

Appendix 6 Significance

Compliance with ANILCA Section 810

After the passage of ANILCA in 1980, several ambiguous concepts with regard to subsistence management were identified as needing further clarification. High among this list was the direction in Section 810 that “no such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands *which would significantly restrict subsistence uses* shall be effected until...” At question was both what defined a “restriction to subsistence use,” and at what threshold this restriction would be considered “significant.”

The following materials, extracted from the court’s decisions in the first ANILCA-related lawsuit, set the parameters and provided guidelines for a determination of significant restriction on subsistence uses. While over 25 years old, the decisions quoted below remain the foundation for determining a finding of “may significantly restrict subsistence” for most federal agencies in Alaska.

Quoting from the decision by Judge Fitzgerald³ with regard to what constitutes a legally acceptable agency definition of the phrase ‘significant restriction upon subsistence uses’:

At this juncture I note that Section 810(a) does not define or interpret the phrase “significant restriction upon subsistence uses.” The Alaska Director has provided a definition of the term “significant restriction of subsistence uses,” as used in Section 810(a), and the plaintiffs do not seriously dispute the validity of that definition. Furthermore, since the Director is the government official charged with the responsibility of complying with Section 810(a), I must defer to his interpretation of the statute provided that it is consistent with and in furtherance of the purposes and policies of the legislation...

The Director has defined “significant restriction of subsistence uses” as (1) a reduction in the availability of harvestable resources caused by decline in the population of subsistence resources; (2) a reduction in the availability of resources, caused by an alteration of their distribution or location throughout the National Petroleum Reserve-Alaska; or (3) the limitation of access by subsistence harvesters.

Significant restrictions are differentiated from insignificant restrictions by a process assessing whether the action undertaken will have no or a slight effect as opposed to large or substantial effects. In further explanation the Director states that no significant restriction results when there would be “no or a slight” reduction in the amount of harvestable resources and no “occasional” redistribution of these resources.

There would be no effect (or slight inconvenience) on the ability of harvesters to reach and use active subsistence harvesting sites; and there would be no substantial increase in competition for harvestable resources (that is, no substantial increase in hunting by oilfield workers or Outsiders using roads to the oil fields).

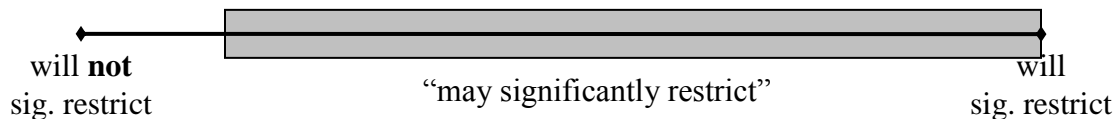
³ from Kunaknana et al. vs. Watt, December 20, 1983, Decision of Record (NPR-A Lease Sale), pages 41 and 42

Conversely, restrictions for subsistence uses would be significant if there are large reductions in the abundance or major distribution of these resources, substantial interference with harvestable access to active subsistence sites or major increases in non-rural resident hunting.

In light of this definition the determination of significant restriction must be made on a reasonable basis, since it must be decided in light of the total subsistence lands and resources that are available to individuals in surrounding areas living a subsistence lifestyle.

Following this example, first a restriction is identified, then the magnitude of the restriction is evaluated. *Kunaknana et al. vs. Clark*, the appeal to the Ninth Circuit Court of the same case, further affirms the above definition, and also sets the precedence for what is termed the “may” threshold. The Opinion filed September 12, 1984 states: “first, the agency determines whether the contemplated action may significantly restrict subsistence use; if it may, the agency must comply with the notice and hearings procedures.” It is because of this Opinion that the ANILCA 810 findings are stated as “will not significantly restrict” or “may significantly restrict.”

The “may” threshold as used by the BLM can be characterized as a continuum, in which one end is “will not significantly restrict” and the other is “will significantly restrict,” with may falling somewhere in between.



While it may seem that the gray area of “may significantly restrict” is ambiguous, it serves the purpose of allowing the analyst to evaluate the particular proposed action and alternatives to the particular subsistence uses of a given area. For example, the analyst may wish to use the following strategy: First, identify the potential impact(s) resulting from the proposed action that may lead to one of the three restrictions defined by case law, above (e.g., a reduction due to decline in resource population; a reduction due to alteration of resource distribution; or a limitation to access by subsistence users). Then, assess the significance of the impact in the context of the following factors⁴:

- Magnitude of the impact (how much)
- Duration or frequency of the impact (how long or how often)
- Extent of the impact (how far)
- Likelihood of the impact occurring (probability)
- Intensity of the impact (e.g., unique setting, unprecedented impacts, uncertain impacts, controversial nature of the impact)

Ultimately, it is up to the analyst to make the determination using the best information available. If you are struggling with whether or not the identified impacts resulting from the proposed action are significant enough for a positive finding of “may significantly restrict,” it is always

⁴ Example of significance criteria defined by the US Forest Service Rural Utilities Service, Jackson County Lake Project Final Environmental Impact Statement, 2001, Appendix C, pages C-3 to C-4.

best to err on the side of protection. One must remember that the intent of Title VIII of ANILCA is to protect subsistence use, and that the Section 810 process has the ultimate goal of identifying ways in which impacts to subsistence can be minimized through the Notice and Hearings process. Lastly, whatever the final determination, adequate discussion must be contained within the Section 810 Evaluation to support the findings, so that the public can adequately review the findings and provide input during the DEIS meeting(s) or the ANILCA Hearing(s), if required.