

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. §100.15,¹ 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

¹ 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,² 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.³ Instead, the Board argued that such comments should have been raised prior to the regulatory notice.⁴ 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.⁵ 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,

² 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).

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

⁴ See, e.g., 72 Fed. Reg. at 25,691.

⁵ 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.⁶ This limitation was, thus, improper. The Board modified one non-regulatory criterion formerly used by the Board⁷ and eliminated two others.⁸ 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.⁹ Instead, the Board argued that the method to be used “had been described and subjected to public comment” prior to the regulatory notice.¹⁰ 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

⁶ *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.

⁷ 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.

⁸ 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.*

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

¹⁰ *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.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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

¹¹ 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.*

¹² 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).

¹³ 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.

¹⁴ 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 Valley¹⁵ 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.¹⁶

3. The "Proximity and Road Accessibility" Criterion

The Board's first listed criterion, "proximity, and road accessibility" cannot reasonably be disputed,¹⁷ 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

¹⁵ 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.

¹⁶ 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 10th 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).

¹⁷ 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.

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.¹⁸

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.¹⁹ The "Ninilchik Tribal Territory," described at 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

¹⁸ *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).

¹⁹ 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.

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, 2007,²⁰ 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

²⁰ 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

FRANK H. MURKOWSKI
GOVERNOR

DEPARTMENT OF FISH AND GAME
OFFICE OF THE COMMISSIONER

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

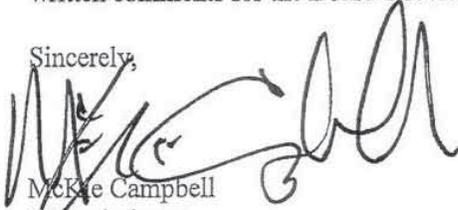
October 26, 2006

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 Blaszk, 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.

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(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

October 26, 2006

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.¹ 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."²

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."³ 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."⁴

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.⁵ 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

¹ 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."

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

³ *Id.* at 150.

⁴ *Federal Register*, Vol. 71, No. 156, August 14, 2006 at 46418.

⁵ 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.”⁶ 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.

⁶ *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,”⁷ 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.⁸ 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.⁹ 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.

⁷ *Id.* at 46417.

⁸ 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.

⁹ *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."¹⁰ 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.

¹⁰ *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."¹¹ 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."¹² 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

¹¹ *Id.*, at 50.

¹² *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

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

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

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

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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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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



Federal Subsistence Board

3601 C Street, Suite 1030
Anchorage, Alaska 99503



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

FOREST SERVICE

FWS/FSB/OSM/SEarplies

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

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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 Makhnati 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

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United States Department of the Interior

OFFICE OF THE SOLICITOR
Alaska Region
4220 University Drive, Suite 100
Anchorage, Alaska 99508-4626
Tel: (907)271-4131 Fax: (907)271-4143
April 26, 2006

FWS.AK.1874

TO: Mitch Dementieff, Chair
Federal Subsistence Board

FROM: Regina L. Sleater
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 Hazy Island Reservation in Executive Order 155 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 Edgcombe-Sitka Point, Kruzof Island area and Shoals 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).

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Mr. Mitch Demientieff

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March 31, 2000

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

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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

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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

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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 Coho 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 (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, 5th day of July, 2007.

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

SUBSCRIBED AND SWORN TO before me this 5th day of July, 2007.

Katie Sechrist
Notary Public, State of Alaska

My commission expires: with office



