

Alaska Federal Subsistence Program

A brief summary of aspects of the statute, program structure and other components of the Federal Subsistence Management Program



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What convinced Congress to act?

"Subsistence defines us. We battle the elements and sometimes risk our life to get the foods we crave. It is not an easy life, but it is ours."

Arthur Lake,
Kwigillingok Tribal Member

Subsistence Harvest in Rural Alaska

- Approx. 400 pounds per person per year (56% fish)
- Up to \$275M per year replacement cost (2016)
- 44.0M pounds of food per year



Congressional Actions

- Alaska Native Claims Settlement Act (1971)
 - “The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.”
- ANILCA House Hearings, Rep. Morris Udall, (Nov. 12, 1980)
 - “[n]either the Secretary nor the State of Alaska made sufficient effort to abide by the direction of the Conference Committee. ... Overwhelming evidence of their failure, or at best indifference, has been thoroughly documented in [Congressional] hearings . . .”



What did Congress conclude?

- Section 801. The Congress finds and declares that--
 - the continuation of . . . subsistence uses by rural residents of Alaska, including both Natives and non-Natives, . . . is essential to . . . physical, economic, traditional, and cultural existence . . .
 - in most cases, no practical alternative means are available to replace the food supplies . . .

Why did Congress pass Title VIII?

- Section 802. It is hereby declared to be the **policy** of Congress that–
 - (1) consistent with . . . the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence;



And . . .

- (2) nonwasteful subsistence uses . . . shall be the **priority** consumptive uses . . . when it is necessary to restrict taking in order to assure the **continued viability** of a fish or wildlife population or the **continuation of subsistence uses**

The Heart and Soul of Title VIII

- Section 804 – first sentence:

“Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.”



What does section 804 mean by “subsistence uses?”

- Section 803 defines “subsistence uses” as
 - 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.



Who are “rural Alaska residents?”

Kenaitze Indian Tribe v. State, Ninth Circuit (1988)

- The Court rejected the State’s definition of “rural,” which required the area’s economy to be dominated by subsistence fishing and hunting and excluded areas characterized primarily by a cash economy.
- Instead, the Court said that “rural” is “a standard word in the English language commonly understood to refer to areas of the country that are **sparsely populated**, where the economy centers on agriculture or ranching.”

What is the significance of the phrase “customary and traditional?”

- ANILCA Senate Report – the phrase is meant to emphasize the “protection and continuation” of subsistence, not to limit it.
- A C&T determination is a determination that a community or area has taken a species *within a specific area* (*Alaska v. U.S. (Chistochina)*, 9th Cir. 2008)
- Many now view positive C&T determinations as a validation of traditional subsistence use areas

What does section 804 mean when it refers to “public lands?”

- Section 102 -- The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands except [land selections by the State of Alaska or Native corporations].



What does section 804 mean when it refers to “public lands?” cont’d

- Section 102 -- The term “land” means lands, waters, and interests therein.



Which waters are included in “public lands”?



- All non-navigable waters located on Federal lands.
- All waters subject to a pre-statehood Federal withdrawal.
- *Katie John* litigation -- all navigable waters within, near or adjacent to federal lands where there is a federal reserved water right.
- *Peratrovich* litigation – all marine waters located in southeast Alaska where there was a pre-statehood federal withdrawal (not including the withdrawal for the Tongass National Forest)

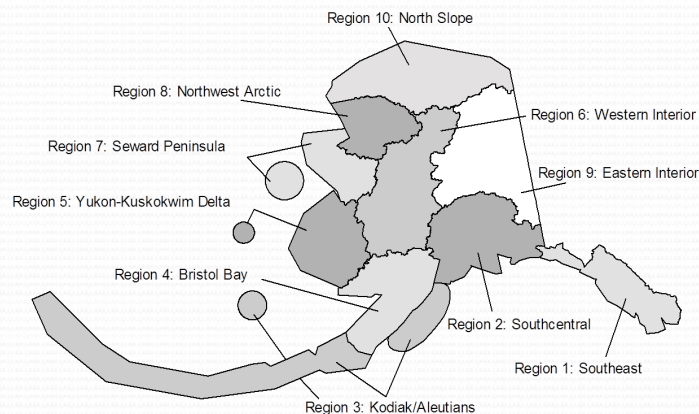
What does “priority” mean in Section 804?

Ninilchik Traditional Council v. U.S. (9th Cir. 2000)

- The word “priority” does not mean that subsistence absolutely preempts everything else
- Rather, the Board must give subsistence users a “**meaningful preference**” while balancing subsistence with conservation and other uses

The Brain of Title VIII

- Section 805 – Requires the creation of at least six subsistence resource regions with a regional advisory council (or RAC) composed of local residents for each region -- we have ten regions and ten RACs.
(60%/40%)



Section 808 – Park and Monument Subsistence Resource Commissions

- Establishes one SRC for each park or monument where subsistence uses are permitted
- Like the RAC, each SRC provides a forum for input by local residents and makes recommendations regarding that park's program for subsistence uses
- Each park and monument has its own regulations that are adopted by the National Park Service, not the Federal Subsistence Board

Section 814 – Regulations



- Subsistence regulations at 50 C.F.R. 100 are divided into four subparts:
 - Subparts A and B include general provisions and address the structure of the program – Secretarial only
 - Subpart C sets out Board determinations including rural designations and customary & traditional use determinations
 - Subpart D – Board determinations for the subsistence taking of fish and wildlife – methods and means, harvest limits, opening and closing dates, etc.

Section 814 – Regulations cont'd

- Allows the Secretary to prescribe regulations necessary and appropriate to implement Title VIII
 - By regulation, the Secretaries established the Federal Subsistence Board and delegated to the Board much of the decision making authority for the taking of fish and wildlife on public lands. (50 C.F.R. § 100.10).
 - 50 C.F.R. § 100.10(d)(9) - *The U.S. Fish and Wildlife Service shall provide appropriate administrative support for the Board.* This regulation places the Office of Subsistence Management within the US Fish & Wildlife Service, where the agency recruits, selects and supervises its' leadership and has oversight of its' annual operating budget.
 - The Secretaries also required the creation of the Interagency Staff Committee (ISC) to provide the Board with analytical and administrative assistance. Agency Members have 1-2 ISC support staff, Public Members (and Chair) share one.



Voting members of the Federal Subsistence Board



- Chairman – appointed by the Secretaries (AK Tribal Member)
- Two representatives of rural subsistence users – also appointed (Both AK Tribal Members)
- Department of the Interior – Regional or State Directors of the Bureau of Indian Affairs and the three land managing agencies
 - Bureau of Indian Affairs, National Park Service, Bureau of Land Management, Fish & Wildlife Service
- Department of Agriculture
 - US Forest Service – Regional Forester



Subsistence Program Structure and Sources of Input

- Office of Subsistence Management (OSM)
 - Drafts an analysis of each proposal and special action
 - Coordinates Council and Board meetings
 - Drafts regulations, Federal Register notices, and press releases
- Regional Advisory Councils (RAC)
 - Allows meaningful local input into the management of subsistence resource. Reviews and evaluates proposals for regulations, policies and management plans. FSB gives “Deference” for “Take” regulations and CNT Determinations
- Subsistence Resource Commissions (SRC) (National Park Service)
 - Make recommendations relating to subsistence uses in parks and monuments
- Tribes/ANCSA Corporation Consultation
- Interagency Staff Committee (ISC)
 - Reviews technical merits of analyses and tries to identify any areas of concern
- State of Alaska (Equal standing as RAC Chairs in regulatory process)
- Public Comments and Testimony

- Federal Subsistence Board



That's all Folks!