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March 2, 2007

Special Committee: House Fisheries
Representative Paul Seaton, Chair
State Capitol, Room 102
Juneau, AK 99801-1182

Chairman Seaton,

The Kenai Peninsula Fishermen's Association represents commercial fishermen throughout Cook Inlet waters.

Many of our fishing families have been here for several years. Some are descendents of Alaskan native inhabitants and others have established homestead acreage; headquarters to support their fishing operations to establish a home for their families. It is significant to say that it was necessary to live off the land to feed their families in the long winters and busy summers.

The subsistence lifestyle in many ways was the beginning for commercial fisheries. It required a customary and traditional knowledge base to understand what, where and when a resource was available. The ability to trade and barter developed into marketing and payment for goods and services. We do believe that subsistence was and is an important pioneer lifestyle and should be respected and protected when necessary.

The population of south-central Alaska has increased intensely in the last century. The definition of "subsistence" has changed and the identification of a subsistence person is not as clear. Questions arise over what lifestyles are we preserving in a semi urban environment? What are the goals of a subsistence priority in a fully utilized resource? In the community of the Kenai Peninsula with obvious accessibility to modern lifestyles, transportation systems and public utilities, what is the identification with customary and traditional in present times? Is there a direct continuum of the practices of the past? Is there a lack of nutrition or well being for the Peninsula Community?

KPFA supports HJR 4 in its quest to fully identify the eight factors in determining a subsistence priority in the Ninilchik, Hope and Cooper Landing areas. We believe that a thorough review with consideration of current Alaska Department of Fish and Game biological information and of the changes within the community should be conducted immediately. It is apparent that the current system of selection lacks the full support of the south-central community and may affect negative changes that will harm the integrity of the subsistence program in to the future.

Respectfully,

The Kenai Peninsula Fishermen's Association
Board of Directors

25-LS0201\M
Kane
2/28/07

CS FOR HOUSE JOINT RESOLUTION NO. 4()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE OLSON

A RESOLUTION

1 **Requesting the Federal Subsistence Board to reconsider its decisions regarding the**
2 **subsistence fishery priority given to Ninilchik, Happy Valley, Hope, and Cooper**
3 **Landing residents.**

4 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 **WHEREAS** the communities of Ninilchik and Happy Valley have not exhibited a
6 long-term and traditional fishing history in the Upper Kenai or Kasilof drainage waters on
7 federal land; and

8 **WHEREAS**, in making the customary and traditional use determination for the
9 communities of Hope and Cooper Landing, the Federal Subsistence Board failed to follow its
10 own regulatory criteria for making that decision; and

11 **WHEREAS** a survey by the Alaska Department of Fish and Game did not support
12 these communities' receiving a subsistence priority; and

13 **WHEREAS** the residents of these communities fall short of meeting the eight factors
14 the Federal Subsistence Board considers when determining if an area has a subsistence
15 priority;

1 **BE IT RESOLVED** by the Alaska State Legislature that the Federal Subsistence
2 Board is requested to reconsider its decisions granting Ninilchik, Happy Valley, Hope, and
3 Cooper Landing residents a subsistence fishery priority.

4 **COPIES** of this resolution shall be sent by electronic transmission and by mail to the
5 Honorable Dirk Kempthorne, United States Secretary of the Interior; the Honorable Mike
6 Johanns, United States Secretary of Agriculture; the members of the Federal Subsistence
7 Board; the Office of Subsistence Management, United States Department of the Interior; and
8 the Honorable Ted Stevens and the Honorable Lisa Murkowski, U.S. Senators, and the
9 Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

25-LS0201NC
Kane
2/23/07

CS FOR HOUSE JOINT RESOLUTION NO. 4() ←
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE OLSON

A RESOLUTION

1 Requesting the Federal Subsistence Board to reconsider its decision regarding the
2 subsistence fishery priority given to Ninilchik, Happy Valley, Hope, and Cooper
3 Landing residents. *and further reconsider its decision*

4 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 WHEREAS the communities of Ninilchik, Happy Valley, Hope, and Cooper Landing
6 have not exhibited a long-term and traditional fishing history in the Upper Kenai or Kasilof
7 drainage waters on federal land; and

8 WHEREAS a survey by the Alaska Department of Fish and Game did not support
9 these communities' receiving a subsistence priority; and

10 WHEREAS the residents of these communities fall short of meeting the eight factors
11 the Federal Subsistence Board considers when determining if an area has a subsistence
12 priority;

13 BE IT RESOLVED by the Alaska State Legislature that the Federal Subsistence
14 Board is requested to reconsider its decisions granting Ninilchik, Happy Valley, Hope, and
15 Cooper Landing residents a subsistence fishery priority.

WORK DRAFT

WORK DRAFT

25-LS0201VC

by electronic method in addition to hard copy

1 **COPIES** of this resolution shall be sent to the Honorable Dirk Kempthorne, United
2 States Secretary of the Interior; the Honorable Mike Johanns, United States Secretary of
3 Agriculture; the members of the Federal Subsistence Board; the Office of Subsistence
4 Management, United States Department of the Interior; and the Honorable Ted Stevens and
5 the Honorable Lisa Murkowski, U.S. Senators, and the Honorable Don Young, U.S.
6 Representative, members of the Alaska delegation in Congress.

Google
Maps

Address **59.948424, -151.718711**
+59° 56' 54.33", -151° 43'
7.36"



ALASKA STATE LEGISLATURE

REPRESENTATIVE KURT OLSON

- Chair, Labor and Commerce
- Vice-Chair, Oil and Gas
- Member, Community and Regional Affairs

Session: January – May
State Capitol
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Interim: May – December
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Official Business

SPONSOR STATEMENT

HJR 4 – Federal Subsistence Board Reconsideration

This resolution requests the Federal Subsistence Board (Board) reconsider its November 2006 decision regarding subsistence fishery priority given to Ninilchik residents.

There are a number of issues worthy of consideration when debating the merits of this resolution; below is a brief list.

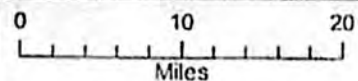
- The evidence presented to the Board did not demonstrate that the salmon, rainbow trout, char and other fish stocks in described area, are the same fish stocks as those present in areas much closer to and historically and much more frequently used by Ninilchik residents, such as Ninilchik River and Deep Creek.
- The Board made its customary and traditional use determination without substantial supporting evidence and without a reasonable examination of the eight regulatory factors for making customary and traditional use determinations with regards to the various fish stocks and areas covered by the determination.
- The Board improperly and unreasonably denied the Alaska Department of Fish & Game Board Liaison the ability to provide and discuss relevant information during the critical point of Board deliberations and in doing so, violated its own regulatory and Secretarial direction.

In short, the Board seems to have based it's ruling on anecdotal evidence rather than facts available for review. Many facts are readily available and a review of State's Request for Reconsideration will serve to enlighten even further.

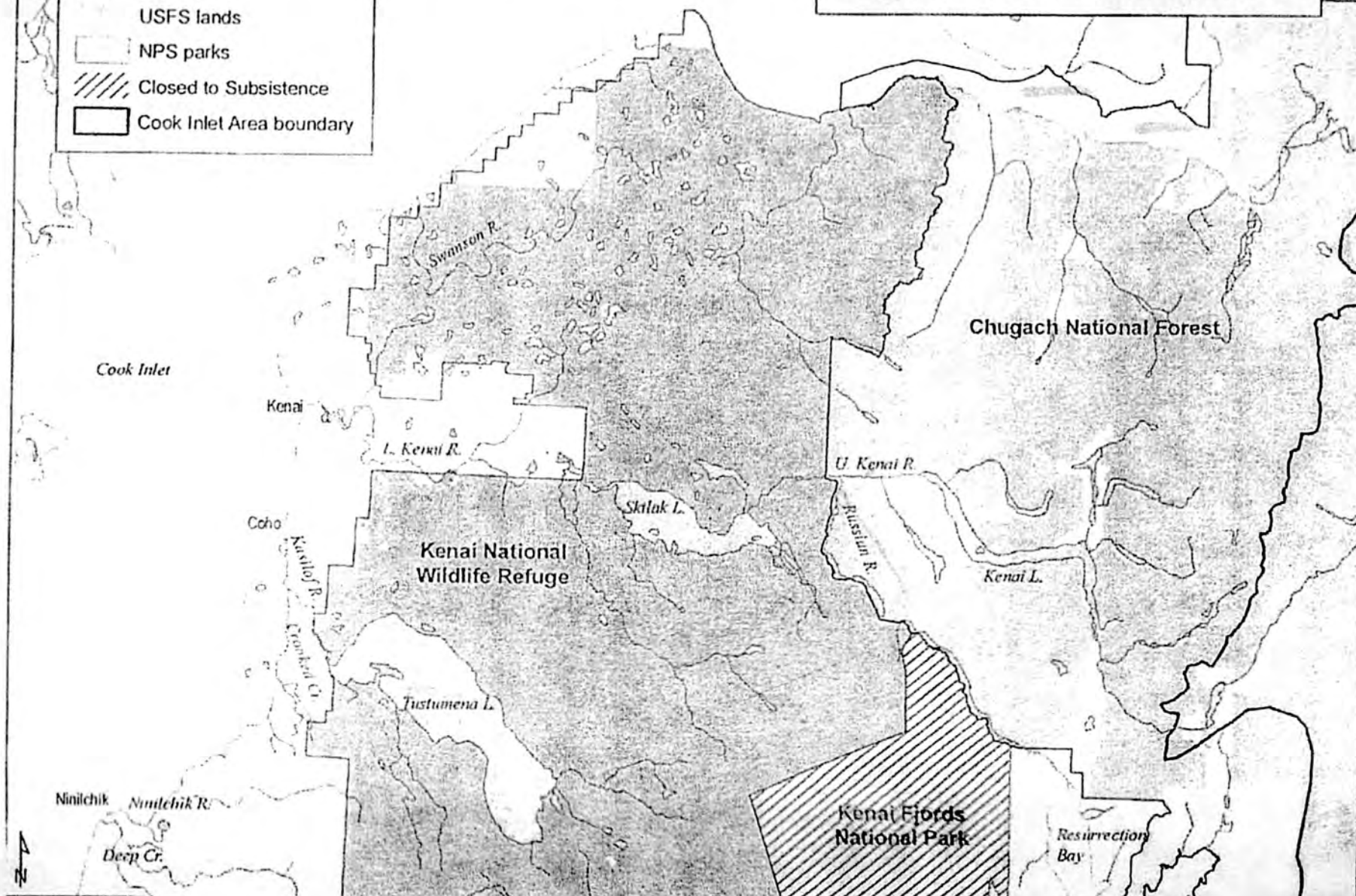
I respectfully ask for your support of HJR 4, bringing the Board to task on this flawed decision, in hopes that they will revisit their decision.

Legend

-  FWS lands
-  USFS lands
-  NPS parks
-  Closed to Subsistence
-  Cook Inlet Area boundary



FRFR06-02/03/08 Map 1 Upper Kenai Peninsula



0320 Page 2 of 30 REQUEST FOR RECONSIDERATION OF BOARD PROPOSAL FRFR 06-02/03/08

**REQUEST FOR RECONSIDERATION OF FEDERAL SUBSISTENCE BOARD
DETERMINATIONS ON PROPOSAL FRFR 06-02/03/08, including the Board's
Determination that the Community of Ninilchik Has Customarily and Traditionally
Harvested for Subsistence Purposes All Fish Located Within the Boundaries of the
Kenai National Wildlife Refuge And Chugach National Forest, including the Upper
Kenai River, Russian River, Swanson River, and their Lakes and Drainages**

By State of Alaska

I. Introduction

The State of Alaska, through the Alaska Department of Fish and Game (ADF&G), respectfully requests that the Federal Subsistence Board (Board) reconsider and rescind its decision of November 17, 2006 upon Proposal FRFR 06-02/03/08, providing "to the community of Ninilchik a customary and traditional use determination for all fish in the waters north of and including the Kenai River drainage, within the Kenai National Wildlife Refuge and Chugach National Forest within the Kenai Peninsula district." See Transcript of Federal Subsistence Board November 16-17, 2006 Work Session (hereinafter "11/16-17/06 Tr."), at p. 169.¹

Reconsideration is required because, in adopting that final rule, "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR §242.20(d); 50 CFR §100.20(d). In addition, reconsideration is required because, in making its determination, the Board assumed incorrect information, including unsupported speculation regarding fish stocks, resulting in a determination based on speculation. The Board must instead consider real, factual information not previously considered by the Board, of the type on which this request is partly based. *Id.*

The Board's aforementioned finding that the residents of Ninilchik have customarily and traditionally used the numerous fish stocks in the area affected, and thus may have a preferential right to harvest those fish by preferential means, is inconsistent with applicable law including the Board's regulations in 36 CFR §242.16 and 50 CFR §100.16, will create a preference for uses that are not within the definition of "subsistence uses" in Section 803 of the Alaska National Interest Lands Conservation Act (ANILCA), does not properly balance or further the competing purposes of ANILCA recognized by the Court in *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000), and will cause unnecessary restriction of non-subsistence uses in violation of

¹ As set out later in this Request for Reconsideration, the State also requests that the Board reconsider its failure to definitively decide ADF&G's previous requests for reconsideration dated May 5, 2006, of the Board's prior customary and traditional use determinations for Ninilchik as to the Kasilof River drainage fishery and for Cooper Landing and Hope as to the "Kenai River Area" drainage fisheries.

Section 815 of ANILCA. More detailed reasons for this Request for Reconsideration (RFR) include the following:

- The Board made its customary and traditional use determination without substantial supporting evidence and without a reasonable examination of the eight regulatory factors for making customary and traditional use determinations with regard to the various fish stocks and areas covered by the determination.
- The Board incorrectly determined that fishing for all fish in the affected, widespread area far removed from the community of Ninilchik is a customary and traditional subsistence use of that community without adequate supporting information for that determination on the record, thus rendering the determination arbitrary and capricious.
- The evidence presented to the Board did not demonstrate a long-term consistent, recurring pattern of subsistence use by the community of Ninilchik of the affected fish in the distant, expansive location of the determination.
- The evidence presented to the Board did not demonstrate that the salmon, rainbow trout, char, and other fish stocks in that distant, widespread area are the same fish stocks as those present in areas much closer to and historically and much more frequently used by Ninilchik, such as the Ninilchik River and Deep Creek.
- The Board unreasonably declined to defer consideration of the proposal which it determined pending compliance with directions from the Secretary of the Interior requiring the Board to develop written procedures and policies for rendering customary and traditional use determinations.
- The Board violated its own regulatory procedures and Secretarial direction by improperly and unreasonably denying the Alaska Department of Fish and Game Board Liaison the ability to provide and discuss relevant information during the critical point of Board deliberations resulting in the challenged determination.
- The Board lacked necessary jurisdiction to make the traditional and customary use determination because the Federal Government has not legally and properly established reserved water rights in the waters covered by its determination, as required by law.

This RFR is being submitted at this time because the State has been informed by the Regulation Specialist for the federal Office of Subsistence Management (OSM) that in his opinion the action which is the subject of this RFR went into effect immediately.²

² Personal communication between Sarah Gilbertson and Bill Knauer on November 28, 2006.

Although nothing to that effect, nor the regulatory action itself, has been published in the Federal Register or elsewhere to the State's knowledge, and although the Board did not provide for immediate effectiveness of its action on the record, nevertheless the State is submitting this RFR at this time, in an abundance of caution. The State does not agree that the Board actions which are the subject of this RFR can be effective immediately without proper process and notice by publication. The State reserves the right to supplement this RFR.

Neither does the State, by requesting reconsideration at this time, waive any of its rights to pursue other legal remedies available to it under applicable law, including court action. It is also the State's position that, under the circumstances presented, it does not have to make this request for reconsideration in order to exhaust administrative remedies. However, this RFR provides the Board with a reasonable opportunity, within a reasonable time frame well before the upcoming fishing season, to address the State's grievances, and thereby possibly resolve the issues and eliminate need of the State's pursuit of relief in another forum.

Because the Board did not properly consider the proposals at issue in accordance with the requirements of ANILCA and the Board's own regulations, and because the Board based its decisions on factual errors and failed to allow or otherwise consider important, necessary information, the Board's determinations upon which reconsideration is hereby being requested are unsubstantiated, arbitrary and capricious.

As provided by 36 CFR §242.20(d)(4) and 50 CFR §100.20(d)(4), a more detailed statement follows.

II. Regulations Challenged and Information Presented, and Not Presented, to the Board

At its meeting on November 17, 2006, the Board adopted a proposal which it, the Staff of the OSM, and the federal Interagency Staff Committee (ISC) curiously identified as FRFR 06-02/03/08, "reconsidering" the Board's prior action in January 2006 on Fisheries Proposal FP06-09 and amending the sections of 36 CFR §242.24 and 50 CFR §100.24 dealing with Cook Inlet customary and traditional use determinations.³ The Board's November 17, 2006 action added a positive customary and traditional (C&T) use determination to those regulations for all residents of the community of Ninilchik for all fish in all waters within the Board's Kenai Peninsula District north of and including the

³ In fact, as is clarified in the discussion which follows, FRFR06-02 and FRFR06-03 were two requests brought by ADF&G in May 2006 concerning different matters, which the State contends the Board never directly or adequately addressed, whereas FRFR06-08 was the request for a new C&T determination for Ninilchik brought separately by the Ninilchik Traditional Council (NTC), which the Board did address.

Kenai River, Russian River, and Swanson River drainages lying within (and also possibly adjacent to) the Kenai National Wildlife Refuge and the Chugach National Forest.⁴ The Board's action added a significant regulation and constituted a new action.

The vast area encompassed by that new C&T determination is depicted by the two shaded areas and boundary lines of FRFR06-02/03/06 Map 1 Upper Kenai Peninsula, attached hereto as Attachment 1 and contained at page 4 of the October 31, 2006 Staff Analysis referenced at footnote 4 below. That area is also shown within Map 11 Cook Inlet Area from page 50 of the 2006-2007 Federal Subsistence Fisheries Regulations, attached as Attachment 2. As shown by those maps, the Board's action translates into a determination that the community of Ninilchik, which is located many miles away on the lower Kenai Peninsula, has customarily and traditionally used all fisheries located within (and/or adjacent to) the exterior boundaries of the Kenai National Wildlife Refuge and Chugach National Forest, including the aforementioned rivers and their lakes and drainages and extending up through the northern, uppermost reaches of the Kenai Peninsula District including Resurrection Creek near Hope and the Lower and Upper Summit Lakes.⁵

The Board's action of November 17, 2006 added the residents of the community of Ninilchik to the communities of Cooper Landing and Hope, to which the Board had previously granted a C&T priority use determination as to all fish in the same "Kenai River Area" waters during its meetings held in January 2006.⁶ At those meetings in January 2006, the Board, in further response to FP06-09, granted a C&T determination to the residents of the community of Ninilchik to all fish in all waters within the Kasilof River drainage within the Kenai National Wildlife Refuge, but deferred any decision upon a C&T determination for Ninilchik as to the above-described "Kenai River Area" waters.⁷

The State of Alaska (State) formally requested reconsideration of the Board's determinations for Ninilchik of C&T use of the Kasilof River drainage and for Cooper Landing and Hope of C&T use of the aforesaid "Kenai River Area".⁸ The Ninilchik

⁴ 11/16-17/06 Tr. pp. 78, 159-169; OSM Staff Analysis FRFR06-02/03/08 dated Oct. 31, 2006, at pp. 1-4 (hereinafter "Staff Analysis"); ISC Recommendation upon FRFR06-02/03/08 (two pages).

⁵ *Id.*

⁶ *Id.* See also Transcript of Federal Subsistence Board's January 10-13, 2006 Public Regulatory Meetings (hereinafter "1/10-13/06 Tr.", at Tr. pp. 499-500, 525-526).

⁷ *Id.*

⁸ See ADF&G's Request for Reconsideration dated May 5, 2006 of that portion of the Board's decision upon FP06-09 establishing a C&T determination for Ninilchik in the Kasilof River drainage, denoted FRFR06-02 by the Board, and ADF&G's Request for Reconsideration dated May 5, 2006 of that portion of the Board's decision upon FP06-09

Traditional Council (NTC) separately requested reconsideration of the Board's "denial" of a C&T determination for Ninilchik use of all fish within the "Kenai River Area".⁹

Later, at NTC's request, the Board chose not to revisit the issue of a C&T determination for Ninilchik of the "Kenai River Area" as a normal regulatory proposal during its next regular cycle of Public Regulatory Meetings¹⁰ in the manner consistent with the Board's established procedure and previous treatment of the subject in January 2006. Instead, the Board accepted NTC's May 30, 2006, Request for Reconsideration on August 31, 2006, in a closed Executive Session not open to the public. The Board then decided NTC's reconsideration proposal (granting the C&T determination) in a specially scheduled Board Work Session on November 17, 2006.¹¹

At the same time, and in the same manner, that the Board took action on NTC's Request for Reconsideration outside of the public eye, the Board took action as to the State's Requests for Reconsideration of the Board's previous C&T determinations for Ninilchik as to the Kasilof River drainage and for Cooper Landing and Hope, although what action the Board took upon those State requests is unclear.¹² The Board stated that in response to the State's two requests it was accepting reconsideration of additional State analysis of information gathered from ADF&G's study, *Cook Inlet Customary and Traditional Subsistence Fisheries Assessment* (Fall et al, 2004), because, in the words of the Board, it "contributes to a more thorough understanding of the customary and traditional use of the Federal waters of the Kenai Peninsula."¹³ The State reasonably understood that the Board, by accepting reconsideration in connection with FRFR 06-02 and FRFR 06-03, was accepting reconsideration of the correctness of the Board's January 2006 C&T determinations for Ninilchik as to the Kasilof River drainage and Cooper Landing and Hope as to the Kenai River drainage, as that was the obvious purpose of

establishing a C&T determination for Hope and Cooper Landing in the Kenai River drainage and waters north of that drainage, denoted FRFR06-03 by the Board.

⁹ See NTC's Request for Reconsideration dated May 30, 2006 of that portion of the Board's decision upon FP06-09 "effectively denying" a C&T determination for Ninilchik in the Kenai River drainage and waters north of that drainage, denoted FRFR06-08 by the Board.

¹⁰ That precise proposal, Proposal FP 07-27A, was already scheduled for regular consideration by the Board in 2007 before the summer fishing season.

¹¹ See, e.g., Board's Sept. 14, 2006 correspondence to NTC legal counsel on Board-designated FRFR 06-08 & references previously cited at footnote 4.

¹² See, e.g., Board's Sept. 14, 2006 correspondence to ADF&G Commissioner Campbell identified as "FWS/FSB/OSM/FRFR06-0203" and regarding federally-denoted FRFR 06-02 and FRFR 06-03, described in footnote 8 above, & the references cited at footnote 4 previously.

¹³ See Board's Sept. 14, 2006 Correspondence to ADF&G described in footnote 12 immediately above, at pp. 1-2, 5.

those two Requests addressing "the Kenai Peninsula".¹⁴ However, federal OSM staff took the position, *after* the Board's September 14, 2006 correspondence, that reconsideration of this additional State analysis and information had been accepted by the Board only in relation to consideration of NTC's request for reconsideration.¹⁵ The Board did not at all address FRFR 06-02 or FRFR 06-03, including those unresolved differences of opinion between the State and OSM staff, at its November 16-17, 2006 proceedings, despite the State's continuing objections in that regard.¹⁶ As part of this RFR, the State requests that the Board finally address FRFRs 06-02 and 06-03 on the merits.

The State of Alaska also objected throughout those proceedings on several other procedural and substantive grounds.¹⁷ Among other points, ADF&G objected for the reasons specified in former Commissioner Campbell's October 26, 2006 correspondence to Board Chairman Fleagle, including its two attachments; namely, Attachment 1, ADF&G Page-by-Page Detailed Comments on [OSM] Draft Staff Analysis FRFR06-02/03/08 dated October 20, 2006, and Attachment 2, ADF&G Specific Comments on Dr. Wolfe's Papers. Both of those attachments and Commissioner Campbell's letter were

¹⁴ See, e.g., the State's May 5, 2006 Requests for Reconsideration & Correspondence dated October 26, 2006, including two attachments, from former ADF&G Commissioner Campbell to Board Chairman Fleagle, continuing to specify how those prior C&T determinations are not supported by substantial evidence and should be reconsidered.

¹⁵ See, e.g., OSM Staff Analysis FRFR 02/03/08 dated October 20, 2006 (and again on October 31, 2006), opining that the prior Board determinations on which the State sought reconsideration should not be reconsidered, & Commissioner Campbell's Oct. 26, 2006 Correspondence to Chairman Fleagle, including two attachments, responding to that OSM analysis and expressing the State's view that OSM Staff had misconstrued the State's information and the basis of FRFR 06-02 and FRFR 06-03. See also OSM's response dated November 13, 2006 to "State of Alaska Comments – October 26, 2006 Regarding FRFR06-02/03/08 Analysis Office of Subsistence Management", opining at p. 2: "Therefore, there is no information for the Board to consider and no changes to the C&T for the Kasilof River drainage made in January 2006" and "The Board never said it would reconsider Hope and Cooper Landing C&T in their earlier letter responding to the RFR or in the threshold analysis. There is no new information provided that would warrant revisiting Hope and Cooper Landing's C&T determinations." Yet OSM Staff continued to address the substance of the State's two RFRs at the Board's proceedings of November 16-17, thus revealing OSM's own uncertainty in the matter. See, e.g., 11/16-17/06 Tr. pp. 80-82.

¹⁶ See, e.g., 11/16-17/06 Tr. pp. 121-122, 125; ADF&G Commissioner Campbell's October 26, 2006 Correspondence to Board Chairman Fleagle, at pp. 1-3 & including Attachments 1 and 2 to that correspondence.

¹⁷ See, e.g., 11/16-17/06 Tr. pp. 121-127, 161-162.

incorporated into the record of the Board's November 16-17, 2006, proceedings through the comments of the State of Alaska representative.¹⁸

In that October 26, 2006, correspondence and also at the Board proceedings, the State expressed its deep concern "that the Federal Subsistence Board is circumventing its normal public process in an effort to hastily grant the community of Ninilchik customary and traditional use of the Kenai River drainage based upon a faulty interpretation of Department [ADF&G] data" and Dr. Wolfe's unpublished papers regarding Ninilchik household and tribal use surveys. The State explained its concerns, including OSM staff's inaccuracies, mischaracterizations, and misanalysis of data being relied on by the Board and the lack of public notice and meaningful opportunity for the State and public to be timely heard.¹⁹

In addition, the State objected to the Board making determinations without the benefit of developed written procedures and policies for making C&T use determinations, as directed by the Secretary of the Interior on October 27, 2005, and the State stated its reasons for those objections.²⁰

It was also shown that the evidence is insufficient -- in terms of frequency of use, area of use, community use, lifetime use, or otherwise -- to support a determination that there has been a long-term consistent, recurring pattern of customary and traditional use for subsistence by Ninilchik of the fisheries located within the Kenai National Wildlife Refuge or Chugach National Forest, as is required by ANILCA and the regulations governing such determinations.²¹ Among other reasons, it was pointed out that OSM's analysis misinterpreted and misused ADF&G survey findings; that the eight factors for determining C&T use under the Board's regulations were not met; that at most only 7% of Ninilchik households claimed annual use of the upper Kenai area fisheries at issue in even recent years, that only 13% (including the 7%) claimed frequent use (meaning almost every year) of that area for any of their fishing, that only 4% more claimed intermittent use, that only a total 28% of Ninilchik residents claimed any such use ever during their lifetimes, and that only 2-3% identified taking trout or any species of fish other than salmon from that area (and only 4% salmon); that Ninilchik residents had their highest use of the fisheries closest to Ninilchik (such as Ninilchik River and Deep Creek), used the lower Kenai River some, and used the upper Kenai River drainage areas "farther

¹⁸ 11/16-17/06 Tr. pp. 121-127, 161-162. The State also submitted written comments into the record entitled "ADF&G Page-by-Page Detailed Comments on [OSM] Staff Analysis FRFR06-02/03/08 dated October 31, 2006" after that subsequent OSM Analysis was issued. *Id.* At 121-122.

¹⁹ Campbell 10/26/06 Correspondence at 1-2; 11/16-17/06 Tr. at 122, 126.

²⁰ See, e.g., Campbell 10/26/06 Correspondence at 2; 11/16-17/06 Tr. at 126-127.

²¹ See, e.g., Campbell 10/26/06 Correspondence at 3-4 & attachments thereto; 11/16-17/06 Tr. pp. 122-134, 161-162.

from the community" least; that Ninilchik and the NTC had not harvested all the fish they could under generous state-issued educational fishery permits already existing on the Kenai Peninsula closer to their homes; that no harvest *amounts* for fish taken by residents of Ninilchik in the upper Kenai areas covered by the Board's new C&T determination had been shown; that the sparse participation levels for Ninilchik residents of the upper Kenai River drainages demonstrated more of a *sportfishing* use (rather than traditional subsistence use), which was made easy by highway access, not unlike the use of that same area to harvest fish by residents of Anchorage and other urban areas; that there was little to no evidence of Ninilchik's use of that distant Kenai area prior to construction of the highway linking Ninilchik (and much of the rest of Alaska) to that area; that heretofore subsistence fishing by traditional subsistence means such as netting had not been allowed within that area under federal or state law; and that subsistence is not even listed as one of the purposes of the Kenai National Wildlife Refuge (explicitly created instead to provide opportunities for fish and wildlife recreation, etc.).²² Even OSM's cultural anthropologist, H. Armstrong, who characterized Dr. Fall's surveys of Ninilchik households for ADF&G as "thorough", scientific, and "of the entire community", also acknowledged: "I mean there's no - nobody here is saying that the Ninilchik people used the Kenai River to a great extent. I mean that's a fact that it's not a really heavily used area [by Ninilchik], they're harvesting most of their resources close to the community."²³

Furthermore, ADF&G was arbitrarily and capriciously denied the opportunity to be fully heard on those matters by being cut off during Board deliberations on the subject, upon the request of a Board member and upon incorrect advice of the Solicitor's Office to the Board Chair, in violation of the Board's own procedures and Secretarial direction.²⁴

Very soon after making that erroneous ruling prohibiting the State from participation, the Board then introduced speculation into its deliberations and improperly relied upon that speculation as an important part of making its positive C&T determination. It speculated that the salmon, trout, and other fish stocks in the distant, widespread drainages of the Kenai National Wildlife Refuge and Chugach National Forest under consideration, including the Kenai River, Russian River, Swanson River, Summit Lake, and Resurrection Creek drainages, are the "same stock" as the fish in the

²² *Id.*

²³ 11/16-17/06 Tr. at 87.

²⁴ See 11/16-17/06 Tr. 161-163 (improperly prohibiting the State of Alaska representative from participating during deliberations); Correspondence in 2004 from Secretary Norton directing otherwise, attached hereto as Attachment 3; Transcript of December 11-12, 2006, Board Meetings (acknowledgement by Board Chair of erroneous ruling on November 17, 2006 improperly preventing State from participation contrary to Secretarial intent).

areas much closer to and much more commonly used by Ninilchik, such as the Ninilchik River and Deep Creek.²⁵

However, *no* evidence, substantial or otherwise, had been presented that could support that speculation.²⁶ To the contrary, that topic did not arise until very late in the Board's deliberations, after all information had been submitted to the Board, none of which included factual information about specific fish stocks. The topic arose only in response to Board concerns that a C&T use for fishing by Ninilchik in the faraway Kenai River Area under consideration had not been shown. At that juncture, the Board's Solicitor countered: "We're trying to determine if there were customary and traditional uses of a *stock or population, that's all*. * * * And we're not – as far as I can tell, we're not tied to a location. It [where the use occurred or is created] could be on the Kenai River, it could be off, we're talking about the population and stock. There's a long, long stretch of fishable water where that stock or population could be harvested." 11/16-17/06 Tr. at 166 (emphasis added). Board Chairman Fleagle then immediately responded: "I'm glad you made that point. * * * And obviously this is going to be another one of those decisions where my vote is either going to allow this thing to pass or not [In my opinion] we are not looking at whether there is just a defined pattern of use for that portion of the river system that happens to be Federal, for the community of Ninilchik and Cooper Landing and Hope on the Kenai River To me it's pretty clear that *if you take that entire river system and even that entire area, if you include other river systems, other than the Kenai, you got the Kasilof, you got the Ninilchik, you got Deep Creek, you got several different systems that could be defined as the same fish stock*, I think it's overwhelmingly evident that you do have customary and traditional use, and that's where I have to fall." *Id.* at 166-167 (emphasis added). Immediately thereafter, the vote of the Board was taken and the motion to grant Ninilchik a C&T determination for the broad scope of the "Kenai River area" passed 5 to 1, with the last voter, Board member Oviatt, commenting: "I'm going to vote aye. And I was swayed by our Chairman" *Id.* at 168-169.

Indeed, it could be shown that the Board's speculation on that topic, which was decisive, is incorrect, but as noted the opportunity to do so was not given. If given the opportunity to address that topic the State could show that the salmon and other fish stocks, including trout and char, of the distant Kenai River drainages, streams and other water bodies affected by the Board's C&T determination, are not the same fish stocks as exist for the Ninilchik River, Deep Creek, Kasilof River or other streams and rivers within the Kenai Peninsula District. They are not one homogenous fish stock.²⁷ The

²⁵ 11/16-17/06 Tr. pp. 166-169.

²⁶ *Id.*, Tr. pp. 78-169.

²⁷ For example, the National Marine Fisheries Service Northeast Fisheries Science Center (http://www.nefsc.noaa.gov/techniques/tech_terms.html#sa2) gives the following definition: "Stock: A part of a fish population usually with a particular migration

State requests Board reconsideration in order to be given the opportunity to show that. Otherwise, the Board's determination will remain founded on unsupported speculation contrary to law.

In addition, the State challenged the Board's claim to jurisdiction to make that C&T use determination and other determinations at issue here and in the additional RFRs being filed by the State this month and previously, because the Federal Government has not legally and properly established water rights in the waters covered by those determinations, as set out and pending in *Katie John, Gerald Nicolia, et al., Plaintiffs, v. The United States of America, et al., Defendants*, United States District Court for the District of Alaska Case No. A05-0006-CV (HRH) (Consolidated), incorporated herein by reference.

The effect of the Board's regulatory C&T determination is to provide a federal preference to residents of Ninilchik for harvest of all fish, including all types of salmon, Dolly Varden, rainbow trout, char, lake trout, grayling, and burbot, in all waters of the Kenai Peninsula District north of and including the Kenai River, Russian River, Swanson River, and their lakes and drainages within and adjacent to the boundaries of the Kenai National Wildlife Refuge and Chugach National Forest, as more fully described above. Nonlisted rural residents, along with other state users, of these highly popular and heavily used water bodies will not be eligible to participate in these federal fisheries and will be limited to participation in state fisheries. This federal customary and traditional use determination can be expected to lead to an increased harvest of fish, such as salmon, eligible for limited harvest within the area under state regulations, and to the harvest of other fish, such as rainbow trout, not generally eligible for harvest under state regulations within the area.

pattern, specific spawning grounds, and subject to a distinct fishery." The Washington Department of Fisheries has defined fish stock as "The fish spawning in a particular lake or stream(s) at a particular season, which fish to a substantial degree do not interbreed with any group spawning in a different place, or in the same place at a different season." WDF 1993, "1992 Washington State Salmon and Steelhead Stock Inventory". Similarly, as early as 1939 in the American Association for the Advancement of Science, Publ. 8, p. 106, it was stated: "The salmon of a given species may in locality, e.g., a river, constitute a more or less distinct entity, for which the name 'stock' is to be preferred." In other words, the term "fish stock" denotes a fish of a particular species which may be found in a specific stream during a particular season, or at most, the fish of a particular species which may be found within a specific drainage during a particular season. Further information on the subject, particularly as it relates to the different fish stocks indiscriminately grouped together in the Board's determinations, can be provided to the Board by ADF&G senior biologists, including John Hilsinger and Jeff Regnert.

In times of shortage, those users who qualify under this federal C&T determination may receive preferential treatment under federal law detrimental to the fish stocks through special actions or through failure to mirror State emergency orders. The new C&T determination may also lead to new restrictions on the great majority of users, who are nonrural. Liberalization of methods and means and increased harvest of fish on federal lands under this C&T determination may require adjustment of seasons and harvest restrictions under state law in order to ensure compliance with the sustained yield mandate of the Alaska Constitution.²⁸ Too little is known about fish species other than salmon in the waters covered by this broad C&T determination, and even the salmon runs in these waters have been unpredictable in recent years. State of Alaska recreational fishing regulations for these species, especially the trout and other resident species, are very conservative. Little or no stock assessment information exists for those species. Any conservation problems created by the new fishery harvests authorized under this new C&T determination would be difficult, if not impossible, to detect in a timely manner.

III. Further Discussion

A. The actions taken by the Board are inconsistent with the regulatory definition of customary and traditional use and with application of the regulatory criteria for finding customary and traditional use.

Reconsideration is required because, in adopting the customary and traditional use determination for Ninilchik in the Kenai River area,²⁹ the Board failed to follow the regulatory definition of customary and traditional use and the regulatory criteria for finding customary and traditional use. As a result, the Board made an unnecessary, incorrect, and overly broad customary and traditional use determination based on incorrect or improper considerations and insufficient evidence (including no evidence at

²⁸ Even nonconsumptive catch and release fisheries may have to be closed in order to reduce pressure on highly vulnerable stocks if consumptive subsistence fisheries are authorized.

²⁹ As previously noted, the State also seeks reconsideration of the Board's apparent failure to act on the State's two previous Requests for Reconsideration dated May 5, 2006 and designated FRFR 06-02 and FRFR 06-03. In support of that part of this RFR, the State relies on the content of those two previous RFRs, Commissioner Campbell's aforementioned correspondence to the Board dated October 26, 2006 including attachments, the State's comments on those subjects at the Board's November 16-17, 2006 Work Session, and the other sources and analyses regarding those subjects already addressed in this RFR. The rest of this document addresses the Board's more recent C&T determination for Ninilchik as to the Kenai River area covered by that determination. However, much that was stated in support of those prior RFRs also applies to the more recent determination, just as much of what is stated hereafter as to that determination also applies to those prior C&T determinations.

all on the pivotal question of what "fish stocks" are present in the area subject to the Board's determination and whether those stocks have been customarily and traditionally harvested by Ninilchik residents).

The regulatory definition of "customary and traditional use," is: "[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community." 36 C.F.R. §242.4; 50 C.F.R. §100.4.

The limited, sporadic fishing for some types of fish occasionally undertaken by some residents of Ninilchik within some of the Kenai National Wildlife Refuge and Chugach National Forest areas north of and including the Kenai and Russian River drainages does not fall within the regulatory definition of a generations-old, community-wide "customary and traditional use." The evidence established that those residents reach those fishing areas, which are located many miles overland from Ninilchik, only by traveling paved highways and main arterials to those areas. The information available to the Board demonstrated that subsistence fishing had been prohibited "in all streams and lakes" of the Kenai Peninsula since 1952, shortly after the highway connecting Ninilchik to the Kenai River Area covered by the C&T determination was built.³⁰ No evidence was presented to demonstrate that subsistence use of fish from the waters situated within the Kenai National Wildlife Refuge and Chugach National Forest was ever part of a consistent, recurring pattern of use for the community of Ninilchik or that such use ever played an important role in the economy of the community, before or after 1952.³¹ Since there was insufficient or no evidence of the existence of such a "long-term, consistent pattern" of a customary and traditional subsistence harvest of those fish from those waters by the community of Ninilchik prior to the promulgation of the preclusive regulations in 1952, there could be no "interruption" of such use.

Ninilchik is not the same "community" it was 55 years ago, before that interconnecting highway was built and those regulations promulgated.³² Neither was it

³⁰ See January 2006 OSM Staff Report at p. 199.

³¹ The available evidence was that it was much more likely that Ninilchik's subsistence activities prior to 1952 would have been primarily in marine areas close to the community because a road into the community was not built until 1951. Jan. 2006 Staff Report at 221; 11/16-17/06 Tr. at 124.

³² The available evidence established that the character of the community has changed greatly and that the population is now "dominated by new residents who have full time jobs and are interested in recreational fishing and hunting," Jan. 2006 Staff Report at 221, and that Ninilchik residents no longer move seasonally to hunt and fish, *id.* See also 11/16-17/06 Tr. at pp. 122-134; Reed, Carolyn, *The Role of Wild Resource Use in Communities of the Central Kenai Peninsula and Kachemak Bay, Alaska* (ADF&G Technical Paper No. 106, October 1985), reporting on interviews and surveys done of

shown that subsistence use of salmon, Dolly Varden, rainbow trout, lake trout, Arctic char, grayling, and burbot from those federal enclaves covered by the Board's C&T determination, if allowed, would play an important role in the economy of the community of Ninilchik even now.³³ To the contrary, the evidence presented showed very low levels of use for fish by Ninilchik's residents of the Kenai River drainage or the other drainages north of the Kenai River, both in general and even within the more southern reaches of those federal enclaves.³⁴

For those and other reasons stated before and afterwards in this RFR and shown by the evidence (and lack thereof) presented to the Board in connection with its C&T determination proceedings in January and November 2006, the regulatory definition and criteria for a customary and traditional use determination were not applied or satisfied in this instance.

The regulations require the Board to determine which fish stocks and wildlife populations have been customarily and traditionally used for subsistence by the community and to identify the specific community's or area's use of those specific fish stocks and wildlife populations. 36 CFR §242.16(a); 50 CFR §100.16(a). Eight specific factors which must be generally exhibited are established for finding customary and traditional use:

- (1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;
- (2) A pattern of use recurring in specific seasons for many years;
- (3) A pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics;

over 10% of Ninilchik households in 1982-83 and concluding, at p. 96, that even then the "differences between segments of Ninilchik's population contributed to the general lack of a community-wide pattern of resource use and beliefs or values associated with resource use." This report is cited in Dr. Fall's studies on Ninilchik and in a very recent federal Draft Staff Analysis relating to WP07-16.

³³ Available information indicated that fish harvests by Ninilchik's residents are now "generally concentrated close to their homes." Jan. 2006 OSM Staff Report at 221. See also Tr. 11/16-17/06 at pp. 122-134. Harvests from more distant areas are not cost efficient when fuel costs are considered and could not be expected to play an "important role in the economy of the community." 36 CFR §242.4; 50 CFR §100.4.

³⁴ See, e.g., Jan. 2006 Staff Report at 221-22; Jan. 2006 Tr. at 212-213; 11/16-17/06 Tr. at 87; Fall et. al., Estimated Percentage of Ninilchik Households Fishing in the Kasilof River Drainage (2005), & Fall et al. Reports for the Kenai River Drainage (2004-2006).

(4) The consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from, the community or area;

(5) A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate;

(6) A pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation;

(7) A pattern of use in which the harvest is shared or distributed within a definable community of persons; and

(8) A pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.

36 CFR §242.16(b); 50 CFR §100.16(b).

The Board did not have adequate information and analysis before it to properly evaluate those eight factors, and the information provided to the Board by federal staff was not sufficient to show a recurring long-term, consistent "pattern of use" of all fish within the areas of the waters encompassed by the Board's determination and amended regulation. Indeed, the Board did not attempt to apply those eight criteria in any level of detail on the record.

The written federal staff reports purported to apply the eight factors. However, the staff analysis was incomplete and misleading in its treatment of the level and location of the history of requisite uses by Ninilchik residents.³⁵ It was also fundamentally flawed because there was no recurring long-term, consistent "pattern of use" shown by residents of Ninilchik of each (or any) of the designated fish stock in the waters situated within the federal areas covered by the C&T determination.³⁶ There was no evidence presented by federal staff, and none was requested by the Board, that could establish such a pattern of use by Ninilchik of those areas for any of those stocks. At most, the record indicated that some fishing, of a "sport fishing" nature, had occurred involving some residents of Ninilchik within some of the widespread area of the C&T determination, of some of the

³⁵ See OSM Staff Analysis reports for January 2006 Board Meeting as to FP06-09 and for November Board Work Session as to FRFR06-02/03/08, and compare to ADF&G's Comments upon those reports including former Commissioner Campbell's Oct. 26, 2006 correspondence to the Board and Attachments 1 & 2 thereto.

³⁶ *Id.*

five species of salmon and even less of the other types of fish species designated within the C&T determination.³⁷

The vote of the Board turned, at the last moment, on two new Board assumptions:

- (1) That it was unnecessary to determine that Ninilchik had customarily and traditionally fished the geographic area of the C&T determination if the Board could conclude that Ninilchik had "traditionally and customarily" fished the "same fish stock" any other area of the Kenai River, the Kasilof River, the Ninilchik River, Deep Creek, or any other part of "that entire [Cook Inlet or Kenai Peninsula] area" (11/16-17/06 Tr. pp. 167, 169), and
- (2) That all of the fish within all of those "several different systems . . . could be defined as the same fish stock" (*id.*).

Obviously, for those assumptions to hold true, it was critical that there be substantial, documented evidence in the record that all of the fish within all of those river systems were in fact of the same stock. Yet, in this instance, there was absolutely no evidence presented to the Board which could rationally support either of those assumptions, or even the assumption that any particular species of fish within those "several different systems" were of the same stock. Instead, all of the evidence in the record, and the entire analysis and discussion of the proposal until the last second, related to *where* Ninilchik residents fished, *when, how, what general species* of fish (such as salmon or trout) they fished, *how much*, and *how often*.

The regulatory requirement for customary and traditional use determinations is to "identify the specific community's or area's use of *specific* fish *stocks* and wildlife populations." 36 CFR §242.16(a); 50 CFR §100.16(a) (emphasis added). Thus, wherever the regulations require a "pattern of use," the regulations are referring to a pattern of use of a specific area and of a specific stock or population by a specific community. Six of the eight factors refer to a "pattern of use." This "pattern of use" required by factors 1 through 3 and 6 through 8 was not shown in this instance.

The first and most important factor is a "long-term consistent pattern of use, excluding interruptions beyond the control of the community or area." The information presented to the Board did not support deciding this key factor favorably for Ninilchik as to any fish stock located within the C&T determination area, and certainly not as to all fish found in the area. The Cook Inlet Customary and Traditional Subsistence Fisheries Assessment considered by the Board instead provided:

³⁷ *Id.*

Federal public lands and waters were also relatively unimportant as fishing locations for interviewed Ninilchik residents in 2002/2003 . . . the Ninilchik River and Deep Creek, both under state management, were key fishing locations for Ninilchik households for chinook salmon, coho salmon, and Dolly Varden. Most Ninilchik households . . . that fished for sockeye salmon used the *lower* Kenai River . . . with the Kasilof River and Ninilchik River also important for sockeyes

Fall et. al. at 51. The oral federal staff report reported that Ninilchik harvests of Chinook, coho, and sockeye salmon and Dolly Varden were taken from waters and specific fish stocks located outside the Kenai National Wildlife Refuge and Chugach Forest lands which are the subject of the Board's C&T determination. Jan. 2006 Tr. at 213. Very little use was shown for Ninilchik of any species of fish other than salmon and Dolly Varden,³⁸ and none of the federal, ADF&G, or NTC staff reports or household or tribal use surveys addressed during the Board's November session identified the specific fish stocks commonly taken by Ninilchik residents nearby their community with the fish stocks in the distant, farflung geographic areas within the "Kenai River Area" federal lands associated with the Board's new C&T determination.

The use data summarized in the staff reports and in the surveys applied to all use of fish in recent years by Ninilchik, as a general category, and the data relating to areas used were applied to the entire Kenai Peninsula District, not just the federal areas of the C&T determination. The combined use information presented to the Board in connection with its January and November 2006 proceedings demonstrated that all but a very small part of the fishing by the Ninilchik community households has occurred on state lands far downstream from the boundaries of the Kenai National Wildlife Refuge and Chugach National Forest. Even using that larger area, harvest rates by Ninilchik residents were shown to be extremely low.³⁹

Isolated instances of historical use by some individual residents of Ninilchik and their families were presented, but, as was pointed out in the State's comments, this limited information did not reflect a long-term, recurring and consistent pattern of use by the Ninilchik community or area of the same fish stocks as are located within the federal

³⁸ See, e.g., OSM Staff Report for January 2006 proceedings at p. 206 (Table 4)(only 5 percent of Ninilchik households used trout, and only 4.0 used char/lake trout; per capita annual consumption even of Dolly Varden was only .62 pounds, for trout it was .22 pounds, and for char/lake trout it was .03 pounds); see also January 2006 Staff Report at 211 (Table 8)(showing only 12 percent of Ninilchik households harvested Dolly Varden and 15 percent harvested char).

³⁹ *Id.* at 219.

lands of the upper Kenai River C&T determination area either.⁴⁰ Any indications of longterm patterns of historical use were limited to the immediate area surrounding the old Ninilchik community. Occasional recreational fishing in the upper Kenai River area developed following construction of the Sterling and Seward highway systems in 1951, and was not shown to be consistent with or linked to usages by the current community, the community which existed 50 years ago, or even the Ninilchik community which existed at the time of the passage of ANILCA in 1980.⁴¹

Uses were further changed by homesteading in the 1930s and 1940s and by the establishment of the Kenai Moose Range in 1941. In 1952, prohibitions were placed on the use of gill nets in most fresh waters within the region which further emphasized reliance on marine fisheries, although some fresh water subsistence activities reportedly continued through snagging of salmon until that method was restricted in 1969 and made illegal in 1973.⁴² Sport fishing continued in fresh water, but subsistence and personal use fishing was a predominantly marine activity by the early 1970s, before the passage of ANILCA.⁴³ Although some residents of Ninilchik are of Alaska Native descent, there is no longer a direct linkage between historical use by Alaska Natives who once inhabited the area of Ninilchik and more contemporary use of fish by the community of Ninilchik.⁴⁴

The second factor is a "pattern of use recurring in specific seasons for many years." As earlier discussed herein, such a pattern was not shown for Ninilchik within the federal public lands within the Kenai River Area which are the subject of the Board's C&T determination.⁴⁵

The third factor is a "pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics." Such a pattern was not shown for the community of Ninilchik in

⁴⁰ See, e.g., October 26, 2006 Letter from Commissioner Campbell to Chairman Fleagle, at 4 and two attachments thereto; 11/16-17/06 Tr. pp. 122-134.

⁴¹ *Id.*

⁴² OSM Staff Report for Board's January 2006 Proceedings, at 204; Fall et. al. 2004 at 19-20, 22-23.

⁴³ ANILCA was adopted in 1980 to allow rural communities engaged in a subsistence way of life to continue to do so, not to create new subsistence opportunities or revive past subsistence practices. Therefore, even if a pattern of subsistence use before 1952 had been shown (which it was not), the pre-ANILCA restrictions should not be considered an interruption of use under the first factor.

⁴⁴ Board January 2006 Proceedings, at Tr. p. 205.

⁴⁵ See, e.g., Commissioner Campbell's 10/26/06 Correspondence to the Board, including specific comments in Attachments 1 & 2 thereto; 11/16-17/06 Board Proceedings Tr. pp. 94-96, 121-134.

the area of the C&T determination, or elsewhere. No information was shown to indicate how harvests in an area roughly 100 miles from Ninilchik could be characterized as efficiency and economy of effort, when fish species available within the Kenai River Area of the C&T determination are also available in areas more accessible to Ninilchik, particularly in marine waters and state waters in the Ninilchik River, Deep Creek, and lower Kasilof drainages. The staff reports, as well as public testimony provided to the Board, indicated that since at least the early 1950s, any harvest of fish within federal lands has been consistent with inefficient rod and reel recreational fishing, not with the efficiency and economy of effort associated with subsistence harvests. Further, the available harvest data showed very low harvest levels for Ninilchik for fish species other than salmon even when all harvests were considered, not just harvests within federal lands within the Kenai River Area.⁴⁶ These low harvest levels are not consistent with a "pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost."

The sixth factor is a "pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation." Although knowledge of fishing and hunting skills may have been passed down from generation to generation among some resident of Ninilchik, the record does not show a community level pattern of any such tradition, or one involving use of the distant federal lands within the upper Kenai River Area which are the subject of the Board's C&T determination. Use by some members of the community in some areas does not show a pattern of use by the community as a whole, or in other areas.

The seventh factor is a "pattern of use in which the harvest is shared or distributed within a definable community of persons." The available information indicated that for species found in fresh water other than salmon, there was very little sharing in Ninilchik. The available record indicated that the highest reported household rate of giving for nonsalmon freshwater fish was 5 percent of households for Dolly Varden, and that the highest household rate of receiving for nonsalmon freshwater fish was 4 percent for trout.⁴⁷ Although salmon were shared at a higher rate,⁴⁸ there was no evidence of an established, recurring pattern of use in which salmon harvested from the federal public lands were shared.

⁴⁶ Salmon are more efficiently available from waters within state lands, and the record indicated that with the possible exception of coho, salmon were harvested primarily in marine and lower river fisheries as early as the late 1800s. Even coho have not been subject to efficient, traditional subsistence harvest methods in fresh water since 1952.

⁴⁷ OSM Staff Report for Board's January 2006 Proceedings at 211.

⁴⁸ Overall, grouping all salmon species, 46 percent of households gave salmon and 58 percent received salmon. *Id.*

The eighth factor is a "pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area." Again, there was no documentation of a long-term community-wide, consistent and recurring pattern of use by Ninilchik relating to reliance on fish from the federal public lands in the area of the C&T determination. Residents of Ninilchik rely upon a relatively low number of wild foods,⁴⁹ most of the fish used by Ninilchik residents are harvested from state waters,⁵⁰ and uses and attempted uses of nonsalmon freshwater fish by Ninilchik residents are extremely low, indicating that they do not provide substantial cultural, economic, social, and nutritional elements to the community, whereas the Board's C&T determination is for "all fish".

As shown above, the six factors requiring a "pattern of use" do not support the customary and traditional use determination upon which reconsideration is sought. The information presented to the Board (and that which the proponents of the determination failed to present) demonstrates that the community of Ninilchik does not "generally exhibit" the "pattern of use" factors for use of the specific fish stocks located within the federal areas of the vast "Kenai River Area" that is the subject of the Board's C&T determination for Ninilchik for that area. Since there was not substantial evidence presented satisfying those factors upon which the Board's determination can be supported, the determination is legally unsupportable, arbitrary, capricious, and unreasonable.

Even the two factors that do not refer to a "pattern of use" are still tied to specific stocks and areas and uses of stocks in those areas under 36 CFR §242.16(a) and 50 CFR §100.16(a). Those factors also do not support a customary and traditional use determination on the federal lands within the afore-mentioned Kenai River Area.

Factor four contains an explicit geographic reference:

A consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from the community or area.

36 CFR §242.16(b)(4); 50 CFR §100.16(b)(4). All of the salmon and most of the freshwater fish available in the Kenai River Area are available in areas much closer to Ninilchik. The methods and means used have not been consistent, with frequent changes over the years; little to no evidence of consistent use of the current rod and reel methods by Ninilchik residents within federal lands in the Kenai River Area drainages was

⁴⁹ *Id.* at 226 (household average of 8.6 compared to 12.9 in Seldovia, 16.5 in Port Graham, and 21.5 in Nanwalek).

⁵⁰ *See Fall et. al.* at 51 (2004).

presented. Prior to completion of the Sterling Highway in 1951, access from Ninilchik to the distant Kenai River Area waters which are the subject of the Board's new C&T determination would have been much more time consuming and less efficient than access to areas closer to Ninilchik. It would have been, in a word, impractical. Thus, the record does not show the community of Ninilchik "generally exemplifies" factor four for a preferred subsistence use of federal lands within the Kenai River Area.

Factor five deals only with handling, but under 36 CFR §242.16(a) and 50 CFR §100.16(a), this use must be tied to the fish stock or wildlife population for which a C&T finding is made:

A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate.

36 CFR §242.16(b)(5); 50 CFR §100.16(b)(5). From the amounts harvested, as well as from much of the public testimony, it appears that what fishing might have occurred within federal lands constituting the Kenai River Area of the C&T determination involved immediate consumption rather than preservation.⁵¹ The record does not support a finding that the community of Ninilchik "generally exhibits" handling, preparing, preserving, and storing fish from the Kenai River Area waters which are the subject of the Board's new C&T determination for that area.

The eight regulatory factors for making a customary and traditional use determination have not been properly applied and could not reasonably be applied, based on the information presented to the Board, to show the necessary recurring, long-term consistent customary and traditional use by residents of Ninilchik of the specific fish stocks within the Kenai River Area that is the subject of the Board's C&T determination upon which Board reconsideration is requested. Any taking of fish stocks from outside the area in which historical use patterns have been shown does not fall within the regulatory definition of "customary and traditional use" because there is no "long-established, consistent pattern of use" of the stock or area. See 36 CFR §242.4; 50 CFR §100.4.

As former Commissioner Campbell pointed out to the Board during its January 2006 proceedings, the standard isn't whether a species has "been eaten at one time or another for subsistence."⁵² The Board is instead bound by existing federal regulations regarding customary and traditional use determinations. It is also bound by the facts, not

⁵¹ See e.g., Board's Jan. 2006 Proceedings at Tr. p. 274 (Stokes: "basically we ate it that night"); 275 (Steik: "We mostly catch trout and grill them or fry them on a stick.").

⁵² Transcript of Board's Jan. 2006 Proceedings at 295.

unsupported assumptions. Because a demonstrated customary and traditional use by Ninilchik within the same area and of the same fish stocks as exist within the Kenai River Area to which the Board granted Ninilchik a C&T determination is required and was not shown, reconsideration of that determination by the Board is appropriate and necessary.

B. The regulations are inconsistent with ANILCA because they authorize a subsistence priority for fishing that is not customary or traditional.

Reconsideration is also required because, in adopting the customary and traditional use determination for Ninilchik as to the Kenai River Area, the Board exceeded ANILCA's purpose of providing an opportunity for rural residents engaged in a subsistence way of life to continue to do so and did not adhere to provisions of Section 803 of ANILCA, which authorizes only "subsistence uses" which are defined as "customary and traditional uses."

Any subsistence fishing, especially any by residents of Ninilchik, that may have occurred within the Kenai River Area drainages affected by the Board's recent C&T determination ended long before the enactment of ANILCA in 1980. For that reason and other reasons stated in this RFR, any subsistence fishery within that area created by the Board's new C&T determination represents a new opportunity and does not serve ANILCA's purpose of allowing rural residents engaged in a subsistence way of life to continue to do so. The information presented to the Board was that subsistence fishing had been prohibited "in all streams and lakes" of the Kenai Peninsula since 1952. Furthermore, as the Board was repeatedly advised (*see, e.g.,* 11/16-17/06 Tr. pp. 126, 121 & ADF&G 10/26/06 correspondence cited there), subsistence use is not among Congress' expressed purposes for the Kenai National Wildlife Refuge in ANILCA. Section 303 of ANILCA provides otherwise. Since any subsistence fishing that may have taken place within the area of the Board's new C&T determination ended over two decades prior to the enactment of ANILCA, a subsistence fishery in that area does not further the purpose of continued subsistence use under ANILCA.

As already discussed, neither did the Board have sufficient evidence before it to support the conclusion that whatever fishing had occurred within the Kenai River Area of that area's specific fish stocks was a consistent, recurring, long-term "customary and traditional" use by the residents of Ninilchik.

Despite those shortcomings, the Board made a C&T determination for the community of Ninilchik for "all fish" within that Kenai River Area, including all five types of salmon, Dolly Varden, lake trout, rainbow trout, steelhead, Arctic char, grayling, and burbot. In making that determination as to "all fish," the Board ignored or improperly discounted the following information (among other things): That "none of the communities [including Ninilchik] show any use of burbot" (ISC Report for Board's Jan. 2006 Proceedings at 192); that steelhead populations "are thought to be very small"

with no harvest currently allowed (*id.*); that only 2-3% of Ninilchik households, at most, identified taking trout or any other species of fish other than salmon from that area (OSM Jan. 2006 Board Meetings Analysis at 222 & Fall, et al.); that there was no evidence presented that the trout and other resident species of that broad upper "Kenai River Area" defined by the Board are of the same stock as the other fish much more commonly fished by Ninilchik residents much closer to home, such as at the Ninilchik River and Deep Creek; and that there was no evidence presented to permit the Board to conclude that the Kenai River Area salmon stocks are the same specific stocks as the salmon also much more commonly fished by Ninilchik residents from those other waters located much closer to that community.

"[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156 (1977). ANILCA authorizes only subsistence uses that are "customary and traditional." Section 803 of ANILCA defines "subsistence uses" as follows:

As used in this act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (emphasis added). To be a valid subsistence use under this section, then, any fishing allowed must be "customary and traditional." This statute should be narrowly construed because it constitutes a federal encroachment on a basic aspect of state sovereignty, a state's authority over management of fish and game within its borders.⁵³

Federal courts have already acknowledged that ANILCA only authorizes "customary and traditional" subsistence uses on federal public lands in Alaska. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). Under ANILCA and this judicial

⁵³ "[I]f Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, courts will not construe a statute to alter the federal balance unless that result is unmistakably clear in the language of the statute. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 768, 120 S.Ct. 1858, 1870 (2000). ANILCA's subsistence provisions involve the balance of federal power because management of fish and wildlife within its borders is "peculiarly within [a state's] police powers." *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 391 (1978).

interpretation, only uses that are actually customary and traditional upon those lands and of the same specific fish stocks within those lands are authorized by ANILCA.

There is nothing substantial in the record of the Board to support the determination that the community of Ninilchik has "customarily and traditionally" fished "all fish" stocks found within the "Kenai River Area" of the Kenai National Wildlife Refuge and Chugach National Forest. By making an unsupported customary and traditional use determination, the Board provides Ninilchik with a subsistence priority for fishing in faraway waters that does not fall within ANILCA's definition of "subsistence uses." Because the Board's actions providing a customary and traditional use determination for residents of Ninilchik for all fish within federal lands within the "Kenai River Area" designated by the Board's action is inconsistent with ANILCA, reconsideration of that action is required.

C. The regulations are inconsistent with ANILCA because they are likely to cause unnecessary restrictions of nonsubsistence use.

Reconsideration is also required because, in adopting the customary and traditional use determination, the Board failed to recognize its duty to balance the competing purposes of ANILCA⁵⁴ and to prevent unnecessary restrictions on non-subsistence uses. Section 815 of ANILCA provides:

Nothing in this subchapter shall be construed as:

...

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law; . . .

16 U.S.C.A. § 3125(3) (2000).

Although the unsupported customary and traditional use determinations in this case do not yet impose direct immediate restrictions on taking of fish for other uses within the areas of the determinations, they can be expected to lead to an implementation and liberalization of take provisions otherwise prohibited and thus cause unnecessary restrictions for other users of these very popular, fully allocated fisheries already subject to harvest pressures. As former Commissioner Campbell stated to the Board:

⁵⁴ See *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000).

Once the C&T determination is in place, I believe you have started down the legal road where it is very hard not to then react favorably to subsequent proposals that you will receive regarding nets, regarding seasons, regarding bag limits, methods and means, all of these things.⁵⁵

As previously noted, under section 303 of ANILCA, the purposes for the Kenai National Wildlife Refuge, unlike other refuges, do not include "continued subsistence use" but do explicitly include "opportunities for fish and wildlife-oriented recreation." The waters of the upper Kenai River, Russian River and other river drainages and lakes situated within the exterior boundaries of the Chugach National Forest have also long been heavily, customarily, and traditionally dedicated to recreational opportunities, including the catching and taking of fish. Those waters are located roughly 100 highway miles from Ninilchik, and, as was shown, have been fished very little by the residents of Ninilchik. Nevertheless, the Board failed to adequately consider and balance the recreational purposes and longstanding practices of the Kenai National Wildlife Refuge and Chugach National Forest in its determinations, and to avoid actions that would cause unnecessary restrictions on recreational uses and opportunities within those dedicated lands. Any new subsistence harvest in the fully allocated and restricted fisheries of the Kenai and Russian Rivers will likely require new restrictions on non-subsistence fishers. Indeed, new consumptive subsistence harvests of rainbow trout, steelhead, and other resident species stocks for which the residents of Ninilchik are now eligible under the Board's new C&T determinations could result in complete closures of recreational fisheries in these recreation-oriented areas in order to protect vulnerable, slow-growing stocks.

The cumulative impacts of such decisions can be expected to require new restrictions upon state fisheries in order to assure compliance with the sustained yield mandate of the Alaska Constitution. The Board's regulatory action, if not corrected, will lead to unnecessary restrictions on non-subsistence uses in violation of section 815 of ANILCA and without balancing ANILCA's purposes for the Kenai National Wildlife Refuge and the established, longstanding purposes of the Chugach National Forest lands.

D. The Board's interpretation of existing data was in error because it was not based on full analysis of available information.

In addition, reconsideration is necessary because the Board did not adequately and properly consider all information presented to it, and, in the case of fish stocks, failed to require information necessary to its determinations. These failures led to incorrect, unsupportable determinations in fact and law. As has been demonstrated, the Board failed to give adequate consideration to longstanding legal and traditional purposes and priorities for the Kenai National Wildlife Refuge and Chugach National Forest

⁵⁵ January 2006 Board Proceedings at Tr. p. 289.

emphasizing recreational opportunities and practices. As has also been demonstrated, the Board failed to adequately and properly consider and evaluate the entire body of information (and lack of information) presented to it which showed that the community of Ninilchik only infrequently, sporadically, and minimally used the area of the C&T determinations to harvest fish, and then only some fish -- instead of showing a recurring, long-term consistent pattern of use by Ninilchik of all of those resources as is required by the Board's determination and by law.

Notably, the Board did not require *any* evidence, as to any species, to support its incorrect assumption that fish stocks harvested by Ninilchik households in waters located outside of and far away from the C&T areas were the same specific fish stocks as those fish located within the C&T areas. As a result, the Board made an overly broad, incorrect determination, creating a subsistence preference for Ninilchik of all salmon, Dolly Varden, rainbow trout, lake trout, steelhead, Arctic char, grayling, and burbot wherever found within the Kenai River National Refuge and Chugach National Forest, although no customary and traditional harvest by that community of the fish stocks within those areas had been shown.

Because the Board's determinations were made without sufficient and proper consideration of all the information presented to the Board, because the Board completely failed to require other information necessary to support its determination as to Ninilchik and the Kenai River Area, and because these defects in analysis caused the Board to make incorrect determinations unsupported by fact and law, those determinations are unreasonable, arbitrary and capricious, and should be reconsidered.

E. The regulation process was arbitrary, capricious and improperly prohibitive.

On the morning of November 17, 2006, shortly after Board deliberations on the motion for a C&T determination for Ninilchik as to the Kenai River Area had begun and the State liaison representative had begun to speak, the Board Chair, at the request of a Board member and upon incorrect advice of the Solicitor's Office, cut off and precluded the State liaison, Sarah Gilbertson, from being heard on the motion.⁵⁶ The Board Chair based this ruling on the erroneous, unreasonable and arbitrary advice of the Solicitor's office in direct violation of directives of the Secretary of the Interior and the Board's own procedures established in 2004.⁵⁷ The ruling effectively precluded participation by the

⁵⁶ 11/16-17/06 Tr. at 161-163.

⁵⁷ See Letters from Secretary Norton to State of Alaska Governor Murkowski and Board Chairman Demientoff dated February 24, 2004 and attached hereto as Attachment 3; Transcript of December 12 - 13, 2006 Board Meetings (wherein the Board Chair, reading from those Secretarial directives, acknowledged the erroneous ruling on

State of Alaska in the Board's deliberative process and caused, or at least contributed to, the Board's erroneous and unsupported determinations.

Because the Board made a mistake of law in excluding the State of Alaska from participation in deliberations upon the motion, and because this mistake of law resulted in substantive harm to the State of Alaska and resulted in or contributed to an arbitrary and capricious decision by the Board contrary to established substantive procedures governing the Board, reconsideration, during which effective participation by the State of Alaska will be allowed, is appropriate and necessary.

F. The regulations are arbitrary and capricious.

In order to be valid, regulations must be reasonable and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (1971).

The Board regulations making a customary and traditional use determination for Ninilchik for all fish within the Kenai River Area as defined by the Board is arbitrary and capricious for several reasons. As already shown, the Board's actions were inconsistent with its own regulations and with the statutory definition of "subsistence use" because the record did not contain substantial evidence to support the Board decision. The Board also unreasonably denied the State the opportunity to participate meaningfully and completely in deliberations upon the proposal. The Board failed to adequately and properly consider and balance the likely cumulative impacts from its overly broad C&T determination on other uses and users. The Board failed to respond to concerns raised by the State and Secretary that the Board needed to develop written procedures and policies to govern customary and traditional use determinations, a failure which contributed to the Board's actions violating its own regulations and federal statutes.

Prior to the Board's action, the State repeatedly raised concerns regarding inconsistency and lack of standards used by the Board for making customary and traditional use determinations. The Secretary responded to these concerns and, on October 27, 2005, urged the Board to develop written procedures or policies for customary and traditional use determinations and to review "whether analytic thresholds and benchmarks for certain criteria are needed and appropriate for inclusion in the decision process." The State requested that the Board delay further customary and traditional use determinations until after development of these policies and procedures.⁵⁸ In the context of the previous proposal on which NTC's request for reconsideration of a

November 17 preventing the State from being heard on the motion establishing the C&T determination).

⁵⁸ See, e.g., January 2006 Tr. at 287; 11/16-17/06 Tr. at 121, 126-127, 185; Campbell Correspondence to Board dated October 26, 2006, at pp. 1-2.

C&T determination for Ninilchik was based, ADF&G's former Commissioner pointed out that the standard is not whether a resource has been eaten for subsistence, and, if that were the standard, the Board's review process would be unnecessary:

I believe that there's probably nowhere in Alaska you can find that any species that exists hasn't been eaten at one time or another for subsistence. But if that's the standard, I can save you guys a lot of time. You don't need to do this you know. It's just all customary and traditional use. The fact that you're going through this implies that that is something – it must be narrower than the fact that, you know, I don't think there's a thing in Alaska that somebody hasn't eaten at some point when they were hungry enough and in need and they happened to be there.

So, while I have my standard of what long-term consistent pattern of use would be, what I think is most as [sic] important that this Board have its standard that it can apply consistently case by case and that's why I'm simply suggesting that you delay until you work that out.

January 2006 Tr. at 295.

The Board proceeded to make this C&T determination for Ninilchik (and previous customary and traditional use determinations related to the Kenai Peninsula District) without first developing any written policies or procedures, and without defining what would constitute a "pattern of use" by a community. As a result, the Board made a C&T determination despite a lack of evidence of a community level long-term, recurring and consistent "pattern of use" by Ninilchik for the fish included in the C&T determination area.

The Board's violations of its regulations regarding customary and traditional use determinations and its provision of a C&T determination in this instance for activities that do not qualify as "subsistence uses" under ANILCA are discussed more fully above. The object of the final rule is purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate that the fishing allowed is customary or traditional. The term "customary and traditional use" is defined by regulation to mean:

[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community.

36 CFR §242.4; 50 CFR §100.4. Customary and traditional use is determined by applying eight regulatory factors which a community must "generally exhibit." While the State agrees that it is not necessary for a community to demonstrate all eight factors,

as ADF&G's former Commissioner indicated to the Board during discussion of the prior proposal concerning Ninilchik in January 2006, some of the factors must be met and a recurring, long-term consistent pattern of use must be shown:

As was pointed out earlier you don't have to meet all eight factors, but it is important that you . . . meet some of them. As Ms. Armstrong correctly said I believe, if you don't meet the first, long-term consistent pattern of use, you might as well not bother with the rest.

January 2006 Tr. at 286.

In this instance, the Board proceeded to make a customary and traditional use determination for Ninilchik for the Kenai River Area at issue without developing a record showing a community-wide recurring "long-term consistent pattern of use" for that community within that area, without showing that such "use plays an important role in the economy of the community", and without even establishing a history of use by Ninilchik of some species and the specific stocks of fish covered by the Board's determination. Thus, the Board's action in providing a customary and traditional use determination for Ninilchik for all fish stocks within the waters within the Kenai River Area over which the federal government claims jurisdiction was arbitrary and capricious, because it was inconsistent with both the regulatory definition of "customary and traditional use" and with the regulatory requirements for finding "customary and traditional use."

In summary, the Board's unreasonable failure to adopt and follow a written policy for customary and traditional use determinations, its failure to follow its own regulations defining customary and traditional use and regulations listing factors that must be "generally exhibited" before a positive customary and traditional use determination is made, its unreasonable exclusion of the State from participation in the deliberations resulting in the C&T determination, and the Board's unreasonable failure to consider the cumulative impact of its overly broad C&T determinations, renders the final rules arbitrary and capricious. Accordingly, the Board should reconsider its decision to adopt these invalid regulations providing a customary and traditional use determination for Ninilchik as to all fish in the Kenai River Area covered by the Board's C&T determination.

G. The Board has no jurisdiction to make the customary and traditional use determinations upon which reconsideration is requested.

As previously stated, the State of Alaska has legally challenged the Board's claim to jurisdiction to make the C&T determinations on which reconsideration is sought by this Request for Reconsideration and by additional Requests for Reconsideration being filed by the State this month and previously, because the federal government has not

legally and properly established water rights in the waters covered by those determinations, as is set out in the pending litigation entitled *Katie John, Gerald Nicolia, et al., Plaintiffs, v. The United States of America, et al., Defendants*, in the United States District Court for the District of Alaska, Case No. A05-0006-CV (HRH) (Consolidated). Accordingly, it is the State's position, which it reserves and does not waive, that those determinations by the Board are illegal, void, and of no effect on that basis. The State's position in that regard and reasons supporting it are set forth in its filings in that pending litigation and are incorporated herein by reference.

IV. Conclusion.

The Federal Subsistence Board's determination and regulation finding that the residents of Ninilchik have customarily and traditionally harvested all fish stocks within the previously-described, widespread "Kenai River Area" for subsistence use, and are therefore entitled to a priority harvest right to those resources under federal law, is inconsistent with ANILCA and with Federal subsistence regulations. Those actions by the Board ignore regulatory and statutory definitions and criteria. They authorize fishing privileges that are not customary and traditional and that will lead to unnecessary restrictions on other users. They ignore information that was available to the Board, fail to consider other appropriate and necessary information, and unreasonably, arbitrarily and capriciously establish preferential uses on the basis of speculation rather than real evidence or information. They provide a subsistence preference for Ninilchik's residents without it having been adequately shown that Ninilchik's residents have customarily and traditionally harvested the relevant stocks for such purposes in the areas affected, and after the available data instead showed only sporadic, occasional use by some individuals, rather than the long-term, consistent recurring community pattern of use required by law. Those actions were taken only after the Board unreasonably precluded the State of Alaska from the Board's deliberations wherein they were reached, and were adopted by the Board without first developing written policies and procedures as urged by the Secretary of the Interior in order to ensure Board compliance with regulatory requirements. The Board's actions upon which reconsideration is hereby sought are unsubstantiated, arbitrary and capricious. For these reasons and others herein stated, the State of Alaska respectfully requests that the Board reconsider its final rules finding customary and traditional use of fish stocks for Ninilchik in the waters of the Kenai River Area over which the Board incorrectly claims jurisdiction. The State also requests that

the Board definitively decide the State's previously submitted, pending requests for reconsideration as to the Board's prior determinations granting Ninilchik a customary and traditional use priority determination as to the Kasilof River drainage waters and Hope and Cooper Landing customary and traditional use determinations as to the Kenai River Area waters.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

DATED: 16 Jan 07

Denby S. Lloyd, Acting Commissioner

02-24-04

01:04pm

From:DOI-SIO-Alaska

0072714102

T-055 P:004/004 F-305



THE SECRETARY OF THE INTERIOR
WASHINGTON

February 24, 2004

Mr. Mitch Dementieff
Chairman, Federal Subsistence Board
Office of Subsistence Management
3601 C Street, Suite 1030
Anchorage, Alaska 99503

Dear Mr. Dementieff:

Enclosed is my response to Governor Markowski's letter of July 17, 2003, requesting that I appoint a representative from the State of Alaska to serve as a non-voting member to the Federal Subsistence Board (Board). With the concurrence of the Secretary of Agriculture, I have accepted the Board's recommendation. I would be pleased to receive the name of the Governor's nominee as liaison to the Board, as opposed to a non-voting member.

The Secretary of Agriculture and I acknowledge the sovereign role of the State of Alaska in the management of fish and wildlife resources. We are committed to working with the Governor and State officials to coordinate and manage an effective and efficient subsistence program. We expect the Board to work closely with the State in a cooperative manner that will maximize everyone's involvement and guarantee that the subsistence program is operating efficiently and effectively. We fully expect that the Chairman will recognize the State for comment on any issue related to the coordinated regulation of fish and wildlife resources.

My decision to appoint a State liaison to the Board will enhance our ability to cooperate and coordinate with the State, and in doing so facilitate a stronger and more successful subsistence program for the mutual benefit of all users.

Sincerely,

A handwritten signature in dark ink, appearing to read "Gale A. Norton".
Gale A. Norton

Enclosure

ATTACHMENT 3
Page 1 of 3

02-24-04 01:04pm From:DOI-SIO-Alaska

9072714102

T-055 P.002/004 F-305



THE SECRETARY OF THE INTERIOR
WASHINGTON

February 24, 2004

The Honorable Frank H. Murkowski
Governor of Alaska
Juneau, Alaska 99811-0001

Dear Governor Murkowski:

Since your initial request that I appoint a representative from the State of Alaska to serve as a non-voting member of the Federal Subsistence Board (Board), I asked the present Board members for a recommendation. The public was given an opportunity to comment on the request before the Board rendered their recommendation. My approach to consideration of your request was guided by the Four C's: Communication, Consultation, and Cooperation, all in the service of Conservation. At the heart of the Four C's is my belief that for conservation and administrative actions to be successful, the federal government must involve the people who live and work on the land. And in that spirit, I would be pleased to receive the name of the nominee to the State liaison to the Board.

This appointment would be consistent with the April 1992 Record of Decision (ROD) for the *Subsistence Management for Federal Public Lands in Alaska Environmental Impact Statement*. Consistent with the ROD, the State liaison, along with ten Regional Advisory Council (RAC) chairs, will serve as active consultants to the Board, but will not have a vote in Board decisions or participate in executive sessions. During Board proceedings, prior to a motion, State and RAC liaisons will fully participate and be recognized by the Chair when they want to ask questions, raise concerns, and/or provide additional information or clarification. Once a motion is made, the liaisons may be invited to participate in Board deliberations or may be recognized by the Chair when they want to ask questions or provide additional information or clarification. The Board's Meeting Guidelines have been amended to reflect these principles.

I have reminded the Federal Subsistence Board of my Four C's inclusive approach to decision making. Both the Secretary of Agriculture and I acknowledge the sovereign role of the State of Alaska in the management of fish and game in Alaska. We fully expect that the Chairman will recognize the State for comment on any issue related to the coordinated regulation of fish and wildlife resources.

The Board enjoys a good working relationship with the State of Alaska Department of Fish and Game, as well as the Alaska State Board of Fish and Board of Game. While not officially designated as liaisons to the Board, representatives from the State of Alaska Department of Fish

ATTACHMENT 3
Page 2 of 3

02-24-04 01:04pm From:DOI-SIO-Alaska

8072714102

T-055 P.003/004 F-395

and Game have routinely attended and participated in Board meetings and have provided valuable input and recommendations. The Board also appreciates how the State Boards of Fish and Game, local fish and game advisory committees, the Federal RACs, and the federal and State staffs have worked together to resolve issues. I anticipate that the appointment of an official State liaison to the Board structure will help clarify State perspectives on issues and provide policy input that may not have been provided in the past.

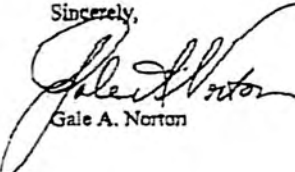
In safeguarding Alaska's fish and game resources and the use of those resources, the State of Alaska and the federal government have differing roles but share some objectives and responsibilities. The responsibilities of the Secretary of Agriculture and the Secretary of the Interior are two-fold: (1) to conserve healthy fish and wildlife populations and (2) to ensure that the taking of fish and wildlife on federal public lands for subsistence use is afforded a priority over other consumptive uses. The State bears primary responsibility for management of fish and game on the lands and waters of Alaska, ensuring sustained yield of the resources and providing for an array of uses including subsistence, personal use, sport, and commercial harvests. Given the differing roles but shared objectives of the two sovereigns, it is important to coordinate regulation of fish and wildlife resources. I anticipate that the appointment of an official State liaison to work with the Federal Subsistence Board will increase cooperation between the State and federal agencies, thereby facilitating efforts to assure conservation and provide for use of the resources.

Although the State has the ability to propose a formal rulemaking to establish a non-voting State seat on the Board, we are optimistic this approach will provide the same benefits. The liaison role has this advantage: it can be accomplished quickly, without the necessity of formal rule-making.

The Office of Subsistence Management, U.S. Fish and Wildlife Service, provides administrative support for the Federal Subsistence Board. Mr. Thomas H. Boyd in the Office of Subsistence Management will provide the State liaison, once nominated and officially appointed, with orientation materials and additional information. Mr. Boyd can be reached at 907-786-3864.

I greatly appreciate your interest in providing a liaison to the Board and look forward to the State's valuable participation in the federal Subsistence Management program.

Sincerely,



Gale A. Norton

Enclosure

ATTACHMENT 3
Page 3 of 3



43961 Kalifornsky Beach Road • Suite F • Soldotna, Alaska 99669
(907) 262-2492 • Fax: (907) 262-2898 • E Mail: kpfa@alaska.net

March 2, 2007

Representative Kurt Olson
State Capitol, Room 408
Juneau, AK 99801-1182

Representative Olson,

The Kenai Peninsula Fishermen's Association represents commercial fishermen throughout Cook Inlet waters.

Many of our fishing families have been here for several years. Some are descendents of Alaskan native inhabitants and others have established homestead acreage; headquarter sites to support their fishing operations to establish a home for their families. It is significant to say that it was necessary to live off the land to feed their families in the long winters and busy summers.

The subsistence lifestyle in many ways was the beginning for commercial fisheries. It required a customary and traditional knowledge base to understand what, where and when a resource was available. The ability to trade and barter developed into marketing and payment for goods and services. We do believe that subsistence was and is an important pioneer lifestyle and should be respected and protected when necessary.

The population of south-central Alaska has increased intensely in the last century. The definition of "subsistence" has changed and the identification of a subsistence person is not as clear. Questions arise over what lifestyles are we preserving in a semi urban environment? What are the goals of a subsistence priority in a fully utilized resource? In the community of the Kenai Peninsula with obvious accessibility to modern lifestyles, transportation systems and public utilities, what is the identification with customary and traditional in present times? Is there a direct continuum of the practices of the past? Is there a lack of nutrition or well being for the Peninsula Community?

KPFA supports HJR 4 in its quest to fully identify the eight factors in determining a subsistence priority in the Ninilchik, Hope and Cooper Landing areas. We believe that

a thorough review with consideration of current Alaska Department of Fish and Game biological information and of the changes within the community should be conducted immediately. It is apparent that the current system of selection lacks the full support of the south-central community and may affect negative changes that will harm the integrity of the subsistence program in to the future.

Respectfully,

The Kenai Peninsula Fishermen's Association
Board of Directors

✓
April 7, 2007

Rep. Paul Seaton
State Capitol, Room 102
Juneau, AK 99801

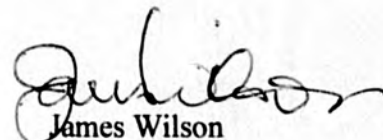
Dear Representative Seaton,

I am writing in support of Representative Kurt Olson's House Joint Resolution 4. It is inconceivable that the Federal Subsistence Board would designate Ninilchik a rural community with subsistence fishing rights on the Kenai River. I urge you to vote for this bill as many of us on the Kenai Peninsula work to reverse the Board's decision.

I have attached a copy of my March 19 letter to Denby Lloyd, Commissioner, ADF&G, which more fully explains my attitude toward this issue.

Please support HJR 4 and thank you for your other good works in Juneau.

Sincerely,



James Wilson
P.O. Box 4386
Soldotna, AK 99669

March 19, 2007

Denby S. Lloyd
Commissioner
Alaska Department of Fish & Game
P.O. Box 115526
Juneau, AK 99811

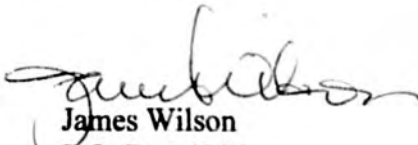
Dear Commissioner Lloyd,

I am writing to express my opposition to the Federal Subsistence Board's designation of Ninilchik as a rural community with subsistence fishing rights on the Kenai River.

This community rests squarely on the Sterling Highway, with easy access to major shopping centers in Homer, Soldotna and Kenai. Further, it has access to a modern airport in Kenai, capable of accommodating jet traffic, and to secondary airports at Homer and Soldotna. The Ninilchik community is also served by two hospitals, Central Peninsula Hospital in Soldotna and South Peninsula Hospital in Homer, with Central Peninsula Hospital currently undergoing a major expansion of its facilities and services. In fact, Ninilchik is often referred to as "Alaska's third largest city" as tourists, sportfishermen, clam diggers and outdoor enthusiasts gather there each year over the Memorial Day week-end. Why this community would be designated "rural" with subsistence fishing rights on two sections of the Kenai River is inexplicable, particularly since these sections are as much as 80 miles distant and have never been traditionally fished by residents of Ninilchik.

Accordingly, I urge the Department of Fish & Game to file suit in U. S. District Court to overturn the Federal Subsistence Board's designation of Ninilchik as a "rural" community.

Sincerely,


James Wilson
P.O. Box 4386
Soldotna, AK 99669

cc: Sarah Palin, Governor
Michael Fleagle, Chair, FSB

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after 10 de sut ~~electro~~
~~the~~ also work up
→

~~Happy Valley~~

Happy Valley.



Novel interpretation

] Don't have to fee C&T on fed lands. can
be use from

] Has anyone ever fished there

Feds say State can't sue on behalf of
its citizens

Andy Sze

Hi Kurt,

The e-mail below from Maureen Clark in the Office of Subsistence Management contains an explanation for why the feds have ignored an important part of ANILCA: namely, that subsistence isn't mentioned in Title VIII as a purpose of the Kenai National Wildlife Refuge. In my opinion, the federal solicitor (and by extension the Federal Subsistence Board) have assumed ever since Judge Sedwick's "no significance" statement that the word "subsistence" — or lack of same — in Title VIII is meaningless. In other words, the FSB has acted as if the KNWR is to be managed the same as the other wildlife refuges in the state, all of which list subsistence among their purposes. If that fact isn't "significant," what is? I strongly believe that the state should challenge this assumption. In the alternative, Congress should clarify that subsistence was left out of the KNWR for a reason, namely that this refuge was as early as the 1960s "Anchorage's Playground," and by the 1980s, when ANILCA became law, "Alaska's Playground," and a world-wide recreational attraction with tremendous economic value for the state.

Can you do anything to help? The risk to the refuge increases with each move by the Federal Subsistence Board to get federal subsistence on the Kenai Peninsula. The Feb. 24 meeting of the RAC subcommittee in Soldotna accomplished one thing: It showed the determination of the Ninilchik Traditional Council to press on for subsistence fishing on the upper Kenai River, no matter the conflict, the divisiveness or the harm to the Peninsula's most valuable renewable resource.

Thanks for anything you can do to right this wrong, Kurt.

Sincerely,

Les Palmer
Sterling
(907) 262-7788

From: Maureen_Clark@fws.gov
Date: February 21, 2007 2:45:10 PM AKST
To: Les Palmer <lpalmer@alaska.net>
Subject: Re: federal analyses of subsistence proposals

Mr. Palmer,

I am forwarding your comments and questions regarding regulatory proposals to those who are analyzing the Kenai Peninsula subsistence fishery proposals so that they might consider them as they continue work on their analyses.

Regarding your question concerning the purpose of the Kenai National Wildlife Refuge, the government raised this argument before the federal district court in the Ninilchik Traditional Council moose case. In an order dated June 13, 1996, Judge Sedwick found "no significance in the fact that the relevant public lands lie within the Kenai National Wildlife Refuge." He concluded that Title VIII of ANILCA is an overlay statute that applies generally to all federal public lands in Alaska, including the refuge. So, the Federal Subsistence Management Program does not ignore the fact that subsistence is not listed as one of the purposes of the Kenai National Wildlife Refuge, but treats this question as a settled issue of law.

Finally, I am not sure if you intended for your e-mail comments to be included in the administrative record on this issue. Comments submitted for the record would be summarized and included in the meeting materials that would go before the Federal Subsistence Board when it considers Kenai Peninsula subsistence fishery proposals May 8-10. If you wish to submit comments for the record, they can be e-mailed to subsistence @fws.gov.

Thanks for your interest.

Maureen Clark
Public Affairs Specialist
Office of Subsistence Management
U.S. Fish and Wildlife Service
(907) 786-3953

Les Palmer <lpalmer@alaska.net>
02/19/2007 07:11 PM

To: Maureen Clark <Maureen_Clark@fws.gov>
cc
Subject: federal analyses of subsistence proposals

2/25/2007

Dear Ms. Clark,

For qualified "rural" residents, federal staff are recommending a season for a dip-net subsistence fishery targeting late-run chinook from July 16 through Sept. 30.

The Sept. 30 closing date is surely an oversight. In July, early-run kings are on their spawning beds in the area proposed. In August and September, late-run kings spawn in this same area. This is well documented in various studies of these stocks, which are already fished and regulated to the max. Under sport-fishing regulations, no fishing is allowed downstream from Skilak Lake after July 31. In my opinion, no subsistence dip netting should be allowed at all, let alone for spawning king salmon.

Do these rural residents who would be fishing with rod and reel have to comply with all sport-fishing regulations, or only those listed on page 70 of the Regulatory Analyses? One such is that fishing from motorized boats is not allowed on Mondays in July.

Federal staff didn't even mention that, while dip netting may not "restrict" other users, it definitely interferes with and displaces them. For years, I fished the tides at the mouth of the Kenai when the reds were coming in. (I suppose that means it was customary and traditional.) Several of us locals would meet there, often before the sun was up, and fish with flies. A couple of the guys who lived in Kenai would have to leave and go to work. But then they opened that area to dip netting, and to the best of my knowledge, no one ever fished with rod and reel there again. For various reasons, the two methods simply are not compatible.

Something else not mentioned in the Regulatory Analyses is that ANILCA says "recreational fishing and hunting" are listed as purposes for the Kenai National Wildlife Refuge, but not subsistence. Subsistence was purposely left out of this refuge for reasons that were obvious in 1980, and are far more obvious in 2006. Has the OSM ever acknowledged this fact, or will it continue to ignore it?

Thank you for considering my questions and comments.

Sincerely,

Les Palmer
Sterling, Alaska
(907) 262-7788

25-LS0201VC

Kane

2/23/07

CS FOR HOUSE JOINT RESOLUTION NO. 4()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY**Offered:****Referred:****Sponsor(s): REPRESENTATIVE OLSON**

A RESOLUTION

1 **Requesting the Federal Subsistence Board to reconsider its decision regarding the**
2 **subsistence fishery priority given to Ninilchik, Happy Valley, Hope, and Cooper**
3 **Landing residents.**

4 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 **WHEREAS** the communities of Ninilchik, Happy Valley, Hope, and Cooper Landing
6 have not exhibited a long-term and traditional fishing history in the Upper Kenai or Kasilof
7 drainage waters on federal land; and

8 **WHEREAS** a survey by the Alaska Department of Fish and Game did not support
9 these communities' receiving a subsistence priority; and

10 **WHEREAS** the residents of these communities fall short of meeting the eight factors
11 the Federal Subsistence Board considers when determining if an area has a subsistence
12 priority;

13 **BE IT RESOLVED** by the Alaska State Legislature that the Federal Subsistence
14 Board is requested to reconsider its decisions granting Ninilchik, Happy Valley, Hope, and
15 Cooper Landing residents a subsistence fishery priority.

1 **COPIES** of this resolution shall be sent to the Honorable Dirk Kempthorne, United
2 States Secretary of the Interior; the Honorable Mike Johanns, United States Secretary of
3 Agriculture; the members of the Federal Subsistence Board; the Office of Subsistence
4 Management, United States Department of the Interior; and the Honorable Ted Stevens and
5 the Honorable Lisa Murkowski, U.S. Senators, and the Honorable Don Young, U.S.
6 Representative, members of the Alaska delegation in Congress.

Page 1:

- Line 2: after "Ninilchik" insert "/Happy Valley, Hope, and Cooper Landing"
- Line 4: delete "Ninilchik has" and insert "The communities of Ninilchik/Happy Valley, Hope, and Cooper Landing have"
- Line 5: after "Upper Kenai" insert "or Kasilof"
delete "water" and insert "waters"
- Line 7: delete "Ninilchik's" and insert "these communities' "
- Line 8: delete "Ninilchik residents" and insert "these communities"
- Line 11: delete "decision" and insert "decisions"
after "Ninilchik" insert "/Happy Valley, Hope, and Cooper Landing"
- Line 14: delete "and"
- Line 15: after "Congress" insert ", the Honorable Dirk Kempthorne, Secretary of the U.S. Department of the Interior, the Honorable Mike Johanns, Secretary of the U.S. Department of Agriculture, Members of the Federal Subsistence Board, and the Office of Subsistence Management."

STATE OF ALASKA

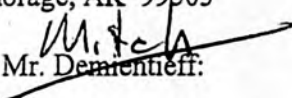
FRANK H. MURKOWSKI
GOVERNOR

DEPARTMENT OF FISH AND GAME
OFFICE OF THE COMMISSIONER

P.O. BOX 115526
JUNEAU, AK 99811-5526
PHONE: (907) 465-4100
FAX: (907) 465-2332

May 5, 2006

Mr. Mitch Demientieff, Chair
Federal Subsistence Board
Office of Subsistence Management
3601 C Street, Suite 1030
Anchorage, AK 99503

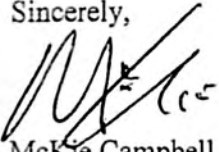

Dear Mr. Demientieff:

As provided for in Subpart B, 36 CFR §242.20 and 50 CFR §100.20, of the Subsistence Management Regulations for Public Lands in Alaska, the Alaska Department of Fish and Game hereby requests that the Federal Subsistence Board reconsider those portions of the January 13, 2006, decision on Proposal WP06-09, which adopts final rules establishing customary and traditional use determinations for the communities of Hope and Cooper Landing for the Kenai River drainage and waters north of the drainage.

The attached Request for Reconsideration on Proposal WP06-09 details the reasons for our opposition to portions of this new federal regulation as adopted.

I urge the Federal Subsistence Board to carefully consider this request and act expeditiously.

Sincerely,


McKie Campbell
Commissioner

Enclosure

cc: Wayne Regelin, Deputy Commissioner, Alaska Department of Fish and Game
David Bedford, Deputy Commissioner, Alaska Department of Fish and Game

**REQUEST FOR RECONSIDERATION OF HOPE AND COOPER LANDING
PORTION OF FEDERAL SUBSISTENCE BOARD PROPOSAL WP06-09
By State of Alaska**

I. Introduction.

The State of Alaska, through the Alaska Department of Fish and Game ("ADF&G"), respectfully requests the Federal Subsistence Board (Board) to reconsider those portions of its January 13, 2006, decision on Proposal WP06-09, which adopts final rules establishing customary and traditional use determinations for the communities of Hope and Cooper Landing for the Kenai River drainage and waters north of the drainage. A separate request regarding those portions of the determination relating to Ninilchik and the Kasilof River drainage is being submitted. Reconsideration is not requested for the portions of FP06-09 relating to Tuxedni Bay.

Reconsideration is required because, in adopting the final rule, "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law," and because new "information not previously considered by the Board" demonstrates that the Board's determination was based on incorrect information and assumptions. 36 C.F.R. § 242.20(d); 50 C.F.R. § 100.20(d).

The finding of customary and traditional use for the communities of Hope and Cooper Landing for the Kenai River drainage does not further ANILCA's purpose of providing an opportunity for rural residents engaged in a subsistence way of life to continue to do so, does not balance the competing purposes of ANILCA, is inconsistent with 36 C.F.R. § 242.16 and 50 C.F.R. § 100.16, creates a preference for uses that are not within the definition of "subsistence uses" in Section 803 of ANILCA, and will cause unnecessary restriction of nonsubsistence use in violation of section 815 of ANILCA. This determination was adopted despite a lack of support by residents of the area; was based on data that had not been fully analyzed; and was made without a reasonable examination of the eight regulatory factors for making customary and traditional use determinations. Further, the Board unreasonably declined to defer consideration of the proposal pending compliance with directions from the Secretary requiring the Board to develop written procedures or policies for customary and traditional use determinations. Because the adopted regulation designates fishing in an area as a customary and traditional use when such a designation was not supported on the record, it is arbitrary and capricious. As required by 36 C.F.R. § 242.20(d)(4) and 50 C.F.R. § 100.20(d)(4), a detailed statement follows.

II. Regulations Challenged.

At its meeting in January 2006, the Board considered Proposal WP06-09, amending the sections of 36 C.F.R. § 242.24 and 50 C.F.R. § 100.24 dealing with Cook Inlet customary and traditional use determinations by adding positive customary and traditional use determinations for all residents of the Cook Inlet area for salmon, Dolly Varden, trout, char, grayling, and burbot taken in the Cook Inlet Area.¹

The Southcentral Alaska Regional Advisory Council supported the proposal with modification to limit the Kenai Peninsula District determination to residents of Hope, Cooper Landing, and Ninilchik. The majority recommendation of the Interagency Staff Committee (ISC) supported the proposal with this modification. The minority recommendation of the ISC supported modification to establish a positive customary and traditional use determination for the residents of Hope and Cooper Landing for salmon, Dolly Varden, trout, char and grayling for the waters north of and including the Kenai River drainage and to establish a positive customary and traditional use determination for residents of Ninilchik for salmon, Dolly Varden, trout (excluding steelhead) and char in the Kasilof River drainage.

During its January 2006 meeting, the Board adopted the Southcentral recommendation with modifications, adopting an "interim" finding, final as to the portion decided but leaving the issue open for possible future expansion, as follows:²

On the Kenai Peninsula for the communities of Hope and Cooper Landing an interim C&T determination is made for all fish species for waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.

Transcript at 499; *see also* 71 Fed. Reg. 15569 (March 29, 2006).

The effect of the regulatory amendment is to provide a federal preference to residents of Hope and Cooper Landing for harvest of all fish on federal lands in the Kenai National Wildlife Refuge and Chugach National Forest within the Kenai River drainage and north of the drainage. Nonlisted rural residents, along with other state users, will not be eligible to participate in these fisheries and will be limited to participation in state fisheries. Although the only current preference is an exemption from state sport fish

¹ The proposal also included provisions relating to a customary and traditional use determination for Tuxedni Bay, portions of the proposal relating to Tuxedni Bay are not presented because the State is not requesting reconsideration of the Board's positive customary and traditional use determination for Tuxedni Bay.

² *See* Transcript at 522.

license requirements, proposals for more liberal methods and means and more liberal bag and possession limits have been submitted. In times of shortage, preferences may be provided to federal users through special actions or through failure to mirror State emergency orders for federal users. Thus, the customary and traditional use determination can be expected to lead to increased harvest of fish not eligible for harvest under state regulations and to restrictions on non federally qualified users on federal lands. Liberalization on federal lands may require adjustment of seasons and harvest restrictions under state law in order to insure compliance with the sustained yield mandate of the Alaska Constitution.

III. Discussion: The Regulations Are Inconsistent with Subsistence Management Regulations and ANILCA and are Arbitrary.

A. The regulations are inconsistent with the regulatory definition of customary and traditional use and with application of the regulatory criteria for finding customary and traditional use.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board failed to follow the regulatory definition of customary and traditional use and the regulatory criteria for finding customary and traditional use. As a result, the Board made an unnecessary and overly broad customary and traditional use determination.

The regulatory definition of "customary and traditional use" is: "[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community." 36 C.F.R. § 242.4; 50 C.F.R. § 100.4.

Subsistence use of fish on the federal lands in the Kenai National Wildlife Refuge and Chugach National Forest within the Kenai River drainage and north of the drainage does not fall within the regulatory definition of "customary and traditional use." The information available to the Board indicated that subsistence fishing had been prohibited "in all streams and lakes" of the Kenai Peninsula since 1952. Staff Report at 199. Very little evidence was presented to indicate that fish from the federal lands in the Kenai National Wildlife Refuge and Chugach National Forest within the Kenai River drainage and north of the drainage have been harvested for subsistence use with a consistent pattern of use within the past 50 years or that such use has played an important role in the economy of the community within the past 50 years.³ No evidence was presented for portions of the area covered by the Board's Customary and Traditional use

³ The current economies of Hope and Cooper Landing are based largely on tourism and sport fishing.

determination.⁴ Further, even if use could be shown to have been customary and traditional prior to regulatory changes in 1952, the populations of the communities changed after 1952⁵ and no evidence was presented to indicate that the character of the communities of Hope and Cooper Landing has not likewise changed. The evidence before the Board did not indicate that subsistence use of fish from the federal lands in the Kenai National Wildlife Refuge and Chugach National Forest within the Kenai River drainage and north of the drainage, if allowed, would play an important role in the economy of the community.⁶

The regulations require the Board to determine which fish stocks and wildlife populations have been customarily and traditionally used for subsistence and to identify the specific community's or area's use of specific fish stocks and wildlife populations. 36 C.F.R. § 242.16(a); 50 C.F.R. § 100.16(a). Eight specific factors, which must be generally exhibited, are established for finding customary and traditional use:

- (1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;
- (2) A pattern of use recurring in specific seasons for many years;
- (3) A pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics;
- (4) The consistent harvest and use of fish or wildlife as related to past methods and means of taking, near, or reasonably accessible from, the community or area;
- (5) A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including

⁴ The area covered by the Board's determination includes an area north of Turnagain Arm, but none of the harvest data presented to the Board demonstrated any use of this area by residents of Hope and Cooper Landing and, thus, did not demonstrate "pattern of use".

⁵ The population of Cooper Landing declined and fell almost in half between 1950 and 1970 and then increased by more than ten times between 1970 and 2003; the population of Hope almost tripled from 1970 to 2003. Fall et al at 33 (2004).

⁶ Overall harvest and use rates for salmon were lower in Hope and Copper Landing than in other study communities, and, although estimated household ability to use nonsalmon fish was higher in Cooper Landing than other communities, the total numbers were still very low. See Fall et al at 55 and Table IV-75 (2004). Most residents did not favor increased harvest limits, and many thought that existing personal use salmon limits were too high. *Id.* at 56-57; Tables IV-77, IV-78. Since both communities have an economic base built on sport fishing and tourism, a subsistence fishery may actually harm the economies of the communities.

consideration of alteration of past practices due to recent technological advances, where appropriate;

(6) A pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation;

(7) A pattern of use in which the harvest is shared or distributed within a definable community of persons; and

(8) A pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.

36 C.F.R. § 242.16(b); 50 C.F.R. § 100.16(b).

The Board did not adequately apply the available information in its analysis of the eight factors, and the information available was not sufficient to show a "pattern of use" of all fish in fresh waters on all of the federal public lands subject to the Board's determination. The Board did not even attempt to apply the eight criteria in any level of detail.

The written staff report did purport to apply the eight factors; however, this analysis was perfunctory and was fundamentally flawed because it was not tied to "pattern of use" by residents of Hope and Cooper Landing in specific waters on the federal public lands for each covered fish species. The regulatory requirement for customary and traditional use determinations is to "identify the specific community's or area's use of specific fish stocks and wildlife populations," 36 C.F.R. § 242.16(a); 50 C.F.R. § 100.16(a), thus, wherever the regulations require a "pattern of use," they are referencing a pattern of use of a specific area or of a specific stock or population by a specific community. Six of the eight factors refer to a "pattern of use." This "pattern of use" required by factors 1 through 3 and 6 through 8 was not shown.

The first and most important factor is a "long-term consistent pattern of use, excluding interruptions beyond the control of the community or area." The information available to the Board could not support a positive analysis for this key factor for the entire area covered by the determination or for all fish found in the area.⁷

⁷ Fish found in portions of the Kenai River drainage and waters north of the drainage include: Chinook, coho, sockeye, chum and pink salmon, lake trout, Dolly Varden, rainbow trout, steelhead trout, grayling, whitefish and smelt.

Although the record did indicate that some of the federal public lands in the area covered by the determination were used for harvest of some species,⁸ the Board did not do a thorough analysis to determine specific areas where there was a community "pattern of use" and instead made an overly broad determination. The record did not demonstrate any use of the area north of Turnagain Arm by residents of Hope or Cooper Landing. The Cook Inlet Customary and Traditional Subsistence Fisheries Assessment indicated that less than 2 percent of Cooper Landing households and less than 3.5 percent of Hope harvested Chinook on federal public lands in 2002/2003.⁹ Similarly, less than 2 percent of Cooper Landing households harvested pink salmon on federal public lands in 2002/2003, and none harvested chum salmon, steelhead, or hooligan.¹⁰ Similarly during 2002/2003, less than 3.5 percent of Hope households harvested lake trout, less than 2 percent harvested hooligan from federal public lands, and no steelhead were harvested by residents of Hope.¹¹ Data from a 2002 harvest survey similarly showed no use or extremely low use levels for pink salmon, chum salmon, burbot, pike, steelhead, and whitefish in Cooper Landing¹² and for burbot, grayling, pike, steelhead, and whitefish in Hope.¹³

Very little data and almost no analysis of use over time were presented to the Board. The oral Staff Report seemed to argue that factor one could be shown based simply on current uses and the fact that the community had been there a long time. Transcript at 221. The staff report also attempted to build a case for a long-term and consistent pattern of use based on historical use by the Dena'ina Athabaskans, but the uses of the Dena'ina were not shown to continue past the mid 20th century or to be linked to usages by the current communities of Hope and Cooper Landing. By 1919, most Dena'ina were concentrated around the village of Kenai.¹⁴ By the 1940s, Dena'ina were rarely seen in the Cooper Landing area.¹⁵ Uses were changed by homesteading in the 1930s and 1940s, by the establishment of the Kenai Moose Range in 1941, and by construction of the Sterling Highway in 1951. In 1952, usage was further changed by prohibitions on the use of gill nets in most fresh waters, which further emphasized reliance on marine fisheries, although some fresh water subsistence activities continued through snagging of salmon until that method was restricted in 1969 and made illegal in 1973.¹⁶ Sport

⁸ See, e.g., Fall et al at 51 (2004); Staff Report at 216-217.

⁹ See Staff Report at 216, 217.

¹⁰ *Id.* At 216.

¹¹ *Id.* At 217.

¹² Staff Report at 208.

¹³ *Id.* at 209.

¹⁴ Staff Report at 204; Fall et al 2004 at 20; Transcript at 205.

¹⁵ Staff Report at 204.

¹⁶ Staff Report at 204; Fall et al 2004 at 22-23.

fishing continued in fresh water, but subsistence and personal use fishing were marine and lower river activities by the early 1970s. Thus, while Hope and Cooper Landing are long established communities, their uses of fish are not linked to Dena'ina uses, their uses of fish from federal public lands have changed dramatically over time, and all use of fish from the federal public lands in recent history has consisted of sport fishing. Subsistence and personal use fishing were concentrated primarily in marine and lower river waters, not subject to federal jurisdiction, long before passage of ANILCA.¹⁷

Thus, factor one's community "pattern of use" was not demonstrated for the area and species covered by the Board's customary and traditional use determination for Hope and Cooper Landing. Further, the available data showed the uses in Hope and Cooper Landing were very different. If a pattern of use exists for one community, it does not mean that it exists for both.

The second factor is a "pattern of use recurring in specific seasons for many years." This factor was not analyzed in any level of detail.

The third factor is a "pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics." This pattern could not be shown based on the available information. The staff reports and public testimony provided to the Board indicated that, since at least the early 1950s, any harvest within federal lands has been consistent with generally inefficient rod and reel recreational fishing, not with efficiency and economy of effort¹⁸. The communities of Hope and Cooper Landing did most of their harvesting with rod and reel and showed very low levels of use of more efficient methods of harvest even when state water fishing areas were considered.¹⁹ Further, the available harvest data indicated low harvest levels for species other than salmon even when all harvests, not just

¹⁷ ANILCA was adopted in 1980 to allow rural communities engaged in a subsistence way of life to continue to do so, not to create new subsistence opportunities or revive past subsistence practices. Therefore, even if a pattern of use had been shown before 1952, the pre ANILCA restrictions should not be considered an interruption of use under the first factor.

¹⁸ Methods of harvest, such as gillnets, are generally considered to be more efficient than rod and reel, although rod and reel can be an efficient harvest practice for some species and/or in some areas. In this case, more efficient harvest was achieved elsewhere regardless of method.

¹⁹ See Fall et al at Tables IV-34, IV-35, IV-46, IV-47 (In 2002/2003, 87 percent of Cooper Landing's salmon and 92 percent of its non-salmon fish was harvested by rod and reel and 85 percent of Hope's salmon and 90 percent of its non-salmon fish were harvested was by rod and reel).

harvests in the federal lands, were considered.²⁰ These low harvest levels are not consistent with a "pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost."

The sixth factor is a "pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation." The Staff Report did not explore this factor with relation to Cooper Landing or Hope,²¹ and the Board also failed to analyze how this factor applied to Cooper Landing and Hope. The record lacked evidence to show intergenerational transmission among current users. Given the extensive population growth in these communities since 1970,²² it should not be assumed that that transmission of fishing skills from generation to generation is a "pattern of use" within the communities of Cooper Landing and Hope.

The seventh factor is a "pattern of use in which the harvest is shared or distributed within a definable community of persons." The available information indicated that for species found in fresh water, other than salmon, there was very little sharing in Cooper Landing or Hope and that in Cooper Landing even the rate of sharing of salmon was extremely low.²³ The available record indicated that in Cooper Landing, the highest reported household rate of giving for a non-salmon freshwater fish species was 13.6 percent of households for char, and that the highest household rate of receiving for a non-salmon freshwater fish species was 5.8 percent for char.²⁴ In Hope, the rates of giving and receiving non-salmon fish were even lower: the highest rate of giving for a non-salmon freshwater fish species was 3.3 percent for hooligan, and the highest rate of receiving for non-salmon fresh water fish was 15 percent, also for hooligan.²⁵ This factor was not discussed in any level of detail for Cooper Landing or Hope in the Staff Report or Board discussions, and the available data do not provide much support for finding a

²⁰ See, e.g., Staff Report at 216, 217.

²¹ See Staff Report at 225.

²² The population of Cooper Landing declined and fell almost in half between 1950 and 1970 and then increased by more than ten times between 1970 and 2003; the population of Hope almost tripled from 1970 to 2003. Fall et al at 33 (2004).

²³ See Staff Report at 225 (In Cooper Landing only 8 percent of households received salmon and only 35 percent gave salmon; in Hope 66 percent received salmon and 44 percent gave salmon).

²⁴ Staff Report at 211.

²⁵ Staff Report at 210. Rates for other freshwater fish, more likely to be found on federal lands were much lower, the next highest rate of giving was 1.7 percent for trout and rainbow trout, and the next highest rate of receiving was 5 percent for trout and rainbow trout. ADF&G does not believe that hooligan can be found on all the federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.

community "pattern of use" in which fish harvested from the federal public lands are "shared or distributed within a definable community of persons."

The eighth factor is a "pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area." Again there was little documentation of a pattern of use relating to reliance on fish or game from the federal public lands. Dr. Fall, the lead author of the Cook Inlet Customary and Traditional Subsistence Fisheries Assessment, prepared by ADF&G, pointed out that additional information was available but had not been analyzed. Transcript at 311. Residents of Cooper Landing and Hope rely upon a relatively low number of wild foods,²⁶ and uses and attempted uses of nonsalmon fresh water fish are extremely low indicating that they do not provide substantial cultural, economic, social, and nutritional elements to the community. Because the economies of Cooper Landing and Hope are built largely upon sport fishing and tourism, it could in fact be argued that residents of these communities depend more on the use of these resources by others than they do on direct personal use.

As shown above, based on the available information, the six factors requiring a "pattern of use" do not support a customary and traditional use determination. The available information indicates that although the communities of Cooper Landing and Hope sport fish on some of the federal public lands, they do not "generally exhibit" the "pattern of use" factors for use of fish from the entire area of federal public lands covered by the Board's determination.

Even the two factors, factor 4 and factor 5, that do not refer to a "pattern of use," are still tied to specific stocks and areas and uses of stocks in those areas under 36 C.F.R. § 242.16(a) and 50 C.F.R. § 100.16(a), and these factors do not support a customary and traditional use determination for all species or on all the federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.

Factor four contains an explicit geographic reference:

A consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from the community or area.

²⁶ See Staff Report at 226 (household averages of 8.3 in Cooper Landing and 9.1 in Hope, compared to 12.9 in Seldovia, 16.5 in Port Graham, and 21.5 in Nanwalek).

36 C.F.R. § 242.16(b)(4); 50 C.F.R. § 100.16(b)(4). The methods and means used on federal lands have not been consistent; there have been frequent changes over the years. Little or no evidence of consistent use of all species or all the federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest was presented. The area covered by the Board's determination included not only areas near Hope and Cooper Landing, but more distant areas where the record before the Board did not show use by residents of Hope and Cooper Landing.²⁷ The Board's determination extended to all fish found in fresh water despite limited or nonexistent use of many species and despite the fact that some species were stocked by the state. Thus, the record does not show the communities of Cooper Landing and Hope "generally exemplify" factor four for use of all species and all federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.

Factor five deals only with handling, but under 36 C.F.R. § 242.16(a) and 50 C.F.R. § 100.16(a)), this use must be tied to the fish stock or wildlife population for which a C&T finding is made:

A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate.

36 C.F.R. § 242.16(b)(5); 50 C.F.R. § 100.16(b)(5). From the relatively low amounts harvested,²⁸ it appears that much of the fishing, especially for non-salmon fish, that did occur in the federal public lands may have involved immediate consumption rather than preservation. Harvest patterns were not shown for any species north of Turnagain Arm. The record does not support a finding that the communities of Hope and Cooper Landing "generally exhibit" handling, preparing, preserving, and storing fish from all species or on all the federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.

The eight regulatory factors for making a customary and traditional determination have not been properly applied and could not reasonably be applied, based on the available information, to show customary and traditional use by residents of Cooper Landing and Hope for all species on all the federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest. Any taking of fish stocks from outside the area in which

²⁷ The record did not indicate any use by these communities north of Turnagain Arm, but this area was included in the Board's determination.

²⁸ See, e.g., Staff Report at 206; Fall et al at Table IV-75.

historical use patterns have been shown does not fall within the regulatory definition of "customary and traditional use" because there is no "long-established, consistent pattern of use" of the stock or area. See 36 C.F.R. § 242.4; 50 C.F.R. § 100.4. As Commissioner Campbell pointed out to the Board, the standard isn't whether a species has "been eaten at one time or another for subsistence."²⁹ The Board is instead bound by existing federal regulations regarding customary and traditional use determinations. Thus, because the Board's determination was overly broad and because use of all fish species from all federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest is not a "customary and traditional" practice, reconsideration is required.

B. The regulations are inconsistent with ANILCA because they authorize a subsistence priority for fishing that is not customary or traditional

Reconsideration is required because, in adopting the customary and traditional use determination, the Board exceeded ANILCA's purpose of providing an opportunity for rural residents engaged in a subsistence way of life to continue to do so and did not adhere to the provisions of Section 803 of ANILCA, which authorizes only "subsistence uses" which are defined as "customary and traditional uses."

Subsistence fishing on federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest ended long before the enactment of ANILCA, and thus any subsistence fishery represents a new opportunity and does not serve ANILCA's purpose of allowing rural residents engaged in a subsistence way of life to continue to do so. The information available to the Board indicated that subsistence fishing had been prohibited "in all streams and lakes" of the Kenai Peninsula since 1952. Staff Report at 199. If the Board had looked at ANILCA's purposes for the Kenai National Wildlife Refuge, it would have found that, unlike other refuges, its purposes do not include "continued subsistence use." Since subsistence fishing in this area ended over two decades prior to enactment of ANILCA, a subsistence fishery in this area does not further the purpose of continued subsistence use under ANILCA.

As shown above, the Board did not have substantial evidence before it that fishing for all species on the federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest was customary and traditional for residents of Cooper Landing and Hope. The Board had no evidence before it of use of portions of this area by current residents of either Cooper Landing or Hope. The Board did have evidence before it indicating that areas of use and uses were very different in Cooper Landing and Hope. Nonetheless the Board lumped

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Cooper Landing and Hope together and made a C&T determination for "all fish" and extended the finding to the entire area of federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest. In making a determination for "all fish" the Board ignored information provided in the minority recommendation of the interagency staff report which noted that "none of the communities show any use of burbot," Staff Report at 192, and that steelhead populations "are thought to be very small" with no harvest currently allowed. *Id.* The Board also ignored comments from the chair of the Cooper Landing Fish and Game Advisory Committee indicating that a C&T determination should not extend to grayling because they were stocked after subsistence use of the drainage ended in 1952. Transcript at 260. Thus, in addition to making a geographically overbroad determination, the Board made a customary and traditional use determination for "all fish" without substantial evidence of such use and despite evidence that at least three fish stocks were not used or suitable for subsistence use.

"[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156 (1977). ANILCA authorizes only subsistence uses that are "customary and traditional." Section 803 of ANILCA defines "subsistence uses" as follows:

As used in this act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (emphasis added). To be a valid subsistence use under this section, any fishing allowed must be "customary and traditional." This statute should be narrowly construed because it constitutes a federal encroachment on a basic aspect of state sovereignty, a state's authority over management of fish and game within its borders.³⁰

³⁰ "[I]f Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, courts will not construe a statute to alter the federal balance unless that result is unmistakably clear in the language of the statute. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 768, 120 S.Ct. 1858, 1870 (2000). ANILCA's subsistence provisions involve the balance of federal power because management of fish and wildlife within its borders is "peculiarly within [a state's] police powers." *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 391 (1978).

Federal courts have already acknowledged that ANILCA only authorizes "customary and traditional" subsistence uses on federal public lands in Alaska. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). Only uses that are customary and traditional are authorized by ANILCA.

There is nothing in the record of the Board to show that fishing by residents of Cooper Landing and Hope for all species on all federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest is "customary and traditional". By making an unsupported customary and traditional use determination, the Board provides a subsistence priority for fishing that does not fall within the ANILCA's definition of "subsistence uses." Thus, because the Board's action providing a customary and traditional use determination for residents of Cooper Landing and Hope for "all fish" on all "federal public lands north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest" is inconsistent with ANILCA, reconsideration is required.

C. The regulations are inconsistent with ANILCA because they are likely to cause unnecessary restrictions of nonsubsistence use.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board failed to recognize its duty to balance the competing purposes of ANILCA³¹ and to prevent unnecessary restrictions on other uses. Section 815 of ANILCA provides:

Nothing in this subchapter shall be construed as:

...
(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law; . . .

16 U.S.C.A. § 3125(3) (2000). It is important to note that the largely urban nature of the Kenai Peninsula and the enhanced need for recreational opportunity in this area was recognized prior to passage of ANILCA. This was reflected in section 303 of ANILCA where the purposes for the Kenai National Wildlife Refuge, unlike those of other refuges, did not include "continued subsistence use" but did explicitly include "opportunities for fish and wildlife-oriented recreation." Thus, the purposes of continuing to provide fish

³¹ See *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000).

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and wildlife oriented recreation should be balanced against providing new subsistence opportunities, and actions likely to lead to unnecessary restrictions on recreational fishing should be avoided.

Although the unsupported customary and traditional use determination in this case does not impose immediate direct restrictions on taking of fish and wildlife for other uses and, in fact, narrows the potentially eligible users, it can be expected to lead to liberalization of take provisions³² and thus cause unnecessary restrictions for other users. As Commissioner Campbell stated to the Board:

Once the C&T determination is in place, I believe you have started down the legal road where it is very hard not to then react favorably to subsequent proposals that you will receive regarding nets, regarding seasons, regarding bag limits, methods and means, all of these things.

Transcript at 289. The Board failed to even recognize the recreational purposes of the Kenai National Wildlife Refuge in its deliberations, let alone balance them and avoid actions that would cause unnecessary restrictions on recreational uses. Following the Board meeting, the Southcentral Regional Advisory Council voted against implementation of the Board's recommendation for formation of a subcommittee to address methods and means, thereby greatly decreasing the chances for development of compromise measures that would not cause unnecessary restrictions to other users. The Board's regulatory action, if not corrected, will thus lead to unnecessary restrictions on nonsubsistence uses in violation of section 815 of ANILCA and without balancing ANILCA's recreational purposes for the Kenai National Wildlife Refuge.

D. The Board's interpretation of existing data was in error because it was not based on full analysis of available information.

Reconsideration is required because the Board did not consider all available information and this failure led to an incorrect determination. The Board failed to consider ANILCA's purposes for the federal lands Kenai National Wildlife Refuge and failed to thoroughly analyze available information relating to uses of fish by the residents of Cooper Landing and Hope.

Many of the federal lands covered by the Board's C&T determination for Cooper Landing and Hope are in the Kenai National Wildlife Refuge. As noted above, the purposes for the Kenai National Wildlife Refuge under section 303 of ANILCA, unlike

³² Current federal subsistence provisions mirror state sport regulations, thus the only preference currently available to federal users is that they do not have to purchase a state fishing license if they limit their fishing to federal public lands.

other refuges, do not include "continued subsistence use" but do explicitly include "opportunities for fish and wildlife-oriented recreation." The Board failed to recognize the unique purposes of the Kenai National Wildlife Refuge under ANILCA and did not properly balance the competing purposes of ANILCA as required under *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000). Proper balancing of the competing purposes of ANILCA and considering the pre-ANILCA limitations on fishing in the Kenai National Wildlife Refuge in particular, and the Kenai Peninsula in general, would have allowed the Board to conclude that a customary and traditional use determination for all fresh water fish for residents of Cooper Landing and Hope in all of the waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest was not warranted.

The Board also failed to fully analyze the available information. The State provided a sample analysis of some of the additional information regarding use of the Kasilof drainage that could be extracted from the data gathered in the Cook Inlet Customary and Traditional Subsistence Fisheries Assessment³³ and requested further analysis for all areas. Information regarding past fishing activities collected through page 20 of the Survey Instrument (Appendix A of the 2004 Cook Inlet Customary and Traditional Subsistence Fisheries Assessment) was not analyzed for residents of Cooper Landing and Hope. The Solicitor's Office, in defending the Board's consideration of the option of deferring final C&T determinations, noted that the Board was faced with a unique situation in which all the data had not been fully analyzed and where a more careful weighing of evidence might be warranted:

As to evidence, it's always judged in context, it's the only thing that makes any sense. And in an easy case, in a remote area of the state you probably need very little evidence and we have certainly acted on evidence that is less in quantity than we have in front of us here today. In this case, however, the context is complicated. The landscape is contentious. We have two groups of eligible users who disagree. And we also have at least three sets of data that are unanalyzed. And in my experience with the Board that's the first time we actually have stuff but we haven't put it together yet

Transcript at 507. Although only one set of data was unanalyzed for Cooper Landing and Hope, the remainder of the statement is just as true for the portion of the proposal to provide a customary and traditional use determination for Cooper Landing and Hope. The Board incorrectly acted without analysis of the available data in an apparent attempt

³³ See Estimated percentage of Ninilchik Households Fishing in the Kasilof River Drainage (November 10, 2005). Similar data could have been extracted for Cooper Landing and Hope. See, e.g., Transcript at 310, 311, 318.

to impose a compromise position on the competing user groups. Thus, because the Board's determination was made without fully considering all available information, it should be reconsidered.

E. The regulations are arbitrary and capricious.

In order to be valid, regulations must be reasonable, and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (U.S. 1971).

The Board regulation making a customary and traditional use determination for Cooper Landing and Hope is arbitrary and capricious because the Board failed to respond to concerns raised by the State and Secretary that the Board needed to develop written procedures and policies to govern customary and traditional use determinations. As a result of the failure to develop and follow clear procedures and policies, the Board took action that was not consistent with its own regulations.

Prior to the Board's action, the State raised concerns regarding inconsistency and lack of standards used by the Board for making customary and traditional use determinations. The Secretary responded to these concerns and, on October 27, 2005, directed the Board to develop written procedures or policies for customary and traditional use determinations and to review "whether analytic thresholds and benchmarks for certain criteria are needed and appropriate for inclusion in the decision process." The State requested that the Board delay further customary and traditional use determinations until after development of these policies and procedures, and the State pointed out that, even if some customary and traditional use determinations might be appropriate before development of these policies, action on FP06-09 would not be appropriate.³⁴ Dr. Fall pointed out that new arrivals could represent 75 to 80 percent of the population of some Kenai Peninsula communities, Transcript at 323, and that these new arrivals changed community use patterns, Transcript at 323-24, creating a need for further analysis and clear standards for C&T determinations where there may be subgroups within a community that no longer represent the typical pattern of the community. Transcript at 325. The Commissioner pointed out that the standard isn't whether a resource has been eaten for subsistence, and that, if that was the standard, the Board's review process would be unnecessary:

I believe that there's probably nowhere in Alaska you can find that any species that exists hasn't been eaten at one time or another for subsistence. But if that's the standard, I can save you guys a lot of time. You don't need to do this you know. It's just all customary and traditional

³⁴ See, e.g., Transcript at 287.

use. The fact that you're going through this implies that that is something -- it must be narrower than the fact that, you know, I don't think there's a thing in Alaska that somebody hasn't eaten at some point when they were hungry enough and in need and they happened to be there.

So, while I have my standard of what long-term consistent pattern of use would be, what I think is most as [sic] important that this Board have its standard that it can apply consistently case by case and that's why I'm simply suggesting that you delay until you work that out.

Transcript at 295. The representative for the Cooper Landing Fish and Game Advisory Committee supported the State's request for deferral. Transcript at 261.

The Board proceeded to make a customary and traditional use determination without first developing any written policies or procedures and without defining what would constitute a "pattern of use" by a community. As a result, the Board made a determination despite a lack of evidence of a community level "pattern of use" for all of the species and area covered by the Board's determination.

The object of the final rules is purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate that all of the fishing allowed is customary or traditional. The term "customary and traditional use is defined by regulation to mean:

[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community.

36 C.F.R. § 242.4; 50 C.F.R. § 100.4. Customary and traditional use is determined by applying eight regulatory factors that a community must "generally exhibit." While the State agreed that it is not necessary for a community to demonstrate all eight criteria, as the Commissioner indicated to the Board, some of the factors must be met, and a long-term consistent pattern of use must be shown:

As was pointed out earlier you don't have to meet all eight factors, but it is important that you sort of meet some of them. As Ms. Armstrong correctly said I believe, if you don't meet the first, long-term consistent pattern of use, you might as well not bother with the rest.

Transcript at 286. The Board proceeded to make a customary and traditional use determination without developing a record to show a community level "long-term consistent pattern of use" and without showing that such "use plays an important role in

the economy of the community." Thus, the Board's action in providing a customary and traditional use determination for Cooper Landing and Hope for all freshwater fish on the federal public lands in waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest was arbitrary and capricious because it was inconsistent with both the regulatory definition of "customary and traditional use" and with the regulatory requirements for finding "customary and traditional use."

The Board's failure to adopt and follow a written policy for customary and traditional use determinations, and its failure to follow its own regulations defining customary and traditional use and regulations listing factors that must be "generally exhibited" before a positive customary and traditional use determination is made, renders the final rules arbitrary and capricious. Accordingly, the Board should reconsider its decision to adopt these invalid regulations providing a customary and traditional use determination for Cooper Landing and Hope.

F. New information requires reconsideration.

The Board appears to have relied upon the assumption that stakeholders would meet as a subcommittee under the Southcentral Regional Advisory Council and develop subsistence preference provisions that would be acceptable to all user groups.³⁵ At its meeting on March 14, 2006, the Southcentral Regional Advisory Committee voted against implementation of the Board's recommendation for formation of a subcommittee to address methods and means. This is new information, which undermines the basis of the Board's decision, justifies reconsideration.

IV. Conclusion.

The regulations finding customary and traditional use of fish stocks in waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest for residents of Cooper Landing and Hope are inconsistent with ANILCA and with Federal Subsistence Management Regulations. The regulations ignore regulatory and statutory definitions and criteria. The regulations authorize fishing that is not customary and traditional and that will lead to unnecessary restrictions on other users. The regulations ignore information that was available to the Board and requests from the State of Alaska for analysis of that information. The regulations provide a subsistence preference for residents of Cooper Landing and Hope for all species in an area when extensive data did not show a community pattern of use for all species or for the entire area covered by the determination. The regulations are

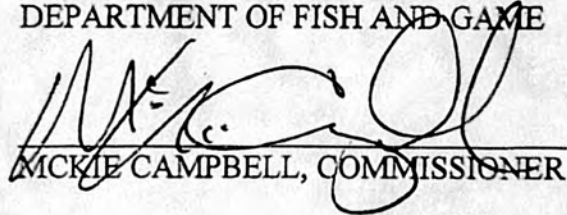
³⁵ See, e.g., Transcript at 525 (noting that "most people requested only the same quantities as provided for under State or current regs.")

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arbitrary and capricious. For these reasons, the State of Alaska respectfully requests that the Federal Subsistence Board reconsider its final rules finding customary and traditional use by Cooper Landing and Hope residents of all fish stocks in waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

DATED: 5/5/06


MICKIE CAMPBELL, COMMISSIONER

STATE OF ALASKA

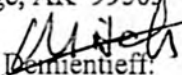
DEPARTMENT OF FISH AND GAME OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI
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May 5, 2006

Mr. Mitch Demientieff, Chair
Federal Subsistence Board
Office of Subsistence Management
3601 C Street, Suite 1030
Anchorage, AK 99503

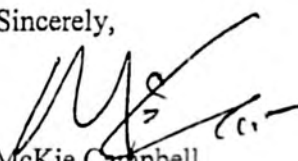
Dear Mr.  Demientieff:

As provided for in Subpart B, 36 CFR §242.20 and 50 CFR §100.20, of the Subsistence Management Regulations for Public Lands in Alaska, the Alaska Department of Fish and Game hereby requests that the Federal Subsistence Board reconsider those portions of the January 13, 2006, decision on Proposal WP06-09, adopting final rules establishing customary and traditional use determinations for the community of Ninilchik for the Kasilof River drainage, published in the Federal Register of March 29, 2006.

The attached Request for Reconsideration on Proposal WP06-09 details the reasons for our opposition to portions of this new federal regulation as adopted.

I urge the Federal Subsistence Board to carefully consider this request and act expeditiously.

Sincerely,


McKie Campbell
Commissioner

Enclosure

cc: Wayne Regelin, Deputy Commissioner, Alaska Department of Fish and Game
David Bedford, Deputy Commissioner, Alaska Department of Fish and Game

**REQUEST FOR RECONSIDERATION OF NINILCHIK PORTION
OF FEDERAL SUBSISTENCE BOARD PROPOSAL WP06-09
By State of Alaska**

I. Introduction.

The State of Alaska, through the Alaska Department of Fish and Game ("ADF&G"), respectfully requests that the Federal Subsistence Board (Board) reconsider those portions of the January 13, 2006, decision on Proposal WP06-09, adopting final rules establishing customary and traditional use determinations for the community of Ninilchik for the Kasilof River drainage, published in the Federal Register of March 29, 2006. A separate request for reconsideration is being submitted for those portions of the decision relating to Hope and Cooper Landing. Reconsideration is not being requested for the portions of FP06-09 relating to Tuxedni Bay.

Reconsideration is required because in adopting the final rule, "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR § 242.20(d); 50 CFR § 100.20(d).

The Ninilchik customary and traditional use determination for the Kasilof River drainage does not further ANILCA's purpose of providing an opportunity for rural residents engaged in a subsistence way of life to continue to do so, does not balance the competing purposes of ANILCA, is inconsistent with 36 CFR § 242.16 and 50 CFR § 100.16, will create a preference for uses that are not within the definition of "subsistence uses" in Section 803 of ANILCA, and will cause unnecessary restriction of nonsubsistence use in violation of section 815 of ANILCA. This determination was adopted based on data which had not been fully analyzed and was made without a reasonable examination of the eight regulatory factors for making customary and traditional use determinations. Further, the Board unreasonably declined to defer consideration of the proposal pending compliance with directions from the Secretary requiring the Board to develop written procedures or policies for customary and traditional use determinations. Because the adopted regulation designates fishing in an area as a customary and traditional use when such a designation was not supported on the record, it is arbitrary and capricious. As required by 36 CFR § 242.20(d)(4) and 50 CFR § 100.20(d)(4), a detailed statement follows.

II. Regulations Challenged.

At its meeting in January 2006, the Board considered Proposal WP06-09, amending the sections of 36 CFR § 242.24 and 50 CFR § 100.24 dealing with Cook Inlet

customary and traditional use determinations by adding positive customary and traditional use determinations for all residents of the Cook Inlet area for salmon, Dolly Varden, trout, char, grayling, and burbot taken in the Cook Inlet Area.¹

The Southcentral Alaska Regional Advisory Council supported the proposal with modification to limit the Kenai Peninsula District determination to residents of Hope, Cooper Landing, and Ninilchik. The majority recommendation of the Interagency Staff Committee (ISC) supported the proposal with this modification. The minority recommendation of the ISC supported modification to establish a positive customary and traditional use determination for the residents of Hope and Cooper Landing for salmon, Dolly Varden, trout, char and grayling for the waters north of and including the Kenai River drainage and to establish a positive customary and traditional use determination for residents of Ninilchik for salmon, Dolly Varden, trout (excluding steelhead) and char in the Kasilof River drainage.

During its meeting in January 2006, the Board adopted the Southcentral recommendation with modifications, adopting an "interim" finding, final as to the portion decided, but leaving the issue open for possible future expansion:²

For the community of Ninilchik an interim C&T determination is made for all fish species for waters within the Kasilof River drainage within the Kenai National Wildlife Refuge.

Transcript at 499-500.

The effect of the regulatory amendment is to provide a federal preference to residents of Ninilchik for harvest of all fish on federal lands in the Kenai National Wildlife Refuge within the Kasilof River drainage. Nonlisted rural residents, along with other state users, will not be eligible to participate in these fisheries and will be limited to participation in state fisheries. Increased harvest of fish not eligible for harvest under state regulations may require adjustment of seasons and harvest restrictions under state law and may in the future also lead to further restrictions on federal lands.

III. Discussion: The Regulations Are Inconsistent with Subsistence Management Regulations and ANILCA and are Arbitrary.

¹ The proposal also included provisions relating to a customary and traditional use determination for Tuxedni Bay; portions of the proposal relating to Tuxedni Bay are not presented because the State is not requesting reconsideration of the Board's positive customary and traditional use determination for Tuxedni Bay.

² See Transcript at 522.

A. The regulations are inconsistent with the regulatory definition of customary and traditional use and with application of the regulatory criteria for finding customary and traditional use.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board failed to follow the regulatory definition of customary and traditional use and the regulatory criteria for finding customary and traditional use.

The regulatory definition of "customary and traditional use," is: "[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community." 36 C.F.R. § 242.4; 50 C.F.R. § 100.4.

Subsistence use of fish on the federal lands in the Kasilof drainage does not fall within the regulatory definition of "customary and traditional use." The information available to the Board indicated that subsistence fishing had been prohibited "in all streams and lakes" of the Kenai Peninsula since 1952. Staff Report at 199. No evidence was presented to indicate that subsistence use of fish from the federal lands in the Kasilof drainage was ever part of a consistent pattern of use for the community of Ninilchik or that such use had ever played an important role in the economy of the community.³ Further, even if use could be shown to have been customary and traditional prior to regulatory changes in 1952, no evidence was presented to indicate that the character of the Ninilchik community had not changed since 1952;⁴ or that subsistence use of fish from the federal lands in the Kasilof drainage, if allowed, would play an important role in the economy of the community.⁵ Evidence which was presented showed very low levels of use of the Kasilof River drainage in general and even lower levels on federal lands.⁶

The regulations require the Board to determine which fish stocks and wildlife populations have been customarily and traditionally used for subsistence and to identify the specific community's or area's use of specific fish stocks and wildlife populations.

³ Available evidence indicated that it was more likely that subsistence activities prior to 1952 would have been primarily in marine areas because a road into the community was not built until 1951. Staff Report at 221.

⁴ Available evidence indicated that the character of the community has changed greatly and that the population is now "dominated by new residents who have full time jobs and are interested in recreational fishing and hunting," Staff Report at 221, and that residents no longer move seasonally to hunt and fish. *Id.*

⁵ Available information indicated that fish harvests are now "generally concentrated close to their homes." Staff report at 221.

⁶ See, e.g., Staff Report at 221-22; Transcript at 212-13; Fall et. al., Estimated Percentage of Ninilchik Households Fishing in the Kasilof River Drainage (2005).

36 C.F.R. § 242.16(a); 50 C.F.R. § 100.16(a). Eight specific factors which must be generally exhibited are established for finding customary and traditional use:

- (1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;
- (2) A pattern of use recurring in specific seasons for many years;
- (3) A pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics;
- (4) The consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from, the community or area;
- (5) A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate;
- (6) A pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation;
- (7) A pattern of use in which the harvest is shared or distributed within a definable community of persons; and
- (8) A pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.

36 C.F.R. § 242.16(b); 50 C.F.R. § 100.16(b).

The Board did not have adequate information and analysis before it to properly apply the eight factors, and the information available was not sufficient to show a "pattern of use" of all fish in fresh waters on federal public lands. The Board did not even attempt to apply the eight criteria in any level of detail.

The written staff report did purport to apply the eight factors; however, this analysis was perfunctory and was fundamentally flawed because it was not tied to "pattern of use" by residents of Ninilchik in waters on the federal public lands for each covered fish species. The regulatory requirement for customary and traditional use determinations is to "identify the specific community's or area's use of specific fish stocks and wildlife populations," 36 C.F.R. § 242.16(a); 50 C.F.R. § 100.16(a), thus, wherever the regulations require a "pattern of use," they are referencing a pattern of use of a specific area or of a specific stock or population by a specific community. Six of the

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eight factors refer to a "pattern of use." This "pattern of use" required by factors 1 through 3 and 6 through 8 was not shown.

The first and most important factor is a "long-term consistent pattern of use, excluding interruptions beyond the control of the community or area." The information available to the Board did not support a positive analysis for this key factor for any species, not to mention for all fish found in the area.⁷ The Cook Inlet Customary and Traditional Subsistence Fisheries Assessment indicated that

Federal public lands and waters were also relatively unimportant as fishing locations for interviewed Ninilchik residents in 2002/2003 . . . the Ninilchik River and Deep Creek, both under state management, were key fishing locations for Ninilchik households for chinook salmon, coho salmon, and Dolly Varden. Most Ninilchik households fished [sic] that fished for sockeye salmon used the lower Kenai River . . . with the Kasilof River and Ninilchik River also important for sockeyes . . .

Fall et. al. at 51. The oral staff report also indicated that harvests of Chinook, coho, sockeye, and Dolly Varden were taken from waters outside federal jurisdiction. Transcript at 213. Very little use was shown for any species other than salmon and Dolly Varden,⁸ and the staff report did not link the fish used to the federal public lands in the Kasilof River drainage. The use data summarized in the staff report applied to all use of fish, and the data relating to areas used applied to the entire Kasilof River Drainage, not just the federal lands, despite the fact that the majority of the fishing on the Kasilof River occurs below the boundary of the Kenai Wildlife Refuge. Even using this larger area, harvest rates by Ninilchik residents were extremely low.⁹

⁷ Fish found in the Kasilof river drainage include: Chinook, coho, sockeye, and pink salmon, lake trout, Dolly Varden, rainbow, and steelhead trout, and whitefish.

⁸ See Staff Report at 206 (Table 4)(only 5 percent of households used trout, and only 4.0 used char/lake trout, per capita annual consumption even of Dolly Varden was only .62 pounds, for trout it was .22 pounds, and for char/lake trout it was .03 pounds); see also Staff Report at 211 (Table 8)(showing 12 percent of households harvested Dolly Varden and 15 percent harvested char).

⁹ The highest harvest rate in the larger Kasilof River drainage area, including state and federal lands was 8 percent of households for sockeye salmon during the 2002/2003 study year. Within this area, rainbow trout and lake trout were harvested by 4 percent of households, and Dolly Varden were only harvested by 1 percent of households. See Staff Report at 219. Additional information provided by ADF&G indicated that lifetime usage rates were also low with only 36 percent of Ninilchik households having ever used the

Additional evidence of use was limited and was not fully analyzed. Some additional evidence of use may be available from 1994 and 1999 survey data collected by the Ninilchik Traditional Council; however this information was not available for analysis during the development of staff reports. The usefulness of these surveys in reflecting the use of the "community or area" is questionable because both studies involved a small number of individuals selected on the basis of long-term use rather than a representative sampling of the community or area. Additional evidence of historical use by individual residents of Ninilchik and their families was presented, but this evidence did not reflect a consistent pattern of use by the community or area.

The staff report attempted to build a case for a long-term and consistent pattern of use based on historical use by the Dena'ina Athabaskans, but the uses of the Dena'ina were not shown to be consistent or to be linked to usages by the current community. Harvest patterns were changed in the early 1800s by the development of the Russian fur trade and in the late 1800s by development of commercial fish packing, immigration of settlers, and decimating disease.¹⁰ By 1919, most Dena'ina were concentrated around the village of Kenai.¹¹ Uses were further changed by homesteading in the 1930s and 1940s, by the establishment of the Kenai Moose Range in 1941, and by construction of the Sterling Highway in 1951. In 1952, usage was further changed by prohibitions on the use of gill nets in most fresh waters which further emphasized reliance on marine fisheries, although some fresh water subsistence activities continued through snagging of salmon until that method was restricted in 1969 and made illegal in 1973.¹² Sport fishing continued in fresh water, but subsistence and personal use fishing was a marine activity by the early 1970s. Thus, uses of fish in the Kasilof Drainage were concentrated primarily in marine waters long before passage of ANILCA¹³, and, although some

larger Kasilof River drainage area, including state and federal lands. ADF&G's additional information indicated that only 1 percent of households used Tustumena Lake, the most significant waterbody within federal lands in the Kasilof drainage, during the 2002/2003 study year. See Fall et. al., Estimated Percentage of Ninilchik Households Fishing in the Kasilof River Drainage (2005).

¹⁰ Staff Report at 204; Fall et. al. 2004 at 19.

¹¹ Staff Report at 204; Fall et. al. 2004 at 20; Transcript at 205.

¹² Staff Report at 204; Fall et. al. 2004 at 22-23.

¹³ ANILCA was adopted in 1980 to allow rural communities engaged in subsistence way of life to continue to do so, not to create new subsistence opportunities or revive past subsistence practices. Therefore, even if a pattern of use had been shown before 1952, the pre ANILCA restrictions should not be considered an interruption of use under the first factor.

residents of Ninilchik are of Dena'ina descent, there is no clear linkage between historical use by the Dena'ina and use by the community of Ninilchik.¹⁴

The second factor is a "pattern of use recurring in specific seasons for many years." This pattern could not be shown for the federal public lands in the Kasilof River drainage based on the information available to the Board.

The third factor is a "pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics." This pattern could not be shown based on the available information. No information was shown to indicate why harvests in an area more than 20 miles from Ninilchik would be characterized as efficiency and economy of effort, when all of the fish species available in the federal lands of the Kasilof drainage, with the exception of lake trout, would be available in more accessible areas, particularly in marine waters, and state waters in the Ninilchik River Drainage, Deep Creek, and the lower Kasilof drainage. The staff reports, as well as public testimony provided to the Board, indicated that, since at least the early 1950s, any harvest within Federal lands has been consistent with generally inefficient rod and reel recreational fishing, not with efficiency and economy of effort¹⁵. Further, the available harvest data indicated very low harvest levels for species other than salmon even when all harvests, not just harvests in the federal lands of the Kasilof drainage, were considered.¹⁶ These low harvest levels are not consistent with a "pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost."

The sixth factor is a "pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation." Although knowledge of fishing and hunting skills may have been passed down from generation to generation in Ninilchik, the record does not show a community level pattern of use of the federal lands in the Kasilof drainage in relation to this factor. Use by a few members of the community does not show a pattern of use by the community.

¹⁴ Transcript at 205.

¹⁵ Methods of harvest, such as gillnets, are generally considered to be more efficient than rod and reel, although rod and reel can be an efficient harvest practice for some species and/or in some areas. In this case, more efficient harvest was achieved elsewhere regardless of the method.

¹⁶ Salmon are more efficiently available from waters within state lands, and the record indicated that with the possible exception of coho, salmon were harvested primarily in marine and lower river fisheries as early as the late 1800s. Even coho have not been subject to efficient harvest methods in fresh water since 1952.

The seventh factor is a "pattern of use in which the harvest is shared or distributed within a definable community of persons." The available information indicated that for species found in fresh water, other than salmon, there was very little sharing in Ninilchik. The available record indicated that the highest reported household rate of giving for nonsalmon freshwater fish was 5 percent of households for Dolly Varden, and that the highest household rate of receiving for nonsalmon freshwater fish was 4 percent for trout.¹⁷ Although salmon were shared at a higher rate,¹⁸ there was no evidence of a pattern of use in which salmon harvested from the federal public lands in the Kasilof drainage were shared.

The eighth factor is a "pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area." Again there was no documentation of a pattern of use relating to reliance on fish from the federal public lands in the Kasilof river drainage. Residents of Ninilchik rely upon a relatively low number of wild foods,¹⁹ most of the fish used by Ninilchik are harvested from state waters,²⁰ and uses and attempted uses of nonsalmon fresh water fish are extremely low indicating that they do not provide substantial cultural, economic, social, and nutritional elements to the community.

As shown above, based on the available information, the six factors requiring a "pattern of use" do not support a customary and traditional use determination. The available information indicates that the community of Ninilchik does not "generally exhibit" the "pattern of use" factors for use of fish from the federal public lands in the Kasilof River drainage.

Even the two factors that do not refer to a "pattern of use" are still tied to specific stocks and areas and uses of stocks in those areas under 36 C.F.R. § 242.16(a) and 50 C.F.R. § 100.16(a), and these factors do not support a customary and traditional use determination on the federal public lands in the Kasilof River drainage.

Factor four contains an explicit geographic reference:

¹⁷ Staff Report at 211.

¹⁸ Overall, grouping all salmon species, 46 percent of households gave salmon and 58 percent received salmon. Staff Report at 211.

¹⁹ See Staff Report at 226 (household average of 8.6 compared to 12.9 in Seldovia, 16.5 in Port Graham, and 21.5 in Nanwalek).

²⁰ See Fall et. al. at 51 (2004).

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A consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from the community or area.

36 C.F.R. § 242.16(b)(4); 50 C.F.R. § 100.16(b)(4). All of the salmon and fresh water fish available in the Kasilof River drainage, other than lake trout, are available in areas closer to Ninilchik. The methods and means used have not been consistent, with frequent changes over the years; little or no evidence of consistent use of the current rod and reel methods in federal lands in the Kasilof River drainage was presented.²¹ Prior to completion of the Sterling Highway in 1951, access to the Kasilof River drainage would have been more time consuming and less efficient than access to areas closer to Ninilchik. Thus, the record does not show the community of Ninilchik "generally exemplifies" factor four for use of the federal public lands of the Kasilof River drainage.

Factor five deals only with handling, but under 36 C.F.R. § 242.16(a) and 50 C.F.R. § 100.16(a) this use must be tied to the fish stock or wildlife population for which a C&T finding is made:

A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate.

36 C.F.R. § 242.16(b)(5); 50 C.F.R. § 100.16(b)(5). From the amounts harvested, as well as from much of the public testimony, it appears that much of what fishing that did occur in the federal public lands may have involved immediate consumption rather than preservation.²² The record does not support a finding that the community of Ninilchik "generally exhibits" handling, preparing, preserving, and storing fish from the federal lands of the Kasilof River drainage.

The eight regulatory factors for making a customary and traditional determination have not been properly applied and could not reasonably be applied, based on the available information, to show customary and traditional use by residents of Ninilchik. Any taking of fish stocks from outside the area in which historical use patterns have been shown does not fall within the regulatory definition of "customary and traditional use" because there is no "long-established, consistent pattern of use" of the stock or area. See 36 C.F.R. § 242.4; 50 C.F.R. § 100.4. As Commissioner Campbell

²¹ Prior to 1952 gillnets and seines were used in Tustumena Lake for commercial and subsistence fishing for freshwater fish. Transcript at 206.

²² See e.g., Transcript at 274 (Stokes: "basically we ate it that night"); 275 (Steik: "We mostly catch trout and grill them or fry them on a stick.").

pointed out to the Board, the standard isn't whether a species has "been eaten at one time or another for subsistence,"²³ and the Board is instead bound by existing federal regulations regarding customary and traditional use determinations. Thus, because use of fish from the federal public lands of the Kasilof River drainage is not a "customary and traditional" practice, reconsideration is required.

B. The regulations are inconsistent with ANILCA because they authorize a subsistence priority for fishing that is not customary or traditional.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board exceeded ANILCA's purpose of providing an opportunity for rural residents engaged in a subsistence way of life to continue to do so and did not adhere to provisions of Section 803 of ANILCA, which authorizes only "subsistence uses" which are defined as "customary and traditional uses."

Subsistence fishing in the Kasilof drainage ended long before the enactment of ANILCA, and thus any subsistence fishery represents a new opportunity and does not serve ANILCA's purpose of allowing rural residents engaged in a subsistence way of life to continue to do so. The information available to the Board indicated that subsistence fishing had been prohibited "in all streams and lakes" of the Kenai Peninsula since 1952. Staff Report at 199. If the Board had looked at ANILCA's purposes for the Kenai National Wildlife Refuge, it would have found that, unlike other refuges, its purposes do not include "continued subsistence use." Thus, since subsistence fishing ended over two decades prior to enactment of ANILCA, a subsistence fishery in this area does not further the purpose of continued subsistence use under ANILCA.

As shown above, the Board did not have substantial evidence before it that any fishing on the federal lands within the Kasilof River drainage within the Kenai National Wildlife Refuge was customary and traditional for residents of Ninilchik. Nonetheless the Board made a C&T determination for "all fish." Further, in making a determination for "all fish" the Board ignored information provided in the minority recommendation of the interagency staff report which noted that "none of the communities show **any** use of burbot," Staff Report at 192, and that steelhead populations "are thought to be very small" with no harvest currently allowed. *Id.* Thus, the Board made a customary and traditional use determination for "all fish" without any substantial evidence of such use and for two species despite evidence the fish stocks were not used or suitable for subsistence use.

"[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct.

²³ Transcript at 295.

2150, 2156 (1977). ANILCA authorizes only subsistence uses that are "customary and traditional." Section 803 of ANILCA defines "subsistence uses" as follows:

As used in this act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (emphasis added). To be a valid subsistence use under this section, then, any fishing allowed must be "customary and traditional." This statute should be narrowly construed because it constitutes a federal encroachment on a basic aspect of state sovereignty, a state's authority over management of fish and game within its borders.²⁴

Federal courts have already acknowledged that ANILCA only authorizes "customary and traditional" subsistence uses on federal public lands in Alaska. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). Under ANILCA and this judicial interpretation, only uses that are customary and traditional are authorized by ANILCA.

There is nothing in the record of the Board to show that fishing by residents of Ninilchik within the federal lands in the Kasilof River drainage is "customary and traditional". By making an unsupported customary and traditional use determination, the Board provides a subsistence priority for fishing that does not fall within ANILCA's definition of "subsistence uses." Thus, because the Board's actions providing a customary and traditional use determination for residents of Ninilchik for all fish in the federal public lands in the Kasilof River drainage is inconsistent with ANILCA, reconsideration is required.

²⁴ "[I]f Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, courts will not construe a statute to alter the federal balance unless that result is unmistakably clear in the language of the statute. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 768, 120 S.Ct. 1858, 1870 (2000). ANILCA's subsistence provisions involve the balance of federal power because management of fish and wildlife within its borders is "peculiarly within [a state's] police powers." *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 391 (1978).

C. The regulations are inconsistent with ANILCA because they are likely to cause unnecessary restrictions of nonsubsistence use.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board failed to recognize its duty to balance the competing purposes of ANILCA²⁵ and to prevent unnecessary restrictions on nonsubsistence uses. Section 815 of ANILCA provides:

Nothing in this subchapter shall be construed as:

...
(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law; . . .

16 U.S.C.A. § 3125(3) (2000). Under section 303 of ANILCA, the purposes for the Kenai National Wildlife Refuge, unlike other refuges, do not include "continued subsistence use" but do explicitly include "opportunities for fish and wildlife-oriented recreation."

Although the unsupported customary and traditional use determination in this case does not impose direct immediate restrictions on taking of fish and wildlife for nonsubsistence use and, in fact, narrows the potentially eligible users, it can be expected to lead to liberalization of take provisions²⁶ and thus cause unnecessary restrictions for other users. As Commissioner Campbell stated to the Board:

Once the C&T determination is in place, I believe you have started down the legal road where it is very hard not to then react favorably to subsequent proposals that you will receive regarding nets, regarding seasons, regarding bag limits, methods and means, all of these things.

Transcript at 289. The Board failed to even recognize the recreational purposes of the Kenai National Wildlife Refuge in its deliberations, let alone balance them, and to avoid actions that would cause unnecessary restrictions on recreational uses. Following the Board meeting, the Southcentral Regional Advisory Council voted against

²⁵ See *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000).

²⁶ Current federal subsistence provisions mirror state sport regulations, thus the only preference currently available to federal users is that they do not have to purchase a state fishing license if they limit their fishing to federal public lands.

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implementation of the Board's recommendation for formation of a subcommittee to address methods and means, thereby greatly decreasing the chances for development of compromise measures that would not cause unnecessary restrictions to other users. The Board's regulatory action, if not corrected, will lead to unnecessary restrictions on nonsubsistence uses in violation of section 815 of ANILCA and without balancing ANILCA's purposes for the Kenai National Wildlife Refuge.

D. The Board's interpretation of existing data was in error because it was not based on full analysis of available information.

Reconsideration is required because the Board did not consider all available information, and this failure led to an incorrect determination. The Board failed to consider ANILCA's purposes for the federal lands in the Kasilof River drainage and failed to thoroughly analyze available information relating to uses of fish by the residents of Ninilchik.

The federal lands in the Kasilof River Drainage are in the Kenai National Wildlife Refuge. Under section 303 of ANILCA, the purposes for the Kenai National Wildlife Refuge, unlike other refuges, do not include "continued subsistence use" but do explicitly include "opportunities for fish and wildlife-oriented recreation." The Board failed to recognize the unique purposes of the Kenai National Wildlife Refuge under ANILCA and did not properly balance the competing purposes of ANILCA as required under *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000). Proper balancing of the competing purposes of ANILCA and considering the pre-ANILCA limitations on fishing in the Kenai National Wildlife Refuge would have allowed the Board to conclude that a customary and traditional use determination for fresh water fish for residents of Ninilchik on the federal lands in Kasilof River drainage was not warranted.

The Board also failed to fully analyze the available information. The State provided a sample analysis of the additional information regarding use of the Kasilof drainage that could be extracted from the data gathered in the Cook Inlet Customary and Traditional Subsistence Fisheries Assessment²⁷ and requested further analysis. Information regarding past fishing activities collected through page 20 of the Survey Instrument (Appendix A of the 2004 Cook Inlet Customary and Traditional Subsistence Fisheries Assessment) was not analyzed.²⁸ The State also requested further analysis of the studies conducted by the Ninilchik Tribal Council and an opportunity to review the

²⁷ See Estimated percentage of Ninilchik Households Fishing in the Kasilof River Drainage (November 10, 2005).

²⁸ Some of the information relating to whether households had ever been involved in selected fisheries was summarized, but other data regarding duration, frequency, harvests, and reasons for non participation were not analyzed.

study results and methodology. The specific study results were not made available to federal or state staff prior to the Board meeting and were not subject to a technical assessment by staff prior to the Board's decision. The Solicitor's Office, in defending the Board's consideration of the option of deferring final C&T determinations, noted that the Board was faced with a unique situation in which all the data had not been fully analyzed and where a more careful weighing of evidence might be warranted:

As to evidence, it's always judged in context, it's the only thing that makes any sense. And in an easy case, in a remote area of the state you probably need very little evidence and we have certainly acted on evidence that is less in quantity than we have in front of us here today. In this case, however, the context is complicated. The landscape is contentious. We have two groups of eligible users who disagree. And we also have at least three sets of data that are unanalyzed. And in my experience with the Board that's the first time we actually have stuff but we haven't put it together yet.

Transcript at 507. These same statements are just as true of the portion of the proposal that the Board did act on providing a customary and traditional use determination for Ninilchik in the Kasilof River drainage. The Board incorrectly determined that a compromise determination could be made without analysis of the available data. Thus, because the Board's determination was made without fully considering all available information, it should be reconsidered.

E. The regulations are arbitrary and capricious.

In order to be valid, regulations must be reasonable and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (U.S. 1971).

The Board regulations making a customary and traditional use determination for Ninilchik for all freshwater fish on the federal lands in the Kasilof River drainage is arbitrary and capricious because the Board failed to respond to concerns raised by the State and Secretary that the Board needed to develop written procedures and policies to govern customary and traditional use determinations. As a result of the failure to develop and follow clear procedures and policies, the Board took action that was not consistent with its own regulations.

Prior to the Board's action, the State raised concerns regarding inconsistency and lack of standards used by Board for making customary and traditional use determinations. The Secretary responded to these concerns and, on October 27, 2005, directed the Board to develop written procedures or policies for customary and traditional use determinations

and to review "whether analytic thresholds and benchmarks for certain criteria are needed and appropriate for inclusion in the decision process." The State requested that the Board delay further customary and traditional use determinations until after development of these policies and procedures and pointed out that, even if some customary and traditional use determinations might be appropriate before development of these policies, action on FP06-09 would not be appropriate.²⁹ The Commissioner pointed out that the standard is not whether a resource has been eaten for subsistence, and that, if that was the standard, the Board's review process would be unnecessary:

I believe that there's probably nowhere in Alaska you can find that any species that exists hasn't been eaten at one time or another for subsistence. But if that's the standard, I can save you guys a lot of time. You don't need to do this you know. It's just all customary and traditional use. The fact that you're going through this implies that that is something – it must be narrower than the fact that, you know, I don't think there's a thing in Alaska that somebody hasn't eaten at some point when they were hungry enough and in need and they happened to be there.

So, while I have my standard of what long-term consistent pattern of use would be, what I think is most as [sic] important that this Board have its standard that it can apply consistently case by case and that's why I'm simply suggesting that you delay until you work that out.

Transcript at 295. The Board proceeded to make a customary and traditional use determination without first developing any written policies or procedures, and without defining what would constitute a "pattern of use" by a community. As a result the Board made a determination despite the complete lack of evidence of a community level "pattern of use."

The object of the final rules is purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate that the fishing allowed is customary or traditional. The term "customary and traditional use is defined by regulation to mean:

[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community.

36 C.F.R. § 242.4; 50 C.F.R. § 100.4. Customary and traditional use is determined by applying eight regulatory factors which a community must "generally exhibit." While

²⁹ See, e.g., Transcript at 287.

the State agreed that it is not necessary for a community to demonstrate all eight criteria, as the Commissioner indicated to the Board, some of the factors must be met, and a long-term consistent pattern of use must be shown:

As was pointed out earlier you don't have to meet all eight factors, but it is important that you sort of meet some of them. As Ms. Armstrong correctly said I believe, if you don't meet the first, long-term consistent pattern of use, you might as well not bother with the rest.

Transcript at 286. The Board proceeded to make a customary and traditional use determination without developing a record to show a community level "long-term consistent pattern of use," and without showing that such "use plays an important role in the economy of the community." Thus, the Board's action in providing a customary and traditional use determination for Ninilchik for all freshwater fish on the federal public lands in the Kasilof River drainage was arbitrary and capricious because it was inconsistent with both the regulatory definition of "customary and traditional use" and with the regulatory requirements for finding "customary and traditional use."

The Board's failure to adopt and follow a written policy for customary and traditional use determinations, and its failure to follow its own regulations defining customary and traditional use and regulations listing factors that must be "generally exhibited" before a positive customary and traditional use determination is made renders the final rules arbitrary and capricious. Accordingly, the Board should reconsider its decision to adopt these invalid regulations providing a customary and traditional use determination for Ninilchik for all freshwater fish in the Kasilof River drainage.

F. New information requires reconsideration.

The Board appears to have relied upon the assumption that stakeholders would meet as a subcommittee under the Southcentral Regional Advisory Council and develop subsistence preference provisions that would be acceptable to all user groups.³⁰ At its meeting on March 14, 2006, the Southcentral Regional Advisory Committee voted against implementation of the Board's recommendation for formation of a subcommittee to address methods and means. This is new information which undermines the basis of the Board's decision and justifies reconsideration.

IV. Conclusion.

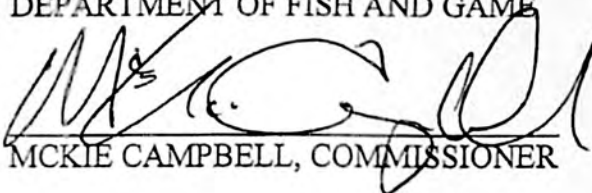
³⁰ See, e.g., Transcript at 525 (noting that "most people requested only the same quantities as provided for under State or current regs.")

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The regulations finding customary and traditional use of fish stocks on federal public lands in the Kasilof River drainage for residents of Ninilchik are inconsistent with ANILCA and with Federal Subsistence Management Regulations. They ignore regulatory and statutory definitions and criteria. They authorize fishing that is not customary and traditional and that will lead to unnecessary restrictions on other users. They ignore information that was available to the Board and requests from the State of Alaska for analysis of that information. They provide a subsistence preference for residents of Ninilchik in an area when extensive data showed use by only a few individuals, not a community pattern of use. The regulations are arbitrary and capricious. For these reasons, the State of Alaska respectfully requests that the Federal Subsistence Board reconsider its final rules finding customary and traditional use of fish stocks on the federal public lands in the Kasilof River drainage for residents of Ninilchik.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

DATED: 5/5/06


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