

**INTERAGENCY STAFF COMMITTEE RECOMMENDATION**  
**THRESHOLD ANALYSIS OF RURAL/NONRURAL REVIEW RFR07-06**

**Majority Recommendation**

**Oppose** rural/nonrural review request for reconsideration RFR07-06.

**Justification**

The full range of information relevant to Saxman 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.

Federal subsistence regulations require that “communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate.” The three indicators the Board directed staff to apply to the evaluation of the grouping of communities for this decennial review were made known to the public and comment was requested in advance of their application. Although this does not represent the only way in which the grouping of communities could be evaluated, it is a legitimate approach that was subject to extensive public review and comment. The staff work was consistent with Board direction, and Board rule-making was in conformance with the requirements of the Administrative Procedure Act.

The methodologies recommended for identifying rural and nonrural areas in the report by Wolfe and Fischer (2003), contracted for by the Federal subsistence program, were not used because the Board found those procedures insufficiently consistent with court direction in *Kenaitze Indian Tribe v. Alaska*. One aspect of the methodologies developed by Wolfe and Fischer (2003), dealing with population densities, was used in the analyses.

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. Similar to the expansion of the Ketchikan grouping, other expansions were adopted by the Board on the Kenai Peninsula and in the Wasilla area.

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 embodied in the plain language of the statute. The law, as passed by Congress, plainly benefits all rural Alaskans rather than only Alaska Natives.

The Board’s approach during the conduct of the review and its decision-making were 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.

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. Because the three indicators may not fully represent all the pertinent information associated with grouping, the Board also used other information in its determinations, as revealed in Board meeting transcripts.

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.

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.” Board actions concerning who is or is not eligible under Title VIII for the subsistence priority are not subject to deference. Accordingly, a Council recommendation concerning the rural or nonrural nature of a community is not entitled to deference by the Board.

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, nor is there any indication that there was undue influence on the Board or staff.

The approach implemented by the Board for this first decennial review of rural/nonrural determinations conforms to Federal subsistence regulations requiring consideration of communities or areas that are economically, socially, and communally integrated in the aggregate, and the *Kenaitze* decision in terms of applying the plain meaning of the term “rural” in evaluating the status of the aggregated Ketchikan Area, including Saxman.

### **Minority Recommendation**

Two claims, 1.1 and 2.1 contained in the Rural/Nonrural Request for Reconsideration, RFR 07-06, submitted by the Organized Village of Saxman IRA Council and the City of Saxman’s may warrant consideration and further advancement by the Federal Subsistence Board.

**Claim 1.1 - Information not previously considered by the Federal Subsistence Board:** The acceptance of the RFR under this criterion could be based on two sources of data and information provided in their RFR – (1) cultural, historical, and socio-economic, and (2) Aggregation/grouping indicators.

*(1) Cultural, historical, and socio-economic data and information:* The definition of what constitutes “new information” is an important determinant for evaluating the merits of accepting this RFR under this criterion.

If the Board elects to use a broad categorical definition for determining if new information was provided in this RFR then the claim may not have merit. The Board was presented with data and information on a variety of cultural, historical, and socio-economic aspects for the community of

Saxman. If lumped together under a broad category labeled as “social, historical, and economic” types of information, then the data provided in Saxman’s RFR after the Board’s December 2006 rule-making could be deemed as not being “new information.”

Alternatively, if the Board chooses to use a more specific definition of “new information” which evaluates the scope, breadth, and specific aspects of the three reports submitted by Dr. Robert Wolfe, Dr. Daniel Monteith, and Mr. Steve Wade the RFR may warrant consideration for acceptance under this criterion. A substantial amount of the highly detailed (and scientifically-referenced) social, historical, and economic data and information that are presented by these experts in the combined 22 pages of these reports was not available to the Board either prior to, or during, their December 2006 final rule-making decision.

(2) Aggregation/grouping indicators: The review of the Board’s use of the three grouping indicators for aggregation of communities -- geographic proximity/road accessibility, shared high school attendance, and percent of people commuting to another community -- provided by Drs. Wolfe & Monteith, and Mr. Wade in this RFR appears to provide new information regarding the validity of the use of these indicators by the Board. Much of the detailed information contained in the reviews of the aggregation indicators by these three specialists was not available to the Board either prior to, or during, their December 2006 final rule-making decision.

**Claim 2.1 - Existing information used by the Board is incorrect:** This claim may also warrant consideration for acceptance, particularly as it applies to the Board’s use of the three aggregation indicators for grouping Saxman with the nonrural Ketchikan area.

The indicators of geographic proximity/road accessibility, common high school attendance area, and percent of people commuting to another location formed the principal basis for grouping communities in the Board’s final rule. As cited in the threshold analysis, the majority Interagency Staff Committee recommendation, and the Federal Board transcript, the consistent application of these indicators was deemed to be the most important consideration in developing the Board’s final rule. This RFR, however, raises a number of technical concerns regarding the scientific validity of these particular indicators. Because of the critical role that the aggregation indicators assumed in the Board’s rule-making process, the Board may therefore need to carefully re-consider the technical merits pertaining to the derivation, application, and interpretation of these three indicators.

The critique of the Board’s aggregation indicators conducted in Drs. Wolfe and Monteith reports, and the recommendation for an independent, scientific peer review of these indicators, may warrant consideration by the Board. This may be particularly important because such a review was not conducted by the Board before it used this approach to make its rural and nonrural designations in December 2006, and because these indicators had such a prominent role in the determinations that were made.

It should be noted that, while public comments were sought on the aggregation indicators, such a process is very different than a formal scientific peer review. Instead of reliance on public comments which technically satisfy the administrative process, the Board may want to consider an independent peer review of the aggregation process used for this decision. This peer review would provide the Board with another evaluation of the technical merits of the methodology and would be useful for the interpretation of the results.