

## **THRESHOLD ANALYSIS**

### **RURAL/NONRURAL REVIEW REQUEST FOR RECONSIDERATION RFR07-02**

#### **ISSUE**

The Alaska Outdoor Council (AOC) submitted a request dated July 4, 2007 (**Appendix A**) that the Federal Subsistence Board (Board) reconsider its final rule 36 CFR Part 242; 50 CFR Part 100, Federal Register/Vol. 72, No. 87. Subsistence Management Regulations for Public Lands in Alaska, Subpart C; Nonrural Determinations, posted in the Federal Register on May 7, 2007. The Board took final action on this matter at a public meeting December 12-13, 2006, in Anchorage. The request was received within the time required by Federal subsistence regulations.

The AOC's request for reconsideration (RFR) says that significant factual errors and procedural inconsistencies occurred in the Board's decennial review of rural determinations. The RFR says these errors of fact and process compromised the legitimacy of the Board's action. The Board's determinations with regard to Sitka, Adak, and the Kenai Peninsula were specifically noted. The AOC contends the Board has consistently refused to work with the State of Alaska or with organizations representing nonrural Alaskans and the AOC said this has contributed to a flawed regulatory decision.

#### **BACKGROUND**

##### **Regulatory History**

Federal subsistence regulations at 36 CFR 242.15 and 50 CFR 100.15 describe procedures for the Board to make and review rural/nonrural determinations. Those regulations stipulate that rural determinations shall be reviewed on a 10-year cycle, commencing with the publication of the year 2000 census. OSM (2006a) provides a summary of relevant regulations and describes the process undertaken to comply with the requirement to conduct the decennial review.

##### **Existing Federal Regulations**

Existing rural/nonrural determinations, following the final rule published May 7, 2007, are described in Federal subsistence regulations at 36 CFR 242.23 and 50 CFR 100.23. OSM (2006a) provides a description of rural/nonrural determinations that had been in place prior to the completion of the decennial review.

##### **Regulatory Language Regarding Requests for Reconsideration**

The applicable regulatory language associated with requests for reconsideration can be found in **Appendix B**.

#### **PRELIMINARY ASSESSMENT OF REQUESTER'S CLAIMS**

The Board uses three criteria to evaluate a request for reconsideration.

**Criterion 1. Information previously not considered by the Board.**

There were no claims by the AOC that there is new information that was not previously considered by the Board.

**Criterion 2. The existing information used by the Board is incorrect.**

There were no claims by the AOC that the existing information used by the Board is incorrect.

**Criterion 3. The Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law.**

Claim 3.1

The Board's vote to eliminate further review of Sitka's rural determination was an inconsistent interpretation and application of the guidelines in Federal regulations.

*Preliminary assessment of claim 3.1*

The Board addressed whether it was necessary to assign Sitka for further analysis in a public meeting December 6-7, 2005. Subsequently, comment was received during the proposed rule comment period regarding review of Sitka's rural determination, and was addressed in a report (OSM 2006b) made available to the Board and public prior to Board action on the final rule in December 2006. The approach taken by the Board relative to the rural status of Sitka did not constitute an inconsistent application of Federal regulations, for reasons as detailed in OSM (2006b: 38-42).

The final rule (72 FR 25689) noted that "Sitka, whose population had increased from 8,588 people in 1990 to 8,835 in 2000, had been initially identified as an area possibly warranting further analysis. However, during its December 6-7, 2005, meeting, the Board heard substantial public testimony regarding the rural characteristics of Sitka and determined that no additional analysis was necessary, leaving Sitka's rural status unchanged."

There does not appear to be merit to this claim.

Claim 3.2

In determining that Adak was rural, the Board inadequately analyzed the criteria, specifically the use of fish and wildlife.

*Preliminary assessment of claim 3.2*

The implementing Federal regulations for ANILCA, Title VIII, provide guidelines for the Board to use in determining which Alaska communities are rural. When a naval installation at Adak was closed during the 1990s, Adak's population of 4,633 in 1990 dropped to 316 in 2000. Adak's population decreased to a level below the 2,500 threshold existing in regulations, under which a community shall be deemed to be rural unless there are significant characteristics of a nonrural nature, or it is grouped with a nonrural area.

OSM (2006a) applied the regulatory guidelines to Adak and described it in terms of the five factors in the guidelines: use of fish and wildlife; development and diversity of economy; infrastructure; transportation;

and educational institutions. The Board did not find that Adak had significant characteristics of a nonrural nature.

Relative to Adak, the final rule (72 FR 25692) notes that “The June 23, 2006, OSM report does not present per capita subsistence use information in the appendix database because such data are not available for Adak in a way that would be consistent with other places for which there are household survey data. The report section on Adak does provide some limited information on salmon harvests. However, the main point of relevance for Adak is in the category of population size.”

There does not appear to be merit to this claim.

### Claim 3.3

The Federal Subsistence Board failed to consistently and adequately apply 36 CFR 242.15 or 50 CFR 100.15. AOC requests the Federal Subsistence Board reverse the decision to retain the rural status of the communities of Ninilchik, Happy Valley, Cooper Landing, and Hope.

#### *Preliminary assessment of claim 3.3*

OSM (2006a) was not intended to address all communities or areas within which changes may have occurred, but rather those for which additional staff analysis was assigned by the Board. That report provided tables and graphics of historical and current population data and indicators for all five community characteristics identified in regulation. In addition, data was presented on population density, which is a characteristic not identified in regulation. Not all data types were available for all communities and areas, but relevant data were provided to the extent available.

The Federal review of existing rural/nonrural determinations, from the beginning, included multiple opportunities for input from the Subsistence Regional Advisory Councils, the State of Alaska, and the public. The Board review was intended to progressively winnow the scope of candidate communities for potential change in status, or grouping and status, from the approximately 300 places in Alaska. OSM (2006a) was focused on a technical record for communities and areas remaining in the forefront of Board consideration for such changes.

OSM (2006b) provided a summary of Council recommendations and public comments on the proposed rule. Comments concerning consistency of application of the regulations for the review of determinations were addressed in that report, which was prior to the final rule.

In developing the proposed rule, the Board made use of the analysis of communities and areas conducted by Federal staff as reported by OSM (2006a) using the analytical guidelines approved by the Board. While the guidelines the Board used to evaluate the grouping of communities may not represent the only way the question could be approached, it is nonetheless a legitimate approach that builds upon the methodology used to make the initial determinations.

The existing determinations on the Kenai Peninsula, entering this decennial review, consisted of the defined nonrural Kenai Area, Homer Area, and Seward Area groupings, with all other places considered rural. The purpose of using the grouping indicators of proximity/road connectedness, shared high school attendance area, and 30% worker commuting level, as directed by the Board, in this case was to evaluate

whether a subject community under analysis should be considered integrated with one of the three existing groupings.

The three criteria the Board directed staff to apply to the evaluation of the grouping of communities for this decennial review were made known to the public in advance of their application (e.g. OSM 2005). The staff work was consistent with Board direction, and Board rule-making was in conformance to the Administrative Procedure Act.

Ninilchik, Happy Valley, Cooper Landing, and Hope are road-connected communities on the Kenai Peninsula mentioned by the requester. The final rule (72 FR 25691) noted relative to road-connected communities on the Kenai Peninsula that “The Board considered grouping issues for some areas, as assigned for further staff analysis in December 2005. The method to be used for the assigned staff analyses was described and subjected to public comment earlier in 2005. An analysis that would evaluate aggregation of the entire road-connected Kenai Peninsula was not proposed by the Board for assignment in July 2005, was not requested by ADF&G at the December 2005 Board public meeting at which the assignments were made, was not requested by the public, and was not assigned by the Board. The staff analysis is consistent with the assignment made by the Board in public session. Further, given the criteria used by the Board, there was no reason to address the issue further during the December 2006 public meeting.”

For these reasons, there does not appear to be merit to this claim.

## **SUMMARY**

The Alaska Outdoor Council submitted a request that the Federal Subsistence Board reconsider its final rule regarding rural and nonrural determinations. The Board took final action on this matter at a public meeting December 12-13, 2006, in Anchorage. The request was received within the time required by Federal subsistence regulations. The AOC said reconsideration is requested because significant factual errors and procedural inconsistencies occurred in the Board’s review of rural determinations. The Board’s treatment of Sitka, Adak, and the Kenai Peninsula were specifically noted.

The AOC’s RFR made three claims, all of which were categorized in this threshold analysis under criterion 3 (the Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law). This threshold analysis finds that there does not appear to be merit to any of these three claims.

## **LITERATURE CITED**

OSM (Office of Subsistence Management). 2005. Informational summary of initial steps in the decennial review of rural determinations. Federal Subsistence Management Program. February 4, 2005. Posted to OSM Website (<http://alaska.fws.gov/asm/home.html>) in February 2005. Anchorage, AK.

OSM (Office of Subsistence Management). 2006a. Rural determinations decennial review: Analysis of communities and areas as assigned by the Federal Subsistence Board. June 23, 2006. FWS, Office of Subsistence Management. Anchorage, AK.

OSM (Office of Subsistence Management). 2006b. Rural determinations decennial review: Summary of Council recommendations and public comments on the August 2006 proposed rule and considerations in response. November 27, 2006. FWS, Office of Subsistence Management. Anchorage, AK.

**APPENDIX A:** Rural/nonrural review request for reconsideration RFR07-02.



## **Alaska Outdoor Council**

PO Box 73902

Fairbanks, AK 99707-3902

Ph: (907) 455-4262 / FAX: 455-6447

[aoc@alaska.net](mailto:aoc@alaska.net)

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

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July 4, 2007

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

**Mike Fleagle, Chair  
Federal Subsistence Board**

Attention: Pete Probasco

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

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



## Alaska Outdoor Council

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

July 4, 2007

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

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

Dear Mr. Fleagle, *Mike*

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

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

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

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

AOC request for Reconsideration of Nonrural Determinations.

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

Sitka's rural determination should be reconsidered.

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

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

Adak's nonrural status should be reinstated.

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

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

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

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

AOC request for Reconsideration of Nonrural Determinations.

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

Thank you for your consideration of AOC's comments,



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

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

**APPENDIX B:** Federal subsistence management program regulatory language regarding requests for reconsideration.

Subsistence management regulations at 36 CFR Part 242 and 50 CFR Part 100, state the following regarding requests for reconsideration.

§ \_\_\_\_\_.20 *Request for reconsideration.*

- (a) *Regulations in subparts C and D of this part published in the Federal Register are subject to requests for reconsideration.*
- (b) *Any aggrieved person may file a request for reconsideration with the Board.*
- (c) *To file a request for reconsideration, you must notify the Board in writing within sixty (60) days of the effective date or date of publication of the notice, whichever is earlier, for which reconsideration is requested.*
- (d) *It is your responsibility to provide the Board with sufficient narrative evidence and argument to show why the action by the Board should be reconsidered. The Board will accept a request for reconsideration only if it is based upon information not previously considered by the Board, demonstrates that the existing information used by the Board is incorrect, or demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law. You must include the following information in your request for reconsideration:*
  - (1) *Your name, and mailing address;*
  - (2) *The action which you request be reconsidered and the date of Federal Register publication of that action;*
  - (3) *A detailed statement of how you are adversely affected by the action;*
  - (4) *A detailed statement of the facts of the dispute, the issues raised by the request, and specific references to any law, regulation, or policy that you believe to be violated and your reason for such allegation;*
  - (5) *A statement of how you would like the action changed.*
- (e) *Upon receipt of a request for reconsideration, the Board shall transmit a copy of such request to any appropriate Regional Council and the Alaska Department of Fish and Game (ADFG) for review and recommendation. The Board shall consider any Regional Council and ADFG recommendations in making a final decision.*
- (f) *If the request is justified, the Board shall implement a final decision on a request for reconsideration after compliance with 5 U.S.C. 551–559 (APA).*
- (g) *If the request is denied, the decision of the Board represents the final administrative action.*