

## **THRESHOLD ANALYSIS**

### **RURAL/NONRURAL REVIEW REQUEST FOR RECONSIDERATION RFR07-04**

#### **ISSUE**

The Alaska Fly Fishers (AFF) submitted a request dated July 5, 2007 (**Appendix A**) that the Federal Subsistence Board (Board) reconsider its actions regarding Final Rule 36 CFR part 242; 50 CFR Part 100, FR Vol 72, No. 87, May 7, 2007 Subsistence Management Regulations for Public Lands in Alaska, Subpart C; Nonrural Determinations. In particular, the Board is asked to reverse the decision to retain rural status for the communities of Cooper Landing, Hope, and Ninilchik/Happy Valley. 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 AFF's request for reconsideration (RFR) says the Board selectively evaluated data from the 2000 general census for only those communities recommended for reevaluation by the Federal staff, recommendations which were said to selectively apply characteristics to some communities, ignoring similar characteristics as they applied to other communities.

#### **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 AFF 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 AFF 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 Federal Subsistence Board did not systematically and thoroughly evaluate all the communities based on changes in population in the 2000 census under existing Federal criteria.

*Preliminary assessment of claim 3.1*

Based on an initial review of Alaska communities conducted in July 2005 (OSM 2005), the Board made an initial assessment that the rural/nonrural status of most Alaska communities should remain unchanged for the proposed rule in 2006. This assessment was based on whether or not the population of a community or grouping of communities had changed significantly between 1990 and 2000 putting it either below 2,500 or above 7,000. If so, a community was recommended for further analysis. The Board also took into consideration comments received from the public comment and Council recommendations. In July, 2005, the Board proposed a list of communities for further analysis. The initial steps in the review process winnowed the number of communities and areas proposed for further analysis from the potential scope of about 300 to 10. Public comments and Council recommendations were taken from August through October, 2005. In December, 2005, the Board held a public meeting to decide upon an approved list of communities for further analysis. In June 2006, the Board developed a proposed rule to solicit public comments and Council recommendations.

As described here, the Board carefully adopted a stepwise process for focusing its review, which fully involved the public. For these reasons, there does not appear to be merit to this claim.

Claim 3.2

The Federal Subsistence Board did not conduct a fair and even handed evaluation of all the characteristics described in the Federal determination process.

*Preliminary assessment of claim 3.2*

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

The Federal review 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.

There does not appear to be merit to this claim.

### Claim 3.3

The Federal Board did not consistently apply the same basis for aggregation of communities or areas which are economically, socially, and communally integrated.

#### *Preliminary assessment of claim 3.3*

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. 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. 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 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, was to evaluate the indications of whether a subject community under analysis should be considered integrated with another community or existing grouping. 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.

The staff work was consistent with Board direction, and Board rule-making was in conformance with the requirements of the Administrative Procedure Act. For these reasons, there does not appear to be merit to this claim.

### **SUMMARY**

The Alaska Fly Fishers submitted a request that the Federal Subsistence Board reconsider its final rule regarding rural and nonrural determinations. In particular, the Board was asked to reverse the decision to retain rural status for the communities of Cooper Landing, Hope, and Ninilchik/Happy Valley. 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 request states that the Board selectively evaluated data from the 2000 general census for only those communities recommended for reevaluation by the Federal staff, recommendations which were said to selectively apply characteristics to some communities, ignoring similar characteristics as they applied to other communities.

The AFF'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. Decennial review of rural determinations: A report to the Federal Subsistence Board on initial comments received and considerations for further analysis. July 15, 2005. FWS, Office of Subsistence Management. Anchorage, AK.

OSM (Office of Subsistence Management). 2006*a*. 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). 2006*b*. 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 RFR07-04.



# ALASKA FLY FISHERS

Winners of the 1994 McKenzie Cup



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

5 July 2007

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

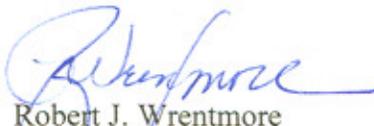
The Alaska Fly Fishers request Reconsideration of the subject final regulations, and particularly to reverse the decision to retain rural status for the communities of Cooper Landing, Hope and Ninilchik/Happy Valley.

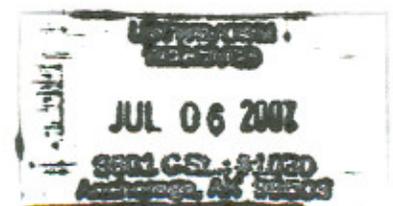
#### RATIONALE:

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

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

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

  
Robert J. Wrentmore  
President  
Alaska Fly Fishers



**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.*