

## **THRESHOLD ANALYSIS**

### **RURAL/NONRURAL REVIEW REQUEST FOR RECONSIDERATION RFR07-06**

#### **ISSUE**

The Organized Village of Saxman, IRA and the City of Saxman (requesters) jointly submitted a request dated July 6, 2007 (**Appendix A**) that the Federal Subsistence Board (Board) reconsider and rescind its decision, published in the Federal Register May 7, 2007, to include Saxman in the Ketchikan nonrural area. 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.

Requesters set forth the grounds they believe justify reconsideration and detail the reasons they believe the Board erred in reclassifying Saxman as nonrural. The Board is urged to carefully consider the request and to act immediately to reinstate Saxman's rural status.

#### **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.**

### Claim 1.1

The Board ignored important ethnographic information establishing that Saxman is a socially, politically, and economically independent community, and the Board's interpretation was in error because it was not based on a full analysis of relevant and available information. Three reports are provided that present information not previously considered by the Board.

#### *Preliminary assessment of claim 1.1*

The three indicators the Board directed staff to use in the evaluation of groupings are not in themselves regulatory standards. The Board has the latitude to develop analytical guidance to staff in order to effectively implement regulations, and may, for instance, examine additional information to gain a better understanding for a specific community. OSM (2006a) reported that all three grouping criteria were fully met by Saxman. However, the staff analysis of Saxman presented in OSM (2006a) provided information on other socioeconomic indicators, including unemployment, per capita income, residents below the poverty level, Native composition of the population, and use of wild resources. Additionally, information was collected during a public comment period, including at a Board public hearing in Saxman. Furthermore, the Board did not rely solely on statistics and public comment, but also visited both Saxman and Ketchikan, gaining a better understanding of the proximity of these communities, as well as their social and economic ties. Taken together, the full range of relevant information was thoroughly discussed and considered. The Board did not ignore unique social and economic characteristics that differentiate Saxman from Ketchikan. The three reports provided do not present new information outside of the range of information previously considered by the Board.

There does not appear to be merit to this claim.

### Claim 1.2

The Board arbitrarily rejected scientific methods of identifying rural and nonrural areas in Alaska as provided by Wolfe and Fischer (2003), due to political pressure and the potential impact the criteria, if adopted, would have on the Kenai Peninsula.

#### *Preliminary assessment of claim 1.2*

In anticipation of the year 2000 U.S. census being published, an effort was launched by OSM to evaluate whether the existing rural determination method could be improved upon, and if so, how this might best be done. Wolfe and Fischer were retained on contract in fiscal year 2001 to develop possible alternative methods. In 2003, the contractor's final report (Wolfe and Fischer 2003) was subjected to independent peer review, and a Board work session was held in January 2004 to review the work. Options for implementation of the methodology were further examined in 2004.

An aspect of the methodology developed by Wolfe and Fischer (2003) dealt with calculating population density. OSM (2006a:7) reported that "Although the overall approaches to rural determinations advanced by Wolfe and Fischer (2003) are not being employed in this decennial review, the population densities can be used as yet another characteristic in the description of communities under the current regulations."

That report by OSM then proceeded to explain the population density measure, and to incorporate that information into the assigned analyses.

There does not appear to be merit to this claim.

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

Claim 2.1

Saxman's rural status should have been reviewed independent from that of Ketchikan, and had the Board done so, Saxman would have retained its rural status. The grouping criteria used for determining whether communities are socially, politically, and economically integrated are arbitrary and scientifically unsound. The information relied upon by the Board was incorrect, misleading, and did not serve to prove that Saxman should be grouped with Ketchikan.

*Preliminary assessment of claim 2.1*

Federal subsistence regulations require that "communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate" (36 CFR 242.15 and 50 CFR 100.15). It is noted that requesters use the term "politically" in making this claim, whereas the regulations use the term "communally."

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 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 an 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 (e.g. OSM 2005a). The staff work was consistent with Board direction, and Board rule-making was in conformance with the requirements of the Administrative Procedure Act.

The final rule (72 FR 25695) noted relative to the grouping of Saxman in the Ketchikan Area that "Saxman is directly adjacent to Ketchikan, connected by road, and surrounded by the outlying Ketchikan development. Visually, the only distinguishing feature to indicate the boundary between Ketchikan and Saxman is a sign on the South Tongass Highway. Saxman has clearly been overtaken and is surrounded by the geographic expansion of Ketchikan; Saxman students attend high school in Ketchikan; and 64 percent of the workers in Saxman commute to Ketchikan for their employment, with another 8 percent commuting to outlying parts of the area. Although a significant percentage of Saxman's population is Native, Ketchikan's Native population is approximately 10 times the size of Saxman's Native population. Many of the people testifying at the hearing in Saxman live in Ketchikan, but reported having very close family and cultural ties to Saxman. Given comments about the need for consistency of application of the

criteria for grouping of communities, and the information on Saxman relative to those criteria, the Board grouped Saxman with the nonrural Ketchikan area.”

The Board understood the relationship between the commuting of workers, which was one of the grouping indicators, and the demographics of unemployment, which was a characteristic reported for communities in staff analysis reports. The Board received written comments and heard testimony about these considerations before acting on the final rule. For example, Mr. Lee Wallace, President of the Organized Village of Saxman, testified to the Board at its public meeting in Anchorage on December 6, 2005, on the unique characteristics of Saxman, the method of grouping being employed by the Board, and specific door-to-door household survey data he had gathered in Saxman regarding the commuting of workers to Ketchikan. On this latter point, Mr. Wallace submitted a two page tabular summary of information that was provided to Board members and entered into the administrative record. That summary concludes that 24% of the *population* of Saxman commutes for employment to Ketchikan or the Ketchikan Borough. Note that the grouping criteria employed by the Board is 30% or more of the *workers* commuting from one community or area of interest to the other. The Board understood that since the survey data provided by Mr. Wallace included all persons in the Saxman population, factoring out non-workers would bring the estimate into closer agreement with the staff analysis estimate of well over 30%.

There does not appear to be merit to this claim.

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

Claim 3.1

The purpose of the Board’s present decennial review is to consider the rural determinations “with an emphasis on what has changed since 1990” (OSM 2006a:4). As the testimony, relevant data, and staff reports and analyses all demonstrate, very little has changed with regard to Saxman since 1990.

*Preliminary assessment of claim 3.1*

While it is correct that the decennial review was conducted with an emphasis on what had changed since 1990, the scope of the review also allowed for the Board to reexamine the grouping of communities and areas and rural/nonrural status. OSM (2006b:19) reported that “This first decennial review of rural/nonrural determinations was conducted with an emphasis on what has changed, but allowing for other considerations. In testimony at hearings and in recommendations and comments, perspectives were provided on the degree of change that has occurred in various communities and areas. OSM (2006a) presented tables and graphs providing historical and current population data and indicators for all five community characteristics identified in regulation. Ultimately, whether changes in communities and areas, or other considerations, warrant regulatory action, rests with the judgment of the Board.”

There does not appear to be merit to this claim.

Claim 3.2

The Board should construe Title VIII of ANILCA and the implementing regulations broadly to accomplish Congress’ purposes, which were, *inter alia*, to ensure that the subsistence way of life would be protected for generations to come. ANILCA is “remedial” legislation.

### *Preliminary assessment of claim 3.2*

The canon of Indian law referred to by the requesters is that “statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *Bryan v. Itasca County*, 426 U.S. 373, 392 (1987). There is no disputing that Title VIII of ANILCA was initially drafted for the benefit of Alaska Natives. However, there is also no disputing that Congress intentionally modified the draft bill such that the law actually passed is, by the express language of its terms, for the benefit of rural Alaskans. In such a case, the intent of Congress is not found in the legislative history, but in the plain language of the statute. There is nothing “doubtful” about the language of Title VIII – the law, as passed by Congress, plainly benefits all rural Alaskans rather than only Alaska Natives. *See Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228-9. (9<sup>th</sup> Cir. 1999) (“Congress expressly rejected the proposition that the subsistence provision was only for Natives.”). *See also 70 FR 76400, 76402 (Dec. 27, 2005)* (“The priority in Title VIII is for rural residents regardless of whether or not they are Alaska Natives, and Alaska Natives who are urban residents do not enjoy the priority.”) Consequently, the Board did not err in its interpretation of the scope of Title VIII or its application thereof.

There does not appear to be merit to this claim.

### Claim 3.3

The Board amply demonstrated that consistency was not a concern in other contexts, i.e., the way in which the Board treated the Kodiak area versus its consideration of Ketchikan. The Board completely eliminated the aggregation step before considering the rural/nonrural status of the Kodiak area. *See Board Transcript (December 13, 2006) at 137-140.*

### *Preliminary assessment of claim 3.3*

Two aspects of the Federal subsistence regulations relative to rural/nonrural determinations were under discussion by the Board at this point in its meeting on December 13, 2006. One aspect concerned the requirement for considering integrated places in the aggregate, and the other concerned how the rural and nonrural determinations that are made are reported.

Two pages later in the Board transcript referenced by the requesters, on page 142, is a statement by then-OSM Subsistence Policy Coordinator Larry Buklis (now OSM Deputy Assistant Regional Director) that clarifies the earlier discussion on pages 137-140 regarding regulatory requirements for the grouping step in relation to what the regulations elsewhere report as the nonrural areas. That clarifying statement is as follows: “... regarding the consideration of the aggregated area, what I said earlier was that in the end the regulations on rural/nonrural don't describe rural groupings, it simply says places in Alaska are rural, except for the following and it delineates places that are not rural. But the regulations do say the Board will consider economically, socially, communally integrated places in the aggregate. So I think, you know, if the Board is demonstrating that they're considering the aggregate here, that's appropriate, and I'm only saying that in the end the regulations describe what you've found to be nonrural.”

The final rule (72 FR 25695) noted relative to Kodiak that “Based on the marginal population growth since 1988 (1.3 percent), the high cost of food, remoteness, and the high use of subsistence resources, no change will be made to Kodiak’s rural determination.”

The final rule (72 FR 25695) also reported that Ketchikan would retain its nonrural status, noting that “Ketchikan possesses many nonrural characteristics, including having a 2-year college, a large national retailer, car dealerships, fast food restaurants, and roads linking the outlying surrounding area to the city. Ferry service is more dependable with greater frequency of service than in most other locations in Alaska. Although the pulp mill closed, there is still diversity in the economy, with tourism, fishing, fish processing, timber, dry docking services, retail services, and government providing the majority of employment. There is a hospital and a high diversity of services offered. The Ketchikan Area had the sixth highest population in the state in 2005, considering community groupings as defined by the Board. All other areas with higher populations are currently considered nonrural in Federal subsistence regulations. Three areas with smaller populations are currently classified as nonrural and are not being changed in status: the Homer Area, Seward Area, and Valdez. Harvest of subsistence resources in the Ketchikan Area is lower than is characteristic of rural communities.”

The Board’s approach during the conduct of the review and its decision-making was consistent. The approach to grouping in the vicinity of Kodiak and in the vicinity of Ketchikan each relied on the same factors, which the Board applied using the best available information. Consequently, there does not appear to be merit to this claim.

#### Claim 3.4

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

#### *Preliminary assessment of claim 3.4*

Title VIII of ANILCA identifies rural Alaska residents as those eligible for the subsistence priority, but does not define the term “rural,” leaving that to implementation under the regulations. The three indicators the Board directed staff to use in the evaluation of groupings are not in themselves regulatory standards. The Board has the latitude to develop analytical guidance to staff in order to effectively implement regulations, and may, for instance, examine additional information to gain a better understanding for a specific community. OSM (2006a) reported that all three grouping criteria were fully met by Saxman. However, the staff analysis of Saxman presented in OSM (2006a) provided information on other socioeconomic indicators, including unemployment, per capita income, residents below the poverty level, Native composition of the population, and use of wild resources. Additionally, extensive information was collected during a public comment period, including at a Board public hearing in Saxman.

There does not appear to be merit to this claim.

#### Claim 3.5

The final rule adopted by the Federal Subsistence Board does not comply with the notice and comment provisions of the APA [because the final rule differs from the proposed rule with respect to the aggregation of Saxman with Ketchikan].

#### *Preliminary assessment of claim 3.5*

The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). The courts have interpreted this to mean that the final rule the agency adopts must be “a ‘logical outgrowth’ of the rule proposed.” *Long*

*Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2350 (2007). See also *NRDC v. United States EPA*, 279 F.3d 1180, 1186 (9<sup>th</sup> Cir. 2002). A rule is deemed a “logical outgrowth” if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. *NRDC*, at 1186. See also *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003). A final rule is not necessarily invalid for lack of notice simply because the position it adopts differs from the position in the proposed rule. *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. App. 1985). Rather, the object is one of fair notice. *Long Island Care at Home v. Coke*, 127 S. Ct. 2339, 2351 (2007).

The purpose of the action to be taken by the Board, as set forth in the proposed rule, was to “revise the list of nonrural areas identified by the Federal Subsistence Board” for the entire State of Alaska. (71 FR 46416). In accordance with regulation, the proposed rule emphasized that “communities that are economically, socially, and communally integrated are combined for evaluation purposes.” The rule focused on 10 areas throughout the State that the Board had previously identified as needing additional analysis, including the Ketchikan/Saxman area. While it is true, as the requesters indicate, that the proposed rule stated that the “unique socioeconomic characteristics” of Saxman “suggest” that it should remain separate from the Ketchikan area, the full context of that statement in the proposed rule (71 FR 46420) was that “Thus, while the grouping criteria lead to including Saxman with the Ketchikan Area, the unique socioeconomic characteristics of Saxman suggest that it should remain separate from the Ketchikan Area.” This dichotomy in potential outcomes was resolved in the final rule by including Saxman in the Ketchikan Area grouping.

There was ample notice regarding the potential for a change in Saxman’s status and opportunities for comment throughout the rural determination process. Public comments on the status of Saxman were solicited and received both before and after the publication of the proposed rule. Among these public comments is a letter from the Organized Village of Saxman, dated September 15, 2005, that expressly addressed the issue of whether or not Saxman should be aggregated with Ketchikan. These public comments also included significant oral testimony at several Regional Advisory Council and Board meetings. Moreover, the Board held a hearing in Saxman on September 25, 2006, six weeks after publication of the proposed rule, specifically to solicit public comment from Saxman residents on the issue of its rural status. Even if Saxman residents did not realize from the language of the proposed rule that their rural/nonrural status remained unresolved, the fact that Board members subsequently traveled to Saxman to hold a publicly-noticed hearing and solicit their comments was a clear indication that a change was possible. In short, both the residents of Saxman and the public in general were afforded a variety of notice and opportunities for comment on Saxman’s status prior to publication of the final rule and, as a result, a large number of verbal and written comments were received.

In summary, although the Board did change the grouping of Saxman with Ketchikan from the proposed rule to the final rule, that action is well within the allowances of the APA because it is a logical outgrowth of the proposed rule and was discussed in publicly available materials, including in the proposed rule. Notice and comment requirements of the APA were plainly met.

There does not appear to be merit to this claim.

### Claim 3.6

The Board violated 16 U.S.C. §3115(c) [Section 805(c) of ANILCA] by failing to give deference to the recommendations of the Southeast Alaska Subsistence Regional Advisory Council.

### *Preliminary assessment of claim 3.6*

Section 805(c) of ANILCA requires the Board to “consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses.” Congress could have simply required the Board to “consider the report and recommendations of the regional advisory councils” and ended the first sentence of section 805(c) 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 the 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 Departments of the Interior and Agriculture interpret the phrase “concerning the taking of fish and wildlife on the public lands . . .” to constrain deference to those types of Board actions that *directly* affect the taking of fish and wildlife, such as setting season dates, establishing harvest limits, and determining permissible methods and means.<sup>1</sup> 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 the rural or nonrural nature of a community is not entitled to deference by the Board.<sup>2</sup>

It should be noted that the question concerning the appropriate scope of deference to regional advisory council recommendations under Section 805(c) has been raised in connection with litigation presently before the Ninth Circuit Court of Appeals. *State of Alaska v. Fleagle et al. and Cheesh-Na Tribal Council*, No. 07-35723 (9<sup>th</sup> Cir.). The Court’s decision may eventually impact how the Departments interpret section 805(c) and its implementing regulations, but in the meantime, the Departments are obligated to follow the law in accordance with its interpretation as described above.

There does not appear to be merit to this claim.

### Claim 3.7

The Board’s decision to group Saxman with Ketchikan appears to have been improperly influenced in violation of the APA. It appears that enormous pressure may have been brought to bear on members of the Board and Office of Subsistence Management staff by Department of the Interior officials in an effort to unduly influence the outcome of the Board’s deliberations.

### *Preliminary assessment of claim 3.7*

The requesters focus on two issues: (1) whether or not the Board’s decision was made in “off-the-record meetings or executive sessions,” and (2) whether or not the National Park Service’s designee on the Board, Judy Gottlieb, was improperly influenced in her vote. The requesters contend that either one of

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<sup>1</sup> This interpretation is based in part on the meaning of “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.

<sup>2</sup> The U.S. District Court for the District of Alaska addressed this issue in *Safari Club Int’l. v. Demientieff* (No. 3:98-cv-0414-HRH). In that case, the Court found that because a proposed rule on Council composition did not concern the “taking of fish and wildlife on public lands,” the Secretaries were under no statutory obligation to submit the rule to the Councils for their review or comment. *Amended Order on Motion for Summary Judgment* (Docket Entry 299, filed Aug. 8, 2006), at 13-14.

these circumstances would constitute a violation of the Administrative Procedure Act. Undue influence on the Board and staff by Department of the Interior officials is alleged.

The rural determination process was lengthy and involved a number of meetings over the course of many months between Board members and staff concerning the proper process for making rural/nonrural determinations, appropriate procedures for conducting public meetings and receiving testimony, and other similar procedural issues. There is no evidence to suggest that the Board's decision to aggregate Saxman with Ketchikan was made prior to the public meeting on December 13, 2006. Indeed, the requesters' own description of the apparent self-conflict and indecision being experienced by the National Park Service designee during the meeting plainly demonstrates that her vote, at least, was not pre-determined.

With regard to whether or not the National Park Service's designee was improperly influenced to vote in favor of aggregating Saxman with Ketchikan, the requesters focus on a telephone call that Ms. Gottlieb received during a break in the December 13 meeting immediately prior to the Board's vote. In the requesters' view, it appeared that Ms. Gottlieb changed her position following that telephone call.

According to Ms. Gottlieb, the telephone call at issue was from Marcia Blaszak, Alaska Regional Director for the National Park Service. Ms. Gottlieb initially attempted to call Ms. Blaszak to confer about the impending decision but was only able to leave a message, and Ms. Blaszak then returned Ms. Gottlieb's call. Because Ms. Blaszak is the *de facto* Board member as set forth in regulation, and Ms. Gottlieb is acting as her designee, it is wholly appropriate for Ms. Gottlieb to confer with Ms. Blaszak prior to voting on any particular issue. Such a conferral does not constitute improper influence. There is no indication that there was undue influence on the Board or staff.

There does not appear to be merit to this claim.

### Claim 3.8

On the question of grouping Saxman with Ketchikan, the Board's decision was driven in part by the erroneous conclusion that the Ninth Circuit Court of Appeals' decision on *Kenaitze* compelled a grouping of Saxman with Ketchikan. The *Kenaitze* decision in no way dictates a grouping of Saxman with Ketchikan.

### *Preliminary assessment of claim 3.8*

OSM (2005*b*) reported the following background information on the review of rural determinations in context with the *Kenaitze* decision:

“These provisions constitute the ‘rural subsistence priority’ of ANILCA, Title VIII. While rural residency is the critical feature determining who benefits from the subsistence priority, the statute itself provides no definition of the term ‘rural.’ Instead this has been left to the implementing regulations and agency determinations.

“Comparatively little discussion of the term ‘rural’ is to be found in the committee reports accompanying the ANILCA bills through Congress. However, the Senate Committee on Energy and Natural Resources identified the four largest population centers in Alaska in 1980, namely Anchorage, Fairbanks, Juneau, and Ketchikan as examples of nonrural places. As examples of rural places, the Committee named Dillingham, Bethel, Nome, Kotzebue, Barrow, and other Native and non-Native villages scattered

throughout the State, though unnamed by the Committee. The Committee emphasized that the rural status of communities is not static, and could change over time, as a community gains or loses population (Senate Report 96-413:233).

“There has been only one judicial action examining the legislative history for the legal sufficiency of agency rural determinations and using the term ‘rural.’ In the *Kenaitze* case (*Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 [9<sup>th</sup> Cir. 1988], *cert. denied*, 109 S. Ct. 3187 (1989), filed and decided during the time of State management of subsistence, the 9<sup>th</sup> Circuit Court of Appeals reviewed determinations by the Alaska Joint Board of Fisheries and Game, and found error in the State’s regulatory framework. The Court held that the term ‘rural’ is a common term, with a common meaning found in a dictionary, and therefore it was not necessary to determine Congressional intent. The Court also found that it was not bound to defer to a State agency determination, as it would to a Federal agency determination, even when the State was implementing a program deemed in compliance by the Secretary of the Interior.

“The Court remanded the specific determinations back for re-examination. However, the State was not able to take further action before its ANILCA Title VIII subsistence program was ended and the Federal program began in 1990.”

The approach implemented by the Board for this first decennial review of rural/nonrural determinations conforms to Federal subsistence regulations which require that “communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate” (36 CFR 242.15 and 50 CFR 100.15), and the above-noted *Kenaitze* decision in terms of applying the plain meaning of the term “rural” in evaluating the status of the aggregated Ketchikan Area, including Saxman.

There does not appear to be merit to this claim.

## **SUMMARY**

The Organized Village of Saxman, IRA and the City of Saxman jointly submitted a request that the Federal Subsistence Board reconsider and rescind its decision to include Saxman in the Ketchikan nonrural area. 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. Requesters set forth the grounds they believe justify reconsideration and detail the reasons they believe the Board erred in reclassifying Saxman as nonrural. The Board was urged to carefully consider the request and to act immediately to reinstate Saxman’s rural status.

The requesters’ RFR made eleven claims, two of which were categorized in this threshold analysis under criterion 1 (information previously not considered by the Board), one of which was categorized under criterion 2 (the existing information used by the Board is incorrect), and eight of which were categorized 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 eleven claims.

## **LITERATURE CITED**

OSM (Office of Subsistence Management). 2005a. 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). 2005*b*. 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.

Wolfe. R. J., and V. Fischer. 2003. Methods for rural/nonrural determinations for Federal subsistence management in Alaska. Final Report: Analysis and recommended methodology. Submitted to: USFWS, Anchorage, Alaska. January 31, 2003.

**APPENDIX A:** Rural/nonrural review request for reconsideration RFR07-06.



**Larry Buklis/R7/FWS/DOI**  
07/06/2007 02:40 PM

To Theo Matuskowitz/R7/FWS/DOI@FWS  
cc  
bcc  
Subject Fw: Saxman RFR

Larry Buklis, Subsistence Policy Coordinator  
Office of Subsistence Management, USFWS  
3601 C Street, Suite 1030  
Anchorage, AK 99503  
907-786-3822 (Voice) / 786-3333 (Fax)  
larry\_buklis@fws.gov

----- Forwarded by Larry Buklis/R7/FWS/DOI on 07/06/2007 02:39 PM -----



**Carol Daniel**  
<cdaniel@alaska.net>  
07/06/2007 02:24 PM

To larry\_buklis@fws.gov  
cc 'iragovt' <iragovt@kpunet.net>  
Subject Saxman RFR

Attached is a Request for Reconsideration of the FSB's decision to group Saxman with the Ketchikan area (published at 72 Fed. Reg. 25688 (May 7, 2007), along with supporting documentation submitted jointly by the Organized Village of Saxman and the City of Saxman.

**Carol H. Daniel, General Counsel**  
Alaska Federation of Natives, Inc.  
1577 C Street, Suite 300  
Anchorage, Alaska 99501  
Telephone: (907) 274-3611 or 263-9883 (direct)  
FAX: (907) 276-7989



Letter to FSB RE RFR July 6 20070001.pdf Saxman RFR 70607.doc Wolfe Saxman and Rural Determinations Final.doc



Monteith Report on Saxman Rural Determination.doc



Methodology Variations in Demographic Analysis of Southeast Alaska Communities.doc Affidavit of David Case.PDF

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

July 6, 2007

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

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

Dear Mr. Fleagle:

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

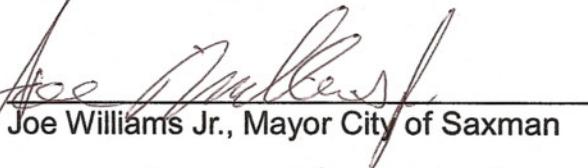
The enclosed Request for Reconsideration sets forth the grounds justifying reconsideration and details the reasons we believe the Board erred in reclassifying Saxman as nonrural.

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

Sincerely,



Lee Wallace, President Saxman IRA Council  
Organized Village of Saxman



Joe Williams Jr., Mayor City of Saxman

Enclosure (RFR)

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

**Submitted by**

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

## **I. Introduction**

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

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

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

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

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

## II. Background

Title VIII of ANILCA was enacted to protect the subsistence way of life of rural Alaska residents, including residents of Native villages. It implements Congress' long-standing concern for, and obligation to protect subsistence uses of Alaska Natives, and serves to fulfill the purpose of the Alaska Native Claims Settlement Act (ANCSA). 16 U.S.C. § 3111(4). Although the statute provides for a "rural" preference, it is important to remember that the subsistence title would never have been added to ANILCA had it not been for the efforts of Alaska Natives.

Title VIII expresses an overriding congressional policy of protecting the subsistence rights of Alaska Natives. Congress found that because "continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska . . . [and] by increased accessibility of remote areas containing subsistence resources," 16 U.S.C. §3111(3) it was necessary and in the national interest "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4) (5). Title VIII reflects recognition of the ongoing responsibility of Congress to protect the opportunity for continued subsistence uses in Alaska by Native people, a responsibility consistent with the federal government's well-recognized constitutional authority to manage Indian Affairs. For that reason, the FSB should construe Title VIII and the regulations implementing it broadly to accomplish Congress' purposes, which were, *inter alia*, to ensure that the subsistence way of life would be protected for generations to come. In no instance is the United States' duty to give ANILCA a liberal interpretation more important than in applying and interpreting the rural residency requirement.

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

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<sup>1</sup> See, e.g., 72 Fed. Reg. 25688, 25691 (May 7, 2007). The FSB takes the position that Title VIII of ANILCA is not Indian legislation for the purpose of statutory construction based on *dicta* in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228 (9<sup>th</sup> Cir. 1999). However, that *dicta* is in direct conflict with *Village of Gambell v. Clark*, 746 F.2d 572, 581 (9<sup>th</sup> Cir. 1984), *rev'd on other grounds sub. nom. Amoco Production Co. v. Village of Gambell*, 107 S.Ct. 1396 (1987). The Supreme Court in *Amoco* implicitly accepted the Ninth Circuit's holding in *Gambell* that Title VIII is Indian legislation; it simply found that there were no ambiguities to interpret with respect to whether Title VIII applied to waters beyond Alaska's territorial sea. The case was reversed on other grounds, so the Ninth

question but that Title VIII is “remedial” legislation. It was intended to remedy the failure of the State and Federal governments to protect the subsistence rights of Alaska Natives and other rural residents who live off the natural resources. And because it is “remedial” legislation, the rules of statutory construction require that Title VIII be broadly construed to accomplish its purposes, *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 504 (1999), which were to ensure that the subsistence way of life would be protected for generations to come.

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

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

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

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

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Circuit’s conclusion in *Gambell v. Clark* on this issue remains good law. Moreover, prior to *Hoonah*, the Court had consistently held that Title VIII of ANILCA is legislation intended to benefit Indians through preservation of Alaska Native hunting and fishing rights and the cultural aspects of the subsistence way of life. *See, e.g., Williams v. Babbitt*, 115 F.3d 657, 666 (9<sup>th</sup> Cir. 1997), *citing Gambell v. Clark; Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9<sup>th</sup> Cir. 1994); *United States v. Alexander*, 938 F.2<sup>nd</sup> 942, 945 (9<sup>th</sup> Cir. 1991). The *dicta* in *Hoonah* does not overrule this prior precedent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The only court decision to address the definition of “rural”, as that term is used in ANILCA, did so in the context of the State of Alaska’s definition of rural -- which eschewed a rational definition of rural in order to exclude the entire Kenai Peninsula. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9<sup>th</sup> Cir. 1988), *cert. denied*, 109 S.Ct. 3187 (1989). In rejecting the State’s definition, the court of appeals held that “the term rural is not difficult to understand – it refers to areas of the country that are sparsely populated.” The Court cited a number of definitions of rural, ranging from that used by the Census Bureau (places with a population of less than 2,500) to one used by Congress in the National Housing Act of 1949, 42 U.S.C. 1490, *as amended* November 28, 1990, Pub. L. No. 101-625, Title VII, §715, 104 Stat. 4296. In the latter case, rural was defined to include communities with a population of up to 25,000 that are not part of a SMSA if there is a serious lack of mortgage credit for lower and moderate-income families.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 805(c) then requires the Secretary to follow the recommendation of any RAC *unless* he determines that it is not supported by “substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs.” If a RAC recommendation is not adopted by the Secretary, in this case the FSB acting on behalf of the Secretary, the FSB is required to set forth the factual basis and the reasons for the decision. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **IX. Conclusion**

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

## **Saxman Rural Determination**

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

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

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

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

### **Abstract**

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

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

### **Ethnographic Information for Saxman**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Contemporary Identity**

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

## **Saxman as an International Tourist Destination in Heritage Tourism**

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

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

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

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

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

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

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

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

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

## **SECTION TWO: Methods**

### **Grouping Criteria**

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

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

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

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

## **Methods**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF ALASKA                    )  
  )ss.  
THIRD JUDICIAL DISTRICT    )

**AFFIDAVIT OF DAVID S. CASE**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

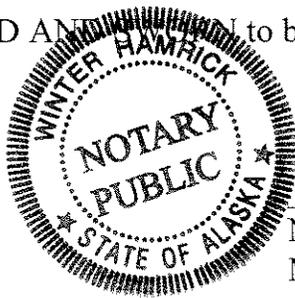
16. Nothing in the legal advice given the board during its deliberations (Tr. 172-175) referred to the Kenaitze case, so it appears from the transcript that the justification for Ms. Gottlieb's change of opinion came from some outside source that was not a part of the board's deliberations. It appeared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

Further your affiant sayeth naught.

  
David S. Case, P.C.

July 3, 2007  
Date

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



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

## **Saxman and Rural Determinations**

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

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

**June 29, 2007**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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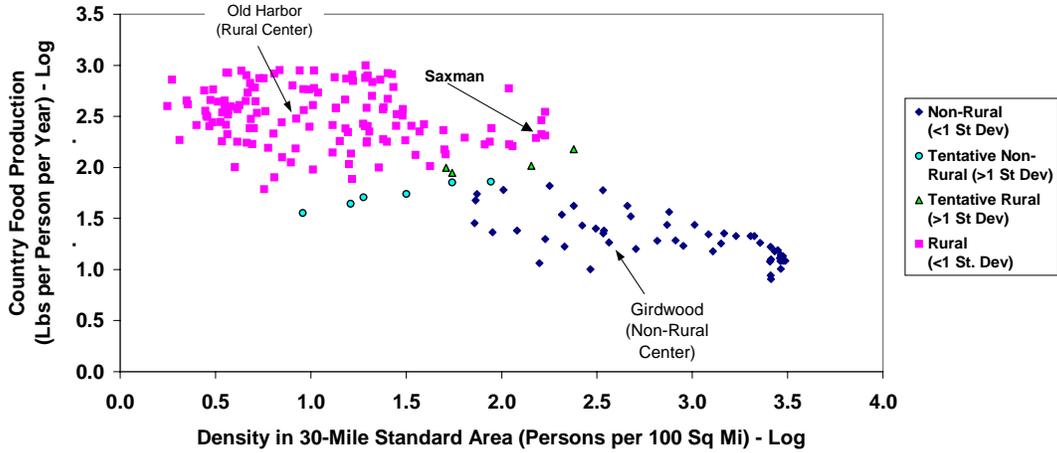
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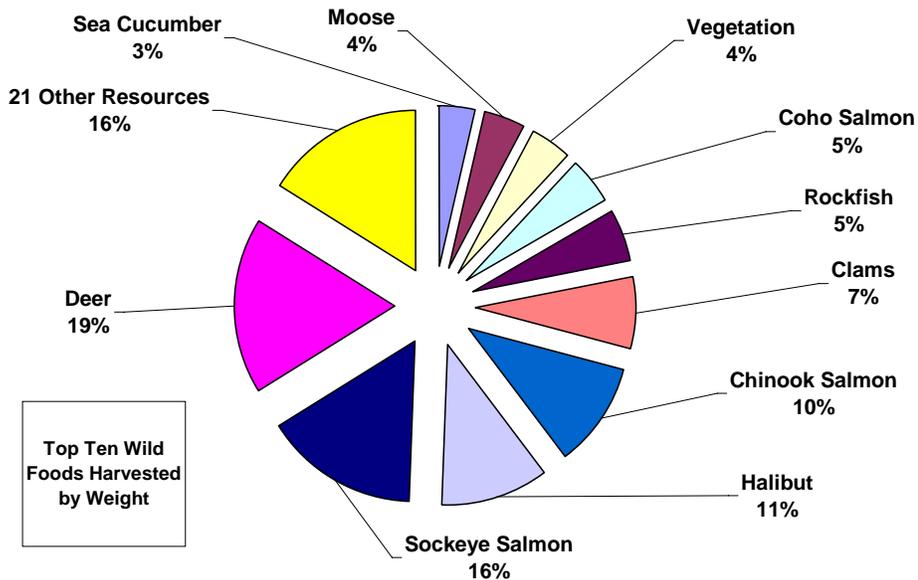
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**Fig. 1. Alaska Populations (N = 195) Categorized into Rural or Non-Rural Groups by two Primary Factors (Density and Country Food Production), With Standard Deviations from Group Centers**



*From Robert J. Wolfe and Victor Fischer (2003) Methods for Rural / Non-Rural Determination for Federal Subsistence Management in Alaska.*

**Fig. 2. Top Ten Wild Foods Saxman (1987) Ketchikan Gateway Borough**



**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.*