

Title VIII of the Alaska National Interest Lands Conservation Act

An Overview of the Statute that Created the Federal
Subsistence Management Program



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Discussion Overview

- What was Congress trying to accomplish?
- Key provisions of ANILCA Title VIII that established the structure of federal subsistence program
- Key provisions of Title VIII that direct or influence the decision making process in the subsistence program



“Subsistence defines us. We battle the elements and sometimes risk our life to get the foods we crave. It is not an easy life, but it is ours.”

Arthur Lake,
Kwigillingok Tribal Member



Subsistence Harvests in Rural Alaska

- 316 pounds per person per year
- \$134-268 million per year replacement cost (2010)
- 38.3 million pounds of food per year





What did Congress conclude?

- Section 801. The Congress finds and declares that--
 - the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, . . . is essential to . . . physical, economic, traditional, and cultural existence . . .
 - 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

Why did Congress pass Title VIII?

- Section 802. It is hereby declared to be the **policy** of Congress that--
 - (1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence; . . . the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;
 - (2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the **priority** consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population

Congress Intended State Implementation of Title VIII



- Congress anticipated that it would be the State of Alaska, and not the federal government, that would implement the rural subsistence priority of Title VIII. The federal government would only pay the State's costs and have an oversight role to ensure compliance.
- State management --1982-1989
- State management came to a screeching halt when the Alaska Supreme Court found that the rural priority violated the common use clause of the State's constitution (McDowell v. State, 785 P.2d 1 (Alaska 1989)).

The Heart and Soul of Title VIII

- Section 804 – first sentence:

“Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.”



What does section 804 mean by “subsistence uses?”

- Section 803 defines “subsistence uses” as
 - the customary and traditional uses by **rural Alaska residents** of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.



Who are “rural Alaska residents?”

Kenaitze Indian Tribe v. State, Ninth Circuit (1988)

- The Court rejected the State of Alaska definition of “rural,” which required the area’s economy to be dominated by subsistence fishing and hunting and excluded areas characterized primarily by a cash economy.
- Instead, the Court said that “rural” is “a standard word in the English language commonly understood to refer to areas of the country that are **sparsely populated**, where the economy centers on agriculture or ranching.”

What does section 804 mean when it refers to “public lands?”

- Section 102 -- The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands except [land selections by the State of Alaska or Native corporations].



Which waters are included in “public lands”?



- All non-navigable waters located on Federal lands.
- All waters subject to a pre-statehood Federal withdrawal.
- Katie John litigation -- all navigable waters within, near or adjacent to federal lands where there is a federal reserved water right.
- Peratrovich litigation – all marine waters located in southeast Alaska where there was a pre-statehood federal withdrawal (not including the withdrawal for the Tongass National Forest)

What did Congress mean by “priority” in Section 804?

Ninilchik Traditional Council v. U.S., 227 F.3d 1186 (9th Cir. 2000)

- The word “priority” does not mean that subsistence absolutely preempts everything else
- Rather, the Board must give subsistence users a “meaningful preference” while balancing subsistence with conservation and other uses
- The word “priority” does not *require* the elimination of all nonsubsistence uses before subsistence uses may be restricted

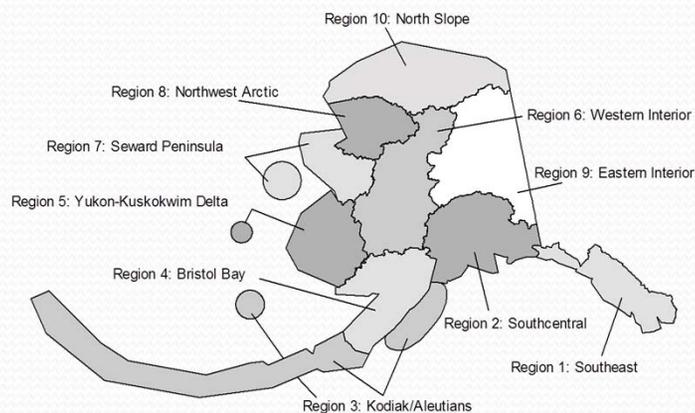


How to allocate when there aren't enough resources?

- Section 804 (second sentence) – Whenever it is necessary to restrict the taking . . . on [public] lands for subsistence uses in order to protect the continued viability of [fish and wildlife] populations, or to continue such uses, [the subsistence] priority shall be implemented . . . based on the application of the following criteria:
 - (1) customary and direct dependence upon the populations as the mainstay of livelihood;
 - (2) local residency; and
 - (3) the availability of alternative resources.

The Brain of Title VIII

- Section 805 – Requires the creation of at least six subsistence resource regions with a regional advisory council (or RAC) composed of local residents for each region -- we have ten regions and ten RACs.



What does Section 805 say about the authorities of the RACs?

- Review and evaluate proposals for regulations, policies and management plans
- Act as a forum for interested persons to express opinions and recommendations
- Encourage local participation
- Prepare an annual report to the Secretary



Deference to RACs



- Section 805(c) – the Board must consider the recommendations of the RACs “concerning the taking of fish and wildlife” on public lands in their regions and may choose not to follow such a recommendation if:
 - not supported by substantial evidence; or
 - violates recognized principles of fish and wildlife conservation; or
 - would be detrimental to the satisfaction of subsistence needs.



Section 808 – Park and Monument Subsistence Resource Commissions

- Establishes one SRC for each park or monument where subsistence uses are permitted
- Each SRC has nine members – three each from the State, the Secretary of the Interior, and the local RAC(s)
- Like the RAC, each SRC provides a forum for input by local residents and makes recommendations regarding that park's program for subsistence uses
- Each park and monument has its own regulations that are adopted by the National Park Service, not the Federal Subsistence Board

Section 814 -- Regulations

- Allows the Secretary to prescribe regulations necessary and appropriate to implement Title VIII
 - By regulation, the Secretaries established the Federal Subsistence Board and delegated to the Board much of the decision making authority for the taking of fish and wildlife on public lands. (50 C.F.R. § 100.10)
 - The Secretaries also required the creation of the Interagency Staff Committee (ISC) to provide the Board with analytical and administrative assistance.



Voting members of the Federal Subsistence Board



- Chairman – appointed by the Secretaries
- Two representatives of rural subsistence users – also appointed
- Department of the Interior – State or Regional Directors of the three land managing agencies plus the BIA
 - Fish and Wildlife Service, National Park Service, Bureau of Land Management, Bureau of Indian Affairs
- Department of Agriculture
 - US Forest Service – Regional Forester



A Quick Check in the Rearview Mirror



- So far, we've discussed:
 - Congress' findings in 1980 and its policy of giving rural Alaskans a priority on public lands
 - The unique system that Congress adopted to accomplish its goals, with the cornerstone being a network of RACs and SRCs to allow meaningful local involvement in the decision making process
 - The administrative structure put into place by the Secretaries to bring it all together

Subsistence Program Structure and Sources of Input

- Office of Subsistence Management (OSM)
 - Drafts an analysis of each proposal and special action
 - Coordinates Council and Board meetings
 - Drafts regulations, Federal Register notices, and press releases
- Regional Advisory Councils (RAC)
 - Allows meaningful local input into the management of subsistence resources (the “bottom up” model)
- Subsistence Resource Commissions (SRC) (National Park Service)
 - Make recommendations relating to subsistence uses in parks and monuments
- Tribes/ANCSA Corporation Consultation
- Interagency Staff Committee (ISC)
 - Reviews technical merits of analyses and tries to identify any areas of concern
- State of Alaska
- Public Comments and Testimony
- Federal Subsistence Board

Conservation First!

- Section 815(1) – Nothing in Title VIII shall be construed as permitting the level of subsistence uses within a conservation system unit to be inconsistent with the conservation of healthy populations of fish and wildlife





No subsistence on lands closed on January 1, 1978 and no manipulation of habitat

- Section 815(2) – Nothing in this title shall be construed as
 - permitting subsistence uses of fish and wildlife on public lands permanently closed to such uses on January 1, 1978 or
 - Enlarging or diminishing the Secretary's authority to manipulate habitat on public lands

No Unnecessary Closures to Nonsubsistence Users

- Section 815(3) – Nothing in Title VIII shall be construed as authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on public lands unless **necessary** for:
 - the conservation of healthy populations of fish and wildlife; or
 - the continuation of subsistence uses; or
 - for reasons of public safety or administration.



Nothing in Title VIII modifies or repeals other federal laws

- Section 815(3) – Nothing in Title VIII shall be construed as modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife . . .



When can there be restrictions on subsistence uses?

- Section 816(b) – Nothing in Title VIII is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on public lands for reasons of:
 - Public safety
 - Administration
 - To assure the continued viability of a particular fish or wildlife population

How does the program issue a temporary closure?

- Section 816(b) -- The Secretary may temporarily close public lands to subsistence uses after:
 - Consultation with the State and
 - Adequate notice and public hearing
- Can go until the end of the regulatory cycle

How does the program issue an emergency closure?

- Section 816(b) – If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands
- Such closure is effective when made and may not extend longer than 60 days unless there is a notice and hearing.

The Rulemaking Process

- **Proposed Rule Published** (January)
 - Opens 45 day proposal period—closes mid-March
- **Regional Advisory Council Winter Meetings** (February-March)
 - Public comments and tribal input accepted. Proposals developed.
- **OSM Leadership Team Review of Proposals** (Early April)
 - Reviewed for validity and assigned to OSM analysts
- **Proposals Published** (Mid-April)
 - Commences minimum 30 day written comment period on proposals
- **Analyses Researched and Drafted by OSM Staff** (April—August)
- **OSM Leadership Team Review of Analyses** (July-August)
- **Interagency Staff Committee Initial Review of Analyses** (Early August)
 - Reviews analyses for factual omissions and technical merit



The Rulemaking Process (cont.)

- **Regional Advisory Council Fall Meetings** (August—October)
 - Opportunities for public comments and tribal input
 - Recommendations developed on proposals
- **Interagency Staff Committee Final Review** (mid-November)
 - Reviews final analysis for completeness and develops comments concerning whether or not RAC recommendations appear to be supported by the record
- **Federal Subsistence Board Annual Regulatory Meeting** (Fisheries in January, Wildlife in April)



That's all Folks!