

## ALASKA FEDERATION OF NATIVES

### 2010 ANNUAL CONVENTION

#### AFN Report on Subsistence

- Secretary Salazar initiated a Review of the Federal Subsistence Management Program in October 2009. In doing so, he called for a new approach to subsistence management -- one that would recognize and respect the voice of subsistence users in subsistence management. According to the Secretary, his intent was to evaluate how well the program is fulfilling the purposes of Title VIII of ANILCA, and would premise the review on the assumption that the State was not going to take the necessary steps to regain management authority.
- Pat Pourchot, Special Assistant to the Secretary for Alaska Affairs, along with Kim Elton, Director of Alaska Affairs at Interior in Washington, DC, were put in charge of the review. Comments were gathered from November through mid-January, 2010.
- On November 10, 2009, AFN wrote to President Obama thanking the Administration for its commitment to undertake a comprehensive review of the Federal Subsistence Management Program in Alaska, and requesting that high-level White House staff participate in the Interior Department's review.
- AFN's Subsistence Committee met on numerous occasions during November and December, 2009, and held at least two, all-day meetings in Anchorage to gather information about regional and local concerns.
- AFN assembled a team of lawyers and staff to review the regional and statewide concerns, to thoroughly research the issues and prepare comprehensive comments and recommendations. Those comments were submitted to the Secretary on January 7, 2010. They were shared with Secretary of Agriculture, Tom Vilsack, Asst. Secretary for Indian Affairs, Larry Echohawk, Governor Parnell, the Alaska congressional delegation and the White House. They were also shared broadly within the Native community.
- AFN's comments were reprinted in a special tabloid insert that ran in all of the rural newspapers in mid-February. Copies were also provided to all of the regional non-profit organizations to share with their members during regional meetings.
- In its comments, AFN emphasized the fact that Title VIII, with its priority for subsistence, is a federal law that must be administered as a federal law, under federal standards, without improper deference to state law and state management issues and objectives. A summary of litigation involving the interpretation and implementation of

Title VIII was prepared and included in the comments to demonstrate the time and money that had been expended over the years by the Native community and the federal government to defend and protect our subsistence way of life.

- In its comments, AFN called for reform of the Federal Subsistence Board and the Office of Subsistence Management through administrative action and regulatory changes. It also requested fundamental structural changes to Title VIII itself. AFN's major recommendations included:
  - Adding a "Native" priority to the current "rural" priority in Title VIII
  - Exempting the RACs from the Federal Advisory Committee Act, so that membership would be limited to rural subsistence users.
  - Expanding the definition of public lands to allow federal subsistence management on Native-owned lands and all navigable and marine waters in Alaska. As an interim measure AFN asked that the Secretaries at least consider amending their regulations to extend ANILCA's jurisdictional reach to upstream and downstream waters adjacent to federal lands.
  - Clarifying, either through an amendment to ANILCA or by Executive Order that Title VIII of ANILCA is "Indian legislation".
  - Undertaking a comprehensive review of all existing subsistence regulations to ensure that they comply with federal law and policy. When the federal program was adopted, the federal managers incorporated into federal law all existing State license, permit, harvest-ticket and tag requirements, without assessing the propriety of imposing these requirements on subsistence users.
  - Changing the composition of the FSB by replacing federal bureaucrats with subsistence users.
  - Amending the regulatory definitions of "rural", and the criteria for assessing rural characteristics during the decennial review of rural status.
  - Amending the regulations governing customary and traditional use determinations.
  - Mandating tribal compacting and contracting of significant aspects of the federal subsistence management program to tribal organizations and increased use of ANILCA's Section 809 cooperative agreements
  - Increasing funding for research and for RAC training and support
- AFN filed supplemental comments a few weeks later that responded to the comments filed by the State of Alaska. The State basically called upon the Secretary to defer to the State's subsistence program and policies, even though the State's program is fundamentally inconsistent with Title VIII of ANILCA.

- AFN also submitted comments on several issues not linked to Title VIII of ANILCA, but which fall under the Department of Interior’s jurisdiction and impact the ability of Alaska Natives to continue to engage in a subsistence way of life in Alaska. Those issues included:
  - A call for legislation exempting the customary and traditional harvests of migratory birds in Alaska from the requirements of the federal Duck Stamp Act; strengthening the co-management provisions of the Marine Mammal Protection Act,
  - Increased funding for co-management activities under Section 119 of the MMPA; and
  - Increased funding for the Alaska Migratory Bird Co-Management Council and 12 regional co-management bodies established to implement the protocol in the amended treaties between the US, Canada and Mexico. The protocol recognizes the traditional subsistence harvest of migratory birds by Alaska Natives and provides for affording Alaska Natives an effective and meaningful role in the development and implementation of regulations affecting the taking of migratory birds and they eggs through participation in co-management bodies. Neither the Council nor the regional bodies have been adequately funded.
  
- In March, 2010, AFN requested that Secretary Salazar adopt, as an interim administrative measure, review of the Department’s position regarding the scope of the federal government’s jurisdiction under Title VIII of ANILCA. The 1999 final regulations are currently the subject of two consolidated cases (the Katie John litigation) pending in the Ninth Circuit Court of Appeals. In one, the State challenges the regulations as overly broad; in the other, Katie John challenges them as not being broad enough. AFN intervened in the lawsuit brought by the State of Alaska to support the Department’s regulations against the State’s attack. AFN joined with the Native American Rights fund to support Katie John’s request that the Department voluntarily review and expand its jurisdiction based on the federal reserved rights doctrine, to include waters that extend upstream and downstream from ANILCA’s conservation units, and to Alaska Native allotments.
  
- AFN also met with Secretary Locke, Department of Commerce during his visit to Alaska in mid-January, 2010, to discuss, among other things, the fishery disaster for the Yukon River Chinook salmon fishery in both 2008 and 2009, and to urge him to support regulations that would impose a hard cap of between 29,000-32,500 on the Chinook salmon bycatch in the Bering Sea Pollock fishery. AFN also delivered a letter to the Secretary during that meeting supporting amendments to the MMPA to strengthen co-management efforts and stressing the need for additional funding.
  
- Because of the overlap of jurisdiction between the various agencies and departments on issues that impact subsistence in Alaska, AFN urged both Secretary Locke and Secretary Salazar to convene a high-level meeting with the Secretaries of Interior, Agriculture,

Commerce and Justice on all aspects of subsistence hunting, fishing and gathering in Alaska, and to include the Alaska congressional delegation and the Alaska Native leadership.

- In late January, AFN representatives met with Interior Department's Deputy Secretary David Hayes, Assistant Secretary-Indian Affairs, Larry Echo-Hawk and Kim Elton in Washington, DC, to discuss the review and to urge the Department to make meaningful changes to the program and to include key White House officials in the review. AFN stressed the need for a multi-agency approach to the Secretaries' review and for White House involvement.
- AFN incorporated its recommendations into AFN's 2010 Priorities, which were then distributed to the White House and agency personnel, key members of Congress, including Alaska and Hawaii's congressional delegations.
- AFN met with Kim Teehee, Sr. Native American Advisor to the President and her staff on numerous occasions during the past year to urge involvement on the part of the White House in determining what action should be taken to restore and maintain Native subsistence hunting and fishing rights and management in Alaska, and to ask for White House assistance in arranging for high-level policy meetings that would involve all of the agencies with jurisdiction over subsistence issues, the White House and the Native leadership.
- AFN's lawyers drafted legislation making the legislative changes to Title VIII of ANILCA that are called for in its comments to the Secretary. The legislation was circulated to the AFN Subsistence and Legislative Committees and to the Board for comments.
- AFN attorneys also drafted and filed AFN's brief in the 9<sup>th</sup> Circuit Court of Appeals in the *Katie John* litigation, and coordinated AFN's arguments with those of Katie John and the United States. As its position in this on-going and protracted litigation demonstrates, the State has continued to resist even the limited assumption of management of subsistence uses in reserved waters. It seeks to limit federal jurisdiction over fishing while it aggressively prosecutes Native subsistence users in waters currently under State control.
- Throughout the federal review process, AFN has met numerous times with the Alaska Congressional delegation, Senator Inouye and other congressional leaders as well as various Interior Department personnel, including Assistant Secretary for Indian Affairs, Larry Echo Hawk, Assistant Secretary for Fish and Wildlife and Parks, Tom Strickland, Pat Pourchot and Kim Elton.
- AFN continued to seek meetings with the Secretary of the Interior and to have White House involvement in high-level inter-agency meetings. Unfortunately, the Gulf oil spill consumed much of the Secretary's time throughout the summer, and it was not until September 3, that AFN was finally able to meet face-to-face with the Secretary. At that point the preliminary decisions had already been made with respect to the outcome of subsistence review. In fact, during his visit to Alaska, the Secretary announced his key recommendations and the appointment of the

new Chair, Tim Towarek, while promising to schedule a follow-up policy level meeting with AFN in Washington, DC.

- The follow-up meeting with the Secretary and his staff occurred on September 28, 2010. AFN again stressed the fact that subsistence hunting, fishing and gathering was the number one issue for Alaska Natives, and that it requires a true and on-going effort. The Administration was again encouraged to introduce legislation that would change the law to provide for a Native plus rural priority and to extend subsistence priorities to all marine and navigable waters as well as to Native lands. The Secretary agreed to think about an multi-agency meeting on subsistence and to appoint an Alaska Native to serve in the Secretary's office.
- The final report on the Subsistence Review was issued on October 5, 2010. To date, the Secretary has not followed through with the appointment of an Alaska Native to work in the Secretary's office.
- The final report on the Subsistence Review calls for changes that can be implemented by the Secretary of the Interior, with the concurrence of the Secretary of Agriculture, or by the FSB through directive or policy changes. Some of the changes recommended will require a change in regulations, which will mean formal rule-making. The report does not address ways to achieve the fundamental structural changes to Title VIII of ANILCA that were the core of AFN's recommendations to the Secretaries.
- Briefly, the recommendations contained in the report are:
  1. **Two public members representing subsistence users will be added to the FSB.** Input on the selection will be obtained from the RACs. Formal rule-making will be required to implement this recommendation. There is no guarantee that the new members will be Alaska Natives.
  2. **State Liaison.** The report does not eliminate the State's non-voting seat on the Board, so the State will be able to continue to wield undue influence on the FSB deliberations.
  3. **Deference to Recommendations of the Regional Advisory Councils:** The FSB will be directed to give deference to RAC recommendations on more issues than just the "taking" of fish and wildlife. At this point, we do not know what other issues this might include. AFN and others have called upon the Secretary to require deference to RAC recommendations on all matters relating to subsistence uses.
  4. **Review, with RAC input, of subsistence procedural and structural regulations that were adopted from the State of Alaska.** Many of the federal regulations simply adopted existing state laws when the federal management program was adopted, including state license, permit, harvest-ticket and tag requirements, regulations governing C&T determinations.
  5. **Customary and Traditional Use Determination Process.** The FSB, with RAC input, will be directed to review the C&T use determination process. The current process incorporates the State's eight-criteria, species by species approach rather than looking at a community's subsistence use area. The review should also look at the degree to which the federal management system relies upon the State's data, often which is out of date or non-existent.

6. **Rural/Non-Rural Determinations:** The FSB will be directed to review rural /non-rural determination process for use in making its review of rural status of communities following the 2010 census. Input will be sought from the RACs, but it is unclear whether deference will be given to their recommendations.
7. **The FSB will be directed to review its policy on the use of executive sessions and to minimize their use.**
8. **MOU between the State and the FSB:** The FSB will be instructed to immediately review, with RAC input, the December 2008 MOU with the State of Alaska, to determine if its needed, and if so, whether it needs to be amended to clarify federal authorities for the subsistence program. AFN and others recommended that the MOU be revoked.
9. **Extraterritorial Jurisdiction.** The FSB will be directed to ensure that the Secretaries are informed when non-DOI/USDA rule-making entities develop regulations that may adversely affect subsistence uses (for example: regulations aimed at reducing the Chinook salmon by-catch in the Bering Sea Pollock fishery and the state's liberal sport hunting regulations for certain game units for the Mulchatna caribou herd that migrates through several GMUs). While the Secretaries have the authority to take action to protect subsistence uses if activity off the public lands effects federal interests on the public lands, the Secretaries have never exercised this authority.
10. **Subsistence Budget:** The FSB will be directed to review and submit recommendations to DOI and USDA for consideration for inclusion in the Department's annual budgets. In addition, the Secretary will direct the Department to include a separate budget line for the core subsistence program budget, and when putting the budget together, will consider adding funding to allow the FSB to meet periodically in rural areas; reinstate the one-year regulatory cycle for FSB rulemaking, increased support and training for RAC members and for increased capacity within OSM for research and analysis. AFN called for a separate pool of money for the RACs to hire their own staff and to participate as full partners.
11. **Office of Subsistence Management and Interior Department Agencies:** The FSB will be directed to participate in the hiring of the Director of OSM when the position is vacant and to participate in the annual evaluation of the Director. It is unknown what role, if any, the RACs will have in the recruitment and hiring of key positions within the OSM.

The Secretary will also direct a departmental or "interagency" taskforce evaluation of the OSM and related agency budgets, organizational issues and diversity issues. AFN expressed concern that too few Alaska Natives were employed in the OSM or by the agencies, and the fact that there were too many former ADF&G employees working for OSM.

Finally, the federal members of the FSB will be required to make subsistence management a priority and attend FSB meetings whenever possible, but they will be able to designate a high-ranking, knowledgeable alternate to fulfill their responsibilities. .

12. **Contacting and Section 809 Cooperative Agreements:** The Secretary promises to encourage the FSB, OSM and the DOI agencies to utilize contracting and Section 809 cooperative agreements with local tribes and other entities to fulfill program imperatives. During the review process, AFN and others called upon both the Secretaries to significantly

expand their use of Section 809 agreements and to allow tribal governments with the capacity to do so, to compact or contract certain functions of the program, including providing staff support to the RACs.

- **Statutory Changes:** The Secretary rejected AFN’s proposals calling upon the Administration to work with the Native community on a legislative proposal amending Title VIII of ANILCA that could be delivered to Congress as an Administration bill. The amendments AFN seeks are:
  - to add a “Native” priority to the existing “rural” priority;
  - to exempt the RACs from the Federal Advisory Committee Act so membership can be restricted to rural subsistence users;
  - to expand the definition of public lands to provide a priority for subsistence fishing and hunting on Native owned lands in marine and navigable waters in Alaska; and
  - to clarify that Title VIII is Indian legislation.

Despite the anticipated regulatory and policy changes outlined by the Secretary, we believe the US Government is failing to live up to its trust responsibility to Alaska Natives (and to the commitments it made to them in ANCSA and ANILCA) to establish, and implement, a comprehensive federal program to protect the right of Alaska Natives to continue to engage in subsistence hunting and fishing.

AFN’s next steps will be to work with Congress to obtain oversight hearings and to proactively work with the committees in Congress with jurisdiction over subsistence to enact new laws to protect subsistence hunting and fishing by all Alaska Natives on all federal and state lands and marine waters in Alaska, as well as on Native owned lands.

AFN will also review all legal options available to bring and defend, where needed, any and all legal actions to protect Alaska Native subsistence rights.

AFN will continued to seek White House involvement and support for meaningful changes to the law that will ensure are ability to engage in hunting, fishing and gathering for generations to come.

### **Additional Federal Issues:**

- **Chinook Bycatch:** This summer Secretary of Commerce Locke accepted the recommendation of the North Pacific Fisheries Management Council to allow up to 60,000 Chinook salmon to be intercepted and wasted in a year as bycatch in the Bering Sea Pollock trawl fisheries – the richest fishery in the world. The bycatch was widely and strongly opposed by tribal and subsistence organizations throughout Alaska. The NPFMC is dominated by wealthy commercial fishing interests – there is no meaningful participation by tribes or subsistence users. AFN and many other Alaska Native organizations have asked that federal law be amended to add an Alaska Native subsistence seat to the NPFMC.
- **Duck Stamps:** This spring the USFWS and State enforcement officers announced their intent to begin issuing citations to subsistence migratory bird hunters and egg collectors if they did not possess a federal duck stamp. Alaska Native organizations involved in the Alaska Migratory Bird Co-Management Council met with Assistant Secretary Echo Hawk, the solicitor’s office and the USFWS regional director for Alaska seeking a review of the local Alaska solicitor’s opinion

finding that subsistence users must obtain Duck Stamps. In the late summer, DOI agreed to review the solicitor's opinion, and Senator's Murkowski and Begich introduced federal legislation that would exempt Alaska subsistence users from the DSA. No final decision has been made regarding the solicitor's opinion and the legislation has not moved.

- **Ninilchik C&T Use Determination:** On November 9 the Federal Subsistence Board (FSB) will be meeting to discuss a request for reconsideration submitted by the Ninilchik tribe seeking a positive C&T use finding for freshwater fish on the Kenai Peninsula. This will be the first test of the FSB after the Secretarial Review of the federal subsistence program. The Secretary directed the FSB to give greater discretion to regional advisory committees on issues such as C&T use determinations. The South Central RAC has repeatedly supported Ninilchik and recommended a positive C&T use determination. The SCRAC met just days ago and unanimously recommended that the FSB make a positive C&T use finding. The FSB has failed to follow this recommendation in several past votes - the vote was tied 3-3. The action the FSB takes on November 9 on this issue will be an important test for the members of the Board representing federal agencies as to whether the Secretarial Review has served to empower subsistence users and RACs or whether it is business as usual.
- **Retirement of Carl Jack:** After many years of service, Carl Jack has retired as the Alaska Native Liaison and staff person to the FSB chair. Thanks for all his years of service. His former position is open for an Alaska Native who wants to take on this important work.

#### ***State Law Subsistence Issues:***

- **Ahtna Community Harvest:** The Alaska Board of Game, after years of struggling with subsistence regulations for the Nelchina caribou herd, took a strong and important step towards making the state subsistence law work better and provide more opportunities for subsistence users as well as other Alaskan hunters. The BOG adopted a community harvest permit (CHP) that allowed residents and members of the eight Ahtna Villages to hunt and share according to their C&T community use patterns and to have the moose and caribou hunting seasons and bag limits necessary to meet the communities' cultural and nutritional subsistence needs. The CHP area established by the Board was consistent with the Ahtna traditional hunting territory. The Alaska Outdoor Council and others sued the Board over the CHP regulation and a superior court in Kenai ruled that the CHP was illegally residency based. Ahtna appealed the decision to the Alaska Supreme Court. Alaska Attorney General Dan Sullivan, refused to appeal and defend the Board despite the Board voting 6-1 to ask the state to appeal. This may be the first time that the state has refused to appeal a final lower state court decision overturning a Board action. The Board met last week to decide how to manage the Nelchina caribou hunt in response to the superior court decision. Attorney General Sullivan once again personally intervened into the issue and advised the Board not to take any action on the CHP until the Supreme Court appeal was finalized. Several Board members immediately expressed their outrage at the AG intruding without cause into their administrative responsibility to manage hunting as they decide is best for Alaskans and the resource. The Board, acting with strength and integrity, re-adopted a CHP for the eight Ahtna villages and other eligible villages and groups.
- **Chitina Dipnetting Case affirms that state subsistence law protects a subsistence way of life:** The Alaska Outdoor Council and others sued the Board of Fisheries claiming that the Chitina dipnet fishery is a subsistence fishery rather than a personal use fishery. One of the eight criteria the BOF uses to determine customary and traditional subsistence uses is the reliance on a wide diversity of subsistence resources that provides substantial elements of the cultural, nutritional

and economic subsistence way of life. The AOC argued this criterion was illegal because the subsistence law does not protect a way of life, and that by applying the criterion the Board of Fisheries favored rural Alaska Natives over other users like those who reside in Fairbanks. The superior court rejected the AOC arguments and found that the criterion defining C&T subsistence uses as a nutritional, cultural and economic way of life is consistent with the state subsistence law.

- **Citation for subsistence fishing in Southeast Alaska:** A Superior Court dismissed the citation Senator Kookesh and other subsistence fishermen received for exceeding an arbitrary subsistence salmon bag limit. The State has indicated that it will appeal this decision and try and reinstate the citation. This case has served as one example of the failure of the current state and federal laws to adequately provide for Alaska Native subsistence uses and their way of life.