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Public Comments Processing  
Attn: FWS-R7-SM-2024-0017  
U.S. Fish and Wildlife Service  
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Falls Church, VA 22041-3803

**Re: Subsistence Management Regulations for Public Lands in Alaska–  
Subpart B; Federal Subsistence Board Membership, 89 Fed. Reg. 14008  
(Feb. 26, 2024); Docket No. FWS-R7-SM-2024-0017**

Dear Deputy Assistant Regional Director Amee Howard,

Safari Club International (“SCI”) submits this comment in opposition to the Department of the Interior’s (“Department”) proposal to add three public members to the Federal Subsistence Board (“Board”)<sup>1</sup> who must be nominated or recommended by federally recognized Tribal governments. SCI recognizes the importance of Alaska Native voices on the Board. However, Alaska Natives constitute only half of federally qualified subsistence users whose interests are protected by the Board. The Department’s proposal would effectively and unlawfully elevate the interests of one half of all users while disenfranchising the other half.

The proposal is also unnecessary, as the Board’s public members are Alaska Natives and already work hard to represent Native interests. The current Board comprises: a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director of the U.S. Fish and Wildlife Service; the Alaska Regional Director of the National Park Service; the Alaska Regional Director of the Bureau of Land Management; the Alaska Regional Director of the Bureau of Indian Affairs; the Alaska Regional Director of the U.S. Forest Service; and two public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture. 36 C.F.R. § 242.10(b). The Chair and public members are all Alaska Native.

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<sup>1</sup> The State of Alaska has challenged the legitimacy of the Board’s creation. *United States v. State of Alaska*, No. 22-CV-54 (D. Alaska), Dkt. 72 (filed Sept. 1, 2023). The U.S. District Court for the District of Alaska rejected this argument. However, that decision is not yet final as the State’s time to appeal the ruling has not yet run. For these reasons, although SCI submits this comment, SCI reserves its right to challenge the Department’s ability to add seats to an illegally created Board.



In passing the Alaska National Interest Lands Conservation Act (“ANILCA”), Congress recognized the importance of protecting subsistence uses of wildlife and fisheries for rural Alaskans, including Alaska Natives and non-Natives alike. Accordingly, SCI requests that the Department withdraw their proposal. Finally, SCI requests that the Department consider an additional voting seat on the Board for the Alaska Department of Fish and Game (“ADFG”).

## **Safari Club International**

SCI, an I.R.C. § 501(c)(4) nonprofit organization, has more than 88,000 members and advocates worldwide and 146 local Chapters. SCI has approximately 1,200 members and two chapters in Alaska. The Alaska Chapter is SCI’s largest. SCI’s missions include conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. SCI has long been an advocate of fair and equitable access to game resources in Alaska.

## **SCI Comments on Proposal to Add Three Native Seats to the Board**

### **1. ANILCA protects a rural preference, not an exclusively Native preference.**

In passing ANILCA, Congress recognized and protected the right of rural Alaskans to use and benefit from wildlife resources. This subsistence priority acknowledges the reality that many rural Alaskans live, at least in part, off the land. Grocery stores and Amazon delivery vans are not available, like they are in Anchorage or most of the Lower 48 States. Congress also recognized that many Alaska Native communities exist in rural Alaska—but many rural Alaskans are not members of Native communities. For this reason, Congress tied the subsistence preference to the reality of location, not membership in a Native community.

Title VIII of ANILCA defines the subsistence priority. According to Section 804, “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.” Section 804 specifies that, when necessary to limit taking of fish and wildlife populations to protect their health and subsistence use of those populations, the subsistence priority “shall be implemented through appropriate limitations based on the application of the following criteria: (1) customary and direct dependence upon the populations as the mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources.” 16 U.S.C. § 3114. In other words, Congress limited the subsistence priority to where and how individuals live—not who they are.

ANILCA’s language represented a deliberate decision by Congress. In early drafts of ANILCA’s Title VIII, the “House Interior Committee allocated access to subsistence resources on an ethnic basis, an approach similar in concept to that suggested by the [Alaska Native Claims



Settlement Act] Conference Committee.”<sup>2</sup> 126 Cong. Rec. 29278 (Nov. 12, 1980). However, the “ethnic basis” was abandoned after Governor Jay Hammond of Alaska addressed Congress. The Governor correctly pointed out that under the Alaska Constitution the State could not participate in a subsistence management system which would require it to allocate access to subsistence resources based on “Nativeness.” *Id.* “Because of the Governor’s objections, [the House] adopted (and the [b]ill retains) a racially-neutral approach to the subsistence allocation issue.” *Id.*

Likewise, Representative Seiberling explained that the subsistence provision in ANILCA

must not be based upon race, that even though we have a commitment to the Natives of Alaska, we must honor that commitment in such a way that we do not set apart and above other people similarly situated. After a great deal of work and travail, we managed to work out a subsistence provision that does protect their rights and is nevertheless not based on race.

124 Cong. Rec. 14162 (May 17, 1978). The racial preference language in ANILCA Title VIII was replaced with a preference based on rural residency, which Congress enacted in Title VIII.<sup>3</sup>

A recent analysis supports Congress’ choice. As Representative Seiberling recognized, many rural Alaskans are Alaska Natives, and their interests and use of wildlife resources should be honored. But rural Alaska Native communities are not the only communities reliant on subsistence use of wildlife and fish. The analysis of Alaska population trends found that 45% of rural residents are non-Native. James A. Fall, *Alaska Population Trends and Patterns, 1960-2018* (July 2019). Non-Natives and Natives alike rely on the land to provide for personal and family consumption. Acknowledging that almost half of rural subsistence users are not Alaska Natives is important when evaluating this proposal. Adding three public members to the Board who must be nominated or recommended by federally recognized Tribal governments disenfranchises the other half of rural subsistence users. It creates a disproportionate balance in decision making.

The Board must fairly and equally represent *all* rural users, not disproportionately favor one group. SCI requests that the Department withdraw their proposal.

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<sup>2</sup> At the time, Congress used the phrase “ethnic basis” in discussions regarding a racial preference.

<sup>3</sup> ANILCA does not define which individuals or communities qualify as rural. Instead, the Board determines whether a community or area of Alaska should be considered rural using guidelines and characteristics defined by the Secretaries of Interior and Agriculture.

**2. Elevating the interests of half of Alaska’s subsistence users raises Equal Protection concerns under the Alaska and U.S. Constitutions.**

Elevating the interests of half of Alaska’s subsistence users while disenfranchising the other half based solely on race, and not the need for a subsistence priority, also raises Equal Protection concerns under the Alaska and U.S. Constitutions. Sections 3, 15, and 17 of Article VIII of the Alaska Constitution are collectively known as the “equal access” clauses.<sup>4</sup> Section 17, the “uniform application” clause, requires that laws and regulations “apply equally to all persons similarly situated,” and provides an equal protection guarantee for the use and disposal of natural resources. Alaska Const. art. VIII, § 17. Courts have found that these clauses guarantee equal access to the state’s natural resources to all of Alaska’s citizens. Most notably, the Alaska Supreme Court ruled that a “rural” only subsistence priority was unconstitutional under the equal access provisions of the Alaska Constitution. *McDowell v. State*, 785 P.2d 1, 1 (Alaska 1989). Under the Alaska Constitution, subsistence cannot be limited based on locality, let alone race.

The U.S. Constitution guarantees that “all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). A government action will be subject to heightened judicial scrutiny—which government actions rarely survive—when it disadvantages a “suspect class” or impinges upon the exercise of a “fundamental right.” *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). The right to basic subsistence is arguably the most fundamental of all human rights. *Price v. Cohen*, 715 F.2d 87 (3d Cir. 1983).

As noted above, Congress recognized that Alaska Native and non-Native subsistence users are “similarly situated.” The proposal turns on a race-based distinction and impinges on the fundamental right to subsistence. The proposal likely violates the U.S. Constitution for this reason. Elevating the interests of half of Alaska’s subsistence users while disenfranchising the other half based solely on race likely violates protections under the Alaska and U.S. Constitutions, and therefore, the Department should withdrawal this rule.

**3. The Alaska Department of Fish and Game should hold a voting seat on the Federal Subsistence Board.**

SCI supports making the Board more representative and better informed about the needs of subsistence users in Alaska. For this reason, SCI supports adding a voting seat for the ADFG. The ADFG is the agency charged with managing Alaska’s wildlife and fisheries resources, under the direction of the Alaska Board of Game and Board of Fisheries. The ADFG is the state agency responsible for gathering data both on the status of Alaska’s wildlife populations and fisheries. It is also the agency responsible for gathering data on the use of these resources. This includes data on subsistence uses, which are protected under state law as well as ANILCA. *E.g.*,

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<sup>4</sup> Alaska Const., art. VIII, § 3 (Common Use); art. VIII, § 15 (No Exclusive Right of Fishery); art. VIII, § 17 (Uniform Application).



AS 16.05.258 (requiring the Boards of Game and Fisheries to protect the amount reasonably necessary for subsistence uses through creating a subsistence priority for game and fish). Simply put, ADFG is an expert on wildlife populations and wildlife uses in Alaska. That expertise should be a part of Board deliberations, for the benefit of all subsistence users in Alaska.

Moreover, adding an ADFG seat is consistent with ANILCA. Congress expressly recognized and maintained the state's management authority except as limited in Title VIII, thus any authority regarding fish and wildlife not specifically granted by Congress in Title VIII remains with the state. 16 U.S.C. § 3202. Importantly, ANILCA requires consultation with the State of Alaska on issues of subsistence.<sup>5</sup> This is often illustrated by ADFG's participation in annual Board meetings. ADFG provides detailed analysis of each proposal, utilizing the best available science and proven wildlife management principles. However, in recent years, the Board has side stepped ADFG's evaluations and made contrary decisions.

Adding an ADFG representative as a full voting member to the Board would allow for more fulsome consultation with the State, as directed by ANILCA. ADFG's voice would be on an equal level as the voting members from federal agencies and public members. ADFG's expertise would benefit the Board and all subsistence users. If the Department wishes to add seats to the Board, it would be well served to add ADFG and withdraw the current proposal.

## **Conclusion**

Thank you again for the opportunity to comment on this proposal. If you have any questions, please contact Madeline Demaske, SCI Litigation Associate, at [litigation@safariclub.org](mailto:litigation@safariclub.org).

Sincerely,

John McLaurin  
President, Safari Club International

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<sup>5</sup> See 16 U.S.C. § 3126(b) (“... the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands ...”); § 3181(i)(2)(B) (“... to make recommendations to appropriate officials of the governments of the United States and the State of Alaska with respect to ways to improve coordination and consultation between said governments in wildlife management ...”).