping Pennock Island, parts of Gravina Island and the road system connected to Ketchikan. Further the Board's actions grouped Saxman with Ketchikan and changed Saxman's status from rural to nonrural. Because these actions significantly impact KIC, KIC is an aggrieved party under 50 C.F.R. §100.20 and therefore eligible to file this request for reconsideration with the Board.

KIC is a federally recognized tribal government formed pursuant to the Indian Reorganization Act. The Tribal Council represents a Tribe of 5,161 members, mostly of Tlingit, Haida, and Tsimpsian heritage.

See ARTICLE III, TRIBAL CONSITUTION (1939). KIC's mission is to provide for the general well being of all tribal members and beneficiaries through the various programs and services provided by the Tribe. See ARTICLE V, TRIBAL CONSITUTION (1939). To this end, KIC maintains a number of programs related to the traditional harvest and use of our subsistence foods and resources. Our way of life is essentially connected to the land, ocean, and the plants and animals that share this place with our Tribe. Hunting, fishing, and gathering provide KIC tribal citizens, as well as Ketchikan's non-Native population, with a protein and vitamin-rich source of food. It is critical to understand that in our way of life, reliance on subsistence foods and resources is not only a matter of health, but also a matter of economic necessity. Any number of factors, including great distance from other food sources and concomitant shipping prices, an unprecedented rise in fuel prices over the past few years, and decreasing living wages, make Ketchikan's Native and non-Native community physically and economically dependent on traditional subsistence resources.

It is also important to understand that 'subsistence' is a non-Native word, and it does not capture KIC's traditional way of life. The word subsistence often suggests poverty or bare survival. As testimonial given at Board meetings details, while subsistence is increasingly essential due to the economic downturn in Ketchikan, at its core, subsistence is a rich, vital, and fulfilling way of life. Subsistence gathering activities within Ketchikan build a network of social relationships and division of labor of harvesting, preparing, and distributing our wild foods. The spirit of sharing is central to a successful harvest, with both Natives and non-Natives sharing portions with extended family, Elders, widows, and others who cannot obtain their own supply. This way of life is central to Ketchikan's rural character, sense of community, and spiritual well-being. For this reason, among others, KIC runs a youth camp specifically designed to pass on our traditional harvest practices and values to the next generation. Prioritized access to subsistence foods and materials is necessary not only for survival, but will preserve the foundation of our culture and way of life.

KIC citizens rely heavily upon traditional foods as a source of healthy diet, healthy culture, and important supplement to the family's budget. Customary and traditional foods are about one-third higher in protein than high priced store-bought domesticated red meats, and the oils we use from fish and sea mammals are healthy and efficient sources of energy for a people residing in a cold northern marine climate. Ketchikan's wild foods are free of the pesticides, hormones, and chemical additives found in commercially processed foods. The customary and traditional subsistence foods are essential to the physical health of our people, and medical research indicates that changes away from the traditional subsistence diet is greatly responsible for the disturbingly high rate of diabetes, heart disease, obesity, and cancer among our people.

The traditional subsistence lifestyle is of critical physical, economic, social, cultural, and spiritual importance to KIC in particular, and the people of Ketchikan in general. For this reason, the Board's decision not to accord a subsistence priority to the Ketchikan area directly injures the physical, economic, social, cultural and spiritual welfare of KIC. The Board's decision places KIC's deep rooted values and needs in competition with commercial and sport interests, which are given equal value and footing. The Board's decision places our health, our economy and our way of life in direct danger. For this reason, KIC is an 'aggrieved party' eligible to submit this RFR. 50 CFR § 100.20 (b),(c)(3).

## **II. The Board's Interpretation of Information, Applicable Law, and Regulation Is In Error**

### **A. Title VIII of ANILCA Is Indian Legislation and Remedial Legislation, Subject to Canons Giving Broad Interpretation to its Mandate. The Board Interprets Title VIII of ANILCA Narrowly, Illegally Restricting KIC's Access to Subsistence Resources**

Congress was mindful of the inherent hunting and fishing rights of Alaska Natives and their importance to our way of life. Congress intended that after the Alaska Native Claims Settlement Act (ANCSA), the Secretary of the Interior and the State of Alaska would protect the subsistence needs of Alaska Natives:

The Conference Committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary [of the Interior] through exercise of his existing withdrawal authority . . . . The Conference Committee expects both the Secretary and the State [of Alaska] to take any action necessary to protect the subsistence needs of the Natives. Senate Report no. 581, 92<sup>nd</sup> Congress, first session 37 (1971). See 1971 USCCAN 5070, 5174-75.

Unfortunately, both the Secretary of the Interior and the State of Alaska failed to heed Congress and protect access to subsistence resources. In 1980, in a direct effort to remedy the lack of protection for the subsistence way of life, Congress passed Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), which states:

In order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority of Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Natives and non-Native rural residents. ANILCA, 16 USCA §§ 3111-3126, 3111 (subparagraph 4) (2006) (emphasis added).

When passing Title VIII of ANILCA Congress was primarily concerned for the Alaska Native traditional subsistence way of life, stating that “the continuation of the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional, and cultural existence” and that

It is the intent of the bill in general, and the subsistence title in particular, so far as possible to allow the Alaska Native people to choose for themselves the direction and pace, if any, of the evolution of their own culture. See 16 USCA § 3111 [subparagraph 1]; 126 CONG. REC. 29, 279 (1980) (Statement of Representative Udall).

See *Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9<sup>th</sup> Cir. 1994) (citing 16 U.S.C. § 3111(1) regarding “the clear congressional directive to protect the cultural aspects of subsistence living”); also *Williams v. Babbitt*, 115 F.3d 657, 666 (9<sup>th</sup> Cir. 1997); *United States v. Alexander*, 938 F.2d 942, 945 (9<sup>th</sup> Cir. 1991). Despite a poorly wrought political compromise to make subsistence a “rural” issue, it is important that the Board remember to what it owes its very existence. Congress reached for its constitutional authority over Native affairs to remedy a flaw in the Alaska Native Claims Settlement Act. There would be no federal subsistence program if not for the need to protect Native subsistence rights. The Board often cites to *dicta* in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223 (9<sup>th</sup> Cir. 1999) (Analysis of Section 810 of ANILCA – Public Land Use Decisions) for the proposition that the canons of federal Indian law are not applicable to their rural determinations. However, KIC is compelled to remind the Federal Subsistence Board of the roots of ANILCA and the historical foundation for the subsistence priority. As discussed more thoroughly below, the Board has taken a narrow view of ANILCA. Beyond ANILCA as Indian legislation subject to liberal interpretation in favor of subsistence rights, Title VIII of ANILCA is clearly remedial legislation subject to canons of interpretation requiring the Board to take an expansive view of the subsistence priority. Remedial legislation seeks to “affect a remedy as distinguished from those [statutes] which affect or modify a

substantive right or duty". *Perkins v. Willamette Industries*, 542 P.2d 473, 475 n.1 (Oregon 1975); see also *Sekaquaptewa v. MacDonald*, 619 F2d 801, 808 n.6 (9<sup>th</sup> Cir. 1980) (remedial legislation is that legislation which creates a "private remedy for wrongs"). ANILCA is remedial because as discussed above regarding its legislative history, it was passed to remedy unlawful infringements on Native and non-Native subsistence rights in rural Alaska. As remedial legislation, ANILCA is entitled to liberal interpretation in order to effectuate its purpose. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 504 (1999) (citing to *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) for the proposition that "it has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.'"). Instead of broad and liberal construction in favor of protecting access to subsistence resources, the Board interprets their mandate narrowly, and unduly restricts KIC and Ketchikan's rural resident's access to subsistence resources.

**B. The Board Failed to Accord Deference to the Recommendations of the Southeast Regional Advisory Council (SERAC) and Failed to Provide Written Findings to the SERAC In a Timely Fashion**

Section 805(c) of ANILCA requires deference to Regional Council recommendations regarding 'taking' of fish and wildlife on public lands. See also 50 CFR § 100.4 [Expansive definition of 'Taking']; 50 CFR §§ 100.10(e), 100.18(a)(4) [Requiring prompt written findings when not deferring to a Regional Council recommendation]. The Board's rural determination decisions directly impact a community's ability to undertake any subsistence hunting and fishing under Federal subsistence regulation. Without a rural classification, KIC and Ketchikan are forced to 'take' fish and wildlife pursuant to State of Alaska "sport" or "personal use" regulations. The Board's determination directly impacts KIC's and Ketchikan's taking of fish and wildlife, and unduly restricts our way of life to the confines of urban uses of fish and wildlife.

Much like Customary and Traditional use proposals, the C&T findings allow, or disallow the possibility that any subsistence 'taking' may occur. With this in mind, the Board must give deference to the Regional Advisory Council's authority to make recommendations regarding Ketchikan's rural determination. See ANILCA 805(c), 50 CFR §§ 100.10(e), 100.18(a)(4), and 100.11(c)(ix). The deference for the Regional Advisory Council stems directly to Congress' intent, expressed in ANILCA Section 801(5) "that an administrative structure be established for the purposes of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management." (Emphasis added). The SERAC has the local knowledge that is vital to a proper understanding of the facts and application of criteria when making a determination for the community of Ketchikan. The local and regional advisory bodies are the rightful foundation of the federal subsistence management program.

Beginning in October of 2005, and concluding in October of 2006, the SERAC made recommendations that the Board make serious consideration of re-classifying Ketchikan as rural. The SERAC recommendations were based on the facts as presented by overwhelming testimony and more recent subsistence harvest data supporting a rural determination for the communities of Ketchikan and Saxman.

The Board's decision fails to accord deference to the SERAC, and the Board failed to provide timely written findings to the SERAC detailing why their recommendations were not supported by substantial evidence, violate recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. 50 CFR §§ 100.18.

### **III. The Board's Interpretation of Information and Data is In Error**

A community that has more than 2,500 people, may be classified as "rural" if the community "possesses significant characteristics of a rural nature (50 CFR § 100.15 and 36 CFR § 242.15). Recognizing that defining a rural community is not an easy task, the Board utilizes several factors that they *may* consider in making a rural determination including, but not limited to: (i) use of fish and wildlife, (ii) development and diversity of the economy, (iii) community infrastructure, (iv) transportation, and (v) educational institutions (*Id.*) While these criteria may provide some semblance of objective decision points for a rural determination, the nature of a place is of equal importance. The legislative history of ANILCA explicitly states that the direction of economic development and rural character of a community is not static, and changes over time. U.S. Senate 1979: 223. When determining the nature of Ketchikan, the Board erred by failing to consider all of the new and relevant information presented since the last ANILCA classifications.

#### **A. Use of Fish and Wildlife**

In making its final rule, the Board found that "harvest of subsistence resources in the Ketchikan Area is lower than is characteristic of rural communities" 72 Fed. Reg. 25688, 25695 (May 7, 2005). KIC takes issue with this statement on a number of levels:

First, it is unclear what information the Board was actually using to make this finding. Beginning with the original non-rural classification in 1990, household subsistence use has not been historically collected, as funding and research was diverted to the original "rural" communities. In lieu of actual research and real information, the only information ever associated with Ketchikan came from ADF&G harvest ticket information for salmon and deer only. The 2000 ADF&G information estimated Ketchikan's 1990 subsistence per capita use at 33 pounds. In January 2006 the KIC received funding from the Bureau of Indians Affairs to conduct a survey of Ketchikan's Native and non-Native households. This survey, led by Dr. Dolly Garza, PhD. University of Alaska, and has been verified as being performed through accepted and established survey protocols. With a survey population of 242 families, The KIC study found per capita subsistence harvest in Ketchikan was 90.8 pounds - orders of magnitude greater than the earlier ADF&G estimate. *See Executive Summary: Ketchikan Household Harvest Survey* (Garza et. al., May 15, 2006). It is important to recognize that the new KIC survey did not include residents of Saxman, as at the time it was not grouped with Ketchikan for purposes of subsistence use. The survey also did not include residents of Ketchikan who live off the paved road system (Gravina Island for example). Further, a more accurate study needs to be performed with a two strata design to capture the major expert harvesters (most often from the tribal community) who represent a larger percentage of take, in order to distribute to others in the community. In short, Ketchikan's changing status over the years has been largely ignored by the Board and ADF&G. More accurate information is needed to discern the significant changes to Ketchikan since the 1990 classification. While some new information from the KIC study was presented to the Board, a careful review of the Board's decision-making transcript and final rule does not indicate that the updated data was considered at all by the Board.

Second, because Ketchikan has historically been designated an urban community, it is inappropriate to compare harvest levels in Ketchikan to that of rural areas. (*See Decennial Review June 2006*, largely adopted by the Board as its findings in the final rule). The surprisingly different harvest data derived in the KIC study begs the question: How many additional pounds of wild resources Ketchikan residents would use if able to harvest pursuant to the access provided by the federal subsistence regulations. Because Ketchikan has been confined in a regulatory box for the past 17 years, it is improper for the

Board to compare Ketchikan's subsistence use data to that of historically rural communities that are free to engage in the federal subsistence harvest. Even given Ketchikan's current restrictions under the State of Alaska's sport/personal use regulations, according to the KIC data use of fish and wildlife in Ketchikan is significantly higher than other urban communities as well as some rural communities including Skagway (48 pounds per capita); Metlakatla (70 pounds per capita) and has similar harvest rates as numerous rural communities in South-central Alaska including Talkeetna, Trapper Creek, Cooper Landing, Gulkana and Glennallen which all have per capita harvest rates of less than 100 pounds.

Third, subsistence use in Ketchikan has been increasing in response to harder economic times with the closure of the Pulp Mill and its stream of steady employment. The 2000 ADF&G estimate of 33 pounds was for salmon and deer use in 1990. Using the this same data set in the KIC study, salmon and deer only, current use of these resources is 73 pounds - more than double use of fifteen years ago. With the economic downturn in Ketchikan, both Native and non-Native families are becoming increasingly reliant on fish and wildlife resources for significant percentages of their protein intake.

Lastly, on the one hand the Board has chosen to group Ketchikan with Saxman and the outlying areas, yet the data related to fish and wildlife use fails to take into account use by these previously rural designated communities. The Board has recognized that use of subsistence resources by Saxman residents (217 pounds per capita) is much greater than that of Ketchikan as well as most other rural communities. We strongly support Saxman's position that the Board erred in aggregating Saxman and Ketchikan together. Regardless, the Board can not have it both ways. If the Board is to aggregate the communities, then it must consider the use of fish and wildlife resources aggregately using both the quantitative values (adjusted overall use to include the high use of resources by Saxman residents) as well as the qualitative importance of such activities to the Saxman community. The Board failed to recognize this changed and enhanced use of subsistence resources in its rule, instead choosing the vague and unfounded statement "Harvest of subsistence resources in the Ketchikan area is lower than is characteristic of rural communities."

Subsistence foods play an especially important role in meeting protein demands of local residents. Wild foods are also healthy and natural promoting better physical well being than many store bought processed foods, an important issue for a community facing health concerns such as diabetes and obesity. More than 80% of households Ketchikan households surveyed use at least one wild resource totaling more than 1 million pounds of fish and wildlife each year. (KIC Harvest Survey 2006) Compelling public testimony was presented to the Board indicated that an increasing reliance on subsistence foods was in part due to the decline in the cash economy. Should Ketchikan be properly re-classified as rural, consumption of traditional foods will increase, and in exchange, less healthy and expensive processed store bought food will decline. The Board erred in finding that use of subsistence resources in Ketchikan is indicative of an urban community.

#### **B. Development and Diversity of the Economy**

As previously stated, the rural character of a community is not static, and is subject to change over time. Nowhere is this more true than with the community of Ketchikan. The Board failed to properly consider the changing economic conditions of Ketchikan in its final rule. Ketchikan's original non-rural determination was made at the height of the logging and wood products industry in Southeast Alaska, and the direction of this community was to be urban. However, the timber industry has diminished substantially, especially in Ketchikan. In its decision, the Board significantly underestimated the impact of the closure of the pulp mill and its impact on the health of the Ketchikan economy. In fact the Board

deliberations show that at least some board members were under the false impression that Ketchikan's economy is more diverse than that of Kodiak and is "not going backwards"(See Statements of Denny Bschor 12/13/06 Board meeting). Further, the Board in making its finding basically dismissed the closure of the pulp mill stating, "Although the pulp mill closed, there is still diversity in the economy" including tourism, fishing and fish processing 72 Fed. Reg. 25695 (May 7, 2007). Given the serious implications of the mill closure and the challenges with the tourism and seafood industry detailed below, the Board's decision is unsupported by the actual facts.

Ketchikan was the center for industrial logging at the time ANILCA was passed. The Ketchikan Pulp Corporation (KPC) Mill was constructed in Ward Cove in 1954. For close to fifty years the KPC mill and a similar mill in Sitka drove the federal timber program on the Tongass National Forest and employed a significant number of full-time well paying jobs in the communities. The Sitka mill closed in 1993 and the KPC mill closed down in March 1997 bringing pulp production in the region to an end. According to the U.S. Forest Service direct employment in the wood products industry declined dramatically from its peak of 3,543 jobs in 1990 to 450 jobs in 2004. Much of this job loss was associated with the closure of the Sitka and Ketchikan mills which together accounted for 899 jobs in 1990 (USFS 2007).

Closure of the KPC mill, Ketchikan's largest employer, resulted in the direct loss of 516 jobs, many of which were high paying, year round benefited jobs. The KPC closure did not only impact those directly working at the mill but had a domino effect on the regional demand for timber, the market for wood chips, and in turn jobs at sawmills and in the logging sector (Alaska Trends 2001). While employment in the wood products sector declined in all boroughs during the 1990s, the largest loss was felt in the Ketchikan Gateway Borough which lost 1,046 jobs (USFS 2007). Ketchikan has also lost many of the Federal government jobs that managed timber harvest in the Tongass National Forest; these jobs are typically not factored into calculations of job loss in the wood products industry. Further, this decline has not ended as "employment decreases tend to lag behind decreases in production, and further declines in employment levels are possible even if there are no further changes in [timber] harvest levels" (Id.). Lastly, the loss of the mill and its associated jobs has meant a significant decline in Ketchikan's tax base, a rise in rental unit vacancy and a decline in real-estate sales (Alaska Economic Trends 2001.)

Ketchikan thought it would see its wood products industry revived a few years back when Gateway Forest Products lumber and veneer facilities opened on the former site of the KPC Pulp Mill in Ward Cove. However, the hope was quickly diminished when Gateway Forest Products filed for bankruptcy protection in February 2002. The sawmill was sold and dismantled shortly thereafter.

It is clear the closure of the KPC pulp mill and the trickle down effect this closure had on the larger wood products industry in Ketchikan was a substantial impact to the community resulting in the loss of good paying benefited jobs that have not been replaced. Between 1996 and 1999 Ketchikan's employment declined by 7% compared to a flat Southeast regional change and a 5.3% statewide change (Alaska Economic Trends 2001). It is not just employment numbers that have changed, but wages as well. Prior to the closure of the KPC mill, Ketchikan wages were on average \$160 more than the Southeast regional average. Yet, after the mill closure Ketchikan's monthly wages dropped below the statewide average and are now comparable with the average wage for the Southeast Alaska region (Alaska Economic Trends 2001.)

The U.S. Department of Commerce, Bureau of Economic Analysis compiled data showing total full and part-time employment (including proprietors and self-employed workers) by borough for 1990 and 2000. These data indicate that overall employment in Southeast Alaska increased by approximately 11

percent during the 1990s, with population increasing by 6 percent over the same period. It also shows that employment increased in all boroughs with the exception of Ketchikan Gateway, which experienced a net loss of 529 jobs or 4.9 percent of total employment over this period. This decline includes a -73.2 % change in wood products jobs. In comparison total employment in Juneau increased by 4,036 jobs or 22 percent and in Haines by 31 percent or 520 jobs. Further, Ketchikan's per capita income while not the lowest in the State, is far below many currently designated rural communities including the Aleutians, Bethel, Dillingham and Haines. Further, rental costs in Ketchikan are higher than state and national averages (Community Assessment 2007).

Rather than looking at the hard data above, in making its findings that Board appears to be taking a snapshot of Ketchikan's economy by looking only at unemployment rate from 2000 rather than changes over the past ten years. In 2000 approximately 7 percent of the labor force in Ketchikan was identified as unemployed and seeking work, this is comparable for Southeast Alaska as a whole. While we understand the Board was using 2000 census data, this does not give the Board a full picture of changes to the community since the 1990 review. In fact on average Ketchikan's annual unemployment rate between 1991 and 2003 (8.4%) is higher than the statewide average of 7.5% (Alaska Department of Labor) and has fluctuated between 7.0% and 10.2% from 1991 to 2003. Given that the vast majority of Southeast Alaska communities, with the exception of Juneau, are currently designated as rural, Ketchikan's above average unemployment rate over the past ten years should be taken into account in determining the health of its economy. While the Board was aware that the pulp mill closure had some impact on Ketchikan's economy, the record indicates that the Board felt the changes felt by Ketchikan in the past 17 years are not "compelling".

In making its determination that Ketchikan's economy is healthy and diverse the Board in part relied on the growth of the tourism industry. While the tourism industry has grown, it is critical to recognize that a large percentage of the owners and employed in the tourism industry are not Ketchikan residents, and a great deal of the wages and income earned return to the Lower 48 states when the Summer season ends. 83% of Alaska's tourists come over the summer months resulting in seasonal employment only (*Id.*) While urban areas, such as Juneau and Anchorage see some seasonal variation in work force on average of 12%, Ketchikan's seasonal fluctuation was much greater at an estimated 31% during 2005 (2,500 jobs) (Community Assessment 2007.) This seasonal fluctuation has grown from 26% in 1997 to 31% in 2005 and is seen as a root cause of many of Ketchikan's social ills (*Id.*) Tourism jobs also pay significantly less than full-time benefited year round jobs at the mill did. Tourism is also estimated to be declining with 100,000 fewer tourists expected to have visited in 2006 than in 2005 (OSM 2006). Lastly, the changes tourism has brought have in many ways created a more rural feel to our community in all months but summer. A visitor to Ketchikan on an average winter day will find many buildings and stores boarded up for the season and downtown feeling much more like a small deserted ghost town than a vibrant urban center. In sum, while tourism is important to Ketchikan's economy it has not replaced the more than 500 well paying, benefited year round jobs lost since the last rural review in 1990. While the Board was given some very general indication that tourism jobs are seasonal and do not pay as well as the lost mill jobs, the significance of the limitations of tourism on the economy were not presented to the Board by the staff prior to making their determination.

Second, the Board's findings point to fishing as a support of a healthy economy in Ketchikan. While we do not dispute the importance of fishing to the community, the Board again failed to look at the whole picture. Specifically, the Board did not consider that the worldwide growth in farmed salmon, and an oversupply of wild salmon, has resulted in significant declines in salmon prices - seriously hurting local fisherman and the Ketchikan economy as a whole. This correlates with the fact that the number of commercial permits held and fished by Ketchikan residents has declined since the 1980s (Alaska

Economic Trends 2001). In 1982, Ketchikan residents held 392 commercial fishing permits. This number declined to 334 in 1990 and declined further to only 252 permits in 1999 (*Id.*) The earnings of commercial fisherman in Ketchikan have also declined since the last rural review, dropping from \$23 million in 1989 to only \$11 million in 1999 (*Id.*) A further decline in seafood related jobs is forecast for Alaska's in the near future (Community Development Assessment 2004). In our review of the record, none of this information was presented to the Board prior to them making their determination.

In sum Ketchikan experienced a -4.8 percent loss of total employment from 1997 to 2005. This economic downturn has also resulted in a loss of population and school enrollment over the past five years. In contrast, urban areas of the State, such as Juneau and Anchorage, experienced growth during this time (Community Assessment 2007). There is concern both that employers are unable to find trained and qualified professional employees and that children are leaving the community as they grow up to move to urban centers such as Juneau and Anchorage where more job opportunities exist for unskilled laborers. Twenty nine percent of the Ketchikan households recently surveyed responded that they were concerned with finding a good job, affording health insurance and housing, and paying for heating and utilities (*Id.*)

The hard data discussed above is supported by the written and oral testimony presented to the Board from Ketchikan and Saxman residents regarding the economic struggles many in our community are facing. Further, new information now exists that also validates the fact that our community is not healthy and diverse as the Board claims.

In January 2007, United Way of Southeast Alaska released the Ketchikan-Saxman Compass II Community Building Assessment. The Assessment took into account the entire Ketchikan Gateway Borough. Among the projects goals was to identify issues that are important to the community. The report analyzed information gathered from a wide range of sources including surveys, executive interviews, focus group discussions, and secondary socio-economic research. Collected information was also extensively reviewed by the McDowell Group research team, a local Ketchikan - based Steering Committee of local leaders, and by United Way staff and volunteers.

Among the themes identified by the study was the fact that Ketchikan is having an "economic identity crisis" and that "a diverse year - round economy [is needed] in order to thrive and resolve many of its social ills." Specifically, the report recognized the impact the pulp mill closure has had on the town's economy and that numerous problems are posed by the seasonality of employment (including high unemployment rates in the winter) (Community Assessment 2007). The study clearly showed, despite a general growth in tourism over recent years, there is still a long way to go to developing a stable and prosperous economic base in Ketchikan" (*Id.*)

The Compass II Assessment also found poverty was a serious concern for Ketchikan:

Poverty remains a root cause of many community problems, exacerbating other issues and leading to intractable situations ... many households in the Ketchikan area are economically fragile, and consequently, the quality of life for many residents is diminished. Seven of the top ten household concerns in Ketchikan revolve around finances and money, with a concern for medical care topping the list. For low-income and other families, there is a lack of affordable housing options, and for unskilled laborers, there is a lack of well-paying job opportunities to help rise out of poverty.

In the household surveys conducted for the assessment, respondents were asked to identify the greatest single unmet need in the community; lack of jobs/the economy was identified as the most significant unmet need (two out of ten households or 20 percent of respondents listed this first). Similarly, respondents were asked "If you were to hope for one thing new or different about the community of Ketchikan in the next ten years what would it be?" The number one answer (18% of respondents) replied that more jobs/stability was there greatest hope.

The United Way report provides important comprehensive community information available that should be reviewed by the Board. The report's findings support the data presented above as well as the written and oral testimony provided to the Board that Ketchikan's economy is struggling. The result is an increasing reliance on subsistence foods in part due to the decline of the cash economy. Further, the economic changes in Ketchikan prompted the SERAC as well as other regional RACs to request reconsideration by the Board of Ketchikan's status. By ignoring the clear economic data and community testimony the Board has failed to recognize that Ketchikan economy has experience significant changes since 1990, clearly exhibiting rural characteristics.

### **C. Transportation**

In its final rule, the Board found that "roads linking the outlying surrounding area to the city" and that "ferry service is more dependable with greater frequency of service than in most other locations in Alaska" contributed to Ketchikan's designation as non-rural. 72 Fed. Reg. 25695 (May 7, 2007). The Board failed to truly consider that despite the existing small road system, Ketchikan has limited transportation options and most importantly, the road system does not connect to any other communities. Access in and out of Ketchikan for people as well as commodities including commercially processed food, is by ferry, plane or private boat. While we do receive daily jet service, the Board failed to recognize that the severe weather of Ketchikan often results in cancelled and delayed flights during large portions of the year and that therefore transportation off the island can not be guaranteed on any given day. Similarly, the Alaska marine highway system has experienced significant problems in recent years, including numerous mechanical problems resulting in cancelled and delayed sailings, as well as continual budget shortfalls making the ferry schedule uncertain from one year to the next. The bottom line is, unlike urban residents who can drive to receive necessary medical care and buy goods, Ketchikan residents, like other rural residents of the state, are limited to expensive and unreliable transportation options for these needs. The costs and difficulties presented by Ketchikan's transportation options are exacerbated further by the tripling of fuel prices over the past few years. When this incredible increase in cost is combined with the loss of employment and strength of wages, Ketchikan residents must seek to supplement their household tables with subsistence resources that locally and more reasonably available.

### **D. Community Infrastructure**

In making its findings the Board points to the presence of a large national retailer (Wal-Mart) as an indicator that Ketchikan is nonrural. What the Board has failed to consider is that while the presence of one such store has driven out some local businesses, the large store has no other large stores to compete with and therefore our food and goods prices remain relatively high. Further, rural communities, such as Kodiak, also possess a large national retailer. The presence of such stores is only relevant to the extent that food prices significantly decline. Given that all goods must be shipped to our island community, our shipping costs result in high commodities regardless of the existence of Wal-Mart. Further, the existence of one store is very different than that of other urban communities such as Anchorage which have many such stores, providing consumers with choices and competitive pricing.

The Board also points to the existence of a car dealership and fast food restaurants as indicative of nonrural status. While we do not dispute the existence of these facilities, they also exist within many other rural communities throughout the State. KIC fails to understand how these factors can be construed as indicative of a non-rural Ketchikan, while they are basically overlooked in other similarly situated rural communities. This approach is an arbitrary and capricious methodology for deciding that some communities are rural, while others that are similarly situated, are inexplicably non-rural.

While on paper it may appear that Ketchikan has diverse services, the reality is that like rural communities throughout Alaska, there are many gaps in certain types of skilled and professional labor available in Ketchikan, resulting in the need for residents to travel at great expense outside the community for certain medical or other professional help.

The closest large communities of Juneau and Seattle are quite a distance away and relatively expensive to travel to. For this reason members of KIC must purchase their food locally or hunt, fish or gather them through subsistence activities. While residents do purchase a portion of their food in town, the cost is significantly higher than many urban communities elsewhere in Alaska and food quality, quantity, and availability are often limited at Ketchikan stores. Similarly, housing, fuel, and food costs in Ketchikan are quite high and to supplement store-bought food with what we can hunt, fish, and gather from the land is invaluable. The 224.5 pounds of wild food harvested by the average Ketchikan household is critical to offsetting the high cost of buying food at the grocery store (KIC Harvest Survey 2006.)

Food, gasoline, fuel and utilities (with the exception of locally generated electricity) cost more in Ketchikan than the national average as well as more than in urban Juneau or Anchorage (Community Assessment 2007.) Heating oil and gas costs have increased significantly in recent years and are expected to continue to do so. Further, lack of affordable medical insurance has been identified as a significant community concern. (*Id.*) Despite these documented changes and concerns, the Board failed to consider these changes when deciding to leave Ketchikan's rural status unchanged.

### **E. Educational Institutions**

In making its finding to keep Ketchikan as nonrural, the Board relied upon the fact that Ketchikan has a 2-year college. Many other communities currently designated as rural also possess these same services. For example, the University of Alaska maintains 19 campuses throughout Alaska, many of which are located in currently designated rural communities. If the Board looked beyond the existence of the small University campus in Ketchikan, they would have seen that the percentage of residents with bachelor's and graduate/professional degrees in Ketchikan is lower than the statewide and national averages (Community Assessment 2007). Further, public school enrollment has declined since the closure of the KPC pulp mill dropping from 2,872 in 1997 to 2,325 in 2005 (*Id.*) Rather than looking beyond the surface, the Board prefers a stilted and arbitrary view of the existence of a 2-year college in our community.

### **Summary:**

The data shows that Ketchikan exhibits the characteristics of a rural community and therefore should be treated so. The recently held Board hearing in Ketchikan as well as written testimony only further strengthens this finding. The bottom line is that subsistence hunting, fishing and gathering is time consuming and hard work. It is not a luxury, but an important part of people's spiritual and physical well being. KIC strongly believes that the Board has erred in finding Ketchikan does not possess the

characteristics of a rural community. Access to subsistence resources under State regulation does not meet the needs of Ketchikan's residents today or in the future.

**IV. The Board Actions were Arbitrary and Capricious as the Application of the Rural Criteria Are Not Being Uniformly Applied to Communities Across Alaska.**

As explained above the Board has five criteria which it may consider in making rural determinations. Additionally, as each Alaskan community is different, the Board is to look at other characteristics it deems relevant in making its decisions. While we appreciate the Board's ability to look to each community's uniqueness, the Board has failed to apply its criteria in a consistent and lawful manner<sup>1</sup>. We believe a comparison between the Board's actions in relation to Ketchikan and Kodiak best demonstrates our concern. However, before doing so we would like to clearly state for the record that KIC strongly supports the finding that Kodiak is a rural community. Our purpose here is solely to demonstrate that the two communities possess very similar characteristics of a rural nature and that the Board's actions in finding one rural and the other nonrural are unclear and indefensible.

The communities of Ketchikan and Kodiak exhibit many of the same characteristics including population and community infrastructure. In 2005 the population of Ketchikan was estimated at 12,720 (excluding Saxman) while Kodiak's population was 12,816. Between 1990 and 2004 the population of Kodiak grew 5.1%. In contrast during this time Ketchikan's population declined by -3.2%. Both communities are on isolated islands with no road connection off the island and therefore travel from either community to the nearest large city is expensive and inconvenient. Although both communities have no outside road connection Kodiak does have significantly more road miles (140) than Ketchikan's limited and small road system.

Ketchikan and Kodiak both have a rural feel as they are largely surrounded by public lands used for hunting, fishing, recreation and other activities. It is the existence of such lands that in many ways limit possibilities for future growth. Both communities have a diversity of stores (including one large national retailer each) as well as fast food restaurants and car dealerships. Both communities have city water and sewage treatment systems. Both communities have similar entertainment options including a pool and movie theatre. Kodiak also has a bowling alley, bingo hall and teen center as well as numerous and diverse recreation facilities at the Coast Guard station. Ketchikan and Kodiak also have similar educational opportunities with one high school and a University of Alaska campus each.

In making findings, at least one Board member, Mr. Denny Bschor, stated his belief that Ketchikan's economy is more diverse than Kodiak. However the facts do not support this finding. Ketchikan and Kodiak also have similar economic conditions. The communities have a similar 2000 census per capita income with Kodiak at \$22,195 and Ketchikan slightly higher at \$24,290. At the same time Ketchikan's 2000 unemployment rate at (7.0%) is greater than that of Kodiak's (4.3%). The cost of food index is close for both communities with Kodiak's costs at \$130-slightly higher than Ketchikan's \$120.

Kodiak's subsistence use is relatively high, yet the level of use has changed little over the years. While little accurate historical data exists for Ketchikan's use of fish and wildlife resources, public testimony, the recent KIC Household Harvest study as well as ADF&G data for salmon and deer, show a significant increase in the use of fish and wildlife resources over the past 17 years. In fact both

<sup>1</sup> It is our understanding that concern over lack of consistency in decision making led the Board to contract the University of Alaska Institute for Social and Economic Research in 2001 to prepare a report to help the Board identify options for incorporating a more standardized methodology in making its rural determinations. The report was completed in 2003, yet it is unclear why no new methodologies suggested in the report have been adopted by the Board to date.

communities use the same amount of these two resources (73 pounds) as indicated by the recent KIC study.

Despite the fact that Ketchikan and Kodiak have many similar traits, the Board looked at each trait in a different light, and strangely enough, made a finding that Kodiak possesses significant characteristics of a rural nature and Ketchikan did not. The Board used inconsistent reasoning in reaching this conclusion.

First, in Ketchikan's situation the Board pointed to the fact that Ketchikan has the state's 6<sup>th</sup> largest population in the State making it nonrural. However, in 2005 the population of Kodiak was actually larger than that of Ketchikan by just under 100 people. So population is clearly not a basis in which to delineate the communities. Further problems with using population as a defining characteristic of a rural community are outlined below.

Second, the Board points to a well attended public hearing with 85 testimonies presented in unanimous support for maintaining Kodiak's rural status. While we do not disagree that the Kodiak community has shown strong community support during the review process (nor do we disagree that Kodiak is in fact rural); we do not see this community support as any different than that shown from Ketchikan. In its deliberations the interagency staff found that the "Board public hearing in Kodiak regarding rural status was well attended by a large, diverse group of people, all of whom presented testimony that elaborated on the rural nature of Kodiak" (FSB Staff Report 12/ 2006). In contrast to Kodiak, the Interagency Staff Report (12/2006) as well as Board deliberations state that public testimony for Ketchikan did not make a "compelling case" for a change in Ketchikan's rural status. This Jekyll / Hyde approach demands further analysis.

During the September 2006 public meeting held by the Board in Ketchikan, 33 people testified in support of redefining Ketchikan from an urban to a rural community. No-one testified against this change. An additional 28 people testified during the Saxman public hearing entirely in support of maintaining Saxman's rural status. Similarly, the Board received 72 written comments during the public comment period also favoring rural status for Ketchikan for these same reasons. From public officials, Elders, the very young and everyone in between, the residents of Ketchikan and Saxman spoke with a unanimous voice that subsistence is an integral part of our communities' culture and heritage as well of extreme importance to our economically challenged situation. Much of the testimony was focused on the many changes in our community since 1990. None spoke more eloquently about the importance subsistence plays in upholding the traditional ways than the Native peoples of this area. Many Native elders testified about the importance of collecting and sharing wild foods among family and friends and passing on the traditions of subsistence hunting, fishing and gathering to the youth. Others focused on the immeasurable health benefits of subsistence gathered foods compared to those purchased in local stores. In the end there was no doubt as to the importance that cultural and traditional foods serve for Ketchikan residents both historically as well as today. It was also clear from public testimony that Ketchikan residents feel strongly that our community exhibits characteristics of a rural community and that much has changed, particularly in relation to Ketchikan's economic decline since the 1990 Board review designated Ketchikan a nonrural community.

Further, support for Ketchikan's rural status came from numerous organizations including the Alaska Federation of Natives (AFN), Alaska Native Brotherhood and Alaska Native Sisterhood, Grand Camp, Kuiu Tlingit Nation. Further, The SE Regional Advisory Board has been strongly in support of designating Ketchikan as a rural community since the inception of this decennial review.

In sum, support for Ketchikan to be redefined as a rural community came from a large diverse group. Further, voluminous written testimony supported this recommendation. Despite these facts, the Board somehow found the testimony in favor of Kodiak to be “compelling”, and testimony in favor of Ketchikan not “compelling”. Without any findings to distinguish the public outpouring in favor of rural status for both communities, the Board’s disparate treatment is arbitrary and capricious.

Third, the Board found that Ketchikan has a more diverse and healthy economy than Kodiak. In making this finding the Board appears to be picking and choosing data from the years that best meet its seemingly pre-determined result. For example, according to the 2000 census data unemployment in Ketchikan was at 7.0% while Kodiak’s unemployment rate was significantly lower at 4.3%. Both communities have had large fluctuations in employment both between seasons and between years. However, in presenting information to the Board in its Rural Decennial Review June 2006, in the case of Kodiak these fluctuations were recognized and the highest unemployment rate (9.7% in 2004) was presented. In contrast when discussing Ketchikan the staff only discusses the 2000 unemployment rate-failing to recognize Ketchikan’s unemployment rate on average between 1991 and 2003 was 8.4%, jumping as high as 10.2% at times since the last review. Further, in the case of Kodiak, the Board specifically recognized the impacts that a downward trend in value of commercial fisheries is having on Kodiak. Despite listing commercial fishing as one of the reasons Ketchikan’s economy has been found diverse, no recognition of the downward trend in the value of commercial fisheries was made for Ketchikan.

Ketchikan and Kodiak can not be differentiated based on population, community infrastructure or economics. While there is some level of difference in the use of subsistence resources, this difference is mitigated by the more recent KIC Household Survey which triples the numbers previously estimated for Ketchikan, and that use is growing due to the economic downturn of Ketchikan. Further, as previously discussed, Ketchikan’s harvest of subsistence resources is confined to a regulatory box by the non-rural determination in 1990.

The record clearly shows that the Board’s decision to maintain Ketchikan’s non-rural classification is due in large part to the fact that Ketchikan has been considered non-rural since the inception of the Federal Subsistence Management Program. (See FSB Staff Report 12/2006). This reasoning is erroneous as it freezes a community in time, and disregards that same legislative history’s statement that a community’s rural status is not static, and does indeed change over time. The Board’s decision fails to truly consider the rural characteristics displayed by Ketchikan today. The purpose of the decennial review is to consider these determinations with an emphasis on what has changed in the last 10 years (See Decennial Review FSB June 2006). That means the Board’s task was to focus on what has changed in Ketchikan since the non-rural determination was made by the Board in 1990. Evidence was demonstrated through empirical data as well as overwhelming public testimony to demonstrate that significant changes have occurred in Ketchikan since 1990 to present and that a change in Ketchikan’s rural status is warranted. However, the Board’s decision seems entranced with the past, and maintaining Ketchikan at its 1990 determination.

Again, the purpose of this analysis was not to undermine the rural determination of Kodiak or any other medium-sized community displaying rural characteristics. The purpose of this analysis was solely to illustrate how the Board looked at nearly identical characteristics in the two communities, but came up with inconsistent and arbitrarily different conclusions.

**V. The Board Improperly Relied on Population Figures When Making Its Determination**

As has been detailed to the Board by the SERAC, the setting of the 7,000 population figure for rural determinations was in error. While Ketchikan City was mentioned in legislative history as the smallest "non-rural community" with a population of around 7,000, the truth is, the "Ketchikan Area" as it has become known had a population of 11,316 in 1980 (excluding Saxman's population of 273). While this error was brought to the Board's attention in 1990, because no other community was impacted by this counting error, there was no further public demand to change the regulation setting a population threshold.

In making its findings the Board relied upon the fact that Ketchikan has the 6<sup>th</sup> largest population in the state and that all areas with higher populations are currently considered non-rural. 72 Fed. Reg. 25695 (May 7, 2007). Further, the Board pointed to the fact that several communities with populations smaller than Ketchikan are also designated nonrural (*Id.*) The Board fails to point out the major difference between these communities (Homer, Seward and Valdez) is that they are connected via a road system to Anchorage where an abundance of diverse economic and social services exist. Ketchikan does not have this luxury as it is on an isolated island. Ketchikan is only reachable by air or water. The Board also failed to recognize that despite Ketchikan being Alaska's 6<sup>th</sup> largest city it still only holds approximately 2% of Alaska's population. Further, according to the 2005 census data the population of Kodiak is slightly above that of Ketchikan, making Ketchikan the 7<sup>th</sup> largest population in the State (with its population declining).

It is clear that at the time ANILCA was passed, Ketchikan was a community on the rise; however data from recent years has shown this is no longer the case. Between 2000 and 2005, the population decreased by a 7 percent (919 residents). Ketchikan Gateway Borough experienced the largest absolute net out-migration of all Southeast Alaska boroughs over this period. Ketchikan had an average out-migration of 11.5 persons per year per 1,000 population from 1991 to 2003 (Alaska Department of Labor). In concert with this out-migration, the Ketchikan School District lost approximately 500 students. Ketchikan's declining population is inconsistent with that of the population of Alaska as a whole and of the urban centers of Anchorage, Juneau and Fairbanks which have seen significantly population increases.

Further, Ketchikan is undoubtedly rural when compared to rest of the United States. Ketchikan's population density is a mere 2.43 per square mile (OSM 2006). According to the USDA's Rural Information Center, there three most common definitions of rural, and all three are less restrictive than the threshold populations used by the Board. *See* USDA Website (Three most common federal definitions of rural are based on a population density of at least 500 people per square mile, proximity to a metropolitan area of 50,000 or more people, and a combination of these two definitions).

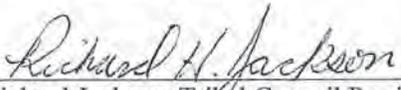
As discussed above, with the economic downturn of Ketchikan, and the rising fuel costs affecting transportation, Ketchikan's population is more isolated geographically and economically than ever before.

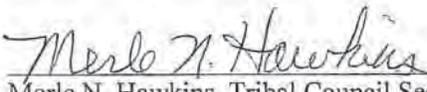
**VI. CONCLUSION**

Based on the points raised above, the Board should reconsider and reverse its May 7, 2007 decision to aggregate Saxman with the Ketchikan Area, and to classify the Ketchikan Area as Non-Rural. At best, the Board should reconsider the information provided by testimony and in this RFR, and should determine the Ketchikan Area to be rural, thus extending the federal subsistence program in a way that

protects and promotes "the continuation of the opportunity for subsistence uses" by rural Native and non-Native harvesters. At worst, the Board should properly digest the new information presented in the 2006 Ketchikan Household Survey and the 2007 United Way Study. Additional analysis should be done, including examination of segments of the Ketchikan population (particularly the tribal population) that show significant characteristics above the average. Further, analysis should be performed to determine whether these harvests are reflecting an increasing trend because of the crash of the timber industry and resultant economic downturn in Ketchikan. Again, ANILCA itself contemplates the fact that the status of a community is not fixed forever. The social and economic changes within Ketchikan since 1990 warrant serious consideration, not just a window dressing to keep the status quo. The Board should accord deference to the SERAC and reconsider its decision to classify Ketchikan as non-rural and interpret its mandate under Title VIII of ANILCA in a broad and remedial manner to effectuate Congress' purpose of protecting access to subsistence resources.

With Respect and Esteem

  
Richard Jackson, Tribal Council President  
Ketchikan Indian Community

  
Merle N. Hawkins, Tribal Council Secretary  
Ketchikan Indian Community

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**RFR 07-06**



ORGANIZED VILLAGE OF SAXMAN  
Saxman I.R.A. Council  
Rt 2 Box 2 Ketchikan, Alaska 99901  
Phone 907-247-2502 / FAX 907-247-2504

July 6, 2007

Mr. Mike Fleagle, Chairman  
Federal Subsistence Board  
Office of Subsistence Management  
U.S. Department of the Interior  
3601 C Street, Suite 1030  
Anchorage, AK 99503

RE: Request for Reconsideration of Decision to classify the Community of  
Saxman as Nonrural

Dear Mr. Fleagle:

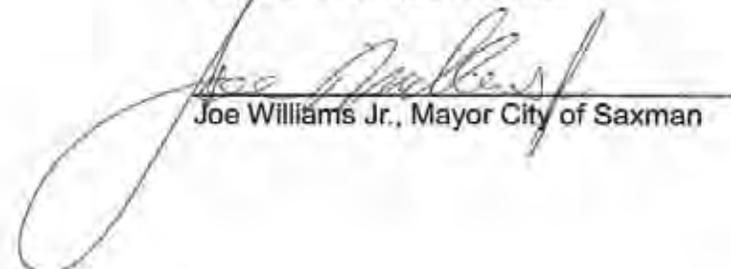
In accordance with 36 CFR §242.20 and 50 CFR §100.20 of the Subsistence Management Regulations for Public Lands in Alaska, the Organized Village of Saxman, IRA and the City of Saxman join in requesting that the Federal Subsistence Board reconsider and rescind its decision of December 12, 2006, to include Saxman in the Ketchikan nonrural area. The Board's decision, published at 72 Fed. Reg. 25688 (May 7, 2007), became final on June 6, 2007.

The enclosed Request for Reconsideration sets forth the grounds justifying reconsideration and details the reasons we believe the Board erred in reclassifying Saxman as nonrural.

We urge the Federal Subsistence Board to carefully consider our request and to act immediately to reinstate Saxman's rural status.

Sincerely,

  
\_\_\_\_\_  
Lee Wallace, President Saxman IRA Council  
Organized Village of Saxman

  
\_\_\_\_\_  
Joe Williams Jr., Mayor City of Saxman

Enclosure (RFR)

## **Request for Reconsideration of the Federal Subsistence Board’s Decision to group the Native Community of Saxman with the Ketchikan Area**

**Submitted by**

**The Organized Village of Saxman  
and  
The City of Saxman**

### **I. Introduction**

On December 13, 2006, the Federal Subsistence Board voted 4-2 to group Saxman with the Ketchikan area. The consequence of that decision was to reclassify Saxman as a nonrural community for purposes of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). The Board’s decision was published in the Federal Register on May 7, 2007, 72 Fed. Reg. 25688, and became effective on June 6, 2007. In accordance with 36 CFR § 242.20 and 50 CFR § 100.20 of the Subsistence Management Regulations for Public Lands, the Organized Village of Saxman, IRA, a federally recognized tribe, and the City of Saxman are requesting that the Federal Subsistence Board (FSB) reconsider and rescind its decision to group Saxman with Ketchikan. Saxman’s rural status should have been reviewed independent from that of Ketchikan, and had the Board done so, Saxman would have retained its rural status.

The request for reconsideration is based upon new information provided in the attached reports: Wolfe, Robert J., Ph.D, *Saxman and Rural Determinations* (June 29, 2007) (*Wolfe 2007*); Monteith, Daniel, Ph.D, *Saxman, Rural Determinations* (July 2, 2007) (*Monteith 2007*); and the paper by Steve Wade, entitled “*Methodology Variations in Demographic Analysis of Southeast Alaska Communities*” (Wade 2007). These reports present information not previously considered by the FSB. We also demonstrate that the information relied upon by the Board was incorrect, misleading and did not serve to prove that Saxman should be grouped with Ketchikan for purposes of making the rural determinations. The Board’s interpretation of the information, applicable law, and the regulations were in error and contrary to the purposes and clear mandates of Title VIII of ANILCA. Because the Board’s actions significantly impact the residents of Saxman, the Organized Village of Saxman, IRA and the City of Saxman are aggrieved parties under 50 C.F.R. § 100.20, and therefore eligible to file this request for reconsideration.

Saxman has been designated as “rural” since the inception of the federal subsistence program in Alaska in 1990. As stated in the *Rural Determinations Decennial Review – Analysis of Communities and Areas as Assigned by the Federal Subsistence Board, June 23, 2006*, the purpose of the Board’s present decennial review is to consider the rural determinations “*with an emphasis on what has changed since 1990.*” *Id.* at 4. As the testimony, relevant data and staff reports and analyses all demonstrate, very little has changed with regard to Saxman since 1990. The FSB disregarded the overwhelming weight of public testimony received at the Southeast Alaska Regional Advisory Council (SERAC) and FSB meetings throughout the lengthy decennial review process and the public hearing in Saxman, as well as the written comments. The public overwhelmingly supported retaining Saxman’s rural status.

In determining that Saxman should be grouped with Ketchikan, the FSB also violated Section 805(c) of ANILCA by failing to give deference to the SERAC's recommendation.

Finally, the FSB violated the Administrative Procedure Act (APA). It published a proposed rule on August 16, 2006, providing that Saxman would retain its rural status. The proposed rule correctly reasoned that even though the grouping criteria would indicate Saxman should be included in the Ketchikan area, social and economic characteristics indicate that Saxman should not be grouped in the Ketchikan area. The FSB reversed itself at the December 2006 meeting. In doing so, the FSB ignored the unique social and economic characteristics that clearly differentiate Saxman from Ketchikan, and failed to give the public, including those most directly impacted, the residents of Saxman, adequate notice and an opportunity to be heard on its final rule. Compounding matters, it appears that enormous pressure may have been brought to bear on members of the FSB and Office of Subsistence Management (OSM) staff by Department of the Interior officials in an effort to unduly influence the outcome of the Board's deliberations.

## II. Background

Title VIII of ANILCA 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.

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. In no instance is the United States' duty to give ANILCA a liberal interpretation more important than in applying and interpreting the rural residency requirement.

While the FSB takes the position that ANILCA is not Indian legislation,<sup>1</sup> there is no

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<sup>1</sup> 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 (9<sup>th</sup> Cir. 1999). However, that *dicta* is in direct conflict with *Village of Gambell v. Clark*, 746 F.2d 572, 581 (9<sup>th</sup> 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 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

question but that Title VIII is “remedial” legislation. It was intended to remedy the failure of the State and Federal 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.

### **III. The Board Ignored Important Ethnographic Information Establishing that Saxman is a Socially, Politically and Economically Independent Community and the Board’s Interpretation of Existing Data was in Error Because it Was Not Based on a Full Analysis of All Relevant and Available Information**

Saxman remains today a rural community. It “has maintained a historical and contemporary independent, autonomous and continuous political, social and economic identity.” *See Monteith (2007)* at 2. Dr. Monteith presents a detailed ethnographic description of Saxman, tracing its history from the early 1800’s to the present, *id.* at 2-8, pointing out the distinct differences between the Ketchikan and Saxman that continue to this day. Many of the residents of Saxman are descendants of the Cape Fox and Tongass Tribes, two of the southernmost Tlingit tribes in Alaska. Prior to the Treaty of Session in 1867, these two tribes were key players in the politics and economics of the southern portion of Southeast Alaska. *Id.* at 2-3.

Beginning in 1893, the Tribes began to relocate near Ketchikan Creek. Oral narratives by both Tongass and Cape Fox elders indicate that they were interested in the promise of a new church as well as a school for their children and medical care since many Tlingits were dying from tuberculosis, smallpox and measles. The Episcopal Church established a church and mission school near Ketchikan Creek. *Monteith (2007)* at 3.

While many of the Tongass people settled in Ketchikan, others of the Cape Fox Tribe located several miles south of the creek, and in 1895, the Presbyterian missionaries established a church and school and named the new community Saxman. *Monteith (2007)* at 4. According to territorial missionary and educator Sheldon Jackson, there were 31 children enrolled in the school by 1895. The school teacher for the new school complained about the attendance of children in the school because the children would leave with their families to engage in subsistence activities. *Id.* “As early as 1897, Young [the schoolteacher] wrote about the loss of students when several of the Saxman people went to Dyea to get seasonal jobs as packers for the miners going to the Yukon gold rush.” *Id.* Clearly, as Dr. Monteith points out, “the temporary out migration for seasonal jobs has been a longstanding historical practice that is as old as the modern day community of Saxman.” *Id.*

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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 (9<sup>th</sup> Cir. 1997), *citing Gambell v. Clark; Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9<sup>th</sup> Cir. 1994); *United States v. Alexander*, 938 F.2<sup>nd</sup> 942, 945 (9<sup>th</sup> Cir. 1991). The *dicta* in *Hoonah* does not overrule this prior precedent.

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By 1900, 142 people were living in Saxman. On May 4, 1907, an Executive Order set aside 40 acres of land for the Indian Village of Saxman for purposes of a school. In 1929, the village of Saxman voted to incorporate as a Second Class municipality. *Monteith (2007)* at 4.

Field work by Viola Garfield documents the history of the totem parks in Saxman and Ketchikan. *Monteith (2007)* at 4-5. During the 1930's, many totem poles, ceremonial carvings and masks were retrieved by the Civilian Conservation Corps from the abandoned villages at Cape Fox, Tongass, Cat Island and Pennock Island. The restoration and reproduction of these historic poles not only serve to perpetuate the memory of the original poles and their oral narratives, but reaffirmed the legal title and claims represented by the poles. The communities of Saxman and Ketchikan developed separate totem parks. The totem park in Saxman has become an important part of the heritage tourism today. The park includes a tribal house (Beaver Clan House) where traditional Tlingit dance exhibitions take place, a carving center, and a community building. The carving center has been integral in teaching and encouraging young artists and perpetuating their traditions. The totem park and the carving center have created a unique sense of cultural identity for Saxman, both historically and today. *Id.*

The 1946 federal study conducted by Goldschmidt and Haas on land and resource use in Southeast Alaska documents and discusses separately the traditional and customary use areas of Saxman and Ketchikan. *Monteith (2007)* at 5. Each community has its own Alaska Native Brotherhood and Sisterhood camps. In 1958, Philip Drucker wrote an ethnography and ethnohistory of the Alaska Native Sisterhood and Brotherhood. He noted that the two camps were organized separately and have maintained that separation to the present day, even though it would be more efficient for them to join forces. *Id.*

Today Saxman maintains a separate political identity from the community of Ketchikan. See *Monteith (2007)* at 6-8; *Wolfe (2007)* at 2, 4.<sup>2</sup> Based on the 2000 census, Saxman had a population of 431, seventy per cent (70%) or more were classified as Alaska Native. Most of the residents of Saxman are Tlingit, and are heavily dependent upon subsistence. Saxman has its own municipal and tribal governments – the Organized Village of Saxman and the City of Saxman. While the City of Ketchikan has tried to absorb Saxman on a number of occasions, the people of Saxman have voted against unifying the governments. Saxman has its own water and sewer systems. Saxman is a separate chapter within the Central Council of Tlingit and Haida Tribes of Alaska, and maintains a separate Native ANCSA village corporation. *Monteith (2007)* at 6. Socially and culturally, “Saxman maintains a unique and separate identity with its own churches and Native dance groups.” *Id.*

Saxman is also a destination location in the international tourist trade. “Since the early 1990's and the exponential growth of the cruise ship industry, Saxman has developed an independent cultural and economic center,” *id.*, with visitors from all over the world coming to see Native artists at work in the Saxman carving center and totem park. As Dr. Monteith points

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<sup>2</sup> It is significant that the OSM staff responsible for preparing the analyses of available data for Saxman did not contact the City of Saxman or the Organized Village of Saxman to gather information about the community. Instead, staff relied primarily on secondary sources and did not thoroughly examine the relevant community characteristics that Saxman residents and their governments believe distinguish their community from Ketchikan. As we understand it, only three days were spent in the Ketchikan area.

out, the seasonal employment in the heritage tourism industry is about the same as the older, more traditional seasonal jobs in fishing, mining and timber. *Id.* at 7. All of these jobs are seasonal and lend themselves to the “mixed” subsistence/wage economy, in which small-to-moderate amounts of cash are provided at different times of the year by seasonal work and family sharing.

Saxman has an unemployment rate that is significantly higher than Ketchikan (22% compared to 7%) and a much lower per capita income (\$15,642 compared to \$24,290) – factors that would indicate unique economic circumstances. *Monteith (2007)* at 7.

Data from the Alaska Department of Fish and Game, Division of Subsistence shows an increase in harvest of subsistence resources for Saxman between 1990 and 2000. *Monteith (2007)* at 7. That data also shows the importance of sharing among community members. As Dr. Monteith notes: “If Saxman were to lose its subsistence status, personal use permits would provide a way for residents to harvest their caloric needs but the harvester could not legally share the resources outside the household.” *Id.* This could have a profound effect on the culture and way of life of the residents of Saxman. “A loss or reduction of subsistence hunting and fishing opportunities would have a profound negative effect on Saxman’s food supply. *Wolfe (2007)* at 4. As noted in the Report of the Alaska Native’s Commission (1994), Final Report, Vol. III at 4, if wild resources were to be denied to subsistence-dependent communities, “the inevitable result would be the deterioration of nutrition, public health<sup>3</sup> and social stability – because the cost of buying, transporting and storing imported replacements would be impossible for local people, or even government agencies, to bear over time. The long-term consequence would not be starvation, but the gradual erosion and disappearance of many rural communities through out-migration. . . . What is at stake . . . is the survival of human communities and cultures.”

When the Federal Subsistence Board made the initial rural determinations in 1990, Saxman was designated as a separate rural community from Ketchikan. The purpose of the present decennial review is to consider these determinations with “an emphasis on what has changed since 1990.” (*Rural Determinations Decennial Review, Analysis of Communities and Areas, Office of Subsistence Management*, June 23, 2006). While Saxman has changed, like any community or culture, the changes only serve to emphasize that Saxman continues to be a separate and unique community in which subsistence remains very much a part of the mixed economy. The people of Saxman continue to be highly reliant on fishing and hunting for their food supply. *See Wolfe (2007)* at 4, and display economic relationships with the land regarding natural resources significantly different from their neighbors. *Id.* at 2; *Wolfe and Fischer 2003* at 79-81.

#### **IV. The grouping criteria used for determining whether communities are socially, politically and economically integrated are arbitrary and scientifically unsound**

In determining whether a specific community or area in Alaska is “rural”, the Board is required to follow the guidelines contained in 50 CFR § 100.15(a). Under those guidelines, a community with a population of 2,500 or less shall be deemed to be rural unless it “possesses

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<sup>3</sup> With the right rate of diabetes among the Native population in Alaska, there is concern that a reduction in the availability of subsistence foods will contribute to this problem.

significant characteristics of a non-rural nature, or is considered to be socially and economically a part of an urbanized area.” 50 CFR § 100.15 (a)(1). Finally, the regulations provide that “[c]ommunities or areas which are economically, socially, and communally integrated shall be considered in the aggregate.” 50 CFR § 100.15 (a)(6). Although not a statutory requirement, federal regulations provide that the rural/nonrural status of communities or areas will be reviewed every 10 years, beginning with the availability of the 2000 census data. 50 CFR § 100.15(b). The regulations require the FSB to make a determination about whether a community or area “has changed from rural to non-rural.” *Id.* The regulations do not set out specific guidelines on how communities or areas should be evaluated for grouping with other communities. The grouping criteria adopted by the FSB in 1990 when the initial rural determinations were made were: 1) Do 15% or more of the working people commute from one community to another? 2) Do they share a common school district? And 3) are daily or semi-daily shopping trips made?

Acknowledging the shortcomings of the original criteria (*see, e.g.,* Kruse, J. and V. Hanna, *Assessment of the rural characteristics of Kenai Peninsula areas currently classified as nonrural under Federal Subsistence Management*, Institute of Social and Economic Research, University of Alaska, Anchorage (1998), the Board adopted slightly different criteria for the first Rural Determinations Decennial Review. The criteria adopted were: 1) Do 30% or more of the working people commute from one community to another? 2) Do they share a common high school attendance area? 3) Are the communities in proximity and road-accessible to one another?

The U.S. Fish and Wildlife Service, the lead agency for the Federal Subsistence Management Program contracted with the Institute of Social and Economic Research (ISER) at the University of Alaska Anchorage and Robert J. Wolfe, a socio-cultural anthropologist and former Research Director at the Division of Subsistence with the Alaska Department of Fish and Game, to develop methodologies for identifying rural and non-rural areas of Alaska for purposes of federal subsistence management. They looked at a number of variables as potential factors, and in accordance with the overriding goal of using a minimal number of criteria that would clearly, effectively and defensibly distinguish between rural and nonrural populations; they developed two measures of primary rural concepts for use in identifying rural/non-rural populations: country food production and population density. *See Methods for Rural/Non-Rural Determinations for Federal Subsistence Management in Alaska, Final Report, Analysis and Recommended Methodology* (January 31, 2003) (Wolfe and Fischer 2003). The issues surrounding the aggregation of populations for measurement and analysis were also discussed in some detail in that report at pages 47-59. The FSB arbitrarily rejected these scientific methods of identifying rural and nonrural areas in Alaska, due to political pressure and the potential impact the criteria, if adopted, would have on the Kenai Peninsula. *See Board Transcript, December 12, 2006 at 20 (Testimony of Victor Fischer); Monteith (2007) at 7.*

In his latest report specific to Saxman, Dr. Wolfe explains in detail why the FSB’s December 13, 2006, decision aggregating Saxman with Ketchikan was erroneous and why the FSB erred in relying exclusively on the three grouping criteria: (1) proximity and road accessibility; (2) sharing a common high school attendance area; and (3) 30% of the working people commute from one community to another. Dr. Wolfe has personally conducted subsistence research in Alaska since 1976, including work in southeast Alaska and on the

rural/nonrural determinations since the early 1980s. He has published multiple scientific articles on subsistence and was the co-principal investigator, with Victor Fischer of the Institute of Social and Economic Research of the University of Alaska Anchorage, on methods for rural and non-rural determinations for the federal subsistence management program in Alaska.

Dr. Wolfe correctly points out that Saxman is like many other small communities in Alaska that are geographically near communities with larger populations. *Wolfe (2007)* at 3. However, deciding whether such populations are rural or urban cannot be accurately determined by arbitrary rules of aggregation, but must be determined on a case-by-case basis with facts directly related to their rural or nonrural characteristics. *Id.* The rural-urban study by Wolfe and Fisher (2003) developed scientifically sound and rigorous measures of rural and nonrural status in Alaska. It identified two factors that met those standards (population density and country food production) and two alternative methodologies for distinguishing rural and urban populations in Alaska for subsistence purposes. The study tested these two factors by two methods, with a large set of communities to assess their performance in a real-world application. The study concluded that the factors and methods performed well; they successfully distinguished communities and produced consistent classifications for most communities. These methodologies avoided arbitrary preliminary aggregation steps and applied measures directly related to rural and non-rural status. As a result, a community was assessed using its own characteristics and not those of its neighbors. *Wolfe 2007* at 3. Under these methods, Saxman was found to be rural.

Dr. Monteith points out that the criteria used by the Board to determine grouping of communities are “out-dated techniques for determining community identity.” *Monteith 2007* at 8-10. These criteria are “based on research and theories used in the early 1900s.” *Id.* at 8-9. Dr. Monteith equates this to a contemporary nuclear physicist saying that the atom cannot be split and relying on that assumption to inform and dictate public policy on nuclear arms. *Id.* at 8. In recent years, both sociologists and anthropologists have come to understand community identity and sense of place; “sense of place is recognized, not measured, and it is first recognizable on the community level.” *Monteith 2007* at 9, citing Binder, R. and R. Speicher, “*Valuing Community Identity within Federal Preservation Policy.*”

Saxman represents a community that retains its rural character, despite being geographically close to Ketchikan. *Wolfe 2007* at 4. Such communities are described as co-resident communities (Wolfe and Fisher 2003: 18, 56-59). Examples of co-resident communities include the Amish and Old Order Mennonites who are distinctively rural, despite their proximity to the greater Pennsylvania population. Another good example would be the Indian reservations that are in close proximity to larger populations – for example the Gila River Pima-Maricopa south of Phoenix. No one would suggest that these two distinct populations are socially, politically and communally integrated. The same is true for Saxman. The grouping criteria ignore the cultural and historical differences between Saxman and Ketchikan.

The residents of Saxman maintain a clear rural land use pattern, and the community has been designated as rural since the passage of ANCSA. In 1971, it was found to be a rural village for purposes of receiving benefits under the claims settlement. *See attached Affidavit of David S. Case*; Board Transcript, December 12, 2006 at 95. In the mid-1980’s it was designated “rural” for purposes of the subsistence preference under ANILCA, and again in 1990 under the Federal

Subsistence Management Program. The assessment of Saxman and the Ketchikan-area in the 2006 Rural Determination Decennial Review makes a clear case for why Saxman should not be included in the Ketchikan-area grouping. No pertinent new information was presented during the various hearings and Board meetings that would lead to its reclassification as nonrural. Saxman lost its status purely because of an arbitrary administrative step of relying solely on high school attendance and commuting information to administratively link Saxman as part of Ketchikan. Rather than looking at the unique characteristics that demonstrate that Saxman remains a separate, distinct rural community, where the majority of the residents choose to continue to live a subsistence way of life, the FSB rigidly applied three criteria to find Saxman should be grouped with Ketchikan and rejected all other relevant evidence to the contrary. Its decision was arbitrary, capacious and a violation of Title VIII of ANILCA. Saxman remains today, as it was in 1990, a separate, geographically-distinct community from Ketchikan.

#### **V. The rigid application of the three factors used by the Board to group Saxman with Ketchikan violates Title VIII of ANILCA**

Title VIII of ANILCA requires that rural Alaska residents be given priority for subsistence uses of fish and wildlife on the Federal public lands. The term “rural” is not defined in the statute. While the legislative history of ANILCA mentions four cities (Anchorage, Fairbanks, Juneau and Ketchikan) as examples of non-rural places, S. Rep. No. 96-413, 96<sup>th</sup> Cong., 1st Sess. 233 (1979), even then it is not entirely clear what Congress intended when it named those cities. It could well have meant, consistent with the approach taken by the U.S. Bureau of the Census at the time, to exclude the rural portions of those cities. The Census Bureau excludes from the definition of “rural” those persons living in the rural portions of extended cities. U.S. Department of the Census, 1980 Census of Population, Vol. 1, ch. B, Part 3 at A-2. In 1980, the Census Bureau also included in the rural population that segment of the urban population who live in “an area with a population density of less than one hundred (100) persons per square mile, if the area covers at least twenty-five square miles.” *Id.* at A-3. Clearly, large portions of each of the four cities identified by Congress as non-rural would qualify as “rural” under the Census Bureau definition. Moreover, federal agencies use varying criteria for classifying rural in administering their programs. In general, these definitions are geared to accomplish the purpose Congress intended when it enacted the legislation. While there is certainly a component that looks at population, there are other indicators of rural communities.

The only court decision to address the definition of “rural”, as that term is used in ANILCA, did so in the context of the State of Alaska’s definition of rural -- which eschewed a rational definition of rural in order to exclude the entire Kenai Peninsula. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9<sup>th</sup> Cir. 1988), *cert. denied*, 109 S.Ct. 3187 (1989). In rejecting the State’s definition, the court of appeals held that “the term rural is not difficult to understand – it refers to areas of the country that are sparsely populated.” The Court cited a number of definitions of rural, ranging from that 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, Pub. L. No. 101-625, Title VII, §715, 104 Stat. 4296. In the latter case, rural was defined to include communities with a population of up to 25,000 that are not part of a SMSA if there is a serious lack of mortgage credit for lower and moderate-income families.

[Correction page 7/12/07 for RFR07-06 “Request for Reconsideration of the Federal Subsistence Board’s Decision to Group the Native Community of Saxman with the Ketchikan Area.”]

There is nothing in Title VIII of ANILCA or the *Kenaitze* decision that requires communities or areas to be aggregated before deciding whether they are rural or nonrural. Congress recognized that the “rural nature” of communities “may change over time.” S. Rep. No. 413, 96<sup>th</sup> Cong., 1st Sess. 233 (1979). At the same time, however, it also chose to preserve the right of Alaska Natives to choose whether to pursue a subsistence way of life. *See, e.g.*, H.R. Rep. No. 95-1045, Part 1, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 187 (1978) (“Furnishing protection of subsistence patterns of existence will allow Native peoples . . . the opportunity to decide for themselves the rate at which acculturation will take place.”); 126 Cong. Rec. 29279 (1980) (the Act is intended to allow Alaska Natives “to choose for themselves the direction and pace, if any, of the evolution of their own culture”). The court of appeals in *Kenaitze* made it plain that “rural” must be defined in its usual sense, i.e., a place that is “sparsely populated,” but it in no way ruled out consideration of socio-economic factors that are indicative of rural economies. Saxman was found to be “rural” under the Board’s definition of rural in 1990, and that definition was adopted after the *Kenaitze* decision. Saxman’s current population is well under the 2,500 threshold for being classified as a rural community. It possesses significant characteristics of a rural nature; and the overwhelming evidence presented to the FSB by OSM staff, the public, experts on subsistence and the residents of Saxman support the conclusion that Saxman is not socially, economically and communally a part of Ketchikan.

It is clear from the December 13, 2006, deliberations on the question of grouping Saxman with Ketchikan, that the Board’s decision was driven primarily by two things: 1) the rigid application of the three grouping factors, to the exclusion of every other factor pointing to a contrary conclusion, out of a concern for “consistency,” Federal Subsistence Board, Public Regulatory Meeting Transcript (TR), December 13, 2007 at 172-73 (Goltz), 187- 90 (Edwards), 186 and 198 (Bschor) and 2) the erroneous conclusion that the Ninth Circuit Court of Appeals’ decision in *Kenaitze* compelled a grouping of Saxman with Ketchikan. *Id.* at 198 (Gottlieb). As we have demonstrated above, the *Kenaitze* decision in no way dictates a grouping of Saxman with Ketchikan.

The consistency argument is simply a red herring.<sup>4</sup> First, the only legal requirement for the Board to periodically review the rural determinations is a regulatory one. 50 CFR § 110.15 (a)(1). The regulation states that a community or area with a population of 2,500 or less shall be deemed to be rural unless such a community or area *possesses significant characteristics of a non-rural nature, or is considered to be socially and economically a part of an urbanized area.* The regulation does not set out the factors that must be considered. The grouping criteria approved by the Board to analyze the integration of communities were adopted as “guidelines.” As noted in the Decennial Review at 4, “flexibility allows the Board to exercise its judgment in the evaluation of circumstances unique to Alaskan communities.” Given the wide array of

<sup>4</sup> The Board amply demonstrated that consistency was not a concern in other contexts, i.e., the way in which the Board treated the Kodiak area versus its consideration of Ketchikan. The FSB completely eliminated the aggregation step before considering the rural/non-rural status of the Kodiak area. *See* Board Transcript (December 13, 2006) at 137-140. The communities of Ketchikan and Kodiak exhibit many of the same characteristics including population and community infrastructure. In 2005, the population of Ketchikan was estimated at 12,720 (excluding Saxman) while Kodiak’s population was 12, 816.

circumstances in Alaska with regard to social networks and economies, the grouping factors adopted by the FSB cannot possibly be the determining factors in every case – and especially not for a community like Saxman.

It was arbitrary for the FSB to rely on the fact that some people in Saxman work outside of Saxman and that Saxman does not have its own high school. Those are but two factors to consider – they are not the end of the evaluation. As Dr. Wolfe points out,

High school attendance is a poor indicator of whether a community is socially, politically, or economically separate from its neighbors. The presence of a local high school depends on contingencies such as the size and income of a community. Before the 1970's, most small rural Alaska villages lacked high schools. They were required to send high school students outside their local communities, a situation legally challenged and changed following the Molly Hootch decision. Saxman, with a population of 422 people in 2006, still sends small numbers of high school students to nearby Ketchikan. This is an indicator that Saxman is not large or rich enough to have a separate high school for its students. It is an arbitrary factor for assessing the separateness of the Saxman community for a rural determination.

*Wolfe 2007 at 2. See also Monteith 2007 at 11.* The FSB failed to acknowledge that the community of Saxman administers some of its own Federal education programs, including Head Start and after school tutoring programs. *Id.* The Board also failed to take into consideration the significantly high dropout rate for Saxman students – which may be an indication of unique social issues for Saxman. *Id.*

As for commuting patterns for wage employment, while sometimes used as an indicator of the boundaries of urban areas in the United States (Wolfe and Fisher 2003: 55-56, 121-124), that is only one factor among many that can be used to determine if Saxman qualifies as a distinct community for rural subsistence purposes. More common indicators of a community's distinctiveness are: municipal boundaries, the presence of separate governments, distinctive local histories, and distinctive socioeconomic systems. *Id.* at 2. “Wage employment by itself has never been found to be a good indicator of a population's urban or rural status, as most of the employed rural population in the United States are engaged in wage employment, rather than in farming or other forms of food production.” *Id.* In fact, Saxman residents have historically migrated out of the community for work. The use of employment outside of Saxman ignores the array of published literature for almost fifty years regarding dual wage-subsistence economies in Alaska. *Monteith 2007 at 12.* “One could argue that the quintessential subsistence hunter-fisher in Alaska is usually a seasonal laborer who migrates out of the community for work.” *Id.*

The Saxman employment data relied upon by the FSB was misleading and possibly inaccurate. As Dr. Monteith points out, the “rural-urban commuting area (RUCA) codes are developed at the zip code level nationally using the 30% commuting standard (Decennial Review 2006:5). Saxman and Ketchikan have the same zip code, and at least some Saxman residents maintain post office boxes in Ketchikan. *Monteith (2007) at 11-12.* Dr. Monteith has identified other data analysis errors or research errors in his report. The actual numbers show that only

14% of the total population of Saxman seeks employment outside of the community, *id.*, which means of course that the vast majority of residents do not.

Steve Wade, Economic Development Specialist for the Business & Economic Development Department of Central Council Tlingit & Haida Indian Tribes of Alaska, points out in his statement entitled “*Methodology Variations in Demographic Analysis of Southeast Alaska Communities*,” points out the dangers of relying on statistics when dealing with very small numbers.

Because of the large percentages of Native peoples choosing a traditional subsistence lifestyle, combined with the historically high unemployment/underemployment and lack of employment opportunities (the latter two contributing to discouraged workers who leave the workforce and are no longer counted as unemployed), statistics traditionally used in urban and traditional non-native communities fail to show the true economic conditions. With fewer workers counted in the labor force, small changes to the “counted” number have significant skewing effects on any data derived from their use. Examples of this can be found throughout the Southeast, where unemployment rates are counted at around 15-19 percent, but where 60-80 percent of adults aged 16 and older are not counted in the workforce.

In Saxman, where the total population is low to begin with, the workforce statistics are significantly distorted. *Id.*

## **VI. The Final Rule adopted by the Federal Subsistence Board does not comply with the notice and comment provisions of the APA**

The Administrative Procedure Act’s (APA), 5 U.S.C. § 553 (1982) requirement that an agency provide notice and an opportunity to comment on a proposed rule is basic to administrative law and the right to due process. The purpose of proposed rulemaking is to “provide an accurate picture of the reasoning that has led the agency to the proposed rule,” so that interested parties can contest that reasoning if they wish. *Connecticut Light & Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 530 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982). Under the APA, the agency notice must be sufficient to fairly apprise interested parties of the substance of the proposed rule. While an agency may promulgate a final rule that differs in some particulars from a proposed rule in response to new data or to comments on the proposed rule, *e.g.*, *National Cable Television Association v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984), the final rule must have been foreshadowed or been a “logical outgrowth” of the rulemaking proposal. “Whatever a “logical outgrowth” might include, it certainly does not include the agency’s decision to repudiate its proposed interpretation and adopt its reverse.” *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005). When an agency publishes a notice seeking comments on a proposed rule and then fundamentally changes the rule, it is obliged under the APA to give notice of the revised rule and allow another opportunity for public comments.

In this case, residents of Saxman were denied an opportunity for meaningful comment, since the final rule departed radically from the proposed rule. In December 2005, the Board identified Saxman as a community that would receive further staff analysis. The June 23, 2006, *Rural Determinations Decennial Review: Analysis of Communities and Areas as Assigned by the Federal Subsistence Board* provided the requested staff analyses. Based on a review of community information concerning Saxman, input from the SERAC, from the OSM staff and the affected public, the FSB published a proposed rule on August 14, 2006, finding that Saxman should not be grouped with the Ketchikan area. The proposed rule included the following rationale:

Even though the grouping criteria would indicate including Saxman with the Ketchikan Area, social and economic characteristics indicate that Saxman should not be grouped in the Ketchikan Area. Saxman is a small, close-knit community that is socially and politically separate from Ketchikan. The residents of Saxman have two distinct entities to separate themselves from Ketchikan, the traditional government (Organized Village of Saxman) and the municipal government (City of Saxman). Socioeconomic indicators suggest distinctions between the two communities. For example, Saxman has a higher unemployment rate, lower per capita income, higher percentage of residents below the poverty level than those found in Ketchikan, and a 70 percent Native population. Another distinguishing characteristic of the community is that Saxman residents depend much more heavily on the harvest of subsistence resources. Saxman's average per capita harvest of 217 pounds is substantially more than has been estimated for the Ketchikan area. Thus, while the grouping criteria lead to including Saxman with the Ketchikan area, the unique socioeconomic characteristics of Saxman suggest that it should remain separate from the Ketchikan Area.

72 Fed. Reg. 46416, 46420 (August 14, 2006). After the publication of the proposed rule, the FSB held public hearings in Ketchikan and Saxman on September 25-26, 2006.<sup>5</sup> The hearings expressly responded to the proposed rule. Because the proposed rule did not aggregate Saxman with Ketchikan, the issue of aggregation or the unique characteristics of Saxman were not fully addressed at the Saxman and Ketchikan hearings and many people may have decided to forego the hearing given that the proposed rule maintained the status quo. Instead the testimony at the Saxman hearing was primarily focused on the rural characteristics of the community and the residents' dependence on subsistence uses. The testimony received in both Ketchikan and Saxman overwhelmingly supported maintaining Saxman's rural status. Neither the written comments submitted on the proposed rule nor the testimony presented at the hearings provided new, compelling information that had not already been considered in developing the proposed rule. Neither the record of the public hearings nor comments received on the proposed rule, nor

<sup>5</sup> Of concern to the people of Saxman is the fact that only three of the six members of the Federal Subsistence Board who make the decision to group Saxman with Ketchikan actually came to the hearing in Saxman (Board Members Oviatt, Gottlieb and Bschor).

the technical analyses prepared by OSM staff, pointed to a conclusion with respect to Saxman that differed from that presented in the proposed rule published on August 14, 2006.

It was not until the day before the December 12-13, 2006, final FSB hearing in Anchorage that anyone from Saxman received any information that their status was likely to change. Not even the SERAC was told that the “majority” staff report recommended aggregating Saxman with Ketchikan. On December 11, Mr. Lee Wallace, President of the Organized Village of Saxman and a member of the SERAC was given a copy of the staff committee majority recommendation calling for aggregating Saxman with Ketchikan and classifying the area as non-rural. He had very little opportunity at that point to prepare his own comments on this new recommendation. The residents of Saxman, who will lose the right to hunt and fish under Federal subsistence regulations, had no opportunity to present testimony to the Board since it was too late to mount a defense to the new recommendation. The SE Regional Advisory Council Chair first saw the new majority recommendation when he arrived at the Board meeting on December 12, 2006. The change in classification of Saxman at the eleventh hour meant that the SE RAC, like the public, was not given an opportunity to review and provide meaningful input on the question of the aggregation of Saxman with Ketchikan, or review the evidence on which the Board based its new conclusion.

The FSB cannot argue that the sudden about-face with respect to Saxman was the result of public comments or new information, since the overwhelming majority of comments supported Saxman as a separate rural community. The FSB does not have *carte blanche* to establish a rule contrary to its original published proposed rule. Otherwise an agency could simply propose a rule and state that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any alternatives under consideration. Because the final rule in this case was a complete reversal of the proposed rule, the FSB failed to give the public, especially the residents of Saxman, who are dependent upon subsistence, adequate notice and an opportunity to respond to the new rule. Accordingly, the FSB should rescind its decision to aggregate Saxman with the Ketchikan area, and give the public, the SE RAC and the people of Saxman an opportunity to present evidence demonstrating that Saxman should not be grouped with the Ketchikan area.

## **VII. The Board violated 16 U.S.C. §3115(c) by failing to give deference to the recommendations of the Southeast Regional Advisory Council**

The Board’s failure to follow the Southeast Alaska Regional Advisory Council’s recommendations that Saxman retain its rural status is a violation of Section 805(c) of Title VIII of ANILCA. Section 805 mandates the formation of regional councils to implement Congress’ intent. Section 801(5) provides “that an administrative structure be established for the purposes of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.” Section 805 implements this purpose first by granting the RACs the specific authority under section 805(a)(3)(A) for “review and evaluation of proposals for *regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region.*” Under section 805(a)(3)(D), the RACs are also authorized to prepare an annual “report” that is to include recommendations on a strategy for the management

of fish and wildlife populations within the region to accommodate subsistence uses and needs, including those concerning policies, standards, guidelines and regulations to implement the proposed strategy.

Section 805(c) requires the Secretary to defer to RAC recommendations for several purposes. The statute provides that the Secretary:

In performing his *monitoring* responsibility pursuant to section 806 and in the exercise of his closure and other *administrative* authority over the public lands, *shall* consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands (emphasis added).

Section 805(c) then requires the Secretary to follow the recommendation of any RAC *unless* he determines that it 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 RAC recommendation is not adopted by the Secretary, in this case the FSB acting on behalf of the Secretary, the FSB is required to set forth the factual basis and the reasons for the decision. *Id.*

Although the FSB sought comments and input from the various RACs in the rural determinations decennial review, it took the position that their recommendations were not subject to the deference afforded to RAC recommendations under Section 805(c) of ANILCA. The only court decision addressing the deference issue is *Safari Club International v. Demientieff*, No. 3:98cv0414 (D. Alaska) (*Order on Motion for Summary Judgment*, filed 6/12/06) at 12-13. There the district court held that the regulation establishing designated seats on the RACs for sport and commercial users was not subject to 805(c) deference because the regulation did not relate to the “taking and uses of fish and wildlife on public lands.” The 70/30 rule at issue in *Safari Club* is quite different from the determination on rural status at issue in this case. The decision as to whether a community is rural or nonrural goes to the very heart of the subsistence program. It is critical to whether residents of a community are eligible to participate *at all* in subsistence hunting and fishing under the federal subsistence regulations. Only rural residents can “take” fish or wildlife under federal subsistence regulations.

Congress intended the system of regional advisory councils to serve as the major mechanism to ensure local and regional participation in making decisions that affect subsistence uses of fish and wildlife on federal lands. The SE Regional Advisory Council members have local knowledge that is vital for understanding the community of Saxman, and applying the rural determination facts and criteria to the community. Yet, the SE RAC’s recommendation to retain Saxman’s rural status was rejected. That was a violation of Section 805(c) of ANILCA.

### **VIII. The Board’s Decision to group Saxman with Ketchikan Appears to have been Improperly influenced in violation of the APA**

Decisions of an administrative agency must be made by the body in which the law vests the power of decision. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954). The decision cannot be dictated by someone else. *Id.* In this case, the decision to aggregate

Saxman with Ketchikan required a vote of at least four of the six members of the Federal Subsistence Board. A tie vote (3-3) would have left the existing regulation with respect to Saxman in place. Both Chairman Michael Fleagle and the representative from the BIA, Niles Cesar expressed their intention to vote against grouping Saxman with Ketchikan. *See Board Transcript* 193-94 (Cesar) and 195-96 (Fleagle). It is apparent from her statements throughout the public testimony and during the Board's deliberations that Judy Gottlieb, representing the National Park Service, also favored retaining Saxman's rural status. *TR.* at 191-192, 194. For example, with respect to the grouping, Ms. Gottlieb stated:

. . . these three factors that we use for grouping, those were used to assist us in wrapping our arms around the concept of aggregation. And for most of the circumstances, most of the areas we looked at, I think those three factors are adequate. But I have to question . . . whether [they are] sufficient indicators to accurately make our determination today on whether Saxman should be grouped. Our regulations do give us some flexibility to examine the unique social and economic circumstances as stated in the proposed regulation. These characteristics or maybe further information that we need can help add further definition and meaning to our conclusions today, and we kind of just applied some of that flexibility just in our Kodiak decision.

*TR.* 191-192. Ms. Gottlieb continued by cataloging the many facts about Saxman that demonstrate that it is a distinct and separate community from Ketchikan. She noted Saxman's separate governments, its low population density, the high school drop out rates of Saxman students, the high unemployment rate in Saxman, low wages and low per capita income -- all indicators of Saxman's rural status. She concluded by stating "there's really quite a difference in the level of sharing and receiving between residents of Saxman and Ketchikan. From the two surveys that were mentioned, Ketchikan receives resources 61.2 percent, in Saxman it [is] 91.8 percent, and in Ketchikan people give 33.9 per cent and in Saxman the number of people giving is 69.9 per cent." *TR.* 192. A little later in the deliberations, Ms. Gottlieb also noted that "little has changed in terms of the data relevant to the guidelines and the grouping and the status regarding Saxman." *TR.* 194. She again stressed the need for flexibility in terms of the application of the grouping criteria. *Id.*

At this point, the clear perception was that the National Park Service, the BIA and the Chair would all be voting to retain Saxman's rural status. *See, e.g., Affidavit of David S. Case.* Before taking a vote on the motion to aggregate Saxman with Ketchikan, the Chair abruptly called for a break. *TR.* 196. Following the break, Ms. Gottlieb, despite her earlier comments in opposition to grouping Saxman with Ketchikan, voted in favor of the aggregation. Her explanation could lead one to conclude that she was unduly pressured during the break to vote to change Saxman's status. *Case Affidavit* at 3-4. As observed by members of the public, Ms. Gottlieb received a telephone call immediately before returning from the break, and afterwards, only reluctantly voted in favor of aggregating Saxman with the Ketchikan area -- directly contrary to her previous statements in support of retaining Saxman's independent status. The sole justification given for her vote was as follows:

Well, I guess from the current legal advice that we're hearing it appears as though we have to follow the court's direction regarding the Kenai Kenaitze case and be cautious on how we do this.

TR.198. As noted by David Case, nothing in the legal advice given the Board during their deliberations (Tr. 172-175 (Goltz); 182 (Ustasiwski); 188-189 (Goltz) referred to the *Kenaitze* case, so it appears from the transcript that the justification of Ms. Gottlieb's change of opinion came about as a result of direction provided by some outside source and not as a part of the Board's deliberations. *Case Affidavit* at 4. In any event, to the extent Ms. Gottlieb's decision to group Saxman with Ketchikan was based on the *Kenaitze* case, it was erroneous since, as discussed earlier, nothing in that decision requires aggregation of communities. Thus, the Board's interpretation of the applicable law or regulation was in error, warranting reconsideration.

The concern expressed by Keith Goltz, a staff attorney in the Office of the Solicitor for the Department of the Interior during the deliberations was that a decision to exclude Saxman from the Ketchikan area would be difficult to defend. He based his opinion primarily on the visual effect presented when one looks at the map of the area (contained in *Analysis of Communities and Areas*, June 23, 2006 at 62) showing Saxman "surrounded on all four sides by an urban area." TR. 172.<sup>6</sup> The second issue for which Mr. Goltz expressed concern was with consistency of application of the criteria. There was no mention of the *Kenaitze* case.

We also believe extreme pressure and administrative direction were placed on the Office of Subsistence Management staff to change their analysis of Saxman only days before the Board's December 12-13 meeting in Anchorage. The SERAC learned that meetings were held at which Board members were urged by Department of Interior officials to vote in a certain way. Mr. Niedig, Special Assistant to the Secretary of the Interior for Alaska met with the National Park Service shortly before the December Board meeting to encourage a vote to aggregate Saxman with Ketchikan. As noted above, the National Park Service's vote was critical to the decision to aggregate Saxman with Ketchikan.

The Constitution of the United States guarantees "no person shall be deprived of life, liberty, or property without due process of law." *Guenther v. C.I.R.*, 889 F.2d 882, 884 (9<sup>th</sup> Circuit. 1989). The essential ingredients of procedural due process necessarily include notice and an opportunity to be heard before an impartial and disinterested decision maker. The basic purpose of due process is to preserve "both the appearance and reality of fairness" in all proceedings, "generating the feeling, so important to a popular government, that justice has been done." *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 1732 (1951)). As noted by the Ninth Circuit in *Greene v.*

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<sup>6</sup> Anyone who has visited Saxman knows that once you drive south past the IGA grocery store, the area changes and around the bend past the Coast Guard station it clearly begins to "feel" different from Ketchikan. After you leave the Coast Guard station you are bordered by the Tongass Narrows on the right and high mountains on the left. There are houses mainly on the water side; Saxman is a "pocket" along the road where the land is lower and there's room for the village and some upland houses. Unlike the north end of the island, the mountains to the south around Saxman make the surrounding "nonrural" area uninhabitable. Dave Jensen (Tr. 174-175) attempted to make the point that Saxman is not surrounded by an urban area. The current nonrural land surrounding Saxman is really just mountain tops.

*Babbitt*, 64 F.3d 1266, 1275 (9<sup>th</sup> Cir. 1995), “[i]nformal decision-making behind closed doors and with an undisclosed record is not an appropriate process for the determination of matters of such gravity.” The *Greene* case involved an *ex parte* meeting that occurred between the Assistant Secretary Ada Deer, the decision-maker, and a government attorney for the BIA prior to a decision on affording federal recognition to the Samish Indian Tribe. The Court concluded in that case that the government’s *ex parte* contacts with the decision maker rendered the proceedings fundamentally unfair and violated the Samish Tribe’s Fifth Amendment due process rights. If off-the-record meetings or executive session discussions took place between Department of Interior employees and members of the Federal Subsistence Board to convince Board members to vote to aggregate Saxman with Ketchikan, it was a violation of the APA and the due process rights of the people of Saxman. While we do not know for certain that instructions were given to the National Park Service Board member, or what sort of meetings took place prior to the Board meeting, but there is certainly an appearance that the decision-making is happening outside the public process.

## **IX. Conclusion**

For the reasons outlined above, and in accordance with 50 CFR § 100.20(d), the Organized Village of Saxman and the City of Saxman ask that the FSB grant its request for reconsideration. On reconsideration, the FSB is urged to find that Saxman is a separate rural community that is not economically, socially or communally integrated into the greater Ketchikan area. The great weight of the available evidence demonstrates that Saxman should not be aggregated with Ketchikan, but should remain for purposes of Title VIII of ANILCA, a “rural” community.

## **Saxman Rural Determination**

**Daniel Monteith, Ph.D.**  
**720 4<sup>th</sup> Street, Douglas, Alaska 99824**  
**July 2, 2007**

### **Biographical Statement and Relevant Research**

My name is Daniel Monteith, I am currently employed as a professor of anthropology at the University of Alaska Southeast. I submit these comments as an independent researcher. The following document is based on my own independent research and in no way represents any official position of the University of Alaska. I hold a Ph.D. in cultural anthropology from Michigan State University with a specialization in subsistence, economic anthropology and ethnohistory. My dissertation specifically was a tribal history of the Tongass Tribe. The focus of this research was the continuous social and economic identity of the Tribe. My dissertation work began in Saxman and my preliminary interests were the social and economic importance of subsistence to the community. I have lived in Saxman for over three and a half years and Ketchikan another six and a half years during which time I conducted extensive ethnographic fieldwork and became very familiar with both communities.

I have conducted research in Alaska for over twenty-five years. In the early 1980s I was involved in the commercial fishing industry in Bristol Bay. I received a Bachelor's degree and Master's degree at the University of Chicago. My Masters thesis at Chicago examined the commercial fishing industry in Bristol Bay. Since that time I have continued to gain knowledge about the commercial fishing industry in Southeast Alaska as a deckhand on a commercial seine boat and around Kodiak as a Halibut long-liner. I have participated in hunting, fishing, and gathering activities with Alaska Natives from communities like Sitka, Angoon, Hoonah, Yakutat, Kasaan, Ketchikan, and Saxman. Both my practical ethnographic experience and my scholarly background have given me a great deal of knowledge about subsistence and resource use in Alaska.

### **Abstract**

On December 13, 2006, the Federal Subsistence Board made a decision to change the status of the community of Saxman from a "rural" to "non-rural" community. The criteria for grouping Saxman with Ketchikan are arbitrary, limiting, politically charged, and weak science. Specifically, the criteria used by the Board to represent community aggregation and grouping are based on outdated sociological theories and concepts. Moreover, the criteria are different from data used by other federal agencies when evaluating rural status. Finally the criteria used by the Board ignore input provided by leading researchers from the Institute of Social and Economic Research of the University of Alaska. The Board's research and data clearly lacks any peer review process. This fact calls into question the validity and legitimacy of its findings from a scientific perspective.

Saxman is a rural community that has maintained a historical and contemporary independent, autonomous, and continuous political, social, and economic identity. This report will outline the unique and autonomous identity of Saxman and its reliance upon subsistence for both its social and economic well-being. The importance of subsistence to the cultural fabric of the community of Saxman is something that can not be replaced by millions of dollars of state and federal social programs and grants.

### **Ethnographic Information for Saxman**

The Board in their analysis and research did not consider historical ethnographic data. The preponderance of ethnographic and historical evidence suggests that the two communities of Saxman and Ketchikan have very unique cultural, social and political identities. Many of the residents of Saxman are the modern day descendants of the Cape Fox Tribe or Sanya Kwaan and the Tongass Tribe or Taanta Kwaan. According to several anthropological sources the Sanya Kwaan and the Taanta Kwaan are two of the southernmost tribes or geographic divisions of the Tlingits (Swanton 1908:396-397; Emmons 1991:9; Olson 1967; Krause 1979; Monteith 1998). This study utilizes primary archival sources, original ethnographic sources, and Native oral narratives and histories to develop the presence of and identity of two distinct communities in southern Southeast Alaska.

The Sanya Kwaan and Taanta Kwaan territory stretched from Portland Canal, the Nass River, and Dixon Entrance in the south to the Unuk River and Lincoln Rock in the north. To the west and north there were other Tlingit kwaans such as the: Heenya Kwaan, Kuiu Kwaan, Klawak Kwaan, and the Stikine Kwaan. Other neighboring linguistic groups were the Nishga, Tsetsaut, Kaigani Haida, and Northern Coastal Tsimshian. There is evidence in the oral narratives and genealogies about inter-marriage between the Sanya Kwaan and Taanta Kwaan and with the other neighboring groups. Just about all of the above mentioned groups may be represented by at least one family in Saxman if you were to trace their genealogy back to the historic and the pre-Euro-American contact period.

Within each kwaan there are usually several clans. The major clans of the Sanya Kwaan are: Kiks.adi, Neix.adi, and Teikweidi. The major clans among the Taanta kwaan are: Ganax.adi, Teikweidi, and Dakl'aweidi. Each of the clans had several house groups. At the historic villages each of these kwaans had over fourteen clan houses.

The Sanya Kwaan and Taanta Kwaan were well documented during the 1800s in many historical and archival sources before each of the tribes moved to Saxman and Ketchikan. Archeological investigations suggest a great deal of continuity of occupation in certain areas of southern Southeast Alaska. Radiocarbon dates from specific sites suggests both kwaans or tribes have been in the area for hundreds if not thousands of years (Langdon 1979; Wooley and Haggarty 1989; Monteith 1998).

Prior to the United States purchase of the administrative rights to Alaska from the Russians, these two Tlingit kwaans were key players in the politics and economics of southern Southeast. Some of the *hit satees* or clan leaders were acknowledged and given diplomatic awards by the Russian government (Dunn 1836; BCP 1903; Dean 1993; Monteith 1998). The

Tongass in particular have two *kooteeya* or poles that commemorate the interaction between Euro-Americans prior to and leading up to the United States period. The Proud Raven Pole tells the narrative of one of the first Tongass people to encounter a European sailing expedition. The Seward Pole tells the narrative about the *koo.eex* or potlatch that Chief Ebbits held for the Secretary of State of the United States, William Seward and his party of dignitaries who visited Alaska. These poles serve as legal documentation in Tlingit culture and as a way of verifying the oral narrative and legal claim or deed to the land. The original poles were erected and a *koo.eex* was held at the village on Tongass Island. These narratives and claims have been rededicated and the poles were reproduced and are displayed in the Saxman Totem Park today.

In 1868, just as the United States was establishing a fort on Tongass Island a business man and entrepreneur by the name of Emil Teichmann traveled to Southeast Alaska. His writings give us one of the few original first hand accounts of the Tongass and describes life at the new military post as it was being constructed (Teichmann 1963). While Teichmann was visiting the Fort and Tongass village he hired a Tlingit boat pilot who would assist him as navigator and Tlingit interpreter on his journey all the way to Sitka (Monteith 2006).

In 1881, Aurel Krause traveled to Alaska on a scientific expedition with the Geological Society of the Bremen. Krause was one of the first individuals to do systematic ethnographic studies of the Tlingit. Krause documents both the Cape Fox and Tongass tribes as separate and distinct tribes. In 1886, Professor S. A. Saxman was put in charge of the public school on Tongass Island. During the winter of 1887 Saxman and Louis Paul went in search of a new location for a village and school. Both individuals disappeared on an excursion traveling north of Tongass Island.

The events leading up to the Tongass relocating to Ketchikan actually began five to six years before the Tongass [and Cape Fox] resettled at their old fishing grounds called Kich x'aaan. They had fished the Ketchikan Creek, and it was owned, at that point, by Geetwein of the Ganax.adi clan (Leer 1978:20-23). Ethnographic sources state that the Tongass had established a fort at Ketchikan and lived there during a major battle with the Tsimshian during the proto-historic period (Olson 1967). In 1888, the Tongass Packing Company began operation on Tongass Narrows near the mouth of Ketchikan Creek (Monteith 1998:172)

From 1893 to 1895 the Taanta Kwaan and Sanya Kwaan began to relocate near Ketchikan Creek. According to territorial missionary and educator Sheldon Jackson, the “Cape Fox and Port Tongass natives had been clamoring for a missionary” (Jackson 1896:1432). Oral narratives by both Tongass and Cape Fox elders state that there were many who were interested in the promise of a new church but many others were interested in the promise of a school for the children and medical attention and smallpox vaccines for the young. “By the early 1890’s, the Tongass people were ravaged by waves of epidemics of infectious diseases. Even as late as the 1860’s, there had been a smallpox epidemic. With no permanent mission being located on Tongass since 1886, there must have been a significant number of new infants who had not been vaccinated for smallpox” (Monteith 1998:174). Many Tlingits were also dying from tuberculosis and measles. The Episcopalian Church established a church and mission school near Ketchikan Creek. Miss Edwards was in charge of the first Ketchikan mission school.

While many of the Tongass people settled in Ketchikan many of the Cape Fox people located about two and a half miles south of the creek. In 1895, as the community south of Ketchikan was being constructed the Presbyterian missionaries established a church and school and named the new community after S. A. Saxman. The school teacher for the new Saxman school was J.W. Young. Over the next few years in his reports to Jackson (1896) he wrote that there were 31 children enrolled in the school by 1895. However, Young complains about the attendance of children in the schools because the families would head off with their parents on subsistence activities. Moreover as early as 1897 Young writes about the loss of students when several of the Saxman people went to Dyea to get seasonal jobs as packers for the miners going to the Yukon gold rush. Thus the temporary out migration for seasonal jobs has been a long standing historical practice that is as old as the modern day community of Saxman.

On May 4, 1907, an Executive Order was issued reserving 40 acres of land at the Indian Village of Saxman for the purposes of a school. This reserve was surveyed and segregated by U.S. Survey 920. Therefore, beginning as early as 1907 the boundaries of Saxman began to be clearly delineated politically and legally.

On October 26, 1929, an election for incorporation of the City of Saxman occurred and balloting for trustees was as follows: Henry Denny Jr. 32, C. T. Johnson 27, Peter McKay 26, Johnny Jackson 15, Paul Jacobson, Henry Denny Sr. 6, Jack Long 2, and Johnny K. Williams 1. The matter of Second Class incorporation for the village of Saxman was filed in District Court for the District of Alaska, Division number one, Ketchikan. Judge Justin W. Harding signed and certified the incorporation of Saxman as a second class municipality on January 22, 1930 (Paul 1951).

Esther Shea, a Tongass elder who was born in Boca De Quadra in 1919 and grew up in Saxman wrote about the subsistence trips her family would make to the Chickamin River (Teikweidi clan territory). Her mother was Alice Harris (Teikweidi) and her father was Richard Harris (Kik's.adi). Her recollections and memories of going to fish camp in the late summer and early fall were recorded in a pamphlet printed by Ketchikan Indian Corporation (Shea n.d.). By the time she was a teenager she was relocated to Sitka to attend boarding school at Sheldon Jackson.

Viola Garfield, an anthropologist, did a great deal of fieldwork work among the Tongass and Cape Fox and her ethnographic notes provide rich documentation about the poles that were rededicated and reproduced by the Native Civilian Conservation Corps carvers for the communities of Saxman and Ketchikan (Garfield n.d.). The reproduction of historic poles from the various historic village sites of the Tongass and Cape Fox did more than just perpetuate the memory of the poles and oral narratives but according to Tlingit culture and law it rededicated in a sense, the legal title and claims represented by the poles (Garfield 1961; Monteith 1998). The poles and the histories behind the poles represent in Tlingit culture unique *at.oow* or clan property.

Both of these communities developed separate totem parks. The totem park in Saxman has become an important part of heritage tourism today and has a carving center which has been

integral in perpetuating, teaching, and encouraging younger artists. The totem park and the carving center in Saxman have continued to create a unique sense of cultural identity for Saxman both historically and today.

In 1946, the federal study conducted by Goldschmidt and Haas on land and resource use in Southeast Alaska wrote that Saxman was an area within the “traditional” tribal areas of the Cape Fox and Tongass tribes (Goldschmidt and Haas. 1946). Their landmark study documents the traditional and customary use areas of the Tongass and Cape Fox. The study clearly separates and discusses both Ketchikan and Saxman areas. It is also a landmark study because it clearly documents the struggles the Tlingit and Haida tribes of Alaska were having with issues of non-natives trespassing on fishing and hunting grounds. Moreover, it documents the unresolved issues between the Tlingit fishers and hunters and their use of federal land during the first half of the 20<sup>th</sup> Century.

In 1951, the Secretary of Interior conveyed the school land to the local city officials of Saxman (Jones 1951). This letter discussed the conveyance of land; specifically “the old school building for community purposes” (ibid). This document recognizes and outlines the procedures the village council should follow to take possession of the school house which today is used as office space and a meeting place for the City of Saxman and the Organized Village of Saxman, IRA village council. The transfer of ownership from the Federal government to the city and tribe of Saxman was essential in establishing the school house as a permanent building for political activity for the community. Not only is this one of the oldest structures in Saxman but it is a central meeting place for many political and community organizations in Saxman today.

Another way in which one sees distinct identities between Saxman and Ketchikan is that each community has its own Alaska Native Brotherhood and Sisterhood camp. In 1958, anthropologist Philip Drucker wrote an ethnography and ethnohistory of the Alaska Native Sisterhood and Brotherhood. In this monograph he writes in detail about the political interaction of the Grand Camp and also a great deal about the interaction and history of each and every camp. Drucker a prominent anthropologist of his day states this about the relationship and identity of Saxman and Ketchikan and the Tongass and Cape Fox:

The two camps were organized separately in the beginning and have maintained that separation to the present day. The same is true of the camps at Ketchikan and Saxman. They also have remained separate and distinct, although it would seem more efficient for them to join forces. The Saxman people consist primarily of the old Sanya kwan or “People of Cape Fox,” and the Indian community of Ketchikan consists principally of the descendants of the Tongass group plus a sprinkling of outsiders from various parts of southern Alaska as well as a good many Tsimshian from Matlakatla. While Sanyakwan and Tongasskwan have been neighbors and are considerably interrelated through ties of blood and marriage and have been so for generations, they have regarded themselves as separate groups and continue to do so today. Their local chapters of the Alaska Native Brotherhood and the Sisterhood are quite separate (Drucker 1958:26).

## Contemporary Identity

Today Saxman maintains a separate political identity from the community of Ketchikan. Each community maintains a separate Alaska Native Brotherhood and Sisterhood camp. Each community has its own federally recognized tribal IRA government (Indian Reorganization Act of 1936). Each community makes up a separate chapter within the Central Council of Tlingit and Haida Tribes of Alaska (Recognized under federal legislation in 1968). Each community maintains a separate Native for-profit corporation that administers Indian programs under federal law 93-638. Cape Fox Corporation is the village for-profit corporation for the community recognized under the Alaska Native Claims Settlement Act, 1971. Saxman is a separate second class municipality recognized by the State of Alaska and has administered federal grants and programs separate from the City of Ketchikan or Ketchikan Gateway Borough. Saxman maintains its own City water and volunteer fire departments. Furthermore, Saxman has vehemently resisted efforts by the Borough and City of Ketchikan to unify local governments. Even socially and culturally Saxman maintains a unique and separate identity with its own churches and Native dance groups. The separate entities are readily apparent at local and regional meetings and events. Most social scientists would agree that all of the above mentioned factors or variables are as relevant indicators, if not more so, for political and social grouping and aggregation than the Board's criteria.

## Saxman as an International Tourist Destination in Heritage Tourism

Today Saxman is recognized by people from all over the world who come to Saxman as a destination location. From an economic and marketing perspective Saxman is characterized as a separate Native village. In the late 1980s work began on the Beaver Tribal House that was a reproduction of the historic clan houses. The Beaver Tribal House has become an important community hall and center for meetings, ceremonies, and artistic performances of all kinds. The more traditional atmosphere of the tribal house provides the ideal location for memorials, wakes, funerals, and potlatches (*koo.ooexs*). The *koo.eex* or potlatch is still an essential part of the social and cultural aspects of the community today and the subsistence foods are an integral part of these ceremonies.

Since the early 1990s and the exponential growth of the cruise ship industry Saxman has developed as an independent cultural and economic center. Visitors and tourists come specifically to see the village of Saxman and experience Alaska Native culture today. These visitors come from all over the world to see Native artists at work in the Saxman carving center. The carving center that was built during this period has served as a place for Tlingit, Haida, and Tsimshian artists of the area to work, display, and market their art to a world wide audience. During the summer Saxman residents share their culture, collective memory and history, their songs, dances, and visual arts (poles). The totem park that was constructed by the Civilian Conservation Corps provides the back drop of poles that are both tangible neumonic memories devices as well as legal symbols that represent the community's unique identity. In recent years new poles have been erected that represent the new historical events and figures of the community. The new poles emphasize the dynamic and changing nature of culture today.

While heritage tourism is increasing opportunities for employment for individuals in Saxman, a large percentage of these positions are seasonal jobs. The seasonality of employment in tourism is not much different from the older more traditional jobs in fishing, mining, and timber. Most of these jobs lend themselves to a “dual” or “mixed” subsistence /wage economy for the residents of Saxman. The seasonal nature and relatively low hourly wage and/or annual income of Saxman residents emphasize their reliance on subsistence resources.

### **Dual Wage Subsistence Economy, Informal Economy**

The most recent data from the Department of Fish and Game, Division of Subsistence on Saxman clearly shows an increase in the harvest of subsistence resources from 1990 to 2000 (ADF&G 2004; ADF&G 2000; ADF&G 1988). The data from recent reports from the Division also emphasizes the importance of sharing subsistence resources among community members. Sharing is an integral part of the Native culture, past and present. Sharing within the community not only provides for the well-being of each community member but reinforces reciprocal relations and kinship ties between kin groups. If Saxman were to lose its subsistence status, personal use permits could provide a way for residents to harvest their caloric needs but the harvester could not legally share the resources outside the household. Personal use permitting and harvesting could greatly restrict the cultural activities of Saxman. The lack of consideration of current research and data by the State of Alaska Department of Fish and Game, Division of Subsistence (ADF&G 2004; ADF&G 2000; ADF&G 1988) calls into question the thoroughness and legitimacy of the Board’s research and findings.

In 1990 the Federal Board made the determination that Saxman was a rural community with a subsistence priority. In practice the burden of proof has been on the communities in question to provide documentation of rural status and document the significance of subsistence. In the case of Sitka or Kodiak, two other communities initially selected for further review by the Board, are much larger and have much greater resources to develop a defense to present to the Board. This seems contrary to the philosophy of ANILCA. Small subsistence communities may be ill suited to provide the documentation necessary to defend their subsistence. Whose responsibility is it: The Board or the community to develop data and information to support continued eligibility for the subsistence priority? How is this practice in keeping with the philosophy, intent, and wording of ANILCA?

As reported in the Decennial Review, but not adequately weighed in the Board’s deliberations, there were significant economic differences between Saxman and Ketchikan. Saxman has an unemployment rate that is significantly high at 22% versus the unemployment in Ketchikan that is approximately 7%. The high unemployment rate in Saxman is accentuated by a much lower per capita income of \$15,642 as compared to Ketchikan’s \$24,290. These are very different economic indicators and could easily be considered factors that would indicate different communities and unique economic circumstances.

The economic data coupled with the differences in the informal economy (or subsistence economy) denotes two very different communities. According to the Decennial Report the subsistence harvest levels for the community of Saxman are over 200 lbs. per capita, compared to that of Ketchikan, which has a harvest level of under 100 lbs. Furthermore, Saxman

consumes almost 120 lbs. of salmon and large land animals. The author of this report would say the data is wrong, and the numbers regarding subsistence harvest is too low for both communities; however, the numbers between the two communities are very different and indicate very different economic characteristics.

## **SECTION TWO: Methods**

### **Grouping Criteria**

The Board's choice of grouping criteria for Saxman with Ketchikan is arbitrary, arrogant, and politically charged. Clearly stated in the regulations are specific points that are grounds for a Request for Reconsideration. While the Board and reviewers have not considered the historical and contemporary ethnographic data presented regarding Saxman in section one of this report, there are also concepts and data that were used in the Board's consideration to determine Saxman's grouping with Ketchikan that have not had proper academic peer review or scrutiny. The criteria used for grouping Saxman with Ketchikan and the alternative suggestions for grouping criteria proposed in this report represent 1) Information not previously considered by the Board; 2) demonstrates that existing information used by the Board is incorrect; and 3) The Board's interpretation of the information is in error and contrary to accepted social science concepts and theories about community identity and grouping.

The criteria used by the Board to determine grouping of Saxman with Ketchikan is based on old and out-dated techniques for determining community identity. The criteria used by the Board dates back to "early rural sociologists" (Sanders & Lewis 1976:37), like Galpin 1915 who used ideas of delineation and identification to define a community. These sociologists "devoted much energy to this delineation, and often equated the community with a trade area. This trade area was a combination of the outreach of various kinds of services (church and school attendance, banking, medical care, grocery shopping, etc.) from a center that was often quite small" (Sanders & Lewis 1976:37). Few sociologists use this technique anymore (Sanders & Lewis 1976:37). Even though forty years ago a few sociologists continued work on community delineation using the trade area model of Galpin, it was viewed as problematic and "was not sufficient because noneconomic factors intruded" (ibid). The criteria and concepts behind the Federal Board's grouping are based on research and theories used in the early 1900s. This is the equivalent to a contemporary nuclear physicist saying that the atom can not be split; that the atom is the smallest piece of matter and using these statements to inform and dictate public policy on nuclear arms today.

By 1959, some sociologists used a more dynamic contemporary perspective for ascertaining community identity. The "interactional conception of a community" used three categories for defining a community: ecological, structural, and typological. "One community is a social unit of which space is an integral part; community is a place, a relatively small one. Two, community indicates a configuration as to way of life, both as to how people do things and what they want – their institutions and their collective goals. A third notion is that of collective action. Persons in a community should not only be able to, but frequently do act together in the common concerns of life" (Kauffman 1959:9).

In recent years both sociologists and anthropologists are creating very dynamic models and theories for understanding community identity. As a way to better understand community identity and sense of place with respect to historic structures, National Park Service scholars have stated: “the criterion needed to protect these structures is one that values significant intangible qualities. Most often, these qualities are expressed on the local level forming both sense of place and community identity. In order to begin the conversation about intangible significance, we should look to the local level of preservation, for it is there that the oral history, the sense of place and the collective memory are most available. We can begin with a definition of sense of place that, if embraced would balance tangible and intangible significance. Sense of place is the human response to history; the sense of place and the collective memory are most available. We can begin with a definition of sense of place that, if embraced, would balance tangible and intangible significance. Sense of place is the human response to history, geography, built and natural environment, and population. Sense of place is recognized, not measured, and it is first recognizable on the community level” (Binder & Speicher). If only the Federal Subsistence Board could adopt as enlightened a perspective as the Park Service has with respect to historic structures. It’s a sad commentary on our society when the Federal government treats historic structures better than Alaska Natives and rural residents of Alaska.

## Methods

In the Decennial Review process, the Board developed three criteria:

The Board identified three guidelines or criteria for analysis to assist in its determination of whether or not to group communities in its review of rural determinations. Those criteria are: 1) Are the communities in proximity and road-accessible to one another?: 2) Do they share a common high school attendance area?; and 3) Do 30% or more of the working people commute from one community to another? (Review 2006:5).

The criteria the Board chose as “grouping” criteria are arbitrary. The citations used to legitimate these criteria were developed specifically for evaluation of grouping of communities on the Kenai Peninsula and the author of this document would argue are not relevant or applicable to Southeast Alaska and Saxman. From a social science and data analysis perspective these criteria are totally arbitrary categories for determining grouping of communities. Many other criteria or variables are much more compelling and informative. The criteria used to evaluate Saxman were instituted even after the Institute for Social and Economic Research stressed the limitations of the criteria.

The citations, reports and documents quoted and used to establish rural grouping in the Board’s review have not been published in peer reviewed journals and are contrary to a great deal of current research and scholarly publications from sociology, anthropology, and political science. Furthermore, the criteria/variables used by the Board are different or contrary to other federal agencies, studies, and reports about community grouping and status. The author of this report, if faced with the task of peer reviewing the Board’s research based on the three criteria set forth would not accept the findings for publication, nor I believe would a majority of scholars.

Some of the social science methods used in collecting data for the research and report to the Board involved limited ethnographic methods. According to the reference cited in the Review, three days were spent in the “Ketchikan area”. Armstrong (2006), who conducted field work in the “Ketchikan area”, spent the 22<sup>nd</sup> through the 24<sup>th</sup> of March 2006, in the area. This is a very superficial and cursory amount of time for doing intensive ethnographic fieldwork. Three days of research is inadequate for assessing the complex issues of subsistence, rural status, or the grouping of communities. I have spent three and a half years in Saxman, and I would argue the validity and accuracy of the data used by the Board was often limited, misleading, incorrect, and erroneous.

Other questions regarding the ethnographic research in Saxman are questions regarding research ethics and guidelines. The following issues should be investigated: 1.) what sort of human subject approval process did this research receive prior to being undertaken? 2.) Did the Tribal IRA council or other entities from Saxman approve and sanction this research? 3.) What sort of informed consent occurred with consultants from Saxman? 4.) Did the risks of the research outweigh the benefits? 5) Why was there no government-to-government consultation on the grouping issue with the Organized Village of Saxman, IRA Council?

### **Criterion 1) Proximity to and Road-Accessibility**

The first criteria used to establish the grouping of Saxman with Ketchikan is simplistic and has changed from the former criterion. The former criterion of daily or semi-daily shopping trips being made by residents of one community to another was changed because as stated “objective data were not available to document such patterns from one community to another” (Review 2006:5). The report states “flexibility allows the Board to exercise its judgment in the evaluation of circumstances unique to Alaskan communities” (Review 2006:4), however, the Board’s decision in December 2006 was a move towards uniformity in assessment of communities. The absence or presence of a road in the case of Saxman does little, from a social science perspective, to establish grouping with a community. It merely proves there is a road, but does not prove “grouping”, consolidation, or aggregation. The fact of the matter is that even the distance of approximately two miles to the City limits of Ketchikan provides a significant obstacle to many residents of Saxman who have no or poor automotive transportation. Public transportation to Ketchikan is also very limited for Saxman. The question of road accessibility is something that has not changed since 1990, and in all fairness, should not be used against Saxman in determining grouping or rural status because residents have little or no political authority or say over a road to Saxman.

According to the Decennial Report, the researchers did not find any discrete boundaries, “despite the lack of apparent boundary and the apparent physical integration of Saxman into Ketchikan, the character of Saxman is significantly different from the City of Ketchikan (Review 2006:63). Most social scientists today would not find the absence of boundary delineations as abnormal and would find the idea of the character of the two communities as being significantly different as the epitomizing comment. One might argue it is not typical when moving from one community to the next to find dramatic boundary delineations. The demographic data on page 63 is key to the socio-economic differences between communities (Decennial Review 2006).

## **Criterion 2) Do they share a common high school area?**

Criterion 2) regarding a common high school is not only a fairly meaningless variable for grouping and aggregating communities, but is an unfair criterion for which the community of Saxman has little political control over. In fact, their rural size and status works against them. It would be very unlikely that the State would be willing to have a separate high school with such a small student population. The Federal Subsistence Board should acknowledge that the community of Saxman does administer some of their own Federal programs for head start and after school tutoring programs. Also, Saxman has had their own native culture classes in the arts and Tlingit language program held in Saxman as part of the University curriculum for the University of Alaska Southeast, Ketchikan campus.

The Board's report clearly states some of the issues with criterion two. "The second criterion, regarding sharing a common high school attendance area, is taken to be an indicator of the social integration of communities. This is an improvement by way of modification from the former criterion of a shared school district. It was pointed out... that attendance in a common high school district often reflects political and administrative boundaries rather than social integration" (Decennial Review 2006:5). The Board was concerned and changed the criteria from common school district to common high school attendance because "attendance in a common school district often reflects political or administrative boundaries rather than social integration." With regard to either factors or variables, Saxman has little or no jurisdiction of political input. Whether or not Saxman students attend the same high school as Ketchikan youth is an uninformative variable that anyone living in Saxman has little control over. Unfortunately the high school drop out rate is significantly high for Saxman students; possibly an indicator of one school not meeting the needs of two communities or unique social issues for Saxman. The incidents of gang violence, racism and bullying in the high school based on community ethnic affiliation may also be a reflection of community differences.

## **Criterion 3) Do 30% or more of the working people commute?**

There are some errors or misleading information in the data presented in the Decennial Review regarding employment for Saxman. The criteria used by the Board for employment for Saxman is problematic from an analytical perspective. When one looks specifically at census and demographic data, Saxman should not be grouped or aggregated with Ketchikan. The actual demographic numbers show approximately 14% of the total population seeks employment outside of the community of Saxman:

1. The population of Saxman 405 people
2. 115 not employed not seeking work
3. 52 unemployed not seeking work
4. 32 retired
5. 98 youth (age 0-15)
6. 31 employed in military (should not count against aggregate data)
7. 21 (28% of employed) residents work in Saxman
8. 349/405 almost 86% of population not employed outside of Saxman
9. Some of those residents may not be receiving employment in the Ketchikan area but outside even the Ketchikan area, therefore not indicative of grouping with Ketchikan

The use of criterion 3), employment outside of the Saxman, ignores the array of literature that has been published regarding dual wage-subsistence economies in Alaska (VanStone 1960). With regard to seeking employment outside the community, the residents of Saxman have a long-standing historical tradition of finding seasonal jobs elsewhere. One could argue that the quintessential subsistence hunter-fisher in Alaska is usually a seasonal laborer who migrates out of the community for work.

The out-migration for jobs outside of Saxman, approximately 14%, does not seem unusual when compared to many other Southeast rural subsistence communities. Most Southeast subsistence communities have higher unemployment than the State average and are characterized by an out-migration for seasonal employment at approximately 15-20 %. Current research of many dual-wage subsistence communities would indicate by the very nature of a rural community one would expect to find a significant temporary out migration for jobs. Thus the criteria of analyzing jobs and employment outside of the community would contradict what might be expected as a norm for a subsistence community.

With respect to data presented to the Board for Criterion 3) Jobs and employment outside of Saxman, there is a number of data analysis issues that were not adequately addressed in the Decennial Report which raise questions about the information stated. For instance, post office or zip codes on employment data could be misleading or might not accurately reflect community of employment. The "Rural-urban commuting area (RUCA) codes are developed at the zip code level nationally using the 30% commuting standard" (Decennial Review 2006:5). Data analysis issues exist in terms of determining the proper RUCA codes when Saxman and Ketchikan have one zip code and/or at least some Saxman residents have Ketchikan post office boxes. Another issue is that some of the employment data for Saxman residents and residents in the outlying areas of Ketchikan seems to be identical in the Decennial Report which leads me to believe that there are some data analysis errors or research errors in adequately discerning employment information between Saxman and outlying areas. There are enough issues with the use of outside employment and the manipulation of the data to cast serious doubt about the validity of that work.

As a researcher who has lived in Saxman for 3 ½ years and Ketchikan for 6 ½ years, I have seen many ways in which Saxman is a distinct community from Ketchikan. There are many social, economic, and political historical factors that are very different between the two communities. There are also many factors that are intangible qualities. The Board's decision on December 13, 2006, will have an adverse impact on the cultural aspects of the community. If the Board does not revise its decision with respect to Saxman it may get what it wants, uniformity in communities. If Saxman is excluded from subsistence activities it will negatively impact the transmission of cultural knowledge to future generations, and should be seen as an act of ethnocide by the Federal Subsistence Board against this community.

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## **Methodology Variations in Demographic Analysis of Southeast Alaska Communities**

To get a true picture of the economic environment in Southeast Alaska Communities several variations to standard Census Bureau methods should be considered. Adjustments to standard methodology for the assessment of economic conditions in Native American/Alaskan Communities in general and Southeast Alaska communities with large native populations specifically, are necessary to gain a true understanding of the economic environment.

This is particularly true when the statistics being used for the demographic analysis include the use of employment or unemployment related figures. Because of the large percentages of Native peoples choosing a traditional subsistence lifestyle, combined with the historically high unemployment/underemployment and lack of employment opportunities (the latter two contributing to discouraged workers who leave the workforce and are no longer counted as unemployed), statistics traditionally used in urban and traditional non-native communities fail to show the true economic conditions. With fewer workers counted in the labor force, small changes to the “counted” number have significant skewing effects on any data derived from their use. Examples of this can be found throughout the Southeast where unemployment rates are counted at around 15-19 percent but, where 60-80 percent of adults aged 16 and older are not counted in the workforce.

For example, in the case of Saxman, AK, where the total population is low to begin with, the workforce statistics are significantly distorted for the various reasons previously named. Therefore, the results of the use of employment statistics when calculating commuter patterns which are used to justify the inclusion of Saxman into the Ketchikan urban area are misleading. The more people living a subsistence lifestyle or using subsistence for various reasons cause the statistics to accentuate the commuter pattern distortion thereby (under current standard methodology) increasing the perception that Saxman should be part of Ketchikan urban area. The rationale of using data that shows the need for more subsistence activities as a rationale for adding Saxman to an urban area thereby cutting subsistence levels fails to make logical sense.

All standard statistical methodologies and applications involving employment and workforce should be carefully examined before using to justify actions as they relate to Southeast Alaska communities. Careful consideration of the actual conditions should be made to make sure that the statistics generated are logical and that they are not providing justification to make quality of life and economic realities worse.

Steve Wade  
Economic Development Specialist  
Business & Economic Development Department  
Central Council Tlingit & Haida Indian Tribes of Alaska  
6/26/2007

STATE OF ALASKA                    )  
   )ss.  
 THIRD JUDICIAL DISTRICT    )

**AFFIDAVIT OF DAVID S. CASE**

David S. Case, being first duly sworn upon oath deposes and says as follows:

1. I am an attorney licensed to practice in the State of Alaska and have appeared before the federal subsistence board (“FSB”) on several occasions in the last two years.

2. I have personal knowledge of the matters contained in this affidavit.

3. The community of Saxman, located on the southern end of Revillagigedo Island, in Southeast Alaska has up to now been considered a “rural” community for purposes of both benefits under the Alaska Native Claims Settlement Act (“ANCSA”) and the subsistence preference under the Alaska National Interest Lands Conservation Act (“ANILCA”).

4. Initially the FSB rule proposed for the 2006 decennial review of Saxman’s rural status specified that Saxman would retain its rural status, while the nearby City of Ketchikan would remain non-rural. The FSB scheduled hearings to make the rural/non-rural determination for Saxman and for other communities on December 12 and 13, 2006, in Anchorage, Alaska.

5. On or about December 11, 2006 I received a worried call from the Administrator for the Native Village of Saxman tribal government requesting that I attend the FSB hearings, because the tribe had learned in the last couple of days that some

members of the FSB's staff in the Office of Subsistence Management ("OSM") were recommending that Saxman be considered "non-rural."

6. I have had regular contacts with the Village of Saxman and in particular the village corporation formed for Saxman under ANCSA since about 1985. This association has allowed me to travel to Saxman many times over the last 22 years and almost every year over the last decade or so.

7. Although I was not and am not employed by the Native Village of Saxman, I was personally concerned about the sudden threat they faced to their rural status and the resulting loss of the ANILCA subsistence preference.

8. I testified on behalf of Saxman on December 12 and returned to the FSB meeting on December 13 to listen to and observe the debate on the question of Saxman's rural status.

9. The FSB took up the deliberation of this issue about 1:00 pm on December 13 with a motion from Denny Bschor, the FSB member for the U.S. Forest Service. Mr. Bschor's motion (December 13, 2006 FSB Transcript at 184, "Tr. 184") included all of the Ketchikan area road system "except Saxman" in the non-rural Ketchikan area, a motion that would have preserved Saxman's rural status. The motion was seconded by George Oviatt, the board member for the Bureau of Land Management.

10. Gary Edwards, the board member for the U.S. Fish and Wildlife Service, then amended the motion to include the community of Saxman in the Ketchikan non-rural area. This amendment, if accepted, would include Saxman in the whole Ketchikan area and eliminate its rural status. Mr. Oviatt seconded the motion to amend (Tr. 187).

11. The debate then continued among the board members with three members (Bschor, Oviatt and Edwards) clearly favoring the amendment and three members (Chairman Mike Fleagle; Park Service representative, Judy Gottlieb, and BIA representative, Niles Cesar) opposing the amendment and favoring Saxman's continued rural status (Gottlieb: Tr. 191-192 and 194; Cesar Tr. 193-194 and Fleagle: Tr. 195-196).

12. Mr. Fleagle spoke last against the amendment, and asked for a vote on the question but then suddenly called a ten minute break.

13. Prior to the break it appeared that the vote would be tied and the amendment to eliminate Saxman's rural status would be defeated on a three/three vote. I was therefore concerned that the board spontaneously took a break as it appeared calculated to allow board members to consult off the record with others that may not have participated in the board's deliberations. Executive sessions and off the record discussions have been a frequent pattern of FSB's practice. I was therefore very observant of the individual FSB members' actions and interactions during this strategic break in their deliberations.

14. Just as the board was being called back to order I noticed that Judy Gottlieb was receiving a cell phone call. I could not overhear the conversation but it seemed from her facial expression that she was concerned or perhaps even disturbed by it. The members then resumed their seats and the vote began on the amendment to include Saxman with Ketchikan and eliminate Saxman's rural status. Consistent with their prior debate Messrs. Oviatt, Bschor and Edwards all voted in favor of the amendment (Tr. 198). Mr. Cesar and Chairman Fleagle voted against the amendment (Id.).

15. Ms. Gottlieb in a statement that to my ears sounded disjointed and inconsistent with her prior discussion concluded that:

Well, I guess from the current legal advice that we're hearing it appears as though we have to follow the court's direction regarding the Kenai Kenaitze case and be cautious on how we do this so I will have to vote aye.

Her support for the amendment resulted in a 4 to 2 vote that revoked Saxman's rural status.

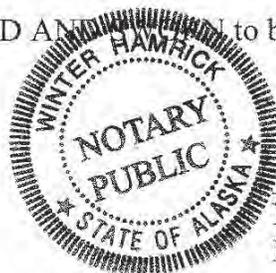
16. Nothing in the legal advice given the board during its deliberations (Tr. 172-175) referred to the Kenaitze case, so it appears from the transcript that the justification for Ms. Gottlieb's change of opinion came from some outside source that was not a part of the board's deliberations. It appeared to me that Ms. Gottlieb cast her vote in favor of the amendment quite reluctantly and I believe probably as a result of the instructions given in her cell phone call.

Further your affiant sayeth naught.

  
David S. Case, P.C.

July 3, 2007  
Date

SUBSCRIBED AND SWORN to before me this 3<sup>rd</sup> day of July, 2007.



  
Notary Public for the State of Alaska  
My commission expires: May 19, 2011

## **Saxman and Rural Determinations**

**Robert J. Wolfe, Ph.D.**

**Robert J. Wolfe and Associates, 1332 Corte Lira, San Marcos, CA 92069**

**June 29, 2007**

My name is Robert J. Wolfe. I am employed as the research head and sole proprietor of Robert J. Wolfe and Associates, a social science research group (1332 Corte Lira, San Marcos, CA 92069, 760-734-3863, wolfeassoc@cox.net, Alaska Business License 703947). I hold a Ph.D. in cultural anthropology from the University of California, Los Angeles with a specialty in subsistence socioeconomic systems. From January 1982 through May 2001, I was the research director of the State of Alaska Department of Fish and Game, Division of Subsistence in Juneau, Alaska. In that capacity, I had oversight responsibility for the state's subsistence research program. Prior to that, I was employed as an associate professor at the University of Southern California in Los Angeles. I retired from the position of research director in June 2001 and have worked in my present position since July 2001.

I have personally conducted subsistence research in Alaska since 1976, including work in southeast Alaska and on rural/non-rural determinations since the early 1980s (Wolfe and Ellanna 1983; Alaska Department of Fish and Game 1986). I have published multiple scientific articles on subsistence, including "Subsistence Economies in Alaska: Productivity, Geography, and Development Impacts", by Robert J. Wolfe and Robert J. Walker, *Arctic Anthropology*, 24(2):56-81 (a study of subsistence harvests in Alaska communities), and "Local Traditions and Subsistence: A Synopsis from Twenty-Five Years of Research by the State of Alaska", for the Alaska Department of Fish and Game, Division of Subsistence, 2004. In 2003, I was the co-principal investigator with Victor Fischer of the Institute of Social and Economic Research of the University of Alaska Anchorage on methods for rural and non-rural determinations for federal subsistence management in Alaska, funded by the U.S. Fish and Wildlife Service for the federal subsistence program (Wolfe and Fischer 2003). That study examined in detail rural concepts and methodologies for determining rural or non-rural status for application in subsistence management.

On December 13, 2006, the Federal Subsistence Board adopted a final rule on changes to the rural or non-rural status of several Alaska communities and areas. The Ketchikan non-rural area was expanded to include all the areas on the road system connected to the City of Ketchikan, including the community of Saxman. This changed the previous determinations for Saxman, which had stood since the mid-1980s, from "rural" to "non-rural."

In their December 13th findings, the Federal Subsistence Board used arbitrary and scientifically-unsound factors for determining whether communities are socially, politically, and economically integrated before assessing rural status. The factors lead to an erroneous conclusion that Saxman is not socially, politically, and economically

distinct from its neighbor, Ketchikan. This further led to the erroneous finding that the people living at Saxman are not rural residents.

A “community” is a named human population forming a distinct segment of society by virtue of a commonly government, common interests, a pattern of sharing, participation, fellowship, or other factors (Wolfe and Fischer 2003: 47; taken from the *American Heritage Dictionary of the English Language*, 4<sup>th</sup> Edition 2000: 374). By this definition, the people living at Saxman qualify as a community. The people of Saxman live in a bounded geographic area. They have a distinct government (City of Saxman; Organized Village of Saxman, IRA). They have a long community history distinct from that of their neighbors in Ketchikan, most of whom are more recent arrivals to southeast Alaska (Alaska Department of Commerce, Community, and Economic Development 2007). And they display economic relationships with the land regarding natural resources significantly different from their neighbors in Ketchikan; as shown below, the people at Saxman harvest wild resources at high levels for sharing and consumption, unlike Ketchikan (Wolfe and Fischer 2003: 79-81).

In the December 13th findings, the Federal Subsistence Board lumped Saxman with Ketchikan based on two factors: students from Saxman attend high school in Ketchikan, and 30% or more of those employed commute to work in Ketchikan. High school attendance is a poor indicator of whether a community is socially, politically, or economically separate from its neighbors. The presence of a local high school depends on contingencies such as the size and income of a community. Before the 1970s, most small rural Alaska villages lacked high schools. They were required to send high school students outside their local communities, a situation legally challenged and changed following the Molly Hootch decision. Saxman, with a population of 422 people in 2006, still sends its small numbers of high school students to nearby Ketchikan. This is an indicator that Saxman is not large or rich enough to have a separate high school for its students. It is an arbitrary factor for assessing the separateness of the Saxman community for a rural determination.

Commuting patterns for wage employment are sometimes used as an indicator of the boundaries of urban areas in the United States (Wolfe and Fischer 2003: 55-56, 121-124). America’s urban-centered populations have increased their commuting times, some living farther away on the rural-urban fringes. However, in the Saxman case, commuting for wage employment is only one factor among many that can be used to determine if Saxman does or does not qualify as a distinct community for rural subsistence assessment. It is an arbitrary decision to look at commuting for wage employment to the exclusion of other more common indicators of community distinctiveness, such as municipal boundaries, the presence of separate governments, distinctive local histories, and distinctive socioeconomic systems. Usually, “rural” refers to areas with farming, agriculture, or other extensive land uses (such as hunting and fishing) in addition to wage employment (Wolfe and Fischer 2003: 9). Wage employment by itself has never been found to be a good indicator of a population’s urban or rural status, as most of the employed rural population in the United States are engaged in wage employment, rather than in farming or other forms of food production (Wolfe and Fischer 2003: 9). It is how

wage employment by segments of the rural population is combined with extensive land uses that identifies rural areas, not whether people engage in wage employment or commute for work.

It is also common for urban-based populations to travel to rural areas for certain activities, especially for fishing and hunting and recreation (Wolfe and Fischer 2003: 16). The fact that a segment of the urban population travels to rural areas for certain pursuits does not automatically make the urban and rural populations a single community, any more than the converse.

Saxman is not unlike many other small communities in Alaska that are geographically near to communities with larger populations. For example, a number of smaller neighborhoods, communities, or unincorporated populations are connected by roads to Palmer-Wasilla, including Big Lake, Chickaloon, Glacier View, Houston, Petersville, and Willow, among others (Wolfe and Fischer 2003: 51). Whether these populations are rural or urban cannot be accurately determined by arbitrary administrative rules of aggregation, but must be determined on a case-by-case basis with information looking at factors directly related to their rural or urban characteristics.

The rural-urban study by Wolfe and Fischer (2003) was commissioned by the U.S. Fish and Wildlife Service for the Federal Subsistence Program to develop scientifically-sound and rigorous measures of rural and urban status in Alaska. The study identified two factors that met those standards (population density; country food production) and two alternative methodologies for distinguishing rural and urban populations in Alaska for subsistence management purposes (Discriminant Analysis Assessment; Criterion-Referenced Assessment). The study tested these two factors and two methods with a large set of communities to assess their performance in a real-world application. The study concluded that the factors and methods performed well: they successfully distinguished communities and produced consistent classifications for most communities. The methodologies avoided arbitrary preliminary aggregation steps (such as the one applied by the Federal Subsistence Board using commuting patterns and high school attendance); instead, the methods applied measures directly related to rural and non-rural status. A community or population was assessed using its own characteristics, not its neighbors'. Aggregation occurred following the rural or non-rural determinations, not before (Wolfe and Fischer 2003: 47ff; "any identifiable population may be legitimately assessed for 'rural' or 'non-rural' classification under our system, subject to availability of information").

The rural or non-rural status of Saxman was tested along with 193 other communities or populations by Wolfe and Fischer (2003: 61ff). These methods determined that Saxman was "rural" (Wolfe and Fischer 2003: 69, 81). The position of Saxman using the Discriminant Analysis Assessment is illustrated in Fig. 1 (attached) (originally from Wolfe and Fischer 2003: 65). As shown in Fig. 1, most test communities statistically clustered into two groupings: rural or non-rural. Saxman fell in the rural cluster (statistically, it was less than one standard deviation from the center of that cluster). Ten other case populations of the 195 cases received tentative rural or non-rural

classifications (statistically, each fell more than one standard deviation from the center of a cluster).

Saxman represents a relatively interesting (but not uncommon) example of a rural community that retains its rural character despite being in close geographic proximity to a non-rural community (Wolfe and Fischer 2003: 18, 56-59). As neighbors, Saxman and Ketchikan use a commons in substantially different ways: the population living at Saxman maintains a clear rural land use pattern while the population living at Ketchikan does not. Because Saxman is a geographically-distinct community, it has been fairly straight-forward in regulations to identify it as a rural population separate from Ketchikan. This was how it had been designated since the mid-1980s. There has been no pertinent new information that would lead to its reclassification as “non-rural;” indeed the latest methodologies in Wolfe and Fisher (2003) reconfirm its rural status with the latest available information.

Saxman lost its rural status only through an arbitrary administrative step applied by the Federal Subsistence Board. The Board used high school attendance and commuting information as a preliminary step to erase Saxman’s status as a distinct community. That step caused Saxman to disappear administratively, becoming arbitrarily absorbed by Ketchikan. In reality, Saxman still exists as a socially, politically, and economically distinct community, one that is dependent on fishing and hunting as part of its traditional, mixed subsistence-cash economy.

The continued rural status is important to the community of Saxman. The people of Saxman are highly reliant on fishing and hunting for their food supply. On an annual basis, the residents at Saxman produce about 211 lbs of wild food per person per year (Wolfe and Fischer 2003: 81). This wild food harvest provides for the protein requirements of the population (it contains 130% of the Recommended Daily Allowance of protein, 49 g per person per day) (Wolfe and Fisher 2003: 41). By contrast, the population at neighboring Ketchikan produces about 34 to 90 lbs of wild food per person per year, providing about 20-58% of the community’s protein needs. These numbers indicate that the economies of the two communities differ substantially.

The annual per capita wild food harvests at Saxman in 1999 included 84 lbs per person of salmon, 31 lbs of halibut, 28 lbs of deer, 23 lbs of marine invertebrates, 12 lbs of harbor seal, and 23 lbs of vegetation (Alaska Department of Fish and Game, Community Profile Database). Of households, 97.3% used wild resources, 79.5% harvested wild resources, 69.9% gave away wild resources, and 91.8% received wild resources. The composition of 31 types of resources harvested at Saxman in 1987 are presented in Figure 2 (attached). A loss or reduction of subsistence hunting and fishing opportunities would have profound negative effects on Saxman’s food supply.

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