Nos. 09-36122, 09-36125, 09-36127 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATIE JOHN, GERALD NICOLAI, ALASKA INTER-TRIBAL COUNCIL, AND NATIVE VILLAGE OF TANANA, *Plaintiff / Appellants*

v.

UNITED STATES OF AMERICA, KEN SALAZAR, Secretary of the Interior, and TOM VILSACK, Secretary of the United States Department of Agriculture, *Defendants / Appellees*

and

STATE OF ALASKA, *Defendant-Intervenor / Appellee*

STATE OF ALASKA,
Plaintiff / Appellant

and

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, ALASKA FISH AND WILDLIFE CONSERVATION FUND, MICHAEL TINKER, and JOHN CONRAD,
Plaintiff-Intervenors / Appellants

v.

KEN SALAZAR, Secretary of the U.S. Department of the Interior, and TOM VILSACK, Secretary of the U.S. Department of Agriculture,
Defendants / Appellees,

and

KATIE JOHN, GERALD NICOLAI, ALASKA INTER-TRIBAL COUNCIL, and NATIVE VILLAGE OF TANANA,
Defendant-Intervenors / Appellees

and

ALASKA FEDERATION OF NATIVES
Defendant-Intervenor / Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA
USDC Nos. 3:05-cv-00006-HRH, 3:05-cv-00158-HRH (Consolidated)

PLAINTIFF/APPELLANT STATE OF ALASKA'S OPENING BRIEF

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JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701 *et seq*. The district court entered final judgment for the Secretaries of the Interior and Agriculture ("Secretaries") in these consolidated cases on October 22, 2009 [Excerpt of Record Tab 33 (ECF Doc. 33 in 3:05-cv-00158-HRH); ER Tab 264 (ECF Doc. 264 in 3:05-cv-00006-HRH)]. The State timely appealed to this Court on December 18, 2009 [Tab 34 (ECFs 34-35 in 3:05-cv-00158-HRH & ECF 266 in 3:05-cv-00006-HRH)];[1] Fed. R. App. P. 4(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1291; the appeal is from a final judgment and dismissal by the district court disposing of all claims as to all parties.

ISSUES PRESENTED

1. Did the district court incorrectly apply *Chevron* deference to the Secretaries' interpretations of statutes and the common law doctrine of federal reserved water rights ("FRWRs") in their 1999 regulations declaring FRWRs throughout Alaska?

2. Did the Secretaries legally satisfy the responsibility the *Katie John I* [2] Court imposed on them to "identify" which of "some" navigable waters possess a

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[1] Hereafter in this brief, any early docket filings in these district court cases before the use of electronic case filing ("ECF") are referred to by their "Doc." number. ECF filings are referred to by their "ECF" number.

[2] *State of Alaska v. Babbitt*, 72 F.3d 698, 704 (9th Cir. 1995) ("*Katie John I*").

FRWR by simply promulgating expansive federal regulations unilaterally declaring binding FRWRs throughout Alaska in broad, unspecified categories, without complying with the established adjudication process and meeting the specific, substantive standards of the FRWR doctrine?

a. Did the district court err in allowing the Secretaries to establish FRWRs by unilateral rulemaking rather than requiring normal adjudication?

b. Did the district court err in upholding the Secretaries' determinations that Congress impliedly reserved broad, indefinite categories of waters – including sea waters and other waters located outside Congressionally-established reservation boundaries – and on private lands and pre-selected lands excluded by ANILCA?

STATEMENT OF CASE AND FACTS

This case challenges the Secretaries' 1999 rulemaking (*Final Rules*, 64 Fed. Reg. 1276 *et seq*. (Jan. 8, 1999)) purporting to establish FRWRs – and through them federal subsistence management and enforcement – throughout Alaska waters. It presents issues of proper process and the geographic scope of federal subsistence control over Alaska waters through the Secretaries' unilateral declaration of FRWRs in those waters, which the district court upheld.

The State of Alaska ("State" or "Alaska") assumed management of the fish and wildlife on all lands and waters in Alaska in 1960. Management of Alaska's

fisheries was a primary reason Alaskans sought statehood in the 1950s, as Alaska's salmon stocks were decimated under federal management. *See Metlakatla Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961), *rev'd in part*, 369 U.S. 45 (1962).

In 1980, Congress passed the Alaska National Interest Lands Conservation Act ("ANILCA"), P.L. 96-487, 94 Stat. 2371, which created or expanded many federal land conservation units ("CSUs") and other national purpose reservations. ANILCA §§ 803 and 804 generally provide for a federal priority for subsistence taking of fish and wildlife by rural residents, but only on federal "public lands." 16 U.S.C. §§ 3113-3114. ANILCA § 102 defines "land" as "lands, waters, and interests therein." 16 U.S.C. § 3102. It defines "Federal land" as such lands "the *title* to which is in the United States after December 2, 1980." *Id.* (emphasis added). The definition of Federal "public lands" specifically excludes lands selected by the State of Alaska or an Alaska Native Corporation for conveyance to them under the Alaska Statehood Act or the Alaska Native Claims Settlement Act ("ANCSA") and also "lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law." *Id.* Thus, "lands, waters, and interests therein" transferred to Alaska under other federal laws, such as the 1953 Submerged Lands Act regarding navigable waters, 43 U.S.C. 1301 *et seq.*, are excluded from the provisions of ANILCA,

including its federal subsistence provisions, as are State and ANCSA-selected lands.

In 1995, in *Katie John I*, a panel of this Court held that "by virtue of the reserved water rights doctrine" the United States has a "title" interest in "some" navigable waters of the State such that Congress intended that ANILCA's subsistence use priority would apply to those waters. 72 F.3d at 702-04.

The panel discussed the elements of the reserved water rights doctrine, upon which it relied in reaching its decision.

> Under the reserved water rights doctrine, when the United States withdraws its lands from the public domain and reserves them for a federal purpose, the United States implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation. The United States may reserve "only that amount of water necessary to fulfill the purpose of the reservation."
> * * *
> In determining whether the reserved water rights doctrine applies, we must determine whether the United States intended to reserve unappropriated waters. Intent is inferred if those waters are necessary to accomplish the purposes for which the land was reserved. It follows that courts must conclude that "without the water the purposes of the reservation would be entirely defeated."

Id. at 703 (citing and quoting *Cappaert v. United States*, 426 U.S. 128, 138-41 (1976), and *United States v. New Mexico*, 438 U.S. 696, 700, 702 (1978)).

The panel next considered the application of the reserved water rights doctrine in this instance.

> The United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes. In doing so, it has

> also implicitly reserved appurtenant waters, including appurtenant navigable waters, *to the extent needed to accomplish the purposes of the reservations*. * * * Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.

Id. (emphasis added, footnote omitted).

The panel went on to hold "that the federal agencies that administer the subsistence priority are responsible for identifying those waters." *Id.* at 704. It did not address how the federal agencies were to make these identifications. However, it recognized that with that responsibility it had "impose[d] an extraordinary administrative burden on [the] federal agencies," apparently contemplating that their claims to FRWRs would be adjudicated as FRWRs normally are.

After the district court entered final judgment on remand, the State appealed. In 2001, this Court affirmed that judgment en banc in a per curiam decision accompanied by several separate opinions, including a dissent. *John v. United States*, 247 F.3d 1032 (9th Cir. 2001).

Meanwhile, the Secretaries proceeded to declare federal reserved water rights through notice-and-comment rulemaking. They promulgated final rules in 1999 purporting to establish binding FRWRs in thousands of streams, rivers, lakes, and sea and tidal waters in Alaska. 64 Fed. Reg. 1276-1288. Those rules do not apply the legal elements necessary to find a FRWR, nor do they list by name

specific rivers, streams, lakes, or tidal river mouths or bays in which the Secretaries found FRWRs exist. Instead they proclaim that FRWRs exist in several broad categories of waters. *Id*. at 1276, 1286-88.[3] They declare the federal subsistence program and its enforcement regulations apply to all "inland" waters, navigable and non-navigable, within and adjacent to the exterior boundaries of the 34 listed federal units, including fresh, tide and sea waters inland of "a straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea." *Id*. The listed reservations cover roughly 170 million acres, or about half of Alaska.[4]

In proclaiming FRWRs by rulemaking, the Secretaries avoided using established adjudication procedures to determine FRWRs, in which an independent tribunal other than the federal agency claiming a FRWR adjudicates the claim.[5]

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[3] The regulations at issue (now slightly revised) also appear at 50 C.F.R. 100.1-.4 (Interior) and 36 C.F.R. § 242.1-.4 (Agriculture). In this brief the State cites only the Interior regulations.

[4] ANILCA established approximately 104 million acres of these reservations. Cong. Rec. S 11119 (Aug. 18, 1980). Many other reservations were established pre-ANILCA, including the vast Chugach and Tongass National Forests and McKinley (re-named Denali) National Park.

[5] For decades federal and state courts have decided FRWR claims in actions brought to declare and enforce FRWRs. *See, e.g., United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *In Re Application for Water Rights of U.S.*, 101 P.3d 1072 (Colo. 2004). Like most other states, Alaska has a comprehensive statutory process, which the Secretaries chose not to use, to "determine and adjudicate rights in the water of the state," including

The State sued, challenging (1) the Secretaries' use of this non-adjudicatory rulemaking procedure to establish their own FRWRs and (2) their categorical declarations of FRWRs as misapplications of *Katie John I* and beyond their statutory authority. [Tab 110 at 2-5 & Tab 253 at 18-19, regarding case history] The State's lawsuit, Case No. 3:05-cv-00158-HRH, was consolidated with *Katie John, et al. v. United States, et al.*, Case No. 3:05-cv-00006-HRH, challenging the same rulemaking on other grounds. [Tab 110 at 3; Docket No. 32 in Case No. 3:05-cv-00158-HRH] [6]

The district court considered the consolidated claims in two phases: a "what process" phase, to determine the validity of the Secretaries' use of rulemaking to establish their own FRWRs, and a "which waters" phase, to consider "What specific water bodies are 'public lands' for purposes of ANILCA [under the *Katie John I* decision]." [Tab 253 at 20]

"reservation of instream flows and levels of water," determination of a claimed "federal reserved water right," "appeal to the superior court" by anyone "adversely affected" by such an adjudication, and direct court adjudications. Alaska Water Use Act, AS 46.15.010 -.270.

[6] The *Katie John* plaintiffs claimed that the Secretaries' regulatory FRWR determinations were too limited. [Tab 253 at 4] The Alaska Fish and Wildlife Federation and Outdoor Council, Alaska Fish and Wildlife Conservation Fund, and two individual fishers and hunters affected by the Secretaries' rulemaking intervened as plaintiffs on the side of the State. [Tab 110 at 3-4; Tab 253 at 18-19]

In its 2007 "what process" opinion, the district court concluded "the Secretaries' use of the rulemaking process to identify reserved water rights for purposes of federal subsistence management was lawful," rejecting the State's contention that an adjudicative process was required. [Tab 110 at 32, 26-27] The court reasoned:

> Here, the Secretaries were directed by the Ninth Circuit to *identify* those navigable waters in which the Government has reserved water rights. By the 1999 regulations, the Secretaries have purported to do nothing more than that. The regulations list federal reservations in which the Government *claims* to have by implication reserved water for purposes of ANILCA. * * * The identification of the existence of a reserved water rights *claim* is *not* the equivalent of a conclusive determination of the claim for purposes of establishing the priority of water use rights.

[*Id*. at 26-27] (emphasis added)

The court held that adjudication to determine the validity of federal agency FRWR claims was unnecessary since "the reserved waters adjudication process is about establishing the *priorities* of users of water" or "*determination of water use priorities*" and not about the existence of FRWRs. [*Id.* at 26, 28 (emphasis added)] It assumed that since FRWRs "vest on the date of the reservation … [t]hey do not depend upon an adjudication for their existence." [*Id.* at 27] While agreeing that "Section 1319 [16 U.S,C, § 3207, ANILCA's water rights savings clause] ensures that ANILCA does not alter existing water law," the court opined that regulatory identification of FRWRs is not inconsistent with existing water law because it does not affect "anyone's right to use water," which the court equated with

"consuming" water. [*Id.* at 27, 30] "The regulations say nothing about who is entitled to use a particular water body, much less what the respective use priorities might be." [*Id*. at 26]

Apparently, the court concluded that while ANILCA § 1319 and other water rights law might preclude the use of notice-and-comment rulemaking procedures to find FRWRs for purposes of drawing water, they do not for purposes of proclaiming preemptive federal jurisdiction over the use of those same waters to enforce a federal harvest priority of fish and other wildlife from them. [*Id.*] The court in its opinion appears to have overlooked that the overriding purpose and effect of the federal subsistence program's regulations are to ensure and enforce federal subsistence harvest regulations, including providing penalty provisions, on what the Secretaries consider federal public lands – including the waters in which they "claim" FRWRs exist. 50 C.F.R. §§ 100.1-.10, 100.18-.28. *See also Alaska v. Federal Subsistence Bd.*, 544 F.3d 1089 (9th Cir. 2008).

The district court then requested briefing on whether the Secretaries' declaration of FRWRs in certain categories of waters was correct, asking the parties to "present test case waterways of each party's choosing that implicate controlling substantive issues, without waiving claims as to non-test case waterways." [ECF 115 at 3; Tab 253 at 20-21]

In its September 2009 "which waters" decision, the district court upheld the Secretaries' designations of where FRWRs exist. [Tab 253] It rejected the State's challenges to the Secretaries' categorical declarations of valid FRWRs in: (1) all waters adjacent to but outside of reservation unit boundaries (including waters outside unit boundaries whose only adjacency with a unit boundary is with non-federal lands); (2) all salt or tidal waters outside of the mean high-tide line boundary for coastal units but within an agency-declared headland-to-headland line at sea; (3) all waters bounded only by non-federal lands within unit boundaries – specifically inholdings in non-federal ownership; and (4) State and ANCSA corporation selected-but-not-yet-conveyed lands the State contended should be excluded under the definition of federal "public land" in ANILCA. [*Id*. at 39-59, 76-84]

Although the court acknowledged the overwhelming case law that FRWRs only exist ***within*** federal reservations [*id*. at 45-46], it chose not to apply that law, instead concluding a FRWR "has no geographic location" until "it comes to appropriation or enforcement." It concluded, without explanation or citation, that "this litigation is not about appropriating water or enforcing federal reserved water rights." [*Id*. at 51] Since, if they have no location, FRWRs might conceivably exist anywhere outside a reservation, including somewhere "possibly 'nearby'", the district court further concluded that the Secretaries' "identification" of FRWRs

"adjacent to", but still outside of the reservation unit boundaries established by Congress, was "lawful and reasonable" – even across the entire width of rivers and lakes located outside the reservation, to the opposite banks. [*Id*. at 45-46, 51, 53-59]

The court also acknowledged that "no court has ever held that federal reserved water rights exist in marine waters" and "[a]s a general proposition, the idea that federal reserved water rights could exist in marine waters runs counter to the underlying principles of the reserved water rights doctrine." [Tab 253 at 31] Yet, it upheld "as a general proposition" – *without* application "to specific water bodies" – the Secretaries' declaration of FRWRs in all waters, including seawaters, located within river mouths, bays and lagoons (some extending for miles) inside of "the straight line drawn from headland to headland across [them] as they flow into the sea." [*Id*. at 39-47] While apparently accepting the State's contention that the Secretaries extended FRWRs into "marine waters" according to "the ordinary meaning of that term" [*id*. at 40], the court rejected the State's contentions that this violated ANILCA or the Submerged Lands Act [*id*. at 42-47]. ANILCA § 103(a) specifies that the boundaries of national park, wildlife refuge, and national forest areas shall "in coastal areas, not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in

such boundary extension." 16 U.S.C. § 3103(a).[7] The Submerged Lands Act, which ANILCA § 102(3)(A) (16 U.S.C. § 1302(3)(A)) incorporates, expressly confirms and grants to Alaska "title to and ownership of" those lands lying inland and seaward of the mean high tide line and to "the natural resources within such lands and waters" – including, "without limiting the generality thereof, oil, gas, and all other minerals, *and fish* [and other aquatic life]." 43 U.S.C. §§ 1301(a) & (e), 1311(a), 1314(a); *United States v. California*, 436 U.S. 32, 37 & n.11 (1978) (emphasis added).[8]

In its discussion of inholdings, the court acknowledged that "[m]any CSUs surround State or privately owned lands (inholdings)" which "are not public land for purposes of ANILCA and may not be regulated by the Secretaries." [Tab 253 at 47, 52] Yet, it upheld the Secretaries' determination they had FRWRs, and pre-emptive control, in all "waters on [those] inholdings," based largely on their

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[7] The district court acknowledged that the Secretaries' "*Katie John* Policy Group" had first recommended that coastal FRWRs exist only "above the mean high tide line," as provided by ANILCA § 103(a) [Tab 253 at 42-43], but concluded that the subsequent extension of this "federal management jurisdiction" in the Secretaries' rulemaking to water "outside the boundaries of a federal reservation" was "reasonable" [*id*. at 46-47].

[8] The issue in *United States v. California*, on which California prevailed, was whether California or the United States had ownership and control of "the submerged lands and waters", including the right to harvest kelp, within a national monument. 438 U.S. at 33-37 & n.8. As this Court has recognized, Congress explicitly applied the 1953 Submerged Lands Act to Alaska, on an equal footing basis with the other states, when Alaska became a state in 1959. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404-06 (9th Cir. 1989).

conclusion that it made "effective management of subsistence fisheries" easier for them and the court's conclusion that FRWRs have "no geographic location" and, therefore, need not even "touch" federal land. [*Id*. at 48-52] The court appeared to equate the United States' ability to *enforce* a FRWR against owners of neighboring non-federal lands in order to "protect its [surface] water [within the reservation] from subsequent diversion" (*Cappaert*, 426 U.S. at 142-43) with a FRWR actually existing on non-federal lands, contrary to "the implied-reservation-of-water-rights doctrine" (*id*; *New Mexico*, 438 U.S. at 698-702). Apparently the district court reasoned that, since the *enforcement* of FRWRs "could *reach* waters on inholdings," therefore it was "reasonable" for the Secretaries to treat waters on those inholdings as federally reserved waters "appurtenant to the associated federal reserve" – even though, according to the district court, this case was not supposed to be about "enforcing federal reserved water rights." [Tab 253 at 51-53 (emphasis added)]

As to selected-but-not-yet-conveyed lands, the district court concluded that, although ANILCA § 102(3) excludes these lands as federal "public lands" subject to ANILCA, through another section, ANILCA § 906(o)(2) – which is not part of the ANILCA Title VIII subsistence provisions – "Congress unambiguously provided that Title VIII applies to selected-but-not-yet conveyed lands" within the listed reservations, including the waters within them. [*Id*. at 82-83]

The district court repeatedly applied *Chevron*-style deference to the Secretaries' determinations, expressly in its "which waters" decision and in effect in its "what process" decision. [Tab 253 at 28, 46-58, 84; Tab 110 at 26-27] The court had specified that the "which waters" issue was about "[w]hat specific water bodies" have FRWRs, and it ordered the parties to address the Secretaries' categorical determinations by presenting test case waterways. [*Id*. at 20-21] But in its "which waters" decision, the court declined to make specific water body determinations or address specific water bodies. [*Id*. at 27] It instead deferred the determination of "specific waters" to the Federal Subsistence Board ("FSB") [*id*.], which has much authority delegated by the Secretaries,[9] but apparently none in this area. As the Secretaries have declared:

> It is unnecessary to set forth in regulations the standards to be applied in determining whether reserved water rights are held in any specific waters. The Secretaries have at all times retained for themselves the task of determining what are public lands. *Neither this task nor any changes* to the subpart A or B portions of the subsistence management regulations [containing the Secretaries categorical declarations of FRWRs] *has been delegated to the Federal Subsistence Board.* The Secretaries are aware of the criteria for determining whether a reserve water right is or is not held in any waters.

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[9] 50 C.F.R. § 100.10; *Alaska v. Federal Subsistence Bd*., 544 F.3d 1089, 1092 (9th Cir. 2008). The FSB is an all-federal agency panel. 50 C.F.R. § 100.10(b). The FSB's delegated authority includes authority to: "Issue regulations [to] . . . [e]nsure that the taking on public lands of fish and wildlife for . . . subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes [and to] [c]lose public lands to the non-subsistence taking of fish and wildlife [.]" 50 C.F.R. § 100.10(d)(4).

70 Fed. Reg. 76400, 76403 (Dec. 27, 2005) (emphasis added).

After releasing its "which waters" order, the district court entered final judgments dismissing the State's and Katie John's complaints. [Tabs 33, 264] The State timely appealed [Tab 34], and this Court consolidated the State's appeal with the other two appeals brought in this case.

STANDARDS OF REVIEW

I. DE NOVO REVIEW APPLIES.

As the district court noted below, "the court is deciding legal issues, which are reviewed de novo." Tab 253 at 27. This Court's review of those legal issues is also de novo. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 770-771 (9th Cir. 2006); *National Medical Enterprises, Inc. v. Sullivan*, 957 F.2d 664, 667 (9th Cir. 1992). That includes questions of statutory interpretation, *Arizona State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1006 (9th Cir. 2006), and court-created law such as the law of FRWRs.

With no trial held, judgment was issued under either Federal Rule of Civil Procedure 12 or 56, and is reviewed de novo. *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993).

II. ADMINISTRATIVE PROCEDURE ACT STANDARDS APPLY.

The Administrative Procedure Act ("APA"), 5 U.S. C. § 706(2), sets forth the standard of review for the rulemaking at issue here. The Court must "hold

unlawful and set aside agency action" if it is (a) "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," (b) "in excess of statutory jurisdiction, authority or limitations, or short of statutory right," or (c) "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). Court review is "searching and careful." *National Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 806 n.20 (9th Cir. 2005).

To satisfy the "strict and demanding requirements" of the APA, an agency must cogently explain its decision. *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983). An agency's record is insufficient if it does not allow the reviewing court to ensure that the agency considered all relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The court must also "review the full agency record to determine whether substantial evidence supports" the agency decision. *Bonnichsen v. United States*, 367 F.3d 864, 879-80 (9th Cir. 2004). The Court must engage in a "thorough, probing, in depth review" of the agency action and record, *Siskiyou Regional Education Project v. U.S. Forest Service*, 565 F.3d 545, 554 (9th Cir. 2009), and will not defer to agency line-drawing that lacks supporting rationale. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1180 (9th Cir. 2000).

III. AGENCY FRWR DETERMINATIONS DO NOT QUALIFY FOR DEFERENTIAL REVIEW.

The FRWR doctrine is court-created law with which the Secretaries have no particular expertise or experience. *New Mexico*, 438 U.S. at 698-702, 713-718. Therefore, *Chevron*-type deferential review [10] does not apply. No deference to the agency action is warranted where, in the course of administering a statute (e.g., ANILCA), the agency is construing and seeking to establish rights based on other law which it is not charged with administering (e.g., FRWR law). *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004) (no deference to Interior's construction of contract entered into under Alaska Native Claims Settlement Act; judicially-developed law of federal contracts applied instead). As the district court acknowledged in its 2007 "what process" decision:

> Agency expertise is not involved because the "what process" [identifying FRWR waters by regulation] issue does not require the interpretation of any provision of ANILCA. The Secretaries have no particular expertise on the "what process" issue, *nor do the Secretaries have any particular expertise as to the reserved water rights doctrine, which was judicially created*.

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[10] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Although the normal rule is federal agencies and the courts must give effect to the plain intent of Congress, *Washington v. Chu*, 558 F.3d 1036, 1043 (9th Cir. 2009), the courts may defer to an agency's interpretation of statutory intent if the statute is ambiguous or silent regarding a matter in which the agency has expertise and is charged by Congress to administer and the agency interpretation is a reasonable reading of the statute. *Chevron*, 467 U.S. at 843; *Arizona State Bd.*, 464 F.3d at 1006-1007.

[Tab 110 at 21] (emphasis added). Yet, in at least its "which waters" decision, the district court clearly and inexplicably applied *Chevron* deference to the Secretaries' determinations of which waters have FRWRs. [Tab 253 at 27-28]

Also, under APA section 706(2), no deference is due where the agency acts "in excess of statutory jurisdiction, authority or limitations," such as where the Secretaries lack statutory authority to establish the existence of FRWRs by rulemaking. 5 U.S.C. § 706(2)(C).

In addition, where the interpretation proferred by the agency "would result in a significant impingement of the States' traditional and primary power over land and water use," the "clear statement" rule also overrides any *Chevron* deference which might otherwise be accorded the agency. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 161, 173-174 (2001); *Pennsylvania Dep't of Corr. v. Yeshey*, 524 U.S. 206, 208-09 (1998). That rule holds that agency construction of a statute that encroaches upon a traditional state power must be rejected by the court where Congress has not "unmistakably" expressed a clear intent to restrict state power. *Id.*; *accord*, *John v. United States*, 247 F.3d at 1044-45 (dissenting opinion).

SUMMARY OF ARGUMENT

Alaska seeks de novo, non-deferential review of the Secretaries' rulemaking purporting to categorically establish FRWRs in thousands of Alaska water bodies,

through which the Secretaries are being allowed to exercise pre-emptive control over fish and fishing within (and possibly beyond) those waters. Their use of limited rulemaking authority to declare FRWRs and preempt the State's sovereign dominion and jurisdiction over Alaska waters and their resources violates FRWR law, ANILCA's water rights savings clause, the clear statement rule, basic due process, and Congressional policy expressed in the McCarran Amendment.

The Secretaries may assert *claims* of FRWRs, but they may not use rulemaking to unilaterally *establish* FRWRs in the United States throughout Alaska (or elsewhere) for subsistence jurisdiction purposes (and possibly for other purposes). They may not categorically establish FRWRs without adjudication by an unbiased decisionmaker applying the required FRWR elements to each water body in which a FRWR is claimed. Unless a legally sufficient FRWR is properly established (not just "identified"), there is no federal "title" in the subject water body enabling it to be treated as "public lands" for federal subsistence purposes under ANILCA § 804. The district court erred in accepting the Secretaries' broad claims of FRWRs as actual rights displacing the State's traditional sovereign authority, without even so much as a complete administrative record based on specific, substantial facts and evidence and application of all FRWR elements as to specific water bodies. This deferential acceptance violated FRWR law and resulted in overbroad "findings" of FRWRs in many waterways where by law

FRWRs cannot exist, including in the test case waterways presented by the State to the district court.

The district court misunderstood and misapplied *Katie John I.* In its two opinions it clearly struggled with this Court's direction that the agencies identify specific navigable waters containing FRWRs according to the FRWR elements listed in *Katie John I*. It was inconsistent as to whether and to what extent it should rely on the law of federal reserved water rights; for example, whether and to what extent it should look to the original primary purposes of the reservations, let alone what purposes were germane. The court offered various conceptual grounds, mostly flawed, for its decisions as to the Secretaries' categorical determinations of FRWRs, but ultimately it deferred to their decisions-by-rulemaking.

Therefore, the 1999 regulations, and the FRWRs declared therein, must be invalidated as contrary to law.

ARGUMENT

I. THE DISTRICT COURT ERRED BY APPLYING DEFERENTIAL *CHEVRON* REVIEW, RATHER THAN DE NOVO REVIEW, AND VIOLATED THE CLEAR STATEMENT RULE.

In its "which waters" rulings against the State, the district court repeatedly applied *Chevron*-style deference to the Secretaries' determinations and interpretations of what constitutes FRWRs and where they might exist, even deferring to the FSB for future application of FRWRs to "specific waters" [Tab

253 at 27-28, 46-58, 84], although the FSB has no apparent authority in that area (70 Fed. Reg. 76400, 76403 (Dec. 27, 2005)). In its "what process" decision, the court characterized the Secretaries' regulations as "claims" to the existence of FRWRs, rather than "determinations" of the validity of those claims. [Tab 110 at 21, 26-27] By effectively transforming the Secretaries' "claims" to FRWRs into "conclusive determinations" of enforceable FRWRs in its deferential "which waters" decision, the district court also effectively applied *Chevron* deference to the Secretaries' choice of a rulemaking process to obtain control over thousands of Alaska water bodies and their resources.

As discussed under Standards of Review, *supra*, agency FRWR determinations do not quality for deferential review. The determination of the validity of FRWR claims is a matter for de novo review by the court applying court-created FRWR law. As the district court noted in its "what process" decision: "[T]he court is being asked to decide a legal issue [and] the Secretaries have [no] particular expertise as to the reserved water rights doctrine, which was judicially created." [Tab 110 at 21][11]

By applying *Chevron* deference to the Secretaries' assertions that FRWRs exist in broad, imprecise categories of waters in its "which waters" decision [Tab

[11] Elsewhere, the court added: "The court is aware of no authority that stands for the proposition that the Secretaries have jurisdiction or power under ANILCA to adjudicate water rights." [Tab 110 at 26]

253 at 27-28], the court, rather than deciding the validity of those claims itself applying court-created law, erroneously transformed the Secretaries' "claims" into "conclusive determinations" – contrary to its "what process" decision [Tab 110 at 26-27] and the law on FRWRs, which does not allow administrative determinations of FRWR claims.[12] This is especially erroneous in light of the Supreme Court's "clear statement" rule[13] and the determination of seven of the 11 members of this Court en banc in *John v. United States*[14] that application of the FRWRs doctrine should be a matter solely for the court to decide de novo.

II. THE DISTRICT COURT ERRED IN ALLOWING THE SECRETARIES TO ESTABLISH FEDERAL RESERVED WATER RIGHTS THROUGH THEIR UNILATERAL RULEMAKING PROCESS.

In promulgating expansive federal regulations unilaterally declaring the establishment of FRWRs in broad, unspecified categories of waters throughout Alaska, without complying with the established adjudication processes and applying the specific, substantive elements necessary to establish a FRWR, the Secretaries acted without statutory authority and disregarded the law of FRWRs.

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[12] ECF 182 at 11-14; *Chickaloon-Moose Creek Native Ass'n, Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004)*; Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 750-752 (10th Cir. 2005) (only the court, not BLM, can determine the validity of an RS 2477 right-of-way).

[13] *E.g.*, *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 161, 173 (2001).

[14] 247 F.3d at 1038, 1040, 1044-46.

The district court erred in dismissing the State's claims and upholding the Secretaries' regulations. This Court should invalidate the regulations and order the Secretaries to determine FRWRs by adjudication.

The 1999 regulations purporting to establish FRWRs fundamentally and radically depart from the established procedure for determining such rights. No statutory authority supports this new approach, which seriously diminishes traditional State authority over its waters and aquatic resources in violation of the clear statement rule. It is also contrary to the court-created FRWR doctrine and the case law, the McCarran Amendment, the ANILCA water rights savings clause (ANILCA § 1319), and due process principles.

A. FRWR Claims Require Third Party Adjudication to Determine Their Existence and Validity.

A FRWR consists of a limited right in the federal government to use (1) a specified quantity of unappropriated water, (2) appurtenant to a particular parcel of reserved federal land, (3) insofar as necessary to accomplish a specific primary purpose of that reservation of land, (4) existing at the time the land was first reserved, (5) which would be "entirely defeated" without the water. *New Mexico*, 438 U.S. at 699-702, 713-18; *Cappaert*, 426 U.S at 138, 141; *Katie John I*, 72 F.3d at 703.

The reserved water rights doctrine has at times been treated as giving the government a non-consumptive right to prevent others from using a supply of

water in a manner that would deprive the federal reservation of a specific amount of water necessary for its primary purpose, and at other times as giving the government the right to withdraw a specific amount of water from within the reservation. *Compare Cappaert*, 426 U.S. at 135, 143, *with Winters v. United States*, 207 U.S. 564, 565 (1908). *See also Totemoff v. State*, 905 P.2d 954, 963 (Alaska 1995).

A FRWR is a judicially-developed right by implication sparingly applied according to particular circumstances. *New Mexico*, 438 U.S. at 699-702, 707-08, 713-18. Its determination requires careful court consideration of both the text of the statute or executive order (and its enabling legislation) creating the particular reservation and the specific facts concerning the necessity of water for the particular purposes of the reservation at the time the reservation was created.

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated. *This careful examination is required both because the reservation is implied, rather than express,* and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water . . . almost invariably defer[ring] to state law.

New Mexico, 438 U.S. at 700-701 (emphasis added) (also discussing prior opinions of the Court, including *Cappaert*, in detail).

Federal courts created the FRWR doctrine, and the courts (or sometimes a state water rights agency initially, subject to judicial review) adjudicate claims of

"whether there is a federally reserved water right implicit in a federal reservation of land." *Cappaert*, 426 U.S. at 139, 145; *Colorado River Water*, 424 U.S. at 812. *Cf*. the Alaska Water Use Act, AS 46.15.010 -.270.

An adjudicative process, not rulemaking or other unilateral agency declaration, is necessary because a right is being established and one entity's water right burdens and diminishes the rights and interests of another. Determination of the existence of a reserved water right requires weighing relative rights and interests – the domain of careful, independent adjudication. That adjudication includes the threshold determination of whether the federal agency claim is legally sufficient to create a FRWR. *New Mexico*, 438 U.S. at 700; *Colorado River Water*, 424 U.S. at 816.

No precedent exists for agencies to conclusively establish their own reserved water rights. To the contrary, agency FRWR claims have been adjudicated for decades. For example, in *Cappaert* the National Park Service pursued its FRWR claim in a Nevada forum and subsequently in the federal judiciary. 426 U.S. at 134-35. In *New Mexico* the U.S. Forest Service asserted its FRWR claims in a New Mexico proceeding, and the U.S. Supreme Court granted certiorari "to consider whether the Supreme Court of New Mexico had applied the correct principles of federal law in *determining* petitioner's reserved water rights in the [Rio] Mimbres." 438 U.S. at 698 (emphasis added). It affirmed the state court,

finding that the United States had not established a reserved right to a minimum instream flow "for [among other items] the purposes of fish preservation." *Id.* at 698, 704, 718. In *United States v. District Court for Eagle County*, 401 U.S. 520, (1971), the Forest Service was compelled to assert its FRWR claims in Colorado court proceedings. 401 U.S. at 522-23. In *Colorado River Water* the United States was directed by the U.S. Supreme Court to the Colorado courts for adjudication of its FRWR claims. 424 U.S. at 819. In *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981), this Court noted its first task was to "consider the *existence*" of the alleged FRWR. (Emphasis added.)

The U.S. Supreme Court has held that there may be an administrative determination of a water right claim only if the administrative proceeding "merely paves the way for an adjudication by the court of all the rights involved." *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 451 (1916); *accord, United States v. State of Oregon*, 44 F.3d 758, 765 (9th Cir. 1994) ("[T]he board's duties are much like those of a referee."). It has expressly rejected unilateral "ex parte determinations" by the Secretary of the Interior adversely impacting the water rights of affected states. *Arizona v. California*, 460 U.S. 605, 638 & n.28 (1983).

The Secretaries' 1999 rules did not merely "pave the way" for subsequent court adjudication, and the district court certainly did not treat them that way in its two orders upholding them. [Tab 110 at 25-28; Tab 253 at 27] Instead the

Secretaries impermissibly used rulemaking to try to turn their claims into binding FRWRs.

This threshold principle that federal agencies may not adjudge their own water rights is buttressed by the language, intent, and case law governing the 1952 McCarran Amendment, 43 U.S.C. § 666, which expressly authorizes the adjudication of FRWRs in state proceedings. Its purpose is to promote unitary consideration of water rights claims, including FRWRs, in an appropriate forum, usually a state or federal court. *Colorado River Water*, 424 U.S. at 812, 819; *State of Oregon*, 44 F.3d at 765. Its goal is to confer primacy on the states regarding the resolution of water rights disputes, including disputes regarding claimed federal water rights. *New Mexico*, 438 U.S. at 698 & n.1. "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *Id*. at 702. Congress intended the McCarran Amendment to provide the means for resolving water claims issues, rather than the Quiet Title Act. *See* 28 U.S.C. § 2409a(a); H. R. REP. No. 92-1559, at p. 4548 (Oct. 10, 1972).

In contrast, allowing federal agencies to pursue FRWRs via "regulatory mechanisms, on an ad hoc basis, ... undermines reliability, promotes disorder, intensifies hostility, leads to takings actions, and generally favors chaos over law." Hobbs, Gregory J., Jr., *State Water Politics Versus an Independent Judiciary: The*

Colorado and Idaho Experiences, 5 U. Denv. Water L. Rev. 122, 130 (Fall 2001). If federal agencies are allowed to establish their own FRWRs by regulation, disregarding the McCarran Amendment and traditional FRWR adjudicatory process, and to have those actions only deferentially reviewed, then any federal agency anywhere, conceivably in any state, can unilaterally establish its claimed FRWRs and compel all other impacted parties to accept those rights (as has so far happened in this case) – whether to secure water or to expand its jurisdiction. The effect is to relegate states to a subservient position despite Congressional policy deferring to state law regarding water rights. *New Mexico*, 438 U.S. at 701-702.

Thus, the Secretaries' 1999 rules must be set aside as contrary to law and without authority. 5 U.S.C. § 706(2).

B. ANILCA's Water Rights Savings Clause Preserves Established FRWR Law, Including Adjudication Requirements.

ANILCA plainly preserves the traditional federal-state balance regarding water rights and FRWR law. ANILCA § 1319 (16 U.S.C. § 3207) provides:

> ***Nothing in this Act shall be construed*** . . . –
> (1) ***as affecting in any way any law governing*** appropriation ***or use of, or Federal right to, water*** on lands within the State of Alaska;
> (2) ***as expanding or diminishing*** Federal or State ***jurisdiction, responsibility, interests, or rights in water*** resources development ***or control***; . . . .

(Emphasis added.)

Section 1319 clearly expresses Congressional intent to maintain the status quo regarding water law, including FRWR law, and the McCarran Amendment's federal-state balance. It applies to all of ANILCA, including Title VIII, which addresses the federal subsistence priority and includes the general rulemaking authority on which the Secretaries and district court relied (ANILCA §§ 804, 814; 16 U.S.C. §§ 3114, 3124). [Tab 110 at 28; Tab 253 at 83] It precludes interpreting ANILCA to expand federal authority and diminish state authority over water rights and resources without adjudication. Because Congress' intention on the issue is clear, contrary agency interpretation is impermissible. *Washington v. Chu*, 558 F.3d 1036, 1043 (9th Cir. 2009).

FRWRs must arise by implication from the statute creating or enabling a reservation. In *Sierra Club v. Watt*, 659 F.2d 203, 206 (D.C. Cir. 1981), the court found that a water rights savings clause in the Federal Land Policy and Management Act ("FLPMA") adopted just four years before and virtually identical to ANILCA § 1319, precluded implying FRWRs. 659 F.2d at 206. As the Supreme Court noted in *Amoco Production Company v. Gambell*, 480 U.S. 531, 552 (1987), under rules of statutory construction "the [use of] nearly identical language in ANILCA strongly suggests a similar scope for that statute."

Thus, while Congress may have impliedly reserved some water rights when reserving federal lands in Alaska, as was held in *Katie John I*, ANILCA § 1319

requires the application of existing FRWR law and procedure and does not allow unilateral rulemaking to establish FRWRs.

The vast majority of FRWRs purportedly determined by the Secretaries are predicated on reservations created or expanded by ANILCA, and all of them are declared using rulemaking in derogation of ANILCA § 1319. *See* 64 Fed. Reg. at 1276, 1286-88. That unprecedented action violates Congressional intent and must be set aside as not in accordance with law and in excess of the Secretaries' authority. 5 U.S.C. § 706(2).

C. General Rulemaking Language in ANILCA Does Not Override ANILCA's Water Rights Savings Clause and FRWR Adjudication Requirements, or Authorize Determining FRWRs by Rulemaking.

The Secretaries argued and the district court agreed that Congress authorized them to determine FRWRs through the general rulemaking authority in ANILCA § 814, effectively bypassing FRWR adjudication requirements. [Tab 110 at 28]

However, nothing in § 814 (16 U.S.C. § 3124) authorizes the Secretaries to bypass the FRWR adjudication process. It simply provides: "The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title." The Secretaries' and district court's expansive interpretation of § 814 cannot withstand scrutiny given the unambiguous savings clause in § 1319 and established water rights law.

As this Court concluded in *Gorbach v. Reno*, 219 F.3d 1087, 1093 (9th Cir. 2000) (en banc), general agency rulemaking authority does not authorize agency action in lieu of court adjudication where there exists a long history of courts deciding a particular matter, a statute authorizes the court action, and no statute authorizes agency action on the particular matter. Moreover, since establishment of FRWRs is not the "special province" or within the primary jurisdiction of the Secretaries, their interpretation of § 814 to grant them that authority is not entitled to *Chevron* deference. *Nigg v. United States Postal Service*, 555 F.3d 781, 786 (9th Cir. 2009); *Davel Communications, Inc. v. Quest Corporation*, 460 F.3d 1075, 1086-87 (9th Cir. 2006). The Secretaries lack authority to make binding determinations and any preliminary determinations they may make are not entitled to any deference. *Southern Utah Wilderness*, 425 F.3d at 735, 757, 788.

Application of the clear statement rule also militates against an expansive interpretation of the general rulemaking authority in § 814 to diminish the more particular terms of § 1319 and FRWR law and process. Congress certainly was not "unmistakably clear" that it intended § 814 to authorize the Secretaries to adjudicate their own FRWR claims, which results in "significant impingement of the State's traditional and primary power over land and water use," so that authority does not exist. *Solid Waste Agency*, 531 U.S. at 161; *see also John v. United States*, 247 F.3d at 1044-45 (dissenting opinion, also discussing and citing

federal title navigability and reservation law for the principle that Congress must have "definitely declared or otherwise made plain" an intent to diminish the State's right to control fishing and other activities on its navigable waters). Since this case relates to Alaska's traditional authority over its waters, lands, and fish and wildlife resources, the clear statement rule applies and restricts agency authority and discretion under ANILCA § 814.

Accordingly, the expansive agency interpretation of § 814 underlying the 1999 regulations must fail, as must any determination of FRWRs based on the Secretaries' rulemaking.

D. Principles of Due Process and the Equal Footing Doctrine Bar the Secretaries from Unilaterally Determining the Validity of Their Claimed Interests in Alaska Waters.

An administrative entity that has an interest in the matter at issue is biased; it violates due process and the rights of other interested parties when it hears the matter and awards an interest to itself. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). A biased decisionmaker is "constitutionally unacceptable" and violates due process. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *State of Oregon*, 44 F.3d at 771-72. The State of Alaska has due process rights, *United States v. Arkansas*, 791 F.2d 1573, 1576-77 (8th Cir. 1986) (citing *Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971)), and important sovereign interests at stake. The Secretaries' unilateral declarations of FRWRs and exertion of jurisdiction over fish

and possibly other State resources in state waters was biased and impacts important State interests.

Alaska is also entitled to "equal sovereignty" on the same basis as other western states, where the FRWR doctrine and the McCarran Act operate to make the federal agencies seek FRWRs via adjudicatory procedures. *See United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citing *Pollard's Lessee v. Hagan*, 3 How. 212, 223 (1845)). The Secretaries' actions violate the State's due process and equal footing rights and are constitutionally unacceptable.

E. The District Court Erred in Holding that Adjudication Is Required Only for Quantifying FRWRs to Allocate Water.

In affirming the rulemaking, the district court held that adjudication of FRWRs is required only for quantifying such rights and allocating water, not for determining the existence of such rights. [Tab 110 at 24, 28] It also held that adjudication to determine the existence of valid FRWRs was unnecessary since "the reserved waters adjudication process is about establishing the priorities of users of waters." [*Id.* at 24]

The court erred in these conclusions. The FRWR cases demonstrate that, prior to quantification, there must be adjudication of the threshold issue of whether a FRWR exists at all in the water body in question, and not by the entity seeking to obtain the interest in water.

In *Cappaert* the National Park Service (NPS) claimed a FRWR to prevent the lowering of water within a small, non-navigable pool (Devil's Hole) located within a national monument. The NPS claimed depleting the pool risked the survival of a rare fish species specifically intended to be protected by the monument. 426 U.S. at 128-131, 142-43. After the NPS claim was filed and denied in a Nevada forum, the United States sued in federal court seeking to limit a rancher's pumping of water from immediately outside the reservation depleting the water within the pool. *Id*. Adjudication hinged on the threshold issue of "whether there is a federally reserved water right" in the pool associated with the Devil's Hole reservation. *Id.* at 139.

Likewise, *New Mexico* was the last stage of court adjudication on the question of whether the U. S. Forest Service had a FRWR for certain purposes in the Rio Mimbres within the Gila National Forest; any issue of quantification relied on that threshold issue. 438 U.S.at 697-698, 718. The Forest Service did not get to decide that question, establishing its own water rights; instead its claims were rejected. *Id*. The New Mexico courts and U.S. Supreme Court, on certiorari, applied the court-created standards for the existence of FRWRs and determined the agency's claims did not satisfy those standards, including a claim to an amount of instream flow for the purposes of fish preservation. *Id*. at 698, 704, 718.

This Court has similarly held "[w]e first consider the existence" of the FRWR. *Walton*, 647 F.2d at 46. There is no precedent for the contrary proposition, that the Secretaries may establish the existence of FRWRs by regulation and force the State to accept those unilateral determinations and the resulting loss of sovereign State control and authority over its waters.

The potential harm to the State if such a unilateral administrative fiat is permitted literally knows no bounds. The district court held in its subsequent "which waters" decision that once "established" by regulation, those agency-declared FRWRs extend to the ***entirety*** of the water bodies embraced (and only categorically described) by those regulations [Tab 253 at 55-56]. Thus, it allowed the Secretaries to unilaterally decide the issues of "existence" and "quantification" of the claimed, but unspecified, FRWRs, without meeting any of the specific elements for the existence ***or*** quantification of FRWRs under the law.[15]

Here the Secretaries declared in their *Final Rules* that "this document identifies Federal land units in which reserved water rights ***exist***." 64 Fed. Reg. 1276 (emphasis added). They did not say "might exist" or "are asserted to exist". Further, the district court in its "which waters" decision seemed to invite the

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[15] At another point in its "which waters" decision, the court, although previously stating this case is not about "allocation", conceded it is about "allocating jurisdiction of fisheries management between state and federal authorities." [Tab 253 at 56]

Secretaries to expand FRWRs even beyond those they declared existed, either through additional declarations or through "enforcement."[16] Certainly, a determination that a specific property interest "exists" is a decision of legal consequence – and here, one of potentially huge legal consequence to the State of Alaska[17] – requiring adjudication before an unbiased decision-maker.

F. The District Court Incorrectly Excused the Secretaries from Making The Findings Necessary to Satisfy the Required FRWR Elements.

As the district court recognized, the Secretaries also did not make the findings necessary to satisfy the FRWR elements as to any of the thousands of unnamed water bodies in which they declared FRWRs by their broad-brush categorizations. According to the court, the Secretaries did not have to make the usual FRWR factual determinations because they were not "allocating" amounts of water. [Tab 110 at 26-29]

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[16] Subsequently, the district court also took the position that "[w]hile a federal reserved water right is necessarily associated with some land, the water right itself has no geographic location," opining, quizzically, at the same time that "this litigation is not about . . . enforcing [FRWRs]." [Tab 253, *e.g.* at 51]. However, enforcement of the ANILCA subsistence priority on the State waters at issue, under more liberal harvest rules and excluding many Alaska citizens, is precisely the purpose of the federal regulations. 50 C.F.R. §§ 100.1-.10, 100.18-.28. If the district court's rationale that such FRWRs have no geographic bounds prevails, the Secretaries could conceivably exert jurisdiction enforcing federal subsistence fishing – and potentially precluding any other fishing – anywhere in Alaska.

[17] In addition to their other impacts, the regulation and district court's opinions are unclear on whether the declared FRWRs are viewed as having effect only for purposes of establishing subsistence jurisdiction, or whether they might have preclusive or precedential effect for other purposes, such as for other water uses.

That unsupported conclusion and the failure to apply the substantive elements necessary to establish valid FRWRs in specific water bodies (or even in categories) are as much departures from the established water rights law as is the Secretaries' use of quasi-legislative rulemaking to pass judgment on their own claims. Determining valid FRWRs in order to exercise and enforce the federal subsistence priority in those waters, and to preclude their use by others, is an allocation of water requiring adjudication. *Cf., New Mexico*, 438 U.S. at 698, 704, 718 (Forest Service FRWR does not exist for purpose of allocating instream flow for fish preservation).

G. Conclusion

Because the Secretaries did not have legal authority to establish federal reserved water rights in the manner they purported to in their 1999 regulations challenged by the State, those regulations must be set aside and vacated.

III. THE DISTRICT COURT ERRED IN AFFIRMING THE SECRETARIES' CATEGORICAL DETERMINATIONS OF FRWRS CHALLENGED BY THE STATE.

The Secretaries made no water body-specific determinations of FRWRs considering each of the elements required to establish a FRWR. They instead made only general declarations that FRWRs exist in ***all*** waters within broad categories of water they deemed impliedly reserved along with 34 named federal land reservations, announcing, "A Federal water right exists in [all] inland waters within

or adjacent to [all 34 listed] Federal conservation system units and national forests." 64 Fed. Reg. at 1279.

In *Katie John I* this court determined that the United States, by reserving lands in Alaska, "implicitly reserved appurtenant waters, including appurtenant navigable waters, *to the extent needed to accomplish the purposes of the reservations*," but "'*only that amount of water necessary to fulfill the purpose of the reservation*.'" 72 F.3d at 703 (emphasis added, citation omitted). This left the task of determining specifically what appurtenant water Congress implicitly reserved, which required, in turn, determination of the primary purpose(s) of each land reservation and determination of the minimum amount of water necessary to fulfill that purpose – a task that the court felt would be an "extraordinary administrative burden." *Id.* at 704.

Disregarding these instructions, the district court concluded that categorical FRWRs by rulemaking were authorized and no more specific determinations were necessary, because, as it stated, it believed a FRWR "has no geographic location" until it comes to appropriation or enforcement. [Tab 253 at 24-25, 51 & n.49] Further stating "this litigation is not about appropriating water or enforcing federal reserved water rights," it upheld the Secretaries' determinations finding FRWRs and enforcing federal subsistence laws in waters outside of federal reservations, irrespective of geographic location and regardless of the purpose of the reservation.

[*Id*.] It repeated these themes throughout its "which waters" decision, using them to uphold the Secretaries' categorical determinations of FRWRs in all waters (1) adjacent to but outside of reservation unit boundaries, including (2) sea, fresh, and tidal waters outside the mean high tide line of coastal reservations and (3) waters bounded only by non-federal lands often within broad unit boundaries but excluded by law from the units. [Tab 253 at 45-46, 50-51, 53-59]

These conclusions are conceptually flawed and incorrect. They constitute critical errors in the district court's application of *Katie John I* and FRWR principles to this case. This case is about establishing FRWRs to establish and enforce federal subsistence laws involving the use of Alaska waters. Already the district court's decision has enabled the Secretaries to enforce federal subsistence takings in those waters, under more liberal rules and when other Alaska residents are not permitted to fish there. 50 C.F.R. §§ 100.1-.10, 100.18-.28. Those rules authorize the Secretaries and their Federal Subsistence Board to "restrict [or] close . . . the taking of fish and wildlife for *non-subsistence* uses on public lands," including in those waters. 50 C.F.R. § 100.19(a), (b). If the district court is correct that FRWRs established for purposes of protecting subsistence have no geographic bounds, it is conceivable that the Secretaries could try to prioritize subsistence fishing anywhere, effectively controlling non-subsistence fishing anywhere, on the premise doing so "ensures" federal subsistence fishing. Especially in the context

of this case, implicitly reserved waters "appurtenant" to a reservation must have a geographic location that is part of the reservation.

It is well-established that only a federal reservation created or authorized by Congress can give rise to a federal reserved water right, and only to the extent necessary to accomplish the primary purpose(s) of that reservation. *New Mexico*, 438 U.S. at 697-705, 712-15, 718; *Cappaert*, 426 U.S. at 138. As the district court acknowledged, there are no FRWRs associated with unreserved public lands, such as those managed by the Bureau of Land Management. [Tab 253 at 10]

Further, as the court also acknowledged, the overwhelming law is that FRWRs arising by implication under the court-created FRWRs doctrine only exist ***within*** and "not beyond the borders" of a federal reservation, as in the 34 federal units for which the Secretaries declared FRWRs in their 1999 regulations. [*Id*. at 45-46] Where FRWRs arise by implication, the courts have not implied them outside the reservation.[18]

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[18] *See, e.g., Cappaert*, 426 U.S. at 131-32, 138-42 (although government could obtain court order enforcing FRWR in pool by enjoining the pumping of water depleting pool level by rancher from outside that monument, the Court emphasized that the water right itself was to the pool within the monument boundaries); *New Mexico*, 438 U.S. at 698-702 (adjudicating FRWR claims to Rio Mimbres within reservation); *Katie John I*, 72 F.3d 698, 700 (Ninth Circuit Court decision applying the FRWRs doctrine specifically involved waters "***within*** Wrangell-St. Elias National Park") (emphasis added); *Walton I*, 647 F.2d at 53 (Ninth Circuit decision that FRWR doctrine relates "to water use on a federal reservation"); *Potlatch Corp. v. United States*, 12 P.3d 1260, 1264-1266, 1268 (Idaho 2000) (FRWRs exist in

The only case the district court cited [Tab 253 at 46] for the contrary proposition, that FRWRs can exist in waters *bordering* a reservation, *Winters v. United States*, 207 U.S. 564 (1908), did not so hold.[19] The district court also cited a law review article published in 1977 opining that FRWRs might "possibly" exist "bordering" a federal reservation [Tab 253 at 50-51). That was mere speculation predating the case law (which the State cited and the court acknowledged) placing FRWRs within reservation boundaries. [Tab 253 at 45-46]

The lower court further erred by concluding, without any citation to authority, that a FRWR is no different "from a water right acquired by an individual." [*Id*. at 24] From that unsupported assumption, the court then relied on general legal encyclopedia and dictionary references discussing different types of individual water rights, including those arising expressly – rather than the specific case law on FRWRs – for additional unsupported conclusions about FRWRs. [*Id*. at 24-25, 45-46, 50-51, 53-59]

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waters "within" Hells Canyon reservation and not "beyond the boundaries" of that reservation, discussing *Cappaert* and *New Mexico*); *United States v. Bell*, 724 P.2d 631, 634, 645 n.17 (Colo. 1986 (en banc)) (waters not "located in or on the lands" considered "not appurtenant to the reserved land").

[19] The boundaries of the Indian reservation at issue in *Winters*, 207 U.S. at 565, expressly extended to the middle of the river from which the inhabitants of the reservation drew their water to irrigate their fields on the reservation side uplands within those boundaries.

But a FRWR existing by implication is fundamentally different than a water right acquired by an individual. Being by implication, it exists only within the boundaries and for the purposes established by Congress for the land reservation. *New Mexico*, 438 U.S. at 698-707, 710, 713, 718.

Furthermore, even if Congress could expressly provide for a reserved water right located outside reservation boundaries, it did not do so in this case. Indeed, it provided to the contrary. In ANILCA, the only express reference to potential reserved water rights is in ANILCA §§ 302 and 303 establishing or expanding 16 National Wildlife Refuge units. For those refuges, those sections set forth as a unit purpose "water quality and *necessary* water quantity *within* the refuge" (emphasis added). *See, e.g.*, ANILCA §§ 302(1)(B)(iv), (2)(B)(iv) *et seq.*; 303(2)(B)(iv), (3)(B)(iv) *et seq.* In addition, under ANILCA § 103(a) areas outside of reservation unit boundaries are declared to be not part of the federal unit.

The district court expressly relied on two state court decisions, *Dermody v. City of Reno*, 931 P.2d 1354, 1356 n.1 (Nev. 1997), and *Mattix v. Swepston*, 155 S.W. 928, 930 (Tenn. 1913), for its conclusion that a FRWR has "no geographic location." [Tab 253 at 51] But those nonfederal decisions do not support the court's conclusion. Indeed, the quotation attributed to *Mattix* by the *Dermody*

court chiefly relied on by the district court does not exist in *Mattix*, which was not even a watercourse or reserved waters case.[20]

Having taken the position that a FRWR has "no geographic location" until water is withdrawn or the right enforced, the district court further concluded that the Secretaries' determinations that FRWRs exist within broad areas outside the boundaries of the reservations were "lawful and reasonable." [*Id*. at 47, 53, 58, 84] But that conclusion confuses the right to reserved water, which lies within the reservation, with the enforcement of that right, which can extend outside the reservation in order to preserve the federal right to water within the reservation, as in *Cappaert*.

The real irony is in the district court's further statement that "this litigation is not about . . . enforcing federal reserved water rights." [*Id*. at 51 n.49] To the contrary, that is precisely what this litigation is about. The 1999 regulations purport to conclusively establish and enforce a federal subsistence priority in millions of acres of waters, including navigable waters "and the resources therein" over which the State supposedly has ownership and control. Essentially, the lower court – by incorrectly stating in its "which waters" decision that FRWRs have no location until enforced, and by further incorrectly stating the Secretaries'

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[20] This and other matters were brought to the district court's attention by motion for reconsideration [ECF 256], which was denied [ECF 262].

regulations have nothing to do with enforcement when clearly they do [*id*. at 24-25, 51, 55-56] – has upheld the Secretaries' unilateral actions enforcing their self-declared "water rights" outside the reservations, without any adjudication. As the court acknowledged elsewhere, "enforcement" of such claims requires adjudication. [*Id*.; Tab 110 at 26-29].

A. The Secretaries' Categorical Determinations of FRWRs on Non-reserved or Excluded Lands Are Contrary to Law.

Fundamental errors, including the misapplication of statutes, pervade the district court's determinations (incorrectly deferring to the Secretaries' determinations) that FRWRs exist throughout millions of acres of waters located outside the reservations Congress established. A few examples, which were also given to the district court, follow. In each of these examples, and elsewhere throughout their determinations, the Secretaries also failed to identify the primary purpose(s) of any of the reservations, or the minimum amount of water claimed necessary to achieve such purpose(s).

1. "Adjacent" but Exterior Waters

Much of the broad Yukon River, which traverses the entire width of interior Alaska and measures about a mile wide, flows next to but outside the boundaries Congress created in ANILCA for at least two refuges, the Nowitna and Innoko National Wildlife Refuges, designated in ANILCA §§ 302(3) and 302(8). The State gave both examples in the proceedings below [*e.g.*, ECF 182 at 23-26 & ECF

169 at 21] and mapped the Nowitna example [Tab 134-16; Tab AR 9]. Together, about 280 miles of the Yukon flows "adjacent to" but outside these two refuges. At a mile wide, that is about 280 square miles of navigable water outside the refuges in which the Secretaries have improperly found, and the district court erroneously upheld, a FRWR. [*Id.*; 64 Fed. Reg. at 1279 (emphasis added); Tab 253 at 55-57][21] There is no justification in FRWRs law for these determinations, which the Secretaries enforce through their federal subsistence regulations.

Sixmile Lake, which is over two miles long and over a mile wide, lies outside the Congressionally-prescribed boundary of the Lake Clark National Park and Preserve. The reservation boundary follows the eastern and southern shores of Sixmile Lake, but the lake itself is not part of the Park/Preserve. [Tab 134-17]; ANILCA § 201(7); 94 Stat. 2380. The entire Sixmile Lake shoreline is also non-federal, non-public land owned primarily by the Native Village Corporation for Nondalton. [Tab 134-17] In addition to the general provisions of ANILCA § 103(c) (16 U.S.C. § 3103(c)) discussed *infr*a, Congress specified that "No lands conveyed to the Nondalton Village Corporation shall be considered within the boundaries of the park or preserve." ANILCA § 201(7)(b). Thus Sixmile Lake is not within the federal reservation, nor does it even touch federally reserved lands.

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[21] The State gave the large Colville River, where it lies outside the National Petroleum Reserve Alaska ("NPRA"), as another example. *See* 64 Fed. Reg. 1276, at 1287; [Tab 134-15; Tab AR:10].

Nonetheless, the Secretaries, improperly relying on their 1999 regulations, include the entire Sixmile Lake as part of "all inland waters (including lakes and rivers) ... *adjacent to*" federal conservation unit. 64 Fed. Reg. at 1279 (emphasis added); [Tab AR:3; Tab 35 at AR 006762].

Seven Juneau area streams (Auke Creek, Cowee Creek, Lemon Creek, Mendenhall River, Montana Creek, Peterson Creek and Salmon Creek) provide another example of exterior waters (and also of non-federal inholdings, discussed later) in which the Secretaries improperly declared FRWRs and the district court erroneously upheld that action. The upper reaches of these streams are in the Tongass National Forest (TNF). After exiting the TNF, the streams flow through State, municipal and private lands in the Juneau area. [Tab 134-11] These non-federal lands, including the stream beds, were excluded from the TNF prior to statehood. [Tab 134-13] Hence, these lower stream reaches are not part of any federal reservation. [*Id*.] Nonetheless, the Secretaries erroneously include them as "public lands" in which the United States has FRWRs. [Federal Fisheries Jurisdiction Map, Tab 134-12 ; Federal Subsistence Management Map, Tab 35 at AR 010867] The district court erroneously upheld that categorical determination, despite the fact the Secretaries elsewhere acknowledge that exterior waters downstream of a reservation do not have FRWRs. [70 Fed. Reg. 76400, at 76402]

These actions, as well as the Secretaries' categorical determinations of FRWRs in thousands of other exterior water bodies, fail to meet the standards of FRWR law and *Katie John I*. The Secretaries failed to include, and the district court failed to require, any site-specific evidence (substantial or otherwise) on the FRWR elements (including reservation purposes and necessary waters) required to determine the existence of FRWRs in those water bodies. An adequate record is necessary to meet the "strict and demanding" requirements of the APA. *State Farm*, 463 U.S. at 48. A bare record, as here, is insufficient as it does not allow the reviewing court to ensure that all relevant factors have been considered by the agency. *Overton Park*, 401 U.S. at 420; *Bonnichsen*, 367 F.3d at 879.

2. Marine and Tidal River Mouths and Bays

Another category of waters located entirely outside reservation boundaries is the salt and brackish water found in river-mouths and bays beyond the statutorily prescribed boundaries of ANILCA units that adjoin the sea. As the court acknowledged below, no court has ever found a FRWR in salt water. [Tab 253 at 31] In addition, ANILCA § 103(a) (16 U.S.C. § 3103(a)) prescribes that federal reservation boundaries "shall, in coastal areas, not extend seaward beyond the [mean] high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension."

Nevertheless, the Secretaries determined FRWRs exist in waters beyond the coastal reservation boundaries within an imaginary line drawn from "headland to headland" across river mouths and "other waters" including vast bays where they flow into the sea. *See* 50 C.F.R. Part 100.4; 64 Fed. Reg. at 1287. That headland-to-headland concept appears nowhere in ANILCA or any other relevant statute. The Secretaries borrowed it, for their "convenience," from a United Nations boundary convention having nothing to do with the law of FRWRs, ANILCA, or federal reservation boundaries. [*Id.*; ECF 182 at 29-33] These navigable bays and river-mouths within the Secretaries' headland-to-headland line, but outside the reservation boundaries specified by Congress, contain particularly valuable waters, fisheries, and other resources of vital State interest which were promised to it under the Submerged Lands Act and Alaska Statehood Act. Nothing in ANILCA or elsewhere authorizes the Secretaries and the district court to disregard these plain expressions of Congressional intent by importing a UN boundary convention line for administrative convenience – especially where doing so impinges on a core area of state sovereignty contrary to the clear statement rule.[22]

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[22] *Solid Waste Agency*, 531 U.S. at 161. In addition, as previously noted (*supra*, pages 10-11), this extension in the rulemaking to saltwaters "outside the boundaries of a federal reservation" came only after the Secretaries' policy group had instead recommended that coastal FRWRs exist only "above the mean high tide line," as provided by ANILCA § 103(a) [Tab 253 at 42-43, 46], and other objections had been disregarded [Tab AR 14] – making the subsequent

One example, among many,[23] of these improperly included waters is Togiak Bay in southwest Alaska. The Togiak National Wildlife Refuge was established in ANILCA § 303(6) and the unit boundary was statutorily fixed along the mean high tide line of the Bay. ANILCA § 103(a); [Tab 134-3]. The Bay and the State-owned submerged lands beneath it are not within the Refuge, are not part of the federal reservation, and cannot qualify as "public lands." Nonetheless, the new "boundary line" drawn by the Secretaries improperly places roughly six square miles of the Bay and its marine and tidal waters and resources under federal control. [Tab 134-4; ECF 182 at 30-31][24] ANILCA §§ 103(a) and 102(3)(A) cannot be interpreted to extend federal authority into these marine waters and State-owned submerged lands and resources in the Bay. The district court's rationale [Tab 253 at 46-47] that the Secretaries had the discretion to set their headland-to-headland line to suit convenience fails – because Congress prescribed specific boundary lines, in this case the mean-high-tide-line.

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interpretation even more suspect. *See, e.g., Federal Subsistence Bd.*, 544 F.3d at 1095, 1097 n.14; *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1345 (9th Cir. 1990).

[23] About half of Tuxedni Bay, located outside of Lake Clark Park and Preserve [Tab 134-6], is another example the State gave and the district court did not reach.

[24] This and other maps showing Federal Subsistence Program jurisdictional boundaries are taken from that Program's annual Subsistence Management booklet made available to the public.

These Secretarial actions, including the agency line-drawing across "headlands" to implement the broad regulations upheld by the court, fail to satisfy FRWR law and the "strict and demanding" requirements of the APA.

3. Non-federal Inholdings

ANILCA specifies that nonfederally-owned inholdings within a reservation unit's exterior boundaries shall not be considered part of that unit. Lands within a unit's exterior boundaries that are not federally owned are by definition not "public lands" and are therefore are not part of the federal unit. ANILCA §§ 102(3) and 103(c) (16 U.S.C. §§ 3102(3) and 3103(c)). In most cases, these non-federal inholdings were already in non-federal hands in 1980 when the ANILCA units were created.

The navigable Chignik Lake and River System (including Black Lake), another specific water body presented by the State at the district court's request, is situated on the the Alaska Peninsula in southwest Alaska. [Tab 134-9] All of the land surrounding and along the shores of these waterbodies is non-federal. [*Id*.] Also, since the system is navigable, the submerged lands are State-owned. Although within the broad exterior boundary of the Alaska Peninsula National Wildlife Refuge established in 1980 by ANILCA § 302(1), these non-federal lands are not "included as a portion of such unit," are not "public lands," and are not subject to unit regulations. ANILCA § 103(c) (16 U.S.C. § 3103(c)); *see also*

§ 102(2), (3) (16 U.S.C. § 3102(2), (3)). Accordingly, these non-federal lands are not reserved and cannot support a FRWR. *Cappaert*, 426 U.S. at 138.

Disregarding these limitations, which would have become apparent in adjudication or a careful administrative application of the FRWR standards, the Secretaries categorically declared FRWRs in, and federal subsistence authority over, these waters and treated them and the underlying State-owned lands as "public lands." [Tab AR:8]; 50 C.F.R. 100.3(b)(2), 100.4, 100.27(i)(8). The basis for this determination, which the district court upheld [Tab 253 at 48-50], was the sweeping proclamation that "inclusion of *all* inland water in a federal reservation containing reserved water rights is generally more practical, easier to administer, and easier for the public to understand" – regardless of whether a FRWR actually exists in all such water. [Tab AR:2 (emphasis added)] *See also* 64 Fed. Reg. at 1279. The Secretaries added that for administrative convenience "it was necessary to include these waters in these regulations, even where they flow through private inholdings [e.g., the Chignik Lake and River systems], in order to assure stewardship of fish and wildlife, to adequately protect subsistence uses . . . and to ensure effective management of subsistence fisheries resources." [Tab AR:15].

None of these lands or waters are statutorily part of the Alaska Peninsula Refuge. The sweeping unlawful determinations of FRWRs in this and other federal reservations impact thousands of miles of waters within millions of acres of

non-federal State, Native Corporation, and other private lands. They do not contain valid FRWRs, and the Secretaries did not so find, but the district court nonetheless upheld their inclusion, based on deferential "reasonableness" grounds [Tab 253 at 48-53] which do not apply. No case precedent or statutory authority allows "administrative convenience" as the basis for a FRWR. To the contrary, the law, including the FRWR cases, ANILCA § 1319, and the clear statement rule, does not permit such excuses to dismantle traditional State authority over its fish and waters. *Solid Waste Agency*, 531 U.S. at 159; *State Farm*, 463 U.S. at 43.

Agency failure to satisfy the *Cappaert* and *New Mexico* substantive elements for FRWRs and the APA record requirements are alternative bases to hold that the 1999 regulations violate the law.

4. Conclusion

This handful of examples demonstrates the Secretaries' repeated and serious failures to satisfy the specific substantive requirements of the FRWR doctrine and their administrative duties under the APA, including making erroneous sweeping categorical FRWR determinations. The district court erred in upholding their actions.

B. The Declarations of FRWRs in Selected State and Native Corporation Lands and Their Waters Are Unlawful, as These Are Not "Public Lands" for ANILCA Title VIII Purposes and So Are Not Subject to Federal Subsistence Jurisdiction.

The district court agreed with the State that federal lands selected by the State or an Alaska Native Corporation for conveyance are excluded by Congress from the definition of "public lands" in ANILCA § 102(3) and ANILCA § 804 imposing federal subsistence jurisdiction only on "public lands." It also agreed that "[a]t first blush, that would seem to end the discussion." [Tab 253 at 80-81] Nevertheless, it upheld the Secretaries' proclamation of preemptive federal subsistence jurisdiction over these selected-but-not-conveyed-lands that are within the exterior boundaries of federal reservations, by reading ANILCA § 906(o)(2) as an exception to this definition. [Tab 253 at 77-83] The district court reached this result despite the clear language in ANILCA § 103(c) that lands within the exterior boundaries of reservation units which are not "public lands" are not part of the unit; the clear language in ANILCA § 102(3) that selected-but-not-conveyed lands are not "public lands"; and the clear language in ANILCA § 804 imposing federal subsistence jurisdiction only on "public lands."

Instead, with only brief discussion, the district court found that an "except as otherwise provided" clause at the start of ANILCA § 804 "unambiguously" authorizes expanding federal subsistence jurisdiction to more than the "public lands" specified in § 804. [*Id*. at 83] It found the issue to be one of statutory intent and concluded – reading ANILCA § 906(o)(2) and "the introductory clause of section 804" together – that "Congress unambiguously provided that Title VIII

applies to selected-but-not-yet-conveyed lands" within the ANILCA specified reserved units. [Tab 253 at 82-83]

The court erred. Given the plain meaning of ANILCA §§ 102(3), 103(c) and 804 – and properly limiting § 906(o)(2) to its place in the overall ANILCA scheme – the selected-but-not-conveyed lands are not subject to the federal subsistence priority and preemption under ANILCA §§ 804 and 805.

Section 906(o)(2) provides only for administration of selected-but-not-conveyed lands "in accordance with the laws applicable to that unit." Section 804 applies the federal subsistence priority and jurisdiction only to "public lands." The "public lands" are defined by ANILCA §§ 102(3) and 103(c), which exclude selected-but-not-conveyed lands from "public lands." Thus, the Secretaries may administer selected-but-not-conveyed lands within unit boundaries for other governmental functions, but not for the subsistence function. *See Amoco Prod. Co.*, 480 U.S. at 549 ("the subsistence protection provisions of the statute must be viewed in the context of the Act [ANILCA] as a whole."); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *United States v. Lewis*, 67 F.3d 225, 228-229 (9th Cir. 1995) ("particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme").

ANILCA § 906(o)(2) is part of a separate title, with separate purposes, not intended to control the determination of which lands are "public lands" for

purposes of § 804. Section 906(o)(2) is part of Title IX, which is labeled "Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act." The Supreme Court has characterized Title IX as providing the "means to facilitate and expedite conveyance of federal lands within the State to the State of Alaska under the Statehood Act and to Alaska Natives under ANCSA." *Amoco*, 480 U.S. at 550. ANILCA § 102 (16 U.S.C. § 3102) provides that its definitions apply in the main provisions of ANILCA, Titles I through VIII, which are codified in 16 U.S.C., but do not apply to Title IX, which is codified in 43 U.S.C. [25] Finally, § 906(o)(2) refers to "federal lands" – not "public lands" – and the latter is the term of art used by Congress regarding subsistence authority. § 804; 16 U.S.C. § 3114.

The "except as otherwise provided" clause at the start of § 804 does not change this result or support the district court's conclusion. Rather, consistent with how exception clauses in statutes normally operate, the clause serves to ***restrict*** the general rule that federal subsistence jurisdiction applies to public lands, by recognizing that there are some situations in which the priority will not be allowed even on public lands. Section 804 reads in pertinent part:

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[25] This highlights the danger in lightly reading a non-specific provision in Title IX that does not refer to federal subsistence jurisdiction (§ 906(o)(2)) as modifying a more specific provision in Title VIII such as § 804 that does.

> *Except as otherwise provided in this Act* and other Federal laws, 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.

16 U.S.C. § 3114 (emphasis added).

"Except as otherwise provided" limits federal subsistence jurisdiction on public lands as defined in ANILCA; it does not expand that jurisdiction to other "federal" lands which, as the district court acknowledged, are not "public lands" under ANILCA. Several neighboring provisions in ANILCA Title VIII evidence this point. They restrict the subsistence priority even on "public lands", and so fall within the "except as otherwise provided" clause. For example, ANILCA § 816 authorizes the Secretaries to "temporarily close any *public lands* … to subsistence uses of a particular fish and wildlife population …." 16 U.S.C. § 3126 (emphasis added). ANILCA § 815 denies the subsistence priority as to "any *public lands* … which were permanently closed to such uses on January 1, 1978" and clarifies that the subsistence priority does not "grant[] any property rights in any fish or wildlife or resources of the *public lands*." 16 U.S.C. § 3125(1), (2) (emphasis added). Other ANILCA provisions creating or expanding National Park units *closed* the public lands within these units to subsistence hunting and fishing. *See, e.g.*, ANILCA § 203. These exceptions work to limit the subsistence priority – *not* expand it.

The exception clause in § 804 also cannot reasonably be read as enlarging federal subsistence jurisdiction to encompass non-public lands under normal rules of statutory construction. "[T]rue statutory exemptions exist only to exempt something that would otherwise be covered." *Singer, Statutes & Statutory Construction*, § 47:11 (7th ed. 2007). "An exception is said to restrict the enacting clause to a particular case." *Id*., § 20:22. "The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached." *Cox v. Hart*, 260 U.S. 427, 435 (1922).

Section 906(o)(2) completely lacks the specificity necessary to override this canon of statutory construction and cause the exception clause to expand rather than limit subsistence jurisdiction. *See Singer* §§ 20:22, 47:11. Section 906 does not discuss federal subsistence jurisdiction, does not discuss "public lands," and does not reference the general rule in § 804 (that federal subsistence jurisdiction applies to "public lands") that the district court erroneously held it modified. By contrast, § 804 discusses both federal subsistence jurisdiction and public lands and expressly limits the federal subsistence priority to *public lands*, which have a definite meaning in ANILCA *excluding* the selected-but-not-conveyed lands only generally referenced in § 906(o)(2). In short, § 906(o)(2) has nothing to do with the federal subsistence priority.

Applying federal subsistence jurisdiction to non-public lands such as selected-but-not-yet-conveyed lands diminishes, and indeed can foreclose, State sovereignty over the waters, submerged lands, and fish and other resources contained therein, given it under the Submerged lands Act, Alaska Statehood Act, and equal footing doctrine. If there were any doubt as to Congressional intent, the clear statement rule resolves it and precludes stretching § 906(o)(2) to encompass selected-but-not-yet-conveyed lands within the federal subsistence priority. *Solid Waste Agency*, 531 U.S. at 161. The district court should be overruled, and the Secretaries' regulations vacated, on this point as well.

CONCLUSION

Accordingly, this Court is requested to reverse and remand this case to the district court with instructions to vacate the Secretaries' challenged regulations and associated FRWR determinations as contrary to law.

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Respectfully submitted this 4th day of June, 2010.

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STATEMENT OF RELATED CASES

To the State's knowledge there are no related cases pending in this Court.

s/ Michael W. Sewright

Addendum

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5 U.S.C § 706(2)

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C § 410hh (ANILCA § 201)

Sec. 410hh. Establishment of new areas

The following areas are hereby established as units of the National Park System and shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act:

(1) Aniakchak National Monument, containing approximately one hundred and thirty-eight thousand acres of public lands, and Aniakchak National Preserve, containing approximately three hundred and seventy-six thousand acres of public lands, as generally depicted on map numbered ANIA–90,005, and dated October 1978. The monument and preserve shall be managed for the following purposes, among others: To maintain the caldera and its associated volcanic features and landscape, including the Aniakchak River and other lakes and streams, in their natural state; to study, interpret, and assure continuation of the natural process of

biological succession; to protect habitat for, and populations of, fish and wildlife, including, but not limited to, brown/grizzly bears, moose, caribou, sea lions, seals, and other marine mammals, geese, swans, and other waterfowl and in a manner consistent with the foregoing, to interpret geological and biological processes for visitors. Subsistence uses by local residents shall be permitted in the monument where such uses are traditional in accordance with the provisions of subchapter II of chapter 51 of this title.

(2) Bering Land Bridge National Preserve, containing approximately two million four hundred and fifty-seven thousand acres of public land, as generally depicted on map numbered BELA–90,005, and dated October 1978. The preserve shall be managed for the following purposes, among others: To protect and interpret examples of arctic plant communities, volcanic lava flows, ash explosions, coastal formations, and other geologic processes; to protect habitat for internationally significant populations of migratory birds; to provide for archeological and paleontological study, in cooperation with Native Alaskans, of the process of plant and animal migration, including man, between North America and the Asian Continent; to protect habitat for, and populations of, fish and wildlife including, but not limited to, marine mammals, brown/grizzly bears, moose, and wolves; subject to such reasonable regulations as the Secretary may prescribe, to continue reindeer grazing use, including necessary facilities and equipment, within the areas which on January 1, 1976, were subject to reindeer grazing permits, in accordance with sound range management practices; to protect the viability of subsistence resources; and in a manner consistent with the foregoing, to provide for outdoor recreation and environmental education activities including public access for recreational purposes to the Serpentine Hot Springs area. The Secretary shall permit the continuation of customary patterns and modes of travel during periods of adequate snow cover within a one-hundred-foot right-of-way along either side of an existing route from Deering to the Taylor Highway, subject to such reasonable regulations as the Secretary may promulgate to assure that such travel is consistent with the foregoing purposes.

(3) Cape Krusenstern National Monument, containing approximately five hundred and sixty thousand acres of public lands, as generally depicted on map numbered CAKR–90,007, and dated October 1979. The monument shall be managed for the following purposes, among others: To protect and interpret a series of archeological sites depicting every known cultural period in arctic Alaska; to provide for scientific study of the process of human population of the area from the Asian Continent; in cooperation with Native Alaskans, to preserve and interpret evidence of prehistoric and historic Native cultures; to protect habitat for seals and other marine mammals; to protect habitat for and populations of, birds, and other wildlife, and fish resources; and to protect the viability of subsistence resources.

Subsistence uses by local residents shall be permitted in the monument in accordance with the provisions of subchapter II of chapter 51 of this title.

(4)

(a) Gates of the Arctic National Park, containing approximately seven million fifty-two thousand acres of public lands, Gates of the Arctic National Preserve, containing approximately nine hundred thousand acres of Federal lands, as generally depicted on map numbered GAAR–90,011, and dated July 1980. The park and preserve shall be managed for the following purposes, among others: To maintain the wild and undeveloped character of the area, including opportunities for visitors to experience solitude, and the natural environmental integrity and scenic beauty of the mountains, forelands, rivers, lakes, and other natural features; to provide continued opportunities, including reasonable access, for mountain climbing, mountaineering, and other wilderness recreational activities; and to protect habitat for and the populations of, fish and wildlife, including, but not limited to, caribou, grizzly bears, Dall sheep, moose, wolves, and raptorial birds. Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with the provisions of subchapter II of chapter 51 of this title.

(b) Congress finds that there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary shall permit such access in accordance with the provisions of this subsection.

(c) Upon the filing of an application pursuant to section 3164 (b) and (c) of this title for a right-of-way across the Western (Kobuk River) unit of the preserve, including the Kobuk Wild and Scenic River, the Secretary shall give notice in the Federal Register of a thirty-day period for other applicants to apply for access.

(d) The Secretary and the Secretary of Transportation shall jointly prepare an environmental and economic analysis solely for the purpose of determining the most desirable route for the right-of-way and terms and conditions which may be required for the issuance of that right-of-way. This analysis shall be completed within one year and the draft thereof within nine months of the receipt of the application and shall be prepared in lieu of an environmental impact statement which would otherwise be required under section 102(2)(C) of the National Environmental Policy Act [42 U.S.C. 4332 (2)(C)]. Such analysis shall be deemed to satisfy all requirements of that Act [42 U.S.C. 4321 et seq.] and shall not be subject to judicial review. Such environmental and economic analysis shall be prepared in accordance with the procedural requirements of section 3164 (e) of this title. The Secretaries in preparing the analysis shall consider the following—

(i) Alternative routes including the consideration of economically feasible and prudent alternative routes across the preserve which would result in fewer or less severe adverse impacts upon the preserve.

(ii) The environmental and social and economic impact of the right-of-way including impact upon wildlife, fish, and their habitat, and rural and traditional lifestyles including subsistence activities, and measures which should be instituted to avoid or minimize negative impacts and enhance positive impacts.

(e) Within 60 days of the completion of the environmental and economic analysis, the Secretaries shall jointly agree upon a route for issuance of the right-of-way across the preserve. Such right-of-way shall be issued in accordance with the provisions of section 3167 of this title.

(5) Kenai Fjords National Park, containing approximately five hundred and sixty-seven thousand acres of public lands, as generally depicted on map numbered KEFJ–90,007, and dated October 1978. The park shall be managed for the following purposes, among others: To maintain unimpaired the scenic and environmental integrity of the Harding Icefield, its outflowing glaciers, and coastal fjords and islands in their natural state; and to protect seals, sea lions, other marine mammals, and marine and other birds and to maintain their hauling and breeding areas in their natural state, free of human activity which is disruptive to their natural processes. In a manner consistent with the foregoing, the Secretary is authorized to develop access to the Harding Icefield and to allow use of mechanized equipment on the icefield for recreation.

(6) Kobuk Valley National Park, containing approximately one million seven hundred and ten thousand acres of public lands as generally depicted on map numbered KOVA–90,009, and dated October 1979. The park shall be managed for the following purposes, among others: To maintain the environmental integrity of the natural features of the Kobuk River Valley, including the Kobuk, Salmon, and other rivers, the boreal forest, and the Great Kobuk Sand Dunes, in an undeveloped state; to protect and interpret, in cooperation with Native Alaskans, archeological sites associated with Native cultures; to protect migration routes for the Arctic caribou herd; to protect habitat for, and populations of, fish and wildlife including but not limited to caribou, moose, black and grizzly bears, wolves, and waterfowl; and to protect the viability of subsistence resources. Subsistence uses by local residents shall be permitted in the park in accordance with the provisions of subchapter II of chapter 51 of this title. Except at such times when, and locations where, to do so would be inconsistent with the purposes of the park, the Secretary shall permit aircraft to continue to land at sites in the upper Salmon River watershed.

(7)

(a) Lake Clark National Park, containing approximately two million four hundred thirty-nine thousand acres of public lands, and Lake Clark National Preserve, containing approximately one million two hundred and fourteen thousand acres of public lands, as generally depicted on map numbered LACL–90,008, and dated October 1978. The park and preserve shall be managed for the following purposes, among others: To protect the watershed necessary for perpetuation of the red salmon fishery in Bristol Bay; to maintain unimpaired the scenic beauty and quality of portions of the Alaska Range and the Aleutian Range, including active volcanoes, glaciers, wild rivers, lakes, waterfalls, and alpine meadows in their natural state; and to protect habitat for and populations of fish and wildlife including but not limited to caribou, Dall sheep, brown/grizzly bears, bald eagles, and peregrine falcons.

(b) No lands conveyed to the Nondalton Village Corporation shall be considered to be within the boundaries of the park or preserve; if the corporation desires to convey any such lands, the Secretary may acquire such lands with the consent of the owner, and any such lands so acquired shall become part of the park or preserve, as appropriate. Subsistence uses by local residents shall be permitted in the park where such uses are traditional in accordance with the provisions of subchapter II of chapter 51 of this title.

(8)

(a) Noatak National Preserve, containing approximately 6,477,168 acres of public lands, as generally depicted on map numbered NOAT–90,004, and dated July 1980 and the map entitled “Noatak National Preserve and Noatak Wilderness Addition” dated September 1994. The preserve shall be managed for the following purposes, among others: To maintain the environmental integrity of the Noatak River and adjacent uplands within the preserve in such a manner as to assure the continuation of geological and biological processes unimpaired by adverse human activity; to protect habitat for, and populations of, fish and wildlife, including but not limited to caribou, grizzly bears, Dall sheep, moose, wolves, and for waterfowl, raptors, and other species of birds; to protect archeological resources; and in a manner consistent with the foregoing, to provide opportunities for scientific research. The Secretary may establish a board consisting of scientists and other experts in the field of arctic research in order to assist him in the encouragement and administration of research efforts within the preserve.

(b) All lands located east of centerline of the main channel of the Noatak River which are—

(1) within

(A) any area withdrawn under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] for selection by the village of Noatak, and

(B) any village deficiency withdrawal under section 11(a)(3)(A) of such Act [43 U.S.C. 1610 (a)(3)(A)] which is adjacent to the area described in subparagraph (i) [1] of this paragraph,

(2) adjacent to public lands within a unit of the National Park System as designated under this Act, and

(3) not conveyed to such Village or other Native Corporation before the final conveyance date, shall, on such final conveyance date, be added to and included within, the adjacent unit of the National Park System (notwithstanding the applicable acreage specified in this paragraph) and managed in the manner provided in the foregoing provisions of this paragraph. For purposes of the preceding sentence the term "final conveyance date" means the date of the conveyance of lands under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], or by operation of this Act, to the Village of Noatak, or to any other Native Corporation which completes the entitlement of such Village or other Corporation to conveyance of lands from the withdrawals referred to in subparagraph (1).

(9) Wrangell-Saint Elias National Park, containing approximately eight million one hundred and forty-seven thousand acres of public lands, and Wrangell-Saint Elias National Preserve, containing approximately four million one hundred and seventy-one thousand acres of public lands, as generally depicted on map numbered WRST–90,007, and dated August 1980. The park and preserve shall be managed for the following purposes, among others: To maintain unimpaired the scenic beauty and quality of high mountain peaks, foothills, glacial systems, lakes, and streams, valleys, and coastal landscapes in their natural state; to protect habitat for, and populations of, fish and wildlife including but not limited to caribou, brown/grizzly bears, Dall sheep, moose, wolves, trumpeter swans and other waterfowl, and marine mammals; and to provide continued opportunities, including reasonable access for mountain climbing, mountaineering, and other wilderness recreational activities. Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with the provisions of subchapter II of chapter 51 of this title.

(10) Yukon-Charley Rivers National Preserve, containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH–90,008, and dated October 1978. The preserve shall be managed for the following purposes, among others: To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves; and in a manner consistent with the

foregoing, to protect and interpret historical sites and events associated with the gold rush on the Yukon River and the geological and paleontological history and cultural prehistory of the area. Except at such times when and locations where to do so would be inconsistent with the purposes of the preserve, the Secretary shall permit aircraft to continue to land at sites in the Upper Charley River watershed.

16 U.S.C § 668 (ANILCA §§ 302,303)

(a) Designation; administration; continuance of resources-management-programs for refuge lands in Alaska; disposal of acquired lands; proceeds

(1) For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service. With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreement shall remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.

(2) The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

(3) With respect to the System, it is the policy of the United States that—

(A) each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established;

(B) compatible wildlife-dependent recreation is a legitimate and appropriate general public use of the System, directly related to the mission of the System and the purposes of many refuges, and which generally fosters refuge management and through which the American public can develop an appreciation for fish and wildlife;

(C) compatible wildlife-dependent recreational uses are the priority general public uses of the System and shall receive priority consideration in refuge planning and management; and

(D) when the Secretary determines that a proposed wildlife-dependent recreational use is a compatible use within a refuge, that activity should be facilitated, subject to such restrictions or regulations as may be necessary, reasonable, and appropriate.

(4) In administering the System, the Secretary shall—

(A) provide for the conservation of fish, wildlife, and plants, and their habitats within the System;

(B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;

(C) plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System, to contribute to the conservation of the ecosystems of the United States, to complement efforts of States and other Federal agencies to conserve fish and wildlife and their habitats, and to increase support for the System and participation from conservation partners and the public;

(D) ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System;

(E) ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located;

(F) assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge;

(G) acquire, under State law, water rights that are needed for refuge purposes;

(H) recognize compatible wildlife-dependent recreational uses as the priority general public uses of the System through which the American public can develop an appreciation for fish and wildlife;

(I) ensure that opportunities are provided within the System for compatible wildlife-dependent recreational uses;

(J) ensure that priority general public uses of the System receive enhanced consideration over other general public uses in planning and management within the System;

(K) provide increased opportunities for families to experience compatible wildlife-dependent recreation, particularly opportunities for parents and their

children to safely engage in traditional outdoor activities, such as fishing and hunting;

(L) continue, consistent with existing laws and interagency agreements, authorized or permitted uses of units of the System by other Federal agencies, including those necessary to facilitate military preparedness;

(M) ensure timely and effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies during the course of acquiring and managing refuges; and

(N) monitor the status and trends of fish, wildlife, and plants in each refuge.

(5) No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any provision of law (except by exchange pursuant to subsection (b)(3) of this section) unless—

(A) the Secretary determines with the approval of the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established; and

(B) such lands are transferred or otherwise disposed of for an amount not less than—

(i) the acquisition costs of such lands, in the case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or fair market value, whichever is greater; or

(ii) the fair market value of such lands (as determined by the Secretary as of the date of the transfer or disposal), in the case of lands of the System which were donated to the System.

The Secretary shall pay into the migratory bird conservation fund the aggregate amount of the proceeds of any transfer or disposal referred to in the preceding sentence.

(6) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is—

(A) designated as an area within such System by law, Executive order, or secretarial order; or

(B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

shall continue to be a part of the System until otherwise specified by Act of Congress, except that nothing in this paragraph shall be construed as precluding—

(i) the transfer or disposal of acquired lands within any such area pursuant to paragraph (5) of this subsection;

(ii) the exchange of lands within any such area pursuant to subsection (b)(3) of this section; or

(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement referred to in subparagraph (B) of this paragraph.

(b) Administration; public accommodations contracts; acceptance and use of funds; exchange of properties; cash equalization payments

In administering the System, the Secretary is authorized to take the following actions:

(1) Enter into contracts with any person or public or private agency through negotiation for the provision of public accommodations when, and in such locations, and to the extent that the Secretary determines will not be inconsistent with the primary purpose for which the affected area was established.

(2) Accept donations of funds and to use such funds to acquire or manage lands or interests therein.

(3) Acquire lands or interests therein by exchange

(A) for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition, or

(B) for the right to remove, in accordance with such terms and conditions as he may prescribe, products from the acquired or public lands within the System. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

(4) Subject to standards established by and the overall management oversight of the Director, and consistent with standards established by this Act, to enter into cooperative agreements with State fish and wildlife agencies for the management of programs on a refuge.

(5) Issue regulations to carry out this Act.

(c) Prohibited and permitted activities; application of mining and mineral leasing laws, hunting or fishing regulations, and State laws or regulations

No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area; or enter, use, or otherwise occupy any such area for any purpose; unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law, proclamation, Executive order, or public land order establishing the area, or amendment thereof: Provided, That the United States mining and mineral leasing laws shall continue to apply to any lands within the System to the same extent they apply prior to October 15, 1966, unless subsequently withdrawn under other authority of law. With the exception of endangered species and threatened species listed by the Secretary pursuant to section 1533 of this title in States wherein a

cooperative agreement does not exist pursuant to section 1535 (c) of this title, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations.

(d) Use of areas; administration of migratory bird sanctuaries as game taking areas; rights of way, easements, and reservations; payment of fair market value

(1) The Secretary is authorized, under such regulations as he may prescribe, to—

(A) permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established: Provided, That not to exceed 40 per centum at any one time of any area that has been, or hereafter may be acquired, reserved, or set apart as an inviolate sanctuary for migratory birds, under any law, proclamation, Executive order, or public land order may be administered by the Secretary as an area within which the taking of migratory game birds may be permitted under such regulations as he may prescribe unless the Secretary finds that the taking of any species of migratory game birds in more than 40 percent of such area would be beneficial to the species; and

(B) permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads, including the construction, operation, and maintenance thereof, whenever he determines that such uses are compatible with the purposes for which these areas are established.

(2) Notwithstanding any other provision of law, the Secretary may not grant to any Federal, State, or local agency or to any private individual or organization any right-of-way, easement, or reservation in, over, across, through, or under any area within the system in connection with any use permitted by him under paragraph (1)(B) of this subsection unless the grantee pays to the Secretary, at the option of the Secretary, either

(A) in lump sum the fair market value (determined by the Secretary as of the date of conveyance to the grantee) of the right-of-way, easement, or reservation; or

(B) annually in advance the fair market rental value (determined by the Secretary) of the right-of-way, easement, or reservation. If any Federal, State, or local agency is exempted from such payment by any other provision of Federal law, such agency shall otherwise compensate the Secretary by any other means agreeable to the Secretary, including, but not limited to, making other land available or the loan of equipment or personnel; except that

(A) any such compensation shall relate to, and be consistent with, the objectives of the National Wildlife Refuge System, and

(B) the Secretary may waive such requirement for compensation if he finds such requirement impracticable or unnecessary. All sums received by the Secretary pursuant to this paragraph shall, after payment of any necessary expenses incurred by him in administering this paragraph, be deposited into the Migratory Bird Conservation Fund and shall be available to carry out the provisions for land acquisition of the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.) and the Migratory Bird Hunting Stamp Act (16 U.S.C. 718 et seq.).

(3)

(A)

(i) Except as provided in clause (iv), the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety. The Secretary may make the determinations referred to in this paragraph for a refuge concurrently with development of a conservation plan under subsection (e) of this section.

(ii) On lands added to the System after March 25, 1996, the Secretary shall identify, prior to acquisition, withdrawal, transfer, reclassification, or donation of any such lands, existing compatible wildlife-dependent recreational uses that the Secretary determines shall be permitted to continue on an interim basis pending completion of the comprehensive conservation plan for the refuge.

(iii) Wildlife-dependent recreational uses may be authorized on a refuge when they are compatible and not inconsistent with public safety. Except for consideration of consistency with State laws and regulations as provided for in subsection (m) of this section, no other determinations or findings are required to be made by the refuge official under this Act or the Refuge Recreation Act for wildlife-dependent recreation to occur.

(iv) Compatibility determinations in existence on October 9, 1997, shall remain in effect until and unless modified.

(B) Not later than 24 months after October 9, 1997, the Secretary shall issue final regulations establishing the process for determining under subparagraph (A) whether a use of a refuge is a compatible use. These regulations shall—

(i) designate the refuge official responsible for making initial compatibility determinations;

(ii) require an estimate of the timeframe, location, manner, and purpose of each use;

(iii) identify the effects of each use on refuge resources and purposes of each refuge;

(iv) require that compatibility determinations be made in writing;

(v) provide for the expedited consideration of uses that will likely have no detrimental effect on the fulfillment of the purposes of a refuge or the mission of the System;

(vi) provide for the elimination or modification of any use as expeditiously as practicable after a determination is made that the use is not a compatible use;

(vii) require, after an opportunity for public comment, reevaluation of each existing use, other than those uses specified in clause (viii), if conditions under which the use is permitted change significantly or if there is significant new information regarding the effects of the use, but not less frequently than once every 10 years, to ensure that the use remains a compatible use, except that, in the case of any use authorized for a period longer than 10 years (such as an electric utility right-of-way), the reevaluation required by this clause shall examine compliance with the terms and conditions of the authorization, not examine the authorization itself;

(viii) require, after an opportunity for public comment, reevaluation of each compatible wildlife-dependent recreational use when conditions under which the use is permitted change significantly or if there is significant new information regarding the effects of the use, but not less frequently than in conjunction with each preparation or revision of a conservation plan under subsection (e) of this section or at least every 15 years, whichever is earlier; and

(ix) provide an opportunity for public review and comment on each evaluation of a use, unless an opportunity for public review and comment on the evaluation of the use has already been provided during the development or revision of a conservation plan for the refuge under subsection (e) of this section or has otherwise been provided during routine, periodic determinations of compatibility for wildlife-dependent recreational uses.

(4) The provisions of this Act relating to determinations of the compatibility of a use shall not apply to—

(A) overflights above a refuge; and

(B) activities authorized, funded, or conducted by a Federal agency (other than the United States Fish and Wildlife Service) which has primary jurisdiction over a refuge or a portion of a refuge, if the management of those activities is in accordance with a memorandum of understanding between the Secretary or the Director and the head of the Federal agency with primary jurisdiction over the refuge governing the use of the refuge.

(e) Refuge conservation planning program for non-Alaskan refuge lands

(1)

(A) Except with respect to refuge lands in Alaska (which shall be governed by the refuge planning provisions of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.)), the Secretary shall—

(i) propose a comprehensive conservation plan for each refuge or related complex of refuges (referred to in this subsection as a "planning unit") in the System;

(ii) publish a notice of opportunity for public comment in the Federal Register on each proposed conservation plan;

(iii) issue a final conservation plan for each planning unit consistent with the provisions of this Act and, to the extent practicable, consistent with fish and wildlife conservation plans of the State in which the refuge is located; and

(iv) not less frequently than 15 years after the date of issuance of a conservation plan under clause (iii) and every 15 years thereafter, revise the conservation plan as may be necessary.

(B) The Secretary shall prepare a comprehensive conservation plan under this subsection for each refuge within 15 years after October 9, 1997.

(C) The Secretary shall manage each refuge or planning unit under plans in effect on October 9, 1997, to the extent such plans are consistent with this Act, until such plans are revised or superseded by new comprehensive conservation plans issued under this subsection.

(D) Uses or activities consistent with this Act may occur on any refuge or planning unit before existing plans are revised or new comprehensive conservation plans are issued under this subsection.

(E) Upon completion of a comprehensive conservation plan under this subsection for a refuge or planning unit, the Secretary shall manage the refuge or planning unit in a manner consistent with the plan and shall revise the plan at any time if the Secretary determines that conditions that affect the refuge or planning unit have changed significantly.

(2) In developing each comprehensive conservation plan under this subsection for a planning unit, the Secretary, acting through the Director, shall identify and describe—

(A) the purposes of each refuge comprising the planning unit;

(B) the distribution, migration patterns, and abundance of fish, wildlife, and plant populations and related habitats within the planning unit;

(C) the archaeological and cultural values of the planning unit;

(D) such areas within the planning unit that are suitable for use as administrative sites or visitor facilities;

(E) significant problems that may adversely affect the populations and habitats of fish, wildlife, and plants within the planning unit and the actions necessary to correct or mitigate such problems; and

(F) opportunities for compatible wildlife-dependent recreational uses.

(3) In preparing each comprehensive conservation plan under this subsection, and any revision to such a plan, the Secretary, acting through the Director, shall, to the maximum extent practicable and consistent with this Act—

(A) consult with adjoining Federal, State, local, and private landowners and affected State conservation agencies; and

(B) coordinate the development of the conservation plan or revision with relevant State conservation plans for fish and wildlife and their habitats.

(4)

(A) In accordance with subparagraph (B), the Secretary shall develop and implement a process to ensure an opportunity for active public involvement in the preparation and revision of comprehensive conservation plans under this subsection. At a minimum, the Secretary shall require that publication of any final plan shall include a summary of the comments made by States, owners of adjacent or potentially affected land, local governments, and any other affected persons, and a statement of the disposition of concerns expressed in those comments.

(B) Prior to the adoption of each comprehensive conservation plan under this subsection, the Secretary shall issue public notice of the draft proposed plan, make copies of the plan available at the affected field and regional offices of the United States Fish and Wildlife Service, and provide opportunity for public comment.

(f) Penalties

(1) Knowing violations

Any person who knowingly violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under title 18 or imprisoned for not more than 1 year, or both.

(2) Other violations

Any person who otherwise violates or fails to comply with any of the provisions of this Act (including a regulation issued under this Act) shall be fined under title 18 or imprisoned not more than 180 days, or both.

(g) Enforcement provision; arrests, searches, and seizures; custody of property; forfeitures; disposition

Any person authorized by the Secretary to enforce the provisions of this Act or any regulations issued thereunder, may, without a warrant, arrest any person violating this Act or regulations in his presence or view, and may execute any warrant or other process issued by an officer or court of competence jurisdiction to enforce the provisions of this Act or regulations, and may with a search warrant search for and seize any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof, taken or possessed in violation of this Act or the regulations issued thereunder. Any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or egg thereof seized with or without a search warrant shall be held by such person or by a United States

marshal, and upon conviction, shall be forfeited to the United States and disposed of by the Secretary, in accordance with law. The Director of the United States Fish and Wildlife Service is authorized to utilize by agreement, with or without reimbursement, the personnel and services of any other Federal or State agency for purposes of enhancing the enforcement of this Act.

(h) Regulations; continuation, modification, or rescission

Regulations applicable to areas of the System that are in effect on October 15, 1966, shall continue in effect until modified or rescinded.

(i) National conservation recreational area provisions; amendment, repeal, or modification

Nothing in this section shall be construed to amend, repeal, or otherwise modify the provision of the Act of September 28, 1962 (76 Stat. 653; 16 U.S.C. 460k—460k–4) which authorizes the Secretary to administer the areas within the System for public recreation. The provisions of this section relating to recreation shall be administered in accordance with the provisions of said sections.

(j) Exemption from State water laws

Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(k) Emergency power

Notwithstanding any other provision of this Act, the Secretary may temporarily suspend, allow, or initiate any activity in a refuge in the System if the Secretary determines it is necessary to protect the health and safety of the public or any fish or wildlife population.

(l) Hunting and fishing on lands and waters not within System

Nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of fish and resident wildlife on lands or waters that are not within the System.

(m) State authority

Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.

(n) Water rights

(1) Nothing in this Act shall—

(A) create a reserved water right, express or implied, in the United States for any purpose;

(B) affect any water right in existence on October 9, 1997; or

(C) affect any Federal or State law in existence on October 9, 1997, regarding water quality or water quantity.

(2) Nothing in this Act shall diminish or affect the ability to join the United States in the adjudication of rights to the use of water pursuant to section 666 of title 43.

(o) Coordination with State agencies

Coordination with State fish and wildlife agency personnel or with personnel of other affected State agencies pursuant to this Act shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

16 U.S.C. § 3102 (ANILCA § 102)

Sec. 3102. Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], and the Alaska Statehood Act)--

(1) The term “land” means lands, waters, and interests therein.

(2) The term “Federal land” means lands the title to which is in the United States after December 2, 1980.

(3) The term “public lands” means land situated in Alaska which, after December 2, 1980, are Federal lands, except--

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)].

(4) The term “conservation system unit” means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

(5) The term “Alaska Native Claims Settlement Act”, means “An Act to provide for the settlement of certain land claims of Alaska Natives, and for other

purposes", approved December 18, 1971 (85 Stat. 688), as amended [43 U.S.C. 1601 et seq.].

(6) The term "Native Corporation" means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Native Group.

(7) The term "Regional Corporation" has the same meaning as such term has under section 3(g) of the Alaska Native Claims Settlement Act [43 U.S.C. 1602(g)].

(8) The term "Village Corporation" has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act [43 U.S.C. 1602(j)].

(9) The term "Urban Corporation" means those Native entities which have incorporated pursuant to section 14(h)(3) of the Alaska Native Claims Settlement Act [43 U.S.C. 1613(h)(3)].

(10) The term "Native Group" has the same meaning as such term has under sections 3(d) and 14(h)(2) of the Alaska Native Claims Settlement Act [43 U.S.C. 1602(d) and 1613(h)(2)].

(11) The term "Native land" means land owned by a Native Corporation or any Native Group and includes land which, as of December 2, 1980, had been selected under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] by a Native Corporation or Native Group and had not been conveyed by the Secretary (except to the extent such selection is determined to be invalid or has been relinquished) and land referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)].

(12) The term "Secretary" means the Secretary of the Interior, except that when such term is used with respect to any unit of the National Forest System, such term means the Secretary of Agriculture.

(13) The terms "wilderness" and "National Wilderness Preservation System" have the same meaning as when used in the Wilderness Act (78 Stat. 890) [16 U.S.C. 1131 et seq.].

(14) The term "Alaska Statehood Act" means the Act entitled "An Act to provide for the admission of the State of Alaska into the Union", approved July 7, 1958 (72 Stat. 339), as amended.

(15) The term "State" means the state of Alaska.

(16) The term "Alaska Native" or "Native" has the same meaning as the term "Native" has in section 3(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1602(b)].

(17) The term "fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod

or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or part thereof.

(18) The term “take” or “taking” as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net capture, collect, kill, harm, or attempt to engage in any such conduct.

16 U.S.C § 3103(a) (ANILCA § 103(a))

Sec. 3103. Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National Forest System shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

16 U.S.C. § 3113 (ANILCA § 803)

Sec. 3113. Definitions

As used in this Act, the term “subsistence uses” means 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. For the purposes of this section, the term--

(1) “family” means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) “barter” means the exchange of fish or wildlife or their parts, taken for subsistence uses--

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

16 U.S.C. § 3114 (ANILCA § 804)

Sec. 3114. Preference for subsistence uses

Except as otherwise provided in this Act and other Federal laws, 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. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such 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 § 3124 (ANILCA § 814)

Sec. 3124. Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this subchapter.

16 U.S.C § 3125 (ANILCA § 815)

Sec. 3125. Limitations and savings clauses

Nothing in this subchapter shall be construed as—

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) 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; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd–jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187) [16 U.S.C. 1151 et seq.], the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531–1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361–1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a–754) [16 U.S.C. 668 et seq.], the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703–711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669–669i), the Magnuson-Stevens Fishery Conservation and Management Act (90 Stat. 331; 16 U.S.C. 1801–1882), the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777–777k), or any amendments to any one or more of such Acts.

16 U.S.C § 3126 (ANILCA § 816)

Sec. 3126. Closure to subsistence uses

(a) National parks and park monuments in Alaska; authorization of subsistence uses and sport fishing

All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this subchapter and other applicable laws of the United States and the State of Alaska.

(b) Closure for public safety, administration, or the continued viability of fish and wildlife population

Except as specifically provided otherwise by this section, nothing in this subchapter is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may

temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

16 U.S.C. § 3207 (ANILCA § 1319)

Sec. 3207. Effect on existing rights; water resources

Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or--

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control, or

(3) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto.

ANILCA § 302. The following are established as units of the National Wildlife Refuge System:

(1) ALASKA PENINSULA NATIONAL WILDLIFE REFUGE.--

(A) The Alaska Peninsula National Wildlife Refuge shall consist of the approximately three million five hundred thousand acres of public lands as generally depicted on the map entitled "Alaska Peninsula National Wildlife Refuge", dated October 1979 and shall include the lands on the Alaska Peninsula transferred to and made part of the refuge pursuant to §1427 of this Act.

(B) The purposes for which the Alaska Peninsula National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, brown bears, the Alaska Peninsula caribou herd, moose, sea otters and other marine mammals, shorebirds and other migratory birds, raptors, including bald eagles and peregrine falcons and salmonoids and other fish;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii) above, the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(2) BECHAROF NATIONAL WILDLIFE REFUGE.--

(A) The Becharof National Wildlife Refuge shall consist of the approximately one million two hundred thousand acres of public lands generally depicted on the map entitled "Becharof National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Becharof National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, brown bears, salmon, migratory birds, the Alaskan Peninsula caribou herd and marine birds and mammals;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(3) INNOKO NATIONAL WILDLIFE REFUGE.--

(A) The Innoko National Wildlife Refuge shall consist of the approximately three million eight hundred and fifty thousand acres of public lands generally depicted on the map entitled "Innoko National Wildlife Refuge", dated October 1978.

(B) The purposes for which the Innoko National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to peregrine falcons, other migratory birds, black bear, moose, furbearers, and other mammals and salmon;

(ii) to fulfill international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(4) KANUTI NATIONAL WILDLIFE REFUGE.--

(A) The Kanuti National Wildlife Refuge shall consist of the approximately one million four hundred and thirty thousand acres of public lands generally depicted on the map entitled "Kanuti National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Kanuti National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, white fronted geese and other waterfowl and migratory birds, moose, caribou (including participation in coordinated ecological studies and management of the Western Arctic caribou herd), and furbearers;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(5) KOYUKUK NATIONAL WILDLIFE REFUGE.--

(A) The Koyukuk National Wildlife Refuge shall consist of the approximately three million five hundred and fifty thousand acres of public lands generally depicted on the map entitled "Koyukuk National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Koyukuk National Wildlife Refuge is established and shall be managed include--

(i) to conserve the fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl and other migratory birds, moose, caribou (including participation in coordinated ecological studies and management of the Western Arctic caribou herd), furbearers, and salmon;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(6) NOWITNA NATIONAL WILDLIFE REFUGE.--

(A) The Nowitna National Wildlife Refuge shall consist of the approximately one million five hundred and sixty thousand acres of public lands generally depicted on a map entitled "Nowitna National Wildlife Refuge, dated July 1980.

(B) The purposes for which the Nowitna National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, trumpeter swans, white-fronted geese, canvasbacks and other waterfowl and migratory birds, moose, caribou, martens wolverines an furbearers, salmon, sheefish, and northern pike;

(ii) to fulfill international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(7) SELAWIK NATIONAL WILDLIFE REFUGE.--

(A) The Selawik National Wildlife Refuge shall consist of the approximately two million one hundred and fifty thousand acres of public land generally depicted on the map entitled "Selawik National Wildlife Refuge, dated July 1980. No lands conveyed to any Native Corporation shall be considered to be within the boundaries of the refuge; except that if any such corporation desires to convey any such lands, the Secretary may acquire such lands with the consent of the owner and any such acquired lands shall become public lands of the refuge.

(B) The purposes for which the Selawik National Wildlife Refuge is established and shall be managed include--

(i) to conserve the fish and wildlife populations and habitats in their natural diversity including but not limited to, the Western Arctic caribou herd (including participation in coordinated ecological studies and management of these caribou), waterfowl, shorebirds and other migratory birds and salmon and sheefish;

(ii) to fulfill international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(C) The Secretary shall administer the refuge in such a manner as will permit reindeer grazing uses, including the construction and maintenance of necessary facilities and equipment within the areas, which on January 1, 1976, were subject to reindeer grazing permits.

(8) TETLIN NATIONAL WILDLIFE REFUGE.--

(A) The Tetlin National Wildlife Refuge shall consist of the approximately seven hundred thousand acres of public land as generally depicted on a map entitled "Tetlin National Wildlife Refuge"dated July 1980. The northern boundary of the refuge shall be a line parallel to, and three hundred feet south, of the centerline of the Alaska Highway.

(B) The purposes for which the Tetlin National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl, raptors and other migratory birds, furbearers, moose caribou (including participation in coordinated ecological studies and management of the Chisana caribou herd), salmon and Dolly Varden;

(ii) to fulfill the international treaty obligations of the States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued; subsistence uses by local residents;

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (1)J water quality and necessary water quantity within the refuge; and

(v) to provide, in a manner consistent with subparagraphs (i) and (ii), opportunities for interpretation and environmental education, particularly in conjunction with any adjacent State visitor facilities.

(9) YUKON FLATS NATIONAL WILDLIFE REFUGE.--

(A) The Yukon Flats National Wildlife Refuge shall consist of approximately eight million six hundred and thirty thousand acres of public lands as generally depicted on the map entitled "Yukon Flats National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Yukon Flats National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, canvasbacks and other migratory birds, Dall sheep, bears, moose, wolves, wolverines and other furbearers, caribou (including participation in coordinated ecological studies and management of the Porcupine and Fortymile caribou herds) and salmon;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

ADDITIONS TO EXISTING REFUGES

ANILCA §303. The following areas, consisting of existing refuges and the additions made thereto, are established or redesignated as unit of the National Wildlife Refuge System:

(1) ALASKA MARITIME NATIONAL WILDLIFE REFUGE.--

(A) The Alaska Maritime National Wildlife Refuge shall consist of eleven existing refuges, including all lands (including submerged lands) waters and interests therein which were a part of such refuges and are hereby redesignated as subunits of the Alaska Maritime National Wildlife Refuge, approximately four hundred and sixty thousand acres of additional public lands on islands, islets, rocks reefs, spires and designated capes and headlands in the coastal areas and adjacent seas of Alaska, and an undetermined quantity of submerged lands, if any, retained in Federal ownership at the time of statehood around Kodiak and Afognak Islands, as generally depicted on the map entitled "Alaska Maritime National Wildlife Refuge", dated October 1979, including the--

(i) Chukchi Sea Unit including Cape Lisburne, Cape Thompson, the existing Chamisso National Wildlife Refuge and all other public lands on islands, islets, rocks reefs spires, and designated capes and headlands in the Chukchi Sea, but excluding such other offshore public lands within the Bering Land Bridge National Preserve. That portion of the public land.~ on Cape Lisburne shall be named and appropriately identified as the "Ann Stevens-Cape Lisburne" subunit of the Chukchi Sea Unit;

(ii) Bering Sea Unit including the existing Bering Sea and Pribilof (Walrus and Otter Islands) National Wildlife Refuges, Hagemeister Island, Fairway Rock, Sledge Island Bluff Unit, Besboro Island, Punuk Islands, Egg Island, King Island, and all other public lands on islands, islets, rocks, reefs, spires and designated capes and headlands in the Bering Sea;

(iii) Aleutian Islands Unit including the existing Aleutian Islands and Bogoslof National Wildlife Refuges, and all other public lands in the Aleutian Islands;

(iv) Alaska Peninsula Unit including the existing Simeonof and Semidi National Wildlife Refuges, the Shumagin Islands, Sutwik Island, the islands and headlands of Puale Bay, and all other public lands on islands, islets, rocks reefs, spires and designated capes and headlands south of the Alaska Peninsula from Katmai National Park to False Pass including such offshore lands incorporated in this unit under §1427; and

(v) Gulf of Alaska Unit including the existing Forrester Island, Hazy Islands, Saint Lazaria and Tuxedni National Wildlife Refuges, the Barren Islands, Latax Rocks, Harbor Island, Pye and Chiswell Islands, Ragged, Natoa, Chat, Chevel, Granite and Middleton Islands, the Trinity Islands, all named and unnamed islands, islets, rocks, reefs, spires, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood surrounding Kodiak and Afognak Islands and all other such public lands on islands, islets, rocks, reefs, spires and designated capes and headlands within the Gulf of Alaska, but excluding such lands within existing units of the National Park System Nuka Island and lands within the National Forest System except as provided in §1427 of this Act.

(B) The purposes for which the Alaska Maritime National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to marine mammals, marine birds and other migratory

birds, the marine resources upon which they rely, bears, caribou and other mammals;

(ii) to fulfill the international treaty obligations of habitats; United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents;

(iv) to provide, in a manner consistent with subparagraphs (i) and (ii), a program of national and international scientific research on marine resources; and

(v) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(C) Any lands acquired pursuant to §1417 of this Act shall be included as public lands of the Alaska Maritime National Wildlife Refuge.

(2) ARCTIC NATIONAL WILDLIFE REFUGE.--

(A) The Arctic National Wildlife Refuge shall consist of the existing Arctic National Wildlife Range including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood and an addition of approximately nine million one hundred and sixty thousand acres of public lands, as generally depicted on a map entitled "Arctic National Wildlife Refuge", dated August 1980.

(B) The purposes for which the Arctic National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, the Porcupine caribou herd (including participation in coordinated ecological studies and management of this herd and the Western Arctic caribou herd), polar bears, grizzly bears muskox, Dall sheep, wolves, wolverines, snow geese, peregrine falcons and other migratory birds and Arctic char and grayling;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(3) IZEMBEK NATIONAL WILDLIFE REFUGE.--

(A) The existing Izembek National Wildlife Range including the lands, waters and interests of that unit which shall be redesignated as the Izembek National Wildlife Refuge.

(B) The purposes for which the Izembek National Wildlife Refuge is`established`and`shall`be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl, shorebirds and other migratory birds, brown bears and salmonoids;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(4) KENAI NATIONAL WILDLIFE REFUGE.--

(A) The Kenai National Wildlife Refuge shall consist of the existing Kenai National Moose Range, including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood, which shall be redesignated as the Kenai National Wildlife Refuge, and an addition of approximately two hundred and forty thousand acres of public lands as generally depicted on the map entitled "Kenai National Wildlife Refuge", dated October 1978, excluding lands described in P.L.O. 3953, March 21, 1966, and P.L.O. 4056, July 22, 1966 withdrawing lands for the Bradley Lake Hydroelectric Project.

(B) The purposes for which the Kenai National Wildlife Refuge is established and shall be managed, include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, moose bears, mountain goats, Dall sheep, wolves and other furbearers, salmonoids and other fish, waterfowl and other migratory and nonmigratory birds;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge;

(iv) to provide in a manner consistent with subparagraphs (i) and (ii), opportunities for scientific research, interpretation, environmental education, and land management training; and

(v) to provide, in a manner compatible with these purposes, opportunities for fish and wildlife-oriented recreation.

(5) KODIAK NATIONAL WILDLIFE REFUGE.--

(A) The Kodiak National Wildlife Refuge shall consist of the existing Kodiak National Wildlife Refuge, including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood, which is redesignated as the Kodiak Island Unit of the Kodiak National Wildlife Refuge, and the addition of all public lands on Afognak and Ban Islands of approximately fifty thousand acres as generally depicted on the map entitled "Kodiak National Wildlife Refuge", dated October 1978. The described public lands on Afognak Island are those incorporated in this refuge from §1427 of this Act.

(B) The purposes for which the Kodiak National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations habitats in their natural diversity including, but not limited to, Kodiak brown bears, salmonoids, sea otters, sea lions and other marine mammals and migratory birds;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(6) TOGIAK NATIONAL WILDLIFE REFUGE.--

(A) The Togiak National Wildlife Refuge shall consist of the existing Cape Newenham National Wildlife Refuge, including lands, waters and interests therein, which shall be redesignated as a unit of the Togiak National Wildlife Refuge, and an addition of approximately three million eight hundred and forty thousand acres of public lands, as generally depicted on the map entitled "Togiak National Wildlife Refuge", dated April 1980.

(B) The purposes for which the Togiak National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, salmonoids, marine birds and mammals, migratory birds and large mammals (including their restoration to historic levels);

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(7) YUKON DELTA NATIONAL WILDLIFE REFUGE.--

(A) The Yukon Delta National Wildlife Refuge shall consist of the existing Clarence Rhode National Wildlife Range, Hazen Bay National Wildlife Refuge, and Nunivak National Wildlife Refuge including lands, waters, interests, and

whatever submerged islands, if any, were retained in Federal ownership at the time of statehood which shall be redesignated as units of the Yukon Delta National Wildlife Refuge and the addition of approximately thirteen million four hundred thousand acres of public lands, as generally depicted on the map entitled "Yukon Delta National Wildlife Refuge", dated April l980.

(B) The purposes for which the Yukon Delta National Wildlife Refuge is established and shall be managed include--

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, shorebirds, seabirds, whistling swans, emperor, white-fronted and Canada geese, black brant and other migratory birds, salmon, muskox, and marine mammals;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(C) Subject to such reasonable regulations as the Secretary may prescribe, reindeer grazing, including necessary facilities and equipment, shall be permitted within areas where such use is, and in a manner which is, compatible with the purposes of this refuge.

(D) Subject to reasonable regulation, the Secretary shall administer the refuge so as to not impede the passage of navigation and access by boat on the Yukon and Kuskokwim Rivers.

28 U.S.C § 1291

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin

Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C § 1331

Sec. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 2409a(a)

Sec. 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

43 U.S.C § 666

Sec. 666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same

extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

43 U.S.C § 1301(a)(e) (ANILCA 102(3)(A))

Sec. 1301. Definitions

When used in this subchapter and subchapter II of this chapter--

(a) The term ``lands beneath navigable waters'' means--

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

…

…

…

(e) The term ``natural resources'' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

43 U.S.C §1311(a) (ANILCA 102(3)(A))

Sec. 1311. Rights of States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

43 U.S.C §1314(a) (ANILCA § 102(3)(A))

Sec. 1314. Rights and powers retained by United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

43 U.S.C § 1635(o)(2) (ANILCA § 906(o)(2))

(o) Status of lands within units

…

(2) Until conveyed, all Federal lands within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be administered in accordance with the laws applicable to such unit.

AS 46.15.010-.270

Sec. 46.15.010. Determination of water rights.

The Department of Natural Resources shall determine and adjudicate rights in the water of the state, and in its appropriation and distribution.

Sec. 46.15.020. Authority and duties of the commissioner.

(a) The commissioner shall exercise all those powers and do all those acts necessary to carry out the provisions and objectives of this chapter. The commissioner may

(1) subject to AS 36.30 (State Procurement Code), enter into contractual agreements necessary to carry out the provisions of this chapter including agreements with federal, state, and local agencies;

(2) apply for, accept, administer, and expend grants, gifts, and loans from the federal government and any other public or private sources for the purposes of this chapter, and adopt procedures and do acts not otherwise restricted by law which are necessary to qualify the state to receive grants, gifts, and loans;

(3) establish a division of water in the Department of Natural Resources and assign to that division the responsibility for carrying out the provisions of this chapter.

(b) The commissioner shall

(1) adopt procedural and substantive regulations to carry out the provisions of this chapter, taking into consideration the responsibilities of the Department of Environmental Conservation under AS 46.03 and the Department of Fish and Game under AS 16;

(2) develop and maintain a standardized procedure for processing applications and the issuance of authorizations, permits, and certifications under this chapter; shall keep a public record of all applications for permits and certificates and other documents filed in the commissioner's office; shall record all permits and certificates and amendments and orders affecting them and shall index them in accordance with the source of the water and the name of the applicant or appropriator; shall require that temporary water use authorizations are valid only to the extent that the water withdrawal and use complies with applicable requirements of AS 16.05.871; and shall make the record of applications, including temporary water use applications under AS 46.15.155 that have been accepted as complete, authorizations, permits, certificates, amendments, and orders affecting them available to the public on the Internet;

(3) cooperate with, assist, advise, and coordinate plans with the federal, state, and local agencies, including local soil and water conservation districts, in matters relating to the appropriation, use, conservation, quality, disposal, or control of waters and activities related thereto;

(4) prescribe fees or service charges for any public service rendered consistent with AS 37.10.050 - 37.10.058, except that the department may charge under regulations adopted by the department an annual $50 administrative service fee to maintain the water management program and a water conservation fee under AS 46.15.035;

(5) before February 1 of each year, prepare a report describing the activities of the commissioner under AS 46.15.035 and 46.15.037; the commissioner shall notify the legislature that the report is available; the report must include

(A) information on the number of applications and appropriations for the removal of water from one hydrological unit to another that were requested and that were granted and on the amounts of water involved;

(B) information on the number and location of sales of water conducted by the commissioner and on the volume of water sold;

(C) recommendations of the commissioner for changes in state water law; and

(D) a description of state revenue and expenses related to activities under AS 46.15.035 and 46.15.037.

Sec. 46.15.030. Water reserved to the people.

Wherever occurring in a natural state, the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water, as provided in this chapter.

Sec. 46.15.035. Appropriation or removal of water out of hydrologic units to other hydrologic units; water conservation fee; reservation of water for fish.

(a) Water may not be removed from the hydrologic unit from which it was appropriated to another hydrologic unit, inside or outside the state, without being returned to the hydrologic unit from which it was appropriated nor may water be appropriated for removal from the hydrologic unit from which the appropriation is sought to another hydrologic unit, inside or outside the state, without the water being returned to the hydrologic unit from which it is to be appropriated, unless the commissioner

(1) finds that the water to be removed or appropriated for removal is surplus to needs within the hydrologic unit from which the water is to be removed or appropriated for removal, including fishing, mining, timber, oil and gas, agriculture, domestic water supply, and other needs as determined by the commissioner;

(2) finds that the application for removal or appropriation for removal meets the requirements of AS 46.15.080; and

(3) assesses a water conservation fee under (b) of this section.

(b) The commissioner shall establish, by regulation, a water conservation fee for a use of water in which the water is removed from the hydrologic unit from which it was appropriated to another hydrologic unit inside or outside the state, without the water being returned to the hydrologic unit from which it was appropriated. The fee established under this subsection shall be graduated to encourage the conservation of water.

(c) Except as provided in AS 46.15.090, and in addition to the requirements of (a) of this section, the commissioner may approve an application for removal or permit an appropriation for removal under (a) of this section of water from a lake, river, or stream that is used by fish for spawning, incubation, rearing, or migration, or ground water that significantly influences the volume of water in a lake, river, or stream that is used by fish for spawning, incubation, rearing, or migration, only if the commissioner reserves a volume of water in the lake or an instream flow in the river or stream for the use of fish and to maintain habitat for fish. The commissioner may adjust the volume of water reserved under this subsection if the commissioner, after public notice and opportunity to comment and with the concurrence of the commissioner of fish and game, finds that the best interests of the state are served by the adjustment. A reservation under this subsection

(1) of a volume of water or an instream flow for the use of fish and to maintain habitat for fish that is reserved under this section is withdrawn from appropriation;

(2) for fish from a lake, river, or stream, identified under AS 16.05.871 or identified in a Department of Fish and Game regional guide as being used by fish for spawning, incubation, rearing, or migration on or before July 1, 1992, has a priority date as of July 1, 1992;

(3) of water does not apply to an application for removal or appropriation for removal under AS 46.15.040 for nonconsumptive uses of water or for single family domestic use;

(4) is not subject to AS 46.15.145;

(5) of water does not apply to appropriations of ground water of 5,000 gallons or less a day unless the commissioner, in consultation with the Department of Fish and Game, determines that the appropriation may adversely affect fish habitat in a lake, river, or stream; the commissioner shall consider multiple appropriations of water for a single related use as a single appropriation for the purposes of this subsection.

(d) With respect to rivers and streams described in (c) of this section, the instream flow reservation shall be limited to the portion of the stream, including tributaries to the stream, at and downstream of the point of diversion or withdrawal. With respect to lakes described in (c) of this section, the reservation shall be limited to the lake from which the diversion or withdrawal is made, and the outlet and tributaries to the outlet flowing downstream.

(e) In this section,

(1) "fish" means a species of anadromous or freshwater fish that may be taken under regulations of the Board of Fisheries;

(2) "hydrologic unit" means a hydrologic subregion established by the United States Department of the Interior, Geological Survey, on the "Hydrologic Unit Map-1987, State of Alaska"; "hydrologic unit" includes the water of an ocean that is adjacent to a hydrologic subregion of the state.

Sec. 46.15.037. Sale of water by the state.

(a) The commissioner may provide for the sale of water by the state if

(1) the water has first been appropriated to the state in accordance with the requirements of this chapter; and

(2) the commissioner determines that

(A) the water is surplus to needs within the hydrologic unit from which it was appropriated, including fishing, mining, timber, oil and gas, agriculture, domestic water supply, and other needs as determined by the commissioner;

(B) the proposed sale of the water meets the requirements of AS 46.15.080; and

(C) the sale price of the water is based upon the fair market value of the water.

(b) A purchaser of water from the state under this section shall acquire only those contractual rights to the water set out in sale documents prepared by the commissioner except that a sale of water by the state does not constitute an appropriation of water under this chapter to the purchaser.

(c) If water to be sold by the state under (a) of this section, is to be removed from the hydrologic unit from which it was appropriated to another hydrologic unit, inside or outside the state, without being returned to the hydrologic unit from which it was appropriated, the commissioner may not sell the water unless the sale meets the requirements of (a)(2) of this section, a water conservation fee is assessed under AS 46.15.035, and, if the water to be sold is from a lake, river, or stream that is used by fish for spawning, incubation, rearing, or migration, or ground water that significantly influences the volume of water in a lake, river, or stream that is used by fish for spawning, incubation, rearing, or migration, the commissioner reserves a volume of water in the lake or an instream flow in the river or stream for the use of fish and to maintain habitat for fish. The commissioner may adjust the volume of water reserved under this subsection if the commissioner, after public notice and opportunity to comment and with the concurrence of the commissioner of fish and game, finds that the best interests of the state are served by the adjustment. A reservation under this subsection

(1) of a volume of water or an instream flow for the use of fish and to maintain habitat for fish that is reserved under this section is withdrawn from appropriation;

(2) for fish from a lake, river, or stream, identified under AS 16.05.870 or identified in a Department of Fish and Game regional guide as being used by fish for spawning, incubation, rearing, or migration on or before July 1, 1992, has a priority date as of July 1, 1992;

(3) is not subject to AS 46.15.145;

(4) of water does not apply to appropriations under this section of ground water of 5,000 gallons or less a day unless the commissioner, in consultation with the Department of Fish and Game, determines that the appropriation may adversely affect fish habitat in a lake, river, or stream; the commissioner shall consider multiple appropriations of water for a single related use as a single appropriation for the purposes of this subsection.

(d) With respect to rivers and streams described in (c) of this section, the instream flow reservation shall be limited to the portion of the stream, including tributaries to the stream, at and downstream of the point of diversion or withdrawal. With respect to lakes described in (c) of this section, the reservation shall be limited to the lake from which the diversion or withdrawal is made, and the outlet and tributaries to the outlet flowing downstream.

(e) In this section,

(1) "fish" means a species of anadromous or freshwater fish that may be taken under regulations of the Board of Fisheries;

(2) "hydrologic unit" has the meaning given in AS 46.15.035(e).

(f) The commissioner may not provide for the sale of salt water under this section.

Sec. 46.15.040. Right to appropriate.

(a) A right to appropriate water can be acquired only as provided in this chapter. A right to the use of water either appropriated or unappropriated may not be acquired by adverse use or possession.

(b) A right to appropriate water shall be obtained by first making application to the commissioner for a permit to appropriate. The commissioner shall by regulation prescribe the form and contents of the application and the procedure for filing the application. If a permit is granted and the means of appropriation is constructed, a certificate of appropriation may be obtained.

(c) All applications to the commissioner for a permit to appropriate water, filed subsequent to July 1, 1966, shall be considered as having been simultaneously filed with the Department of Fish and Game under AS 16 and the Department of Environmental Conservation under AS 46.03.

(d) The commissioner's issuance of a permit under AS 46.15.080 or of a certificate under AS 46.15.065 or 46.15.120 does not represent a guarantee by the state to the permittee or certificate holder that water will be available for

appropriation at a certain volume, quality, artesian pressure, or cost. This subsection does not, however, alter the right a permittee or certificate holder may have against a later appropriator, including a government agency.

Sec. 46.15.050. Priority.

(a) Priority of appropriation gives prior right. Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire the appropriator's water under the changed conditions.

(b) Priority of appropriation made under this chapter dates from the filing of an application with the commissioner.

(c) Priority of appropriation perfected before July 1, 1966, shall be determined as provided in AS 46.15.065.

Sec. 46.15.060. Existing rights.

A water right acquired by law before July 1, 1966 or a beneficial use of water on July 1, 1966, or made within five years before July 1, 1966, or made in conjunction with works under construction on July 1, 1966, under a lawful common law or customary appropriation or use, is a lawful appropriation under this chapter. The appropriation is subject to applicable provisions of this chapter and regulations adopted under this chapter.

Sec. 46.15.065. Determination of existing rights.

(a) A claimant of an existing right under AS 46.15.060 shall file a declaration of appropriation with the commissioner as set out in this section. The declaration shall be considered correct until a certificate of appropriation is issued or denied. Priority of the right dates from the day work was begun on the appropriation if due diligence was used in completing the work; otherwise, from the day water was applied for the beneficial use.

(b) The commissioner shall, as soon as practicable, determine the rights of persons owning existing appropriations. To accomplish this, the commissioner shall

(1) by order set a definite period for filing a declaration of appropriation within a specified area or from a specified source;

(2) publish notice of the order once a week for three weeks before the beginning of the period in a newspaper of general circulation in the affected area;

(3) give notice of the order by certified mail to any appropriator within the specified area or from the specified source who has requested mailed notice or of

whom the commissioner can readily obtain knowledge including each owner of a recorded mining claim.

(c) The commissioner shall make investigations as necessary of rights asserted by declarations filed under this section and shall determine each existing appropriation and mail a summary of the determination to each person who has filed a declaration with respect to the specified area or source. Any person adversely affected by a determination may file with the commissioner a request for a hearing within 20 days of the date the notice is mailed. If a hearing is requested, the commissioner shall, after consulting with the office of administrative hearings (AS 44.64.010), send a notice of the time and place of the hearing to each person who has filed a declaration.

(d) If a hearing is not requested with respect to a determination, or if, after the hearing, the commissioner finds the determination to have been correctly made, the commissioner shall immediately issue a certificate of appropriation. If the commissioner finds the determination to be incorrect, the commissioner shall correct it and either issue a certificate of appropriation or refuse the certificate according to the commissioner's findings.

(e) A person aggrieved by the action of the commissioner may appeal to the superior court within 30 days of the date on which that action is final.

(f) The adjudication process for a declaration filed under (a) of this section that is pending before the commissioner on June 10, 1986, continues under the procedures set out in this section until the commissioner finally determines whether the declarant is entitled to a certificate. If a certificate is issued under this section, the certificate holder may be included as a participant in an adjudication under AS 46.15.165 or 46.15.166.

Sec. 46.15.080. Criteria for issuance of permit.

(a) The commissioner shall issue a permit if the commissioner finds that

(1) rights of a prior appropriator will not be unduly affected;

(2) the proposed means of diversion or construction are adequate;

(3) the proposed use of water is beneficial; and

(4) the proposed appropriation is in the public interest.

(b) In determining the public interest, the commissioner shall consider

(1) the benefit to the applicant resulting from the proposed appropriation;

(2) the effect of the economic activity resulting from the proposed appropriation;

(3) the effect on fish and game resources and on public recreational opportunities;

(4) the effect on public health;

(5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;

(6) harm to other persons resulting from the proposed appropriation;

(7) the intent and ability of the applicant to complete the appropriation; and

(8) the effect upon access to navigable or public water.

Sec. 46.15.090. Preference in granting permits.

When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the commissioner shall give preference first to public water supply and then to the use that alone or in combination with other foreseeable uses will constitute the most beneficial use.

Sec. 46.15.100. Terms of permit.

The commissioner may issue a permit for less than the amount of water requested, but in no case for more water than can be beneficially used for the purposes stated in the application. The commissioner may require modification of plans and specifications for the appropriation. The commissioner may issue a permit subject to terms, conditions, restrictions, and limitations necessary to protect the rights of others, and the public interest. However, the permit shall be subject to termination only as provided in this chapter.

Sec. 46.15.110. Time for construction and completion.

A permit may place a time limit for beginning construction and perfecting appropriation. Reasonable extensions of time shall be permitted for good cause shown.

Sec. 46.15.120. Certificates.

Upon completion of construction of the works and commencement of use of water, the permit holder shall notify the commissioner that the appropriator has perfected the appropriation. If the commissioner determines that the appropriation has been perfected in substantial accordance with the permit, the commissioner shall issue the permit holder a certificate of appropriation. The certificate shall set out any condition that the commissioner may prescribe by regulation, including conditions that are necessary to protect the prior rights of other persons and the public interest.

Sec. 46.15.133. Notices; objections.

(a) If the commissioner proposes a sale of water or receives an application for appropriation or removal, the commissioner shall prepare a notice containing the location and extent of the proposed sale, appropriation, or removal, the name and

address of the applicant, if applicable, and other information the commissioner considers pertinent. The notice shall state that within 15 days of publication or service of notice, persons may file with the director written objections, stating the name and address of the objector, and any facts tending to show that rights of the objector or the public interest would be adversely affected by the proposed sale, appropriation, or removal.

(b) The commissioner shall publish the notice in one issue of a newspaper of general distribution in the area of the state in which the water is to be appropriated, removed, or sold. The commissioner shall also have notice served personally or by certified mail upon an appropriator of water or applicant for or holder of a permit who, according to the records of the division of lands, may be affected by the proposed sale, appropriation, or removal and may serve notice upon any governmental agency, political subdivision, or person; notice shall also be served upon the Department of Fish and Game and the Department of Environmental Conservation. An applicant for an appropriation or removal shall pay the commissioner's costs in providing publication and notice under this subsection. The commissioner may require as a condition of a sale of water under AS 46.15.037, that a purchaser of water reimburse the department for the costs associated with providing notice of the proposed sale.

(c) Within 15 days of publication or service of notice, an interested person may file an objection. The commissioner may hold hearings upon giving due notice and shall grant, deny, or condition the proposed sale or application for appropriation or removal in whole or in part within 30 days of receipt of the last objection or, if the commissioner elects to hold hearings, within 180 days of receipt of the last objection. Notice of the order or decision shall be served personally or mailed to any person who has filed an objection.

(d) If no objection is filed, the commissioner may proceed to make a determination upon the application for appropriation or removal or the proposal for sale.

(e) A person aggrieved by the action of the commissioner or by the failure of the commissioner to grant, deny, or condition a proposed sale or an application for appropriation or removal in accordance with (c) of this section may appeal to the superior court.

(f) The commissioner may, by regulation, designate types of appropriations that are exempt from this section and provide simplified procedures for ruling on the applications. The commissioner may not exempt under this subsection appropriations for removal under AS 46.15.035, appropriations by the state for sale or sales by the state under AS 46.15.037, or removals of water under AS 46.15.035 and 46.15.037.

Sec. 46.15.140. Abandonment, forfeiture, and reversion of appropriations.

(a) The commissioner may declare an appropriation to be wholly or partially abandoned and revoke or amend the certificate of appropriation as to the unused quantity of water if an appropriator, with intention to abandon, does not make beneficial use of all or a part of the appropriated water.

(b) The commissioner may declare that an appropriator has wholly or partially forfeited an appropriation, and shall revoke the certificate of appropriation in whole or in part if the appropriator voluntarily fails or neglects, without sufficient cause, to make use of all or a part of the appropriated water for a period of five successive years. A person who has a permit to develop a use of water including but not limited to residential, agricultural, industrial, or mining use, but has not developed that property to the point of water use before permit expiration, may file a request for permit extension with the commissioner.

(c) Failure to use beneficially for five successive years all or part of the water granted in a certificate of appropriation raises a rebuttable presumption that the appropriator has abandoned or forfeited the right to use the unused quantity of water and shifts to the appropriator the burden to prove otherwise to the satisfaction of the commissioner.

(d) If the commissioner revokes a certificate in whole or in part, the portion of the certificate covered by the revocation reverts to the state and the water becomes unappropriated water.

Sec. 46.15.145. Reservation of water.

(a) The state, an agency or a political subdivision of the state, an agency of the United States or a person may apply to the commissioner to reserve sufficient water to maintain a specified instream flow or level of water at a specified point on a stream or body of water, or in a specified part of a stream, throughout a year or for specified times, for

(1) protection of fish and wildlife habitat, migration, and propagation;

(2) recreation and park purposes;

(3) navigation and transportation purposes; and

(4) sanitary and water quality purposes.

(b) Upon receiving an application for a reservation under this section, the commissioner shall proceed in accordance with AS 46.15.133.

(c) The commissioner shall issue a certificate reserving the water applied for under this section if the commissioner finds that

(1) the rights of prior appropriators will not be affected by the reservation;

(2) the applicant has demonstrated that a need exists for the reservation;

(3) there is unappropriated water in the stream or body of water sufficient for the reservation; and

(4) the proposed reservation is in the public interest.

(d) After the issuance of a certificate reserving water, the water specified in the certificate shall be withdrawn from appropriation and the commissioner shall reject an application for a permit to appropriate the reserved water.

(e) A reservation under this section does not affect rights in existence on the date the certificate reserving water is issued.

(f) At least once each 10 years the commissioner shall review each reservation under this section to determine whether the purpose described in (a) of this section for which the certificate reserving water was issued and the findings described in (c) of this section still apply to the reservation. If the commissioner determines that the purpose, or part or all of the findings, no longer apply to the reservation, the commissioner may revoke or modify the certificate reserving the water after notice, hearing when appropriate, and a written determination that the revocation or modification is in the best interests of the state.

Sec. 46.15.150. Preferred use.

(a) An applicant who asserts and proves a preferred use shall be granted a permit and shall be granted preference over other appropriators. A preferred use of water is for a public water supply.

(b) To be entitled to a preference an applicant must show that the applicant's use will be prevented or substantially interfered with by a prior appropriation; the use is a preferred use; the applicant agrees to compensate a permit or certificate holder for the prior appropriation for any damages sustained by the preferred use; and other information that the commissioner requires by regulation.

Sec. 46.15.155. Authorization for temporary use of water.

(a) Notwithstanding any contrary provision of this chapter, the commissioner may authorize the temporary use of a significant amount of water, as determined by the department by regulation, for a period of time not to exceed five consecutive years, if the water applied for has not been appropriated in accordance with this chapter.

(b) Notwithstanding any contrary provision of this chapter, an authorization for a temporary use of less than a significant amount of water is not required under this section unless the commissioner has determined by regulation that the use may have an adverse effect on other water uses and that an authorization must be obtained from the department.

(c) The issuance of an authorization for temporary use of water under this section does not establish a right to appropriate water. The temporary use of water under an authorization remains subject to appropriation under this chapter.

(d) Notwithstanding any contrary provision of this chapter, the commissioner is not required to provide public notice under AS 46.15.133 of a proposed authorization for temporary use of water; however, the commissioner shall request comment on an application for temporary use of water from the Department of Fish and Game and the Department of Environmental Conservation.

(e) The provisions of AS 46.15.080 do not apply to the issuance under this section of an authorization for temporary use of water.

(f) The commissioner may impose reasonable conditions or limitations on an authorization for temporary use of water to protect the water rights of other persons or to protect fish and wildlife habitat, human health, or other public interests.

(g) Upon approval by the department, an authorization under this section may be transferred to another person under the same conditions and limitations under which the authorization was issued.

(h) A person to whom an authorization for temporary use of water was issued under this section may allow another person to use the authorization, consistent with the conditions and limitations of the authorization.

(i) The commissioner may modify, suspend, or revoke an authorization issued under this section if the commissioner determines it necessary to protect the water rights of other persons or the public interest.

Sec. 46.15.160. Transfer and change of appropriations.

(a) The right to use water under an appropriation or permit shall be appurtenant to the land or place where it has been or is to be beneficially used, provided, that water supplied by one person to another person's property is not appurtenant to the property unless the parties so intend. An appurtenant water right shall pass with a conveyance of the land, or transfer, or by operation of law unless specifically exempted from the conveyance.

(b) With the permission of the commissioner, all or any part of an appropriation may be severed from the land to which it is appurtenant, may be sold, leased or transferred for other purposes or to other land and be made appurtenant to other land. A permit or certificate or a deed, lease, contract, assignment of permit or other instrument transferring an appropriation must be filed in the office of the commissioner and a certified copy of the instrument must be recorded in the recorder's office of the recording district in which the appropriation is located.

Sec. 46.15.165. Administrative adjudications.

(a) The commissioner may, by order, initiate an administrative adjudication to quantify and determine the priority of all water rights and claims in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct

hydrologic regime, including any hydrologically interrelated surface and ground water systems.

(b) In the order initiating an administrative adjudication, the commissioner shall describe the appropriate geographic and hydrologic boundaries of the adjudication area. During the adjudication, the commissioner may adjust the boundaries to ensure the efficient administration of water appropriations among users.

(c) Upon initiation of the adjudication, the commissioner shall

(1) serve the order on each applicant, certificate holder, or permittee listed in the department's records within the adjudication area;

(2) serve the order on any agency of the federal, state, or a local government with management authority over land or water within the adjudication area;

(3) serve the order on any person who owns or claims land within the adjudication area if the land is held in trust by the United States for the person or if the patent, deed, or certificate to the land from the United States was issued under 25 U.S.C. 334 (Indian General Allotment Act of February 8, 1887, 24 Stat. 389, as amended and supplemented), 25 U.S.C. 372 (the Allotment Act of June 25, 1910, 36 Stat. 855), former 43 U.S.C. 270-1, 270-2 (the Allotment Act of May 17, 1906, 34 Stat. 197), any other allotment act, or the Alaska Native Townsite Act of May 25, 1926, 44 Stat. 629, and serve the order on the United States on behalf of the person;

(4) serve the order on the United States and the appropriate governing body of the Annette Island Reserve established by 25 U.S.C. 495 (the Act of March 3, 1891, 26 Stat. 1101) if the land or water, including hydrologically interconnected water, of the Annette Island Reserve is within the adjudication area;

(5) serve the order on any other person claiming a federal reserved water right within the adjudication area;

(6) serve the regional corporation and village corporation established under 43 U.S.C. 1601 et seq. (Alaska Native Claims Settlement Act) that has a pending land selection or has acquired ownership to land under that act that is located within the adjudication area; and

(7) serve the order on each mining claimant of record with the United States and the state within the adjudication area as of the date of the order initiating the administrative adjudication.

(d) Service of an order under (c) of this section does not constitute an admission by the state that the person served with the order has a water right.

(e) Service of the order under (c)(1) of this section is sufficient if mailed by certified mail, return receipt requested, to the last known address that the applicant, certificate holder, permittee, or claimant has given to the division of the department responsible for administration of water rights. A person served under (c)(1) - (7) of this section who fails to appear in a timely manner and assert a claim

as prescribed by the commissioner is estopped from subsequently asserting an objection to the adjudication of that person's water rights within the adjudication area, unless the person is entitled to a federal reserved water right and has failed to consent under (k) of this section.

(f) In an adjudication under this section, the commissioner may appoint an impartial qualified person as a master to preside over the adjudication, to hold hearings, to take testimony, to collect evidence, to propose to the commissioner an order adjudicating the validity of, quantifying, and determining the priority of all water rights, and to take other action the commissioner decides is necessary.

(g) A state agency may assert a water right on behalf of the state in the adjudication.

(h) A division of the department or another state agency may provide documentary and testimonial evidence, research, and scientific analysis during the adjudication. The commissioner may provide evidence, research, or analysis from sources outside government.

(i) In conducting an adjudication, the commissioner may take action necessary for the efficient and fair administration and use of the state's water including

(1) determining indispensable, necessary, and convenient parties to the adjudication;

(2) classifying applicants, certificate holders, permittees, and claimants in groups that share similar interest, such as by the amount of water used or the type of use, and restricting their active participation in the adjudication by appointing group representatives for the purposes of receiving notices, examining witnesses, and other adjudicatory functions;

(3) entering interlocutory orders appropriate to a disposal of all or part of the issues in the adjudication, and designating the orders as final for the purposes of an appeal to the superior court under (l) of this section; and

(4) allocating to a participant the extra costs that the state has incurred in conducting the adjudication because the participant has in bad faith asserted a claim to water wholly without merit or has unreasonably delayed the proceeding.

(j) For the purpose of asserting a water right in an adjudication, a certificate issued under this chapter is prima facie evidence of the water right and its priority date.

(k) If the commissioner has initiated the adjudication and the federal government or a private person who has been served under (c)(2) - (4) of this section asserts a federal reserved water right but fails to consent in writing to the adjudication, then the commissioner may exclude the federal government or the person, respectively, as participants in the adjudication. The commissioner may negotiate the terms of the written consent.

(l) A person adversely affected by a final order of the commissioner adjudicating water rights under this section may appeal to the superior court within 30 days after the decision is mailed or delivered to the person.

(m) The commissioner may adopt regulations setting out procedures for administrative adjudications under this section.

Sec. 46.15.166. Judicial adjudications.

(a) Instead of initiating an adjudication under AS 46.15.165, the commissioner may, with the concurrence of the attorney general, if a federal reserved water right has been or might be asserted by an agency of the United States on its own behalf or on behalf of a person described in AS 46.15.165(c)(3) - (6), file on behalf of the state a complaint in superior court to initiate a judicial adjudication consistent with 43 U.S.C. 666 to quantify and determine the priority of all water rights in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime, including any hydrologically interrelated surface and ground water systems.

(b) The venue for an action filed under (a) of this section shall be established by rule of the supreme court under AS 22.10.030.

(c) In a complaint brought under (a) of this section, the court may appoint an impartial, qualified person as a master to hold hearings, take testimony, collect evidence, and make recommendations to the court regarding the scope and content of a proposed judicial decree that would finally adjudicate the validity of water rights, quantify them, and determine priorities among the water right appropriations in the adjudication area. Employment by a federal, state, or local government agency does not disqualify an individual from appointment as master under this subsection if the court determines that the individual is otherwise impartial and qualified to act as master. The master may, with the court's permission, take action that the commissioner would be authorized to take in an administrative adjudication under AS 46.15.165.

(d) In an adjudication under this section, the court may incorporate in an order or judgment final orders of the commissioner previously issued under AS 46.15.165.

(e) Proceedings under this section shall be conducted without a jury.

Sec. 46.15.167. Effect of decision.

The final order of the commissioner under AS 46.15.165 and the final judgment of a court under AS 46.15.166 are binding on each party to the adjudication and on each person who subsequently makes an application for a water right. The court or the commissioner may retain jurisdiction for a period of time necessary to

implement an adjudication order or judgment and to provide for subsequent water appropriations.

Sec. 46.15.168. Other actions.

(a) The state may timely intervene as a party in a superior court action potentially involving a determination of the validity, quantity, use, reservation, or priority of water rights.

(b) The commissioner may accept a remand from a state or federal court of a water rights dispute and may administratively adjudicate the dispute under AS 46.15.165.

(c) The commissioner may enter into arbitration to resolve a water rights dispute.

(d) The commissioner may incorporate and apply as binding upon the parties to an administrative adjudication under AS 46.15.165 any court decree concerning the state hydrologic regime involved in the adjudication.

Sec. 46.15.169. Federal reserved water rights.

This chapter does not represent a commitment by the state to a specific federal reserved water right.

Sec. 46.15.170. Effect of recording.

(a) A deed, lease, contract, assignment of permit, or other instrument transferring an appropriation is void as against a subsequent innocent purchaser who in good faith paid a valuable consideration for the appropriation or any portion of it and whose instrument is first filed and recorded under AS 46.15.160(b).

(b) A deed, lease, contract, assignment of permit, or other instrument transferring an appropriation that is recorded under AS 46.15.160(b) is constructive notice of its contents to subsequent purchasers of the appropriation or any portion of it. An unrecorded instrument is valid between the parties to it and as against one who has actual notice of it.

Sec. 46.15.175. Termination of permit for violation.

(a) If the commissioner has reason to believe that a person who holds an appropriation permit under this chapter is wilfully violating or has wilfully violated a term, condition, restriction, or limitation of the permit, the commissioner may commence proceedings to terminate the appropriation permit under AS 44.62.330 - 44.62.630 (Administrative Procedure Act).

(b) When an appropriation permit is terminated under this section, the appropriation of water made by the permit reverts to the state and becomes unappropriated water.

Sec. 46.15.180. Crimes.

(a) A person may not

(1) construct works for an appropriation, or divert, impound, withdraw, or use a significant amount of water from any source without a permit, certificate of appropriation, or authorization issued under this chapter;

(2) violate an order of the commissioner to cease and desist from preventing any water from moving to a person having a prior right to use it;

(3) disobey an order of the commissioner requiring the person to take steps to cause the water to move to a person having a prior right to use it;

(4) fail or refuse to install meters, gauges, or other measuring devices or control works;

(5) violate an order establishing corrective controls for an area or for a source of water;

(6) knowingly make a false or misleading statement in a declaration of existing right.

(b) A person who violates this section is guilty of a misdemeanor.

(c) Crimes under this section are in addition to any other crimes provided by law.

Sec. 46.15.185. Appeals.

Appeals to the superior court under this chapter are subject to AS 44.62.560 - 44.62.570 (Administrative Procedure Act).

Sec. 46.15.190. The Water Resources Board.

There is created the Water Resources Board composed of seven members having a general knowledge of the use and requirements for use of the water of the state and the conservation and protection of it. The commissioner of environmental conservation or a designee shall serve as an additional, ex officio member serving without a vote. The commissioner of natural resources shall act as the executive secretary of the board, and shall provide clerical staff for the board. Members of the board are appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session.

Sec. 46.15.200. Term of office.

The term of office for members of the board is four years. If a vacancy occurs, the governor shall fill it by appointment for the unexpired term, subject to AS

39.05.080(4). The appointment shall be submitted to the legislature for confirmation at the next regular session.

Sec. 46.15.210. Duties of the board.

The board shall inform and advise the governor on all matters relating to the use and appropriation of water in the state, including, but not limited to,

(1) the effect and adequacy of state laws and regulations governing the establishment of water rights;

(2) the multi-purpose uses of water;

(3) the prevention of pollution and the protection of fish and game;

(4) studies of the state's water supplies and plans for future requirements;

(5) development of water resources;

(6) participation of local governmental units in the management of water resources;

(7) land that is or may be needed for dams, reservoirs, flood dams, flood ways, canals, or ditches for the impoundment, storage, flow, and control of water.

Sec. 46.15.220. Board meetings.

The board shall hold one regular meeting annually at the state capital and one or more additional meetings at the time and place in the state the board selects for the transaction of business.

Sec. 46.15.230. Public meetings.

The board may hold and conduct public meetings at any time or any place in the state in order to obtain public opinion on a water use problem or proposal and it may, by majority vote of all members, formally or informally delivered, authorize one or more of its members to hold and conduct a public meeting.

Sec. 46.15.240. Compensation of board members.

Each member of the board is entitled to travel expenses and per diem as authorized for state boards by AS 39.20.180 while traveling to or from, or in attendance at, regular or special meetings or conferences authorized by the board.

Sec. 46.15.250. Enforcement authority.

The following persons are peace officers of the state and they shall enforce this chapter:

(1) a state employee authorized by the commissioner;

(2) a police officer of the state.

Sec. 46.15.255. Enforcement and costs.

(a) In addition to a penalty imposed under AS 46.15.180 for violation of an order issued under this chapter, the commissioner may

(1) remove or abate unpermitted works of appropriation, diversion, impoundment, or withdrawal;

(2) install corrective controls or control works; and

(3) seek enforcement of the order by filing an action in the superior court.

(b) A person who violates an order issued under AS 46.15.180 is liable for all costs of removal, abatement, or installation and for court costs and attorney fees incurred by the state in seeking enforcement of the order.

Sec. 46.15.256. Data collection authority.

To carry out the provisions of this chapter, the commissioner may

(1) inspect books, records, meters, gauges, well logs, works of appropriation, diversion, impoundment, withdrawal, or control and other relevant information or physical condition;

(2) enter private property at all reasonable times after obtaining a search warrant from a judicial officer if the owner refuses consent to entry; and

(3) compel the production of relevant information by a subpoena or subpoena duces tecum signed by the commissioner if the commissioner reasonably believes the information is necessary to carry out the purposes of this chapter.

Sec. 46.15.260. Definitions.

In this chapter, unless the context otherwise requires,

(1) "appropriate" means to divert, impound, or withdraw a quantity of water from a source of water, for a beneficial use or to reserve water under AS 46.15.145;

(2) "appropriation" means the diversion, impounding, or withdrawal of a quantity of water from a source of water for a beneficial use or the reservation of water under AS 46.15.145;

(3) "beneficial use" means a use of water for the benefit of the appropriator, other persons or the public, that is reasonable and consistent with the public interest, including, but not limited to, domestic, agricultural, irrigation, industrial, manufacturing, fish and shellfish processing, navigation and transportation, mining, power, public, sanitary, fish and wildlife, recreational uses, and maintenance of water quality;

(4) "commissioner" means the commissioner of natural resources;

(5) "director" means the director of the division of lands, Department of Natural Resources;

(6) "mineral and medicinal water" means

(A) water of a hot spring or spring with curative properties which has been reserved by the federal government under Public Land Order No. 399; and

(B) geothermal fluid, as defined in AS 41.06.060;

(7) "person" includes an individual, partnership, association, public or private corporation, state agency, political subdivision of the state, and the United States;

(8) "source of water" means a substantial quantity of water capable of being put to beneficial use;

(9) "water" means all water of the state, surface and subsurface, occurring in a natural state, except mineral and medicinal water.

Sec. 46.15.270. Short title.

This chapter may be cited as the Alaska Water Use Act.

50 C.F.R. § 100.1-.4

§ 100.1 Purpose.

The regulations in this part implement the Federal Subsistence Management Program on public lands within the State of Alaska.

§ 100.2 Authority.

The Secretary of the Interior and Secretary of Agriculture issue the regulations in this part pursuant to authority vested in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101–3126.

§ 100.3 Applicability and scope.

(a) The regulations in this part implement the provisions of Title VIII or ANILCA relevant to the taking of fish and wildlife on public land in the State of Alaska. The regulations in this part do not permit subsistence uses in Glacier Bay National Park, Kenai Fjords National Park, Katmai National Park, and that poortion of Denali National Park established as Mt. McKinley National Park prior to passage of ANILCA, where subsistence taking and uses are prohibited. The regulations in this part do not supersede agency-specific regulations.

(b) The regulations contained in this part apply on all public lands, including all inland waters, both navigable and non-navigable, within and adjacent to the

exterior boundaries of the following areas, and on the marine waters as identified in the following areas:

(1) Alaska Maritime National Wildlife Refuge, including the:

(i) Karluk Subunit: All of the submerged land and water of the Pacific Ocean (Sheliokof Strait) extending 3,000 feet from the shoreline between a point on the spit at the meander corner common to Sections 35 and 36 of Township 30 South, Range 33 West, and a point approximately 11/4miles east of Rocky Point within Section 14 of Township 29 South, Range 31, West, Seward Meridian as described in Public Land Order 128, dated June 19, 1943;

(ii) Womens Bay Subunit: Womens Bay, Gibson Cove, portions of St. Paul Harbor and Chiniak Bay: All of the submerged land and water as described in Public Land Order 1182, dated July 7, 1955 (U.S. Survey 21539);

(iii) Afognak Island Subunit: A submerged lands and waters of the Pacific Ocean lying within 3 miles of the shoreline as described in Proclamation No. 39, dated December 24, 1892;

(iv) Simeonof Subunit: All of the submerged land and water of Simeonof Island together with the adjacent waters of the Pacific Ocean extending 1 mile from the shoreline as described in Public Land Order 1749, dated October 30, 1958; and

(v) Semidi Subunit: All of the submerged land and water of the Semidi Islands together with the adjacent waters of the Pacific Ocean lying between parallels 55°57'57"00–56°15'57"00 North Latitute and 156°30'00"–157°00'00" West Longitude as described in Executive Order 5858, dated June 17, 1932;

(2) Arctic National Wildlife Refuge, including those waters shoreward of the line of extreme low water starting in the vicinity of Monument 1 at the intersection of the International Boundary line between the State of Alaska and the Yukon Territory; Canada, and extending westerly, along the line of extreme low water across the entrances of lagoons such that all offshore bars, reefs and islands, and lagoons that separate them from the mainland to Brownlow Point, approximately 70 10' North Latitude and 145 51' West Longitude;

(3) National Petroleum Reserve in Alaska, including those waters shoreward of a line beginning at the western bank of the Colville River following the highest highwater mark westerly, extending across the entrances of small lagoons, including Pearl Bay, Wainwright Inlet, the Kuk River, Kugrau Bay and River, and

other small bays and river estuaries, and following the ocean side of barrier islands and sandspits within three miles of shore and the ocean side of the Plover Islands, to the northwestern extremity of Icy cape, at approximately 70°21' North Latitute and 161 46' West Longitude; and

(4) Yukon Delta National Wildlife Refuge, including Nunivak Island: the submerged land and water of Nunivak Island together with the adjacent waters of the Bering Sea extending, for Federal Subsistence Management purposes, 3 miles from the shoreline of Nunivak Island as described in Executive Order No. 5059, dated April 15, 1929.

(5) Southeastern Alaska—Makhnati Island Area: Land and waters beginning at the southern point of Fruit Island, 57°02'35" north latitude, 135°21'07" west longitude as shown on United States Coast and Geodetic Survey Chart No. 8244, May 21, 1941; from the point of beginning, by metes and bounds; S. 58° W., 2,500 feet, to the southern point of Nepovorotni Rocks; S. 83° W., 5,600 feet, on a line passing through the southern point of a small island lying about 150 feet south of Makhnati Island; N. 6° W., 4,200 feet, on a line passing through the western point of a small island lying about 150 feet west of Makhnati Island, to the northwestern point of Signal Island; N. 24° E., 3,000 feet, to a point, 57°03'15" north latitude, 134°23'07" west longitude; East, 2,900 feet, to a point in course No. 45 in meanders of U.S. Survey No. 1496, on west side of Japonski Island; southeasterly, with the meanders of Japonski Island, U.S. Survey No. 1,496 to angle point No. 35, on the southwestern point of Japonski Island; S. 60° E., 3,300 feet, along the boundary line of Naval reservation described in Executive Order No. 8216, July 25, 1939, to the point beginning, and that part of Sitka Bay lying south of Japonski Island and west of the main channel, but not including Aleutski Island as revoked in Public Land Order 925, October 27, 1953, described by metes and bounds as follows: Beginning at the southeast point of Japonski Island at angle point No. 7 of the meanders of U.S. Survey No. 1496; thence east approximately 12.00 chains to the center of the main channel; thence S. 45° E. along the main channel approximately 20.00 chains; thence S. 45° W. approximately 9.00 chains to the southeastern point of Aleutski Island; thence S. 79° W. approximately 40.00 chains to the southern point of Fruit Island; thence N. 60° W. approximately 50.00 chains to the southwestern point of Japonski Island at angle point No. 35 of U.S. Survey No 1496; thence easterly with the meanders of Japonski Island to the point of beginning including Charcoal, Harbor, Alice, Love, Fruit islands and a number of smaller unnamed islands.

(c) The regulations contained in this part apply on all public lands, excluding marine waters, but including all inland waters, both navigable and non-navigable, within and adjacent to the exterior boundaries of the following areas:

(1) Alaska Peninsula National Wildlife Refuge;

(2) Aniakchak National Monument and Preserve;

(3) Becharof National Wildlife Refuge;

(4) Bering Land Bridge National Preserve;

(5) Cape Krusenstern National Monument;

(6) Chugach National Forest;

(7) Denali National Preserve and the 1980 additions to Denali National Park;

(8) Gates of the Arctic National Park and Preserve;

(9) Glacier Bay National Preserve;

(10) Innoko National Wildlife Refuge;

(11) Izembek National Wildlife Refuge;

(12) Kanuti National Wildlife Refuge;

(13) Katmai National Preserve;

(14) Kenai National Wildlife Refuge;

(15) Kobuk Valley National Park;

(16) Kodiak National Wildlife Refuge;

(17) Koyukuk National Wildlife Refuge;

(18) Lake Clark National Park and Preserve;

(19) Noatak National Preserve;

(20) Nowitna National Wildlife Refuge;

(21) Selawik National Wildlife Refuge;

(22) Steese National Conservation Area;

(23) Tetlin National Wildlife Refuge;

(24) Togiak National Wildlife Refuge;

(25) Tongass National Forest, including Admiralty Island National Monument and Misty Fjords National Monument;

(26) White Mountain National Recreation Area;

(27) Wrangell-St. Elias National Park and Preserve;

(28) Yukon-Charley Rivers National Preserve;

(29) Yukon Flats National Wildlife Refuge;

(30) All components of the Wild and Scenic River System located outside the boundaries of National Parks, National Preserves, or National Wildlife Refuges, including segments of the Alagnak River, Beaver Creek, Birch Creek, Delta River, Fortymile River, Gulkana River, and Unalakleet River.

(d) The regulations contained in this part apply on all other public lands, other than to the military, U.S. Coast Guard, and Federal Aviation Administration lands that are closed to access by the general public, including all non-navigable waters located on these lands.

(e) The public lands described in paragraphs (b) and (c) of this section remain subject to change through rulemaking pending a Department of the Interior review of title and jurisdictional issues regarding certain submerged lands beneath navigable waters in Alaska.

[70 FR 76407, Dec. 27, 2005, as amended by 71 FR 49999, Aug. 24, 2006; 74 FR 34696, July 17, 2009]

§ 100.4 Definitions.

The following definitions apply to all regulations contained in this part:

Agency means a subunit of a cabinet-level Department of the Federal Government having land management authority over the public lands including, but not limited to, the U.S. Fish & Wildlife Service, Bureau of Indian Affairs, Bureau of Land Management, National Park Service, and USDA Forest Service.

ANILCA means the Alaska National Interest Lands Conservation Act, Public Law 96–487, 94 Stat. 2371, (codified, as amended, in scattered sections of 16 U.S.C. and 43 U.S.C.)

Area, District, Subdistrict, and Section mean one of the geographical areas defined in the codified Alaska Department of Fish and Game regulations found in Title 5 of the Alaska Administrative Code.

Barter means the exchange of fish or wildlife or their parts taken for subsistence uses; for other fish, wildlife or their parts; or, for other food or for nonedible items other than money, if the exchange is of a limited and noncommercial nature.

Board means the Federal Subsistence Board as described in §100.10.

Commissions means the Subsistence Resource Commissions established pursuant to section 808 of ANILCA.

Conservation of healthy populations of fish and wildlife means the maintenance of fish and wildlife resources and their habitats in a condition that assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystem, including the recognition that local rural residents engaged in subsistence uses may be a natural part of that ecosystem; minimizes the likelihood of irreversible or long-term adverse effects upon such populations and species; ensures the maximum practicable diversity of options for the future; and recognizes that the policies and legal authorities of the managing agencies will determine the nature and degree of management programs affecting ecological relationships, population dynamics, and the manipulation of the components of the ecosystem.

Customary trade means exchange for cash of fish and wildlife resources regulated in this part, not otherwise prohibited by Federal law or regulation, to support personal and family needs; and does not include trade which constitutes a significant commercial enterprise.

Customary and traditional 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.

FACA means the Federal Advisory Committee Act, Public Law 92–463, 86 Stat. 770 (codified as amended, at 5 U.S.C. Appendix II, 1–15).

Family means all persons related by blood, marriage, or adoption or any other person living within the household on a permanent basis.

Federal Advisory Committees or Federal Advisory Committee means the Federal Local Advisory Committees as described in §100.12

Federal lands means lands and waters and interests therein the title to which is in the United States, including navigable and non-navigable waters in which the United States has reserved water rights.

Fish and wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the carcass or part thereof.

Game Management Unit or GMU means one of the 26 geographical areas listed under game management units in the codified State of Alaska hunting and trapping regulations and the Game Unit Maps of Alaska.

Inland Waters means, for the purposes of this part, those waters located landward of the mean high tide line or the waters located upstream of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea. Inland waters include, but are not limited to, lakes, reservoirs, ponds, streams, and rivers.

Marine Waters means, for the purposes of this part, those waters located seaward of the mean high tide line or the waters located seaward of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea.

Person means an individual and does not include a corporation, company, partnership, firm, association, organization, business, trust, or society.

Public lands or public land means:

(1) Lands situated in Alaska which are Federal lands, except—

(i) Land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(ii) Land selections of a Native Corporation made under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq., which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(iii) Lands referred to in section 19(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1618(b).

(2) Notwithstanding the exceptions in paragraphs (1)(i) through (iii) of this definition, until conveyed or interim conveyed, all Federal lands within the boundaries of any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Forest Monument, National Recreation Area, National Conservation Area, new National forest or forest addition shall be treated as public lands for the purposes of the regulations in this part pursuant to section 906(o)(2) of ANILCA.

Regional Councils or Regional Council means the Regional Advisory Councils as described in §100.11.

Reserved water right(s) means the Federal right to use unappropriated appurtenant water necessary to accomplish the purposes for which a Federal reservation was established. Reserved water rights include nonconsumptive and consumptive uses.

Resident means any person who has his or her primary, permanent home for the previous 12 months within Alaska and whenever absent from this primary, permanent home, has the intention of returning to it. Factors demonstrating the location of a person's primary, permanent home may include, but are not limited to: the address listed on an Alaska Permanent Fund dividend application; an Alaska license to drive, hunt, fish, or engage in an activity regulated by a government entity; affidavit of person or persons who know the individual; voter registration; location of residences owned, rented, or leased; location of stored household

goods; residence of spouse, minor children, or dependents; tax documents; or whether the person claims residence in another location for any purpose.

Rural means any community or area of Alaska determined by the Board to qualify as such under the process described in §100.15.

Secretary means the Secretary of the Interior, except that in reference to matters related to any unit of the National Forest System, such term means the Secretary of Agriculture.

State means the State of Alaska.

Subsistence uses means 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.

Take or taking as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

Year means calendar year unless another year is specified.

50 C.F.R § 100.10(b)

Sec. 100.10 Federal Subsistence Board.

(a) The Secretary of the Interior and Secretary of Agriculture hereby establish a Federal Subsistence Board, and assign it responsibility for administering the subsistence taking and uses of fish and wildlife on public lands, and the related promulgation and signature authority for regulations of subparts C and D of this part. The Secretaries, however, retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands when such activities interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority.

(b) Membership. (1) The voting members of the Board are: a Chair to be appointed by the Secretary of the Interior with the concurrence of the Secretary of

Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; Alaska Regional Director, National Park Service; Alaska Regional Forester, USDA Forest Service; the Alaska State
Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs. Each member of the Board may appoint a designee.

(2) [Reserved]

(c) Liaisons to the Board are: a State liaison, and the Chairman of each Regional Council. The State liaison and the Chairman of each Regional Council may attend public sessions of all Board meetings and be actively involved as consultants to the Board.

(d) Powers and duties. (1) The Board shall meet at least twice per year and at such other times as deemed necessary. Meetings shall occur at the call of the Chair, but any member may request a meeting.

(2) A quorum consists of four members.

(3) No action may be taken unless a majority of voting members are in agreement.

(4) The Board is empowered, to the extent necessary, to implement Title VIII of ANILCA, to:

(i) Issue regulations for the management of subsistence taking and uses of fish and wildlife on public lands;

(ii) Determine which communities or areas of the State are rural or non-rural;

(iii) Determine which rural Alaska areas or communities have customary and traditional subsistence uses of specific fish and wildlife populations;

(iv) Allocate subsistence uses of fish and wildlife populations on public lands;

(v) Ensure that 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;

(vi) Close public lands to the non-subsistence taking of fish and wildlife;

(vii) Establish priorities for the subsistence taking of fish and wildlife on public lands among rural Alaska residents;

(viii) Restrict or eliminate taking of fish and wildlife on public lands;

(ix) Determine what types and forms of trade of fish and wildlife taken for subsistence uses constitute allowable customary trade;

(x) Authorize the Regional Councils to convene;

(xi) Establish a Regional Council in each subsistence resource region and recommend to the Secretaries, appointees to the Regional Councils, pursuant to the FACA;

(xii) Establish Federal Advisory Committees within the subsistence resource regions, if necessary, and recommend to the Secretaries that members of the

Federal Advisory Committees be appointed from the group of individuals nominated by rural Alaska residents;

(xiii) Establish rules and procedures for the operation of the Board, and the Regional Councils;

(xiv) Review and respond to proposals for regulations, management plans, policies, and other matters related to subsistence taking and uses of fish and wildlife;

(xv) Enter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program;

(xvi) Develop alternative permitting processes relating to the subsistence taking of fish and wildlife to ensure continued opportunities for subsistence;

(xvii) Evaluate whether hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority, and after appropriate consultation with the State of Alaska, the Regional Councils, and other Federal agencies, make a recommendation to the Secretaries for their action;

(xviii) Identify, in appropriate specific instances, whether there exists additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches, and make appropriate recommendation to
the Secretaries for inclusion of those interests within the Federal Subsistence Management Program; and

(xix) Take other actions authorized by the Secretaries to implement Title VIII of ANILCA.

(5) The Board may implement one or more of the following harvest and harvest reporting or permit systems:

(i) The fish and wildlife is taken by an individual who is required to obtain and possess pertinent State harvest permits, tickets, or tags, or Federal permit (Federal Subsistence Registration Permit);

(ii) A qualified subsistence user may designate another qualified subsistence user (by using the Federal Designated Harvester Permit) to take fish and wildlife on his or her behalf;

(iii) The fish and wildlife is taken by individuals or community representatives permitted (via a Federal Subsistence Registration Permit) a one-time or annual harvest for special purposes including ceremonies and potlatches; or

(iv) The fish and wildlife is taken by representatives of a community permitted to do so in a manner consistent with the community's customary and traditional practices.

(6) The Board may delegate to agency field officials the authority to set harvest and possession limits, define harvest areas, specify methods or means of harvest, specify permit requirements, and open or close specific fish or wildlife harvest seasons within frameworks established by the Board.

(7) The Board shall establish a Staff Committee for analytical and administrative assistance composed of members from the U.S. Fish and Wildlife Service, National Park Service, U.S. Bureau of Land Management, Bureau of Indian Affairs, and USDA Forest Service. A U.S. Fish and Wildlife Service representative shall serve as Chair of the Staff Committee.

(8) The Board may establish and dissolve additional committees as necessary for assistance.

(9) The U.S. Fish and Wildlife Service shall provide appropriate administrative support for the Board.

(10) The Board shall authorize at least two meetings per year for each Regional Council.

(e) Relationship to Regional Councils. (1) The Board shall consider the reports and recommendations of the Regional Councils concerning the taking of fish and wildlife on public lands within their respective regions for subsistence uses. The Board may choose not to follow any Regional Council recommendation which it determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, would be detrimental to the satisfaction of subsistence needs, or in closure situations, for reasons of public safety or administration or to assure the continued viability of a particular fish or wildlife population. If a recommendation is not adopted, the Board shall set forth the factual basis and the reasons for the decision, in writing, in a timely fashion.

(2) The Board shall provide available and appropriate technical assistance to the Regional Councils.

50 C.F.R § 100.19

Sec. 100.19 Special actions.

(a) The Board may restrict, close, or reopen the taking of fish and wildlife for non-subsistence uses on public lands when necessary to assure the continued viability of a particular fish or wildlife population, to continue subsistence uses of a fish or wildlife population, or for reasons of public safety or administration.

(b) The Board may open, close, or restrict subsistence uses of a particular fish or wildlife population on public lands to assure the continued viability of a fish or wildlife population, to continue subsistence uses of a fish or wildlife population, or for reasons of public safety or administration.

(c) The Board will accept a request for a change in seasons, methods and means, harvest limits and/or restrictions on harvest under this Sec. 100.19 only if there are extenuating circumstances necessitating a regulatory change before the next annual subpart D proposal cycle. Extenuating circumstances include unusual and significant changes in resource abundance or unusual conditions affecting harvest opportunities that could not reasonably have been anticipated and that potentially could have significant adverse effects on the health of fish and wildlife populations or subsistence uses. Requests for Special Action that do not meet these conditions will be rejected; however, a rejected Special Action request will be deferred, if appropriate, to the next annual regulatory proposal cycle for consideration, after coordination with the submitter. In general, changes to Customary and Traditional Use Determinations will only be considered through the annual subpart C proposal cycle.

(d) In an emergency situation, the Board may immediately open, close, liberalize, or restrict subsistence uses of fish and wildlife on public lands, or close or restrict non-subsistence uses of fish and wildlife on public lands, if necessary to assure the continued viability of a fish or wildlife population, to continue subsistence uses of fish or wildlife, or for public safety reasons. Prior to implementing an emergency action, the Board shall consult with the State. The emergency action shall be effective when directed by the Board, may not exceed 60 days, and may not be extended unless it is determined by the Board, after notice and public hearing, that such action should be extended. The Board shall, in a timely manner, provide notice via radio announcement or personal contact of the emergency action and shall publish notice and reasons justifying the emergency action in newspapers of any area affected, and in the Federal Register thereafter.

(e) After consultation with the State, the appropriate Regional Advisory Council(s), and adequate notice and public hearing, the Board may make or direct a temporary change to close, open, or adjust the seasons, to modify the harvest limits, or to modify the methods and means of harvest for subsistence uses of fish and wildlife populations on public lands. An affected rural resident, community, Regional Council, or administrative agency may request a temporary change in seasons, harvest limits, or methods or means of harvest. In addition, a temporary change may be made only after the Board determines that the proposed temporary change will not interfere with the conservation of healthy fish and wildlife populations, will not be detrimental to the long-term subsistence use of fish or wildlife resources, and is not an unnecessary restriction on non-subsistence users.

The decision of the Board shall be the final administrative action. The temporary change shall be effective when directed by the Board following notice in the affected area(s). This notice may include publication in newspapers or announcement on local radio stations. The Board shall publish notice and reasons justifying the temporary action in the Federal Register thereafter. The length of any temporary change shall be confined to the minimum time period or harvest limit determined by the Board to be necessary to satisfy subsistence uses. A temporary opening or closure will not extend beyond the regulatory year for which it is promulgated.

(f) Regulations authorizing any individual agency to direct temporary or emergency closures on public lands managed by the agency remain unaffected by the regulations in this part, which authorize the Board to make or direct restrictions, closures, or temporary changes for subsistence uses on public lands.

(g) You may not take fish and wildlife in violation of a restriction, closure, opening, or temporary change authorized by the Board.

57 FR 22940-01

*22940 AGENCY: Forest Service, Department of Agriculture. Fish and Wildlife Service, Department of the Interior.

ACTION: Final rule.

SUMMARY: This rule promulgates regulations governing administration of subsistence taking of fish and wildlife on public lands in Alaska. This rule implements the subsistence priority for rural Alaska residents under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). It replaces the Temporary Subsistence Management Regulations for Public Lands in Alaska, which expire on June 30, 1992.

EFFECTIVE DATE: July 1, 1992.

FOR FURTHER INFORMATION CONTACT: Richard S. Pospahala, Office of Subsistence Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503; telephone (907) 786-3447. For questions specific to National Forest system lands, contact Norman R. Howse, Assistant Director Subsistence, USDA, Forest Service, Alaska Region, P.O. Box 21628, Juneau, Alaska 99802-1628; telephone (907) 586-8890.

SUPPLEMENTARY INFORMATION:

Background

Title VIII of ANILCA (16 U.S.C. 3111-3126) requires the Secretary of the Interior and the Secretary of Agriculture (Secretaries) to implement a joint Federal Subsistence Management Program (FSMP) to grant a priority for subsistence uses of fish and wildlife resources on public lands in Alaska, unless the State of Alaska enacts and implements laws of general applicability consistent with sections 803, 804, and 805 of ANILCA. To be consistent with sections 803, 804, and 805 of ANILCA, the State's laws of general applicability must confine the preference for subsistence uses to those subsistence uses engaged in by rural Alaska residents. Until recently, the State managed the subsistence program on public lands pursuant to section 805 of ANILCA. In December 1989, the Alaska Supreme Court ruled in McDowell v. State of Alaska that the rural preference found in the State subsistence statute violated the Alaska Constitution. The effect of this ruling required the State to delete the rural preference from its subsistence statute, and therefore, the State subsistence statute failed to comply with Title VIII of ANILCA. The Court stayed the effect of the McDowell decision until July 1, 1990.

Consequently, the Secretaries assumed responsibility for the implementation of Title VIII of ANILCA on July 1, 1990. On June 29, 1990, the “Temporary Subsistence Management Regulations for Public Lands in Alaska, Final Temporary Rule” were published in the Federal Register (55 FR 27114-27170). The temporary regulations defined and implemented a program approved by the Secretaries and administered by the Federal Subsistence Board (Board). Under the temporary regulations, the Secretary of the Interior with the concurrence of the Secretary of Agriculture appointed the Board Chair. Other members of the Board include the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, National Park Service; the Alaska State Director, Bureau of Land Management; the Alaska Area Director, Bureau of Indian Affairs; and the Alaska Regional Forester, USDA Forest Service. These agencies participated in the development of the temporary regulations. In addition, all Board members have reviewed this final rule and concur in its publication. Because this final rule relates to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, identical text will be incorporated into 36 CFR part 242 and 50 CFR part 100.

Summary of Comments

The proposed rule for Subsistence Management Regulations on Federal Public Lands in Alaska, subparts A, B, and C (57 FR 3676-3687, January 30, 1992) afforded the public a comment period of 45 days to address issues and language included therein. During the comment period, public meetings were held in Alaska in Anchorage, Barrow, Bethel, Dillingham, Fairbanks, Kodiak, Kotzebue, Naknek, Nome, and Sitka. In addition to comments offered during this comment period, comments received at 42 public hearings held for discussion regarding the draft Environmental Impact Statement (EIS), and at six public hearings on subpart D, were considered. The public submitted a total of 446 written comments and 200 oral comments.

Analysis of Comments

Section ___.1 Purpose

No comments were received on this section.

Section ___.2 Authority

Several commentors questioned the need for any regulation of subsistence taking of fish and wildlife. Title VIII of ANILCA provides for the continuation of the opportunities for subsistence uses, by rural Alaska residents, consistent with maintaining healthy fish and wildlife populations. The Secretaries' responsibilities are thus two-fold: To conserve healthy fish and wildlife populations and to ensure that non-wasteful subsistence uses of fish and wildlife populations are accorded priority over other consumptive uses on public lands. Section 814 of ANILCA requires the Secretaries to prescribe regulations as necessary to carry out these responsibilities. In accordance with the mandate of Title VIII of ANILCA, it is the intent of the Secretaries to regulate subsistence taking of fish and wildlife in such a way as to cause the least adverse impact possible on subsistence users.

It also was suggested that the regulations should not apply in cases of dire need. Emergency taking of wildlife in life-threatening situations is governed under State regulations; such taking is not prohibited under FSMP regulations.

Another commentor declared that management of fish and wildlife should only fall under the State's administration. The Secretaries agree that it is preferable for the State of Alaska to manage the subsistence taking and use of fish and wildlife. However, if the State regulatory regime is inconsistent with sections 803, 804, and 805 of ANILCA, then the Secretaries must establish a regulatory regime for public

lands that meets those requirements. At this time, the State does not have a law of general applicability that is consistent with the title VIII requirement to grant a subsistence priority to residents of rural areas. As long as the State fails to satisfy section 805 of ANILCA, and as long as the rural preference is required by title VIII of ANILCA, the Secretaries must regulate subsistence taking and use of fish and wildlife on public lands. However, the regulations do provide for the State to reacquire the responsibility for managing subsistence taking of fish and wildlife on public lands.

**22941 Section ___.3 Applicability and Scope*

Several commentors objected to the prohibition against subsistence taking in Glacier Bay National Park and Katmai National Park. Title II of ANILCA specifies the National Park Service areas in which subsistence uses are authorized. Title II does not authorize subsistence uses in Glacier Bay National Park, Katmai National Park, Kenai Fjords National Park, and that portion of Denali National Park established as Mt. McKinley National Park prior to passage of ANILCA. Therefore, neither Title VIII of ANILCA nor these regulations permit subsistence uses on the public lands identified above.

Several commentors expressed frustration with the lack of clarity in the regulations. Commentors generally did not identify the specific regulations that they thought were confusing. However, where possible, regulatory language has been revised to improve clarity. One commentor requested clarification of the meaning of the § ___.3(a) statement that these regulations do not supersede other agency specific regulations. This statement means that regulations in this final rule do not override regulations that individual agencies establish to carry out their particular responsibilities.

One commentor asserted that the regulations do not apply to a sovereign nation. The regulations apply to the taking of fish and wildlife resources on public lands as defined in this Part.

Another commentor suggested that the term “fish and wildlife” be replaced with the term “other wild and renewable resources,” the term used in section 803 of ANILCA to define subsistence uses. ANILCA requires the Secretary to take over subsistence management responsibilities on public lands if the State fails to enact laws of general applicability consistent with sections 803, 804, and 805 of ANILCA. Section 805(d) of ANILCA specifies that these regulatory responsibilities apply to the taking of fish and wildlife on public lands. The FSMP

has been established to assume these responsibilities until the Secretaries certify that the State's subsistence legislation complies with title VIII of ANILCA and a rulemaking proceeding to repeal these regulations has been completed. Additionally, section 1314 (a) and (b) of ANILCA further limit the State's subsistence management jurisdiction to fish and wildlife only, and ensure that management responsibility for all other resources remains with the Secretaries. Consequently, the FSMP pertains only to the taking of fish and wildlife on public lands. The taking and use of wild and renewable resources, other than fish and wildlife, will continue to be managed by the appropriate land management agency.

Section ___.3 of these regulations specifies that the regulatory language applies to all non-navigable waters located on all public lands and to navigable waters located on certain public lands listed at § ___.3(b). The areas in this list, along with the area referred to as the Old Kuskokwim Wildlife Refuge which has now been deleted from this list in the final rule, previously appeared at various locations throughout § ___.24 of subpart D in the proposed regulations (56 FR 64404-64444). The area identified as the Old Kuskokwim Wildlife Refuge is that portion of the present Yukon Delta National Wildlife Refuge formerly known as the Kuskokwim National Wildlife Range. The definition of public lands found in ANILCA and these regulations does not include the submerged lands beneath navigable waters in the area formerly known as the Kuskokwim National Wildlife Range because the United States does not hold title to those submerged lands. As indicated in § ___. 3(c), the areas in this list remain subject to modification through rulemaking procedures. Nothing in these regulations is intended to enlarge or diminish the Federal government's authority to manage submerged lands title to which is held by the United States. The Departments retain the authority to exercise jurisdiction over those submerged lands which the United States reserved at the time of Alaska's Statehood and which have not been subsequently conveyed to the State or any other party.

Section ___.4 Definitions

Comments on definitions included requests for clarity, criticisms of specific definitions, suggested revisions to specific definitions, and requests for additional terms to be defined. Several editorial changes have been made to correct inadvertent deletions and to clarify intent. Where possible, definitions have been revised to be more explicit. The definition of agency has been expanded to identify the five principal Federal land management agencies with subsistence management responsibilities.

The definitions of barter and customary trade elicited numerous comments. Some commentors objected to the regulation defining customary trade as an alternative means of supporting subsistence needs. They viewed customary trade as integral to, not an alternative to, subsistence, citing section 803 of ANILCA. The final regulation has been amended to reflect this comment.

Several commentors felt that it was inappropriate to prohibit the use of money as a component of barter. Others mentioned that the definition of barter, which prohibits exchange of money, conflicts with the definition of customary trade, which authorizes the exchange of money as long as the exchange does not constitute a significant commercial enterprise. The definition of barter in the regulations, including the prohibition against use of cash, comes directly from section 803(2) of ANILCA. Likewise, the legislative history of ANILCA pertaining to customary trade reveals that cash may play a role in subsistence activities, and ANILCA accommodates that role. Several commentors recommended that the regulations establish more definitive guidelines describing exactly what constitutes customary trade. Some of these commentors suggested that the regulations use a dollar figure to define customary trade. Others felt that customary trade should be limited to the types and volumes of trade that occurred prior to the passage of ANILCA. At this time, insufficient customary and traditional use information exists to establish further guidelines that will accommodate subsistence use for customary trade while precluding the development of any significant commercial enterprise under the guise of subsistence. Following the enactment of this rule, the Board will place a high priority on refining the definition of customary trade and developing a definition for significant commercial enterprise, after considering recommendations submitted by the Federal Regional Advisory Councils (Regional Councils).

Several comments were received relative to the definitions of conservation of healthy populations of fish and wildlife and conservation of natural and healthy populations of fish and wildlife. Some felt that the definitions should be compatible with the State's sustained yield concept. Others saw the need to replace the definitions with a continued viability standard as found in sections 802, 804 and 816 of ANILCA. A few commentors wanted to reword the regulation to characterize subsistence uses as an integral, rather than natural, part of the ecosystem. Some commentors felt that the definition of natural and healthy populations of fish and wildlife was an unnecessarily conservative standard. A few commentors suggested that *22942 managing for stable populations is unrealistic.

Title VIII sets forth, in sections 802(1) and 815(1), the term conservation of

healthy fish and wildlife populations, rather than sustained yield, as the standard by which subsistence taking and uses will be managed. The definition of this term comes from Senate Report 96-413, p.233. The term conservation of natural and healthy populations of fish and wildlife has been deleted from the definitions section because adequate protection of natural populations in National Park Service areas is embodied in the conservation of healthy populations of fish and wildlife definition, which states that management will differ depending upon specific agency mandates.

Several commentors pointed out that the term continued viability was used in the regulations, but was not defined. A definition is unnecessary since the added protection afforded by conservation of healthy populations of fish and wildlife will also protect and assure the continued viability of those populations.

The definition of customary and traditional use was criticized as lacking a reference to the concept of sharing. Section 803 of ANILCA and these regulations include sharing in the definition of subsistence uses. Sharing is recognized as a characteristic of subsistence uses, and is one of eight factors to be used by the Board in making customary and traditional use determinations. Section ___.16 of these regulations describes the process the Board will employ when making customary and traditional use determinations. One commentor felt the last sentence of the regulation, referring to the important role of customary and traditional use in the economy of the community, was redundant.

One commentor felt that the definition of family was too restrictive because it excludes members of the extended family living in other households. Section 803(1) of ANILCA explicitly limits the definition of family to those persons related by blood, marriage, or adoption or those persons living within the same household on a permanent basis. Therefore, although members of an extended family may live in separate households, the members nevertheless satisfy the definition of family if they are related by blood, marriage, or adoption. The regulations recognize the importance of sharing, and do not prohibit the customary and traditional sharing of fish and wildlife for personal or family consumption.

Numerous comments were received concerning the definitions of Federal lands and public lands. All of these comments focused on the issue of jurisdiction over fisheries in navigable waters. Many felt that the definitions should include navigable waters to protect subsistence use and the subsistence priority. They strongly believe it was Congress' intent to protect subsistence rights as broadly as possible. Additionally, many individuals commented that most subsistence

resources are found in navigable waters.

The scope of these regulations is limited by the definition of public lands, which is found in section 102 of ANILCA and which only involves lands, waters, and interests therein title to which is in the United States. Because the United States does not generally own title to the submerged lands beneath navigable waters in Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters.

Consequently, neither ANILCA nor these regulations apply generally to subsistence uses on navigable waters. However, based upon specific pre-Statehood reservations of submerged lands, § ___.3(b) establishes that these regulations apply to navigable waters located on the identified public lands. The listed areas remain subject to change through further rulemaking pending a review and determination of pre-Statehood reservations by the United States.

Some commentors requested that the terms reasonable opportunity, subsistence priority, and rural subsistence priority be defined. However, the definitions section is intended to provide definitions for terms that are used in the regulations; and because these terms do not occur in the regulations it is not necessary to define them.

Comments relating to the definition of resident consisted of opinions on what should constitute the minimum period of residency to qualify as a resident. The FSMP will continue to use the variety of factors listed in the regulations as the basis for determining who is a resident, because Board use of the various factors injects fairness and good faith into the process of identifying a resident.

Several requests suggested changes to the definition of subsistence uses. These regulations have adopted the term as defined by Congress in section 802 of ANILCA, and will not be amended.

Section ___.5 Eligibility for Subsistence Use

Three types of comments were received relative to determining eligibility for subsistence use. Some wanted clarification regarding which individuals are eligible. A few objected to the authority of the National Park Service, separate from the Board, to regulate eligibility for subsistence uses on National Park Service lands. Some suggested specifically excluding military personnel stationed in rural areas from eligibility for subsistence use.

This section briefly describes those individuals eligible to take fish and wildlife for subsistence purposes under these regulations and how their eligibility is determined. There are two tests for Board determinations of eligibility. The first is rural residency. Only residents of communities or areas that the Board has determined to be rural are eligible for the subsistence priority. The process the Board uses to make rural determinations is described in § ___.15 of these regulations. The second test for determining eligibility is customary and traditional use determinations. In making these determinations, the Board determines which rural communities or areas have customary and traditional use of specific fish stocks and wildlife populations. After these determinations have been made, only those rural communities or areas determined by the Board to have customary and traditional use of particular fish stocks or wildlife populations are eligible for subsistence use of those stocks or populations. The Board may determine which fish stocks or wildlife populations, if any, have been customarily and traditionally used by residents of military installations that the Board has determined to be rural. If the Board has not made a customary and traditional determination of a fish stock or wildlife population, then all Alaska rural residents as defined in § ___.4 are eligible for use of those stocks or populations.

In accordance with section 203 of ANILCA, eligibility for the subsistence use of resources in areas managed by the National Park Service is restricted to local rural residents in National Preserves and, where specifically permitted, in National Monuments and Parks. National Park Service regulations govern which communities or individual residents qualify as local rural residents for specific National Park Service areas.

In some cases it may be necessary to establish priorities for subsistence uses among qualified rural Alaska residents in order to protect the continued viability of a fish stock or wildlife population or to continue subsistence uses. In these cases allocation among qualified rural Alaska residents will be determined according to the regulatory language found herein at § ___.17, *22943 which is consistent with § 804 of ANILCA.

64 FR 1276-01

Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, and D, Redefinition to Include Waters Subject to Subsistence Priority

Friday, January 8, 1999

*1276 AGENCY: Forest Service, Agriculture; and Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule amends the scope and applicability of the Federal Subsistence Management Program in Alaska to include subsistence activities occurring on inland navigable waters in which the United States has a reserved water right and to identify specific Federal land units where reserved water rights exist. The amendments also extend the Federal Subsistence Board's management to all Federal lands selected under the Alaska Native Claims Settlement Act and the Alaska Statehood Act and situated within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, or any new national forest or forest addition, until conveyed to the State of Alaska or an Alaska Native Corporation, as required by the Alaska National Interest Lands Conservation Act (ANILCA). In addition, the amendments specify that the Secretaries are retaining the authority to determine when hunting, fishing or trapping activities taking place in Alaska off the public lands interfere with the subsistence priority on the public lands to such an extent as to result in a failure to provide the subsistence priority and to take action to restrict or eliminate the interference. The Departments also provide the Federal Subsistence Board with authority to investigate and make recommendations to the Secretaries regarding the possible existence of additional Federal reservations, Federal reserved water rights or other Federal interests, including those which attach to lands in which the United States has less than fee ownership. The regulatory amendments conform the Federal subsistence management regulations to the court decree issued in State of Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995)cert denied517 U.S. 1187 (1996). The rule includes updated Customary and Traditional Use Determinations and annual seasons and harvest limits for fisheries. This rulemaking also responds to the Petitions for Rulemaking submitted by the Northwest Arctic Regional Council al. on April 12, 1994, and the Mentasta Village Council, al. on July 15, 1993.

DATES: Sections __.1 through __.24 are effective October 1, 1999. Sections __. 26 and __.27 are effective October 1, 1999 through February 29, 2001.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Thomas H. Boyd, (907) 786-3888. For

questions specific to National Forest System lands, contact Ken Thompson, Regional Subsistence Program Manager, USDA, Forest Service, Alaska Region, (907) 271-2540.

SUPPLEMENTARY INFORMATION:

Background

The Federal Subsistence Board assumed subsistence management responsibility for public lands in Alaska in 1990, after the Alaska Supreme Court ruled in McDowell v. State of Alaska, 785 P.2d 1 (Alaska. 1989), reh'g denied (Alaska 1990), that the rural preference contained in the State's subsistence statute violated the Alaska Constitution. This ruling put the State's subsistence program out of compliance with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) and resulted in the Secretaries assuming subsistence management on the public lands in Alaska. The “Temporary Subsistence Management Regulations for Public Lands in Alaska, Final Temporary Rule” was published in the Federal Register (55 FR 27114-27170) on June 29, 1990. The “Subsistence Management Regulations for Public Lands in Alaska; Final Rule” was published in the Federal Register (57 FR 22940-22964) on May 29, 1992.

In both cases, the rule “generally excludes navigable waters” from Federal subsistence management, 55 FR 27114, 27115 (1990); 57 FR 22940, 22942 (1992). In a lawsuit consolidated with Alaska v. Babbitt, plaintiff Katie John challenged these rules, arguing that navigable waters are properly included within the definition of “public lands” set out in ANILCA. At oral argument before the United States District Court for Alaska, the United States took the position that Federal reserved water rights which encompass the subsistence purpose are public lands for purposes of ANILCA. The United States Court of Appeals for the Ninth Circuit subsequently held: “[T]he definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.”Alaska v. Babbitt, 72 F.3d at 703-704. In the course of its decision, the Ninth Circuit also directed: “[T]he federal agencies that administer the subsistence priority are responsible for identifying those waters.”Id. at 704.

These amendments conform the Federal subsistence management regulations to the Ninth Circuit's ruling in Alaska v. Babbitt. As the Ninth Circuit directed, this document identifies Federal land units in which reserved water rights exist. These are “public lands” under the Ninth Circuit's decision in Alaska v. Babbitt and thus

are subject to the Federal subsistence priority in Title VIII of ANILCA. The amendments also provide the Federal Subsistence Board with clear authority to administer the subsistence priority in these waters.

This Final Rule is not effective until October 1, 1999, in accordance with language contained in the Omnibus Appropriations Bill for FY99, which prohibits the implementation and enforcement of regulations related to expanded jurisdiction for subsistence management until October 1, but does allow publication of this rule. However, should the Secretary of the Interior certify before October 1, 1999, that the Alaska State Legislature has passed a bill or resolution to amend the Constitution of the State of Alaska, that, if approved by the electorate, would enable the implementation of State laws consistent with and which provide for the definition, preference, and participation described in Sections 803, 804, and 805 of ANILCA, then these regulations will be held in abeyance until December 1, 2000, and a timely document will be published in the Federal Register delaying the effective date.

On July 15, 1993, the Mentasta Village Council, Native Village of Quinhagak, Native Village of Goodnews Bay, Alaska Federation of Natives, Alaska Inter-tribal Council, RurAL CAP, Katie John, Doris Charles, Louie Smith and Annie Cleveland filed a “Petition for Rulemaking by the Secretaries of Interior and Agriculture that Navigable Waters and Federal Reserved Waters are ‘Public Lands' Subject to Title VIII of ANILCA's Subsistence Priority.”On April 12, 1994, the Northwest Arctic Regional Council, Stevens Village Council, Kawerak, Inc., Copper River Native Association, Alaska Federation of Natives, Alaska Inter-tribal Council, RurAL CAP and Dinyee Corporation ***1277** filed a “Petition for Rule-Making by the Secretaries of Interior and Agriculture that Selected But Not Conveyed Lands Are To Be Treated as Public Lands for the Purposes of the Subsistence Priority in Title VIII of ANILCA and that Uses on Non-Public Lands in Alaska May Be Restricted to Protect Subsistence Uses on Public Lands in Alaska.”A Request for Comments on this Petition was published at 60 FR 6466 (1995). This rule also responds to both petitions for rulemaking.

Federal Subsistence Regional Advisory Councils

Alaska has been divided into ten subsistence resource regions, each of which is represented by a Federal Subsistence Regional Advisory Council. The Regional Councils provide a forum for rural residents with personal knowledge of local conditions and resource requirements to have a meaningful role in the subsistence management of fish and wildlife on Alaska public lands. The Regional Council

members represent geographical, cultural, and user diversity within each region.

The Regional Councils have had a substantial role in reviewing the proposed rule and making recommendations for the final rule.

Public Review and Comment

The Secretaries published an Advance Notice of Proposed Rulemaking (ANPR) (61 FR 15014) on April 4, 1996, and during May and June held eleven public hearings around Alaska to solicit comments on the Advance Notice. On December 17, 1997, the Secretaries published a Proposed Rule (62 FR 66216) and held 31 public hearings around the State, as well as soliciting input from the ten Federal Regional Subsistence Advisory Councils. The Proposed Rule was also available for review through the Office of Subsistence Management's home page at http:// www.r7.fws.gov/asm/home.html.

In addition to the oral testimony received at the public hearings and Regional Council meetings, we received an additional 74 written comments. The comments received both in writing and during the hearings provided the agencies with a sense of how the public viewed the general jurisdictional concepts and practical implementation aspects of the rule.

Analysis of Federal Subsistence Regional Advisory Councils' Comments

The ten Regional Councils were given an opportunity to comment on a draft of the Proposed Rule during their regular meetings in the fall of 1997, and then again on the Proposed Rule itself during their winter 1998 meetings. This section summarizes the comments received from the Councils and our analysis of those comments.

Southeast Regional Council—Some Council members expressed a need to include under Federal jurisdiction all lands and waters originally included in the proclamation establishing the Tongass National Forest, including the marine waters. This issue is the subject of pending litigation, Peratrovich v. United States, A92-734 (D-AK); therefore, the Final Rule will not be modified to include the marine waters within the original proclamation area.

Southcentral Regional Council—The Regional Council asked a number of questions but had no recommendations.

Kodiak/Aleutians Regional Council—The Regional Council expressed concern regarding the loss over time of subsistence marine resources. It did not make any formal recommendation on the Proposed Rule. The regulations clearly identify which marine waters are under Federal jurisdiction by referring to the original Federal Register publications delineating boundaries of the listed Federal land units. The issue of expanding the Federal jurisdiction to other marine waters outside the listed Federal land units is beyond the scope of this rule.

Bristol Bay Regional Council—The Council expressed concern that customary and traditional use determination findings for some communities need to be revised and that wording on the take of rainbow trout and steelhead should be revised. Additional concern was expressed about how to deal with the definition of customary trade and implementing regulations. Changes to the customary and traditional use determinations and taking regulations on rainbow trout would be more appropriately handled as proposals. This suggestion should be submitted to the Federal Subsistence Board for consideration as a proposal during a standard regulatory cycle for fish proposals. We did modify the customary trade regulations slightly to clarify them, but have not included a definition of "significant commercial enterprise" or placed any dollar limits on an allowable level of customary trade. The regulations in this rule clearly limit the sale of subsistence-caught fish to customary and traditional practices. We agree with the commentors who said that specific decisions on customary trade should be made at the local level. We anticipate working closely with Regional Advisory Councils to identify where specific limits should be implemented. These limits may vary in different regions of the State.

Yukon-Kuskokwim Delta Regional Council—The Regional Council suggested more publicity clarifying the program, particularly in smaller, coastal villages and a publicity effort to let people know what is going to happen before it actually does. After publication, a condensed easy-to-read booklet with the regulations will be prepared and distributed to the public. The field offices of the Federal agencies that are a part of the Federal Subsistence Board will make this regulation, and information about the Federal program, available to villages within their areas.

Western Interior Regional Council—The Council expressed concern regarding the regulations addressing customary trade and the necessity to provide for ongoing practices; also the necessity to prevent wanton waste. We have added language prohibiting wanton waste of subsistence-taken fish and shellfish. We did modify the customary trade regulations slightly to clarify them, but have not included a definition of "significant commercial enterprise" or placed any dollar limits on an

allowable level of customary trade. The regulations in this rule clearly limit the sale of subsistence-caught fish to customary and traditional practices. We agree with the commentors who said that specific decisions on customary trade should be made at the local level. We anticipate working closely with Regional Advisory Councils to identify where specific limits should be implemented. These limits may vary in different regions of the State.

Seward Peninsula Regional Council—The Regional Council asked a number of questions but had no recommendations.

Northwest Arctic Regional Council—The Regional Council had one recommendation: to eliminate a subsistence fishing closure where no similar sport closure currently exists. Recommendations for specific closures would be more appropriately handled as proposals. This suggestion should be submitted to the Federal Subsistence Board for consideration as a proposal during a standard regulatory cycle for fish proposals.

Eastern Interior Regional Council—The Council expressed concern regarding restrictions on customary trade. They asked that sections be rewritten to allow subsistence harvest by commercial license holders, and also recommended that agreements be made for local harvest data collection, and recommended that the "two basket" restriction for fishwheels not apply to the Yukon, Kuskokwim, Tanana, and *1278 Copper Rivers. The existing regulations already authorize the Board to enter into cooperative agreements for harvest data collection. The recommendation related to the "two basket" restriction for fishwheels would be more appropriately handled as a proposal. This suggestion should be submitted to the Federal Subsistence Board for consideration as a proposal during a standard regulatory cycle for fish proposals. We did modify the customary trade regulations slightly to clarify them, but have not included a definition of "significant commercial enterprise" or placed any dollar limits on an allowable level of customary trade. The regulations in this rule clearly limit the sale of subsistence-caught fish to customary and traditional practices. We agree with the commentors who said that specific decisions on customary trade should be made at the local level. We anticipate working closely with Regional Advisory Councils to identify where specific limits should be implemented. These limits may vary in different regions of the State.

North Slope Regional Council—The Regional Council comments centered around not creating any more restrictions on the Inupiaq way of life. The Council recommended that the C & T restriction for Unit 26(B) be stated more clearly as

“except for those living in Prudhoe Bay and other oil industry complexes.”Changes to the customary and traditional use determinations would be more appropriately handled as proposals. This suggestion should be submitted to the Federal Subsistence Board for consideration as a proposal during a standard regulatory cycle for fish proposals.

Analysis of Public Comments

General Comments

Several commentors questioned the adequacy of the Environmental Assessment, and suggested that it significantly understated the economic impacts of the Proposed Rule, particularly because of “customary trade” provisions of the rule. One commentor said that there should be an economic cost-benefit analysis done, and another said that the Proposed Rule was in violation of the Regulatory Flexibility Act, because no regulatory flexibility analysis was performed. The Final Rule is not expected to have a significant impact on either the physical environment or the socio-economic activities generated by Alaska's fisheries. For the most part, this rule continues pre-existing subsistence harvest activities at a level already occurring under State management. If there is any additional reallocation of fish or wildlife resources to subsistence users adopted in future annual regulations, it will likely be a relatively minor additional percentage of the fish harvested annually for other purposes in Alaska. ANILCA Title VIII does not require a cost-benefit analysis, nor does NEPA require such an analysis in the Environmental Assessment. Federal subsistence management under Title VIII of ANILCA will be designed to protect existing customary and traditional subsistence uses, including ongoing customary trade which may not be sanctioned by existing State regulations. It is not the intent of these regulations to encourage new subsistence fisheries. Because of this, the Departments certify that the proposed action represented by this final rulemaking will not have a significant effect on small entities and a flexibility analysis under the Regulatory Flexibility Act, Public Law 96-354, is not required.

One commentor said that the Proposed Rule violated Executive Order 12612, stating that it requires Federal agencies to examine the authority supporting any Federal action to limit the policy-making discretion of the states. The Final Rule clearly complies with Executive Order 12612, since it is implementing the U.S. Ninth Circuit Court of Appeals decision in State of Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995)cert denied517 U.S. 1187 (1996).

One commentor said that the Proposed Rule violated Executive Order 12866, stating that it requires Federal agencies to seek special involvement of those expected to be burdened by any regulation, specifically State officials, and stated that such involvement has not occurred. This rule does not impose any new requirements on the State of Alaska. The Board has worked closely with the State of Alaska since the inception of Federal subsistence management in 1990 and has continued to do so throughout the development of this rule. Cooperative agreements and cooperative management efforts with the State are beneficial to both parties and are ongoing.

The same commentor suggested the proposed rule also violated Executive Order 12988, stating that it requires regulations be written to minimize litigation and to provide a clear legal standard for affected conduct. Several provisions of the proposed rule have been modified in this final rule to clarify the legal standard for conduct. However, other provisions are unchanged in order to create a regulatory framework that will implement the subsistence priority mandates of ANILCA Title VIII, minimize socio-economic impacts, and ensure that resource conservation standards in ANILCA are met.

One commentor said that these regulations should comply with the Clean Water and Antidegredation Acts. These regulations are consistent with the Clean Water Act and all other Federal laws.

One commentor recommended that the Federal Subsistence Board adopt an expedited process so that recommendations for regulatory changes could be adopted for the 1999 fishing season. The Board can not do this, because of the existence of Congressional limitations on implementation. Legislation enacted in October 1998 restricts implementation of these regulations until October 1, 1999.

One commentor recommended that the government should hire locally to manage the fisheries. The Federal agencies that are members of the Federal Subsistence Board will utilize the local hire authority of ANILCA to the maximum extent possible when hiring personnel to work in the Federal program.

One commentor suggested that the regulations needed to be written in plainer language and that the Federal Subsistence Board should send representatives to villages to explain them before the regulations go into effect. The regulations have been significantly re-written to put them in to plain language. After publication a condensed easy to read booklet with the regulations will be prepared and distributed to the public. The Board has made considerable effort to provide

information about the expanded Federal fishery management program through numerous public hearings, regional advisory council meetings, press releases, and wide dissemination of information to an extensive mailing list. This final regulation will be mailed to over 2700 individuals and organizations in Alaska. The field offices of the Federal agencies that are a part of the Federal Subsistence Board will make this regulation, and information about the Federal program, available to villages within their areas.

One commentor said that there was no Alaska Native organization listed as being involved in the drafting of the proposed rule. Native organizations throughout the State have had an opportunity to provide input on this rule a number of times—after the issuance of the Advanced Notice of Proposed Rulemaking (April 4, 1996), during Regional Advisory Council meetings held throughout the State in *1279 the fall of 1997, during a 120-day public comment period after the publication of the proposed rule on December 17, 1997, and during 31 public hearings and 10 Regional Advisory Council meetings held around the State during that public comment period. In addition, as a member of the Federal Subsistence Board, the Bureau of Indian Affairs has been directly involved in the drafting of the Proposed Rule and this Final Rule.

Subpart A—General Provisions

__.2 Authority.

One commentor asked how the Pacific Salmon Treaty with Canada fit in with these regulations. These regulations are consistent with all existing treaties.

__.3 Applicability and scope.

The suggestion was made to include navigable waters on BLM lands. BLM lands set aside for specific purposes, such as Steese and White Mountains Conservation Areas, have Federal reserved water rights and are included within the scope of these regulations. Other BLM lands are general public domain lands without specific purposes and do not have reserved water rights.

Several commentors suggested that waters with Federal subsistence jurisdiction should be delineated the same for Forest Service lands as they are for Department of the Interior lands, and that Federal jurisdiction should be extended to include the marine waters identified in the 1907 Tongass National Forest Proclamation. The Final Rule has been modified from the Proposed Rule so that the definition of

inland waters covered under this rule is consistent for Forest Service and DOI waters. The Federal subsistence jurisdiction asserted in the Final Rule applies to waters where the Federal government holds a reserved water right or holds title to the waters or submerged lands. A Federal water right exists in inland waters within or adjacent to Federal conservation system units and national forests. The question of Federal jurisdiction over marine waters included in the Tongass Proclamation is the subject of pending litigation in Peratrovich v. United States, A92-734 (D. AK), and therefore those marine waters are not included in this rule.

Five commentors suggested that the scope of the Federal fishery management should be extended to include waters on Native corporation lands or to include all navigable waters within the state of Alaska. To do so would improperly extend the scope of the Federal program beyond the scope of Title VIII of ANILCA or the direction of the Ninth Circuit Court in the Katie John decision. In Title VIII Congress mandated the implementation of a subsistence priority on Federal public lands. Native corporation and other non-Federal lands and waters located beyond the boundaries of the conservation system units and other areas specified in §__.3 do not fall within the scope of Title VIII. In the Katie John decision, the Ninth Circuit Court ruled that the Federal program should include those waters where the Federal government retains a reserved water right. Those waters are identified in §__.3 of this rule.

Two commentors questioned the inclusion of inland waters adjacent to conservation system unit boundaries within the scope of Federal subsistence jurisdiction, and also questioned the inclusion of waters on inholdings within those unit boundaries. We have determined that a Federal reserved water right exists in those waters and that their inclusion is necessary for effective management of subsistence fisheries. Therefore, they are included.

One commentor said that waters flowing through or adjacent to Native allotments should be subject to the Federal subsistence jurisdiction. Many Native allotments are within the boundaries of the Federal lands identified in §__.3 of this rule, and therefore waters flowing through or adjacent to those allotments are subject to a Federal reserved water right and Federal subsistence jurisdiction. However, Native allotments falling outside of the lands and waters identified in §__.3 are not included. Whether there are Federal reserved water rights associated with any of these small, scattered parcels would have to be determined on a case-by-case basis. These regulations contain a process for the Board to make recommendations to the Secretaries for additions, if necessary.

One commentor said that the proposed regulations did not address problems with sport fishing lodges in the Togiak drainage, or with other issues related to sport and commercial fishing or pollution of spawning grounds. This rule provides an opportunity for, and regulates, subsistence hunting, trapping, and fishing only. As such, the regulations do not contain specific provisions for sport or commercial fishing. However, the impacts of all fishery allocations and harvests were considered in the preparation of this Final Rule, and will be considered in the annual review of Subpart D regulations.

One commentor said that lakes should be included within the Federal program, and specifically mentioned Teshekpuk Lake. One commentor recommended that the Delta River, all of the Gulkana River, Tiekel River and Little Tonsina River should be included in the Federal program. All inland waters (including lakes and rivers) within and adjacent to the areas identified in §__.3 of this rule are included in the Federal subsistence jurisdiction. Teshekpuk Lake is included. Those portions of the above-named rivers that are included within or adjacent to the boundaries of the units identified in §__.3 of these regulations are included within the Federal subsistence jurisdiction; any waters falling outside of the units identified are not included.

Two commentors said that Glacier Bay National Park should be included in these regulations. When Congress passed ANILCA, it stated (in Sections 203 and 1314(c)) that subsistence uses are permitted only in those national park or national monument areas where specifically authorized by the Act. Subsistence uses in Glacier Bay National Park were not specifically permitted by the Act, and can therefore not be authorized by these regulations.

One commentor noted that this rule would not protect subsistence opportunities on Native corporation lands. This is correct, since Native corporation lands (which have been conveyed or interim conveyed to corporations) are no longer Federal lands and thus not within the scope of the subsistence priority of ANILCA. However, any inland waters located within or adjacent to the external boundaries of the units identified in §__.3 will fall within Federal subsistence jurisdiction.

Numerous commentors said that the proposed rule did not clearly identify where the proposed rule would apply, particularly with regards to marine waters. The same commentors also said that there were specific regulations regarding the taking of fish and shellfish in §§__.26 and 27 of this rule that related to fisheries where there did not appear to be any Federal waters or reserved water rights. The Final Rule lists the Federal land units where the rule will apply in §__.3. Pursuant

to Section 103 of ANILCA, maps and detailed legal descriptions of the boundaries of those National Park Service and Fish and Wildlife Service units were published in the Federal Register, including descriptions of the boundaries of units of the National Wildlife Refuge System which include marine waters. See 48 FR 7890 (February 24, 1983) (Boundaries of National Wildlife Refuges in Alaska); 57 FR 45166 (September 30, 1992) (Boundaries of National Park System *1280 Units in Alaska). These legal descriptions and maps specifically identify the marine areas where the rule will apply. We also reviewed all the specific regulations found in §§__.26 and 27 and removed any regulations that did not apply to lands or waters identified in §__.3.

One commentor said that halibut and seagull eggs should be included in the Federal subsistence program. While these regulations only apply to relatively few marine waters (see the list of marine waters in §__.3), fish within those waters are subject to the subsistence priority and regulations for the subsistence harvest of halibut and other fish will be included for those waters. As for seagull eggs, the harvest of migratory birds (including seagull eggs) is not included within the Federal subsistence management program. Harvest of migratory birds falls under the Migratory Bird Treaty Act and its implementing regulations.

__.*4 Definitions.*

One commentor said that the definition of “conservation of healthy populations of fish and wildlife” appears to contradict Section 815 of ANILCA. The definition was not amended in these regulations. Section 815 states, in part, that nothing in Title VIII permits a level of subsistence uses of fish and wildlife in a conservation system unit to be inconsistent with the conservation of healthy populations (or inconsistent with natural and healthy populations within a national park or monument). The existing definition in this section simply defines the phrase found in Section 815, but does not contradict or supersede it.

One commentor said that the existing definition of the word “family” would permit sharing of subsistence resources outside the household, and thereby expand subsistence uses.Section 803 of ANILCA specifically includes “sharing for personal or family consumption” within the definition of “subsistence uses”. Permitting the sharing of subsistence resources outside the household will not expand current levels of subsistence harvest, since such sharing has always been a customary and traditional practice. The definition was not amended by these regulations.

Two commentors said that the Federal subsistence jurisdiction should be extended to Federal lands which have been selected, but not yet conveyed, to Native corporations or the State of Alaska, including those lands classified as over-selections. Two other commentors objected to the inclusion of selected lands within the program. While selected lands do not fall within the definition of "public lands" found in ANILCA, section 906(o)(2) states that "Until conveyed, all Federal lands within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be administered in accordance with the laws applicable to such unit."(emphasis added). Since selected lands do fall within the definition of "Federal lands" in ANILCA and Title VIII of ANILCA is a law applicable to such units, the subsistence priority of Title VIII must be extended to those lands, pursuant to section 906(o)(2). The definition of "public lands or public land" found in ___.4 of these regulations clarifies that selected lands will be treated as public lands until they are conveyed.

One commentor asked how the adoption of a fisheries regulatory year different from the wildlife regulatory year would affect regional advisory council and Federal Subsistence Board schedules. Another commentor said that the proposed fishery regulatory year would create conflicts with State regulations because of conflicting seasons and harvest reporting periods, and would complicate comparison of State and Federal information. The adoption of a different fisheries regulatory year is intended to provide a regulatory schedule that is the most efficient in managing an annual cycle of fishing regulations, and which has the least impact on subsistence users. Schedules for regular meetings of the Regional Advisory Councils and Federal Subsistence Board dealing with fishery issues will be adjusted to coincide with the fisheries regulatory year. The Federal Subsistence Board will work with the Alaska Department of Fish and Game and the State Board of Fisheries to minimize any conflicts created by this action.

__.6 Licenses, permits, harvest tickets, tags, and reports

One commentor recommended that subsistence users should be required to possess a valid Alaska resident fishing license. This section of the regulations was rewritten to conform with plain language requirements; no substantive changes were made. Subsistence users wishing to take fish and wildlife on public lands for subsistence uses are required to possess the pertinent valid Alaska resident hunting and trapping license. At the current time, the State of Alaska does not require a license for subsistence fishing, therefore no license is required for subsistence users under the Final Rule.

It was suggested that State licenses and permits not be used. We have attempted to avoid confusion and unnecessary duplication wherever possible when establishing this new program. The retention of State permits and licenses is one area where it is possible to avoid unnecessary duplication. Federal permits and licenses may be issued in certain situations as warranted.

One commentor said that the existing State harvest reporting system should be used for any harvest reporting required under these regulations. This will be done to the maximum extent possible.

One commentor pointed out that the proposed rule and the existing Federal subsistence regulations state in §__.6(d) that "Community harvests are reviewed annually under the regulations in subpart D of this part.", and questioned whether those annual reviews have been conducted in the past. Such review is incorporated into the annual review of all subpart D regulations, which are subject to modification by proposals from Regional Advisory Councils, subsistence users, and any other interested organizations or individuals.

__.*8 Penalties*

One commentor suggested that enforcement of these regulations should be by the Federal Subsistence Management Program through cooperative agreements and that there should be no State enforcement of these regulations by the State of Alaska. The existing regulations provide that enforcement of these regulations will be retained by the individual land management agencies that are a part of the Federal Subsistence Board. This provision has not been amended. The State of Alaska will not generally be enforcing these regulations, unless authorized to do so through some special arrangement or mutual assistance agreement. However, the State of Alaska will continue to enforce on Federal lands other applicable State laws and regulations which are not inconsistent with these regulations or other Federal laws.

One commentor said that there was no information in the regulations about penalties. One commentor said that the Proposed Rule had no provision for enforcement, particularly in regards to the issue of customary trade. Enforcement of these regulations is accomplished in accordance with the penalty provisions applicable to the public land where the violation occurred. Each of the Federal land management agencies that are a part of the Federal Subsistence Board (Bureau *1281 of Land Management, Bureau of Indian Affairs, U.S. Fish and Wildlife

Service, National Park Service, and U.S. Forest Service) have separate penalty provisions for offenses occurring on lands they manage. More detailed information can be obtained from each agency.

__.*9 Information collection requirements*

One commentor said that data collection to manage the Federal subsistence program is prohibited unless approved by the Office of Management and Budget (OMB). While OMB approval is not required for all data collection, it is required where Federal officials request information from more than ten persons. As stated elsewhere in this preamble (Paperwork Reduction Act), OMB has already approved the initial information collection requirements of these regulations and additional approvals will be sought whenever required.

__.*10 Federal Subsistence Board*

Several commentors disagreed with the language of §__.10(a) of the Proposed Rule which stated that the Secretaries retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities which occur on lands or waters other than the lands identified in the applicability and scope section of the regulation. We did not modify this section. The authority of the Secretaries to restrict or eliminate activities off Federal public lands has been confirmed in cases as Kleppe v. New Mexico (426 U.S. 529) and Minnesota v. Block (660 F.2d 817). This regulation does not expand or diminish the Secretaries' authority, it only states that it exists. This authority has rarely been exercised and is not exercised in this Final Rule.

One commentor recommended that the Secretaries should delegate to the Federal Subsistence Board authority to extend jurisdiction beyond Federal lands. Extension of Federal jurisdiction is a significant policy decision, only applied in very rare circumstances, and the Secretaries have chosen not to delegate that authority to the Board. They have delegated overall management of the subsistence program to the Board. By adoption of these regulations, the Board will assume the responsibility for management of an expanded fishery program on all lands identified in §__.3 of this rule.

One commentor said that the Federal agencies do not have sufficient expertise to assure compliance with ANILCA, and recommended that management authority be vested in the National Marine Fisheries Service and that the regulations provide clear guidelines for cooperation with the Alaska Department of Fish and Game.

The Federal Subsistence Board, and its member agencies, understand the complexity of the issues associated with the implementation of these regulations. The Board will obtain whatever expertise is needed to implement these regulations in order to assure that the subsistence opportunity is protected consistent with the conservation of healthy populations of fishery resources.

One commentor recommended that a tribal liaison appointed by the Federally-recognized tribes should be included as one of the official liaisons to the Federal Subsistence Board. Any tribe or group of tribes (or any other organization) can designate at any time a person to act in a liaison role to the Board. At this time, the Board believes that tribes have sufficient opportunity to provide input to the Board through the existing Regional Advisory Council structure, or through direct presentation of information to the Board without the designation of a formal liaison position.

One commentor recommended that the Chairs of the ten Regional Advisory Councils be included as voting members of the Federal Subsistence Board. Separate from this rulemaking, the Federal Subsistence Board just recently completed an internal examination the Board structure and considered one option of including Regional Council chairs on the Board. That option was rejected, in part because ANILCA stipulates that the Regional Councils are to provide recommendations to the government. A conflict would occur if those chairs sat on a board that would deliberate and make decisions on recommendations made by the Councils on which those chairs sit.

Five commentors recommended that use of compacts, contracts, and co-management or other agreements should be included within this rule. We clarified the wording of this section without changing its scope by changing the phrase “Native corporations” to “Native organizations.” Section 10(d)(4)(xv) of this regulation now states that the Federal Subsistence Board may “Enter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program”. This regulatory language derives from section 809 of ANILCA, and permits a wide range of cooperative mechanisms to carry out the purposes of the title, including, where appropriate, the cooperative mechanisms suggested above. The subsistence priority of Title VIII is not solely a priority for Alaska Natives, but is a priority for all rural residents, Native or otherwise.

One commentor objected to §__.10(d)(4)(xviii) of the Proposed Rule which states that the Board can investigate and make recommendations to the Secretaries identifying additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters to which the Title VIII subsistence priority would be extended. This commentor said that section constituted a granting authority beyond the scope of ANILCA. We did not revise this section in this final rule. If additional waters or Federal interests are proposed for inclusion, the Board would need to investigate and provide a recommendation based on their findings to the Secretaries. This section only authorizes the Board to do so. The addition of any other waters or interests to this rule will involve a further rulemaking, with public notice and comment.

Two commentors questioned the regulation dealing with delegation of certain actions by the Board to agency field officials (§__.10(d)(6)). One said that the regulatory language was not clear as to what type of actions might be delegated and the other said that field officials might abuse such delegation resulting in harm to the resource. As written, such delegation will be limited to setting harvest limits, defining harvest areas, and opening or closing specific fish or wildlife harvests. In all cases such delegation will specifically define “frameworks established by the Board” as specified in the regulation. Thus, field officials will always be constrained by the framework of any delegation, and the Board will not lose its oversight of actions by agency officials.

One commentor recommended that the authority to open or close fish or wildlife harvest seasons should be community-based, and not in the hands of an agency field official. Implementation and enforcement of Federal regulations is the responsibility of the Departments. Field managers will work with local communities and local biologists to assure that community interests are addressed in any actions.

__.11 Regional advisory councils

Four organizations or individuals commented on the make up of the Regional Advisory Councils. Two *1282 recommended that the Council membership include fish and game biologists or individuals familiar with non-subsistence uses in the region. One suggested that the Councils need more representation from other user groups. The fourth recommended that there should be tribal recognition and tribal recommendations for appointments to the Councils. The Regional Advisory Councils were established pursuant to section 805(a) of ANILCA and §__.11 of these regulations, and are charged with providing recommendations to the Board

relating to subsistence uses within each region. The Board considers the recommendations of the Councils, along with technical information gathered by Federal staff, and testimony presented to the Board by other organizations and individuals. The input of other fish and game biologists and organizations or individuals knowledgeable about non-subsistence uses is considered by the Board before taking action on Council recommendations. Tribal recommendations, as well as recommendations by other organizations or individuals, are considered in the selection of Council membership. No changes were made in this section of these regulations.

One commentor recommended that Regional Council members should be elected, but did not specify by whom. This recommendation was not adopted, because ANILCA requires that persons serving as members of these Councils must be appointed by the Secretaries.

__.12 Local Advisory Committees.

There were several comments in regards to the role of local advisory committees in the Federal process, especially on the Yukon River. Local fish and game advisory committees have the opportunity to be involved in Federal subsistence management program by submitting recommendations to the Federal Subsistence Board and Regional Advisory Councils. The Federal Subsistence Board will seek guidance and expertise from all user groups. Two commentors requested a committee for their area or village. The creation of local fish and game advisory committees is a function of the Alaska Department of Fish and Game. The request should be made to them. One commentor suggested that existing State advisory committees should be used as opposed to creating a separate system. Local advisory committees may be used in addition to Regional Advisory Councils; a separate system will not be created. The Federal Subsistence Board will seek the best information available for regulation development. Local advisory committee input is always welcome under current and proposed rules.

__.14 Relationships to State Provisions and Regulations.

One commentor said that the Proposed Rule and Environmental Assessment did not adequately explore mechanisms for cooperation or outline the Secretaries' expectations of the Federal agencies for cooperation. There will be ample opportunities for cooperation with the State under the Final Rule. A question arose concerning timely reassertion of State authority over subsistence and suggested imposing a time limit once the petition to reassert is filed. This section was not

amended and no time limit was included in this Final Rule. The Secretaries will act expeditiously when a petition for reassumption is filed. One commentor requested a transition period from Federal to State management authority for specific regulations. The Secretary will not certify a State subsistence management program unless the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference and participation specified in sections 803, 804, and 805 of ANILCA.

One commentor said that the proposed regulations did not support State conservation efforts, since the State has already implemented many changes to its regulations through fishery management plans since the Proposed Rule was published. To the extent possible, these final regulations incorporate changes to make them consistent with existing State regulations. The Board intends to utilize, to the extent possible, the existing State fishery management plans, but all those plans must be reviewed to ensure that the fishery allocation determinations in the plans are consistent with the subsistence priority of ANILCA.

One commentor suggested that the Federal subsistence regulations should adopt State regulations to the maximum extent possible, and that the Federal regulations should only include those regulations that differ from existing State regulations. As already stated, it has always been the intent of the Board with the adoption of these regulations to be consistent with existing State regulations except where specifically noted. However, we believe that to include in the Federal regulations only those areas where the Federal regulations differ from State regulations would be more confusing to subsistence users who would then have to refer to two sets of regulations while hunting or fishing on Federal lands.

__.16 The Customary and Traditional Use Determination Process.

One commentor suggested that the Federal Subsistence Board abandon the Customary and Traditional use determination process and make determinations on a geographical basis. The Customary and Traditional use determination process is currently being evaluated. The Federal Subsistence Board accepts proposals for changes annually, but no changes were made in this section in the Final Rule.

__.19 Closures and Other Special Actions.

Several commentors stated the closure provisions are too cumbersome, bureaucratic, and do not accurately define the circumstances under which the Federal Subsistence Board may take action to ensure resource conservation. The

Secretaries understand this concern; this Final Rule grants to the Board specific authority to "* * * delegate to agency field officials the authority to set harvest limits, define harvest areas, and open or close specific fish or wildlife harvest seasons within frameworks established by the Board."(§__. 10(d)(6). Implementation of this regulation will provide for less cumbersome management actions, while retaining Board oversight of those actions.

Subpart C—Board Determinations

__.22 Subsistence Resource Regions.

Two commentors urged the formation of a Yukon River Regional Council while one suggested two Councils for the Southeast Region; one for game and another for fish. The Federal Subsistence Board will not make these changes at this time but will continue to evaluate the efficiency of the current structure and make future adjustments as needed.

__.23 Rural Determinations.

Two commentors questioned the basis for and outcomes of the rural determinations. The procedure for making rural/non-rural determinations was developed previously with public input through a rulemaking process as were the existing rural/non-rural determinations. Those determinations will be reviewed after the year 2000 census results are available.*1283

__.24 Customary and Traditional Use Determinations.

One commentor suggested that the Federal Subsistence Board should make customary and traditional use determinations by geographic area rather than species. Another objected to making customary and traditional use determinations that have not been subjected to public review and suggested that C&T determinations be accompanied by a determination of the amount of fish and wildlife reasonably necessary to provide for subsistence on public lands. The Federal Subsistence Board has established a task force to evaluate the existing C&T process and will seek Regional Advisory Council input on various alternatives before making changes, if any, to the current regulations.

One commentor said that the rule should be modified to require a positive affirmation of customary and traditional use in order for subsistence regulations to apply. We did not make this change. To require a positive affirmation of use puts

the burden on the subsistence user to ensure that his or her use is authorized in regulation. The current Federal subsistence regulations state in part that: "If no determination has been made for a species in a Unit, all rural Alaska residents are eligible to harvest fish or wildlife under this part." , §__.24(a). This regulation already covers customary and traditional use determinations for fish, and does not need to be modified.

Several other commentors said that the customary and traditional use determinations in the proposed rule were incomplete. We have revised the determinations for fish and shellfish in this section to incorporate both the last Alaska Board of Fish customary and traditional use determinations that were in compliance with Title VIII (January 1990) and the determinations that the Board of Fish has made since 1990 where they might apply on Federal waters. For those determinations made by the Board of Fish since 1990, we have made a determination that eligibility for those fisheries should be limited to the residents of the area identified. These determinations are subject to revision through the annual consideration of proposed changes to Subpart C.

Subpart D—Subsistence Taking of Fish

__.26 Subsistence taking of fish

Numerous comments regarding customary and traditional use determinations and the taking of fish were received. Proposed changes to the existing subpart C and subpart D regulations will not be considered until the 2000-2001 regulations cycle. The commentors have been notified that their suggestions should be submitted to the Federal Subsistence Board for consideration as a proposal during a standard regulatory cycle.

A large number of comments dealt with the issue of customary trade. Many of the commentors felt that the sections dealing with customary trade in the Proposed Rule (§§__.26(c)(11) and (12)) were not specific enough, and would permit an expansion of subsistence fishing beyond current levels. Several suggested that this rule should define the term "significant commercial enterprise", including a specific dollar limit. Some said that no sale of subsistence-caught fish should be permitted, while others said that customary trade practices should be protected and that customary trade should include sales up to $70,000 per year. Several commentors suggested that decisions on customary trade should be made on a local level. We did modify the customary trade regulations slightly to clarify them, but have not included a definition of "significant commercial enterprise" or placed

any dollar limits on an allowable level of customary trade. The regulations in this rule clearly limit the sale of subsistence-caught fish to customary and traditional practices. We agree with the commentors who said that specific proposals on customary trade should be made at the local level. We anticipate working closely with Regional Advisory Councils to identify where specific limits should be implemented. These limits may vary in different regions of the State.

Numerous commentors also said that the proposed rule did not always rely on the State's reporting areas, and were not always consistent with current State regulations. The majority of these comments came from the State of Alaska. When the proposed rule was published in December of 1997, it was structured to reflect all the State subsistence fishery regulations which were current at that time. Since then, the State Board of Fish has made changes to State regulations which resulted in the comments noted above. In order to address these concerns, we reviewed Subparts C and D with respect to fisheries and shellfish (particularly §§__.26 and 27). Changes were made in this Final Rule to make it consistent with current State regulations. There are a few specific regulations where this rule is not consistent with State regulations. These are areas where the courts have ruled or the Board has previously dealt with a fishery issue and made decisions which are not consistent with State regulations. These areas include: (1) the use of rod and reel for subsistence as a method of harvest, (2) the extension of salmon fisheries on Kodiak Island to 24 hours per day, (3) customary and traditional use determinations for rainbow trout in Southwest Alaska, and (4) regulations relating to the take of king crab around Kodiak Island.

Another commentor suggested the rule should clarify how the Federal subsistence management program will manage halibut, since the International Pacific Halibut Commission has halibut management responsibilities. Although most marine waters are excluded from these regulations, halibut and other marine resources in those marine waters identified in §__.3 will be included within these regulations.

Many comments were received in regards to joint management whereby the Federal agencies determine the number of fish necessary to meet subsistence needs and monitor the take, while the State manages to meet these needs. While the Final Rule provides for management of fisheries in a manner consistent with the current Federal program, it does not preclude the adoption of other management scenarios.Sections __10 and .14 give the Board broad authorities to cooperate with the State and other organizations in the implementation of the Federal Subsistence Management Program. Other commentors asked about the status of personal use fisheries in the Federal plan. Personal use fisheries are not provided for under

ANILCA's Title VIII and are not addressed in these regulations. The State of Alaska manages personal use fisheries and comments or recommendations concerning those fisheries should be directed to the State. There were several comments in regards to the use of different types of equipment for subsistence use. Although the use of rod and reel is not permitted under State subsistence regulations, it is permitted under these regulations, since the Board has previously determined that rod and reel should be considered a traditional means of harvest. There are no requirements to purchase commercial equipment. One commentor wanted some provision made for the use of fish as bait in sport and commercial fisheries. Provisions regarding sport and commercial fisheries should be referred to the State which has management authority over these fisheries. Comments in regards to changing wording from “unless permitted” to “unless prohibited” for steelhead and rainbow trout were suggested. The *1284 “unless permitted” wording is consistent with State regulations. One commentor suggested dropping bag limits for rod and reel. Bag limits are reasonable regulations for conservation of fish stocks and are authorized and consistent with ANILCA, Section 814.

One commentor said in that Southeast Alaska the harvest of subsistence fish should be permitted at any time. Another commentor said that there should be no requirement for permits, seasons or bag limits for subsistence harvest, since ANILCA did not specifically mention any of those items. The subsistence priority of ANILCA is a priority over other consumptive uses, but that opportunity does not mean that subsistence harvest should be free from all regulation. ANILCA stipulates that subsistence harvest should not threaten the conservation of healthy populations of fish or wildlife. Regulations such as permits, seasons and bag limits, are considered a necessary and reasonable restriction of subsistence harvest.

One commentor said that genetic studies should be completed in the Area M fishery and associated destination drainages before there is a serious problem. Area M is not within the area of Federal jurisdiction. However, the Federal Subsistence Board will work closely with the State of Alaska, Native organizations, fishing groups and others to assure that necessary biological and harvest information is obtained.

A number of comments dealt with permit possession and record keeping. Current regulations require on-person possession of permits. In addition, permits and daily records will be required when important for collection of specific data to ensure adequate management and to provide biological data for emergency management decisions. One commentor noted that subsection (f) allows Federally qualified users to remove fish from their commercial catch for subsistence purposes which

conflicts with State commercial fishing regulations. This provision is consistent with State regulations and will be retained. Another commentor noted that the proposed regulations do not contain measures to conserve chum salmon in times of shortage as provided in State regulations and will hinder efforts to conserve chum salmon in times of shortage. All fisheries will be managed for healthy populations as provided for in ANILCA Section 802(1). The request for fish habitat enhancement for the Yukon Flats area should be directed to the local land manager who has responsibility for these activities.

__.27 Subsistence Taking of Shellfish

One commentor requested that the Federal program also cover sea cucumbers, abalone, and sea urchins. Management of these species can occur under current regulations and the Federal program may include them where it has marine jurisdiction.

One commentor opposed having to purchase a license to dig clams. Licenses are not required although permits may be required in some areas for resource management purposes. Another commentor stated that State and Federal requirements for king crab pots differ. This difference occurs only in the Kodiak Island area and results from the Federal Subsistence Board instituting regulations a number of years ago to protect king crab populations in that area.

Summary of Changes

Based on our analysis of comments, we have made the following revisions from the Proposed Rule:

Throughout the document, we have made editing and wording changes to comply with the Executive Memorandum on Plain Language in Government Writing.

§__.3(b)—Jurisdiction over inland waters on Forest Service lands has been modified to be consistent with the jurisdictional approach used on Department of the Interior lands. We have also more clearly identified the waters in which the Federal government will manage subsistence fisheries.

§__.24(a)(2)—We have revised the determinations for fish and shellfish in this section to incorporate both the past Alaska Board of Fish customary and traditional use determinations that were in compliance with Title VIII (January 1990) and the determinations that the Board of Fish has made since 1990 where they apply on

Federal waters and are consistent with Title VIII of ANILCA.

§§__.26 and .27—We have made minor wording changes to the regulations on customary trade (§__.26(c)(11-12)), but have retained the intent found in the Proposed Rule to provide for ongoing customary trade practices. We have made numerous revisions to assure consistency with the current State subsistence fisheries and shellfish regulations. In order to reduce confusion, we have also eliminated regulations covering areas where there is no Federal jurisdiction.

We must emphasize that these regulations ONLY APPLY TO FEDERAL LANDS AND WATERS where there is a Federal interest. Individuals who do not meet the requirements under these regulations may still harvest fish and wildlife on Federal lands and waters in accordance with other State fishing and hunting regulations, except in those instances where Federal lands or waters have been specifically closed to non-Federally qualified subsistence users.

Nothing in this Final Rule is intended to change the underlying rural priority which is set out in Title VIII of ANILCA or otherwise amend the statuatory basis of the Federal Subsistence Management Program. Although many sections of these regulations are not being amended other than to make them conform to requirements for plain language, for the purpose of clarity and ease of understanding, the entire text of the rule for subparts A, B, and C, and sections __.26, and __.27 of subpart D is being printed. The unpublished section (Section __.25) relates to wildlife regulations that are revised annually. Because this rule relates to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, identical text is incorporated into 36 CFR Part 242 and 50 CFR Part 100.

Conformance With Statutory and Regulatory Authorities

National Environmental Policy Act Compliance

A Draft Environmental Impact Statement (DEIS) that described four alternatives for developing a Federal Subsistence Management Program was distributed for public comment on October 7, 1991. That document described the major issues associated with Federal subsistence management as identified through public meetings, written comments and staff analysis and examined the environmental consequences of the four alternatives. Proposed regulations (Subparts A, B, and C) that would implement the preferred alternative were included in the DEIS as an appendix. The DEIS and the proposed administrative regulations presented a

framework for an annual regulatory cycle regarding subsistence hunting and fishing regulations (Subpart D). The Final Environmental Impact Statement (FEIS) was published on February 28, 1992.

Based on the public comment received, the analysis contained in the FEIS, and the recommendations of the Federal Subsistence Board and the Department of the Interior's Subsistence Policy Group, it was the decision of the Secretary of the Interior, with the concurrence of the Secretary of Agriculture, through the U.S. Department of Agriculture-Forest Service, to implement Alternative IV as *1285 identified in the DEIS and FEIS (Record of Decision on Subsistence Management for Federal Public Lands in Alaska (ROD), signed April 6, 1992). The DEIS and the selected alternative in the FEIS defined the administrative framework of an annual regulatory cycle for subsistence hunting and fishing regulations. The final rule for Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C (57 FR 22940-22964, published May 29, 1992) implemented the Federal Subsistence Management Program and included a framework for an annual cycle for subsistence hunting and fishing regulations.

An environmental assessment has been prepared on the expansion of Federal jurisdiction over fisheries and is available by contacting the office listed under “For Further Information Contact.” The Secretary of the Interior with the concurrence of the Secretary of Agriculture has determined that the expansion of Federal jurisdiction does not constitute a major Federal action, significantly effecting the human environment and has, therefore, signed a Finding of No Significant Impact.

Compliance With Section 810 of ANILCA

A Section 810 analysis was completed as part of the FEIS process on the Federal Subsistence Management Program. The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless restriction is necessary to conserve healthy fish and wildlife populations. The final Section 810 analysis determination appeared in the April 6, 1992, ROD which concluded that the Federal Subsistence Management Program, under Alternative IV with an annual process for setting hunting and fishing regulations, may have some local impacts on subsistence uses, but it does not appear that the program may significantly restrict subsistence uses.

During the environmental assessment process, an evaluation of the effects of this

rule was also conducted in accordance with Section 810. This evaluation supports the Secretaries' determination that the Final Rule will not reach the "may significantly restrict" threshold for notice and hearings under ANILCA Section 810(a) for any subsistence resources or uses.

Paperwork Reduction Act

This rule contains information collection requirements subject to Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1995. It applies to the use of public lands in Alaska. The information collection requirements are a revision of the collection requirements already approved by OMB under 44 U.S.C. 3501 and have been assigned clearance number 1018-0075, which expires 5/31/2000. This revision was submitted to OMB for approval. A comment period was open on OMB collection requirements and no comments were received.

Currently, information is being collected by the use of a Federal Subsistence Registration Permit and Designated Hunter Application. The information collected on these two permits establishes whether an applicant qualifies to participate in a Federal subsistence hunt on public land in Alaska and provides a report of harvest and the location of harvest. The collected information is necessary to determine harvest success, harvest location, and population health in order to make management decisions relative to the conservation of healthy wildlife populations. Additional harvest information is obtained from harvest reports submitted to the State of Alaska. The recordkeeping burden for this aspect of the program is negligible (one hour or less). This information is accessed via computer data base. The current overall annual burden of reporting and recordkeeping is estimated to average 0.25 hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the form. The estimated number of likely respondents under the existing rule is less than 5,000, yielding a total annual reporting and recordkeeping burden of 1,250 hours or less.

The collection of information under this Final Rule will be achieved through the use of a Federal Subsistence Registration Permit Application, which would be the same form as currently approved and used for the hunting program. This information will establish whether the applicant qualifies to participate in a Federal subsistence fishery on public land in Alaska and will provide a report of harvest and location of harvest.

The likely respondents to this collection of information are rural Alaska residents

who wish to participate in specific subsistence fisheries on Federal land. The collected information is necessary to determine harvest success and harvest location in order to make management decisions relative to the conservation of healthy fish populations. The annual burden of reporting and recordkeeping is estimated to average 0.50 hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the form. The estimated number of likely respondents under this rule is less than 10,000, yielding a total annual reporting and recordkeeping burden of 5,000 hours or less.

You may direct comments on the burden estimate or any other aspect of this form to: Information Collection Officer, U.S. Fish and Wildlife Service, 1849 C Street, NW, MS 224 ARLSQ, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (Subsistence), Washington, DC 20503.

Additional information collection requirements may be imposed if local advisory committees subject to the Federal Advisory Committee Act are established under subpart B. Such requirements will be submitted to OMB for approval prior to their implementation.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A “section” appears in bold type and is preceded by the symbol “§” and a numbered heading; for example, §__.24 Customary and traditional determinations.) (5) Is the description of the rule in the SUPPLEMENTARY INFORMATION section of the preamble helpful in understanding the rule? What else could we do to make the rule easier to understand? Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW, Washington, DC 20240. You may also e-mail the comments to this address: Exsec@ios.doi.gov.

Economic Effects

This rule was not subject to OMB review under Executive Order 12866.

This rulemaking will impose no significant costs on small entities; this Final Rule does not restrict any existing sport or commercial fishery on the***1286** public lands and subsistence fisheries will continue at essentially the same levels as they presently occur. The exact number of businesses and the amount of trade that will result from this Federal land-related activity is unknown. The aggregate effect is an insignificant positive economic effect on a number of small entities, such as ammunition, snowmachine, fishing tackle, and gasoline dealers. The number of small entities affected is unknown; but, the fact that the positive effects will be seasonal in nature and will, in most cases, merely continue preexisting uses of public lands indicates that they will not be significant.

In general, the resources to be harvested under this rule are already being harvested and consumed by the local harvester and do not result in an additional dollar benefit to the economy. However, it is estimated that 24 million pounds of fish (including 8.3 million pounds of salmon) are harvested by subsistence users annually and, if given an estimated dollar value of $3.00 per pound for salmon and $0.58 per pound for other fish, would equate to about $34 million in food value state-wide.

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organizations or governmental jurisdictions. The Departments have determined based on the above figures that this rulemaking will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

The Small Business Regulatory Enforcement Act (5 U.S.C. 801 et seq.) requires that before a rule can take effect, copies of the rule and other documents must be sent to the U.S. House and U.S. Senate and establishes a means for Congress to disapprove the rulemaking. The Departments have determined that this rulemaking is not a major rule under the Act, and thus the effective date of the rule is not additionally delayed unless Congress takes additional action.

Title VIII of ANILCA requires the Secretaries to administer a subsistence priority on public lands. The scope of this program is limited by definition to certain public lands. Likewise, these regulations have no potential takings of private property

implications as defined by Executive Order 12630.

The Secretaries have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of $100 million or more in any given year on local or state governments or private entities. The implementation of this rule is by Federal agencies and there is no cost imposed on any state or local entities or tribal governments.

The Secretaries have determined that these final regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

In accordance with Executive Order 12612, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Title VIII of ANILCA precludes the State from exercising subsistence management authority over fish and wildlife resources on Federal lands unless it meets certain requirements.

Drafting Information—These regulations were drafted by William Knauer, Bob Gerhard, and Victor Starostka under the guidance of Thomas H. Boyd, of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Additional guidance was provided by Curt Wilson, Alaska State Office, Bureau of Land Management; Sandy Rabinowitch, Alaska Regional Office, National Park Service; Ida Hildebrand, Alaska Area Office, Bureau of Indian Affairs; and Ken Thompson, USDA-Forest Service.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

For the reasons set out in the preamble, the Departments amend Title 36, Part 242, and Title 50, Part 100, of the Code of Federal Regulations, as set forth below.

PART—SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA1. The authority citation for both 36 CFR Part 242 and 50 CFR Part 100 continues to read as follows:

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101-3126; 18 U.S.C. 3551-3586; 43 U.S.C. 1733.

2. Revise subparts A, B, and C of 36 CFR part 242 and 50 CFR part 100 to read as follows:

Subpart A—General Provisions

Sec.

__.1 Purpose.

__.2 Authority.

__.3 Applicability and scope.

__.4 Definitions.

__.5 Eligibility for subsistence use.

__.6 Licenses, permits, harvest tickets, tags, and reports.

__.7 Restriction on use.

__.8 Penalties.

__.9 Information collection requirements.

Subpart B—Program Structure

__.10 Federal Subsistence Board.

__.11 Regional advisory councils.

__.12 Local advisory committees.

__.13 Board/agency relationships.

__.14 Relationship to State procedures and regulations.

__.15 Rural determination process.

__.16 Customary and traditional use determination process.

__.17 Determining priorities for subsistence uses among rural Alaska residents.

__.18 Regulation adoption process.

__.19 Closures and other special actions.

__.20 Request for reconsideration.

__.21 [Reserved].

Subpart C—Board Determinations

__.22 Subsistence resource regions.

__.23 Rural determinations.

__.24 Customary and traditional use determinations.

Subpart A—General Provisions§__.1 Purpose.

The regulations in this part implement the Federal Subsistence Management Program on public lands within the State of Alaska.

§__.2 Authority.

The Secretary of the Interior and Secretary of Agriculture issue the regulations in this part pursuant to authority vested in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101-3126.

§__.3 Applicability and scope.

(a) The regulations in this part implement the provisions of Title VIII of ANILCA

relevant to the taking of fish and wildlife on public lands in the State of Alaska. The regulations in this part do not permit subsistence uses in Glacier Bay National Park, Kenai Fjords National Park, Katmai National Park, and that portion of Denali National Park established as Mt. McKinley National Park prior to passage of ANILCA, where subsistence taking and uses are prohibited. The regulations in this part do not supersede agency specific regulations.

(b) The regulations contained in this part apply on all public lands including all non-navigable waters located on *1287 these lands, on all navigable and non-navigable water within the exterior boundaries of the following areas, and on inland waters adjacent to the exterior boundaries of the following areas:

(1) Alaska Maritime National Wildlife Refuge;

(2) Alaska Peninsula National Wildlife Refuge;

(3) Aniakchak National Monument and Preserve;

(4) Arctic National Wildlife Refuge;

(5) Becharof National Wildlife Refuge;

(6) Bering Land Bridge National Preserve;

(7) Cape Krusenstern National Monument;

(8) Chugach National Forest, excluding marine waters;

(9) Denali National Preserve and the 1980 additions to Denali National Park;

(10) Gates of the Arctic National Park and Preserve;

(11) Glacier Bay National Preserve;

(12) Innoko National Wildlife Refuge;

(13) Izembek National Wildlife Refuge;

(14) Katmai National Preserve;

(15) Kanuti National Wildlife Refuge;

(16) Kenai National Wildlife Refuge;

(17) Kobuk Valley National Park;

(18) Kodiak National Wildlife Refuge;

(19) Koyukuk National Wildlife Refuge;

(20) Lake Clark National Park and Preserve;

(21) National Petroleum Reserve in Alaska;

(22) Noatak National Preserve;

(23) Nowitna National Wildlife Refuge;

(24) Selawik National Wildlife Refuge;

(25) Steese National Conservation Area;

(26) Tetlin National Wildlife Refuge;

(27) Togiak National Wildlife Refuge;

(28) Tongass National Forest, including Admiralty Island National Monument and Misty Fjords National Monument, and excluding marine waters;

(29) White Mountain National Recreation Area;

(30) Wrangell-St. Elias National Park and Preserve;

(31) Yukon-Charley Rivers National Preserve;

(32) Yukon Delta National Wildlife Refuge;

(33) Yukon Flats National Wildlife Refuge;

(34) All components of the Wild and Scenic River System located outside the

boundaries of National Parks, National Preserves or National Wildlife Refuges, including segments of the Alagnak River, Beaver Creek, Birch Creek, Delta River, Fortymile River, Gulkana River, and Unalakleet River.

(c) The public lands described in paragraph (b) of this section remain subject to change through rulemaking pending a Department of the Interior review of title and jurisdictional issues regarding certain submerged lands beneath navigable waters in Alaska.

§__.4 Definitions.

The following definitions apply to all regulations contained in this part:

Agency means a subunit of a cabinet level Department of the Federal government having land management authority over the public lands including, but not limited to, the U.S. Fish & Wildlife Service, Bureau of Indian Affairs, Bureau of Land Management, National Park Service, and USDA Forest Service.

ANILCA means the Alaska National Interest Lands Conservation Act, Pub. L. 96-487, 94 Stat. 2371 (codified, as amended, in scattered sections of 16 U.S.C. and 43 U.S.C.)

Area, District, Subdistrict, and Section mean one of the geographical areas defined in the codified Alaska Department of Fish and Game regulations found in Title 5 of the Alaska Administrative Code.

Barter means the exchange of fish or wildlife or their parts taken for subsistence uses; for other fish, wildlife or their parts; or, for other food or for nonedible items other than money, if the exchange is of a limited and noncommercial nature.

Board means the Federal Subsistence Board as described in §__.10.

Commissions means the Subsistence Resource Commissions established pursuant to section 808 of ANILCA.

Conservation of healthy populations of fish and wildlife means the maintenance of fish and wildlife resources and their habitats in a condition that assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystem, including the recognition that local rural residents engaged in subsistence uses may be a natural part of that ecosystem; minimizes the likelihood

of irreversible or long-term adverse effects upon such populations and species; ensures the maximum practicable diversity of options for the future; and recognizes that the policies and legal authorities of the managing agencies will determine the nature and degree of management programs affecting ecological relationships, population dynamics, and the manipulation of the components of the ecosystem.

Customary trade means cash sale of fish and wildlife resources regulated in this part, not otherwise prohibited by Federal law or regulation, to support personal and family needs; and does not include trade which constitutes a significant commercial enterprise.

Customary and traditional 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.

FACA means the Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (codified as amended, at 5 U.S.C. Appendix II, 1-15).

Family means all persons related by blood, marriage or adoption, or any person living within the household on a permanent basis.

Federal Advisory Committees or Federal Advisory Committee means the Federal Local Advisory Committees as described in §__.12.

Federal lands means lands and waters and interests therein the title to which is in the United States, including navigable and non-navigable waters in which the United States has reserved water rights.

Fish and wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the carcass or part thereof.

Game Management Unit or GMU means one of the 26 geographical areas listed under game management units in the codified State of Alaska hunting and trapping regulations and the Game Unit Maps of Alaska.

Inland Waters means, for the purposes of this part, those waters located landward of the mean high tide line or the waters located upstream of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea. Inland waters include, but are not limited to, lakes, reservoirs, ponds, streams, and rivers.

Marine Waters means, for the purposes of this part, those waters located seaward of the mean high tide line or the waters located seaward of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea.

Person means an individual and does not include a corporation, company, partnership, firm, association, organization, business, trust or society.

Public lands or public land means: *1288

(1) Lands situated in Alaska which are Federal lands, except—

(i) Land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(ii) Land selections of a Native Corporation made under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq., which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(iii) Lands referred to in section 19(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1618(b).

(2) Notwithstanding the exceptions in paragraphs (1)(i) through (iii) of this definition, until conveyed or interim conveyed, all Federal lands within the boundaries of any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Forest Monument, National Recreation Area, National Conservation Area, new National forest or forest addition shall be treated as public lands for the purposes of the regulations in this part pursuant to section 906(o)(2) of ANILCA.

Regional Councils or Regional Council means the Regional Advisory Councils as

described in §__.11.

Regulatory year means July 1 through June 30, except for fish and shellfish where it means March 1 through the last day of February.

Reserved water right(s) means the Federal right to use unappropriated appurtenant water necessary to accomplish the purposes for which a Federal reservation was established. Reserved water rights include nonconsumptive and consumptive uses.

Resident means any person who has his or her primary, permanent home for the previous 12 months within Alaska and whenever absent from this primary, permanent home, has the intention of returning to it. Factors demonstrating the location of a person's primary, permanent home may include, but are not limited to: the address listed on an Alaska Permanent Fund dividend application; an Alaska license to drive, hunt, fish, or engage in an activity regulated by a government entity; affidavit of person or persons who know the individual; voter registration; location of residences owned, rented or leased; location of stored household goods; residence of spouse, minor children or dependents; tax documents; or whether the person claims residence in another location for any purpose.

Rural means any community or area of Alaska determined by the Board to qualify as such under the process described in §__.15.

Secretary means the Secretary of the Interior, except that in reference to matters related to any unit of the National Forest System, such term means the Secretary of Agriculture.

State means the State of Alaska.

Subsistence uses means 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.

Take or taking as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

Year means calendar year unless another year is specified.

§__.5 Eligibility for subsistence use.

(a) You may take fish and wildlife on public lands for subsistence uses only if you are an Alaska resident of a rural area or rural community. The regulations in this part may further limit your qualifications to harvest fish or wildlife resources for subsistence uses. If you are not an Alaska resident or are a resident of a non-rural area or community listed in §__.23, you may not take fish or wildlife on public lands for subsistence uses under the regulations in this part.

(b) Where the Board has made a customary and traditional use determination regarding subsistence use of a specific fish stock or wildlife population, in accordance with, and as listed in, §__.24, only those Alaskans who are residents of rural areas or communities designated by the Board are eligible for subsistence taking of that population or stock on public lands for subsistence uses under the regulations in this part. If you do not live in one of those areas or communities, you may not take fish or wildlife from that population or stock, on public lands under the regulations in this part.

(c) Where customary and traditional use determinations for a fish stock or wildlife population within a specific area have not yet been made by the Board (e.g. “no determination”), all Alaskans who are residents of rural areas or communities may harvest for subsistence from that stock or population under the regulations in this part.

(d) The National Park Service may regulate further the eligibility of those individuals qualified to engage in subsistence uses on National Park Service lands in accordance with specific authority in ANILCA, and National Park Service regulations at 36 CFR Part 13.

§__.6 Licenses, permits, harvest tickets, tags, and reports.

(a) If you wish to take fish and wildlife on public lands for subsistence uses, you must be a rural Alaska resident and:

(1) Possess the pertinent valid Alaska resident hunting and trapping licenses (no license required to take fish or shellfish) unless Federal licenses are required or unless otherwise provided for in subpart D of this part;

(2) Possess and comply with the provisions of any pertinent Federal permits (Federal Subsistence Registration Permit or Federal Designated Harvester Permit) required by subpart D of this part; and

(3) Possess and comply with the provisions of any pertinent permits, harvest tickets, or tags required by the State unless any of these documents or individual provisions in them are superseded by the requirements in subpart D of this part.

(b) If you have been awarded a permit to take fish and wildlife, you must have that permit in your possession during the taking and must comply with all requirements of the permit and the regulations in this section pertaining to validation and reporting and to regulations in subpart D of this part pertaining to methods and means, possession and transportation, and utilization. Upon the request of a State or Federal law enforcement agent, you must also produce any licenses, permits, harvest tickets, tags or other documents required by this section. If you are engaged in taking fish and wildlife under these regulations, you must allow State or Federal law enforcement agents to inspect any apparatus designed to be used, or capable of being used to take fish or wildlife, or any fish or wildlife in your possession.

(c) You must validate the harvest tickets, tags, permits, or other required documents before removing your kill from the harvest site. You must also comply with all reporting provisions as set forth in subpart D of this part.

(d) If you take fish and wildlife under a community harvest system, you must report the harvest activity in accordance with regulations specified for that ***1289** community in subpart D of this part, and as required by any applicable permit conditions. Individuals may be responsible for particular reporting requirements in the conditions permitting a specific community's harvest. Failure to comply with these conditions is a violation of these regulations. Community harvests are reviewed annually under the regulations in subpart D of this part.

(e) You may not make a fraudulent application for Federal or State licenses, permits, harvest tickets or tags or intentionally file an incorrect harvest report.

§__.7 Restriction on use.

(a) You may not trade or sell fish and wildlife, taken pursuant to the regulations in this part, except as provided for in §§__.25, __.26, and __.27.

(b) You may not use, sell, or trade fish and wildlife, taken pursuant to the

regulations in this part, in any significant commercial enterprise.

§__.8 Penalties.

If you are convicted of violating any provision of 50 CFR Part 100 or 36 CFR Part 242, you may be punished by a fine or by imprisonment in accordance with the penalty provisions applicable to the public land where the violation occurred.

§__.9 Information collection requirements.

(a) The rules in this part contain information collection requirements subject to Office of Management and Budget (OMB) approval under 44 U.S.C. 3501-3520. They apply to fish and wildlife harvest activities on public lands in Alaska. Subsistence users will not be required to respond to an information collection request unless a valid OMB number is displayed on the information collection form.

(1) Section __.6, Licenses, permits, harvest tickets, tags, and reports. The information collection requirements contained in §__.6 (Federal Subsistence Registration Permit or Federal Designated Hunter Permit forms) provide for permit-specific subsistence activities not authorized through the general adoption of State regulations. Identity and location of residence are required to determine if you are eligible for a permit and a report of success is required after a harvest attempt. These requirements are not duplicative with the requirements of paragraph (a)(3) of this section. The regulations in §__.6 require this information before a rural Alaska resident may engage in subsistence uses on public lands. The Department estimates that the average time necessary to obtain and comply with this permit information collection requirement is 0.25 hours.

(2) Section __.20, Request for reconsideration. The information collection requirements contained in §__.20 provide a standardized process to allow individuals the opportunity to appeal decisions of the Board. Submission of a request for reconsideration is voluntary but required to receive a final review by the Board. We estimate that a request for reconsideration will take 4 hours to prepare and submit.

(3) The remaining information collection requirements contained in this part imposed upon subsistence users are those adopted from State regulations. These collection requirements would exist in the absence of Federal subsistence regulations and are not subject to the Paperwork Reduction Act. The burden in this

situation is negligible and information gained from these reports are systematically available to Federal managers by routine computer access requiring less than one hour.

(b) You may direct comments on the burden estimate or any other aspect of the burden estimate to: Information Collection Officer, U.S. Fish and Wildlife Service, 1849 C Street, N.W., MS 224 ARLSQ, Washington, D.C. 20240; and the Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503. Additional information requirements may be imposed if Local Advisory Committees or additional Regional Councils, subject to the Federal Advisory Committee Act (FACA), are established under subpart B of this part. Such requirements will be submitted to OMB for approval prior to their implementation.

Subpart B—Program Structure§__.10 Federal Subsistence Board.

(a) The Secretary of the Interior and Secretary of Agriculture hereby establish a Federal Subsistence Board, and assign them responsibility for, administering the subsistence taking and uses of fish and wildlife on public lands, and the related promulgation and signature authority for regulations of subparts C and D of this part. The Secretaries, however, retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands when such activities interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority.

(b) Membership. (1) The voting members of the Board are: a Chair to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; Alaska Regional Director, National Park Service; Alaska Regional Forester, USDA Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Area Director, Bureau of Indian Affairs. Each member of the Board may appoint a designee.

(2) [Reserved]

(c) Liaisons to the Board are: a State liaison, and the Chairman of each Regional Council. The State liaison and the Chairman of each Regional Council may attend public sessions of all Board meetings and be actively involved as consultants to the Board.

(d) Powers and duties. (1) The Board shall meet at least twice per year and at such other times as deemed necessary. Meetings shall occur at the call of the Chair, but any member may request a meeting.

(2) A quorum consists of four members.

(3) No action may be taken unless a majority of voting members are in agreement.

(4) The Board is empowered, to the extent necessary, to implement Title VIII of ANILCA, to:

(i) Issue regulations for the management of subsistence taking and uses of fish and wildlife on public lands;

(ii) Determine which communities or areas of the State are rural or non-rural;

(iii) Determine which rural Alaska areas or communities have customary and traditional subsistence uses of specific fish and wildlife populations;

(iv) Allocate subsistence uses of fish and wildlife populations on public lands;

(v) Ensure that 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;

(vi) Close public lands to the non-subsistence taking of fish and wildlife;

(vii) Establish priorities for the subsistence taking of fish and wildlife on public lands among rural Alaska residents;

(viii) Restrict or eliminate taking of fish and wildlife on public lands;

(ix) Determine what types and forms of trade of fish and wildlife taken for *1290 subsistence uses constitute allowable customary trade;

(x) Authorize the Regional Councils to convene;

(xi) Establish a Regional Council in each subsistence resource region and recommend to the Secretaries, appointees to the Regional Councils, pursuant to the

FACA;

(xii) Establish Federal Advisory Committees within the subsistence resource regions, if necessary and recommend to the Secretaries that members of the Federal Advisory Committees be appointed from the group of individuals nominated by rural Alaska residents;

(xiii) Establish rules and procedures for the operation of the Board, and the Regional Councils;

(xiv) Review and respond to proposals for regulations, management plans, policies, and other matters related to subsistence taking and uses of fish and wildlife;

(xv) Enter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program;

(xvi) Develop alternative permitting processes relating to the subsistence taking of fish and wildlife to ensure continued opportunities for subsistence;

(xvii) Evaluate whether hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority, and after appropriate consultation with the State of Alaska, the Regional Councils, and other Federal agencies, make a recommendation to the Secretaries for their action;

(xviii) Identify, in appropriate specific instances, whether there exists additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches, and make appropriate recommendation to the Secretaries for inclusion of those interests within the Federal Subsistence Management Program; and

(xix) Take other actions authorized by the Secretaries to implement Title VIII of ANILCA.

(5) The Board may implement one or more of the following harvest and harvest reporting or permit systems:

(i) The fish and wildlife is taken by an individual who is required to obtain and possess pertinent State harvest permits, tickets, or tags, or Federal permit (Federal Subsistence Registration Permit);

(ii) A qualified subsistence user may designate another qualified subsistence user (by using the Federal Designated Harvester Permit) to take fish and wildlife on his or her behalf;

(iii) The fish and wildlife is taken by individuals or community representatives permitted (via a Federal Subsistence Registration Permit) a one-time or annual harvest for special purposes including ceremonies and potlatches; or

(iv) The fish and wildlife is taken by representatives of a community permitted to do so in a manner consistent with the community's customary and traditional practices.

(6) The Board may delegate to agency field officials the authority to set harvest limits, define harvest areas, and open or close specific fish or wildlife harvest seasons within frameworks established by the Board.

(7) The Board shall establish a Staff Committee for analytical and administrative assistance composed of a member from the U.S. Fish and Wildlife Service, National Park Service, U.S. Bureau of Land Management, Bureau of Indian Affairs, and USDA Forest Service. A U.S. Fish and Wildlife Service representative shall serve as Chair of the Staff Committee.

(8) The Board may establish and dissolve additional committees as necessary for assistance.

(9) The U.S. Fish and Wildlife Service shall provide appropriate administrative support for the Board.

(10) The Board shall authorize at least two meetings per year for each Regional Council.

(e) Relationship to Regional Councils. (1) The Board shall consider the reports and recommendations of the Regional Councils concerning the taking of fish and wildlife on public lands within their respective regions for subsistence uses. The Board may choose not to follow any Regional Council recommendation which it

determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, would be detrimental to the satisfaction of subsistence needs, or in closure situations, for reasons of public safety or administration or to assure the continued viability of a particular fish or wildlife population. If a recommendation is not adopted, the Board shall set forth the factual basis and the reasons for the decision, in writing, in a timely fashion.

(2) The Board shall provide available and appropriate technical assistance to the Regional Councils.

§__.11 Regional advisory councils.

(a) The Board shall establish a Regional Council for each subsistence resource region to participate in the Federal subsistence management program. The Regional Councils shall be established, and conduct their activities, in accordance with the FACA. The Regional Councils shall provide a regional forum for the collection and expression of opinions and recommendations on matters related to subsistence taking and uses of fish and wildlife resources on public lands. The Regional Councils shall provide for public participation in the Federal regulatory process.

(b) Establishment of Regional Councils; membership. (1) The number of members for each Regional Council shall be established by the Board, and shall be an odd number. A Regional Council member must be a resident of the region in which he or she is appointed and be knowledgeable about the region and subsistence uses of the public lands therein. The Board shall accept nominations and recommend to the Secretaries that representatives on the Regional Councils be appointed from those nominated by subsistence users. Appointments to the Regional Councils shall be made by the Secretaries.

(2) Regional Council members shall serve 3 year terms and may be reappointed. Initial members shall be appointed with staggered terms up to three years.

(3) The Chair of each Regional Council shall be elected by the applicable Regional Council, from its membership, for a one year term and may be reelected.

(c) Powers and Duties. (1) The Regional Councils are authorized to:

(i) Hold public meetings related to subsistence uses of fish and wildlife within their respective regions, after the Chair of the Board or the designated Federal

Coordinator has called the meeting and approved the meeting agenda;

70 FR 7600-01

*76400 ACTION: Final rule.

SUMMARY: This rule revises and clarifies the jurisdiction of the Federal Subsistence Management Program for certain coastal areas in Alaska in order to further define, in part, certain waters that may never have been intended to fall under the Subsistence Management Program jurisdiction.

DATES: This rule is effective January 26, 2006.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Thomas H. Boyd, Office of Subsistence Management; (907) 786-3888. For questions specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region, (907) 786-3888.

SUPPLEMENTARY INFORMATION:

Background

In Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111-3126), Congress found that “the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses * * *” and that “continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened * * *.” As a result, Title VIII requires, among other things, that the Secretary of the Interior and the Secretary of Agriculture (Secretaries) implement a program to provide for rural Alaska residents a priority for the taking for subsistence uses of fish and wildlife resources on public lands in Alaska, unless the State of Alaska enacts and implements laws of general applicability that are consistent with ANILCA and that provide for the subsistence definition, priority, and participation specified in sections 803, 804, and 805 of ANILCA.

The State implemented a program that the Department of the Interior previously found to be consistent with ANILCA. However, in December 1989, the Alaska Supreme Court ruled in McDowell v. State of Alaska that the rural priority in the

State subsistence statute violated the Alaska Constitution. The Court's ruling in McDowell caused the State to delete the rural priority from the subsistence statute which therefore negated State compliance with ANILCA. The Court stayed the effect of the decision until July 1, 1990. As a result of the McDowell decision, the Department of the Interior and the Department of Agriculture (Departments) assumed, on July 1, 1990, responsibility for implementation of Title VIII of ANILCA on public lands. On June 29, 1990, the Departments published the Temporary Subsistence Management Regulations for Public Lands in Alaska in the Federal Register (55 FR 27114). Permanent regulations were jointly published on May 29, 1992 (57 FR 22940), and have been amended since then.

As a result of this joint process between Interior and Agriculture, these regulations can be found in the Code of Federal Regulations (CFR) both in Title 36, “Parks, Forests, and Public Property,” and Title 50, “Wildlife and Fisheries,” at 36 CFR 242.1-28 and 50 CFR 100.1-28, respectively. The regulations contain subparts as follows: Subpart A, General Provisions; Subpart B, Program Structure; Subpart C, Board Determinations; and Subpart D, Subsistence Taking of Fish and Wildlife.

Consistent with Subparts A, B, and C of these regulations, as revised May 7, 2002 (67 FR 30559), the Departments established a Federal Subsistence Board to administer the Federal Subsistence Management Program, as established by the Secretaries. The Board's composition includes a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, U.S. National Park Service; the Alaska State Director, U.S. Bureau of Land Management; the Alaska Regional Director, U.S. Bureau of Indian Affairs; and the Alaska Regional Forester, USDA Forest Service. Through the Board, these agencies participated in the development of regulations for Subparts A, B, and C, and the annual Subpart D regulations.

Jurisdictional Perspective

Federal Subsistence Management Regulations (50 CFR 100.3 and 36 CFR 242.3) currently specify that they apply on “all navigable and non-navigable waters within the exterior boundaries * * *” of the parks, refuges, forests, conservation areas, recreation areas, and Wild and Scenic Rivers. This includes hundreds of thousands of acres of saltwater bays within National Wildlife Refuge boundaries that were not withdrawn prior to Statehood and which the Secretaries have now determined should not have been included in the regulations published on January 8, 1999 (64 FR 1276). We have concluded that our regulations (50 CFR 100.3 and 36 CFR

242.3) should exclude some bays associated with certain Refuges in Western Alaska. Therefore, we are amending the Federal Subsistence Management Regulations for Public Lands in Alaska to reflect the jurisdiction in those areas.

During the early interagency discussions relative to inclusion in fisheries management in the Federal Subsistence Management Program, there does not appear to have been any *76401 intention to specifically extend Federal jurisdiction to various saltwater bays where there was no pre-Statehood withdrawal of submerged lands and waters. Prior to 1999, the Federal Subsistence Management Program clearly and specifically identified the waters under its jurisdiction in the 1992 rule that set out the structure of the Federal Program (57 FR 22940, May 29, 1992). The various saltwater bays under discussion in this rule were not included as public lands in the 1992 rule. The Ninth Circuit Court decision in Alaska v. Babbit, 72.F.3d 698 (1995) (the Katie John decision) held and affirmed the Federal government's position that navigable waters in which the Federal Government holds reserved water rights are public lands for purposes of the subsistence use priority. As work began following the Katie John decision to identify these waters, discussion centered on the problem of “checkerboard jurisdiction” (a complex interspersion of areas of State and Federal jurisdiction) as it occurred on rivers within Conservation System Units. Federal officials recognized that in order to provide a meaningful subsistence use priority that could be readily implemented and managed, unified areas of jurisdiction were required for both Federal land managers and the subsistence users. The problems associated with the dual State and Federal management caused by the State's inability to take actions needed to implement the required subsistence use priority are difficult enough without imposing on that situation elaborate and scattered areas of different jurisdictions. Therefore, we determined in the January 1999 regulations that all waters within or adjacent to the boundaries of areas listed in § —.3(b) of those regulations were public lands. This determination provided both the land managers and the public with a means of identifying those waters that are public lands for the purposes of the subsistence use priority.

In the course of implementing the 1999 determinations, the Federal land managers became aware of some unanticipated consequences, particularly with respect to the inclusion of some marine waters as public lands. This current final rule is designed to address some of the problem areas that have been identified since 1999.

Additionally, ANILCA section 103 is very specific that in coastal areas, boundaries for new additions to Federal reservations identified in that Act shall not extend seaward beyond the mean high-tide line to include lands owned by the State

of Alaska unless the State concurs. The regulations published in compliance with that section delineating the National Wildlife Refuge boundaries (48 FR 7890, February 24, 1983) specify that Federal ownership does not extend below mean high tide to include lands owned by the State of Alaska except where the State may agree to that extension. Even though maps show hundreds of thousands of acres of marine waters (exclusive of pre-Statehood withdrawals) within the exterior boundaries of refuges, the Fish and Wildlife Service has never attempted nor intended to exercise any jurisdiction within those areas. The broader inclusion in the 1999 regulations, § ——.3(b), of all waters within the boundaries of the listed units, operated to designate some waters as public lands over which the Fish and Wildlife service had not in the past asserted jurisdiction. This final rule addresses that problem and is intended to exclude those waters from the scope of the definition of public lands for the purposes of the ANILCA subsistence use priority.

The boundaries of the National Wildlife Refuges in Alaska were finalized, according to ANILCA, with the Federal Register publication of February 24, 1983 (48 FR 7890). Some of these boundaries include marine waters and saltwater bays. Subsistence jurisdiction for the priority use of fish and shellfish extends only where the United States owns the submerged lands or where there are reserved water rights. Therefore, where the submerged lands under marine waters are owned by the State and there is no Federal water right, there is no subsistence jurisdiction. This regulation attempts to make clear which areas within certain refuges are excluded from subsistence management.

Additionally, the final Issue Paper and Recommendations of the Alaska [Katie John] Policy Group (attachment to Acting Regional Solicitor Dennis Hopewell's memorandum of June 15, 1995, as amended July 12, 1995), stated that:

Where a federal reservation with reserved water rights includes rivers or streams flowing into marine waters, reserved water rights will apply to all waters above the mouth of said rivers or streams, when the mouth is within the exterior boundaries of the federal reservation. The mouth is defined by a line drawn between the termini of the headlands on either bank of the river. * * *

There are apparently no cases in which the federal government has asserted reservation of rights to marine waters under the Winters docrine. * * *

Extending the Winters doctrine assertion of reserved water rights to marine waters would be without precedent and would represent a considerable leap in reasoning. * * * Potential appropriation of such waters remains implausible to any degree that

could substantially affect marine water quantity or levels at all but the most restricted of locations (such as some salt chucks).

* * * [T]he rationale behind the federal reserved waters doctrine would not apply to these marine waters. From this standpoint, it would be difficult to establish a need to reserve water in marine waters in order to accomplish the purposes of a reservation, even such a reserve as the Alaska Maritime National Wildlife Refuge that specifically includes the "adjacent seas."

He made the following recommendations:

Where a federal reservation with reserved water rights includes rivers or streams flowing into marine waters, reserved water rights will be asserted to the mouths of those rivers or streams, where the mouths are within the exterior boundaries of the reservation.

Reserved water rights will not be asserted in marine waters except to the extent that the United States has already taken the position that submerged lands underlying marine waters reserved to the United States at the time of Alaska statehood meet the ANILCA definition of public lands.

Thus, neither the 1999 regulations nor this final rule claims that the United States holds a reserved water right in marine waters as defined in the existing regulations.

Public Review and Comment

The Secretaries published a proposed rule (69 FR 70940) on December 8, 2004, soliciting comments on the proposed revisions. During their Winter Council meetings in February and March 2005, all Federal Subsistence Regional Advisory Councils received information on the proposed changes and they and the public had an opportunity to offer comments. The initial comment period upon request of the public was extended to April 1, 2005. As a result of the public announcements soliciting input, we received comments from 24 different entities, including 2 from State of Alaska agencies, 10 from Native organizations, 3 from other organizations, 5 from individuals and 5 from Regional Advisory Councils. Of particular note, was a comment received requesting detailed maps in order to more thoroughly evaluate the proposed changes. Recognizing the validity of that comment, we developed more detailed maps of the areas in question, placed them on our website, and reopened the comment period. We published in the Federal Register on August 29, 2005, (70 FR 50999) an announcement of the list of areas

to be excluded from Federal Subsistence Management jurisdiction and reopened the comment period through October 21, 2005. As a result of that notice, we received an additional 4 *76402 comments: 1 from a State entity, 1 from a Native organization, 1 from an individual, and 1 from a Regional Council. We will address the following comments received during both comments opportunities below.

Analysis of Public Comments

Comment: The government has reserved water rights to use all waters necessary to sustain the habitat of subsistence resources, including waters beyond the boundaries of the CSU's (including upstream and downstream areas). The Federal government should include these areas.

Response: We believe that including all upstream and downstream reaches would constitute an overly broad interpretation of “Federal reserved waters.” The Ninth Circuit Court in Katie John found the government's interpretation that public lands for the purposes of the Title VIII priority include navigable waters in which the United States holds reserved water rights reasonable and thus upheld it. Consequently, we did not propose to add and are not adding those stretches of water to the Federal Subsistence Management Program's area of jurisdiction.

A Federal reserved water right is a usufruct which gives the right to divert water for use on specific land or the right to guaranty flow in a specific reach of a water course. As such, the water right does not affect the water downstream of the use area and does not have an effect on upstream areas except in times of shortage when a junior use may be curtailed. There is no shortage; therefore, up and downstream waters have not been included.

Comment: Saltwater embayments within national wildlife refuge boundaries are important for subsistence activities and should be considered public lands.

Response: The jurisdiction of the Federal Subsistence Management Program depends not on whether the saltwater bays are important for subsistence, but whether they are public lands. Navigable water bodies can be public lands if there is a Federal reserved water right or if the Federal government retained ownership of the submerged lands. The saltwater bays discussed in these regulations are not considered public lands under the Subsistence Management Program because they do not fall within either of those categories.

Comment: ANILCA, Title VIII is Indian legislation and any ambiguities must be resolved in favor of Alaska Natives.

Response: While Congress did invoke its Constitutional authority over Native affairs and the Commerce and Property clauses as a basis for the Act, Title VIII is not "Indian Legislation" for the purposes of the canon of construction that ambiguities should be resolved in favor of Alaska Natives. See Hoonah Indian Association v. Morrison, 170 F.3d 1223, 1228 (9th Cir. 1999). The priority in Title VIII is for rural residents regardless of whether or not they are Alaska Natives, and Alaska Natives who are urban residents do not enjoy the priority.

Comment: The comment period should be extended to allow more opportunity for the public to comment.

Response: Following an initial comment period of 48 days, in response to a number of requests, we extended the comment period an additional 65 days through April 1, 2005, which resulted in a total comment period of 113 days. Additionally, upon making more detailed maps available, we reopened the comment period for another 55 days. The public opportunity for comment has been fully accommodated.

Comment: This proposed rule seems to be an effort to circumvent the Katie John ruling.

Response: In promulgating this final rule, the Government is complying with, not circumventing the Katie John ruling. The agencies are charged with defining the waters that are public lands. In the course of administering the determinations made in the 1999 regulations, we determined that certain waters that were encompassed within the waters listed in § ——.3(b) are not public lands for the purposes of the Title VIII priority. Thus, this final rule is merely a continuation of the process that started with the Katie John decision.

Further, the 1999 regulations contemplated this very responce. Section ——. 3(b) of those regulations explicitly stated that "[t]he public lands described in paragraph (b) of this section remain subject to change * * *" This final rule is just a part of that anticipated process. Further, this final rule is itself not forever final and unchangeable, as shown in the new regulation § —.3(e), which is a restatement of the prior regulation.

Comment: The government should clarify that marine waters below mean high tide are excluded in all applicable Federal areas of the State.

Response: Title VIII of ANILCA and the regulations limit the Federal Subsistence Management Program jurisdiction to public lands. Public lands include marine areas where the Federal government retained ownership of the submerged lands on the date of Alaska Statehood. The Federal Government has consistently recognized that navigable waters that overlay submerged lands that were reserved to the United States at the time of Alaska statehood are public lands for the purposes of the Title VIII subsistence use priority. 57 FR 22942 (May 29, 1992), 64 FR 1279 (January 8, 1999). Some of the waters listed as public lands both in the 1992 and the 1999 regulations were so determined because of reserved ownership of the submerged lands. This final rule continues that recognition. Therefore, because the Federal government did retain some marine submerged lands at Statehood, it would be improper for the regulations to exclude from the Program's jurisdiction all marine waters below mean high tide in all applicable Federal areas of the State. See e.g., United States v. Alaska, 521 U.S. 1 (1997).

Comment: The government should exclude all marine waters below mean high tide by removing the “headland-to-headland” portion of the definitions for “inland waters” and “marine waters.”

Response: The definition in the regulations recognizes that there can be reserved Federal water rights in rivers and lakes, but not the sea. Therefore, it is necessary to determine where the river ends and the sea begins. In order to do so, the regulations use the methodology found in the Convention on the Territorial Sea and Contiguous Zone from the United Nations Law of the Sea for closing the mouths of rivers. The use of the headland-to-headland delineation across the mouths of rivers is also described in Shore and Sea Boundaries by Aaron Shalowitz (1964) and Water Boundaries by George Cole (1997). Some rivers are tidally influenced for a significant distance above their mouths. Although submerged lands under portions of rivers which are tidally influenced may be owned by the State or other entity, those stretches are still a part of the river and remain subject to potential Federal reservation of water rights. Rivers and streams have high water marks rather than lines of mean high tide. Upon further review, we have determined that no modifications are necessary in the definitions of “inland waters” and “marine waters” as found in the January 8, 1999, regulations; therefore none are made in this final rule.

Comment: The government should include in regulation the Ninth Circuit Court's criteria in the Katie John decision for determining whether waters are “public lands.”

*76403 Response: The Ninth Circuit did not adopt criteria for determining whether waters are public lands but affirmed the Secretaries' determination that public lands includes, inter alia, water within which there were Federal reserved water rights. It is unnecessary to set forth in regulations the standards to be applied in determining whether reserved water rights are held in any specific waters. The Secretaries have at all times retained for themselves the task of determining what are public lands. Neither this task nor any changes to the subpart A and B portions of the subsistence management regulations has been delegated to the Federal Subsistence Board. The Secretaries are aware of the criteria for determining whether a reserve water right is or is not held in any waters. Further, any additional determinations of waters as public lands will require notice and opportunity to comment on a proposal. Therefore, the public will have ample opportunity to inform the secretaries if they disagree with any such proposal. The Secretaries fully believe that this final rule complies with the applicable criteria.

Comment: The government should correct the regulation's proposed expansion of the Federal priority into “all inland waters, both navigable and non-navigable, within and adjacent to the exterior boundaries * * *.” The Court only expanded the definition of “public lands” outside of Federal reservations into navigable waters where the U.S. has a reserved water right (i.e. where the adjoining water is necessary for the purposes of the reservation)—not “all adjacent” waters.

Response: This comment relies, in part, on a misstatement of the decision of the Court of Appeals in the Katie John litigation. The Court of Appeals did not find in that decision that the only navigable waters which are public lands for the purposes of Title VIII subsistence use priority are those waters in which the United States holds a reserved water right. The Court of Appeals only agreed with the United States, that if the United States holds a reserved water right in navigable waters that is a property interest sufficient to make those waters public lands for the purposes of Title VIII of ANILCA. Therefore, the definition of public lands is not limited only to waters in which the United States holds a reserved water right. Contrary to that comment, that definition can extend to other interests.

The Court of Appeals rejected the claim that the navigation servitude was a property interest sufficient to make waters subject to that interest as public lands and rejected the claim that Congress intended that all waters within the reach of the

Commerce Clause were public lands. However, the Government has never relied and does not now rely on either navigational servitude or the extent of the Commerce Clause to define waters that are public lands. Further, the issuance of "adjacent" has only been applied to inland rivers and lakes immediately adjacent to Federal areas. Those waters immediately adjacent provide some of the necessary waters for achieving the purposes for which each Federal area was established. The category of "adjacent waters" has not been applied to any marine waters. This regulation presents no expansion of the existing Federal jurisdiction as published in the January 8, 1999, Federal Register (64 FR 1276).

Comment: The government should use the legal boundaries of the Federal conservation system units as published in the Federal Register; correct all Federal Subsistence Management Program maps and descriptions consistent with those boundaries; apply for Federal reserved water rights; limit Federal authorities to public lands; and accurately portray the State's management authorities.

Fed. R. App. P. 4(a)

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment.

A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals.

If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal.

The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

the judgment or order is set forth on a separate document, or

150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

9th Circuit Case Number(s) Nos. 09-36122, 09-36125, 09-36127 (Consolidated)

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Jun 4, 2010 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Michael W. Sewright

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Attorney for Plaintiff/Appellant

Date June 4th, 2010