ANNEXATION STUDY COMMISSION
Subsistence Issue
January 30, 2006

• At the last meeting, members of the public expressed concern that annexation could jeopardize or impact the designation of an area for subsistence use. The commission asked staff to review the issue.

• At that meeting, Dan Bockhorst, staff to LBC, stated that the subsistence issue had come up in an LBC proceeding and that they had determined, after review, that there was no impact and it was thus not an issue of concern.

• The issue came up in the 1999 annexation proceedings by the City of Kodiak. LBC staff researched. State and Federal officials assured staff that annexation would not automatically revoke the subsistence status of the area. See attached e-mail: Excerpt of LBC staff memo on subsistence issue.

• Confirmed with Natural Resources section of AG's office that under state law, annexation of territory would have no immediate or automatic affect.

• Joint Board of Fisheries and Game establishes nonsubsistence areas.

• When the Joint Board considers whether a community is eligible for subsistence rights, it evaluates the “natural community” and characteristics of subsistence lifestyle, not the community as it is defined by political subdivision boundaries.

• Joint Board did not define the Juneau Nonsubsistence Area as matching the political subdivision boundaries of CBJ. See 5 AAC 99.015(a)(2) (attached).

• Joint Board applies the statutory criteria in AS 16.02.258(c) (attached).

• Similarly, under Federal law, subsistence determinations are based on numerous factors and annexation would have no immediate impact on the “rural” designation of an area annexed.

• The Federal “rural determination process” and criteria are set out in 50 CFR § 100.15 (attached).
• Determinations of whether communities are rural or non-rural under the federal system are made every 10 years after the federal census results become available.

• 2000 census review process ongoing; Federal board will not begin another review cycle until after the 2010 census.

• 50 CFR §100.23 (attached), the Federal Subsistence Board "has determined all communities and areas to be rural in accordance with §100.15 except the following [with respect to Juneau]: Juneau area – including Juneau, West Juneau, and Douglas." Thus, except for these sub-areas, the Juneau community or area has been determined "rural." Federal rural/non-rural determination for Juneau is not based on the boundaries of the political subdivision.

• The USFWS, Federal Subsistence Management Program, has maps delineating the boundaries of non-rural areas. The map of the Juneau area shows that the non-rural area is strictly the area of the CBJ on the road system (attached).
Barbara Ritchie

From: Dan Bockhorst [dan_bockhorst@commerce.state.ak.us]
Sent: Thursday, January 26, 2006 11:45 AM
To: Barbara Ritchie
Subject: Effects of annexation on subsistence rights
Attachments: Prov report word version.doc; Final Report.pdf

Barbara: Attached is a copy of the LBC Staff preliminary and final reports regarding the 1999 City of Kodiak annexation proposal. The issue is addressed in both reports:

In the preliminary ("provisional") report, the staff stated:

The concerns of various correspondents noted in subsection C above are also of potential significance to others in the territory. However, the perceptions expressed about the effects that annexation will have on subsistence rights are incorrect. DCRA has been assured by State and Federal officials that annexation will not “automatically revoke” the subsistence status of the area as has been alleged.

James Fall, Regional Program Manager for the Division of Subsistence in the Alaska Department of Fish and Game, indicated that the proposed annexation would not automatically affect the rights of citizens of Kodiak to engage in subsistence hunting and fishing activities on either State or Federal lands. Mr. Fall indicated that when the State considers whether a community is eligible for subsistence rights, it evaluates the ‘natural community’ rather than the community as it is defined by political boundaries. In the case of Kodiak, the State did not define the community of Kodiak to be comprised only of the territory within the corporate boundaries of the City, but rather considered the community to be comprised of the entire area connected by roadway. This included the area within the City, the territory proposed for annexation, Womens Bay, and the Coast Guard Station.

Cliff Edenshaw of the U.S. Fish and Wildlife Service indicated that Federal subsistence determinations also include consideration of natural communities. One of the criteria that the Federal system utilizes is population. If a community or aggregate set of communities has 2,500 or fewer residents, it is presumed to be rural. If a community or aggregate set of communities has 7,000 or more residents, it is presumed to be non-rural.

However, the presumption can be overcome with a showing of special circumstances. Mr. Edenshaw indicated that, in fact, Kodiak has previously overcome the presumption. As was the case with State subsistence rights, Federal authorities defined the community of Kodiak to be comprised of the area connected by roadway. DCRA estimates that the area in question is currently inhabited by 12,659 individuals. Notwithstanding the substantial margin by which the community exceeds the 7,000 population threshold, Federal regulators recognized that subsistence plays a vital cultural and economic role in the lives of many in Kodiak. Consequently, Kodiak overcame the presumption of being non-rural following the 1990 census and was granted a rural designation. Determinations of whether communities are rural or non-rural under the federal system are made every 10 years after the federal census results become available.

On pages 5 and 6 of the final report, LBC Staff stated:

Rumors and allegations that annexation will eliminate or diminish subsistence rights of Kodiak residents have persisted throughout this
proceeding. After investigating, DCED stated it its preliminary report that “. . . annexation will not affect the rights of citizens of Kodiak to engage in subsistence hunting and fishing activities on either State or Federal lands.” (Executive Summary, page 5). An individual present at the August 2 informational meeting disputed DCED’s view on this matter. In particular, the individual challenged DCED’s statement on page 50 of the preliminary report that areas with more than 7,000 residents can overcome the presumption in Federal law that they should be designated as non-rural for subsistence purposes. DCED affirms its earlier position regarding this matter. 50 CFR 100.15(a)(3) provides that, “A community with a population of more than 7000 shall be presumed non-rural, unless such a community or area possesses significant characteristics of a rural nature.” Kodiak’s current eligibility for subsistence rights is not based on consideration of separate populations inside the corporate boundaries of the City of Kodiak (population 6,859) and the remainder of the greater community of Kodiak (5,800). Rather it is based on the aggregate population of the greater community of Kodiak. 

The population of the greater community of Kodiak was far in excess of 7,000 at the time of the last Federal determination regarding subsistence. However, Kodiak overcame the presumption of non-rural character based on considerations other than population. Those considerations consisted of characteristics that “may include, but are not limited to: (i) use of fish and wildlife; (ii) development and diversity of the economy; (iii) community infrastructure; (iv) transportation; and (v) educational institutions.” (50 CFR 100.15(a)(5)).
5 AAC 99.015. Joint Board nonsubsistence areas

(a) The following areas are found by the Joint Board of Fisheries and Game to be nonsubsistence use areas:

1. The Ketchikan Nonsubsistence Area is comprised of the following: within Unit 1(A), as defined in 5 AAC 92.450(1) (A), all drainages of the Cleveland Peninsula between Niblack Point and Bluff Point, Revillagigedo, Gravina, Pennoek, Smeaton, Bold, Betton, and Hassler Islands; all marine waters of Sections 1-C, as defined by 5 AAC 33.200(a) (3), 1-D, as defined by 5 AAC 33.200(a) (4), 1-E, as defined by 5 AAC 33.200(a) (5), that portion of Section 1-F, as defined by 5 AAC 33.200(a) (6), north of the latitude of the southernmost tip of Mary Island and within one mile of the mainland and the Gravina and Revillagigedo Island shorelines; and that portion of District 2, as defined by 5 AAC 33.200(b), within one mile of the Cleveland Peninsula shoreline and east of the longitude of Niblack Point.

2. The Juneau Nonsubsistence Area is comprised of the following: within Unit 1(C), as defined by 5 AAC 92.450(1) (C), all drainages on the mainland east of Lynn Canal and Stephens Passage from the latitude of Eldred Rock to Point Coke, and on Lincoln, Shelter, and Douglas islands; within Unit 4, as defined by 5 AAC 92.450(4), that portion of Admiralty Island that includes the Glass Peninsula, all drainages into Seymour Canal north of and including Pleasant Bay, all drainages into Stephens Passage west of Point Arden, the Mansfield Peninsula, all drainages into Chatham Strait north of Point Marsden; all marine waters of Sections 11-A and 11-B, as defined in 5 AAC 33.200(k) (1) and (k)(2), Section 12-B, as defined in 5 AAC 33.200(l) (2), and that portion of Section 12-A, as defined in 5 AAC 33.200(l) (1), north of the latitude of Point Marsden and that portion of District 15, as defined in 5 AAC 33.200(o), south of the latitude of the northern entrance to Berners Bay, and including Berners Bay.

3. The Anchorage-Matsu-Kenai Nonsubsistence Area is comprised of the following: Units 7, as defined by 5 AAC 92.450(7) (except the Kenai Fjords National Park lands), 14, as defined by 5 AAC 92.450(14), 15, as defined by 5 AAC 92.450(15) (except that portion south and west of a line beginning at the mouth of Rocky River up the Rocky and Windy Rivers across the Windy River/Jakolof Creek divide and down Jakolof Creek to its mouth, including the islands between the eastern most point of Jakolof Bay and the eastern most point of Rocky Bay), 16(A), as defined by 5 AAC 92.450(16)(A); all waters of Alaska in the Cook Inlet Area, as defined by 5 AAC 21.100 (except those waters north of Point Bede which are west of a line from the eastern most point of Jakolof Bay north to the western most point of Hesketh Island including Jakolof Bay and south of a line west from Hesketh Island; the waters south of Point Bede which are west of the eastern most point of Rocky Bay; and those waters described in 5 AAC 01.555(b), known as the Tyonek subdistrict).

4. The Fairbanks Nonsubsistence Area is comprised of the following: within Unit 20(A), as defined by 5 AAC 92.450(20) (A), east of the Wood River drainage and south of the Rex Trail but including the upper Wood River drainage south of its confluence with Chicken Creek; within Unit 20(B), as defined by 5 AAC 92.450(20) (B), the North Star Borough and that portion of the Washington Creek drainage east of the Elliot Highway; within Unit 20(D) as defined by 5 AAC 92.450(20) (D), west of the Tanana River between its confluence with the Johnson and Delta Rivers, west of the east bank of the Johnson River, and north and west of the Volkmar drainage, including the Goodpaster River drainage; and within Unit 25(C), as defined by 5 AAC 92.450(25) (C), the Preacher and Beaver Creek drainages.

5. The Valdez Nonsubsistence Area is comprised of the following: within Unit 6(D), as defined by 5 AAC 92.450(6) (D), and all waters of Alaska in the Prince William Sound Area as defined by 5 AAC

http://www.legis.state.ak.us/cgi-bin/folioisa.dll/aac/query=[group+!275+aac+99!2E015!27... 1/25/2006
(b) The provisions of this section do not apply during the period from April 28, 1994 until a final decision by the Alaska Supreme Court in State v. Kenaitze, No. S-6162, concerning the constitutionality of AS 16.05.258 (c).

History: Eff. 5/15/93, Register 126; am 4/28/94, Register 130

Authority: AS 16.05.251

AS 16.05.255

AS 16.05.258
Sec. 16.05.258. Subsistence use and allocation of fish and game.

(a) Except in nonsubsistence areas, the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner shall provide recommendations to the boards concerning the stock and population identifications. The boards shall make identifications required under this subsection after receipt of the commissioner's recommendations.

(b) The appropriate board shall determine whether a portion of a fish stock or game population identified under (a) of this section can be harvested consistent with sustained yield. If a portion of a stock or population can be harvested consistent with sustained yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses and

(1) if the harvestable portion of the stock or population is sufficient to provide for all consumptive uses, the appropriate board

   (A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

   (B) shall adopt regulations that provide for other uses of those stocks or populations, subject to preferences among beneficial uses; and

   (C) may adopt regulations to differentiate among uses;

(2) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses and some, but not all, other consumptive uses, the appropriate board

   (A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

   (B) may adopt regulations that provide for other consumptive uses of those stocks or populations;

   and

   (C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;

(3) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses, but no other consumptive uses, the appropriate board shall

   (A) determine the portion of the stocks or populations that can be harvested consistent with sustained yield; and

   (B) adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses; and

(4) if the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall
(A) adopt regulations eliminating consumptive uses, other than subsistence uses;

(B) distinguish among subsistence users, through limitations based on

(i) the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of livelihood;

(ii) the proximity of the domicile of the subsistence user to the stock or population; and

(iii) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

(c) The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:

(1) the social and economic structure;

(2) the stability of the economy;

(3) the extent and the kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;

(4) the amount and distribution of cash income among those domiciled in the area or community;

(5) the cost and availability of goods and services to those domiciled in the area or community;

(6) the variety of fish and game species used by those domiciled in the area or community;

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area or community participating in hunting and fishing activities or using wild fish and game;

(9) the harvest levels of fish and game by those domiciled in the area or community;

(10) the cultural, social, and economic values associated with the taking and use of fish and game;

(11) the geographic locations where those domiciled in the area or community hunt and fish;

(12) the extent of sharing and exchange of fish and game by those domiciled in the area or community;

(13) additional similar factors the boards establish by regulation to be relevant to their determinations under this subsection.

(d) Fish stocks and game populations, or portions of fish stocks and game populations not identified
under (a) of this section may be taken only under nonsubsistence regulations.

(e) Takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

(f) For purposes of this section, "reasonable opportunity" means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.

Sec. 16.05.259. No subsistence defense.

In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses.

Sec. 16.05.260. Advisory committees.

The Board of Fisheries and the Board of Game may adopt regulations they consider advisable in accordance with AS 44.62 (Administrative Procedure Act) establishing, at places in the state designated by the individual boards, advisory committees to be composed of persons well informed on the fish or game resources of the locality. The boards shall set the number and terms of each of the members of the advisory committees, shall delegate one member of each committee as chairman, and shall give the chairman authority to hold public hearings on fish or game matters. Recommendations from the advisory committees shall be forwarded to the appropriate board for their consideration but if the Board of Fisheries or the Board of Game chooses not to follow the recommendations of the local advisory committee the appropriate board shall inform the appropriate advisory committee of this action and state the reasons for not following the recommendations. The commissioner shall delegate authority to advisory committees for emergency closures during established seasons. The commissioner is empowered to set aside and make null and void only opening of seasons set by the advisory committees under this section. The appropriate board shall adopt the necessary regulations governing these closures.

Sec. 16.05.261. [Renumbered as AS 16.05.259].

Repealed or Renumbered

Sec. 16.05.270. Delegation of authority to commissioner.

For the purpose of administering AS 16.05.251 and 16.05.255, each board may delegate authority to the commissioner to act in its behalf. If there is a conflict between the board and the commissioner on proposed regulations, public hearings shall be held concerning the issues in question. If, after the public hearings, the board and the commissioner continue to disagree, the issue shall be certified in writing by the board and the commissioner to the governor who shall make a decision. The decision of the governor is final.

Sec. 16.05.280. Removal of board members.

The governor may only remove a board member for inefficiency, neglect of duty, or misconduct in office, or because the member while serving on the board is convicted of a misdemeanor for violating a
§ 100.15 Rural determination process.

(a) The Board shall determine if an area or community in Alaska is rural. In determining whether a specific area of Alaska is rural, the Board shall use the following guidelines:

(1) A community or area with a population of 2,500 or less shall be deemed to be rural unless such a community or area possesses significant characteristics of a non-rural nature, or is considered to be socially and economically a part of an urbanized area.

(2) Communities or areas with populations above 2,500 but not more than 7,000 will be determined to be rural or non-rural.

(3) A community with a population of more than 7,000 shall be presumed non-rural, unless such a community or area possesses significant characteristics of a rural nature.

(4) Population data from the most recent census conducted by the United States Bureau of Census as updated by the Alaska Department of Labor shall be utilized in this process.

(5) Community or area characteristics shall be considered in evaluating a community's rural or non-rural status. The characteristics may include, but are not limited to:

(i) Use of fish and wildlife;

(ii) Development and diversity of the economy;

(iii) Community infrastructure;

(iv) Transportation; and

(v) Educational institutions.

(6) Communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate.

(b) The Board shall periodically review rural determinations. Rural determinations shall be reviewed on a 10-year cycle, commencing with the publication of the year 2000 U.S. census. Rural determinations may be reviewed out-of-cycle in special circumstances. Once the Board makes a determination that a community has changed from rural to non-rural, a waiting period of 5 years shall be required before the non-rural determination becomes effective.

(c) Current determinations are listed at § 100.23.
§ 100.23 Rural determinations.

(a) The Board has determined all communities and areas to be rural in accordance with § 100.15 except the following:

Adak;

Fairbanks North Star Borough;

Homer area--including Homer, Anchor Point, Kachemak City, and Fritz Creek;

Juneau area--including Juneau, West Juneau, and Douglas;

Kenai area--including Kenai, Soldotna, Sterling, Nikiski, Salamatof, Kalifornsky, Kasilof, and Clam Gulch;

Ketchikan area--including Ketchikan City, Clover Pass, North Tongass Highway, Ketchikan East, Mountain Point, Herring

Cove, Saxman East, Pennock Island, and parts of Gravina Island;

Municipality of Anchorage;

Seward area--including Seward and Moose Pass, Valdez, and

Wasilla area--including Palmer, Wasilla, Sutton, Big Lake, Houston, and Bodenberg Butte.

You may obtain maps delineating the boundaries of non-rural areas from the U.S. Fish and Wildlife Service.

(b) [Reserved]
Do these regulations apply to you?

Are you a rural Alaska resident?

All communities and areas of Alaska are rural, except the areas shown on the following maps as nonrural areas. You must be a rural Alaska resident to harvest fish and shellfish under Federal subsistence regulations. You must have your primary, permanent place of residence in a rural area to qualify to hunt, trap or fish under Federal subsistence regulations. A seasonal residence does not qualify you as a rural resident.

See detailed maps of nonrural areas (except Adak) on the following pages.

Nonrural Communities

The Federal Subsistence Board is currently reviewing the rural/nonrural status of Alaska communities. For more information, contact:

Office of Subsistence Management
phone: (907) 786-3888 or (800) 478-1456
e-mail: subsistence@fws.gov
web: http://alaska.fws.gov/asm/home.html

- Adak
- Anchorage (Municipality)
- Fairbanks North Star Borough
- Homer area (including Homer, Anchor Point, Kachemak City and Fritz Creek)
- Juneau area (including Douglas, Juneau, West Juneau)
- Kenai area (including Clam Gulch, Kasilof, Kenai, Nikiski, Salamatof, Soldotna, Sterling)
- Ketchikan area (including Clover Pass, Herring Cove, Ketchikan City, Ketchikan East, Mountain Point, North Tongass Highway, Pennock Island, parts of Gravina Island, and Saxman East)
- Wasilla area (including Big Lake, Bodenberg Butte, Houston, Palmer, Sutton, Wasilla)
- Seward area (including Seward and Moose Pass)
- Valdez
General Information

Nonrural Areas

Anchorage Municipality

Knik
Knik Arm
Eklutna
Chugiak
Eagle River
Girdwood
Hope
Portage
Whittier

Wasilla Area

Kashwitna
Willow
Houston
Palmer
Moose Creek
Bodenburg Butte
Chickaloon River Bridge
Sutton
Glenn Highway

Big Lake
Eagle River
Chugiak
Knik
Eklutna
Nonrural Areas

Fairbanks North Star Borough

Ketchikan Area

Revillagigedo Island

Clover Pass

North Tongass Highway

Ward Cove

Ketchikan City

Ketchikan East

Saxman East

Herring Cove

Mountain Point
Nonrural Areas

Homer Area

Ninilchik
Anchor Point
Fritz Creek
Kachemak City
Kachemak Bay
Seldovia
Nanwalek
Port Graham
General Information

Nonrural Areas

Seward Area

Cooper Landing

Moose Pass

Kenai Lake

Seward

Kenai Area

Cook Inlet

Nikiski

Salamatof

Kenai

Sterling

Soldotna

Kalifornsky

Kasilof

Clam Gulch