



January 7, 2010

Honorable Kenneth Salazar  
Secretary of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Re: Alaska Subsistence Review

Dear Secretary Salazar:

The Alaska Native community greatly appreciates your review of the subsistence management program in Alaska. We have been working with the Department for many years to implement the program, but it is apparent that there are fundamental flaws in the existing program and that it needs to be reformed. Changes are needed both in the governing federal statute and in the program itself.

We are mindful of, and support, the remarks of Special Assistant to the Secretary, Kim Elton, to the 2009 annual convention of the Alaska Federation of Natives including, specifically, the recognition that, under federal law, subsistence management is a Secretarial responsibility. We also agree with the commitments to implement the federal subsistence mandate of the Alaska National Interest Lands Conservation Act (ANILCA) and promptly put in place a system that does not anticipate a return to State management, to recognize and respect (1) the voice of subsistence users in subsistence management, (2) traditional knowledge and (3) the overriding importance of subsistence to the lives of Alaska Natives. We also welcome the pledge that this issue “will not be compromised or relegated to a low-priority status in this administration.”

Title VIII, with its priority for subsistence is, of course, a federal law, which has a clear purpose to protect the subsistence uses of Alaska Natives, along with those of other rural residents. It must be administered as a federal law, under federal standards, without improper deference to state law or state management issues and objectives, which are inconsistent with federal requirements. While we will submit a separate response to the comments of the State of Alaska, through the Commissioner of Fish and Game, calling for widespread and specific deference to the State of Alaska's subsistence determinations, practices and policies, we note here our specific objection to deferring key subsistence policies and practices away from the federal government, where they belong, to the State. Our concern over deference on such a fundamental matter as our food supply is particularly meaningful in Alaska, which is one of only a handful of states where special protections are still in place to protect the civil rights of a minority population under the Voting Rights Act.

As noted in the attached history of litigation involving subsistence, and in its own comments calling for deference, the State of Alaska has a long history of opposition to a Native or rural subsistence priority in favor of one for all residents of Alaska, which of course, amounts to no preference at all. This approach is fundamentally inconsistent with ANCSA and ANILCA, and cannot properly be deferred to in administering a federal program of fundamental importance to Native people. After falling out of compliance with Title VIII in 1989, and thus losing authority to manage subsistence uses on federal lands, the State has steadfastly refused to amend its constitution to allow its laws to conform to the compromise reached in ANILCA in 1980, despite the best efforts by the Native community, our Congressional delegation and many Alaskans.

Summarized below are our primary policy suggestions for the Department. Attached is a more detailed memorandum in support of our request that the Obama Administration advance action by Congress to secure Native hunting, fishing and gathering rights. In addition, we recommend administrative changes in the federal subsistence program as currently structured under Title VIII of ANILCA.

The issue is whether our country can learn from its own past - and whether it will finally deal honorably with Alaska's indigenous peoples by giving them meaningful protections for their way of life. What we now call subsistence is not a relic from the past – a holdover from previous times that will inevitably disappear as market conditions take over – it continues to be the foundation of Alaska Native society and culture. A vast majority of Alaska's 120,000 Native people (nearly 20% of the total population of Alaska) still participate in hunting, fishing and gathering for food during the year. The subsistence harvests remain central to the nutrition, economies and traditions of Alaska's Native villages.

Protection of Native hunting, fishing and gathering rights is a part of federal law throughout the United States. The right to food security for oneself and one's family is a human right enumerated in the Universal Declaration of Human Rights of the United Nations Charter. The only reason that there is a priority for subsistence uses in Alaska is because of Alaska Native ownership of the territory transferred from Russia to the United States in 1867. The Treaty with Russia recognized that as the original occupants, Alaska Native peoples had continuing rights to use and occupy all of Alaska. Art. III, Treaty of March 30, 1867, 15 Stat. 539. Those rights were largely ignored until the Statehood Act of 1959, 72 Stat. 339, and the discovery of vast oil reserves at Prudhoe Bay in the 1960s ran up against Alaska Native aboriginal rights. In response to the conflict, Congress in 1971 passed the Alaska Native Claims Settlement Act (ANCSA), Act of December 18, 1971, Pub. L. NO. 92-203, 85 Stat. 689, 43 U.S.C. §§1601 et seq. Although Congress did not expressly protect Native hunting and fishing rights in ANCSA, that Congress expected both the Secretary of the Interior and the State of Alaska to “take any action necessary to protect the subsistence needs of the Natives.” S. Rep. No. 581, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess, 37 (1971). Their expectation was not fulfilled and the current program was established in Title VIII of the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. §§ 3111 et seq. (ANILCA), a cornerstone title of that major federal conservation and land management law.

ANILCA's scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the rural priority. That system operated for a

mere seven years before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the cooperative federalism program. After initial efforts to amend the State Constitution to comply with the ANILCA's compromise and thus have a unified management regime, the State has undermined the system through litigation and by gutting its own subsistence law applicable to state and private lands.

Rather than simply defending a system that no longer serves its intended function, we believe it is time to consider options that reach back to Congress's original expectation that Alaska Native hunting, fishing and gathering rights be protected. Alaska Native peoples have submitted many wise and informative suggestions to you as part of this review process. We held numerous meetings with our constituents in our process of developing these recommendations.

We recommend that the Obama Administration ask Congress to replace the present rural preference with a priority for all Alaska Natives to engage in subsistence uses in Alaska, in addition to maintaining the current rural priority, *i.e.*, a "Native plus rural" or a "tribal plus rural" priority. Congress has the authority to enact legislation, based on the supremacy clause and on its plenary authority to regulate Indian affairs, to provide a Native or tribal subsistence preference on all lands and waters of Alaska. There are already variations of a Native priority in Alaska with respect to marine mammals, halibut and migratory birds. A Native plus rural preference would fulfill the promises of ANCSA and ANILCA, and would be consistent with settled principles of federal Indian law followed elsewhere in the United States. It would also put an end to the otherwise endless litigation concerning the implementation of the current rural priority.<sup>1</sup>

The Secretary should create an Alaska Native Fund, as part of the BIA Rights Protection Program to reimburse the Native community for the millions of dollars we have had to spend defending our aboriginal and human rights. As demonstrated in the attached addendum, many of the subsistence court cases were directly related to forcing the federal agencies to take their responsibilities under Title VIII seriously. One of our most costly cases, the Katie John litigation, was necessitated by the federal government's initial refusal to assert management authority over fishing. Congress very clearly intended our subsistence fishing in Alaska to be protected by Title VIII, and the agencies knew that fishing is the very lifeblood of our traditional way of life. We continue to this day to participate in the litigation to defend the federal regulations put in place to implement that decision.

Congress should extend the geographical scope of ANILCA's jurisdiction to include all marine and navigable waters in Alaska, and all lands conveyed to and owned by Native corporations pursuant to ANCSA as well as the thousands of Native allotments in Alaska.

Cooperative management of fish and game populations with tribal governments has been successful in the implementation of Indian treaty rights in other states and should be replicated in ANILCA as amended.

The Regional Advisory Councils are in need of reform. At a minimum, they should be exempted from the requirements of the Federal Administrative Committees Act (FACA). Section 805 of

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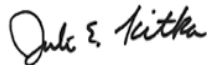
<sup>1</sup> See attached summary of litigation involving the interpretation and implementation of Title VIII of ANILCA.

ANILCA mandates that the secretaries establish regional advisory councils, composed of local subsistence users, with the authority to devise and submit to the Federal Subsistence Board recommendations on proposed regulations. Today, because of FACA, the RACs are required to be composed on at least 30% sport and commercial users. While not a majority, the sport and commercial interests do their best to water down the subsistence priority rather than implementing it.

While our primary focus is on achieving fundamental structural changes to the law, administrative and regulatory changes in the current management system are needed. We stress, however, that a band-aid approach to a system that is broken and that has never worked is not acceptable to the Native community.

We look forward to working with you, the Department of Agriculture, the Congress and the White House to make the changes needed to provide lasting protections for our way of life. We are confident that with your help meaningful changes can be made that will ensure the promises of ANCSA and ANILCA are finally fulfilled.

Sincerely,



Julie Kitka, President  
Alaska Federation of Natives

cc:

The Honorable Tom Vilsack, Secretary, U.S. Department of Agriculture  
The Honorable David Hayes, Deputy Secretary, U.S. Department of the Interior  
The Honorable Larry Echohawk, Assistant Secretary for Indian Affairs, U.S. Department of the Interior  
The Honorable Kim Elton, Director, Alaska Affairs, U.S. Department of Interior  
The Honorable Pat Pourchot, Special Assistant to the Secretary for Alaska  
The Honorable Sean Parnell, Governor, State of Alaska  
The Honorable Mark Begich, U.S. Senator, Alaska  
The Honorable Lisa Murkowski, U.S. Senator, Alaska  
The Honorable Don Young, U.S. Congressman, Alaska  
The Honorable Byron Dorgan, Chair, U.S. Senate Indian Affairs Committee, U.S. Senate

**RECOMMENDATIONS**  
**SECRETARIAL REVIEW OF FEDERAL SUBSISTENCE MANAGEMENT PROGRAM**

**General Recommendations concerning the review itself:** The Review should be thorough and not constrained by an arbitrarily short deadline. It should integrate the Regional Advisory Councils into the review and recommendation process. Special standing should not be given to comments from the Territorial Sportsmen, the Alaska Outdoor Council and other anti-subsistence groups or to the State of Alaska. An Alaska Native advisor should be hired to assist in the review of the comments and to assist in making the recommendations to the Secretary.

The Secretary and Deputy Secretary of the Department should meet with key Native leadership after all comments are submitted. There should be at least two such meetings to discuss the views of the Department as it develops its position, and there should be full consultation with the Native community on legal and policy issues.

In addition, the Secretary should convene a meeting with key White House officials, including the Domestic Policy Council, and the Department of Agriculture to participate in the Review and in the crafting of a legislative proposal to provide meaningful protections for Native hunting, fishing and gathering rights.

AFN’s recommendations and comments are set out below. While many represent views on how to reform the existing system, it is critical to note that fundamental change in the priority from one based on rural residence to a Native priority is essential. The comments are based on the following principles, which are foundational to a successful subsistence program:

1. The subsistence management system must recognize the overriding importance of meeting the needs of subsistence users, over other management issues and objectives.
2. Subsistence is a Native issue - a critical part of the larger historical question about the status, rights and future survival of Alaska's aboriginal peoples. The economic and cultural survival of Native communities is the principal reason why Congress enacted its rural subsistence preference in 1980. By articulating the federal government's traditional obligation to protect indigenous citizens from the political and economic power of the non-Native majority, Title VIII of ANILCA constitutes a landmark of Indian law, but one that has failed to deliver the protection promised.
3. The Obama Administration (the Secretaries of Interior and Agriculture, along with senior White House officials) should press Congress to introduce a legislative package that includes a Native plus “rural”, or “tribal plus rural” priority for Alaska Native subsistence uses.
4. The federal system must not defer to the State government on management policies. This is a federal system, to implement established federal priorities in support of Native hunting, fishing and gathering rights.

5. The heart of Title VIII is the local and regional participation system, the mechanism by which Congress ensured local subsistence users would be given a “meaningful role” in subsistence management. The federal system must recognize the fundamental importance of the input from the Regional advisory Councils, separate from any other “stakeholder” input.
6. The Secretary should undertake a survey of the amount of money spent on litigation involving the interpretation and implementation of Title VIII since 1980, by both the federal government and Alaska Natives that can be used to demonstrate to Congress the need for fundamental statutory changes.

**TITLE VIII OF ANILCA IS INDIAN LEGISLATION:** The Secretary should encourage President Obama to issue an Executive Order that advises the Federal Subsistence Board and the Office of Subsistence Management that Title VIII is Indian legislation, enacted under the plenary authority of Congress over Indian Affairs, and directs OSM and the FSB to implement a subsistence management program in accordance with the Executive Order. Title VIII 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. The Justice Department and the Interior Solicitor’s office should also be directed to take this position in all litigation surrounding Title VIII.

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.

While the FSB takes the position that ANILCA is not Indian legislation,<sup>1</sup> there is no question but that Title VIII is “remedial” legislation. It was intended to remedy the failure of the State and Federal

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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

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.

**AMEND TITLE VIII of ANILCA as follows:**

- Replace the “rural” priority with a “Native,” or “Native plus rural” or “tribal plus rural” subsistence priority. ANILCA’s rural preference does not protect legitimate subsistence needs of many Native people who still occupy their ancestral homelands, but whose communities are now designated nonrural due to the influx of people into the surrounding areas. Congress has the authority, based on the supremacy clause and on its plenary authority to regulate Indian affairs rooted in the Indian commerce clause of the United States Constitution, to enact legislation that imposes a Native or tribal subsistence preference on all lands and waters of Alaska. This could be in addition to protecting the legitimate needs of non-Natives who live in rural Alaska who also dependent upon subsistence. Protection for Native hunting and fishing rights in Alaska are already contained in numerous other federal laws, including the Marine Mammal Protection Act, the Migratory Bird Treaty Act, the Fur Seal Treaty, the Endangered Species Act, and the International Whaling Convention. In 2000, the North Pacific Fishery Management Council (NPFMC) authorized a subsistence fishery for halibut in Alaska for rural residents and members of Alaska’s federally recognized tribes. A Native subsistence preference for hunting, fishing and gathering would fulfill the promises of ANCSA and ANILCA, and would be consistent with settled principles of federal Indian law. It would also put an end to the otherwise endless litigation concerning the implementation of the current rural priority.
- Mandate tribal compacting and contracting of subsistence programs in order to give Alaska Natives a more meaningful role in the management of subsistence uses on federal and Native lands. Here again, examples abound. The Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. §§703 et seq., and the treaties with Canada and Mexico provide for subsistence uses of migratory birds by the indigenous inhabitants of Alaska and provide for a federal-state-tribal co-management regime to manage the subsistence harvest. The Marine Mammal Protection Act, as amended, 16 U.S.C. §§1361 et seq., governs the management of marine mammals in Alaska and authorizes the Secretaries of Interior and Commerce to enter into cooperative agreements with Alaska Native Organizations to conserve marine mammals and provide co-management of subsistence use of marine mammals by Alaska Natives. One of the earliest examples of co-

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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 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.

management in Alaska involves the Alaska Eskimo Whaling Commission, which under the authority of a cooperative agreement between AEWC and the National Oceanic and Atmospheric Administration (NOAA), has taken responsibility for conducting its own research, developing whaling regulations, allocating the national whale quota among participating villages, and enforcing both the quota and the regulations. The North Pacific Fishery Management Council has also authorized agreements with tribal governments for harvest monitoring, local area planning and other issues affecting subsistence uses of halibut.

- Exempt the Regional Advisory Councils from the requirements of the Federal Administrative Committees Act (FACA). Section 805 of ANILCA mandates that the secretaries establish regional advisory councils, composed of local subsistence users, with the authority to devise and submit to the Federal Subsistence Board recommendations on proposed regulations. Today, because of the requirements of FACA, the RACs are required to be composed on at least 30% sport and commercial users. Congress never intended the RACs to be composed of anyone other than local subsistence users. Application of FACA's membership requirements contradicts and frustrates the purposes of §805 of ANILCA. Congress should amend FACA (or Title VIII of ANILCA) to exempt the RACs from the requirements of FACA, and the Secretaries should advance such an amendment.

**AMEND THE DEFINITION OF PUBLIC LANDS:** Extend the geographical scope of ANILCA jurisdiction to include all marine and navigable waters in Alaska, and Native allotments. Provide Alaska Native Corporations the authority to opt into a provision ensuring a federally protected customary and traditional hunting and fishing right on ANCSA fee lands and associated waters for Alaska Natives. ANCSA lands and Native allotments were often selected for their value to the subsistence economy and culture, yet jurisdiction to regulate hunting and fishing on these lands presently lies with the State. Congress obviously intended to provide protection to subsistence uses of fish, which for the most part occurs in navigable waters. Indian treaty rights in the lower 48 states often extend to state and private lands. The Administration should consider this possibility in the review.

**ALASKA NATIVE FUND:** The Secretary should create an Alaska Native Fund, as part of the BIA Rights Protection Program, to reimburse the Native community for the millions of dollars we have had to spend defending our aboriginal and human rights. As demonstrated in the attached addendum, many of the subsistence court cases were brought by Alaska Natives and were directly related to forcing the federal agencies to take their responsibilities under Title VIII seriously. One of our most costly, the Katie John litigation, was necessitated by the federal government's initial refusal to assert management authority over fishing. Congress very clearly intended our subsistence fishing in Alaska to be protected by Title VIII, and the agencies knew that fishing is the very lifeblood of our traditional way of life. That case took years to litigate and involved several appeals, not to mention the time that was spent in the regulatory processes. We continue to this day to participate in litigation to defend the federal regulations put in place to implement the *Katie John* decision.

**COMPREHENSIVE REVIEW OF ALL SUBSISTENCE REGULATIONS.** When the federal subsistence program was adopted, the federal managers blindly incorporated into federal law all existing

State license, permit, harvest-ticket and tag requirements – without any assessment of the propriety of imposing these requirements on subsistence users. These types of restrictions should not be imposed upon subsistence users unless necessary under §804 to protect the viability of a species and/or the continuation of subsistence uses.

The Federal Subsistence Management system was also put into place before the Secretaries established the local and regional participation scheme mandated by §805(a)-(c). We believe Congress intended that the development of a “permanent” subsistence management program would derive from the local and regional participation system, and would be based on the recommendations flowing through that system. Congress gave the Councils the explicit authority to engage in “the review and evaluation of proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish and wildlife” in each region of the State. Yet, the regional councils had no input (since they were not formed at the time) in important questions like (1) whether the program should be implemented by a federal subsistence board, and if so what its composition should be; (2) the critical “rural” eligibility determinations; (3) the proper approach for determining C&T uses of resources; (4) the content of the initial hunting and fishing regulations that govern the day-to-day resource harvest activities of subsistence users, and many other vital questions important to the management of subsistence. All of these important questions need to be revisited with input from the RACs.

As noted by the Northwest Arctic Borough, by the wholesale incorporation of the State’s regulations, the federal system also incorporated the State’s long history of commercial hunting/fishing biases. The FSB needs to start fresh with the idea of fulfilling the full intent of ANILCA, which was allow Native communities to be able to retain the opportunity to maintain local subsistence practices and customs.

During the last Administration, in particular, the FSB more often than not aligned its hunting seasons and bag limits with the State’s rather than based on subsistence users needs and customary practices. As a result, in many cases the regulations do not reflect the customary and traditional values of subsistence users. Every regulation should be necessary, consistent with Title VIII, and cause the least adverse impact possible on subsistence uses. Finally, in adopting regulations, local traditional knowledge should be incorporated into the analysis.

**COMPOSITION OF THE FEDERAL SUBSISTENCE BOARD:** The Federal Subsistence Board should be replaced with a federally-chartered or authorized entity composed of twelve (12) subsistence users from the 12 ANCSA regions or the chairs of each of the Regional Advisory Councils. There is nothing in Title VIII of ANILCA that prohibits the federal government from creating a Federal Subsistence Board structure composed of non-federal members – in fact there is nothing in the statute that mandates the establishment of a Federal Subsistence Board at all. At the very least the Secretaries should increase the size of the Board and make at least 50% of the membership rural residents. The North Pacific Fisheries Management Council is composed of a mix of federal, state and public members.

**RURAL/NON-RURAL DETERMINATIONS:**

- Amend the regulatory definition of “rural”. As noted earlier, we believe the rural preference should be amended to expressly protect Native subsistence use. But until that happens, the

current definition of rural should be amended and defined as broadly as possible so as to benefit the greatest number of Alaska Natives who wish to continue to pursue a subsistence way of life. The only court decision addressing the question did so in the context of the State of Alaska's definition of rural, which excluded the entire Kenai Peninsula. *Kenaitze Indian Tribe v. Alaska*, 860 F.3d 312 (9<sup>th</sup> Cir. 1988), *cert. denied*, 109 S. Ct. 3187 (1989). In rejecting the State's definition, the court of appeals cited a number of definitions of rural, ranging from the one 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 (rural defined to include communities with a population of up to 25,000). Residents of communities on the Kenai Peninsula were thus entitled to financial assistance for a number of rural housing programs but not to the subsistence priority. In light of the federal government's trust responsibility to Alaska Natives, ANILCA's rural definition should surely be construed at least as broadly as the National Housing Act.

- Revise the FSB criteria for assessing rural characteristics in making its decennial reviews of communities' rural status. The FSB needs to identify fair and workable criteria for making rural determinations. Following the first decennial review the USFWS contracted with the University of Alaska Anchorage's Institute of Social and Economic Research (ISER) to develop methodologies for identifying rural and non-rural areas, but the FSB arbitrarily rejected the scientific method recommended by ISER which would have used clear, effective and defensible criteria to distinguish between rural and non-rural populations. The FSB's rejection was due to political pressure from the State to avoid the potential impact the methodology would have on the Kenai Peninsula. The regulations need to be amended to ensure that future rural status reviews do not result in the elimination of rural, subsistence-dependent communities.
- Military bases should not be considered "rural" but rather separate communities, so that sparsely populated areas such as Delta Junction are not bumped out of the rural priority due to the presence of self-contained military installations like Fort Greely;
- The FSB should reconsider its decision finding the Organized Village of Saxman to be socially and communally integrated with Ketchikan, and reinstate Saxman's rural status; alternatively, the Secretary should direct the FSB to reconsider its decision to classify Saxman as nonrural. Saxman has little economic development and few cash jobs – its economic and cultural characteristics are more akin to those of other small rural communities across Alaska.

**CUSTOMARY AND TRADITIONAL USE DETERMINATIONS:** The federal subsistence regulations adopted the State's eight criteria for determining customary and traditional uses (C & T) on a species-by-species basis. See 50 C.F.R. § 101.16(b). This means that a community may have C&T use of moose but not sheep, for example, even though sheep are located within that community's traditional uses areas.

We believe a species-by-species approach to C&T determinations is inconsistent with Title VIII of ANILCA. The policy goal of ANILCA is to preserve cultural systems and activities which underlie subsistence uses. A primary component of subsistence use patterns involves opportunistic taking of fish or game *as needed and as available*. Congress fully expected Native communities to be able to retain the opportunity to maintain local subsistence practices and customs and understood that subsistence use activities were grounded in and by local self-regulating forces:

[T]he phrase “customary and traditional” is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources in areas of, and by persons (both Native and non-Native) resident in, areas of Alaska in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation. H.R. No. 96-97, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. Part I at 279 (1979).

Subsistence uses historically took place within particular areas customarily used by the Villages. In other words, Alaska Natives used all the resources available to them within their community’s traditional use area. Rather than focusing on whether particular species are the subject of C&T use, the regulations should focus on C&T use areas, and provide that all species found within those areas are subject to the subsistence priority, including indigenous, reintroduced and introduced species. Federal district court Judge H. Russel Holland employed the proper methodology in striking down restrictive state regulations in the landmark case of *Bobby v. Alaska*.

Because many Villages are now surrounded by state and private lands, the FSB should implement its C&T regulations and determinations in such a way that ensures communities surrounded by State and private lands will have reasonable access to federal “public lands” in order to harvest all subsistence resources that were customarily and traditionally used by the Native Villages.

**TRIBAL COMPACTING AND CONTRACTING:** As noted earlier, we believe this should be included in a legislative package in order to ensure meaningful participation in management of subsistence in Alaska. Significant aspects of the federal subsistence program in Alaska could be compacted to tribal organization in Alaska. Meanwhile, Section 809 of ANILCA provides some authority for contracting OSM and FSB functions. It has not been fully utilized and needs to be expanded.

**OFFICE OF SUBSISTENCE MANAGEMENT:**

- Remove OSM from USF&WS to the Secretary’s office, and consider contracting with a Native organization pursuant to ANILCA §809 to perform the functions the OSM currently operates. Under the current system, the USFWS is designated as the lead agency and as such has too much control over the federal subsistence program. The federal subsistence management program is supposed to be a multi-agency effort, yet USF&WS has garnered almost total control over subsistence management because it receives the funding and hires the personnel to run the OSM. The subsistence management program could be operated out

of the Secretary's office in a way similar to the Indian water rights settlement program. In both cases multiple agencies are involved and central coordination is essential.

- OSM Director. Since the OSM is included in the budget of the USFWS, the Director is hired and answers to the Regional Director of USFWS. In the past, there has been no consultation with the Native community and apparently none or very little with the other federal partners or the Regional Advisory Committees in the recruitment and hiring of key positions within the OSM. In the future, USFWS should consult with the Native community, the RACs and the other federal partners in the hiring of the Director and Deputy Director. Those positions should be filled with individuals who are highly qualified, and who have an understanding and appreciation of the importance of subsistence to the economy and way of life of our people. They should also be committed to meaningful participation and consultation with Alaska Native Tribes and organizations on all issues that impact them. Finally, we recommend consideration of Native candidates for these positions.
- Native Hire: Increase the number of Alaska Natives in management positions in OSM and the federal agencies. Under the previous administration, the number and authority of Alaska Native OSM employees steadily decreased, reaching a point in June, 2009, where only six Natives, of more than 45 OSM employees remained, and none have an effective role in policymaking decisions. The Secretaries of Interior and Agriculture should conduct an analysis of federal hiring practices in Alaska at USFWS, OSM, NPS, BLM, BIA the Forest Service to determine whether there are inherent barriers to the hiring of Alaska Natives, and address the cause of underrepresentation of Alaska Natives within the agencies.

## **FEDERAL SUBSISTENCE BOARD**

- **Appoint a new FSB Chair,** after consultation with tribes & Native organizations and include the RAC's in the nomination and selection process.
- **Revoke the 2008 MOA between the FSB and the State of Alaska** and renegotiate it with input from RACs and Alaska's tribes. The agreement was signed in the final days of the Bush Administration and purports to establish guidelines to coordinate the management of subsistence uses on federal public lands. It imports state law requirements into the federal management program. For example, under subparagraph IV(3) of the MOU, the FSB and the State agree to "provide a priority for subsistence uses of fish and wildlife resources and to allow for other uses of fish and wildlife resources when surpluses are sufficient, consistent with ANILCA and AS 16.05.258 (emphasis added). Alaska's statute only requires the State to "provide a reasonable opportunity for subsistence uses," while §802(1) of ANILCA requires that "[t]he use of the public lands in Alaska is to cause the least adverse impact possible on residents who depend upon subsistence uses of the resources of such lands." This is but one example of the problem. It is simply impossible for the FSB to provide a subsistence priority consistent with *both* federal and state law. It is notable that Alaska law provides for the creation of "non-subsistence use areas," which is nothing more than a

vehicle for excluding subsistence uses when politically powerful sport or commercial interests feel the priority interferes unduly with their activities.

- **Revoke Secretary Kempthorne’s Letter of June 28, 2007**, requiring Regional Directors to be present at key meetings and allow them to decide if they want to serve on the Board or delegate that responsibility to staff who can devote more time to the Federal Subsistence Management System.
- **The FSB should hold some of its meetings in regional locations.** Given the importance of subsistence to Alaska Natives living closest to the land and subsistence resources, and the fundamental significance of input of real-life subsistence users, FSB meetings should be held in regional locations to maximize the opportunity for input from subsistence users and real-time, experiential resource evaluations.
- **Make FSB deliberations transparent and eliminate excessive use of Executive Sessions.** Executive sessions should be limited to issues involving personnel, litigation and other issues that require confidentiality as a legal matter; deliberations on regulatory matters -- no matter how contentious -- should never take place in executive session. In the past, the Board has held regulatory discussions in executive session simply because the issue was “controversial.” What made the issue controversial were objections and pressures coming from non-subsistence users and the State of Alaska. The FSB was created to implement Title VIII of ANILCA and to protect subsistence users – not to cater to or negotiate with competing users of fish and game or the State of Alaska.
- **The Federal Subsistence Board Regulatory Cycle:** Until 2007, the FSB regulatory cycle was conducted yearly, with annual deadlines for recommendations from RACs and the public. Citing budgetary constraints, the FSB switched to 2-year cycles. This change has meant more “out-of-cycle” and emergency Openings/Closures, which means there is no time to seek RAC recommendations or pay them any deference. Decisions on these actions are made at FSB work sessions or by email, with no or minimum input from the RACs or the public. The RACs should not be limited to participation in the federal regulatory process to only one time every two years. Excluding their input on out-of-cycle and emergency proposals abrogates the role of the RACs and is arguably a violation of Title VIII of ANILCA. The Secretary should direct the FSB to return to an annual cycle, and to seek RAC recommendations on all proposals, including out-of-cycle and emergency openings and closures.
- **Non-voting Seats on the FSB.** The State of Alaska has a non-voting seat on the FSB, and its representative has been allowed to sit at the table with the FSB and participate in Board discussions and deliberations. While not entitled to vote, the State is being given too much influence over the decision-making process. We believe the position should be eliminated.

- **Deference to Regional Advisory Council Recommendations:** Section 805 is the heart of the reform program designed by Congress to protect subsistence uses of Alaska Natives and other rural Alaskans. It mandates a viable regional participation scheme and requires that deference be given to Regional Advisory Council (RAC) recommendations. The Secretary must follow these recommendations unless he determines a recommendation is “not supported by substantial evidence, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of subsistence needs.” The FSB has interpreted §805(c) as only requiring deference on regulatory proposals involving the “taking” of fish and wildlife and not on important policy decisions.

The Secretaries should direct the FSB to give deference to the recommendations of the RACs on (1) rural determinations; (2) customary and traditional use determinations; (3) out-of-cycle; and (4) special actions and emergency regulations, as well as any other matter that impacts rural subsistence users’ ability to subsistence hunt and fish on federal public lands and waters. Examples of where the RACs were not given deference include the proposal to close Mahknati Island to commercial herring harvest & the decision to reclassify Saxman as non-rural.

- **Discontinue the use of RAC subcommittees and/or Working Groups** unless called for by the RACs themselves. These work groups tend to circumvent the RACs and are usually formed at the request of the State. The FSB has allowed Workgroup reports to become part of its record and deliberation regardless of the RAC response to the Workgroup’s recommendations.
- **Petitions for Reconsideration:** Reinstate the Board’s policy of allowing RACs to submit requests for reconsideration of FSB decisions. The SE RAC denied right to request reconsideration of the Saxman nonrural determination. RFRs should be posted on the OSM website prior to the meeting where the issue will be decided.

The FSB should adopt a policy that prevents opponents of subsistence from filing repeated requests for reconsideration of the FSB’s positive C&T determinations. The Policy should state that the Board will only consider a proposal to modify or rescind a positive C&T determination if the proponent of the proposal has demonstrated substantial new information supporting the claim.

## **REGIONAL ADVISORY COMMITTEES:**

- **The Regional Advisory Committees (RACs) need more support and funding.** Congress gave the regional councils explicit authority to engage in “the review and evaluation of proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish

and wildlife.” §805(a)(3)(A). The full advisory role of the RACs set forth in §805 needs to be recognized in the public hearing, consultation and regulatory process. Instead, the RACs are largely on their own, with little or no professional expertise or sources of information necessary to carry out their role of making recommendations to the FSB and reporting to the Secretaries. This has weakened the grassroots input to the federal system. Despite today’s obvious constraints on the federal budget, the Secretaries should review the budgetary needs of an adequate federal system, which includes a well-funded RAC system, and restore as much of the recent reductions as is fiscally possible. The Councils, to be effective, need to have a separate pool of funding to hire their own staff and participate as full and independent partners with the agencies and their staff.

- Currently, the RACs can no longer hold meetings in rural communities so that affected subsistence users can provide input on issues that will come before the FSB. This policy should be rescinded.
- Contract management of the RACs to an Alaska Native tribally authorized entity.
- Members of the RACs should be appointed by their tribal governments & should be subsistence users.

**SCIENTIFIC RESEARCH AND DATA COLLECTION:** Additional funding is needed for scientific research and data collection, including for the partnership program and fisheries information service projects. Currently, too much of the federal research funding is going to the State of Alaska. That funding could go to a statewide Native organization. The Secretary should direct OSM and the various agencies to contract and/or compact with Alaska’s Tribes and their organizations to conduct more of this research and data collection. Alaska Natives and their organizations need to be able to participate as full partners. More involvement by Alaska Natives can only improve the overall research.

In fact, given the complexity of dual management now in place in Alaska, depressed stocks and the need to scrutinize diverse fishing pressures on a large number of different stocks and species, there is a need for a statewide Alaska Native umbrella organization that can monitor and coordinate activities statewide, and provide technical assistance to regions and localities that have not yet developed their own resource management capacity. There are numerous working groups, task forces and committees that the State and the Federal Government have established to address natural resource issues that do not have meaningful Native participation because no one is paying attention or has the time or staff to offer the follow-through needed. A well-staffed statewide Native Subsistence Commission could monitor efforts to undermine federal protections for subsistence, act as a clearinghouse on subsistence-related information, and provide administrative and professional help to Alaska tribal governments and their organizations on fish and wildlife issues. While some regions and tribes have begun to develop modern resource management capacity, there is no statewide coordination and no uniform approach on many fish and wildlife issues. Such a Commission would serve to clearly demonstrate the capacity within the Alaska Native community to manage resources using appropriate science and management regimes, including traditional knowledge, so as to disprove the prevailing belief among policy makers and resource managers that there can be no meaningful role for Alaska Natives.

OSM also needs to obtain RAC, tribal and local input into research priorities so they reflect issues of importance at the local level, and then avail themselves of local, traditional knowledge and expertise in conducting subsistence research.

**TRIBAL CONSULTATION:** FWS and the OSM has given a very narrow interpretation to EO 13175 in Alaska. They limit consultation to only those issues that affect tribal trust lands or resources that impact tribal self-governance or treaty rights, and see no need to consult on regulations that impact subsistence users and uses. Each of the federal agencies, including the OSM, need to create a meaningful public consultation process which honors the federal government's trust responsibility to Alaska's tribes and that includes consultation on all subsistence policies and regulations.

**ANILCA SECTION 810 REVIEWS:** Section 810 requires federal agencies to analyze the effect of non-subsistence uses allowed by federal decisions that "withdraw, reserve, lease, or otherwise permit the use, occupancy or disposition of public lands" if those uses would "significantly restrict subsistence uses." Both the National Park Service ("NPS") and Bureau of Land Management ("BLM") have permitted a rapidly increasing number of transporters and outfitters and their growing numbers of sport hunting clients to have almost unregulated access to the federal public lands and waters in the northwest arctic that are under NPS and BLM management. The NPS last performed an 810 analysis in 1986 when it found that the northwest arctic region was too remote for sport hunting to have any adverse effects on subsistence uses. The BLM recently completed an Environmental Impact Statement and a massive Resource Management Plan reaching from the Kobuk Valley north of Kotzebue to the Seward Peninsula south of Nome where it took the position that since the Resource Management Plan did not specifically "withdraw, reserve, lease, or otherwise permit the use, occupancy or disposition of public lands" it did not "significantly restrict" subsistence. It is now preparing a more localized Resource Management Plan for the Squirrel River drainage, which reportedly will include an 810 analysis on the effect of permitted sport hunting on subsistence. The NPS is also reportedly completing a long delayed concession permitting plan for the Noatak Preserve, but has previously taken the position that in part as long as "some" species were available for subsistence uses (such as rabbits or ptarmigan) sport hunting could not be said to "significantly restrict" subsistence uses of caribou. It is probable that these are not isolated lapses.

The Secretary should direct all federal land management agencies to review, the agencies' process for the implementation of Title VIII, Section 810. The review should be conducted with the full participation and consultation of the RACs and subsistence users. The review should lead to the adoption of regulations that meaningfully protect the opportunity for customary and traditional subsistence patterns and practices of taking and use, and the opportunity to harvest subsistence resources, as well as the availability of subsistence resources and the maintenance of healthy fish and wildlife populations. The regulations should require an 810 process and analysis that is designed to protect the opportunity to continue the subsistence way of life rather than the narrow and cramped interpretation the agencies currently subscribe to section 810. The regulations and policy should be consistent among all the federal agencies.

**ENFORCEMENT:** Citations should be given for wanton waste, illegal methods and means and commercial sale of subsistence taken fish, but not for subsistence users who responsibly follow their customary and traditional practices. The federal subsistence regulations establishing seasons, methods & means and bag limits need to legalize customary and traditional practices and set realistic harvest quotas.

All enforcement actions on federal lands and waters should be suspended pending a complete regulatory review, and violations that were issued pursuant to erroneous policies prior to the review should be dismissed, and law enforcement agents directed to return individual's nets, small fishing gear and other essential equipment needed to feed their families.

We also recommend the Department undertake an investigation and report on Federal and State law enforcement aimed at subsistence activities undertaken in 2008 and 2009. We have seen a significant increase in enforcement actions against Alaska Natives. Finally, we recommend that the MOU between the State of Alaska and the FSB that allows the State to carry out enforcement actions on federal lands be reviewed and possibly suspended.

**INTENSIVE MANAGEMENT OF PREDATORS ON FEDERAL LANDS:** The FSB has refused to adopt regulations that would allow for predator control. It adopted a policy in 2004 that states that it has no authority to adopt such measures. The policy states that the FSB is authorized only to administer the subsistence taking and uses of fish and wildlife on federal public lands for rural residents and that the authority over predatory control and habitat management rests with the various land managers (FWS, NPS, BLM, BIA and the Forest Service). The Secretaries of Interior and Agriculture should direct the various agencies to incorporate predator control measures into their wildlife management plans, and to ensure that decisions are based on local and traditional knowledge as well as the more general biological and social impact data. Section 815(1) of Title VIII of ANILCA infers that the "conservation of healthy populations" is not the same as the "conservation of natural and healthy populations," which is the standard required for the national parks and monuments. ANILCA §801(4) provides that Congress invoked its constitutional authorities to protect and provide the opportunity for continued subsistence uses on the public lands by rural residents. ANILCA refers to using sound management principles, in accordance with recognized scientific principles and the purposes of each conservation unit. Predator control is a legitimate wildlife management tool and in situations where it does not conflict with the stated purposes of the federal land unit, could be used to manage ungulate populations at a healthy level to "provide the opportunity for continued subsistence uses on the public lands by rural residents."

## Subsistence in the Courts

**\**Madison v. Alaska Department of Fish and Game*, 696 P.2d 168 (1985):** The Alaska Supreme Court overturned the state regulations that limited subsistence uses to rural residents on the grounds that the Alaska subsistence statute did not limit eligibility to rural residents. The decision placed the State out of compliance with Title VIII of ANILCA.

***Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9<sup>th</sup> Cir. 1988), cert. denied, 491 U.S. 905 (1989):** The State amended its subsistence statute in 1986 to limit the state subsistence priority to “residents of a rural area,” and defined “rural area” to mean “a community or area of the state in which noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area.” The definition had the effect of excluding Native communities located on the Kenai Peninsula. The Kenaitze Indian Tribe sued. The Court of Appeals rejected the State’s definition of rural, concluding that the State was simply trying to find a way to “take away what Congress had given, adopting a creative redefinition of the word rural, a redefinition whose transparent purpose is to protect commercial and sport fishing interests.

***Bobby v. Alaska*, 718 F. Supp. 764 (D. Alaska 1989):** This case helped define and clarify the requirements of Title VIII by establishing that the state subsistence regulations (seasons, bag limits, means and methods of harvest) had to be consistent with local, customary and traditional subsistence uses and that regulatory restrictions had to result in the minimum adverse impact possible upon rural residents’ customary and traditional uses. The court also held that neither state law nor ANILCA precludes a defendant from challenging the validity of a state hunting regulation as a defense to a criminal prosecution.

**\**McDowell v. State of Alaska*, 785 P.2d 1 (Alaska 1989):** The Alaska Supreme Court invalidated the state subsistence statute’s rural residency preference as unconstitutional under several clauses in article VIII of the Alaska Constitution. The decision meant that the State could not comply with the basic requirement in Title VIII that it provide a priority for subsistence uses of Alaska’s rural residents. In response to the McDowell ruling and Alaska’s inability to comply with the requirements of Title VIII, the federal agencies took over management of subsistence uses on federal lands in 1990. 55 Fed. Reg., 27,114 (1990).

**\**McDowell v. United States*, A92-0531-CV, (D. Alaska, filed June 22, 1990):** The same plaintiffs in the earlier State court McDowell case brought a facial challenge to ANILCA in federal court challenging the constitutionality of Title VIII’s rural preference. The district court upheld the constitutionality of Title VIII, and rejected equal protection and 11<sup>th</sup> amendment challenges, but on reconsideration determined that the plaintiffs’ original complaint had been filed prior to the effective takeover of management of the subsistence program and dismissed the case on procedural grounds. The plaintiffs appealed, but voluntarily dismissed their appeal in early 1998.

***Kwethluk IRA Council v. Alaska*, 740 F. Supp. 765 (D. Alaska 1990):** The court struck down state regulations governing subsistence hunting of caribou in western Alaska as inconsistent with customary and traditional harvest patterns of Yupik natives.

\*Denotes those cases in which AFN has intervened to defend the federal priority.

***John v. Alaska*, Civ. No. A85-698 (D. Alaska Jan. 19, 1990)(Order on cross motions for summary judgment):** The court struck down state regulations that restricted subsistence fishing at historic native fish camp on a Native allotment on the Copper River.

***U.S. v. Alexander*, 938 F.2d 942 (9<sup>th</sup> Cir. 1991):** The court set aside a federal Lacey Act prosecution on the ground that the state subsistence law prohibiting cash sales from being considered subsistence uses was in conflict with ANILCA's protection of customary trade as a subsistence use.

***Peratrovich v United States*, No. 92-0734-CV (D. Alaska):** At issue in this case, which is still being litigated, is whether the definition of public lands in Alaska should include the waters within the Tongass National Forest. The plaintiffs claim that the US owns the submerged lands within the Forest as a result of a pre-statehood withdrawal. The case was stayed for years pending a decision in *Alaska v. United States*, 546 U.S. 413 (2006) (No. 128 Original), and was jointly managed with the *Katie John* case. The court in *Alaska v. US* approved the federal government's disclaimer of interest in the Tongass submerged lands, but the plaintiffs argue that the submerged lands within the exterior boundaries of the Forest are either subject to the exceptions in the disclaimer or that the US did not disclaim title to those waters.

***State of Alaska v. Morry*, 836 P.2d 358 (Alaska 1992):** The Alaska Supreme Court held that "all Alaskans," regardless of where they live or what their circumstances, are eligible to travel anywhere in the State and participate in subsistence hunting and fishing on equal terms with local subsistence users. It also held that the "customary and traditional uses" standard does not provide any basis for distinguishing among users, nor does it protect "traditional patterns and methods of taking fish and game for subsistence purposes," or "traditional and customary methods of subsistence takings."

***Native Village of Quinhagak v. United States*, 35 F.3d 388 (9<sup>th</sup> Cir. 1994):** Several Alaska Native villages were granted preliminary injunctive relief from state regulations that prevented them from fishing for rainbow trout in the navigable portions of rivers in the Togiak National Wildlife Refuge. At the time, the federal government took the position that it did not have jurisdiction over navigable waters. In reversing the lower court's refusal to grant a preliminary injunction, the Court of Appeals found that the district court erred in focusing on whether people were going hungry in weighing the harm to the villages, and held that "the court should have focused on the evidence of the threatened loss of an important food source and destruction of their culture and way of life."

**\**Olsen v. United States*, A97-0031CV (D. Alaska, filed January 30, 1997):** This case alleged the same issues that were plead in *McDowell v. United States* and involved largely the same group of plaintiffs. The case was voluntarily dismissed without prejudice on March 13, 1998, in order to allow the Alaska Legislative Council's case to proceed in the DC Circuit. The DC Circuit had issued an order stating that it would transfer that case to Alaska unless the Olsen case was dismissed.

**\**Katie John v. United States*, A90-0484-CV (HRH), 1994 WL 487830 (D. Alaska March 30, 1994), consolidated with *Alaska v. Babbitt*, Nos A92-0264-CV, 94-35480 (D. Alaska, April 20, 1995):** In response to the federal agencies decision not to assume management over most navigable waters (only those overlying submerged lands withdrawn before Statehood), Alaska Native elders fishing near the Copper River from a Native allotment

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near Batzulnetas challenged the Secretary's position. They sought to extend federal subsistence management to all navigable waters in Alaska. The State sued, alleging that the federal regulations impermissibly diminished the State's authority to manage fish and game. The two cases were consolidated. Before oral argument on cross-motions for summary judgment, the federal government changed its position and conceded that the priority should extend to waters in which the US has a reserved water right. The district court concluded, based on the federal navigational servitude that federal management should extend to all navigable waters in Alaska in order to fulfill Congress' intent to provide for subsistence needs of rural Alaska residents. Both the State and the plaintiffs appealed.

The court also rejected Alaska's claim that the federal government lacked authority to manage subsistence uses on federal public lands. The State did not appeal this ruling and stipulated to a dismissal with prejudice. The State legislature, along with a group of anti-subsistence advocates attempted to intervene in the Ninth Circuit in order to appeal this ruling, but the Court denied their motion.

**\*Alaska Legislative Council v. Babbitt, 181 F.3d 1333 (DC Cir. 1999):** A group of Alaska legislators, having failed in their attempt to intervene in the appeal of the Katie John decision, attempted to challenge the federal exercise of management authority in a separate lawsuit. The case was dismissed on the ground that the Legislature lacked standing to vindicate an alleged injury to the State's sovereignty interests, and the individual plaintiffs had not established their standing to bring their claims.

**\*Alaska v. Babbitt (Katie John II), 72 F.3d 698 (9<sup>TH</sup> Cir. 1995):** The Ninth Circuit reversed as to the navigational servitude and agreed with the plaintiffs' alternative theory that the federal public lands include all federally reserved waters in the State.

**Totemoff v. State of Alaska, 905 P.2d 954 (Alaska 1995), cert. denied, 517 U.S. 1244 (1996):** The Alaska Supreme Court, in *dicta*, expressed disagreement with the *John* ruling, creating a conflict between state and federal law on the issue of whether the reserved rights doctrine applies to the state's navigable waters. The court also rejected the argument that *Alexander* and *Bobby* should be read to invalidate the State law that purports to strip subsistence users of "a defense [to a prosecution for a taking violation] that the taking was done for subsistence uses." AS 16.05.259. The court held that only the US Supreme Court can control the decisions of state courts, even on questions of federal law.

**State of Alaska v. Kenaitze Indian Tribe, 894 P.2d 632 (1995):** Since Alaska fell out of compliance with Title VIII of ANILCA in 1989, its statutory scheme maintains a subsistence priority in name only, as demonstrated by a series of State court decisions. In this case, the Supreme Court upheld the constitutionality of the state's creation of vast non-subsistence areas (Alaska Sta. 16.05.258(c)). The court also unanimously invoked *McDowell's* construction of the "equal access" clauses of the State Constitution to prohibit the Legislature from using "local residency" for any subsistence-priority purpose, even as one of the three "Tier II" criteria of dependence and need to determine which subsistence users should be preferred when a particular fish or wildlife resource is not sufficiently abundant to satisfy all subsistence uses. Section 804 of ANILCA imposes local residency in its scheme to differentiate between subsistence users in times of shortages.

\*Denotes those cases in which AFN has intervened to defend the federal priority.

***Native Village of Elim v. State of Alaska*, 990 P.2d 1 (Alaska 1999):** This case interpreted the state-law subsistence priority as not applying to subsistence fish and wildlife resources throughout their migratory range. The ANILCA priority, by contrast, clearly attaches to such resources throughout their migratory travels. That is, the ANILCA priority prevents resources from being taken for non-subsistence uses in one part of their range if that would deprive rural residents in another part of the range of sufficient resources to satisfy subsistence uses. *See, e.g.*, 50 C.F.R. §§100.10(a) (the Secretary retains “existing authority to restrict or eliminate hunting, fishing, or trapping activities [outside of the] public lands when such activities interfere with subsistence fishing, hunting or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority.”)

***Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9<sup>th</sup> Cir. 2000):** The Court deferred to the Federal Subsistence Board’s application of restrictions on subsistence users—ostensibly for conservation purposes, but without first eliminating non-subsistence users. The court found it permissible for the FSB to balance competing aims of subsistence use, recreation, and conservation, but noted that the Board must provide subsistence users with a meaningful use preference, and found the two-day opening for subsistence hunters insufficient.

**\**John v. US*, 247 F.3d 1032 (9<sup>th</sup> Cir. 2001) (en banc):** Following publication of the agencies final determination of which waters are subject to the federal reserved water rights doctrine, 64 Fed. Reg. 1276 (January 8, 1999), the State appealed the Secretaries’ action to federal district Judge Holland, who affirmed the Secretarial action as consistent with the Ninth Circuit’s 1995 decision. On appeal, an *en banc* panel of the court upheld the federal regulations, holding that “the judgment rendered by the prior panel, and adopted by the district court should not be disturbed or altered by the en banc court.” Governor Knowles decided against petitioning for certiorari to the US Supreme Court.

***State v. Kenaitze Indian Tribe*, 83 P.3d 1060 (Alaska 2004):** The Supreme Court rejected a challenge to the implementation of the State’s non-subsistence areas (Alaska Sta. 16.05.258(c), and found that the Joint Boards of Fisheries and Game did not act arbitrarily or capriciously in including Native, subsistence-dependent communities within a large non-subsistence area encompassing almost half the state (Anchorage, the Kenai Peninsula and the Mat-Su Borough).

**\**Alaska Constitutional Legal Defense Conservation Fund v. Kempthorne*, 2006 US App. LEXIS 21570 (9<sup>th</sup> Cir. 2006), cert. denied, January 22, 2007:** In an unpublished decision, the Ninth Circuit affirmed the district court’s dismissal of plaintiffs’ challenge to the federal regulations implementing Title VIII’s rural priority. The court held that the Federal Subsistence Board acted within its statutory authority under ANILCA by enacting regulations that grant a preference for subsistence hunting to rural Alaskans, and that the preference does not violate the federal Equal Protection guarantee.

***Safari Club International v. Dementieff*, 227 F.R.D. 300 (D. Alaska 2005):** The court ruled that the exclusion of non-subsistence users from regional advisory councils violated the requirement of the Federal Advisory Committees Act (FACA) that committees subject to FACA be “fairly balanced.” The Secretary in October, 2004 adopted a rule that required the RACs to be composed of 30% sport and commercial users. Native tribes and individuals intervened to challenge the rule on the grounds that it violated ANILCA. The Court ultimately ruled that the RACs are subject to FACA, and after additional rulemaking, the FSB adopted a final rule that asks the Board to achieve 30% sport and/or commercial users on each of the RACs.

\*Denotes those cases in which AFN has intervened to defend the federal priority.

***Ninilchik Traditional Council v. Fleagle*, No. 3:06 CV 213 JWS, 2006 U.S. District LEXIS 67753 (D. Alaska 2006):**

This lawsuit challenged the failure of the Federal Subsistence Board to provide for a subsistence fishery on federal waters on the Kenai Peninsula. The federal district court denied the tribe's request for a preliminary injunction to set aside the FSB's decision not to approve the Southcentral Regional Advisory Council's recommendation to create the temporary subsistence fishery requested by the Tribe. The Court held that the regulations do not clearly require the FSB to give deference to RAC recommendations when considering a request for special action for a temporary change under 50 C.F.R. 100.19(e), i.e., concluding that 805(C) Of ANILCA only applies to recommendations on actions taken during the annual regulatory cycle.

***Alaska v. Federal Subsistence Board*, 544 F.3d 1089 (9<sup>th</sup> Cir. 2008):** The Ninth Circuit affirmed the district court's summary judgment dismissal of the State of Alaska's challenge to the FSB's customary and traditional use determination for moose hunting for the relevant game management unit near Chistochina. The State had alleged that because harvest data indicated that customary and traditional use occurred in only a very small portion of the unit, the Board's decision to extend the C&T finding to the whole unit was made without substantial evidence. The Cheesh-na Tribal Council in Chistochina intervened in the case to defend the FSB's C&T determination.

**\**Katie John v. U.S.*, NO. 3:05-cv-0006-HRH, consolidated with *State of Alaska v. Salazar*, NO. 3:05-cv-0158-HRH) (Order on Cross Motions for Summary Judgment, September 29, 2009):** The State filed suit in federal court in 2005 to challenge regulations adopted by the federal agencies in 1999 to implement the Ninth Circuit Court of Appeals decision (in the original Katie John case), holding that the definition of "public lands" for purposes of Title VIII of ANILCA includes navigable waters in which the US has reserved water rights. AFN intervened on the side of the federal government to support the existing regulations. Katie John filed a separate lawsuit arguing that the federal regulations should have defined water upstream and downstream from Conservation System Units (CSUs) and waters adjacent to Native allotments as public lands for purposes of ANILCA. The cases were consolidated and jointly managed with *Peratrovich v. US*, which asserted that certain marine waters within the boundaries of the Tongass National Forest should have been included within the definition of "public lands."

In May 2007, Judge Holland upheld the federal rulemaking process for determining which waters in Alaska are subject to federal jurisdiction, and on September 29, 2009, issued an order deciding all of the remaining issues in these cases regarding which waters have federal reserved water rights and are thus subject to federal jurisdiction. The court upheld the agencies' regulations which define "public lands" to include (1) waters bordering CSUs, even if they are outside the CSU; and (2) waters adjacent to in-holdings within CSUs. The court also held that selected but not conveyed lands within CSUs are properly treated as public lands until conveyed; and that the method for determining where a river ends and marine waters begin (headland to headland) was reasonable. Unfortunately, the court rejected the claims raised in both *Katie John* and *Peratrovich*, and held that federal reserved water rights do not exist, as a matter of law, in marine waters. In addition, the court upheld as "reasonable" the Secretaries' decision to exclude waters upstream and downstream of CSUs, and waters adjacent to Native allotments that are outside of CSUs from the definition of public lands. The State has appealed the decision to the Ninth Circuit.

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