

**White Paper:**  
**POLICY ADMINISTRATIVE DIRECTION NEEDED**  
**TO RESOLVE SIGNIFICANT ISSUES BETWEEN STATE AND FEDERAL SUBSISTENCE PROGRAMS**

**I. BACKGROUND**

**EVOLUTION OF THE DUAL SUBSISTENCE PROGRAMS:** Beginning in 1960, the Alaska Department of Fish and Game became responsible for management of fish and wildlife populations on all lands in the state while the Boards allocate and regulate harvests of sustainable yield for a variety of uses. Since 1978, State of Alaska law provides a preference for subsistence uses of fish and wildlife by all Alaskan residents on all lands regardless of ownership, with minor exceptions. In 1980, Congress adopted the Alaska National Interest Lands Conservation Act (ANILCA) in which Title VIII established that nonwasteful subsistence uses of fish and wildlife by rural residents are given a preference on federal public lands over other consumptive uses. Congress also recognized the responsibility and authority of the State of Alaska for management of fish and wildlife on all lands (ANILCA Section 1314). Until 1990, the State's regulatory program implemented both the state and federal subsistence laws.

In 1989, the Alaska Supreme Court<sup>1</sup> decided that, under the Alaska Constitution, the state can not allocate harvest preference among Alaskan residents based on rural residence, but the state can allocate a preference for subsistence based on other criteria. In 1990, the Secretaries of Agriculture and Interior adopted the state's subsistence hunting regulations to fulfill the federal responsibility on federal public lands under ANILCA Title VIII, noting that the State was already meeting the requirements of ANILCA. A federal program responsible for assuring the ANILCA preference for subsistence uses of wildlife by rural residents on federal lands was established in 1992, with adoption of a programmatic EIS and regulations that establish a federal regulatory structure and Federal Subsistence Board. In 1995, the federal court defined federal public lands to include certain waters, thereby extending the federal responsibility to assure a preference for subsistence use of fish by rural residents. In 1999, the Federal agencies adopted the State's fishery regulations as part of assuming responsibility to assure the subsistence preference for rural residents on waters added to the definition of federal public lands<sup>2</sup>.

Currently, the state and federal regulatory programs both continue to provide a subsistence preference on federal public lands. The Alaska Department of Fish and Game continues to manage fish and wildlife on all lands in the state, and the Alaska Boards of Fish and Game continue to provide the subsistence preference on all lands and waters where subsistence harvests are allowed, regardless of ownership. Thus, the State's program provides a subsistence preference to a larger portion of Alaska residents than the federal program. The federal regulations largely mirror the state's regulations on federal public lands except where the Federal Subsistence Board has taken action to close or restrict other residents on federal public lands.

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<sup>1</sup> *McDowell v. State*, 785 P.2d 1.

<sup>2</sup> Throughout this document, the term "federal public land" refers to both land and water as defined in ANILCA 102(3) and modified by federal court to include waters within conservation system units and navigable waters adjacent to units where there is a Federal Reserved Water Right.

The implementation of dual regulatory programs in 1992 was controversial, triggered litigation, and both state and federal legislative 'fixes' were pursued but died on the vine. Over the next decade, the state continued to provide for subsistence uses on all lands in the state while the federal program retained and revised the state's subsistence regulations for uses on federal public lands. The State of Alaska repeatedly requested resolution of significant issues that impact the state's management of fish and wildlife and the subsistence users themselves due to duplicate programs and regulations.

In 2003, with no changes in state or federal law in sight, Governor Murkowski focused efforts toward reducing impacts of the duplicate federal and state subsistence programs. The Governor elevated to the Secretaries long-standing problems in the dual programs, including unnecessary duplication, costs, inefficiencies, public confusion, and intrusion on the State management of fish and wildlife. In 2004, the Secretary of the Interior's policy representatives met with State policy officials and agreed to review the problems and seek resolution while continuing to fulfill the requirements of ANILCA. As a start, the Secretary and Governor filled the State liaison seat on the Federal Subsistence Board in order to facilitate consideration of the State's expertise on fish and wildlife and its uses during decision deliberations.

The Secretary is committed to maximizing cooperation and minimizing intrusion in the State management of fish and wildlife while also assuring the federal subsistence law is fully implemented. The Governor is committed to assuring the federal and state subsistence laws are fully implemented. In early 2005, the State provided correspondence identifying major issues to representatives of the Secretaries of Interior and Agriculture, who assigned policy representatives to cooperate with the State in order to evaluate the issues and possible administrative solutions. State and federal policy representatives are continuing to meet and cooperatively develop options toward resolution. Resolution is achievable due to the commitment by current state and federal administrations to assure that the federal and state laws according a subsistence preference use of fish and wildlife are fully implemented.

While steps are underway to improve coordination between the state and federal subsistence programs, successful resolution of some of the primary issues of the dual programs will require clarification of federal policy through issuance of Secretarial directives. These policy directives may be adopted in the form of formal published policy or instructional memos. Such directives are within the discretionary authority of the Secretary and are necessary to implement recommended changes in administration of the federal program. Both long-term and short-term goals can be achieved through adopting improvements in the existing administrative procedures of the federal regulatory program described below. Other recommendations, not detailed below, will entail additional procedures before adoption by the federal board or Secretary.

**ISSUES:** On April 18, 2005, Federal and State Policy administrators discussed the following significant issues:

- the needed priority for the federal program to establish an analysis process to identify a "meaningful subsistence preference" before adopting regulations
- inconsistent evaluation of evidence in Federal Board procedures before rendering determinations of "customary and traditional use,"

- incomplete evaluations by the Federal Board of criteria in ANILCA Section 815(3) before restricting non-subsistence uses, and
- other significant problems due to lack of a process to reduce duplication of state regulations and insufficiency of federal land to support some federal harvests.

As an outcome of the above discussion, this “white paper” was developed to summarize state and federal authorities available to take action and Secretarial policy direction needed to facilitate resolution of these issues in federal administrative procedures, consistent with ANILCA:

1. **Customary and Traditional Determinations**—Objective, standard criteria need to be established in Federal Board procedures for evaluating evidence before making customary and traditional findings of specific subsistence uses. Future customary and traditional use determinations should be based on substantial evidence supporting the determination. Written findings should record a deliberate decision process based on long-established user practices. Existing determinations need to be reviewed over time to develop written findings and ensure that the determinations are supported by substantial evidence. Consistent and thorough application of the existing federal regulatory criteria, providing a thorough analysis of each criterion, and enumerating each use would result in a standard of evidence for federal determinations that would more accurately identify subsistence uses and avoid unnecessary restrictions on other subsistence users and nonsubsistence uses. See Section II of this white paper for a thorough analysis of this significant issue and its proposed resolution.

**Recommendation**—Provide Secretarial direction to adopt regulatory standards for making a customary and traditional use determination.

2. **Restrictions on Non-subsistence Uses**—Substantial evidence needs to be required in Federal Board procedures and documented in written findings showing that a closure or restriction on consumptive uses by those not qualified as federal subsistence users is clearly necessary for the conservation of healthy fish and wildlife populations or to continue subsistence uses of such populations. When considering such proposals, the Secretary and Federal Board should balance the competing purposes of ANILCA and consider whether such measures might be detrimental to the satisfaction of subsistence needs because impacts on subsistence might occur as a result of the restriction. Written findings are needed to ensure that the closure or restriction will be reviewed and eliminated when no longer necessary. Existing closures and restrictions should be reviewed to determine whether there is substantial evidence showing that they are necessary, and new findings to support continued closure or restrictions should be required on a scheduled periodic basis. See Section II of this “white paper” for a thorough analysis of this significant issue and its proposed resolution.

**Recommendation**—Provide Secretarial direction to the Board that any closure or restriction on consumptive uses of an area be documented in written findings that the limit is supported by substantial evidence as necessary for the conservation of healthy fish and wildlife populations or to continue subsistence uses of such populations, and to implement a process review periodically whether the restriction needs to be continued.

3. **Meaningful Preference for Subsistence**—Both state and federal administrators are responsible for providing a priority for subsistence uses of fish and wildlife while allowing other beneficial uses consistent with ANILCA and state law. The Federal Board should establish the amounts of fish and game needed for subsistence uses (subsistence use amounts) to indicate whether the federal priority opportunity for rural residents is being provided and whether it is appropriate to evaluate, among other things, management actions that would affect other uses.

The State completed assessments of the amounts necessary for subsistence for most populations on all lands and waters, and the Alaska Boards established determinations as a measure for managers to gauge the level of success in meeting the priority subsistence use. In those instances in which subsistence harvests consistently fall outside the harvest range identified as necessary for subsistence, managers and regulators are alerted to the need to explore the causes for the change in harvests, including assessing the potential need for management action for nonsubsistence harvests. Until the Federal Board likewise identifies subsistence use amounts necessary to assess the federal priority on federal public lands, there is no consistent measure of whether the State regulations are already providing the federal priority or whether the Federal Board should consider action to facilitate subsistence harvests. This basic analysis needs to be completed before the Federal Board acts to evaluate whether the priority is provided or whether subsistence harvest patterns have changed. The need for Federal Board action to establish this analytic process is one of the highest priorities for resolution.

**Recommendation:** Provide Secretarial direction to prioritize federal participation to finalize the interagency protocol dealing with establishment of subsistence use amounts.

4. **Duplicate Regulations**—Federal subsistence regulations extensively mirror state subsistence regulations, creating a morass of divergent and duplicate regulations that are not necessary to provide the federal preference for subsistence use by rural residents. The situation is confusing for the public due to different permit requirements, seasons, bag limits, and boundaries. It also confounds law enforcement, is costly for the agencies, and intrudes in the State's responsibilities for management of fish and wildlife on all lands. The wholesale adoption of state regulations by federal agencies in 1990 was intended to implement the rural priority requirement in ANILCA based on a perceived need due to the state court disallowing a preference based on rural residency. While the State contests the legal basis and need for federal creation of a comprehensive regulatory program, the State recognizes the federal responsibility to assure the implementation of a meaningful preference for subsistence uses by rural residents on federal public lands, however, the State provides a subsistence preference to a larger set of residents than the federal program. Therefore, changes to the federal program are needed to meet the requirements of ANILCA but minimize impacts on state fish and wildlife management and regulation of public uses. This is consistent with the Interim Memorandum of Agreement that was signed by the State and Federal Boards and agencies in 2000.

As a result of the State and Federal Policy representatives meeting in April, policy staff are evaluating adoption of administrative steps that assure the federal and state laws providing for subsistence are met, while avoiding unnecessary Federal Board action in the future and eliminating existing regulations not necessary to meet the federal subsistence preference. The most significant issue that needs Secretarial direction is confirmation that the federal preference can be met by reference to state regulations that are sufficient. See Section II of this "white paper" for a thorough analysis of this significant issue and its proposed resolution

**Recommendation:** Provide Secretarial direction for the Federal Subsistence Board to minimize its impacts on the State's management, including providing other beneficial uses of fish and wildlife, consistent with ANILCA 815(3). Three actions are necessary:

- (1) Future federal subsistence regulations—enact a determination process by the Federal Board in evaluating proposals that considers whether the state is already providing the subsistence priority for rural residents on federal public lands; and
- (2) Existing federal subsistence regulations—Adopt a process to review and delete existing regulations where the state is providing the federal priority for subsistence use by rural residents on federal public lands.<sup>3</sup>
- (3) All federal regulations—Regulations adopted by the Federal Board should be accompanied by written findings, based on consistent standards, describing why state regulations do not adequately provide for subsistence needs and do not provide a meaningful preference for subsistence.

## II. PROPOSED SECRETARIAL INSTRUCTIONS

Consistent with the above background and issues discussion, the following provides both a proposed "preamble" and policy instructions for possible adoption by the Secretary as Secretarial Instructions or formal policy:

### Federal Policy Related to Subsistence Administration

In 1983, the Secretary of the Interior issued a revised policy on state-federal relationships to clarify fish and wildlife authorities, agency jurisdictions, increase accountability, and to reduce confusion in agency programs. That policy (43 CFR Part 24) reaffirms the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands. It also clarifies that the power of Congress respecting the taking of fish and wildlife is exercised as a restrictive regulatory power. In keeping with Congress' delegation of authority and the Secretary's Policy, a specific policy is hereby adopted to clarify the respective regulatory responsibilities of the State

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<sup>3</sup> 36 CFR 242 and 50 CFR 100. 50 CFR 100.14 states: "(a) State fish and game regulations apply to public lands and such laws are hereby adopted and made a part of the regulations in this part to the extent they are not inconsistent with, or superseded by, the regulations in this part. (b) The Board may close public lands to hunting, trapping, or fishing, or take actions to restrict the taking of fish and wildlife when necessary to conserve healthy populations of fish and wildlife, continue subsistence uses of such populations, or pursuant to other applicable Federal law. The Board may review and adopt State openings, closures, or restrictions which serve to achieve the objectives of the regulations in this part. (c) The Board may enter into agreements with the State in order to coordinate respective management responsibilities."

of Alaska and the Federal Subsistence Board in providing priority opportunity for subsistence through fish and wildlife harvest regulations.

Under Title VIII of the Alaska National Interest Lands Conservation Act (PL 96-487) of 1980, *“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”*. Since 1978, a priority opportunity for subsistence use is provided by the State fish and wildlife management agency on all lands in Alaska. In 1989, the State Supreme Court determined that the state’s constitution prohibited providing a priority use to persons based on location of residence, but upheld that a priority can be provided. The Secretary of the Interior responded in 1990 by determining that the State was not in compliance with Congress provisions for a rural priority, thus established a federal regulatory program to assure that priority opportunity for rural residents on federal public lands.

A review of the federal subsistence regulations beginning with 1990, and of the EIS and Record of Decision adopted in 1992 for the federal subsistence program, reveal **the Secretary’s decision to create a subsistence management program and adoption of the state’s regulations was an administrative action** reacting to the immediate need to meet Congress ANILCA requirements on federal public lands. In other words, duplication of the State’s regulations was enacted during initial phases of establishing the federal program because the State’s program and regulations met the requirements of the federal law (with the exception of the rural limit on eligibility); e.g., preamble FR 29311 June 26, 1991:

*These regulations use existing State of Alaska regulations relevant to subsistence management as much as possible. The majority of seasons and bag limits and methods and means of harvest regulations in subpart D are very similar or identical to the current State regulations. State regulations promulgated prior to the effective date of the McDowell decision are presumed to fulfill the title VIII requirements since the State’s program was considered to meet the general applicability requirements of section 805(d) of ANILCA.*

Nothing in the ensuing regulations nor the Programmatic EIS/ROD adopted in 1992 that established the Federal Subsistence Board precludes the Secretaries’ ability to reassess this 15-year old administrative decision and determine, henceforth, to only adopt regulations when necessary to provide the priority opportunity for subsistence uses by rural residents on federal public land.

The decision to evaluate and eliminate unnecessary duplication will reduce confusion among residents dependent upon subsistence uses of fish and wildlife, who presently refer to two sets of regulations that apply on most federal public lands. Elimination of duplicative regulations also reflects sound fiscal responsibility in that, despite millions of dollars expended each year to administer an extensive federal subsistence regulatory program that largely duplicates the State’s program, only 29 hunts and 5 fisheries close federal public lands to non-rural residents in order to provide a meaningful subsistence preference for subsistence needs of rural residents. All other federal wildlife and fish subsistence harvest regulations deviate due to residual changes by one or the other Board or for reasons other than necessary to provide the federal priority.

**Draft Proposed Instructions concerning Regulations:**

Consistent with the 1983 Policy and Interior's public policy of minimal intrusion and maximum cooperation, the Departments of the Interior and Agriculture confirm:

(1) **Future Regulations:** The Federal Subsistence Board will adopt regulations only as necessary to meet the federal subsistence preference if it is not provided by the State regulations, and

- All regulations adopted by the Federal Subsistence Board will be accompanied by written findings describing why state regulations are not adequately providing the ANILCA preference for subsistence by rural residents on federal public lands.
- Consistent standards will be developed for use in decision-making where federal regulations supplement, contradict, or preempt state authority or regulations; and use of these standards will be documented in the written findings. These standards will be implemented by December 2005.
  - a) Customary and Traditional Determinations: Under Title VIII of ANILCA, subsistence is defined as the "customary and traditional use of fish and wildlife." The Federal Subsistence Board will consider proposed harvest regulations where evidence clearly demonstrates on the record that specific subsistence uses are in fact customary and traditional. A finding of any subsistence use is only sufficient to support authorizing that specific subsistence use, not all subsistence uses. A written finding and analysis will be based on supporting evidence directly related to those specific uses, i.e., a clear record of the pattern of subsistence use, including substantial evidence that justifies findings that differ from those made by the State Boards of Fish and Game.
  - b) Restrictions on non-subsistence uses: Closures of federal public lands to only federally qualified subsistence users are allowed only if necessary to provide for the ANILCA preference for subsistence by rural residents. Areas will not be closed to non-federally eligible users where the state's determination of a harvestable surplus exceeds the amounts necessary for subsistence. The Federal Subsistence Board will establish standards of factual evidence or information that must be met before areas are closed or can remain closed to non-federally qualified subsistence users. When adopting a regulation that restricts non-subsistence use, the Federal Subsistence Board will provide written findings describing how the action is consistent with the standards in §815(3).
- Regulations will be reviewed every three years. Regulations for conservation of the population will only be adopted if conservation measures are needed to protect the population while retaining a meaningful preference for subsistence uses. All regulations will be reviewed every three years to determine whether they remain necessarily in effect to provide the federal subsistence preference by rural residents or for conservation of the population.

- (2) **Existing Regulations:** The federal program will take immediate steps to establish a process to review and eliminate existing regulations in order to retain only those regulations that are necessary to provide the federal priority for subsistence uses by rural residents on public lands. All regulations that are unnecessary will be eliminated by December 2005.

This policy retains the federal regulatory program in order to act upon the recommendations of the Regional Advisory Councils as necessary to carry out the federal responsibility, but reduces unnecessary federal regulations. This approach meets the spirit and intent of ANILCA in both Title VIII and Section 1314, and fulfills the Secretary's Policy in 43 CFR Part 24. This policy effectively minimizes confusion, expense, enforcement issues, and other impacts on the public and on the state's management of fish and wildlife while fulfilling federal responsibilities directed in ANILCA and by the courts.

This administrative change in the federal regulatory program mirrors the legislatively recognized roles of the federal and state agencies in ANILCA and other law: the State maintains its police powers to manage fish and wildlife and to provide harvests under State law; and the federal agencies maintain limited authority to adopt harvest regulations where the state's regulations do not assure the federal priority for subsistence uses by rural residents on federal public lands. This administrative policy shall be in effect so long as the State is providing a subsistence priority through the state's program and so long as the federal program is in place to adopt regulations when necessary to provide the federal priority under ANILCA.

The Secretary's clear policy in 43 CFR Part 24 is hereby reiterated in the administration of the federal subsistence program to assure that the federal agencies recognize the State as the fundamental manager of fish and wildlife. The Federal Subsistence Board and all federal staff will reflect this policy in the federal agencies' publications, coordination activities, and recommendations concerning regulations. This policy also clearly articulates direction to assist the state in acquiring its data needs that are paramount to management of fish and wildlife in order to provide the federal and state preference for subsistence use of fish and wildlife. Most importantly, all policies should reinforce that, where the state is already providing a preference for subsistence use of fish and wildlife, the federal agencies primary role is to monitor subsistence activities and to ensure that the federal priority for subsistence use by rural residents as required by ANILCA is being met on the federal public lands without unnecessarily restricting other uses.

### **III. STATUTORY & REGULATORY BACKGROUND**

The following information synthesizes the laws and regulations applicable to the state and federal regulatory programs regarding the above issues:

#### **A. ANILCA Statutory Background**

Congressional intent in Title VIII of ANILCA was to provide an opportunity for rural residents engaged in a subsistence way of life to continue to do so. To achieve this goal, Section 802 declares that:



nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska 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 of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses

16 U.S.C.A. § 3112 (2000). “Subsistence uses” are defined in Section 803 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.

16 U.S.C.A. § 3113 (2000).

Under Section 805, in the absence of a qualifying state program,<sup>4</sup> the Secretary, in consultation with the State, is required to establish regions, each with its own regional advisory council and “such local advisory committees within each region as he finds necessary . . .” 16 U.S.C.A. § 3115(a) (2000). Regional advisory councils have authority relating to:

- (A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;
- (B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;
- (C) the encouragement of local and regional participation pursuant to the provisions of this subchapter in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;
- (D) the preparation of an annual report to the Secretary which shall contain--
  - (i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;
  - (ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;
  - (iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and
  - (iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

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<sup>4</sup> See 16 U.S.C.A. § 3115(d) (2000) (Directing the Secretary not to implement (a), (b), and (c) of this section if a State program is implemented, and requiring State rulemaking authority to “consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations . . .”). The State was unable to maintain a program that fully satisfies the requirements of ANILCA as a result of *McDowell v. State*, 785 P.2d 1 (Alaska 1989), in which the Alaska Supreme Court held that rural preference provisions required under ANILCA violate the Alaska Constitution.

16 U.S.C.A. § 3115 (2000).

While the Secretary has general regulatory authority under Section 814 of ANILCA to “prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title,” 16 U.S.C.A. § 3124 (2000), the only direct substantive authority of the Secretary granted or recognized in the statutory language in Title VIII of ANILCA is the authority to monitor State provisions for the subsistence preference, exercise closure and other administrative authority over the public lands, and authority to report to Congress with any recommendations he may have. *See* 16 U.S.C.A. §§ 3115 (c), 3116, 3120, 3123 (2000). In implementing monitoring, closure, and administrative authority, the Secretary is required to consider reports and recommendations of the regional advisory councils “concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses.” 16 U.S.C.A. §§ 3115(c). However, the Secretary is not required to follow the recommendations, he “may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs.” *Id.* Further, nothing in Title VIII of ANILCA is to be construed as

...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). The Board’s current guidelines for addressing regional advisory council proposal recommendations recognize that this provision allows the rejection of a recommendation that unnecessarily restricts nonsubsistence uses.

More generally, with respect to taking of fish and wildlife on public lands, ANILCA provides:

**(a) Responsibility and authority of State of Alaska**

Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in subchapter II (Title VIII) of this chapter, or to amend the Alaska constitution.

**(b) Responsibility and authority of Secretary**

Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

**(c) Areas controlled; areas closed, exceptions**

The taking of fish and wildlife in all conservation system units, and in national conservation areas, national recreation areas, and national forests, shall be carried out in accordance with the provisions of this Act and other applicable State and Federal law. Those areas designated as national parks or national park system monuments in the State shall be closed to the taking of fish and wildlife, except that--

(1) notwithstanding any other provision of this Act, the Secretary shall administer those units of the National Park System, and those additions to existing units,

established by this Act and which permit subsistence uses, to provide an opportunity for the continuance of such uses by local rural residents; and (2) fishing shall be permitted by the Secretary in accordance with the provisions of this Act and other applicable State and Federal law.

16 U.S.C.A. 3202 (2000) (parenthetical added).

Federal regulations already incorporate state fish and game regulations by reference and provide that the Federal Subsistence Board may review and adopt State openings, closures, or restrictions.

(a) State fish and game regulations apply to public lands and such laws are hereby adopted and made a part of the regulations in this part to the extent they are not inconsistent with, or superseded by, the regulations in this part.

(b) The Board may close public lands to hunting, trapping, or fishing, or take actions to restrict the taking of fish and wildlife when necessary to conserve healthy populations of fish and wildlife, continue subsistence uses of such populations, or pursuant to other applicable Federal law. The Board may review and adopt State openings, closures, or restrictions which serve to achieve the objectives of the regulations in this part.

50 C.F.R. § 100.14(a),(b) (2004). Federal regulations also provide that the “Board may enter into agreements with the State in order to coordinate respective management responsibilities.” *Id.* at (c).

#### **B. Customary and Traditional Determinations Statutory and Regulatory Background.**

ANILCA does not define “customary and traditional” and does not establish criteria for making determinations as to what is “customary and traditional,” but these determinations are crucial given ANILCA’s definition of “subsistence uses” in Section 803. *See* 16 U.S.C.A. § 3113 (2000). The federal government adopted a regulatory definition of “customary and traditional use,” under which such use means:

[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.”

50 C.F.R. § 100.4 (2004). This definition is similar to the state statutory definition found at AS 16.05.940 which defines “customary and traditional” to mean:

[T]he noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game.”

AS 16.05.940(7) (2004).

Current Federal and State regulatory standards for making a customary and traditional use determination are very similar, as shown in the table below:

Federal Customary and Traditional Criteria 50 C.F.R. 100.16 (b)	State Customary and Traditional Criteria 5 AAC 99.010(b)
(1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;	1) a long-term consistent pattern of noncommercial taking, use, and reliance on the fish stock or game population that has been established over a reasonable period of time of not less than one generation, excluding interruption by circumstances beyond the user's control, such as unavailability of the fish or game caused by migratory patterns;
(2) A pattern of use recurring in specific seasons for many years;	(2) a pattern of taking or use recurring in specific seasons of each year;
(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;	(3) a pattern of taking or use consisting of methods and means of harvest that are characterized by efficiency and economy of effort and cost;
(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;	(4) the area in which the noncommercial, long-term, and consistent pattern of taking, use, and reliance upon the fish stock or game population has been established;
(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;	(5) a means of handling, preparing, preserving, and storing fish or game that has been traditionally used by past generations, but not excluding 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;	(6) a pattern of taking or use that includes the handing down of knowledge of fishing or 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	(7) a pattern of taking, use, and reliance where the harvest effort or products of that harvest are distributed or shared, including customary trade, barter, and gift-giving; 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.	(8) a pattern that includes taking, use, and reliance for subsistence purposes upon a wide diversity of fish and game resources and that provides substantial economic, cultural, social, and nutritional elements of the subsistence way of life.

State regulations require that the state boards make customary and traditional; determinations for fish stocks or game populations by “considering” the eight factors. *See* 5 AAC 99.010. Federal regulations require the Board to identify a specific community or area’s use of specific fish

stocks or wildlife populations by determining that a community or area “generally exhibits” the factors listed in regulation. See 50 C.F.R. 100.16 (2004).<sup>5</sup>

#### IV. DISCUSSION

##### A. The Federal Subsistence Program Does Not Require Additional Area-Specific Federal Regulation Where State Regulations Adequately Provide For Subsistence.

The legislative history of ANILCA and subsequent case law contain nothing that indicates that the federal government is required to adopt separate additional area-specific regulations where State regulations, which are incorporated by reference into the federal regulations,<sup>6</sup> adequately provide for subsistence. There are no express provisions for federal fish and wildlife management under Title VIII of ANILCA, and the text and legislative history of the statutory scheme favors State implementation with oversight by the Secretary and judicial enforcement. Federal subsistence management responsibility and regulatory authority on the Federal public lands has been firmly established through litigation, but nothing in the cases requires the Secretary to adopt area-by-area regulations where the state regulations adequately provide for subsistence. Similarly, none of the Final Environmental Impact Statement,<sup>7</sup> Record of Decision,<sup>8</sup> or existing regulatory provisions,<sup>9</sup> mandates separate area-by-area regulations.

Early cases indicated in dicta that the Secretary could adopt subsistence regulations if the State failed to implement ANILCA.<sup>10</sup> After Alaska lost the ability to regulate subsistence in full compliance with ANILCA as a result of the decision of the Alaska Supreme Court in *McDowell v. State*,<sup>11</sup> the State of Alaska initially took the position in *Babbitt*,<sup>12</sup> based on the text and legislative history of ANILCA, that ANILCA did not authorize federal agencies to promulgate regulations to manage subsistence fishing or hunting on federal lands.<sup>13</sup> The district court ruled against the State, concluding that although Congress “rejected a program wholly with the control of the Secretary,” and “consciously and intentionally” reduced the role of the Secretary and correspondingly increased the role of the State, “Congress unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement Section 804 in the absence

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<sup>5</sup> Determinations may also be made on an individual basis in areas managed by the National Park Service. See 50 C.F.R. 100.16(a)(2004).

<sup>6</sup> See 50 C.F.R. 100.14(a) (2004). Federal adoptions by reference are enforceable in the same manner as other federal regulations. See, e.g., *Com. of Kentucky ex rel. Cabinet for Human Resources v. U.S.*, 16 Cl.Ct.755, 763-764 (May 16, 1989)(No. 107-88C) (Incorporation by reference gives OMB Circular force of regulation); see also, *Int. Brominated Solvents Association v. American Conf. Of Gov. Ind. Hygienists, Inc.*, 2005 WL 1073927 at \*18 (M.D.Ga. 2005) (Claim based on challenge to prospective adoption by reference of Threshold Limit Values barred by 60 day rule of Occupational Health and Safety Act).

<sup>7</sup> Federal Subsistence Board, *Subsistence Management for Federal Public Lands in Alaska, Final Environmental Impact Statement* (1992).

<sup>8</sup> Federal Subsistence Board, *Subsistence Management for Federal Public Lands in Alaska, Record of Decision* (1992).

<sup>9</sup> 50 C.F.R. Part 100 (2004).

<sup>10</sup> See, e.g., *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313-14, 316 (9<sup>th</sup> Cir. 1984).

<sup>11</sup> 785 P.2d 1 (Alaska 1989) (holding that a rural preference violates the Alaska Constitution).

<sup>12</sup> *John v. Babbitt*, Case No. A90-484 CIV (Consolidated).

<sup>13</sup> See, e.g., *id.*, Memorandum in Support of States Motion for Summary Judgment, March 19, 1993; *John v. United States*, 1994 WL 487830 at \*5, March 30, 1994 (D. Alaska).

of a state program.” *John v. United States*, 1994 WL 487830 at \*7, (March 30, 1994 D. Alaska). The court in *Babbitt* went on to hold that “the Secretary, not the State of Alaska, is entitled to manage fish and game on public (federal) lands in Alaska for purposes of Title III of ANILCA.”<sup>14</sup> The court cited the wholesale adoption of the State’s pre-*McDowell* subsistence regulations with approval.<sup>15</sup> However, there is nothing in the opinion limiting federal regulatory options or requiring adoption of separate area-by-area regulations where the subsistence priority can be met through state regulations that are adopted by reference in the federal regulations.

While *McDowell* made it impossible for state regulations to provide the rural preference necessary to fully meet the requirements of ANILCA in all cases, state subsistence law continues to provide a subsistence priority and remains essentially unchanged from the previous program that did satisfy ANILCA requirements. State law continues to provide for a subsistence preference except in state nonsubsistence areas, *see* AS 16.05.258, and federally qualified subsistence users are a subset of state subsistence users. Therefore, in most cases, if state-defined subsistence requirements are being provided, the federal subsistence priority will also be met. The state subsistence program should thus be adequate except in rare cases where state nonsubsistence areas do not match federal non-rural areas, or where the state has determined that a fish or game stock cannot support a harvest open to all state subsistence users.

Further, case law developed under State administration is not controlling on actions of the Secretary, so the Federal Subsistence Board and the Secretary have greater flexibility in implementation of ANILCA than the State. Under the current federal subsistence management program, actions of the Secretary and the Federal Subsistence Board are subject to a deferential standard of review and will be upheld if “reasonable” and based on a permissible construction of the statute.”<sup>16</sup> State regulations are already incorporated by reference in the federal subsistence regulations,<sup>17</sup> and an administrative decision, consistent with the Department of Interior Fish and Wildlife Policy on State-Federal Relationships,<sup>18</sup> to reduce user confusion, cut publication costs, and prevent the inadvertent divergence of regulations by relying on that incorporation by reference, instead of mirroring state regulatory language in federal regulation, should certainly be found reasonable. Similarly, decisions to rely on the substance of incorporated state regulations rather than adopting different federal regulations should generally be found reasonable. Unless substantial evidence illustrates that state regulations fail to meet the subsistence needs of federally qualified subsistence users or provide a meaningful subsistence preference, and a written finding is made, state regulations should not be preempted.

If a thorough record is developed, in most cases, there will be no real obstacles to reliance on state regulations that are already adopted by reference. Standards of evidence for customary and traditional use determinations and closures or restrictions on nonsubsistence uses are more fully discussed below, however it would be reasonable to reject any proposal that is not supported by substantial evidence showing that the proposal would better serve subsistence needs, would not

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<sup>14</sup> *Id.* at \*9. The State appealed this holding, but after briefing and prior to oral argument, stipulated to dismissal with prejudice on that issue. *Alaska v. Babbitt*, 72 F3d 698, 700 n.2 (December 19, 1995).

<sup>15</sup> *Id.* at \*8.

<sup>16</sup> *See Niniichik Traditional Council v United States* 227 F.3d 1186, 1191 (9<sup>th</sup> Cir. 2000) (citations omitted).

<sup>17</sup> *See* 50 C.F.R. § 100.14 (2004).

<sup>18</sup> *See* 43 C.R.R. Part 24 (2004)

threaten the health of a fish stock or wildlife population, and would not unnecessarily restrict other uses of fish and wildlife.<sup>19</sup>

## **B. Customary and Traditional Use Determinations**

While “customary and traditional use” is not defined under ANILCA, sound and consistent customary and traditional determinations are necessary for the proper identification of “subsistence uses” as defined in ANILCA. “Subsistence uses” are defined 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.

16 U.S.C.A. § 3113 (2000). A failure to make a customary and traditional use determination may result in undue restrictions or even the exclusion of federally qualified subsistence users from hunting or fishing in an area in which they have traditionally hunted or fished. Similarly, an erroneous finding of customary and traditional use may result in undue restrictions or exclusion of other federally qualified subsistence users, state subsistence users, and other consumptive users. Therefore, sound customary and traditional use determinations are critical to the implementation of ANILCA’s subsistence use priority and to ANILCA’s mandate to avoid unnecessary restrictions on both subsistence and other takings of fish and wildlife.

The federal regulatory definition of “customary and traditional use” found at 50 C.F.R. § 100.4, and regulatory criteria for determinations found at 50 C.F.R. § 100.16 do not exactly match the state’s definition found at AS 16.05.940 or regulatory criteria found at 5 AAC 99.010. However, there is nothing preventing the Secretary and the Board from more consistently doing a thorough analysis using the existing definition and criteria, which do generally correspond with the state definition and criteria. The practice of consistently using existing federal regulatory criteria, providing a thorough analysis of each criterion, and specifically enumerating each use would result in a standard of evidence for federal determinations that would more accurately identify subsistence uses and help avoid unnecessary restrictions on other subsistence users and nonsubsistence uses. Further, consistent and thorough application of existing federal criteria and development of written findings would support similar action under the state definition and criteria and would thus help to reduce conflicts between State and Federal regulations.

While the federal regulatory standard for a customary and traditional use determination requires only that a community or area “generally exhibit” the eight criteria listed at 50 C.F.R. 100.16(b), the regulations do require the Board’s determinations to “identify the specific community’s or area’s use of specific fish stocks and wildlife populations.” *Id.* at (a). In order to identify these uses by a community or area, each of the eight criteria should be discussed. Specific uses and

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<sup>19</sup> See 16 U.S.C.A. § 3115(c)(2000); 16 U.S.C.A. § 3125(3) (2000). See also, *Ninilchik*, 227 F.3d at 1193 (holding that interpretation of the term “priority” to allow balancing of the competing aims of subsistence use, conservation, and recreation, while providing a meaningful use preference, is reasonable).

patterns of use, and evidence of such use, should also be discussed in the determination process. A thorough record supporting a customary and traditional use determination will assist in development and enforcement of regulations that protect customary and traditional use but also protect other subsistence and nonsubsistence use from unnecessary restrictions by preventing undue expansion of customary and traditional use.<sup>20</sup> While it may not be necessary to specifically identify all customary and traditional uses, at a minimum, specific findings should be required regarding any bartering, sales, or customary trade of a fish or wildlife resource or products made from the resource. Such findings will assist in development of appropriate regulations, may help protect subsistence users from prosecution, and will make enforcement of regulations easier.<sup>21</sup>

In order to assure thorough and consistent customary and traditional use determinations we recommend that written findings be required for such determinations and suggest that Board members be provided with worksheets to help them in their analysis.<sup>22</sup> Future customary and traditional use determinations should not be made in the absence of substantial evidence supporting the determination, and existing determinations should be reviewed over time to develop written findings and ensure that the determinations are supported by substantial evidence.

### **C. Closures and Restrictions on Nonsubsistence Use**

Any closure or restriction on consumptive uses of an area<sup>23</sup> by those that are not qualified federal subsistence users should be supported by substantial evidence showing that the closure or restriction is clearly necessary for the conservation of healthy fish and wildlife populations or to continue subsistence uses of such populations.<sup>24</sup> In each case, ANILCA's competing aims, including subsistence use, conservation, and recreation, should be considered.<sup>25</sup> The Secretary and the Board should also consider whether such measures might be detrimental to the satisfaction of subsistence needs because of impacts on subsistence, including impacts on State and private lands, that might occur as a result of the closure or restriction.<sup>26</sup> Measures relating to the fish stock or wildlife population already being taken, being considered, or proposed and rejected, under State regulation, and the record behind such action or inaction, should also be considered to insure that the repercussions of the proposed closure or restriction are fully

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<sup>20</sup> There is nothing in ANILCA or the federal regulatory program under ANILCA that supports an expansion of "subsistence uses" beyond those uses that are "customary and traditional." See 16 U.S.C.A. 3113 (2000) (definition of "subsistence uses").

<sup>21</sup> See, e.g., *United States v. Alexander*, 938 P.2d 942, 948 (9<sup>th</sup> Cir. 1991) (customary trade allowed as a defense, but defendant bears burden of proof). It is important to note that while the State interpretation of "subsistence use" received no deference, *id.* at 946 fn. 6, a Federal Subsistence Board interpretation should receive deference. See, *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9<sup>th</sup> Cir. 2000).

<sup>22</sup> A draft worksheet is attached. See Attachment A.

<sup>23</sup> Other than national parks and park monuments.

<sup>24</sup> See 16 U.S.C. § 3115(c) and 16 U.S.C. § 3125. Closure or restriction would not be necessary where subsistence needs are being met or where a meaningful subsistence preference already exists under state regulation. Note: separate standards apply for closures to subsistence uses under 16 U.S.C. § 3126.

<sup>25</sup> See, *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9<sup>th</sup> Cir. 2000) (upholding Board's reading of the term "priority" to allow balancing of competing aims of subsistence use, conservation, and recreation, while providing a "meaningful use preference" for subsistence).

<sup>26</sup> See 16 U.S.C.A. § 3115(c).



understood and that the closure or restriction is truly necessary. Written findings should be required whenever a closure or restriction is adopted to ensure a thorough and consistent approach and to ensure that the closure or restriction will be reviewed and lifted when it is no longer necessary. These findings should include a quantitative evaluation of the subsistence needs of federally qualified subsistence users<sup>27</sup> and a determination that the management measures taken are designed to achieve and accommodate those needs in a manner that minimizes impacts on other consumptive uses. Closures and restrictions should not be imposed to provide a subsistence preference where subsistence needs are already being met.

Subjective complaints about competition and having to work harder in order to meet subsistence needs should not be sufficient to require closure or restriction of other uses. In *Ninilchik Traditional Council v United States*, 227 F.3d 1186 (9<sup>th</sup> Cir. 2000), the court rejected arguments that an absolute priority must be accorded to subsistence use of fish and wildlife and upheld the Federal Subsistence Board's interpretation of the term "priority" to allow balancing of "the competing aims of subsistence use, conservation, and recreation, while at the same time providing subsistence hunters with a meaningful use preference." *Id.* at 1193. The court in *Ninilchik* recognized the competing policies found in ANILCA and noted that earlier more restrictive language in *Alexander*,<sup>28</sup> and *Kenaitze Indian Tribe*,<sup>29</sup> which indicated that nonsubsistence uses must be eliminated before subsistence uses could be circumscribed, were simply general statements paraphrasing section 804 of ANILCA, and did not reflect a specific analysis of the issue. *Ninilchik*, at 1192-93. The restrictive standards imposed by the District Court on state subsistence management in *Bobby v. State*,<sup>30</sup> are not applicable to the federal subsistence management program and have been implicitly overruled by the Ninth Circuit's decision in *Ninilchik*.<sup>31</sup> Thus, even if nonsubsistence hunting or fishing does make it more difficult to meet subsistence needs, closure or restriction of nonsubsistence consumptive use is not required, as long as subsistence needs are being met or a meaningful subsistence preference is provided, and mere allegations that such impacts are occurring would not support an argument that closure or restriction is necessary for the conservation of healthy fish and wildlife populations or to continue subsistence uses of such populations.

It is difficult to lay out precise guidelines for determining whether there is substantial evidence that a closure or restriction is necessary for the conservation of healthy fish and wildlife

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<sup>27</sup> Exact quantification may not always be necessary or even possible, however some discussion of subsistence needs in comparison to the harvestable surplus and amounts expected to be harvested by other users is needed. Where state regulation identifies amounts reasonably necessary for subsistence, it should be recognized that federally qualified subsistence users are a subset of state subsistence users and thus the amounts needed by federally qualified subsistence users should be lower than the amounts identified in state regulation. It should also be recognized that the amounts identified in state regulation do not represent minimum or maximum harvest amounts or harvest guarantees and that significant harvest variation can be expected from year to year based on a number of factors other than amounts available for harvest. Other factors such as participation levels, weather, temporal and spatial availability, and abundance of other resources may significantly affect harvest levels even where a harvestable surplus is available.

<sup>28</sup> *United States v. Alexander*, 938 F.2d 942, 945 (1991).

<sup>29</sup> *Kenaitze Indian Tribe v Alaska*, 860 F.2d 312 (9<sup>th</sup> Cir. 1988).

<sup>30</sup> *Bobby v. State*, 718 F.Supp. at 778-79 (D. Alaska 1989).

<sup>31</sup> Compare *Ninilchik*, 227 F.3d at 1192-93 and *Bobby*, 718 F.Supp. at 778-79.

populations or to continue subsistence uses of such populations. Such determinations, by their nature, require a case-by-case analysis. However, the impacts of closure and restriction determinations are immense, and it is critical that they be supported by substantial evidence after a thorough review of the issues including a balancing of the competing aims of ANILCA. In order to assure thorough and consistent approach to closures and restrictions, we recommend that written findings be required for such determinations, and suggest that Board members be provided with checklists of factors to consider to help them in their analysis.<sup>32</sup> Written findings should be detailed enough to ensure that the determination that the closure or restriction is necessary can be reviewed and lifted when the closure or restriction is no longer necessary. Existing closures and restrictions should be reviewed to determine whether there is substantial evidence showing that they are necessary, and new findings to support continued closure or restrictions should be required on a periodic basis.

## V. CONCLUSION

Although federal case law establishes that a federal subsistence program is required, it does not require separate area-specific regulations. Since state regulations are already adopted by reference in the federal subsistence regulations, there is no legal requirement for duplicative federal regulations in cases where subsistence needs can be met under state law. Separate federal regulations could be limited to instances where state regulations fail to meet subsistence needs and do not provide a meaningful subsistence preference.<sup>33</sup> Adoption of separate regulations has caused unnecessary confusion and regulatory conflict as a result of evolution of regulations over time; confusion and regulatory conflicts could be minimized in the future if separate federal regulations are only adopted where there is a written finding that state regulations do not meet subsistence needs and do not provide a meaningful subsistence preference. After adoption, such regulations should be reviewed periodically to determine if they are still necessary. Existing regulations should also be reviewed over time to eliminate duplicative and unnecessarily divergent regulations.

“Customary and traditional use” is not defined in ANILCA, but reasoned and consistent customary and traditional determinations are critical for the proper identification of “subsistence uses” as defined in ANILCA. The federal regulatory definition of “customary and traditional use” found at 50 C.F.R. § 100.4<sup>34</sup> and regulatory criteria for determinations found at 50 C.F.R. § 100.16 do not exactly match the state’s definition found at AS 16.05.940, or regulatory criteria found at 5 AAC 99.010. However, the federal definition and criteria do generally correspond with the state definition and criteria, and consistent thorough analyses of the criteria would result in a standard of evidence for federal determinations that would more accurately identify subsistence uses and help avoid unnecessary restrictions on other subsistence users and nonsubsistence uses.<sup>35</sup> Findings addressing a few additional questions would greatly increase the

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<sup>32</sup> A draft checklist is attached. See Attachment B.

<sup>33</sup> A meaningful preference is not required if subsistence needs are being met.

<sup>34</sup> The same regulation is also found at 36 C.F.R. § 242.4 (2004). Subsistence regulations at 50 C.F.R. Part 100 are mirrored at 36 C.F.R. Part 242 but citations in this memorandum will be limited to 50 C.F.R. Part 100.

<sup>35</sup> Consistent and thorough application of existing federal criteria would also support similar action under the state definition and criteria, thereby reducing conflicts between State and Federal regulations.

usefulness of customary and traditional use determinations in the regulatory process. A policy requiring written findings should ensure a through and consistent approach.

Closures or restrictions on consumptive uses in an area<sup>36</sup> by those that are not qualified federal subsistence users should be supported by substantial evidence showing that the closure or restriction is clearly necessary for the conservation of healthy fish and wildlife populations or to continue subsistence uses of such populations.<sup>37</sup> When considering such proposals, the Secretary and Board should balance the competing purposes of ANILCA and should also consider whether such measures might be detrimental to the satisfaction of subsistence needs because of impacts on subsistence that might occur as a result of the closure or restriction.<sup>38</sup> Consideration of state regulatory activities, including actions taken or under consideration in order to provide the state subsistence priority, should be required. Written findings should be required whenever a closure or restriction is adopted to ensure a through and consistent approach and to ensure that the closure or restriction will be reviewed and lifted when it is no longer necessary. Existing closures and restrictions should be reviewed to determine whether there is substantial evidence showing that they are necessary, and new findings to support continued closure or restrictions should be required on a periodic basis.

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<sup>36</sup> Other than national parks and park monuments.

<sup>37</sup> Separate standards apply for closures under 16 U.S.C. § 3126 (2000).

<sup>38</sup> See 16 U.S.C.A. § 3115(c) (2000).

# **ATTACHMENT A** **Customary and Traditional Use Worksheet**

Specific Fish or Wildlife Population or Stock: \_\_\_\_\_

Specific Community or Area: \_\_\_\_\_

“Customary and traditional use means a long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. Thus use plays an important role in the economy of the community.”

Customary and Traditional Criteria 50 C.F.R. 100.16 (b)	Yes	No	Summary of Evidence:
(1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;			Identify duration of pattern of use:
(2) A pattern of use recurring in specific seasons for many years;			Identify use(s), patterns, & season(s):
(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;			Identify past and present methods and means of harvest:
(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;			Identify consistency of harvest and use, methods and means, locations, and proximity to community or area:
(5) A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past			Identify and compare present and past means of handling, preparing, or preserving and reasons for alteration of past practices if applicable:

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;			Identify pattern(s) of use and how handed down, indicate whether and how knowledge, skills, values and lore are passed from generation to generation:
(7) A pattern of use in which the harvest is shared or distributed within a definable community of persons;			Identify pattern(s) of use and whether and to what extent sharing or distribution occurs; identify the community of persons in which such sharing or distribution occurs:
(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.			Identify pattern(s) of use relating to reliance on fish and wildlife resources of the area, identify cultural, economic, social, and nutritional elements of reliance in the community or area:

With regard to the specific stock or populations considered above, does the community or area generally exhibit the eight factors listed above which exemplify customary and traditional use? \_\_\_\_\_

**With regard to the specific stock or populations considered above, is reliance on the stock or population limited to a specific season or use? If so what season or use?**

**With regard to the specific stock or population considered above, what has the customary and traditional harvest range been? Is this a stock that is used extensively, moderately, or only rarely or for special events? What are the subsistence use amounts? (Note: numerical ranges are useful if available, but it is important to document the level of use even if numerical data is unavailable).**

**Is there any evidence of customary and traditional ceremonial use of the specific resource in the specific community or area? If so what is the extent of such use and what evidence shows such use?**

**Is there any evidence of customary and traditional bartering of the specific resource in the specific community or area? If so what is the extent of such use and what evidence shows such use?**

**Is there any evidence of customary trade of the fish or wildlife resource or products made from the resource? If so what is the extent of such use, who did the trade occur with, and what evidence shows such use?**

**Is there any evidence of customary and traditional sales for cash of the fish or wildlife resource or products made from parts of the resource? If so what is the extent of such use, who were sales made to, and what evidence shows such use?**

## **ATTACHMENT B**

### **Factors for Consideration Before Closing or Restricting Nonsubsistence Consumptive Use of Federal Public Lands:**

**Standard for adoption:** A closure or restriction on consumptive uses of an area by those that are not qualified federal subsistence users should be supported by substantial evidence showing that the closure or restriction is necessary for the conservation of healthy fish and wildlife populations or to continue subsistence uses of such populations.

**Factors for consideration:** (Note: factors should be considered if applicable but consideration of all factors is not required).

- 1) What evidence indicates that there is a problem or potential problem?  
Is further information development needed before action?
- 2) Are subsistence needs currently being met?  
Harvest Data  
Community Survey Data  
Harvests by the same community or area on state and private lands  
State regulations  
State regulatory actions and the basis for such actions  
Subsistence use amounts  
Harvest per unit of effort  
Is further information development needed before action?
- 3) How would the proposal impact ANILCA's competing aims, including subsistence use, conservation, and recreation?
- 4) Whether the proposal might be detrimental to the satisfaction of subsistence needs because of impacts on subsistence, including impacts on State and private lands, that might occur as a result of the closure or restriction.
- 5) Would a closure or restriction offer significant benefits to federally qualified subsistence users?  
Land ownership patterns in the area  
Harvest patterns in the area
- 6) Are other options available that will place fewer restrictions on consumptive uses while still meeting subsistence needs or providing a meaningful subsistence preference?  
State regulatory proposals under consideration  
Other federal proposals under consideration  
Is a sufficient meaningful subsistence preference already being provided?  
Is immediate action required, or is further study or opportunity for State action warranted first?