No. 13-___

In the Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

SALLY JEWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. GERAGHTY
Attorney General
MICHAEL G. MITCHELL
Senior Assistant Attorney General
STATE OF ALASKA
Department of Law
1031 W. 4th Avenue
Suite 2000
Anchorage, AK 99501

GREGORY G. GARRE
Counsel of Record
KATHERINE I. TWOMEY
KATYA S. CRONIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

QUESTIONS PRESENTED

The State of Alaska, like all States, enjoys the sovereign "right to control and regulate navigable streams within [her borders]," *Coyle v. Smith*, 221 U.S. 559, 573 (1911), and to manage fish and game along those waters, *United States v. Alaska*, 521 U.S. 1, 5-6 (1997). In the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 et seq., Congress gave rural Alaskans a priority over other residents for the "taking on public lands of fish and wildlife" for subsistence uses. *Id.* § 3114. "[P]ublic lands" are "[f]ederal lands"—*i.e.*, "lands, waters, and interests therein"—"the title to which is in the United States." *Id.* § 3102(1)-(3). Although the definition does not mention navigable waters, the Ninth Circuit adopted the government's litigating position that ANILCA nevertheless covers any navigable waters in which the United States has an interest by virtue of the "reserved water rights doctrine." In the decision below, the Ninth Circuit applied that framework to uphold a 1999 Rule that transfers from Alaska to the United States authority to control of fishing and hunting along waterways in over *half* of the State.

The questions presented are:

1. Whether the Ninth Circuit properly held—in conflict with this Court's decisions—that the federal reserved water rights doctrine authorizes the unprecedented federal takeover of Alaska's navigable waters sanctioned by the 1999 Rule.

2. Whether the Ninth Circuit properly proceeded on the premise—which also conflicts with this Court's decisions—that ANILCA could be interpreted to federalize navigable waters at all given Congress's silence on the Act's application to navigable waters.

PARTIES TO THE PROCEEDING

In this case, petitioner is the State of Alaska. Respondents are: Sally Jewell, Secretary of the U.S. Department of the Interior, and Tom Vilsack, Secretary of the U.S. Department of Agriculture, who were defendants below; the Alaska Fish and Wildlife Federation and Outdoor Council, the Alaska Fish and Wildlife Conservation Fund, Michael Tinker, and John Conrad, who were plaintiff-intervenors below; Katie John, Charles Erhart, the Alaska Inter-Tribal Council, and the Native Village of Tanana, who were defendant-intervenors below; and the Alaska Federation of Natives, which was a defendant-intervenor below.

Before the Ninth Circuit, this case was consolidated with another case in which the parties were: Katie John, Charles Erhart, the Alaska Inter-Tribal Council, and the Native Village of Tanana, who were plaintiffs; the United States of America, Sally Jewell, Secretary of the U.S. Department of the Interior, and Tom Vilsack, Secretary of the U.S. Department of Agriculture, who were defendants; and the State of Alaska, which was a defendant-intervenor.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Alaska, respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-64a) is reported at 720 F.3d 1214. The orders of the district court (App. 65a-183a) are not reported.

JURISDICTION

The court of appeals entered its judgment on July 5, 2013. App. 64a. On September 30, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 4, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set out in the appendix. App. 184a-367a.

INTRODUCTION

This case concerns two ideals at the heart of the American experience. The first is federalism—"our Nation's own discovery," and the "genius . . . that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *United States v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The second is fishing and hunting—"an important part of our Nation's

heritage," representing "the great spirit of our country," and to this day a way of life for many Alaskans. Proclamation No. 7822, 69 Fed. Reg. 59,539 (Sept. 24, 2004) (President Bush). The federal regulation at issue in this case intrudes on the State of Alaska's sovereign authority to regulate fishing and hunting along waters in over *half* of Alaska. The Ninth Circuit decision below upholding that federal takeover directly contravenes this Court's decisions and threatens those ideals, as well as the State's ability to manage and conserve its natural resources.

Alaska is home to the nation's largest network of navigable waters and many of its most prized fisheries. Those waters—and the fish and wildlife that inhabit and depend upon them, like the Chinook salmon and brown bear—are central to the State's identity. Alaska entered the Union in 1959 on equal footing with the lower 48 States, which included "the right to control and regulate navigable streams within [her borders]," *Coyle v. Smith*, 221 U.S. 559, 573 (1911), and to manage fish and game along those waters, *see United States v. Alaska*, 521 U.S. 1, 5-6 (1997). One of the primary reasons Alaskans sought statehood in the first place was to secure the ability to save Alaska's fisheries. And the authority to regulate fishing and hunting within its borders is central to Alaska's sovereignty and critical to Alaskans generally. Fishing and hunting not only remain a way of life in Alaska; they are key to Alaska's economy and its residents' livelihood.

In 1980, Congress gave rural Alaskans a priority over other residents for the "taking on *public lands* of fish and wildlife for nonwasteful subsistence uses." Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3114 (emphasis added). It

defined "public lands" as "[f]ederal lands"—*i.e.*, "lands, waters, and interests therein"—"the title to which is in the United States." *Id.* § 3102(1)-(3). After initially recognizing that ANILCA does not intrude on the State's sovereign authority over navigable waters, the Executive flipped and took the position that it does.

This case involves a challenge to the Final Rule promulgated by the Secretaries of the Interior and Agriculture in 1999 implementing ANILCA. *See* 64 Fed. Reg. 1276 (Jan. 8, 1999) (1999 Rule). Invoking the "federal reserved water rights" doctrine, the rule federalizes thousands of miles of waterways in Alaska, and thereby transfers authority from the State to the federal government to regulate fishing and hunting along those waters. In the decision below, the Ninth Circuit upheld the rule in its entirety—even while recognizing that it was working with "imperfect tools" and had "sanctioned the use of a doctrine [the federal reserved water rights doctrine] ill-fitted to determining which Alaskan waters" are now subject to federal control. App. 64a. The Ninth Circuit decision not only directly conflicts with a decision of the Alaska Supreme Court—*Totemoff v. Alaska*, 905 P.2d 954 (Alaska 1995), *cert. denied*, 517 U.S. 1244 (1996)—but contravenes this Court's precedents as well.

The Ninth Circuit's decision drastically expands the federal reserved water rights doctrine, in conflict with this Court's precedents. Whereas this Court has "repeatedly emphasized" that this doctrine reserves "'only that amount of water necessary to fulfill the purpose of the reservation, [and] no more,'" *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (citation omitted), the Ninth Circuit upheld a declaration of federal reserved water rights based on the theory that

water "might" be necessary without *any* particularized examination of the purpose of the reservation. Moreover, the Ninth Circuit decision is grounded on the premise, adopted by an earlier case, that ANILCA's definition of federal "public lands" may be construed to include navigable waters to begin with. App. 54-56a. As Judge Kozinski explained in his dissent from the en banc decision in that case, this Court has "held time and again that states control fishing in their navigable waters, unless Congress has *clearly* stated a contrary intention." *Katie John v. United States*, 247 F.3d 1032, 1044 (9th Cir. 2001) (*Katie John II*) (joined by O'Scannlain and Rymer, JJ., dissenting). ANILCA does not remotely supply such a clear statement. *Id.* at 1047-48.

In short, the Ninth Circuit decision not only grossly expands the federal reserved water rights doctrine, but disregards foundational principles of federalism. This Court's review is plainly needed.

STATEMENT OF THE CASE

A. ANILCA And The 1990 Rule

Alaska entered the Union in 1959 on equal footing with the other States—and with title to the lands underlying navigable waters within its borders and "the right to control and regulate" those navigable waters. *Coyle*, 221 U.S. at 573. Twenty years later, Congress enacted ANILCA. Title VIII of the Act gave rural Alaskans a priority over other residents for "the taking on public lands of fish and wildlife for nonwasteful subsistence uses." 16 U.S.C. § 3114. ANILCA defines "public lands" as "[f]ederal lands," *id.* § 3102(3), which are defined as "lands the *title* to which is in the United States," *id.* § 3102(2) (emphasis added).

In accordance with language used in numerous federal statutes, ANILCA defines "land" as "lands, waters, and interests therein." *Id.* § 3102(1). The definition does not mention navigable waters.

Consistent with ANILCA § 3115(d), Alaska enacted a rural subsistence priority and retained control over subsistence management until 1989 when the Alaska Supreme Court invalidated that priority on the ground that it violated the state constitutional guarantee of equal access to fish and game. *McDowell v. Alaska*, 785 P.2d 1, 1 (Alaska 1989). Federal regulators then assumed control over fish and game management on federal "public lands" in Alaska. In 1990, the Secretaries of the Interior and Agriculture promulgated temporary regulations governing subsistence fishing and hunting on "public lands" and established a Federal Subsistence Board for the day-to-day management of such activities. 55 Fed. Reg. 27,114 (June 29, 1990). The regulations defined "public lands" to *exclude* navigable waters, recognizing that "[t]he United States generally does not hold title to navigable waters and thus navigable waters generally are *not* included within the definition of public lands." *Id.* at 27,115; *see id.* at 27,118. Those regulations became final in 1992. *See* 57 Fed. Reg. 22,940, 22,942 (May 29, 1992); 36 C.F.R. § 242.3(b) (1994).

B. *Katie John I* And *Totemoff*

In a separate case from this one, private plaintiffs, including Katie John, challenged the 1990 Rule and its interpretation of "public lands," seeking an order requiring the federal government to enforce the rural subsistence priority on *all* navigable waters in Alaska. Shortly after the change in presidential administrations in 1992, the government informed the

district court during an oral argument that the Secretaries had flipped positions and now interpreted "public lands" to include navigable waters "in which the federal government has an interest under the federal reserved water rights doctrine." *Alaska v. Babbitt*, 72 F.3d 698, 701 (9th Cir. 1995) (*Katie John I*), *cert. denied*, 517 U.S. 1187 (1996). The district court rejected the government's new federal reserved water rights argument and, instead, held that *all* navigable waters are "public lands" under ANILCA by virtue of the federal navigational servitude. *Id.*

The State took an interlocutory appeal and the Ninth Circuit reversed and remanded. Without mentioning this Court's precedents requiring a "clear statement" from Congress before the federal government may usurp a traditional aspect of State sovereignty, the court adopted the government's novel federal reserved water rights argument. The court recognized that ANILCA "makes no reference to navigable waters," and did not give "clear direction" about which navigable waters are "public lands." *Id.* at 702. And the court acknowledged that excluding navigable waters "would give meaning to the term 'title' in the definition of the phrase 'public lands.'" *Id.* at 704. But the court deferred to the government's position under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and held that "the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Katie John I*, 72 F.3d at 703-04.

The Ninth Circuit recognized the limited nature of the reserved water rights doctrine. Under that doctrine, as this Court has held, when the United States reserves land for a federal purpose, it implicitly

reserves "appurtenant waters then unappropriated" that are "*necessary* to accomplish the purposes for which the land was reserved," such that "'without the water the purposes of the reservation would be *entirely defeated*.'" *Id.* at 703 (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976); quoting *United States v. New Mexico*, 438 U.S. 696, 700, 702 (1978) (emphasis added)). And even when that high bar is met, the government "may reserve 'only that amount of water *necessary* to fulfill the purpose of the reservation.'" *Id.* (emphasis added) (citation omitted). Given these limits, the Ninth Circuit recognized that the task of "identifying" the navigable waters that qualify as "public lands" under this doctrine was "extraordinary" and "complicated." *Id.* at 703-04. Yet it left that task to the Secretaries. *Id.* at 704.

Shortly after the Ninth Circuit issued *Katie John I*, the Alaska Supreme Court issued a directly contrary decision in *Totemoff v. Alaska*. The Alaska Supreme Court explicitly "disagree[d]" with the Ninth Circuit and held that "ANILCA does not give the federal government the power to regulate subsistence hunting and fishing in . . . navigable waters" above state lands. 905 P.2d at 968, 973. The court explained that Alaska had title to its navigable waters; that "reserved water rights are not the type of property interests to which title can be held"; that a contrary interpretation would "conflict with the clear statement doctrine"; and that using the reserved water rights doctrine "to define the geographic scope" of ANILCA "would be highly impractical, perhaps impossible." *Id.* at 964-67.

The State brought *Totemoff* to the Ninth Circuit's attention and the panel responded by withdrawing and reissuing its initial opinion—but this time Judge Hall

dissented. She rejected the majority's unprecedented use of the federal reserved water rights doctrine. As she saw it, the "task of determining the exact quantity of water, from each body of navigable water, necessary to achieve the Congressional goal of subsistence fishing would be an administrative nightmare." *Katie John I*, 72 F.3d at 704. In addition, in her view, "[s]uch a drastic change in the amount of control exercised by the federal government over all navigable waters in Alaska can only come from Congress." *Id.* at 706.

Alaska sought this Court's review of that ruling. In opposing certiorari, the Solicitor General emphasized that the case was interlocutory; that it made sense for the Court to allow the regulatory and political process to proceed before intervening; and that "the parties will have another opportunity to petition this Court for review." Br. for the Fed. Resp'ts in Opp. at 18-19, *Alaska v. Babbitt*, No. 95-1084 (No. 95-1084 Opp.). This Court denied certiorari. 517 U.S. 1187 (1996).

C. *Katie John II*

On remand, the district court stayed the case pending issuance of the Secretaries' 1999 Rule, but then determined that the pending case, which challenged the 1990 Rule, should not be the vehicle for challenging the new rule and entered final judgment dismissing the case. The State appealed and the Ninth Circuit granted *initial* hearing en banc to reconsider the court's threshold ruling that ANILCA's definition of "public lands" includes any navigable waters.

A majority of the en banc court agreed that *Katie John I* was wrong. But the court could not reach a controlling decision on *why*, and so issued a per curiam decision holding that its prior decision "should not be disturbed or altered." *Katie John II*, 247 F.3d at 1033.

Six of the eleven judges rejected *Katie John I*'s reliance on *Chevron* deference and the federal reserved water rights doctrine. Of those six, three judges (Tallman, Tashima, and Fletcher) would have held that ANILCA covers *all* navigable waters in Alaska, and that the federal reserved water rights doctrine did not limit the navigable waters to which ANILCA applies. *Id.* at 1034 (concurring). The other three (Kozinski, O'Scannlain, and Rymer) would have held that ANILCA's definition of "public lands" does not include *any* navigable waters. *Id.* at 1047-48 (dissenting).

In his opinion, Judge Kozinski explained that *Katie John I* contravened this Court's repeated holdings "that states control fishing in their navigable waters, unless Congress has *clearly* stated a contrary intention." *Id.* at 1044. That clear-statement rule, he emphasized, is grounded on "important structural considerations in the relationship between the states and the federal government." *Id.* Although in his view ANILCA's definition of "public lands" was best read *not* to reach the State's navigable waters, he explained that it suffices under the clear-statement rule "that it is *a* plausible interpretation." *Id.* at 1047.

D. 1999 Rule At Issue Here

In 1999, while the challenge to the 1992 Rule was still being litigated, the Secretaries issued a new rule that categorically asserts that ANILCA's definition of "public lands" includes "all navigable and non-navigable water within the exterior boundaries of" and "inland waters adjacent to the exterior boundaries" of 34 federal land reservations that constitute about *half* of the State of Alaska. *See* 64 Fed. Reg. 1276, 1286-87 (Jan. 8, 1999); 50 C.F.R. § 100.1-.4; 36 C.F.R. § 242.1-.4. The 1999 Rule does not contain (or reference) any

analysis of the purposes of these particular federal reservations, much less the location and specific quantity of water necessary to achieve those purposes.

The 1999 Rule sets forth extensive regulations of fishing and hunting on these waters to implement the rural subsistence priority. 64 Fed. Reg. at 1293-313. Among other things, the regulations specify the days and hours during which subsistence fishing is allowed, what equipment may be used (down to the length of nets), and sometimes how many fish may be caught. *See, e.g.*, *id.* at 1307-08. The 1999 Rule also empowers the Federal Subsistence Board to "[c]lose public lands to the *non-subsistence* taking of fish and wildlife"—indeed, to "[r]estrict or *eliminate* taking of fish and wildlife on public lands." *Id.* at 1289 (emphasis added).[1]

E. This Litigation

In 2005, the State of Alaska and, separately, various individual plaintiffs brought new and separate actions against the federal defendants challenging the 1999 Rule, which were consolidated before the district court. Numerous parties intervened. The district court upheld the validity of the rule in its entirety. After rejecting the State's argument that the Secretaries' use of notice-and-comment rulemaking to determine federal water rights *en masse* was improper, the court issued a decision upholding the rule on the merits. In that decision, the court recognized that "the reserved water rights doctrine is not very well suited" for the

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[1] The 1999 Rule was amended in 2005, *see* 70 Fed. Reg. 76,400 (Dec. 27, 2005), but the amendments "are not at issue in these appeals," except where the court noted that they related to the headland-to-headland methodology, which is not discussed in detail here. App. 17a n. 59, 39a-40a & n.113.

task, App. 122a, but it deferred to the Secretaries' determinations under *Chevron*, *id.* at 124a.

The Ninth Circuit affirmed. At the outset, the court reviewed the framework adopted by *Katie John I* for allowing ANILCA's extension to navigable waters. *Id.* at 15a-16a. The court recognized the fundamental mismatch between the federal reserved water rights doctrine—which "focuse[s] on the *amount* of water needed for a specific federal reservation"—and the task assigned to the Secretaries—which requires determining the "*locations* of water sources that might generally be needed for subsistence living from many such reservations." *Id.* at 22a (emphasis added). In addition, the court candidly admitted: "We, and perhaps the Secretaries, failed to recognize the difficulties in applying the federal reserved water rights doctrine in this novel way, and in retrospect the doctrine may provide a particularly poor mechanism for identifying the geographic scope of ANILCA's rural subsistence priority management when it comes to water." *Id.* at 22a-23a. Yet, because "*Katie John I* remains the law of [the Ninth Circuit]," the court stated that it "must apply it as best we can." *Id.* at 64a.

The court's solution to this mismatch was simply to relieve the Secretaries of the burden of determining which navigable waters are "necessary" to effectuate the purposes of the federal reservations. Following the district court, the court allowed the Secretaries to proceed by rulemaking on the notion that they were merely "identifying those bodies of water to which the rural subsistence priority *might* apply by virtue of the federal reserved water rights doctrine," but they did "not actually allocate or reserve any water in these bodies." *Id.* at 24a (emphasis added). And the court

held that there was no need to determine "the purpose of the land reservation and the amount of water necessary for each reserved unit." *Id.* at 29a.

On the merits, the court afforded the Secretaries "some deference" under *Chevron*, and upheld the Secretaries' "novel" application of the federal reserved water rights doctrine across-the-board. *Id.* at 28a. Disregarding the doctrine's strict "necessity" requirement, the court rejected the State's challenges to the Secretaries' designations on the ground that the navigable waters listed in the 1999 Rules "*may* be necessary to fulfill the primary purposes of" the land reservations. *Id.* at 33a (emphasis added); *see also id.* at 32a ("may require water"); *id.* at 36a ("might be necessary"). Applying that understanding, the court held the federal reserved water rights could be enforced to implement ANILCA both within and *outside* federal reservations, at least as to "'immediately adjacent" waters. *Id.* at 56a.

The court also affirmed the Secretaries' decision to exclude "waters upstream and downstream from those reservations." *Id.* Here, by contrast, the court stressed that "none" of the reservations ANILCA established "listed [subsistence] use as their primary purpose and most did not list subsistence use among their purposes at all." *Id.* at 48a. Indeed, "human use for subsistence on most federal reservations in Alaska is a servitude imposed as a *limitation* on federal control, rather than a specified purpose for which the federal reservation was established." *Id.* (emphasis added); *see also id.* at 51a. The court also held that "it is untenable" that "upstream and downstream waters are *necessarily* included in the priority granted to subsistence uses on those reservations." *Id.* at 54a.

The Ninth Circuit concluded that the Secretaries had reasonably "applied *Katie John I* and the federal reserved water rights doctrine"—while at the same time recognizing that "*Katie John I* was a problematic solution" and that the federal reserved water rights doctrine was "ill-fitted to determining which Alaskan waters are 'public lands' to be managed for rural subsistence priority under ANILCA." *Id.* at 64a.

REASONS FOR GRANTING THE PETITION

The customary requirements for certiorari are readily met. Sup. Ct. R. 10. First, this case is extraordinarily important. The decision below upholds a federal intrusion on Alaska's sovereign right to control fishing and hunting on navigable waters in over half of the State. That authority is fundamental to the State's identity. Second, the Ninth Circuit decision squarely conflicts with this Court's precedents. By holding that it was sufficient that the waters at issue "may" or "might" be necessary without any particularized examination of the purposes of the reservations, the Ninth Circuit directly contravened the limits set by this Court on the scope of the federal reserved water rights doctrine. Moreover, the Ninth Circuit decision conflicts with this Court's decisions requiring courts to insist on a clear statement of congressional intent before altering the traditional balance of power. And third, the Ninth Circuit decision squarely conflicts with the Alaska Supreme Court's decision in *Totemoff*—holding, in no uncertain terms, that ANILCA does not sanction this federal takeover. Review by this Court is plainly warranted.

I. THE QUESTIONS PRESENTED CUT AT THE HEART OF ALASKA'S SOVEREIGNTY

Alaska's authority over its navigable waters strikes at the core of what it means for Alaska to be a state. As this Court has held, "navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1997). "[T]he sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes" has been "considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987); *see Tarrant Reg'l Water Dist. v. Hermann*, 133 S. Ct. 2120, 2132 (2013); *Idaho*, 521 U.S. at 282; *United States v. Alaska*, 521 U.S. 1, 5 (1997).

When the original thirteen Colonies formed the Union, they succeeded to the English Crown's title to the lands under the navigable waters within their boundaries. *Shively v. Bowlby*, 152 U.S. 1, 15-16 (1984). Since then, new States—including Alaska—have been "admitted to the Union on an 'equal footing' with the original 13 colonies" and as sovereigns they "succeed[ed] to the United States' title to the beds of navigable waters within their boundaries." *Alaska*, 521 U.S. at 5. All States enter the Union with title to the lands underlying the navigable waters within their borders and "the right to control and regulate" those navigable waters. *Coyle v. Smith*, 221 U.S. 559, 573 (1911). Congress has confirmed that title in Alaska's case. *Infra* at 26. Authority over navigable waters—including the authority to regulate fishing and hunting along such waters—is, and always has been, a fundamental aspect of state sovereignty. *Utah Div.*, 482 U.S. at 195-96.

This is critical to Alaska. One of the primary reasons Alaskans sought statehood was to gain control of Alaska's fisheries from the federal government, which was allowing overexploitation of salmon by use of fish traps. *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 47 (1962) (*Egan II*); *see also Metlakatla Indian Cmty. v. Egan*, 362 P.2d 901, 905, 915 (Alaska 1961) (*Egan I*), *vacated*, 369 U.S. (1962); App. 42a-43a. Salmon fishing was the "basic industry" of the State and "preservation of [that] natural resource [was] vital to the state." *Egan I*, 362 P.2d at 915. As Alaska's territorial governor testified in favor of statehood, "it is inconceivable to think of a State being created without control of [fisheries]" because "the very existence and perpetuation of that resource ... depends on local control."[2] The Alaska Constitution enshrines the importance of Alaska's natural resources with numerous provisions preserving them for common use. *See McDowell*, 785 P.2d at 15-16 (citing provisions).

The 1999 Rule transfers authority over these resources to the federal government by subjecting waterways in over half of Alaska to ANILCA's rural subsistence priority. This takeover not only includes some of the State's most significant waterways, including the Yukon, Kuskokwim, and Copper Rivers, but is vast in scope. According to the United States Fish and Wildlife Service, "[s]ince 1999, the Service has successfully managed subsistence fisheries in *60 percent* of Alaska's waters," on over "200 million acres"

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[2] Alaska Statehood: Hearings on H.R. 331 and S. 2036 Before the S. Comm. on Interior and Insular Affairs, 81st Cong., 2d Sess. 486 (1950) (remarks of Hon. Gruening, Governor of Alaska).

of land.[3] Given Alaska's size, that amounts to a large portion of waters in the *entire* United States.[4]

And it is not just the staggering *scope* of waters covered that is extraordinary, but the location and type of waters as well. For example, the Ninth Circuit upheld federal reserved water rights in waters *outside* the boundaries of vast federal reservations—even though "there is no shortage of water *on* the ANILCA reservations." App. 41a (emphasis added). *Contra, e.g.*, *Potlatch Corp. v. United States (In re Srba)*, 12 P.3d 1260, 1267-68 (Idaho 2000) (finding that Congress did not intend to reserve water rights "beyond the boundaries" of the reservation). In addition, the court upheld reserved water rights in tidally influenced waters (river mouths and bays)—even though, as it acknowledged, "federal reserved water rights have never been held to exist in marine waters." App. 39a.

This case also concerns more than the loss of state sovereignty. The Alaskan experience is a testament to the fact that fishing and hunting remain a critical part of the Nation's heritage, as well as major commercial and recreational pursuits. *See* Proclamation No. 7822, 69 Fed. Reg. 59,539 (Sept. 24, 2004) (President Bush); Proclamation No. 5474, 51 Fed. Reg. 17,313 (May 12, 1986) (President Reagan). Alaskans—who sought statehood to secure the authority to protect Alaska's fisheries—also deeply appreciate the importance of

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[3] *See* U.S. Fish & Wildlife Servs., *FY 2007 Budget Justification* at 303, *available at* http://www.fws.gov/budget/2007/FY%202007%20GB/11.03%20FWMA.pdf (last visited Nov. 4, 2013) (emphasis added).

[4] *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2012* at 223 (2012), *available at* http://www.census.gov/prod/2011pubs/12statab/geo.pdf.

conserving fish and game, and some of the State's most prized fish and wildlife inhabit and depend on its navigable waters. To Alaska, in particular, being deprived of authority to control fish and wildlife management and fishing and hunting along its own navigable waters is a loss of incalculable measure.

II. THE NINTH CIRCUIT DECISION DIRECTLY CONTRAVENES THIS COURT'S PRECEDENT ON THE FEDERAL RESERVED WATER RIGHTS DOCTRINE IN DEROGATION OF STATE SOVEREIGNTY

Up to this point, the federal reserved water rights doctrine has been invoked in narrow circumstances, where it was "impossible to believe" that Congress did not intend to set aside water when it created a federal land reservation because such water was necessary to achieve the primary purpose of the reservation. *Arizona v. California*, 373 U.S. 546, 599 (1963). The Ninth Circuit decision below overrides those important limits and transforms the doctrine into a blunt instrument for seizing federal control over waters to which States hold title under the equal footing doctrine and the Submerged Lands Act—in clear conflict with this Court's and state supreme courts' precedents.

A. This Court's Precedent Carefully Limits The Federal Reserved Rights Doctrine

In general, Congress defers to state allocations of water use rights. *See United States v. New Mexico*, 438 U.S. 696, 701 (1978). The federal reserved water rights doctrine is a narrow exception to that rule, in which this Court has inferred a congressional intent to reserve water use rights where Congress sets aside

land for a federal purpose and that purpose would be "entirely defeated" without such water. *Id.* at 700.

The doctrine originated in cases involving Indian reservations in the desert. In *Winters v. United States*, the Court interpreted the agreement creating the Fort Belknap Indian Reservation to include a right for the Indians to divert certain amounts of water from the river bordering the reservation for irrigation purposes. 207 U.S. 564, 575-76 (1907). The Court held that the United States intended to reserve rights to use the water because the purpose of the reservation was to establish a "pastoral and civilized" settlement for the Indian residents, but the "lands were arid and, without irrigation, were practically valueless." *Id.* at 576.

In *Arizona v. California*, the Court held that when the United States created certain Indian reservations in Arizona, California, and Nevada, "it reserved not only land but also the use of enough water from the Colorado [River] to irrigate the irrigable portions of the reserved lands." 373 U.S. at 596. As in *Winters*, the reserved lands were arid, so it was "impossible to believe" that Congress did not know that "water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Id.* at 598-99. Applying *Winters*, the Court agreed that the United States intended to reserve "waters without which their lands would have been useless," and held that the quantity of water intended to be reserved was enough to satisfy the "needs" of the Indian reservations. *Id.* at 600.

In *Cappaert v. United States*, the Court held that Congress's reservation of Devil's Hole—a limestone cavern in Nevada—implicitly reserved rights to unappropriated waters to maintain a pool at the bottom

of the hole that was home to a unique species of fish (pupfish). 426 U.S. 128, 136 (1976). The Court held that whether an inference to reserve unappropriated water can be made depends on whether "the previously unappropriated waters are *necessary* to accomplish the purposes for which the reservation was created." *Id.* at 139 (emphasis added) (citing *Arizona* and *Winters*). Because the law setting aside Devil's Hole expressly reserved unappropriated water to maintain the pool, provided that the "'pool . . . should be given special protection,'" and specifically noted the unique pupfish that resided in the pool, which was of "'outstanding scientific importance,'" the Court held that this requirement was met. *Id.* at 140-41 (citation omitted). The Court stressed, however, that the reserved water rights doctrine "reserves only that amount of water *necessary* to fulfill the purpose of the reservation, *no more*." *Id.* at 141 (emphasis added) (citing *Arizona*).

And, in *New Mexico*, the Court held that the United States had not implicitly reserved unappropriated water from the Rio Mimbres river when it reserved the Gila National Forest in New Mexico. 438 U.S. at 697-98. The Court reiterated the key limits of the doctrine. First, "the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" *Id.* at 700 (quoting *Cappaert*). Second, "[e]ach time this Court has applied" the doctrine, "it has carefully examined both the asserted water right and the specific purposes for which the land was reserved," and applied the doctrine only when "without the water the purposes of the reservation would be *entirely defeated*." *Id.* (emphasis added).

By contrast, the Court added, "[w]here water is only valuable for a secondary use of the reservation," water rights are not implicitly reserved. *Id.* at 702. The "careful examination" is necessary for two reasons: (1) "the reservation is implied, rather than expressed," and (2) historically Congress has "almost invariably deferred to state [water] law." *Id.* at 701-02. Undertaking that examination, the Court determined that Congress reserved the national forests "'[to] conserve the water flows, and to furnish a continuous supply of timber for the people,'" and thus did *not* intend to reserve water for aesthetic, environmental, recreational, wildlife, or stockwatering purposes. *Id.* at 704-17 (emphasis added) (citation omitted). The Court specifically rejected the argument that such secondary purposes were sufficient. *Id.* at 715.

In sum, because the federal reserved water rights doctrine is "built on implication and is an exception to Congress' explicit deference to state water law in other areas," *id.*, it is strictly limited to instances when an amount of water is (1) "necessary" to achieve (2) the "primary purpose" of the federal land reservation. "Each time" the Court has applied the doctrine, it has "carefully examined" those criteria. *Id.* at 700.

B. The Ninth Circuit Decision Clearly Conflicts With This Court's Decisions

The 1999 Rule and the decision below vastly expand the federal reserved water rights doctrine, in direct conflict with this Court's precedent.

1. In upholding the 1999 Rule, the Ninth Circuit flouted the requirement that courts must "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved." *Id.*

The 1999 Rule claims reserved water rights in broad categories of waters—without specifically discussing the purposes of any of the reservations that purportedly reserved these rights. The State challenged the 1999 Rule on the ground that the Secretaries "failed to state the purpose of the land reservation and the amount of water necessary for each reserved unit." App. 29a. Yet, the Ninth Circuit held that "these steps were not necessary" on the ground the Secretaries were merely determining which waters constitute "public lands" under ANILCA, and not actually determining whether specific amounts of water were necessary for the federal purpose. *Id.* That fiction does not withstand serious scrutiny: a "careful examination" is necessary to determine *whether* federal reserved water rights exist, not merely the specific *quantity* of water they guarantee.

According to the court, a "more particularized approach" could not have been completed "'promptly.'" *Id.* at 25a-26a. But expediency cannot justify disregarding the "careful examination" required by this Court's precedents. Carefully identifying the "purpose" of the reservation—and the claimed water rights—is critical to determining whether it is possible to infer that Congress actually intended to reserve those rights. Otherwise, the doctrine may be applied by courts simply as a blunt instrument for transferring water rights from the States to the federal government—regardless of Congress's intent. Consistent with the targeted inquiry required by this Court, it also was error for the Secretaries to make an omnibus determination of federal reserved water rights by way of a global rulemaking, as opposed to an adjudication in which the individualized determinations

required by the doctrine could be attempted. *See* Alaska CA9 Opening Br. 22-37, ECF No. 15.

2. The Ninth Circuit also violated the requirement that the waters must be "necessary" to serve the purpose of the reservation, and instead upheld the Rule on the ground that the waters "may" or "might" be necessary. *Id.* at 35a-36a. The "necessity" requirement is the linchpin of the doctrine because it is the basis for the inference that Congress intended to reserve the water. As this Court explained in *New Mexico*, "[w]here water is only *valuable*"—rather than necessary—for the purpose of the reservation, the "contrary inference" arises that "Congress intended, consistent with its other views" deferring to State water law, "that the United States would acquire water in the same manner as any other public or private appropriator." 438 U.S. at 702 (emphasis added). Necessity is a critical limit on the doctrine—ensuring that courts do not engage in such *inferential* transfers of water rights unless it is "impossible to believe" that Congress did not intend to transfer water rights. *Arizona*, 373 U.S. at 598-99.

All of this Court's cases have emphasized the necessity requirement. In *Winters*, the Court held that the requirement was met because the land was "valueless" without the irrigation waters. 207 U.S. at 576. In *Arizona*, the Court held that irrigation water was "essential to the life of the Indian people" living on the reservation. 373 U.S. at 599. In *Cappaert*, the Court stressed that the doctrine reserved only waters "necessary" to meet the "minimal need" of the land reservation, as defined by the proclamation reserving Devil's Hole. 426 U.S. at 139-41. And in *New Mexico*, the court held that water rights are reserved only

when "the purposes of the reservation would be entirely defeated" without the water. 438 U.S. at 700.

In stark contrast, the Ninth Circuit held that the Secretaries "reasonably concluded" that the navigable waters adjacent to the reservations listed in the 1999 Rules "*may* be necessary to fulfill the primary purposes of" the land reservations. App. 33a (emphasis added); *see also id.* ("may require water"); *id.* at 32a ("may become necessary"); *id.* at 36a ("might be necessary"). The court explicitly included waters that were within the "potential scope" of the doctrine based on "hypothetical[s]." *Id.* at 34a. And the court even admitted that the State was free to argue in future proceedings that "*no* amount of water from a particular identified source is necessary to fulfill the primary purposes of the reservation" because the 1999 Rule did not resolve the issue. *Id.* at 25a (emphasis added). If that were not clear enough, the court ultimately confessed: "In this case . . . no one is claiming that the water itself must be reserved to fulfill the purposes of the ANILCA reservations." *Id.* at 50a. Indeed, the Ninth Circuit agreed with the Secretaries that "there is no shortage of waters to serve the primary purposes of the reservations." *Id.* at 55a n.155.

Not only did the Ninth Circuit lower the standard—from necessity to *possible* necessity—it deferred to the Secretaries' conclusion under *Chevron* rather than independently evaluating the issue. As even the Ninth Circuit recognized, the federal reserved water rights doctrine is a judicially created doctrine and thus does not fit within the structure of a "typical administrative law case." *Id.* at 28a. This Court has recognized rights under the doctrine only when *it* concluded that the elements were satisfied. The Ninth Circuit's reliance

on *Chevron* deference principles in applying the doctrine is itself grounds for further review.

In sum, the Ninth Circuit may have put it best when it observed that, "until now, the federal reserved water rights doctrine has operated in the context of the United States enforcing its right to the amount of water [1] necessary to fulfill [2] the purpose of a particular reservation." *Id.* at 22a. Until now.[5]

C. The Ninth Circuit's Expansion Of The Doctrine Invades State Sovereignty

The Ninth Circuit's expansion of the federal reserved water rights doctrine also conflicts with this Court's demand that courts respect the traditional balance of federal and state authority, absent clear evidence that Congress intended to upset that balance. Federal reserved water rights convey only a usufructuary right to *use* a specific quantity of water. *Infra* at 27-28. But here, the Ninth Circuit—in upholding the 1999 Rule—applied the doctrine to transfer the sovereign authority to regulate the waters

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[5] Because the Ninth Circuit failed to enforce the limits established by this Court for inferred federal reserved water rights, its decision below also conflicts with numerous state supreme court decisions that *have* properly recognized and enforced those limits. *See, e.g.*, *United States v. State (In re Srba Case No. 39576)*, 23 P.3d 117, 127 (Idaho 2001) ("The primary purpose of the Migratory Bird Conservation Act will not be defeated without a federal reserved water right."); *Avondale Irrigation Dist. v. North Idaho Props., Inc.*, 577 P.2d 9, 17 (Idaho 1978) (supplemental purpose does not count); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 289 P.3d 936, 941-42 (Ariz. 2012) (listing elements of doctrine); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 767 (Mont. 1985) (same); *United States v. City & Cnty. of Denver*, 656 P.2d 1, 20 (Colo. 1982) (same).

from the State to the United States. Such a drastic "alter[ation] [in] the usual constitutional balance between the States and the Federal Government" can occur only when Congress "make[s] its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (citation and internal quotation marks omitted). At a minimum, the clear statement rule mandates strict adherence to the requirements of the federal reserved water rights doctrine, given the interests at stake.

III. THE NINTH CIRCUIT DECISION RESTS ON THE FLAWED PREMISE THAT ANILCA MAY BE INTERPRETED TO REACH NAVIGABLE WATERS AT ALL

The decision below is grounded on the Ninth Circuit's earlier ruling in *Katie John I* that the federal reserved water rights doctrine establishes that navigable waters may qualify as "public lands" to begin with. In this case, the Ninth Circuit began its analysis by describing the federal reserved water rights doctrine; noting that the doctrine was a "particularly poor mechanism" for determining the scope of ANILCA's rural subsistence priority; and explaining that "a majority of the en banc court agreed for diverging reasons that *Katie John I* was incorrectly decided." App. 23a. But because the *Katie John I* framework "remain[ed] controlling law," the Ninth Circuit was bound to "attempt to apply it" below, *id.*, even though that framework has been rejected by majority of judges on the en banc Ninth Circuit panel and squarely conflicts with this Court's decisions. The Ninth Circuit's reliance on that framework presents an additional ground for granting certiorari.

A. The Ninth Circuit's Framework Conflicts With This Court's Precedents

As Judge Kozinski observed in *Katie John II*, "[w]hen Congress takes away important incidents of a state's sovereignty, it must speak plainly, not only to show that it has carefully considered the issue, but also to ensure political accountability." 247 F.3d at 1045 (joined by O'Scannlian and Rymer, JJ., dissenting). *See Gregory*, 501 U.S. at 460 ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute*." (emphasis added) (citation and internal quotation marks omitted)). Courts must "be certain of Congress' intent before finding that federal law overrides this balance." *Id.* (citation and internal quotation marks omitted). This rule is "an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461; *see also Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543-44 (2002).

Congress has confirmed that Alaska took title to navigable waters within its borders at statehood, including navigable waters within federal lands. *See* Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958); Submerged Lands Act, 43 U.S.C. § 1311(a); *Alaska v. United States*, 545 U.S. 75, 78 (2005). As this Court recently reiterated, "'[a] court deciding a question of title to [a] bed of navigable water [within a State's boundaries] must . . . begin with a strong presumption against defeat of a State's title." *Tarrant*, 133 S. Ct. at 2132 (alterations in original) (citation omitted); *see also Alaska*, 545 U.S. at 78-79.

That settled principle applies with full force to navigable waters in Alaska. *Cf. Hynes v. Grimes Packing Co.*, 337 U.S. 86, 105 (1949) ("It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate the Alaska fisheries permanently from public control.").

The Ninth Circuit's interpretation of ANILCA plainly violates the clear statement requirement. As the Ninth Circuit candidly recognized, ANILCA "makes no reference to navigable waters," much less gives "clear direction" about "*which* navigable waters are public lands." *Katie John I*, 72 F.3d at 702 (emphasis added). Nor does the definition of "public lands" mention reserved water rights. *See* 16 U.S.C. § 3102(1)-(3). In fact, the statutory definition of "public lands" on its face *excludes* navigable waters because it requires federal "title." *Id.* § 3102(2). *Alaska* holds title to the lands underlying the navigable waters in its borders. *Supra* at 14. And the federal reserved water rights doctrine does not confer title—it establishes a non-possessory *use* right. *See Totemoff*, 905 P.2d at 965 ("Reserved water rights give the federal government the right to prevent others from appropriating water or to use a certain volume of water, not to possess a body of water."); *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1379-81 (Colo. 1982) (federal reserved water rights do not defeat private owners "title to water rights"); *Katie John II*, 247 F.3d at 1047 (Kozinski, J., dissenting) ("a usufructuary right does not give the United States *title* to the waters or

the lands beneath those waters" (citing cases)).[6]

The absence of a clear statement to deprive Alaska of control over its navigable waters ends the matter under this Court's precedent. But Alaska's interpretation is superior in any event, particularly given the definition's reference to "title." Even the Ninth Circuit recognized that excluding navigable waters—to which the State holds title—"would give meaning to the term 'title' in the definition of the phrase 'public lands.'" *Katie John I*, 72 F.3d at 704. But, as Judge Kozinski explained, although Alaska has offered the "most plausible" interpretation of ANILCA, all that matters is that it is "*a* plausible interpretation." 247 F.3d at 1047 (dissenting). Under this Court's decisions, "the existence of two plausible interpretations, one of which removes an incident of state sovereignty and the other of which does not, requires [a court] to adopt the interpretation that preserves the state's sovereignty." *Id.* (citing cases).

The Ninth Circuit also erred in invoking *Chevron* deference in construing ANILCA—to *sub silentio* alter the balance of state and federal power in this important sphere. The cases summarized above require that the sovereignty stripping interpretation be "'unmistakably clear *in the language of the statute*.'" *Gregory*, 501 U.S. at 460 (emphasis added) (citation omitted). By definition, however, *Chevron* deference only is possible

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[6] Furthermore, ANILCA explicitly exempts from the definition of "public lands" all "lands . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). As the Alaska Supreme Court held in *Totemoff*, that exemption necessarily includes navigable waters because the Submerged Lands Act grants Alaska title to the land underlying its navigable waters. 905 P.2d at 964-65.

if the language of the statute is *not* "unmistakably clear." *See Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng's*, 531 U.S. 159, 174 (2001). In *Solid Waste Agency*, the Court rejected application of *Chevron* deference and applied the clear statement rule to a federal regulation that claimed federal jurisdiction over waters that "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

The Ninth Circuit's reliance on *Chevron* in this context conflicts with the approach taken by other circuits in similar circumstances. *See, e.g., City of Joliet v. New West, L.P.*, 562 F.3d 830, 836 (7th Cir. 2009) (applying clear statement rule rather than deferring to agency's interpretation of statute), *cert. denied*, 559 U.S. 936 (2010); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) (applying canon of constitutional avoidance rather than deferring to agency); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) (same), *cert. denied*, 530 U.S. 1213 (2000). Not to mention, the Ninth Circuit's reliance on *Chevron* also fails to account for the fact that the Executive flipped its position on whether ANILCA reaches navigable waters. *See FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009).

This case underscores why the Court's precedent in this area is so important. If the Ninth Circuit had followed this Court's decisions, it would have concluded that ANILCA's definition of "public lands" did not extend to navigable waters above lands to which the State took title at statehood. End of story—absent further action by Congress itself. Instead, the Ninth Circuit disregarded those decisions, interpreted ANILCA to intrude on Alaska's sovereign authority to

regulate its navigable waters under the "ill-fitted" reserved water rights doctrine, and spawned a novel regulatory regime that even the Ninth Circuit below recognized is "problematic." App. 64a.

B. Certiorari Is Warranted To Review The Ninth Circuit's Framework

Certiorari is warranted to review this foundational element of the decision below as well. The framework on which the Ninth Circuit decision in this case rests not only conflicts with this Court's well-settled precedents, but also with a decision of the Alaska Supreme Court on this precise issue. In *Totemoff*, the Alaska Supreme Court held that "neither the navigational servitude nor reserved water rights bring navigable waters within ANILCA's definition of 'public lands'" and thus the "federal government has no authority ... to regulate hunting and fishing in Alaska's navigable waters." 905 P.2d at 964.

Totemoff arose when a subsistence hunter, who was in a boat in navigable waters, shot a deer on federal land with the aid of a spotlight. *Id.* at 960-61. The state prosecuted the hunter for violating a state law that prohibited hunting with the aid of an artificial light, and the hunter defended on the ground that ANILCA preempted the state law. *Id.* The Alaska Supreme Court held that ANILCA did not apply because the hunter was in navigable waters, rejecting the Ninth Circuit's holding and reasoning in *Katie John I*. *Id.* at 963. The Alaska Supreme Court followed *Gregory*'s clear statement rule and rejected the Ninth Circuit's use of *Chevron* deference. *Id.* at 966-67.

The United States has argued that *Totemoff*'s ANILCA holding is dicta because the court also held there was no conflict between the state and federal

hunting laws. No. 95-1084 Opp. 17. But the Alaska Supreme Court explicitly stated: "We *hold* that navigable waters are generally not 'public lands' under ANILCA." 905 P.2d at 968 (emphasis added). And when a "decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). In any event, any doubt about *Totemoff*'s force when this Court denied certiorari in *Katie John I* in 1996, has since been dispelled. The Alaska Supreme Court has reiterated that it "held" in *Totemoff* "that ANILCA does not apply to navigable waters overlying [submerged lands] . . . owned by the State," *James v. State*, 950 P.2d 1130, 1132 n.5 (Alaska 1997), and lower courts in Alaska have repeatedly applied that holding. *See, e.g.*, *Charles v. State*, 232 P.3d 739, 741 (Alaska Ct. App. 2010); *Jones v. State*, 936 P.2d 1263, 1267 (Alaska Ct. App. 1997); *Miyasoto v. State*, No. A-5486, 1996 WL 33686451 (Alaska Ct. App. Mar. 13, 1996).

Tometoff illustrates the practical consequences of this conflict. Under current law, in state court, ANILCA's rural subsistence priority does not apply to navigable waters, but in federal court, it does. That conflict is significant because Alaska, which has a unique vantage point from which to monitor the situation, has different views, different policies, and different laws and regulations, than federal regulators in Washington, D.C., on the best way to manage subsistence hunting and fishing—in Alaska. And as discussed, the 1999 Rule extensively regulates subsistence fishing and hunting—down to the times it is allowed, equipment that may be used, number of fish and game that may be taken, and purpose for which they may be taken, with the additional authority to

shut down commercial or sport uses. *Supra* at 10.

For example, in 2011 the U.S. Fish and Wildlife Service superseded Alaska management of salmon in the Kuskokwim River by closing lower Kuskokwim waters to all users other than federally-qualified subsistence users. The Service did so over the unanimous objections of the Kuskokwim River Salmon Management Working Group, organized to provide a forum to achieve consensus on in-season management decisions. The group's thirteen members include Alaska Native elders, subsistence fishermen, sport fishers, commercial fishers, processors, and members of Federal Subsistence Regional Advisory Committees. *See* Alice M. Bailey & Holly C. Carroll, Alaska Dep't of Fish & Game, Fishery Management Report No. 12-36, *Activities of the Kuskokwim River Management Working Group, 2011* at 7-8, 11-12, 25 (Oct. 2012), *available at* http://www.adfg.alaska.gov/fedaidpdfs/FMR12-36.pdf. The fact that the 1999 Rule asserts authority to regulate, and shut down, fishing and hunting for *commercial and sport* uses—when federal regulators claim that restrictions are needed to protect "subsistence" uses—underscores the breadth of the sovereign authority on which the Rule intrudes.

Moreover, the importance of this question extends beyond *Alaska's* own sovereign interests. The Ninth Circuit's interpretation of "public lands" potentially impacts federal reservations throughout the country because the definition of "land" in ANILCA as including "lands, waters, and interests therein" is used in numerous other federal statutes that establish and authorize federal officials to acquire property for parks

and conservation units.[7] The Ninth Circuit's novel interpretation that the federal reserved water rights doctrine expands this definition to include a state's own navigable waters could disrupt the federal-state balance of power throughout the Circuit—the largest geographic Circuit in the Nation, by far. And the importance of that issue is only magnified by the increasing importance of water rights in the West.[8]

* * * * *

Whether viewed from the standpoint of the Ninth Circuit's unprecedented expansion of the federal reserved water rights doctrine or its threshold disregard for *Gregory*'s clear-statement rule, the Ninth Circuit has contravened bedrock principles established by this Court to preserve the constitutional balance between the States and the federal government and thereby transferred control from Alaska to the United States of fishing and hunting in over *half* of the State. That ruling cries out for this Court's review.

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[7] *See*, *e.g.*, 16 U.S.C. §§ 45f(b)(1), 90, 90b(a), 121, 228b(a), 230a(b), 230g(a), 272, 273(a), 398d(a), 410j, 410o, 410p, 410bb(b)(1), 410ff-1(a), 410gg, 410gg-1, 410ii-3(a), 410jj-3(c), 410mm-2(b), 410qq-2(a), 410rr-2, 410rr-7(c), 459d-3(a), 459e-1(a), 459h-1(a), 459i-1, 460*l*-8(a), 460*l*-9(a), 460*l*-10a, 460*l*-10b, 460m-3, 460m-9(a), 460m-16(a), 460p-2(a), 460q-2(a), 460r-2(a), 460v-7, 460z-6(a), 460z-13, 460aa-12, 460bb-3(a), 460cc-1(a), 460ee(c)(1), 460kk(c)(1), 460ww(b).

[8] Like the court below, Alaska was bound by *Katie John I* below. So Alaska—which had already challenged *Katie John I* twice (once in *Katie John I* and once in securing en banc review in *Katie John II*)—did not challenge *Katie John I* below. Nevertheless, because the Ninth Circuit plainly relied on *Katie John I* in framing the analysis and repeatedly questioned its workability, this Court may consider Alaska's challenge here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL C. GERAGHTY
Attorney General
MICHAEL G. MITCHELL
Senior Assistant Attorney General
STATE OF ALASKA
Department of Law
1031 W. 4th Avenue
Suite 2000
Anchorage, AK 99501

GREGORY G. GARRE
Counsel of Record
KATHERINE I. TWOMEY
KATYA S. CRONIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

NOVEMBER 4, 2013

Counsel for Petitioner

APPENDIX

APPENDIX TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Katie JOHN, Charles Erhart; Alaska Inter-Tribal Council; Native Village of Tanana; State of Alaska,
Plaintiffs,

and

Alaska Fish and Wildlife Conservation Fund; Alaska Fish and Wildlife Federation and Outdoor Council; John Conrad; Michael Tinker,
Plaintiffs-Intervenors-Appellants,

v.

UNITED STATES of America; Mike Johanns; Sally Jewell,* Secretary of the Interior,
Defendants-Appellees,

Alaska Federation of Natives,
Defendant-Intervenor-Appellee.

Katie John; Charles Erhart; Alaska Inter-Tribal Council; Native Village of Tanana,
Plaintiffs,

Alaska Fish and Wildlife Conservation Fund; Alaska Fish and Wildlife Federation and Outdoor Council; John Conrad; Michael Tinker,
Plaintiffs-Intervenors,

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* Sally Jewell is substituted for her predecessor, Kenneth Lee Salazar, as Secretary of the Interior. Fed. R.App. P. 43(c)(2).

and

State of Alaska,
Plaintiff-Appellant,

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Alaska Federation of Natives,
Defendant-Intervenor-Appellee.

No. 09-36122, 09-36125, 09-36127

Argued and Submitted July 25, 2011,
Filed July 5, 2013

720 F.3d 1214

Before: WILLIAM C. CANBY, JR., ANDREW J. KLEINFELD, and CONSUELO M. CALLAHAN, Circuit Judges.**

OPINION

KLEINFELD, Senior Circuit Judge:

These consolidated appeals concern the 1999 Final Rules ("1999 Rules") promulgated by the Secretary of the Interior and the Secretary of Agriculture ("Secretaries") to implement part of the Alaska National Interest Lands Conservation Act ("ANILCA").[1] The 1999 Rules identify which navigable waters within Alaska constitute "public lands" under Title VIII of ANILCA, which provides a priority to rural Alaska residents for subsistence hunting and fishing on such lands. Plaintiffs-Appellants Katie John, et al., argue that the 1999 Rules sweep too narrowly, in that they fail to designate certain navigable waterways as "public lands" subject

** Judge Betty B. Fletcher was a member of the panel but passed away after oral argument. Judge Canby was drawn to replace her. He has read the briefs, reviewed the record, and listened to the tape of oral argument held on July 25, 2011.

1 16 U.S.C. §§ 3101-3233, Pub.L. 96-487, 94 Stat. 2371 (1980).

to the federal rural subsistence priority. Plaintiff-Appellant the State of Alaska argues that the 1999 Rules sweep too broadly, in that they include as "public lands" subject to the priority waters in which no federal interest exists. The district court upheld the 1999 Rules against both sets of challenges. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

BACKGROUND

A. Legal and factual background

1. ANILCA and the rural subsistence priority

Congress enacted ANILCA to preserve and protect "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" and landscapes by creating "conservation system units," such as national parks, preserves, and other federal reservations.[2] Congress also sought to protect the "subsistence way of life for rural residents" and the resources upon which they depend, as well as to obviate the need for future legislation regarding environmental conservation and subsistence uses.[3]

To protect the "subsistence way of life for rural residents," Title VIII of ANILCA provides that, "[e]xcept 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."[4] "Subsistence uses"

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[2] 16 U.S.C. § 3101(a)-(b); *see also id.* § 3102(4) (defining "conservation system units").

[3] *Id.* § 3101(c)-(d).

[4] *Id.* § 3114.

are defined as "customary and traditional uses by *rural* Alaska residents of wild, renewable resources . . . ."[5] This federal subsistence priority for rural Alaska residents therefore applies to all "public lands," which ANILCA defines as "land situated in Alaska which, after December 2, 1980, are Federal lands," except, as pertinent here, "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," and "land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished."[6] Federal lands are "lands the title to which is in the United States after December 2, 1980," and "land" is "lands, waters, and interests therein."[7] ANILCA gives rural subsistence uses "priority over the taking on such lands of fish and wildlife for other purposes."[8] When 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,"

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5 *Id.* § 3113 (emphasis added).

6 *Id.* § 3102(3).

7 *Id.* § 3102(1)-(2).

8 *Id.* § 3114.

implementation of such restrictions is subject to a set of criteria.[9]

ANILCA charges the Secretaries with implementing its rural subsistence priority in Alaska.[10] However, ANILCA states that the Secretaries should not take action to implement Title VIII if Alaska "enacts and implements laws of general applicability which are consistent with" ANILCA's rural subsistence priority requirements.[11] In other words, ANILCA expresses a preference for state management of the rural subsistence priority on "public lands," but provides that the United States may step in where the State fails to act.[12]

Persons aggrieved by an alleged failure to enforce the rural subsistence priority are authorized to "file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority."[13]

2. The State's efforts to protect subsistence uses

Alaska had addressed subsistence uses before ANILCA's passage, and had taken steps to assume the management responsibility that ANILCA contemplated. A 1978 state law, passed in anticipation of ANILCA becoming law, established "that subsistence hunting and fishing had priority over other

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[9] *Id.*

[10] *Id.* § 3115.

[11] *Id.* § 3115(d).

[12] *See id.* § 3202(a).

[13] *Id.* § 3117.

uses of fish and game stocks."[14] The statute identified two tiers of subsistence users based on customary and direct dependence, local residency, and availability of alternative resources.[15] The state Joint Boards of Fish and Game issued regulations linking subsistence fishing to particular geographic communities,[16] and eventually introducing a rural element to the subsistence preference.[17] The regulations initially treated towns with fewer than 7,000 people as "rural."[18] In 1982, the Secretary of the Interior certified Alaska to manage subsistence hunting and fishing on public lands, as ANILCA and the Alaska legislature had intended.

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[14] *McDowell v. State*, 785 P.2d 1, 1-2 (Alaska 1989) (citing Ch. 151 § 4 SLA 1978).

[15] *Id.* at 2.

[16] 5 Alaska Admin. Code § 01.597 (repealed 1985), *reprinted in Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168, 172 n. 8 (Alaska 1985); *see also Bobby v. Alaska*, 718 F.Supp. 764, 767 (D.Alaska 1989).

[17] 5 Alaska Admin. Code § 99.010 (1982), *reprinted in Bobby*, 718 F.Supp. at 794-95.

[18] *See* 5 Alaska Admin. Code § 99.020 (1982) ("In this chapter, 'rural' means outside the road connected area of a borough, municipality, or other community with a population of 7,000 or more, as determined by the Alaska Department of Community and regional Affairs."), *reprinted in Bobby*, 718 F.Supp. at 795; *see also Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir.1988), *cert. denied*, 491 U.S. 905, 109 S.Ct. 3187, 105 L.Ed.2d 695 (1989).

However, in 1985, the Alaska Supreme Court held in *Madison*[19] that the regulations linking subsistence fishing to particular geographic communities were inconsistent with Alaska's subsistence statute. The court reasoned that the statutory preference was for subsistence users, whether or not they were rural.[20] Many Alaskans depend heavily on wild fish and game for their protein, whether they live in isolation or in villages, small towns, or cities. The Secretary of the Interior notified the Governor of Alaska that *Madison's* holding "raised questions as to the continuing eligibility of the State to manage subsistence on public lands in Alaska," and that Alaska had until June 1, 1986 to "revise its subsistence program to bring it back into compliance" with ANILCA's rural subsistence priority requirement.[21]

In response, the Alaska legislature amended the state subsistence statute to expressly limit the definition of subsistence activities to those "'domiciled in a rural area of the state.'"[22] The amended statute defined a "rural area" as "'a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family

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[19] *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985).

[20] *Madison*, 696 P.2d at 177-78.

[21] Letter from Bill Horn, Assistant Secretary, Fish and Wildlife and Parks, Office of the Secretary, United States Department of the Interior, to Bill Sheffield, Governor of Alaska (Sept. 23, 1985), *reprinted in Bobby*, 718 F.Supp. at 813-15.

[22] *McDowell*, 785 P.2d at 1 (quoting Ch. 52 SLA 1986); *see also Kenaitze*, 860 F.2d at 314.

consumption is a principal characteristic of the economy of the community or area.'"[23]

Under the amended statute, the State did not treat the Kenai peninsula as rural because it had Sears and Safeway stores and shopping malls. That is, Alaskans tended to use the word "rural" to refer to areas off the road system, rather than sparsely populated agricultural areas, there being few roads and little agriculture in Alaska.[24] Accordingly, Alaska law had provided a subsistence priority to people who largely depended on hunting and fishing for their living. However, in *Kenaitze Indian Tribe*,[25] the Ninth Circuit reasoned that the Kenai peninsula had "a long way to go before it approaches anything resembling an urban community."[26] *Kenaitze* held that the state's definition of "rural"—economies dominated by subsistence fishing and hunting—"would exclude practically all areas of the United States that *we* think of as rural, including virtually the entirety of such farming and ranching states as Iowa and Wyoming," and was therefore invalid.[27] "Rural," *Kenaitze* held,

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[23] *McDowell*, 785 P.2d at 2 (quoting Alaska Stat. § 16.05.940(25)).

[24] *See* 5 Alaska Admin. Code § 99.020 (1982) ("In this chapter, 'rural' means *outside the road connected area* of a borough, municipality, or other community with a population of 7,000 or more, as determined by the Alaska Department of Community and regional Affairs.") (emphasis added).

[25] *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir.1988).

[26] *Id.* at 314 n. 2.

[27] *Id.* at 316 (emphasis added).

meant something like communities smaller than 2,500 people, or towns or cities outside urban areas with populations not exceeding certain limits.[28] Thus, under *Kenaitze*, ANILCA's priority applied to people in small communities regardless of whether they depended on hunting and fishing.

In 1989, several months after *Kenaitze* came down, the Alaska Supreme Court concluded in *McDowell*[29] that Chapter 52 SLA 1986, the rural subsistence priority chapter put into the Alaska Code to conform to ANILCA, was in tension with provisions of the Alaska Constitution providing for common use of fish and game and equality of access among those similarly situated.[30] Though a subsistence preference based on individual characteristics would satisfy the Alaska constitution, the rural-urban distinction was an "extremely crude" means to establish such a preference.[31] That is, many of Alaska's subsistence users lived in what, for Alaska, were "urban" areas, and many people living in what were, under *Kenaitze*, "rural" areas did not extensively rely on subsistence resources.[32] Accordingly, the Alaska Supreme Court held that the rural subsistence priority chapter provided too poor a fit with Alaska subsistence lifestyles to satisfy state constitutional requirements.[33]

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[28] *Id.* at 317.

[29] *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

[30] *Id.* at 9.

[31] *Id.* at 10.

[32] *Id.* at 10-11.

[33] *Id.* at 9.

3. Federal efforts to implement ANILCA's rural subsistence priority, *Katie John I*, and *Katie John II*

Following *McDowell*, the federal government denied the re-certification Alaska needed under ANILCA to manage its own fish and game. Implementation of ANILCA's rural subsistence priority accordingly fell back to the federal government in July 1990. In initial regulations promulgated in 1992 ("1992 Rules"), the Secretaries took the position that "public lands" under Title VIII of ANILCA, or those lands subject to the rural subsistence priority, excluded all navigable waters in Alaska.[34] This position generated several lawsuits, which were consolidated into a single action. During the course of that litigation, the Secretaries changed their position, arguing instead that some navigable waters were "public lands" by virtue of the federal reserved water rights doctrine, and therefore subject to the rural subsistence priority.[35]

The consolidated lawsuits against the 1992 Rules came before us in *Alaska v. Babbitt* ("*Katie John I*").[36] We concluded that, because Congress included subsistence fishing in Title VIII, ANILCA applies to *some* of Alaska's navigable waters.[37] We observed

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[34] *See* Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, 57 Fed.Reg. 22,940, 22,942 (May 29, 1992) (codified at 36 C.F.R. pt. 242 and 50 C.F.R. pt. 100).

[35] *Alaska v. Babbitt*, 72 F.3d 698, 701 (9th Cir.1995), *cert. denied*, 517 U.S. 1187, 116 S.Ct. 1672, 134 L.Ed.2d 776 (1996).

[36] *Babbitt*, 72 F.3d 698.

[37] *Id.* at 702.

that Title VIII was unclear as to which navigable waters constitute "public lands," but rejected the Katie John plaintiffs' argument, with which the district court had agreed, that "public lands" includes "*all* navigable waters" in Alaska.[38] We explained that the federal navigational servitude is a "concept of power, not property."[39] Because it did not give the United States any property interest, the navigational servitude did not establish "public lands," the *sine qua non* for application of ANILCA's rural subsistence priority.[40] Our task, therefore, was to "decide whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine" was "based on a permissible construction of the statute."[41]

We concluded that it was. We explained that the United States, in "reserv[ing] vast parcels of land in Alaska for federal purposes through a myriad of statutes,"[42]

> has also implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations. By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to

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[38] *Id.* at 703-04 (emphasis added).

[39] *Id.* at 702 (quotation marks omitted).

[40] *Id.* at 702-03.

[41] *Id.* at 702.

[42] *Id.* at 703.

> subsistence management under ANILCA include certain navigable waters.[43]

We held that the "federal agencies that administer the subsistence priority are responsible for identifying those waters."[44] We recognized that this directive placed an "extraordinary administrative burden" on the Secretaries, that ANILCA contemplated a robust role for the State in managing ANILCA's rural subsistence priority, and that "[o]nly legislative action by Alaska or Congress will truly resolve the problem" of how best to manage ANILCA's rural subsistence priority vis-à-vis Alaskan waters.[45]

Following *Katie John I*, the Secretaries issued the 1999 Rules, which "amend[ed] 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."[46] Rather than listing specific bodies of water that are "public lands" by virtue of the federal reserved water rights doctrine, the 1999 Rules identify "Federal land units in which reserved water

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[43] *Id.*

[44] *Id.* at 700, 704; *see also id.* at 704 (expressing "hope that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management").

[45] *Id.* at 704.

[46] Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, and D, Redefinition to Include Waters Subject to Subsistence Priority, 64 Fed.Reg. 1,276, 1,276 (Jan. 8, 1999) (codified at 36 C.F.R. pt. 242 and 50 C.F.R. pt. 100).

rights exist."[47] The 1999 Rules provide that the Rules apply to "all public lands including all non-navigable waters located on these [land units], on all navigable and non-navigable water within the exterior boundaries of the [land units], and on inland waters adjacent to the exterior boundaries of the [land units]."[48] The 1999 Rules list thirty-four separate "Federal land units" subject to this general rule of applicability.[49] The 1999 Rules also, pursuant to § 906(*o*)(2) of ANILCA,[50] extend rural subsistence priority 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."[51]

In 2000, the district court, which had retained jurisdiction over the consolidated challenges to the 1992 Rules on remand from *Katie John I*, concluded that the action should not serve as the vehicle for challenges to the 1999 Rules. The court issued an order "readopting all of its rulings on the merits," deeming

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[47] *Id.*

[48] *Id.* at 1,286-87.

[49] *Id.* at 1,287. These land units are a mix of ANILCA conservation system units and other federal reservations.

[50] 43 U.S.C. § 1635(*o*)(2); *see infra* 1243-45 (discussing § 906(*o*)(2)).

[51] 64 Fed.Reg. at 1,276.

those rulings final "for all purposes and to all parties," and dismissing the case.

The State of Alaska appealed this final judgment, arguing that the "clear statement doctrine"[52] precluded the determination that any navigable waters in Alaska could constitute "public lands." We granted initial en banc rehearing.[53] In a per curiam opinion, we wrote that "[a] majority of the en banc court has determined that the judgment rendered by the [*Katie John I*] panel, and adopted by the district court, should not be disturbed or altered by the en banc court."[54] In an opinion concurring in the judgment, three judges took the position that the federal reserved water rights doctrine does not limit the scope of ANILCA's rural subsistence priority; rather, because Congress was exercising its authority under the Commerce Clause when it enacted ANILCA, the priority applied to all navigable waters in Alaska.[55] In a dissenting opinion, three judges took the position that ANILCA did not provide the necessary "clear statement"—that Congress sought to take away "important incidents of a state's sovereignty"—to make navigable waters within

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[52] *See, e.g., United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

[53] *See John v. United States*, 247 F.3d 1032 (9th Cir.2001) (en banc) ("*Katie John II*").

[54] *Id.* at 1033.

[55] *Id.* at 1034 (Tallman, J., concurring in the judgment).

Alaska subject to federal control.[56] They also argued that the United States does not have "title" to Alaskan waters or the lands underlying them.[57] For these reasons, they concluded that *no* navigable waters are "public lands" under ANILCA.[58] Since neither of these opinions garnered a majority of votes, *Katie John I* remains controlling.

B. The current litigation

The current litigation includes two consolidated challenges to the 1999 Rules.[59] In the first challenge, Plaintiffs-Appellants Katie John, et al., argue that the 1999 Rules violate ANILCA because they fail to provide the rural subsistence priority for (1) the navigable waters upstream and downstream from the conservation system units created under ANILCA, and (2) waters appurtenant to lands allotted to Alaska Natives under the Alaska Native Allotment Act of 1906. The State of Alaska intervened as a defendant. In the second challenge, the State of Alaska, along with several intervenors, argue, in essence, that the regulations violate ANILCA by designating as "public

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[56] *Id.* at 1045-46 (Kozinski, J., dissenting).

[57] *Id.* at 1046-47 (Kozinski, J., dissenting) (citing 16 U.S.C. § 3102(1)-(3)).

[58] *Id.* at 1048-49 (Kozinski, J., dissenting).

[59] In 2005, the Secretaries published amendments to the 1999 Rules to "revise[] and clarif[y] the jurisdiction of the Federal Subsistence Management Program for certain coastal areas in Alaska." Subsistence Management Regulations for Public Lands in Alaska, Subpart A, 70 Fed.Reg. 76,400, 76,400 (Dec. 27, 2005) (codified at 36 C.F.R. pt. 242 and 50 C.F.R. pt. 100). These amendments are not at issue in these appeals, except where noted below.

lands" (1) waterways outside the boundaries of federal lands, conservation system units, or national forests; (2) water that constitutes "marine water"; and (3) land selected for but not yet conveyed to Alaska or a Native corporation. The Katie John plaintiffs, as well as the Alaska Federation of Natives, intervened as defendants.

Thus, both challenges assert that the Secretaries improperly interpreted and applied the federal reserved water rights doctrine. For the Katie John plaintiffs, the Secretaries were too restrained in applying the doctrine; for the State, the Secretaries were not restrained enough. Both challenges also assert that the 1999 Rules are not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Finally, the State of Alaska argues that the Secretaries should have used adjudication, not rulemaking, to implement *Katie John I*.

The district court issued two decisions—which we and the parties refer to as "what process" and "which waters" decisions—in which it rejected all the challenges to the 1999 Rules. In its "what process" decision, the district court concluded that "the Secretaries' use of the rulemaking process to identify reserved water rights for purposes of federal subsistence management was lawful." In the "which waters" decision, the court discussed the "test case" waterways submitted by the litigants and concluded that the Secretaries' designation of which waters constitute "public lands" was "lawful and reasonable." The parties timely appealed.

ANALYSIS

A. Threshold issues

1. The federal reserved water rights doctrine

In *Katie John I*, we approved the Secretaries' use of the federal reserved water rights doctrine to identify which waters are "public lands" for purposes of ANILCA's rural subsistence priority. Because that doctrine underlies the 1999 Rules, the parties' arguments in this case, and our conclusions, some background on the doctrine and its place in Alaska's history is necessary.

Congress had unfettered power to regulate the Territory of Alaska from 1867, when the United States purchased the land from Russia, until 1959, when the Territory attained statehood.[60] Under the "equal footing" doctrine, when Alaska was "admitted into the Union, it gain[ed] 'the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.'"[61] More specifically, the equal footing doctrine gave Alaska "presumptive title to its submerged lands when it join[ed] the Union."[62] "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states

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[60] The U.S. Constitution gives Congress "the power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const. art. IV, § 3.

[61] *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1035 (9th Cir.2012) (quoting *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 474, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988)).

[62] *Id.* at 1034.

respectively. . . . The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[63] Thus the State of Alaska has the same rights over lands under navigable waters within it as, say, the State of New York and the State of California do over such waters within their borders. This authority is constrained by two separate federal rights: the navigational servitude and the federal reserved water rights doctrine.

"It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as [the state] may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations . . . ."[64] Thus, where rivers and streams are navigable in interstate commerce, the United States has authority to protect a navigational servitude, but the states own the river beds and other submerged lands.

Since 1908, the courts have also recognized that a federal reservation of land carries with it the right to use water necessary to serve the purposes of federal reservations. Under the federal reserved water rights doctrine, water rights for federal reservations are distinct from the federal servitude for navigable

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[63] *Pollard v. Hagan*, 44 U.S. 212, 230, 3 How. 212, 11 L.Ed. 565 (1845).

[64] *United States v. Holt State Bank*, 270 U.S. 49, 54, 46 S.Ct. 197, 70 L.Ed. 465 (1926).

waters. So, for example, in *Winters v. United States*,[65] a non-navigable stream was protected upstream despite the admission of Montana to statehood and despite its non-navigability, because diverting the upstream water could turn the downstream Indian reservation into a "barren waste," which would be inconsistent with reservation of the land for the use of the tribe.[66]

Winters involved an Indian reservation, but the federal reserved water rights doctrine applies to all federal reservations.[67] The word "reservation" does not mean only an Indian reservation—there is only one Indian reservation in Alaska, the Metlakatla Indian Community of Tsimshian Indians at the Annette Islands Reserve south of Ketchikan—but rather "any body of land, large or small, which Congress has reserved from sale for any purpose."[68] Reservations in Alaska serve a variety of purposes, such as military bases and parks. *Cappaert v. United States*,[69] a modern case, shows how the federal reserved water rights doctrine works outside the context of an Indian reservation. In *Cappaert*, the federal reservation of a

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65 *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908).

66 *Id.* at 577, 28 S. Ct. 207.

67 *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1173 n. 5 (9th Cir. 2010).

68 *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909); *see also Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 693 (9th Cir.2004).

69 *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976).

national monument featuring a notable pool of water required enough water to fill the pool to protect an endangered species living there. As a result, the state could not grant a permit to a ranch two and one-half miles away to pump so much groundwater that the pool (and the species) would be further endangered. The Supreme Court held that a federal reservation acquires for the federal government a right to "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation," regardless of whether the waters are navigable or nonnavigable.[70] The federal right, though, "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."[71] In *United States v. New Mexico*,[72] the Court reiterated that the federal reserved water rights doctrine is limited to the quantity of water necessary to fulfill the primary purposes of the reservation.[73]

Notably, in these cases the United States sought water itself, for the need of the reservation itself. In *Winters*, the water was needed on an Indian reservation for the Indians' farms and ranches, and in *Cappaert* for the deep pool of water for which the federal land was reserved. In *New Mexico* the Supreme Court held that federally reserved waters are limited to the *primary* purposes for which the land was reserved, without which "the purposes of the

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[70] *Id.* at 138, 96 S.Ct. 2062.

[71] *Id.* at 141, 96 S.Ct. 2062.

[72] *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978).

[73] *Id.* at 716-18, 98 S.Ct. 3012.

reservation would be entirely defeated."[74] Applying this narrow rule, the Court rejected a federal claim to water rights for "aesthetic, environmental, recreational, or wildlife-preservation purposes," because those were not the primary purposes for which the national forest lands at issue had originally been reserved.[75]

What makes this case difficult is that, until now, the federal reserved water rights doctrine has operated in the context of the United States enforcing its right to that amount of water necessary to fulfill the purpose of a particular reservation.[76] That is, previous applications of the federal reserved water rights doctrine have focused on the amount of water needed for a specific federal reservation, rather than the locations of water sources that might generally be needed for subsistence living from many such reservations. We, and perhaps the Secretaries, failed to recognize the difficulties in applying the federal reserved water rights doctrine in this novel way, and in retrospect the doctrine may provide a particularly poor mechanism for identifying the geographic scope of

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[74] *Id.* at 700, 98 S.Ct. 3012.

[75] *Id.* at 708, 713-15, 98 S.Ct. 3012; *see also id.* at 700, 98 S.Ct. 3012 ("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.").

[76] *See, e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir.1981) (first considering the existence of water rights and then considering the amount of water reserved).

ANILCA's rural subsistence priority management when it comes to water.

Of course, we had the opportunity to revisit *Katie John I* in *Katie John II*, and while a majority of the en banc court agreed for diverging reasons that *Katie John I* was incorrectly decided, we could not come to a controlling agreement about why that was true.[77] We accordingly concluded that the decision "should not be disturbed or altered."[78] *Katie John I* therefore remains controlling law, and we must attempt to apply it in this case.

2. Rulemaking versus adjudication

The State argues that the Secretaries were required to adjudicate, rather than prescribe by rule, which waters the United States has an interest in by virtue of the federal reserved water rights doctrine. The State argues that an adjudicative process "is necessary because a right is being established and one entity's water right burdens and diminishes the right and interests of another."

The State is correct that, until this point, the federal reserved water rights doctrine has been applied to adjudicate competing claims to water, a task that requires an adjudicator to allocate use of water among the claimants. The State, however, fails to appreciate

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[77] *Katie John I* was issued as a two judge majority, with one dissenting opinion. *See* 72 F.3d at 704-08 (Hall, J., dissenting). In *Katie John II*, three judges concurring in the judgment thought that *Katie John I* erred in failing to uphold a rural subsistence priority over all navigable waters and three dissenting judges were of the view that it erred in applying the priority over any navigable waters. *See* 247 F.3d at 1034-50.

[78] *Katie John II*, 247 F.3d at 1033.

the distinction between the adjudication of the amount of federal reserved water rights and the identification of the geographic scope of those rights for purposes of administering ANILCA's rural subsistence priority. The Secretaries were charged with the latter task, *i.e.*, identifying those bodies of water to which the rural subsistence priority might apply by virtue of the federal reserved water rights doctrine. Thus, the 1999 Rules identify the bodies of waters in which the Secretaries believe the United States has a federal reserved water rights interest (for purposes of administering ANILCA), but they do not actually allocate or reserve any water in these bodies. In other words, the rules do not purport to assert rights over a particular amount of water, nor do they do anything to displace future water rights litigation. The agencies are not, therefore, "determining their own water rights," nor does their rulemaking burden the State's right to use water.[79]

Two implications flow from this observation. First, as long as water remains abundant in the identified bodies, allocation of their waters may never become

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[79] Because the 1999 Rules do not actually burden the State's right to use water, they do not infringe upon ANILCA's water rights savings clause. *See* 16 U.S.C. § 3207 ("Nothing in [ANILCA] shall be construed as limiting or restricting the power and authority of the United States or . . . as affecting in any way any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska[, or] as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control.").

necessary.[80] Second, any future attempt by the United States to enforce its right to reserved water in a particular body *could* burden the State's use of water. At that point, the State could challenge the quantitative scope of the United States' reservation. Indeed, in the context of a particular enforcement action, the State could take the position that no amount of water from a particular identified source is necessary to fulfill the primary purposes of the reservation. But, to reiterate, the 1999 Rules do not displace or otherwise affect future water rights litigation; they were promulgated merely for the purposes of administering Title VIII of ANILCA and complying with *Katie John I*.

For these reasons, we hold that the Secretaries appropriately used notice-and-comment rulemaking, rather than adjudication, to identify those waters that are "public lands" for the purpose of determining the scope of ANILCA's rural subsistence priority. The use of rulemaking is consistent with ANILCA, which requires the federal government to "prescribe such regulations as are necessary,"[81] and with our decision in *Katie John I*, where we expressed our "hope that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management."[82] A more particularized

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[80] *See New Mexico*, 438 U.S. at 699, 98 S.Ct. 3012 (recognizing that, where water is abundant, there is no need to determine the relative rights of various claimants of water from a particular source).

[81] 16 U.S.C. § 3124.

[82] *Katie John I*, 72 F.3d at 704.

approach could not have fulfilled the requirement that the federal agencies make their determination "promptly," since Alaska constitutes about one-sixth of the entire United States, and most of its coastline. In directing the Secretaries to make this determination, we could not have intended to require the agencies to initiate individual water rights adjudication proceedings for each identified body of water, particularly when the purpose of the directive was not to allocate water, but to identify which bodies of water constituted "public lands" for purposes of ANILCA's rural subsistence priority. Logically, we intended the agencies to act through rulemaking, where doing so was feasible.

3. The standards of review and *Chevron* deference

This case presents questions of law, which we review *de novo*.[83] "De novo review of a district court judgment concerning the decision of an administrative agency means we view the case from the same position as the district court."[84] Under the Administrative Procedure Act,[85] we ask whether an agency decision is "arbitrary, capricious, an abuse of discretion, or

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[83] *Sauer v. U.S. Dep't of Educ.*, 668 F.3d 644, 650 (9th Cir.2012).

[84] *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir.2002) (internal quotation marks and citation omitted).

[85] 5 U.S.C. §§ 701-706.

otherwise not in accordance with law" or "in excess of statutory . . . authority."[86]

The district court determined that, because the Secretaries are charged with administering ANILCA, deference was warranted for questions of statutory interpretation under *Chevron*.[87] Applying *Chevron* deference involves a two-step inquiry: if Congress has "directly spoken to the precise question at issue," then the court must "give effect to the unambiguously expressed intent of Congress."[88] If instead the "statute is silent or ambiguous with respect to the specific issue," the court defers to the administering agency's interpretation as long as it reflects "a permissible construction of the statute."[89]

We generally agree with the district court that *Chevron* deference applies to questions of ANILCA's interpretation in this case, where ANILCA is ambiguous as to the answer. In promulgating the 1999 Rules, the Secretaries were identifying those bodies of water in which the United States may claim an interest by virtue of the federal reserved water rights doctrine,

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[86] *Id.* § 706(2). The State incorrectly argues that we must review the Katie John plaintiffs' arguments under § 706(1), for agency action "unlawfully withheld or unreasonably delayed." The Katie John plaintiffs challenge the validity of an agency action (the 1999 Rules), not an agency's alleged failure to act. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004).

[87] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[88] *Id.* at 842-43, 104 S.Ct. 2778.

[89] *Id.* at 843, 104 S.Ct. 2778.

and which thereby qualify as "public lands" for purposes of administering ANILCA's rural subsistence priority. The Secretaries are expressly charged with administering that priority when the state does not enact law that implements it.[90] In construing the term "public lands," therefore, the Secretaries are entitled to some deference.[91]

We say "some deference" because this is not a typical administrative law case, where an agency is simply applying its expertise in implementing a substantive statute. Instead, the Secretaries are applying, in a novel way, a judicially created doctrine to implement ANILCA. The courts have a strong role in defining the contours of such doctrines.[92]

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[90] *See* 16 U.S.C. § 3115(a)(1) (providing for subsistence program implementation by the Secretaries, in consultation with the State); *id.* § 3115(d) ("The Secretary shall not implement subsections (a), (b), and (c) of this section if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in . . . this title . . . .").

[91] *See Katie John I*, 72 F.3d at 702; *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1191-92 (9th Cir. 2000) (holding that the agency's interpretation of ANILCA is entitled to deference).

[92] *See, e.g., Morris v. Commodity Futures Trading Comm'n*, 980 F.2d 1289, 1293 (9th Cir. 1992) ("Where the question to be decided involves matters of particular expertise of the agency, the deferential standard should be applied. But judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue.") (citation omitted).

B. The merits

As an initial matter, the State argues that the 1999 Rules are invalid because they do not expressly address the "elements" of the federal reserved water rights doctrine with respect to each of the identified 34 reservation units. That is, the Secretaries failed to state the purpose of the land reservation and the amount of water necessary for each reserved unit.

However, these steps were not necessary for the Secretaries to identify which bodies of water constitute "public lands" under ANILCA. The administrative record reveals the bases for asserting federal reserved water rights with regard to each unit, and nothing in the identification process pertains to the amount of water reserved in each body of water, which is still open to future determination by the appropriate adjudicator. It falls to us to determine whether the Secretaries' decisions are arbitrary or capricious.

1. Adjacent waters

The State argues that, in the 1999 Rules, the Secretaries improperly included within the definition of "public lands" waters "adjacent to," but not physically on, federally reserved land. In the State's view, federal reserved water rights arising by implication exist only within the borders of the federal reservations, not beyond them. Even if such rights may be invoked to enjoin the use of waters outside the boundaries of a federal reservation, the State argues that the rights themselves exist only in the waters that are within the boundaries of the reservation.

We disagree. The federal reserved water rights doctrine allows the United States to reserve waters

"appurtenant" to federally reserved lands in order to fulfill the purposes of that reservation.[93] While the cases do not define "appurtenancy," there is an apparent consensus that it does not mean physical attachment:

> The reserved water rights doctrine holds that the government impliedly withdrew its consent to creation of private rights each time it earmarked public lands for a specific federal purpose to the extent necessary to fulfill that purpose. Thus, the fact that a reservation was detached from water sources does not prove an absence of intent to reserve waters some distance away. Judicial references to such rights being "appurtenant" to reserved lands apparently refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes.[94]

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[93] *See New Mexico*, 438 U.S. at 698, 98 S.Ct. 3012 (recognizing Congressional authority "to reserve unappropriated water in the future for use on *appurtenant* lands") (emphasis added); *Katie John I*, 72 F.3d at 703 ("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."); *Walton*, 647 F.2d at 46 ("Where water is needed to accomplish [the purposes of federal land withdrawn from the public domain], a reservation of appurtenant water is implied.").

[94] David H. Getches, *Water Law* 349-50 (4th ed. 2009); *see also 4 Waters and Water Rights* § 37.01(b)(3) (Robert E. Beck ed., 1991

As the district court recognized, "[a]ppurtenancy has to do with the relationship between reserved federal land and the use of the water, not the location of the water."

No court has ever held that the waters on which the United States may exercise its reserved water rights are limited to the water within the borders of a given federal reservation. Instead, the Supreme Court has recognized that federal water rights may reach sources of water that are separated from, but "physically interrelated as integral parts of the hydraulic cycle" with, the bodies of water physically located on the reserved land.[95] In *Cappaert*, the Court held that the United States could enjoin the use of groundwater two and one-half miles from Devil's Hole because the federal reserved water rights doctrine is "based on the necessity of water for the purpose of federal reservation," rather than the location of the water.[96] The relevant question, then, is not where these waters are located, but rather whether these waters are "appurtenant" to the reserved land. And if the waters are "appurtenant" to the reserved land, they may be subject to future enforcement of federal reserved

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ed., repl. vol. 2004) ("[R]eserved rights may be drawn from water sources that do not traverse or border on reservations.").

[95] *Cappaert*, 426 U.S. at 133, 142, 96 S.Ct. 2062 (internal citation and quotation marks omitted).

[96] *Id.* at 143, 96 S.Ct. 2062; *see also United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1158 (9th Cir.2010) (recognizing that a tribe's water rights to surface water protected it against diminution resulting from allocation of groundwater, because of the "reciprocal hydraulic connection between groundwater and surface water").

water rights if the other requirements for asserting a federal reserved water right are met.

Each federal reservation listed in the 1999 Rules was created for an express set of statutory purposes.[97] These purposes may require water not only from the water sources on the lands themselves, but also from surrounding areas. For example, the majority of the federal reservations identified in the 1999 Rules are to be managed "to protect habitat for, and populations of" fish and wildlife[98] or "to conserve fish and wildlife populations and habitats."[99] The State does not

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[97] The 1999 Rules provide that the regulations will apply to "inland waters adjacent to the exterior boundaries of" 34 different "areas." Several of the identified "areas" actually include multiple reservations or units. Sixteen of the "areas" are national wildlife refuges established, expanded or redesignated by ANILCA. Twelve of the "areas" include one or more units of the National Park System established, expanded or redesignated by ANILCA. The remaining six "areas" include two national forests (the Chugach and the Tongass), one National Conservation Area, one National Recreation Area, the National Petroleum Reserve in Alaska, and all components of the Wild and Scenic River System located outside the boundaries of National Park, National Preserves or National Wildlife Refuges. Only the National Petroleum reserve was not established, expanded or redesignated by ANILCA.

[98] *See* ANILCA §§ 201, 202 (codified at 16 U.S.C. 410hh, 410hh-1). Sixteen of the 17 National Park System units listed in the 1999 Rules have the identified purpose "to protect habitat for, and populations of" fish and wildlife. The remaining National Park System unit, the Glacier Bay National Preserve, has the purpose to "protect a segment of the Alsek River, fish and wildlife habitats and migration routes."

[99] *See* ANILCA §§ 302, 303. All 16 of the National Wildlife Refuges named in the 1999 Rules have a primary purpose "to

dispute that the wildlife in these reservations readily use the waters adjacent to the reservations.[100] Due to the proximity and connectivity of these adjacent waters to the reserved land, and given the fact that the federal reserved water rights doctrine allows the United States to exert rights over water that is "physically interrelated" with the reserved land, the Secretaries reasonably concluded that adjacent waters are appurtenant to, and may be necessary to fulfill the primary purposes of, the federal reservations identified in the 1999 Rule, and are sources from which the United States could at some point claim a reservation of water. Accordingly, the Secretaries reasonably concluded that the United States has an "interest" in these adjacent waters by virtue of the federal reserved water rights doctrine sufficient to qualify as "public lands" for purposes of Title VIII.[101]

There is a broader point to be made here. As discussed above, the federal reserved water rights doctrine does not typically assign a geographic location to implied federal water rights. The rights are created when the United States reserves land from the public domain for a particular purpose, and they exist to the

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conserve fish and wildlife populations and habitats in their natural diversity."

[100] *Cf. United States v. Alaska*, 423 F.2d 764, 767 (9th Cir.1970) (rejecting the argument that the Kenai National Moose Range did not reserve water rights in navigable water because this would leave "only mountains, hills, ridges, valleys and barren areas . . . for the moose to feed and breed").

[101] *See Katie John I*, 72 F.3d at 703 ("By virtue of its reserved water rights, the United States has interests in some navigable waters.").

extent that the waters are necessary to fulfill the primary purposes of the reservation.[102] The United States may enforce this implied right in a particular, appurtenant body of water, and it is at this point that the right takes on a geographical dimension. The existence of the right, therefore, has no physical location separate and distinct from the waters on which the right can be enforced. For purposes of this case, then, we must include within its potential scope all the bodies of water on which the United States' reserved rights could at some point be enforced—*i.e.*, those waters that are or may become necessary to fulfill the primary purposes of the federal reservation at issue. Because this potential scope in hypothetical scenarios is immensely broad, it runs up against the conclusion in *Katie John I* that not all navigable waters are included in the rural subsistence priority. That judgment reflects the practical view that the federal reservations are unlikely to need all the water even in some of the greatest rivers in the world. It was reasonable for the Secretaries to conclude that a federal reserved water right existed in adjacent waters to serve all of the purposes of the reservations. The Secretaries also concluded, however, that the needs of subsistence uses did not justify expansion to vast reaches of waters upstream and downstream. For reasons we will explain when we address that issue below, we conclude that this decision of the Secretaries was also reasonable.

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[102] *Cappaert*, 426 U.S. at 139, 96 S.Ct. 2062.

2. Specific water bodies

The State challenges the designation of specific bodies of water as "public lands for purposes for ANILCA." We consider each challenge in turn.

a. Sixmile Lake

The State argues that Sixmile Lake should not be considered a "public land" subject to federal subsistence management because the Lake's shoreline is non-federal, non-public land owned primarily by the Native Village Corporation for Nondalton.[103] Therefore, the State argues, Sixmile Lake is not within any federal reservation and does not touch federally reserved land.

However, the agency map of the Lake Clark National Park and Preserve[104] places the Park's boundary at the shoreline of Sixmile Lake. ANILCA provides that, "[i]n the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling."[105] The Secretaries therefore properly concluded that Sixmile Lake was in fact adjacent to the Lake Clark National Park and Preserve. Moreover, under the federal reserved water rights doctrine, the Secretaries must show only that the waters are positioned such that the United States may need to exercise its rights upon

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[103] *See* ANILCA § 201(7)(b), 16 U.S.C. § 410hh(7)(b) (providing that "[n]o lands conveyed to the Nondalton Village Corporation shall be considered to be within the boundaries of the park or preserve").

[104] *See* National Park System Units in Alaska; Description of Boundaries, 57 Fed.Reg. 45,166, 45,220 (Sept. 30, 1992).

[105] 16 U.S.C. § 3103.

them. For that reason, the formal ownership of the land immediately along the shoreline of Sixmile Lake is not dispositive, so long as the lake contains water that is or might be necessary to fulfill the primary purposes of the Lake Clark National Park and Preserve. The State does not dispute that, due to its location, the United States has such an interest in Sixmile Lake. We therefore affirm the Secretaries' determination that Sixmile Lake is a "public land" subject to ANILCA's rural subsistence priority.

b. Seven Juneau-area streams

The State argues that the Secretaries improperly declared seven streams in the Juneau area "public lands" under ANILCA. The upper reaches of these streams are in the Tongass National Forest, but, according to the State, they also flow through many lands in the Juneau area that are not federally owned. The State contends that the determination that the United States has an interest in these waters is erroneous because they are "exterior waters downstream of the reservation."

The parties disagree about whether the streams in question fall completely within the boundaries of the Tongass National Forest, or whether a portion of the streams lies outside of these boundaries. None of the maps offered by the parties is entirely conclusive. The map upon which the Secretaries relied, however, does indicate that the entire streams fall within the exterior boundaries of the Tongass National Forest. It was not unreasonable for the Secretaries to rely on it instead of

the map or other evidence offered by the State.[106] We therefore uphold the Secretaries' inclusion of these streams within the definition of "public lands."

c. Water on inholdings

The Secretaries included within the definition of "public lands" all navigable and non-navigable water within the outer boundaries of the 34 listed land units.[107] Within these units, however, also lie State and privately owned lands, referred to as "inholdings." ANILCA expressly provides that lands that have been conveyed to Alaska, a Native corporation, or a private individual, even if such lands are within the boundaries of a conservation system unit, are not subject to regulation under Title VIII of ANILCA.[108] The State argues that designating waters that lie on such "inholdings" as "public lands" runs contrary to the principle that only waters appurtenant to reserved federal lands can contain a federally reserved water right.

However, water rights that the United States impliedly acquires are not forfeited or conveyed to third parties when the government conveys to another party land within a federal reservation.[109]

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106 *See Union Oil Co. of Cal. v. FPC*, 542 F.2d 1036, 1040 (9th Cir.1976) (stating that rulemaking is not the kind of adjudicative procedure for which the Administrative Procedure Act specifies a "substantial evidence" standard of review).

107 *See* 64 Fed.Reg. at 1,286-87 (codified at 36 C.F.R. § 242.3(b), 50 C.F.R. § 100.3(b))

108 16 U.S.C. § 3103(c).

109 *See Winters*, 207 U.S. at 577, 28 S.Ct. 207 (holding that the United States' reservation of water in the Milk river for the Fort

Furthermore, federal reserved water rights can reach waters that lie on inholdings as long as those waters, based on their location and proximity to federal lands, are or may become necessary for the primary purposes of the federally reserved land. Because these water bodies are actually situated within the boundaries of federal reservations, it is reasonable to conclude that the United States has an interest in such waters for the primary purposes of the reservations. We therefore uphold the Secretaries' inclusion of these waters within "public lands."

d. Coastal waters and the "headland-to-headland" method

Section 103(a) of ANILCA provides 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."[110] In the 1999 Rules, the Secretaries defined "inland waters" as "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."[111] This boundary represents the Secretaries' determination of "where the river ends and the sea begins," that is, the line that separates inland waters from marine

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Belknap Indian Reservation was not repealed when Montana was admitted to the union); *Arizona*, 373 U.S. at 596-99, 83 S.Ct. 1468; *Walton*, 647 F.2d at 48-49.

110 16 U.S.C. § 3103(a).

111 64 Fed.Reg. at 1,287 (codified at 36 C.F.R. § 242.4 and 50 C.F.R. § 100.4).

waters.[112] Creation of such a boundary was necessary because, as the Secretaries recognize, federal reserved water rights have never been held to exist in marine waters.[113]

The State contends that the Secretaries' use of the "headland-to-headland" method improperly places marine and tidal waters under federal management because, in § 103(a), Congress placed the boundary of federal control at the high tide line. The Secretaries respond that, because they can assert federal reserved water rights in "tidally influenced waters," their use of the headland-to-headland method was a reasonable way of designating the boundary of federal rural subsistence priority management.

We agree with the Secretaries. The boundary Congress set forth in § 103(a) establishes only the physical boundary for the federal reservations themselves; it does not set the limit for the water over which the United States may exert any interest. As discussed above, a federal interest by virtue of the federal reserved water rights doctrine may exist in waters adjacent to, but outside the boundary of, a federal reservation, as long as these waters are appurtenant to the reservation. Because the headland-to-headland method includes tidally influenced waters that are physically connected to, and indeed practically

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[112] 70 Fed.Reg. at 76,402.

[113] In the 2005 amendments, the Secretaries clarified that the 1999 Rules do not identify any marine waters as "public lands" by virtue of the federal reserved water rights doctrine. 70 Fed.Reg. at 76,401 ("[N]either 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.").

inseparable from, waters inland of the high tide line (or waters on the federal reservations themselves), drawing of the boundary line in this manner is consistent with the federal reserved water rights doctrine. Finally, as the Secretaries explain in the 2005 amendments, "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."[114] For these reasons, using the headland-to-headland approach for purposes of determining the boundaries of rural subsistence priority management is a reasonable way to administer ANILCA.

3. Upstream and downstream waters

The 1999 Rules apply the federal rural subsistence priority to waters within and adjacent to the federal reservations listed in the Rules. We have explained why the State of Alaska's argument—that the federal priority should not extend to adjacent waters—does not have merit.

However, the Secretaries did not make claim to waters farther afield from the federal reservations, waters we refer to as "upstream and downstream waters." The Secretaries justified their decision to exclude upstream and downstream waters on the grounds that the United States had no such general practice, no Indian treaty rights were involved, and such reservation "would conflict with the parts of the *Katie John [I]* decision holding that ANILCA did not extend subsistence fishing to all navigable waters in Alaska."

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114 *Id.* at 76,402.

The Katie John plaintiffs argue that the federal priority should apply to waters upstream and downstream from federal reservations—a position that would subject most of the rivers and streams in Alaska to the federal priority, since the federal reservations listed in the 1999 Rules cover about one-half of Alaska.[115] We reject this argument, and hold that the Secretaries did not act arbitrarily or contrary to law in refusing to extend the federal rural subsistence priority to waters upstream and downstream from federal reservations. We base our conclusion on the limits of the federal reserved water rights doctrine, the primary purposes of the federal reservations at issue in the 1999 Rules, the history (and limits) of ANILCA's rural subsistence priority, and *Katie John I* and *II*. As we will explain, there is no shortage of water on the ANILCA reservations, so any need for additional water beyond adjacent waters for general purposes of wilderness preservation is too remote to require the Secretaries to identify upstream and downstream

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[115] The Katie John plaintiffs' complaint asks for "a declaratory judgment that reserved waters extend upstream and downstream of CSUs." "CSU" stands for "conservation system unit," which is a defined term in ANILCA. The 1999 Rules cover some, but not all, of the ANILCA conservation system units. The 1999 Rules also cover some federal reservations that are not "conservation system units," such as the National Petroleum Reserve in Alaska. It is unclear whether the Katie John plaintiffs argue that upstream and downstream waters are necessary for all of the reservations listed in the 1999 Rules, or only those that are conservation system units. It is also unclear whether the Katie John plaintiffs seek a declaratory judgment that applies to conservation system units that are not listed in the 1999 Rules. Because we conclude that the 1999 Rules are reasonable, we need not resolve these ambiguities.

waters as subject to a reserved right. The question then is whether ANILCA's priority for rural subsistence uses somehow requires a more expansive identification of reserved rights. For the reasons that follow, we conclude that it does not.

a. The history of ANILCA's rural subsistence priority

As our previous discussion makes clear, ANILCA makes "subsistence uses" of fish and wildlife a priority "on public lands." Though stated in broad terms, the priority is not without limits.

Some historical background provides context. Among the major reasons why Alaskans sought statehood was that federal regulation of territorial waters allowed non-Alaskan commercial firms to take salmon in "fish traps," which starved local Alaskans of the catch and threatened the salmon runs.[116] In 1948, outside salmon packing companies owned 383 of the 429 fish traps licensed in Alaska.[117] Alaskans twice voted overwhelmingly to eliminate fish traps, but these pre-statehood votes meant nothing because Alaska and its people then had no power to regulate fisheries.[118] One of the first acts of the Alaska Constitutional Convention in 1955 was to adopt an ordinance prohibiting fish traps, to be submitted to voters for

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[116] Gerald E. Bowkett, Reaching for a Star 12 (1989) ("If there were one symbol of the economic discrimination Alaskan's sought to end through statehood it was the salmon trap, a highly efficient means of catching fish controlled primarily by the big absentee canning interests.").

[117] *Id.* at 74.

[118] *Id.*

approval along with the state constitution.[119] Between 1936 and 1959, when federal management of Alaska's salmon finally ended, production had fallen from 8.5 million cases annually to 1.8 million cases.[120]

Ernest Gruening, former governor of and United States senator from Alaska, opposed the establishment of a federal Arctic Wildlife Range because of federal mismanagement of fish and game:

> I opposed the bill because it seemed to me unthinkable that after the Interior Department's failure in the management and conservation of Alaska's fishery and wildlife resources, the new state, which had set up its own far-more-qualified fish and wildlife organization and had offered to make this range a state-managed project, should be asked to turn it back to that discredited federal control.[121]

Modern efforts at federal regulation, including ANILCA's rural subsistence priority, remain intensely controversial within Alaska.

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[119] *Id.* at 74-76; Alaska Const. Ord. 3, § 2 ("As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, *the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited* in all the coastal waters of the State.") (emphasis added).

[120] Bowkett, Reaching for a Star, at 12.

[121] Ernest Gruening, Many Battles 426 (1973).

As a result of this long-running federal-state controversy, ANILCA imposes negotiated limits on how certain natural resources are managed in Alaska. While ANILCA emphasizes the importance of "subsistence uses" of fish and wildlife and gives them a priority "on public lands," it limits the priority to *rural* subsistence uses, to certain (but not all) public lands, and to federal lands. Moreover, lands owned by the United States but subject to valid State and Native corporation land selections are excluded from the definition of public lands.[122] The priority for "subsistence uses by rural residents of Alaska, including both Natives and non-Natives,"[123] applies only on the specified subset of federal lands.[124] State, Native corporation, and private lands are expressly excluded from the rural subsistence preference regulations.[125]

Furthermore, ANILCA establishes an elaborate scheme for cooperation with state fish and game authorities in managing the rural subsistence priority and limits federal authority even for protecting that priority.[126] Congress prohibits any construction of the statute "granting any property right in any fish or wildlife," or "enlarging or diminishing the Secretary's authority to manipulate habitat" on the public lands, or restricting the taking of fish or wildlife on the federal

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[122] 16 U.S.C. § 3102(3).

[123] *Id.* § 3111(1).

[124] *See id.* §§ 3102(2)-(3), 3114.

[125] *Id.* § 3103(c).

[126] *Id.* §§ 3113-3115, 3202(a).

lands for nonsubsistence uses "unless necessary for the conservation of healthy populations of fish and wildlife [or] to continue subsistence uses of such populations."[127]

b. The primary purposes of ANILCA and other federal reservations in Alaska

"From the 1780s, when the Articles of Confederation government enacted the Northwest Ordinance and its predecessors, to 1986, when the Homestead Act repeal became effective in Alaska, national policy on federally owned lands was to sell them cheap or give them away, rather than to hold on to them or charter them to great companies as England and Spain had."[128]

> With so liberal a policy of giving away the public domain, the government needed a means to mark out some portions that would not be turned into farms, mines, homesites, trade sites, and all the other categories of private ownership. Under the Northwest Ordinance and its Jeffersonian predecessor, land was to be reserved from sale (giving away land for free was Lincoln's subsequent innovation under the Homestead Act) for such purposes as schools and transfer to Revolutionary War veterans. Likewise, under the Morrill Land-Grant Act of 1862, lands were reserved from entry for various public purposes, such as schools. Beginning in 1872 with Yellowstone,

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127 *Id.* § 3125(1)-(3).

128 *Coeur D'Alene Tribe of Idaho*, 384 F.3d at 697 (Kleinfeld, J., dissenting).

> reservations from entry were made for parks.[129]

Homesteading ended on October 21, 1976, when Congress enacted the Federal Land Policy and Management Act of 1976. "On that day, all homestead laws were repealed nationwide, however, a 10-year extension was allowed in Alaska since it was a new state with fewer settlers. The last time anyone could file any type of [federal] homestead claim in Alaska was on October 20, 1986. After that day, no more new homesteading was allowed on federal land in Alaska."[130] Many of Alaska's federal reservations are military reservations, such as 607,800 acres near Fairbanks for a missile-testing range.[131] In 1980, ANILCA designated approximately 105 million acres in Alaska as permanently protected federal lands, for various purposes generally associated with wilderness preservation.[132]

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[129] *Id.* at 698 (footnotes omitted). Homesteaders usually were required to pay $1.25 per acre, a price that was reduced substantially if the land was not particularly desirable. *See* http://www.archives.gov/education/lessons/homestead-act (last visited June 26, 2013).

[130] Bureau of Land Management, Homesteading Frequently Asked Questions, *available at* http://www.blm.gov/ak/st/en/prog/culture/ak_history/homesteading/homesteading_Q_and_A.html#6 (last visited June 26, 2013).

[131] Ernest Gruening, Many Battles 418 (1973); *see also United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 40 S.Ct. 518, 64 L.Ed. 935 (1920) (reservation of land near Nome for use as an Army post).

[132] *Se. Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305, 1307 (9th Cir.1983).

Indeed, by and large the reservations ANILCA established are not for use by any people who might need the water itself in competition with other users. These lands generally were reserved *from* people (other than subsistence users) who might want to live there, not *for* them. For example, ANILCA sets up seventeen new units within the National Park System and expands three others, and lists the "purposes" for each reservation.[133] In seventeen of these twenty reservations, none of the "purposes" include human subsistence, and only in three is the protection of "the viability of subsistence resources" mentioned as one among several purposes.[134] For example, the Aniakchak National Monument is reserved to maintain volcanic features and study the flora and fauna, and to protect habitat for wildlife.[135] The Cape Krusenstern National Monument is established for archeological study and to preserve habitat for wildlife.[136] The 6.5 million-acre Noatak National Preserve has as among its purposes maintaining the river "unimpaired by adverse human activity."[137] The purpose of the 567,000-acre Kenai Fjords National Park is "[t]o maintain unimpaired the scenic and environmental

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133 *See generally* 16 U.S.C. §§ 410hh-410hh-1.

134 *See id.* § 410hh(2)-(3), (6). ANILCA states that "subsistence uses by local residents shall be permitted" in several reservations, but that is far different from saying that subsistence use is a reason why the reservations were created. *See id.* §§ 410hh(1), (3), (4)(a), (6), (7)(b), (9), 410hh-1(3)(a).

135 *Id.* § 410hh(1).

136 *Id.* § 410hh(3).

137 *Id.* § 410hh(8)(a).

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."[138] The Secretaries' 1999 Rule includes additional reservations that also are not primarily designed for the purpose of furthering subsistence hunting or fishing.

However, because quite a few people, Native and non-Native, already did live on the vast newly reserved lands, or hunted or fished there for their subsistence, ANILCA was shaped to preserve their interest in subsistence living from the new federal restrictions. Accordingly, Congress preserved subsistence use in many of the reservations, even though none of the reservations listed such use as their primary purpose and most did not list subsistence use among their purposes at all. The crucial point is that human use for subsistence on most federal reservations in Alaska is a servitude imposed as a limitation on federal control, rather than a specified purpose for which the federal reservation was established.[139]

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[138] *Id.* § 410hh(5) (emphasis added).

[139] Perhaps the best example of the tension between the purposes of federal reservations in Alaska—more or less of excluding human activities—and the preservation of rural subsistence rights as a kind of servitude is the case of Alex Sando Tarnai. Tarnai was a trapper who had fled Hungary after the unsuccessful 1956 uprising, and who built his cabin on the Nowitna River in 1977. David Hullen, *Trapper, government wage strange battle*, Anchorage Daily News, Nov. 19, 1989, at A1. In 1980,

Indeed, not only are the ANILCA and other federal reservations not established for human use of the water in the streams, but most of time, at least in the northern half of the state, the water is not even "water" in the sense of being a liquid. It is ice. No one can drink it without making a hole in the ice, and it could not be used for irrigation, if there were anything to irrigate, which by and large there is not. There are no large farms or ranches, nor great reservoirs serving cities, along the greatest of the waters, the roughly two thousand-mile-long Yukon, nor along most of the other rivers and streams at issue in this litigation.

ANILCA established the Nowitna National Wildlife Refuge to "conserve wildlife populations and habitats in their natural diversity." ANILCA § 302(6), 94 Stat. 2371. Tarnai was the sole human living in the vast wilderness of the newly created 2.1-million acre refuge, two days' dogsled trip from Ruby, Alaska.

Tarnai was so isolated that he did not learn of ANILCA until two years after it had become law. When federal officials learned that a woman was planning to visit him for a few weeks at his cabin, they threatened to treat his cabin as a "recreational" rather than a "subsistence" cabin, so that he would be evicted from his home. Their theory was that if a woman who was not an immediate family member stayed in his cabin, his use of the cabin would become "recreational" rather than "subsistence," and the statute bars permits for "private recreational use" cabins. *See* 16 U.S.C. § 3193(b)(2). Tarnai and his guest slept in a tent outside his cabin in minus-twenty-degree weather to avoid a citation. Tarnai later successfully litigated against the federal government, establishing that his subsistence use for trapping was not defeated by this incidental non-subsistence use, and that even a "subsistence" dweller was entitled to engage in activities in his cabin yielding companionship or pleasure, not just activities sustaining life. *Tarnai v. Fisher*, No. 87-0068 (D.Alaska dismissed Jan. 21, 1990).

This observation distinguishes the federal reservations at issue in this case from much of the American West, where water is scarce and where, as in *Winters*, aridity can defeat the purpose of a reservation. In this case, in contrast, no one is claiming that the water itself must be reserved to fulfill the purposes of the ANILCA reservations. That is, there is no suggestion that any federal reservation along any Alaskan waters risks being turned into a "barren waste" as in *Winters*, or a substantially diminished pool, as in *Cappaert*, or is in any way short of water. In this way, Alaska's federal reservations differ dramatically from the reservations in arid regions.

Of course, water must be preserved for the geese and ducks, and if anyone were to drain the many lakes and ponds, the reduction in water quantity would threaten migrating birds. For example, the Nowitna National Wildlife Refuge, where Alex Tarnai lived, has among its legislatively stated purposes ensuring the necessary water quantity "within the refuge" to conserve its fish and wildlife population, including geese, ducks, moose, pike, salmon, and other wildlife.[140] The Wrangell-Saint Elias National Park

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[140] ANILCA § 302(6)(B), 94 Stat. 2371, 2387 (1980) ("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 and other furbearers, salmon, sheefish, and northern pike; (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

and Preserve seek to protect habitat for "fish and wildlife" such as "trumpeter swans and other waterfowl."[141] And the Lake Clark National Park and Preserve were created "to protect the watershed necessary for perpetuation of the red salmon fishery in Bristol Bay."[142] As for the people living in or near these and other ANILCA reservations, the utility of the water is generally as transportation arteries for riverboats, snow machines, and occasionally dog teams, and for fishing.

ANILCA's text and history, as well as the history and realities of rural living in Alaska, thus lead to a critical observation: human use for subsistence on many federal reservations in Alaska, including ANILCA conservation system units, is a servitude imposed as a limitation on federal control, rather than a specified purpose for which most such reservations were established. For this reason, and because modern federal efforts to regulate natural resources in Alaska remain controversial, ANILCA limits the application of its rural subsistence priority to a carefully delineated subset of federal lands, and establishes an elaborate scheme for cooperation between the Secretaries and State fish and game authorities in managing the rural subsistence priority.

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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.").

141 16 U.S.C. § 410hh(9).

142 *Id.* § 410hh(7)(a).

c. The constraints of the federal reserved water rights doctrine

Recognizing these constraints in *Katie John I*, we limited federal ANILCA authority over waters outside the boundaries of reservations to federally reserved lands, including "appurtenant waters then unappropriated to the extent necessary to accomplish the purpose of the reservation."[143] That is, we held that the ANILCA rural subsistence priority applied not to all Alaska waters subject to the federal navigational servitude, but only to those "navigable waters in which the United States has reserved water rights."[144] Waters were reserved to the United States only if the United States *intended* to reserve the water. That intent would be inferred "if those waters are necessary to accomplish the purposes for which the land was reserved."[145] We noted that the United States had reserved vast lands in Alaska for many different purposes, and left it to the federal agencies to identify the "navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine."[146] These prior holdings control on the critical questions in this litigation.

The Katie John plaintiffs would have us extend the rural subsistence priority to all waters upstream and downstream from, and not only adjacent to, federal reservations, on the theory that what happens

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[143] *Katie John I*, 72 F.3d at 703.

[144] *Id.* at 700.

[145] *Id.* at 703.

[146] *Id.* at 704.

elsewhere may affect what happens within a reservation. That broad claim, to federal regulation of a substantial majority of the rivers and streams in Alaska, is unsupported by ANILCA's text and conflicts with *Katie John I* and *Katie John II*. Our circuit is committed to the position that for the rural subsistence priority to apply to navigable waters outside federal reservations, the waters have to be "appurtenant to" the reservations and so "necessary to accomplish the purposes for which the land was reserved" that "without the water the purposes of the reservation would be entirely defeated."[147]

ANILCA put 105 million acres (162,500 square miles), of Alaska under federal restrictions[148] (beyond the 84.1 million acres (131,406 square miles) already reserved or withdrawn when Alaska attained statehood[149)] for purposes that involve little or no water consumption and many of which have little or nothing to do with human use. Congress did state at the beginning its intent in ANILCA "to protect the resources related to subsistence needs."[150] ANILCA provides for "continuation of the opportunity for subsistence uses by rural residents of Alaska"[151] to avoid disrupting and destroying the human uses

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147 *Id.* at 703 (quoting New Mexico, 438 U.S. at 700, 98 S.Ct. 3012).

148 *Se. Alaska Conservation Council*, 697 F.2d at 1307.

149 Teresa Hull & Linda Leask, *Dividing Alaska, 1867-2000: Changing Land Ownership and Management*, Alaska Review of Social & Economic Conditions, Volume XXXII, 6 tbl. 1 (2000).

150 16 U.S.C. § 3101(b).

151 16 U.S.C. § 3111(1).

already being made, but the Supreme Court held in *Amoco Production Co. v. Village of* Gambell[152] that ANILCA does not make subsistence uses more important than other uses of federal lands. Rather, ANILCA simply recognizes subsistence uses as "*a* public interest" within a statutory "framework for reconciliation, where possible, of competing public interests."[153] Similarly, the additional (non-ANILCA) federal reservations listed in the 1999 Rules were not primarily withdrawn for the stated purpose of furthering subsistence fishing or hunting.[154] As explained above, human subsistence needs are imposed on all of these reservations as a kind of servitude, so that ANILCA does not destroy the preexisting way of life on those federal lands. But it is untenable to reason that upstream and downstream waters are necessarily included in the priority granted to subsistence uses on those reservations, particularly when subsistence uses are not among the primary purposes listed in the statutory sections establishing most of the reserves.

Again, water rights may be essential to a purpose of the reservation other than subsistence. Were non-federal activities, such as a dam or diversion of a river where salmon spawn, or drying up of lakes and ponds that migrating geese use, to threaten the purposes of a federal reservation, ANILCA's rural subsistence

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152 *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

153 *Id.* at 545-46, 107 S.Ct. 1396.

154 The National Petroleum Reserve in Alaska was established for exploration of petroleum reserves. *See* 42 U.S.C. § 6504.

priority might come into play as a result of an enforcement action particularized to the particular purposes of a particular reservation. But no such activity is before us. This is not a particularized enforcement action, and the Katie John plaintiffs do not ask us or the Secretaries to consider the actual purposes of any of the reservations. Instead, they seek a generalized declaratory judgment "that reserved waters extend upstream and downstream of" all the federal reservations listed in the 1999 Rules.[155]

Such relief we cannot grant. We cannot conclude that the Secretaries acted arbitrarily, capriciously, or contrary to law in declining to include upstream and downstream waters as currently within a reserved right for purposes of a rural subsistence priority, when subsistence uses in many cases were not specified as primary purposes of the reservations. The Katie John plaintiffs' demand would require us to ignore the central role those purposes play in applying the federal reserved water rights doctrine, and to make up out of nothing a notion that all federal reservations in Alaska require all upstream and downstream waters for purposes we or the plaintiffs, not Congress, claim. Such a holding would be inconsistent with the Supreme Court's decision in *New Mexico*, under which reserved water rights exist to serve only the primary purposes of a federal reservation,[156] and with ANILCA, which

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[155] We note, as do the Secretaries, that there is no shortage of waters to serve the primary purposes of the reservations.

[156] *See* 438 U.S. at 708, 713-15, 98 S.Ct. 3012.

simply "does not support such a complete assertion of federal control."[157]

If any of the various reservations ever do run short of the water necessary to maintain subsistence uses, the United States may or may not be entitled to that water under the federal reserved water rights doctrine, a fact the Secretaries acknowledge. But "[w]here water is only valuable for a secondary use of the reservation," the United States must acquire the water "in the same manner as any other public or private appropriator."[158] No claims particularized to any federal reservation and its need for water are made in the complaint in this case.

In short, we agree with the district court that the Secretaries reasonably determined that, as a general matter, federally reserved water rights may be enforced to implement ANILCA's rural subsistence priority as to waters within and "immediately adjacent to" federal reservations, but not as to waters upstream and downstream from those reservations. We also agree with the district court that the federal reserved water rights doctrine might apply upstream and downstream from reservations in some circumstances, were there a particularized enforcement action for that quantity of water needed to preserve subsistence use in a given reservation, where such use is a primary purpose for which the reservation was established. But the abstract claim that all upstream and downstream waters are necessary for all the federal reservations in the 1999 Rules cannot withstand

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157 *Katie John I*, 72 F.3d at 704.

158 *New Mexico*, 438 U.S. at 702, 98 S.Ct. 3012.

ANILCA's text or history, the joint decision of the two cabinet secretaries to whom administration of the complex statute has been delegated, our decisions in *Katie John I* and *Katie John II*, or the facts established in this litigation.

4. Alaska Native Allotments

The Alaska Native Allotment Act of 1906[159] authorized the Secretary of the Interior to allot "to any Indian, Aleut, or Eskimo" a 160-acre allotment of unsurveyed or otherwise unappropriated land upon proof of "substantially continuous use and occupancy" of the land for five years.[160] The Alaska Native Claims Settlement Act of 1971[161] repealed the 1906 Act but did not extinguish existing allotments or allotments under application at the time of the repeal.[162] Alaska Natives who have been granted allotments own the lands conveyed to them in restricted fee. The allotments are non-taxable unless authorized by Congress, and they cannot be conveyed without approval from the Secretary of the Interior.[163]

The Secretaries did not include within "public lands" the waters appurtenant to Alaska Native allotments falling outside the land units listed in the

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159 Pub.L. 59-171, 34 Stat. 197 (1906, as amended) (codified at 43 U.S.C. §§ 270-1 through 270-3 (1970)). The original Act did not include Aleuts, or require five years of substantially continuous use.

160 *Id.*

161 Pub.L. 92-203, 85 Stat. 688 (1971, as amended) (codified at 43 U.S.C. §§ 1601-1629h).

162 43 U.S.C. § 1617(a).

163 43 C.F.R. § 2561.3 (2006).

1999 Rules.[164] Rather, the 1999 Rules delegate to the Federal Subsistence Board the authority to

> [i]dentify, 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.[165]

Thus, the Federal Subsistence Board has the authority to make recommendations to the Secretaries for additions, if necessary, to the waters that are "public lands" by virtue of the federal reserved water rights doctrine, including waters appurtenant to the Alaska Native allotments.

The Secretaries concede that the United States has consistently asserted an interest in Native American allotments by virtue of their restricted fee status. The Secretaries also recognize that, typically, "allotments of Indian reservations to individual Indians, as well as the transfer of these allotments to non-Indians, have

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[164] Some allotments granted pursuant to the Alaska Native Allotment Act are within the boundaries of the conservation system units and forest reserves identified in the 1999 Rules. *See* 64 Fed.Reg. at 1,279. These allotments are already subject to ANILCA's rural subsistence priority. *Id.*

[165] *Id.* at 1,290 (codified at 36 C.F.R. § 242.10(d)(4)(xix) and 50 C.F.R. § 100.10(d)(4)(xix)).

been found to carry with them a share of the reservation's [federal reserved water rights] pursuant to section 7 of the General Allotment Act, 25 U.S.C. § 381."[166] Although the Secretaries do not take the position that federal reserved water rights do not or cannot reach the waters appurtenant to Alaska Native allotments, they argue that the allotments are "unique" and that the "complex legal issues surrounding the question" led them to conclude that identification of which waters appurtenant to these allotments should be included within "public lands" was best done on a case-by-case basis.

The State argues that the Alaska Native allotments do not give rise to federal reserved water rights at all. The State reasons that, "[u]nlike the allotments [created under the General Allotment Act], Alaska Native allotments are not derived from a previous Indian reservation and, therefore, cannot succeed to any *Winters* water rights associated with an Indian reservation." In other words, federal reserved water rights emerge only out of federal reservations; they do not attach to Alaska Native allotments created from the public domain.

For their part, the Katie John plaintiffs challenge the Secretaries' decision not to categorically designate as "public lands" subject to ANILCA's rural subsistence priority the waters appurtenant to all Alaska Native allotments. The Katie John plaintiffs argue that the United States has an interest in the

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166 *See, e.g., United States v. Powers*, 305 U.S. 527, 532, 59 S.Ct. 344, 83 L.Ed. 330 (1939); *Walton*, 647 F.2d at 50 ("It is settled that Indian allottees have a right to use reserved water.")

allotments by virtue of their restricted fee status, and that water is necessary to carry out the subsistence purposes for which these allotments were created.

We need not decide whether Alaska Native allotments can give rise to federal reserved water rights. The Secretaries reasonably decided to resolve this difficult issue on a case-by-case basis. We uphold the 1999 Rules, and affirm the district court's conclusion that it was "lawful and reasonable" for the Secretaries to delegate authority to the Federal Subsistence Board to decide which Native allotments falling outside of federal reservations, if any, give rise to federal reserved water rights which justify imposing ANILCA's rural subsistence priority on appurtenant waters.

Determining which waters within or appurtenant to each allotment may be necessary to fulfill the allotment's needs is a complicated and fact-intensive endeavor that is best left in the first instance to the Secretaries, not the courts. We are mindful that *Katie John I* expresses the hope that the federal agencies will "determine promptly which navigable waters are public lands subject to federal subsistence management,"[167] and that the parties to this litigation have an interest in a final determination of how the Secretaries will manage ANILCA's rural subsistence priority. Accordingly, while we defer to the Secretaries' determination in the 1999 Rules regarding how best to identify federal reserved water rights for Alaska Native settlement allotments, we encourage

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167 *Katie John I*, 72 F.3d at 704.

them to undertake that process in a reasonably efficient manner.

5. Selected-but-not-yet-conveyed lands

The final disputed issue is not about water rights, but rather about certain lands on which the Secretaries have chosen to apply ANILCA's rural subsistence priority. These lands—known as "selected-but-not-yet-conveyed" lands—are federal lands that have been selected by the State or an Alaska Native corporation for conveyance, but have not yet been formally conveyed from the United States to Alaska or the corporation.

Section 102 of ANILCA expressly excludes selected-but-not-yet-conveyed lands from the definition of "public lands."[168] For this reason the State argues that the Secretaries' decision to administer them according to the rural subsistence priority was unlawful. But it is not so simple. Section 906(*o*)(2) of ANILCA, located in Title IX of the statute, provides a competing directive: "Until conveyed, all Federal lands within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest

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[168] 16 U.S.C. § 3102(3)(A) (excluding from the definition of public lands "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"); *id.* § 3102(3)(B) (excluding from the definition of public lands "land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished").

addition, shall be administered in accordance with the laws applicable to such unit."[169] Because ANILCA does not define "Federal land" for purposes of § 906(*o*)(2),[170] we give that term its ordinary meaning, *i.e.*, "[l]and owned by the United States government."[171] The record in this case shows that title to selected-but-not-yet-conveyed lands remains with the United States.

Accordingly, in administering ANILCA's rural subsistence priority, the Secretaries faced inconsistent obligations. On one hand, selected-but-not-yet-conveyed lands are not "public lands" subject to the rural subsistence priority. On the other hand, these lands are "Federal lands," which, under § 906(*o*)(2), "shall be administered in accordance with the laws applicable to" the federal reservation that they are within. ANILCA therefore is ambiguous regarding whether selected-but-not-yet-conveyed lands "within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition" are subject to rural subsistence priority management, and we must decide whether the Secretaries' decision—that they are so

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169 43 U.S.C. § 1635(o)(2).

170 16 U.S.C. § 3102 states that "in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act." We are not aware of any definition of "Federal land" in the Alaska Native Claims Settlement Act, *see* 43 U.S.C. § 1602, or the Alaska Statehood Act, *see* Pub.L. 85-508, 72 Stat. 339 (1958).

171 Black's Law Dictionary 893 (8th ed.2004).

subject—is a permissible interpretation of the statute.[172]

The Secretaries argue that they resolved this inherent conflict in favor of § 906(*o*)(2) because to do otherwise would make all laws *except* Title VIII of ANILCA applicable to the selected-but-not-yet-conveyed lands within the boundaries of the conservation system units. Admittedly, by resolving the conflict in this manner, the Secretaries are extending rural subsistence priority beyond "public lands." But their position is reasonable. To hold that the selected-but-not-yet-conveyed lands are subject to the same laws as the surrounding areas *except* rural subsistence priority management would require the Secretaries to carve out small geographic sections from the larger federal land units and then administer the rural subsistence priority on all lands *but* these sections. Such a regime would be unmanageable and contrary to the intent of § 906(*o*)(2). Furthermore, because the title to the selected-but-not-yet-conveyed land remains with the United States, there is no

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[172] *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. The district court, in upholding the Secretaries' decision to apply ANILCA's subsistence priority to selected-but-not-yet-conveyed lands, reasoned that the provision in ANILCA § 804, 16 U.S.C. § 3114, that the subsistence priority applies "[e]xcept as otherwise provided in this Act and other Federal laws" cures any conflict between §§ 102 and 906, and supports the Secretaries' decision to apply the priority to selected-but-not-yet-conveyed lands. We are not so sanguine. Read in the context of § 804, "[e]xcept as otherwise provided" is most naturally read to *limit* the application of the rural subsistence priority, indicating that there may be instances in which even "public lands" are not subject to subsistence management.

practical reason to exclude these lands from federal rural subsistence priority management before they are formally conveyed to the State or a Native corporation. For these reasons, the Secretaries' reconciliation of conflicting provisions in favor of § 906(*o*)(2) was a permissible construction of an ambiguous statute.

CONCLUSION

In reaching our decision, we recognize that we and the Secretaries have been working with imperfect tools. *Katie John I* was a problematic solution to a complex problem, in that it sanctioned the use of a doctrine ill-fitted to determining which Alaskan waters are "public lands" to be managed for rural subsistence priority under ANILCA. But *Katie John I* remains the law of this circuit, and we, like the Secretaries, must apply it as best we can.

We conclude that, in the 1999 Rules, the Secretaries have applied *Katie John I* and the federal reserved water rights doctrine in a principled manner. It was reasonable for the Secretaries to decide that: the "public lands" subject to ANILCA's rural subsistence priority include the waters within and adjacent to federal reservations; and reserved water rights for Alaska Native Settlement allotments are best determined on a case-by-case basis.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KATIE JOHN, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants,	
STATE OF ALASKA, Plaintiff, and ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, et al., Plaintiff-Intervenors, vs. GALE NORTON, Secretary of the Interior, et al., Defendants, and KATIE JOHN, et al., Defendant-Intervenors, and ALASKA FEDERATION OF NATIVES, Defendant-Intervenor.	No. 3:05-cv-0006-HRH (Consolidated with No. 3:05-cv-0158-HRH) <u>DECISION</u> The Process for Identification of Federally <u>Reserved Waters</u>

- AND -

LINCOLN PERATROVICH, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants. and STATE OF ALASKA, Defendant-Intervenor.	)	No. 3:92-cv-0734-HRH

Proceedings

The proceedings which give rise to this decision were commenced January 6, 2005, in the United States District Court for the District of Columbia by the State of Alaska.[1] By its complaint for declaratory and injunctive relief, the State challenged the process by which the Secretaries of the Departments of Agriculture and the Interior undertook to identify federally reserved waters within navigable waters of the State of Alaska.[2] On January 7, 2005, by complaint filed in the United States District Court for the District of Alaska, Katie John and others[3] complained that the Secretaries of the Interior and Agriculture had failed to accord them the priority for the taking of fish and game on public lands to which they are entitled

1 Alaska v. Norton, No. 05-cv-0012-RMC (D.D.C.).

2 Complaint (Count I, page 14), D.D.C. Docket No. 1.

3 The other plaintiffs are Charles Erhart, the Alaska Inter-Tribal Council and the Native Village of Tanana. These plaintiffs are referred to collectively herein as the "Katie John plaintiffs".

under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). The focus of the Katie John complaint was the contention that the Secretaries had failed to identify the full scope of waters that should be considered to be public lands for purposes of ANILCA.[4] The United States District Court for the District of Columbia ordered its case transferred to the District of Alaska.[5] By order of August 4, 2005,[6] the State's case was consolidated with the Katie John case, with the latter designated as the lead case.

Prior to the consolidation of the cases, the Alaska Federation of Natives (AFN) moved to intervene in the State case as a defendant-intervenor and that motion was granted by order of July 28, 2005.[7] Subsequently, the court entered a second order[8] granting intervention in the State case to the Katie John plaintiffs. Finally, by order of March 15, 2006,[9] the Alaska Fish and Wildlife Federation and Outdoor Council (AOC) and others[10] were granted leave to intervene, with certain conditions not relevant to this

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[4] Complaint (First Cause of Action, page 17), Docket No. 1.

[5] Order to Transfer, D.D.C. Docket No. 16 (now Case No. 3:05-cv-0158-HRH (D. Alaska)).

[6] Docket No. 32 in Case No. 3:05-cv-0158-HRH.

[7] Docket No. 25 in Case No. 3:05-cv-0158-HRH.

[8] Docket No. 29 in Case No. 3:05-cv-0158-HRH.

[9] Docket No. 52.

[10] The other plaintiff-intervenors are the Alaska Fish and Wildlife Conservation Fund, Michael Tinker, and John Conrad. These plaintiff-intervenors are referred to collectively herein as the "AOC intervenors."

decision, as plaintiff-intervenors on the side of the State of Alaska.

In Case No. 3:05-cv-0006-HRH, the Katie John plaintiffs assert three claims: (1) that the federal defendants[11] violated ANILCA by refusing to provide a subsistence priority for plaintiffs who reside in areas upstream or downstream from conservation system units (CSUs);[12] (2) that the federal defendants violated the Alaska Native Allotment Act and Title VIII of ANILCA by refusing to provide a subsistence priority on their Native allotments;[13] and (3) that the federal defendants' restrictive application of the reserved water rights doctrine was arbitrary and capricious under the Administrative Procedure Act (APA).[14] The federal defendants answered, denying each of the Katie John plaintiffs' claims, and asserted affirmative defenses of standing, failure to state a claim, failure to exhaust administrative remedies, waiver, statute of limitations, laches, res judicata / collateral estoppel, lack of jurisdiction, and lack of ripeness.[15]

In Case No. 3:05-cv-0158-HRH, the State of Alaska asserts four claims: (1) that the federal defendants violated ANILCA and the APA by failing to properly

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[11] The federal defendants consist of the United States of America, the Secretary of the Interior, and the Secretary of Agriculture.

[12] Complaint at 17, Docket No. 1.

[13] Id. at 17-18.

[14] Id. at 18.

[15] Answer at 17-19, Docket No. 8.

apply the reserved water rights doctrine;[16] (2) that the federal defendants violated ANILCA and the APA by unlawfully extending their authority to marine waters;[17] (3) that the federal defendants violated ANILCA and the APA by unlawfully extending their authority to selected but not yet conveyed lands;[18] and (4) that the federal defendants violated ANILCA and the APA by improperly extending their jurisdiction to waterways that have no connection to Federal lands, CSUs, or National Forests.[19] The AOC intervenors' complaint-in-intervention adopted the State's claims against the federal defendants.[20] The federal defendants answered, denying the claims of the State of Alaska, and again asserted affirmative defenses of failure to state a claim, failure to exhaust administrative remedies, waiver, lack of jurisdiction, statute of limitations, laches, estoppel, and res judicata / collateral estoppel.[21] The AFN and the Katie John plaintiffs, as defendant-intervenors, answered the State's complaint and asserted affirmative defenses which, for all practical purposes, mirrored the position of the federal defendants vis-a-vis the State of Alaska.[22]

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[16] Complaint at 14-15, D.D.C. Docket No. 1.

[17] Id. at 15-16.

[18] Id. at 16-17.

[19] Id. at 17-18.

[20] Docket No. 55.

[21] Answer at 17-23, D.D.C. Docket No. 15.

[22] Answer at 7-10, D.D.C. Docket No. 25 and Answer at 8-11, D.D.C. Docket No. 30.

Finally as regards parties interested in this litigation, the court has long had pending before it the complaint of Peratrovich v. United States, Case No. 3:92-CV-0734-HRH. In their amended complaint,[23] the Peratrovich plaintiffs assert a single claim alleging that the federal defendants have failed to provide them with the priority for subsistence uses for which they are entitled under Title VIII. They seek to have the federal defendants amend the federal subsistence regulations to include all navigable waters within the Tongass National Forest, and they rely upon the reserved waters doctrine as the basis for requiring such an amendment.

On April 24, 2006, the court convened a status conference in the consolidated cases. The Peratrovich plaintiffs participated in the conference. It was agreed by all of the parties to all three of the above-mentioned cases that two overarching issues were raised by these cases:

(1) Did the Secretaries employ a proper administrative procedural process for determining the existence of reserved water rights within navigable waters for purposes of ANILCA? This issue is referred to by the parties as the "what process" issue.

(2) What specific water bodies are "public lands" for purposes of ANILCA as a result of the Ninth Circuit Court's determination that public lands include navigable waters within which the Government has reserved water

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[23] Docket No. 79 in Case No. 3:92-cv-0734-HRH.

rights? This issue is referred to by the parties as the "where" issue.

All of the conferees and the court agreed that the "what process" issue should be briefed and decided first; and, when that decision has been made, the "where" issue would be briefed and decided.

Although slightly different words are employed by various parties, each of the State (in its Count I), the Katie John plaintiffs (in their first cause of action), and the Peratrovich plaintiffs assert a claim which either raises or directly implicates the State's and AOC intervenors' primary contention, which is that rule-making proceedings are not the appropriate procedure for identification of those navigable waters in which the Government has reserved water rights. The State raises that issue directly and overtly. The claims of the Katie John plaintiffs and the Peratrovich plaintiffs would each be adversely impacted by a determination that the Secretaries had employed an incorrect procedural process. As a consequence of the foregoing, all of the parties were invited to participate in the briefing of the "what process" issue, and did so.[24]

Background

The Alaska National Interest Lands Conservation Act (ANILCA) was enacted in 1980. Title VIII of ANILCA establishes a preference for customary and traditional uses of fish and wildlife by according a priority for the taking of fish and wildlife on public

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[24] The various briefs of the parties are located in the record as follows: State of Alaska, Docket Nos. 68 and 88; United States (the Secretaries), Docket Nos. 78 and 103; Katie John plaintiffs and AFN, Docket Nos. 82 and 106; AOC intervenors, Docket No. 71; and Peratrovich plaintiffs, Docket Nos. 81 and 107.

lands[25] in Alaska for non-wasteful subsistence uses by rural Alaska residents. 16 U.S.C. §§ 3113 and 3114. Section 805 of ANILCA charged the Secretaries with the responsibility of implementing the subsistence priority. 16 U.S.C. § 3115. However, as what might be viewed as an early expression of renewed federalism favoring states rather than the national government, Congress intended that the subsistence priority be effected by the State of Alaska through the implementation of a state law of general application consistent with Title VIII of ANILCA. 16 U.S.C. § 3115(d). The State of Alaska enacted and implemented a subsistence law that complied with Title

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[25] The term "public lands" in this decision has reference to those federally owned lands to which ANILCA has application. "[P]ublic lands" are defined by § 102(3) of ANILCA as:

> (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)].

16 U.S.C. § 3102(3). The term "land" is defined in ANILCA to "mean[] lands, waters, and interests therein." Id. at § 3102(1) (emphasis added).

VIII and managed subsistence hunting and fishing throughout Alaska until 1989.

In 1989, the Alaska Supreme Court, in McDowell v. State, 785 P.2d 1 (Alaska 1989), invalidated the state subsistence law, thereby making the state noncompliant with ANILCA's rural preference requirement. The effect of McDowell was stayed until July 1, 1990, at which time the Secretaries assumed responsibility for the management of subsistence hunting and fishing on public lands.[26] The Secretaries promulgated temporary regulations which adopted a definition of "public lands" for purposes of Title VIII of ANILCA that did not include navigable waters. See 55 Fed. Reg. 27114, 27115 (June 29, 1990). The permanent regulations that were promulgated in 1992 also did not include navigable waters within the definition of "public lands" for purposes of Title VIII. See 50 C.F.R. § 100.4 (1992).[27]

The Secretaries' determination — that navigable waters were not included within the definition of "public lands" — generated a host of lawsuits. These cases were consolidated, and the court reviewed extensive briefing and argument. Late in this litigation, the Secretaries changed their position, arguing that navigable waters in which the Government had reserved water rights were public

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[26] The State of Alaska continues to manage subsistence hunting and fishing on state public lands and non-subsistence hunting on all lands in Alaska based upon state law and regulations.

[27] The regulations at issue here are codified at both 36 C.F.R. Part 242 and 50 C.F.R. Part 100. This order will cite only the version of the regulations codified at 50 C.F.R. Part 100.

lands for purposes of ANILCA. This court held that "[f]or purposes of Title VIII, 'public lands' includes all navigable waterways in Alaska." John v. United States, Nos. A90-0484-CV (HRH) and A92-0264-CV (HRH), 1994 WL 487830, at *18 (D. Alaska March 30, 1994) (Katie John I). The court based its holding on the navigational servitude.

An interlocutory appeal was taken by the State and the federal defendants. The majority of a three-judge panel for the Ninth Circuit Court of Appeals held:

> to be reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters.

Alaska v. Babbitt, 72 F.3d 698, 703-04 (9th Cir. 1995) (Katie John II).[28] The court of appeals remanded the case to this court and stated that it "hope[d] that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management." Id. at 704. On remand, this court vacated the portion of its March 30, 1994, order defining public lands and deemed that issue controlled by the Katie John II decision.[29]

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[28] This opinion superseded an earlier opinion, Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995).

[29] See Order re Case Status at 2, Docket No. 229 in Case No. A90-0484-CV (HRH) [Consolidated with No. A92-0264-CV (HRH)].

Following the panel decision in Katie John II, the Secretaries undertook rule-making proceedings to identify navigable waters in which the federal government had reserved water rights. On April 4, 1996, the Secretaries published an advance notice of proposed rule-making. See 61 Fed. Reg. 15014. Under "summary of changes", the advance notice provided:

> The amendments being considered ... would expand the scope of the Federal subsistence program to include, in addition to the waters already included, all inland navigable waters within the exterior boundaries of the listed National Parks, Preserves, Wildlife Refuges, and other specified Federal land units managed by the Department of the Interior in Alaska. Within the exterior boundaries of the two national forests in Alaska, the subsistence program would apply to all inland navigable waters bordered by lands owned by the United States.

Id. at 15015. The advance notice included a list of all the parks, preserves, refuges, and other land units which would be covered by the amendments. Id. at 15018. Public hearings were held on the advance notice and written comments were also invited. On December 17, 1997, the Secretaries published proposed regulations. See 62 Fed. Reg. 66216. Public hearings were held on the proposed regulations and the Secretaries also accepted written comments on the proposed regulations. However, promulgation and implementation of the final regulations were delayed by Congress through a series of appropriation act restrictions.

On January 8, 1999, the final rule was published. See 64 Fed. Reg. 1276. The summary section of the final rule explained that "[t]his 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." Id. The final rule, which became effective on October 1, 1999, provides that public lands include "navigable and non-navigable waters in which the United States has reserved water rights." Id. at 1287. The final rule also provides that all navigable waters and non-navigable waters within, and inland waters adjacent to, the specifically listed areas are "public lands" for purposes of Title VIII of ANILCA. Id. at 1286-87.

While the foregoing rule-making was underway, the consolidated Katie John litigation was essentially dormant. By early 2000, this court became convinced that consolidated cases which dated back to the early 1990s should terminate and not become the vehicle for further litigation over the Secretaries' new regulations. In an order dated January 6, 2000, the court "readopt[ed] all of its rulings on the merits of plaintiffs' claims heretofore made"[30] and deemed those rulings final "for all purposes and to all parties."[31] Judgment was entered on January 7, 2000.

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[30] Order re Case Status at 2, Case No. A90-0484-CV (HRH) [Consolidated with No. A92-0264-CV (HRH)], Docket No. 268.

[31] Id.

The State appealed again. The Ninth Circuit voted to hear this second appeal en banc rather than by a three-judge panel. After oral argument, "[a] majority of the en banc court ... determined that the judgment rendered by the prior panel, and adopted by the district court, should not be disturbed or altered by the en banc court." John v. United States, 247 F.3d 1032, 1033 (9th Cir. 2001) (Katie John III). The current litigation challenging the 1999 regulations followed.

As set forth above, the parties agreed that the court would first take up the issue of whether the Secretaries employed the proper process for determining the existence of reserved water rights. The State and the AOC intervenors take the position that the Secretaries have conclusively established reserved water rights in the 1999 regulations and that this is improper because reserved water rights can only be conclusively established through a formal adjudication. The federal defendants and the Katie John plaintiffs contend that the State's challenge to the process used by the Secretaries is barred by issue and claim preclusion, the law of the case doctrine, and the State's failure to exhaust administrative remedies. Even if the State's challenge is not barred, the federal defendants, the Katie John plaintiffs, and the Peratrovich plaintiffs take the position that the Secretaries could determine the existence of reserved water rights through the rule-making process.

Issue Preclusion

The federal defendants and the Katie John plaintiffs contend that the issue of whether the Secretaries have the authority to identify the waters that are public lands based on the reserved water rights doctrine through rule-making has already been litigated and

decided. "As a general proposition, '[t]he doctrine of collateral estoppel (or issue preclusion) prevents relitigation of issues actually litigated and necessarily decided, after a full and fair opportunity for litigation, in a prior proceeding.'" Af-Cap Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080, 1086 (9th Cir. 2007) (quoting Kourtis v. Cameron, 419 F.3d 989, 994 (9th Cir. 2005)). The doctrine applies "'where (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.'" Id. An issue need not be explicitly decided by the prior tribunal; issue preclusion also applies when the prior tribunal implicitly decided an issue. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 750 (9th Cir. 2006). "Although [i]ssue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law ..., [i]ssue preclusion has never been applied to issues of law with the same rigor as to issues of fact[.]" Af-Cap, 475 F.3d at 1086 (internal citations omitted).

If and to the extent that the State is actually contending that the Secretaries do not have jurisdiction or the authority to promulgate regulations implementing Title VIII of ANILCA, that issue is precluded. In the Katie John I case, the State argued that the Secretaries had no authority to issue regulations implementing the subsistence priority on public lands in Alaska. This court held that Title VIII of ANILCA authorizes the Secretaries, not the State of Alaska, to manage fish and wildlife on public lands in

Alaska for purposes of Title VIII of ANILCA. Katie John I, 1994 WL 487830, at *18. On appeal, the parties stipulated to dismissal with prejudice of this issue, and the court of appeals accepted the stipulation. Katie John II, 72 F.3d at 700 n.2.

It is the court's perception that the State is not arguing that the Secretaries lack the authority to promulgate regulations implementing the rural subsistence priority on public lands in Alaska. Rather, the State's argument is a much more focused one: that the Secretaries do not have the authority to conclusively establish reserved water rights through the rule-making process. The federal defendants and the Katie John plaintiffs argue that in Katie John II the Ninth Circuit mandated that the Secretaries act through rule-making.

Nothing in the Katie John II decision indicates that the court of appeals decided that the Secretaries must determine reserved water rights through rule-making. When the court of appeals held that "the federal agencies that administer the subsistence priority are responsible for identifying those waters", Katie John II, 72 F.3d at 704, it did not expressly say how that was to be accomplished. The court of appeals did not say what process of identification should be employed.

In the alternative, the federal defendants and the Katie John plaintiffs suggest that this issue was implicitly decided by the court of appeals. In their briefing to the court of appeals, the federal defendants suggested that the Secretaries were contemplating using rule-making to identify which waters were subject to the reserved water rights doctrine, and the State argued that Congress could not have intended the subsistence priority to extend to reserved waters

because the nature and scope of such rights must be decided in a judicial forum. The federal defendants and the Katie John plaintiffs argue that in order to hold that the federal agencies were responsible for identifying reserved waters, the court of appeals had to have rejected the State's contention that reserved waters can only be identified by the courts through an adjudication.

The court of appeals did not implicitly decide the "what process" issue. The appellate court's direction to identify reserved waters implies nothing about whether the Secretaries were to carry out the court's ruling by court action or by use of their power to adopt regulations. The sole issue before the court of appeals was whether navigable waters fell within the statutory definition of public lands. Katie John II, 72 F.3d at 700. To decide that issue, the court of appeals did not have to decide what process the Secretaries should use to determine the existence of reserved water rights. Issue preclusion does not bar the State's "what process" challenge.

Claim Preclusion

The Katie John plaintiffs argue that the State's "what process" challenge to the 1999 regulations is barred by claim preclusion. "Under claim preclusion, a subsequent action is precluded if the same claim was previously litigated." United States v. Oregon, 470 F.3d 809, 817 (9th Cir. 2006). "As such, claim preclusion requires an identity of claims." Id. It also applies to claims that "could have been asserted in the prior litigation." Id.

The Katie John plaintiffs contend that the State has previously raised the claim that the Secretaries lack the authority to determine which waters are public

lands for purposes of Title VIII of ANILCA. The Katie John plaintiffs insist that the State's contention that the Secretaries were required to determine reserved water rights through formal adjudication is an attempt by the State to relitigate its claim that the Secretaries do not have the authority to issue regulations implementing the Title VIII subsistence priority.

As stated above,[32] if the State were pursuing a claim that the Secretaries do not have jurisdiction or the authority to promulgate regulations implementing Title VIII of ANILCA, such a claim would be precluded. However, none of State's three extant claims is based on such broad allegations. The claim at issue in this stage of the litigation is that asserted in Count I of the State's complaint: that the Secretaries did not properly apply the reserved water rights doctrine. That claim was not previously litigated, nor is it a claim that could have been brought in the earlier litigation because the Secretaries had not yet attempted to apply the reserved water rights doctrine. The State's challenge to the process employed by the Secretaries to determine the existence of reserved water rights is not barred by claim preclusion.

Law of the Case

In a footnote in their brief, the Katie John plaintiffs suggest that the law of the case doctrine could apply to the issue of whether the federal agencies are the proper entities to identify reserved waters. "Under the law of the case doctrine, a court 'is generally precluded from reconsidering an issue previously

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[32] See pages 14-15.

decided by the same court ... in the identical case.'" Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1186 (9th Cir. 2006) (quoting United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000)). "[B]ecause this case is so closely related to the prior disputes between the parties,"[33] the Katie John plaintiffs argue that the law of the case doctrine could apply, even though the ruling at issue was not made in this case.

As said before, the "what process" issue raised by the State in this case is not the same issue that the State raised in the earlier litigation. The State is arguing that the Secretaries acted improperly in implementing Katie John II, not that the Secretaries do not have the authority to promulgate regulations implementing the subsistence priority on public lands. The law of the case doctrine has no application here.

Exhaustion of Administrative Remedies

The federal defendants and the Katie John plaintiffs argue that the State of Alaska failed to exhaust its administrative remedies as to its contention that the Secretaries improperly adjudicated reserved water rights through rule-making. "[A] party's failure to make an argument before the administrative agency in comments on a proposed rule bar[] it from raising that argument on judicial review." Universal Health Services, Inc. v. Thompson, 363 F.3d 1013, 1019 (9th Cir. 2004).

The State participated in the notice and comment period during the rule-making process that resulted in

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[33] Brief of Alaska Federation of Natives and Katie John, et al. 33 at 12, n.6, Docket No. 82.

the 1999 regulations. Two assistant attorney generals and the attorney general for the State of Alaska testified at six different public hearings held on the advance notice of rule-making that was published in the spring of 1996. Each one testified at the hearings he or she attended that the State objected to the proposed amendments because the State continued to believe that navigable waters in which the federal government had a reserved water right were not public lands.[34] They also testified that the State would "challenge any designation where reserved waters are not absolutely necessary to fulfill a primary purpose of the land reservation."[35] None of them objected to the proposed rules on the ground that the Secretaries were improperly adjudicating reserved water rights through the rulemaking process.

After the proposed rules were published in December 1997, the State submitted written comments. In a cover letter, the Attorney General of Alaska stated that "[w]hile the state recognizes that the federal agencies are required to extend ANILCA title VIII jurisdiction to navigable waters in which the United States claims a reserved water right, the proposed rulemaking provides no basis for the extensive reserved water rights it claims."[36] In its comments, the State objected that the Secretaries had

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[34] Admin. Rec., Vol. 8, Tab 189 at 4130-31; Tab 194 at 4223-24; Tab 196 at 4267-69; Tab 198 at 4319; and Vol. 9, Tab 200 at 4464; Tab 202 at 4543-45.

[35] Admin. Rec., Vol. 8, Tab 189 at 4131-32; Tab 194 at 4224; Tab 196 at 4269; and Vol. 9, Tab at 4464; Tab 202 at 4545.

[36] Admin. Rec., Vol. 15, Tab 352 at 8424.

not "explained the necessity of reserving water in each reservation or the basis for including adjacent waters."[37] The State also reiterated its continuing objection to the holding of the Ninth Circuit in Katie John II and stated that it was not "conceding the existence of any particular federal reserved water rights."[38]

In none of these comments did the State ever expressly raise the primary argument that it makes here, that the Secretaries were improperly adjudicating reserved water rights through the rulemaking process. However, the court may "entertain an issue not raised before the agency if 'exceptional circumstances' warrant such review." Johnson v. Director, Office of Workers' Compensation Programs, 183 F.3d 1169, 1171 (9th Cir. 1999) (quoting Marathon Oil Co. v. United States, 807 F.2d 759, 768 (9th Cir. 1986)). The court "determine[s] whether such circumstances exist by balancing 'the agency's interests "in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances."'" Id. (quoting Litton Indus., Inc. v. FTC, 676 F.2d 364, 369-70 (9th Cir. 1982) (quoting Montgomery v. Rumsfeld, 572 F.2d 250, 253 (9th Cir. 1987)).

Two exceptional circumstances exist and warrant review here. First, the court is being asked to decide a

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[37] Id. at 8450.

[38] Id. at 8452.

legal issue: whether court adjudication should have been employed by the Secretaries to properly carry out the holding of Katie John II. Agency expertise is not involved because the "what process" 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. It also strikes the court that it likely would have been futile for the State to argue during the notice-and-comment period that the Secretaries could not conclusively establish federal reserved water rights through rule-making.

Second, during the period when the rule-making proceedings were underway, the State's appeal of this court's final decision implementing Katie John II was still pending. The rule-making proceedings ended with publication of the final rules on January 8, 1999. The State's appeal contesting application of the reserved water rights doctrine was not rejected until May 7, 2001. In light of this sequence of events, it is quite understandable that the State did not focus on the "what process" issue in the rule-making proceedings.

The court concludes that the foregoing exceptional circumstances excuse the State's failure to raise the "what process" issue before the Secretaries.

Standard of Review

The court's scope of review is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-06. The pertinent part of Section 706 provides that

> [t]he reviewing court shall —
>
> ....

> (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....

5 U.S.C. § 706(2). The State argues that Secretaries have acted "otherwise not in accordance with law", "contrary to constitutional right", "in excess of statutory jurisdiction, authority or limitations" or "without observance of procedure required by law." Id.

The parties disagree as to whether the court's review, in this instance, is deferential. The State argues that the Secretaries' position that reserved water rights could be determined through rule-making is entitled to no deference; the federal defendants argue that the Secretaries' position is entitled to deference. The court need not decide whether or not the Secretaries' position is entitled to deference because the result would be the same under either a deferential review or an entirely non-deferential review. See Sierra Club v. Dep't of Transp., 948 F.2d 568, 573 (9th Cir. 1991).

The "What Process" Claim

We turn finally to the merits of the State's "what process" claim that is based on Count I of its complaint, in which the State alleges that the Secretaries:

> failed to apply the reserved water rights doctrine and, instead, simply identified all waters within and adjacent to CSUs and National Forests, and broadly asserted preemptive Federal subsistence management jurisdiction over thousands of appurtenant waterways.[39]

By agreement of the parties, the court here addresses only the general proposition of whether the Secretaries should have proceeded to identify reserved waters within navigable waters by means of rule-making procedures or court adjudication of water rights. The court will take up subsequently the question of individual reservations identified by the Secretaries. For the reasons discussed below, the court concludes that, as a general proposition, the Secretaries' rule-making power was a proper process by which to identify reserved waters within navigable waters for purposes of implementing the rural subsistence priority created by Title VIII of ANILCA.

The Ninth Circuit Court of Appeals relied upon the reserved water rights doctrine in making its decision as to how the rural subsistence priority should be effected with respect to water bodies. The reserved water rights doctrine was judicially created by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908). Winters involved a priority dispute between irrigators and the Fort Belknap Indian Tribe over the waters of the Milk River in central Montana. The Court determined that in

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39 Complaint at 14, Docket No. 1 in Case No. 3:05-cv-0158-HRH.

reserving land as an Indian reservation, the federal government had impliedly reserved sufficient water to fulfill the purpose of the reservation. Id. at 575-77. In 1955, the Supreme Court extended the reserved water rights doctrine to all federal reservations. See Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955). The essence of the doctrine is "that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert v. United States, 426 U.S. 128, 138 (1976). However, the government "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Id. at 141. "In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. [Such] [i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." Id. at 139. But, the Court has limited the doctrine to the water necessary to fulfill the primary purposes of the reservation. In United States v. New Mexico, 438 U.S. 696, 718 (1978), the Court held that in reserving the Gila National Forest, the federal government reserved water only where necessary to preserve timber in the forest or to secure favorable water flows, but it did not reserve water for aesthetic, recreational, wildlife preservation, or stock watering purposes. While the Court recognized that the foregoing purposes might be secondary purposes of the reservation, they were not the primary purpose of the reservation, and the Court held that there was no

intent by the federal government to reserve water for these secondary purposes. Id. at 714-18.

Here, the State first argues that the process by which the Secretaries identified the waters in which the federal government has reserved water rights was improper because the 1999 regulations "go beyond identification and expansively purport to adjudicate and establish [federal reserve water rights] (and preemptive federal authority) in numerous Alaska waterways."[40] The State contends that the 1999 regulations declare that federal reserved water rights exist and thus must be read as an effort to administratively adjudicate the existence of reserved water rights. The State argues that because the Secretaries do not have the authority to adjudicate reserved water rights, the portion of the 1999 regulations dealing with reserved water rights must be set aside.

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. The Secretaries have not claimed any such jurisdiction. In the 1999 regulations, the Secretaries have not purported to establish any allocation of water rights. As the case law discussed above shows, the reserved waters adjudication process is about establishing the priorities of users of water. Here, the Secretaries were directed by the Ninth Circuit Court to identify those navigable waters in which the Government has reserved water rights. By the 1999 regulations, the

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[40] Plaintiff State of Alaska's Opening Brief at 2, Docket No. 68.

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 regulations say nothing about who is entitled to use a particular water body, much less what the respective use priorities might be. The identification of the existence of a reserved water rights claim is not the equivalent of a conclusive determination of the validity of such claim for purposes of establishing the priority of water use rights. Rule-making was a proper process by which to identify reserved waters for purposes of the implementation of the subsistence priority created for rural Alaskans by Title VIII of ANILCA.

To the extent the State is arguing that a formal adjudication of a reserved water right is necessary to determine the existence of that right, this argument fails. For purposes of ANILCA public lands determinations, no adjudication of water rights is needed. A formal adjudication, whether it be in a state or federal court, is not the only means of identifying reserved water rights. Reserved water rights vest on the date of the reservation. Cappaert, 426 U.S. at 138. They do not depend upon an adjudication for their existence. Claims of reserved water rights have often been determined through formal adjudication, but this has occurred because the question of whether the federal government has reserved water rights has arisen in places where water is scarce and there is a need to determine who is entitled to how much water. The allocation of water is not at issue here. The parties to this litigation are not "consumers" of water, and the disagreement between the State and the Secretaries has nothing to do with what amount of water was

available for appropriation when lands were reserved by the Government. The core disagreement here is the extent to which each governmental regulatory body is entitled (indeed required) to regulate the fish and wildlife that inhabit navigable waters. The Secretaries are required by ANILCA to implement the rural subsistence priority for the taking of fish and wildlife on public lands (including reserved waters based upon Katie John II), and are authorized by Congress to carry out that directive by the enactment of regulations. 16 U.S.C. § 3124. The State also implements its subsistence law through regulations. AS 16.05.258. The federal and state regulatory schemes intersect at various times and places and in various ways. However, there is nothing about the interaction between these two regulators of fish and wildlife that necessitates an adjudication of water rights — that is, a determination of water use priorities.

Because this case is about regulation and allocation of fish and wildlife, and not the appropriation of water, it is entirely appropriate that those responsible for the regulation of fish and wildlife determine, for the purposes of ANILCA, which waters are subject to reserved water rights through a rule-making process. Nothing in the reserved water cases cited by the parties suggests otherwise. The Ninth Circuit in Katie John II directed the Secretaries to "identify" the waters in which the federal government has reserved water rights. The statutory method for the Secretaries to carry out their regulatory responsibilities under ANILCA is to "prescribe such regulations as are necessary...." 16 U.S.C. § 3124. In directing the Secretaries to "identify" reserved waters, the court of

appeals could not have intended that the Secretaries initiate water rights adjudications when there was no need for allocation of water resources.

The State also finds fault with the Secretaries' process because the Secretaries did not expressly identify the primary purpose of each land reservation, determine whether that purpose would be defeated by the absence of water, and quantify the amount of water necessary to fulfill the primary purpose. The Secretaries had no reason to make such determinations. A determination of the primary purpose of a reservation, whether it would be defeated by the absence of water, and/or the quantity of water necessary to fulfill the primary purpose of the reservation, has to do with the adjudication of water rights under a prior appropriation scheme for the establishment of water use rights. As explained above, this case is not about the allocation of water. This case is about the regulation of fish and wildlife that inhabit public lands. There was no need for the Secretaries to make the determinations that are necessary for a formal adjudication of reserved water rights.

Lastly, the State argues that the Secretaries, in promulgating the 1999 regulations, exceeded their statutory authority and violated the principles set forth in sections 1314 and 1319 of ANILCA. Section 1319 of ANILCA provides:

> 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.

16 U.S.C. § 3207. Section 1314 of ANILCA, in pertinent part, and as codified, provides:

> Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in subchapter II of this chapter, or to amend the Alaska constitution.

16 U.S.C. § 3202(a). The State contends that these two savings clauses manifest Congressional intent to protect and maintain the State's traditional authority over fish and wildlife and that the rule-making process employed by the Secretaries impermissibly impinges on this traditional authority.

The Secretaries have not run afoul of either section 1319 or section 1314 of ANILCA in identifying reserved water rights through the rule-making process. Section 1319 ensures that ANILCA does not alter existing water law. The identification of reserved

water rights through rule-making is not inconsistent the Alaska Water Use Act. AS 46.15.010-.270[41] The Secretaries' rule-making for purposes 41 of ANILCA says nothing about anyone's right to use water.

Section 1314 recognizes that the State's traditional authority over fish and wildlife management may be diminished "as ... provided in subchapter II of this chapter[.]" 16 U.S.C. § 3202(a). Subchapter II refers to the codified form of the subsistence provisions which are Title VIII of ANILCA. Thus, Section 1314 recognizes that in implementing Title VIII the Secretaries may have to take action that impinges on the State's traditional authority over fish and wildlife management. The Secretaries' use of rulemaking to identify reserved waters for purposes of Title VIII of ANILCA falls within the "except[ion]" to section 1314.

Other Issues Raised by the State

In addition to raising the issue of whether the Secretaries improperly adjudicated reserved water rights through the rulemaking process, the State raises two other issues in its opening brief: (1) the Secretaries improperly claimed reserved water rights in marine or tidally influenced waters, and (2) the Secretaries improperly claimed reserved water rights in selected but not yet conveyed lands.

These two issues are "which waters" issues, and it was agreed that the court would take up those issues once a decision had been reached on the "what process" issue. Although the other parties responded to these "which waters" issues, the court declines to address

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[41] The Alaska Water Use Act, AS 46.15.030, sets forth Alaska's prior appropriation water use regime.

them at this point. However, if, as this litigation moves forward, the parties are all satisfied with their briefing on either or both of these two "which waters" issues, they may stipulate to submit that issue or issues on the existing briefs.

Conclusion

The court concludes that the Secretaries' use of the rulemaking process to identify reserved water rights for purposes of federal subsistence management was lawful and was a procedure authorized by law.

Counsel will please confer and by May 31, 2007 propose to the court a plan and schedule for briefing the "which waters" issues.

DATED at Anchorage, Alaska, this 17th day of May, 2007.

/s/ H. Russel Holland
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KATIE JOHN, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants, and STATE OF ALASKA, Defendant-Intervenor,	No. 3:05-Cv-0006-HRH (Consolidated with No. 3:05-cv-0158-HRH)
STATE OF ALASKA, Plaintiff, and ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, et al., Plaintiff-Intervenors, vs. KEN SALAZAR, Secretary of the Interior, et al., Defendants, and KATIE JOHN, et al., Defendant-Intervenors, and ALASKA FEDERATION OF NATIVES, Defendant-Intervenor.	ORDER Which Waters Have Federal Reserved Water Rights

- AND -

LINCOLN PERATROVICH, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants. and STATE OF ALASKA, Defendant-Intervenor.	)	No. 3:92-cv-0734-HRH

These consolidated cases involve challenges to regulations that were promulgated by the Secretaries of Interior and Agriculture on January 8, 1999 (herein "the 1999 final rule"). The regulations primarily implemented a Ninth Circuit Court of Appeals' decision that the definition of "public lands" for purposes of Title VIII of the Alaska National Interest Lands Conservation Act includes navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. See Alaska v. Babbitt, 72 F.3d 698, 703-04 (9th Cir. 1995). This decision addresses legal issues flowing from the Secretaries' application of the reserved water rights doctrine to broad categories of Alaskan waters.

I. Background

The Alaska National Interest Lands Conservation Act (ANILCA) was enacted in 1980. Congress set forth four specific purposes of ANILCA, three of which have implication here:

(a) Establishment of units

In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) Preservation and protection of scenic, geological, etc., values

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

(c) Subsistence way of life for rural residents

> It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

16 U.S.C. § 3101.

In order to allow rural residents to continue to engage in a subsistence way of life, Title VIII of ANILCA establishes a preference for customary and traditional uses of fish and wildlife by according a priority for the taking of fish and wildlife on public lands in Alaska for nonwasteful subsistence uses by rural Alaska residents. 16 U.S.C. §§ 3113 and 3114. We emphasize that the preference and priority created by ANILCA for subsistence uses by rural residents is not restricted geographically to the conservation system units created by ANILCA. Rather, and "[e]xcept as otherwise provided in [ANILCA] 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).

A "conservation system unit" (herein referred to as "CSU") is defined in section 102(4) of ANILCA as

> 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 unit, and any such unit established, designated, or expanded hereafter.

16 U.S.C. § 3102 (4). Not included in this definition are national forests. Thus, there are lands withdrawn from public domain for specific purposes, such as Chugach National Forest and Tongass National Forest, which are not included in CSUs and, of course, there are substantial unreserved federal lands (public domain), title to which is in the United States.

"Public lands" are defined in section 102(3) of ANILCA as:

> (3) ... 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)].

16 U.S.C. § 3102 (3). Federal lands are defined as "lands the title to which is in the United States after December 2, 1980." Id. § 3102(2). "Land" is defined as "lands, waters, and interests therein." Id. § 3102(1). These definitions do not apply to Title IX of ANILCA. Id. § 3102.

Section 805 of ANILCA charged the Secretaries with the responsibility of implementing the subsistence preference. 16 U.S.C. § 3115. However, Congress intended that the subsistence preference be effected by the State of Alaska through the implementation of a state law of general application consistent with Title VIII of ANILCA. Id. § 3115 (d). The State of Alaska enacted and implemented a subsistence law that complied with Title VIII and managed subsistence hunting and fishing throughout Alaska until 1989.

In 1989, the Alaska Supreme Court, in McDowell v. State, 785 P.2d 1 (Alaska 1989), invalidated the state subsistence law, thereby making the State noncompliant with ANILCA's rural preference requirement. The effect of McDowell was stayed until July 1, 1990, at which time the Secretaries assumed responsibility for the management of subsistence hunting and fishing on public lands.

This assumption of authority by the Secretaries did not have the effect of totally excluding the State from fish and game management. The priority established in Title VIII of ANILCA is triggered only if "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[.]" 16 U.S.C. § 3114. Until a priority is deemed necessary, the State and federal fish and wildlife regulators such as the Secretaries of the

Interior and Agriculture have concurrent jurisdiction over fish and game management in Alaska, even on federal lands.

In 1990, the Secretaries promulgated temporary regulations which adopted a definition of "public lands" for purposes of Title VIII of ANILCA that did not include navigable waters. See Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114, 27,115 (June 29, 1990). The permanent regulations that were promulgated in 1992 also did not include navigable waters within the definition of "public lands" for purposes of Title VIII. See 50 C.F.R. § 100.4 (1992).

The Secretaries' determination – that navigable waters were not included within the definition of "public lands" – generated a host of lawsuits, which were eventually consolidated. In the consolidated action, the State took the position that no navigable waters were public lands. The Katie John and Peratrovich plaintiffs took the position that all navigable waters were public lands either because of the navigational servitude or because of Congress' Commerce Clause powers. Late in the litigation, the Secretaries modified their position, arguing that some navigable waters were public lands by virtue of the reserved water rights doctrine. After extensive briefing and argument, this court held that "[f]or purposes of Title VIII, 'public lands' includes all navigable waterways in Alaska." John v. United States, Nos. A90-0484-CV (HRH), A92-0264-CV (HRH), 1994 WL 487830, at *18 (D. Alaska March 30, 1994). The court based its holding on the navigational servitude.

The Secretaries and the State appealed. On appeal, the Ninth Circuit Court of Appeals first "reject[ed] the argument that the navigational servitude is an 'interest ... the title to which is in the United States, ' such that all navigable waters are public lands within the meaning of ANILCA." Alaska v. Babbitt, 72 F.3d 698, 703 (9th Cir. 1995) (Katie John I).[1] The circuit court also "reject[ed] the argument that Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters." Id. The circuit court then considered whether the Secretaries' interpretation of "public lands" based on the reserved water rights doctrine was a permissible construction of ANILCA. Id. The circuit court held

> to be reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. [It] also h[e]ld that the federal agencies that administer the subsistence priority are responsible for identifying those waters.

Id. at 703-04. The circuit court explained:

> 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

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[1] This opinion superseded an earlier opinion, Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995).

> the reservations. By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.

Id. at 703 (footnote omitted).

In its conclusion, the circuit court "recogniz[ed] that [its] holding may be inherently unsatisfactory." Id. at 704. The circuit court explained that if it had "adopt[ed] the state's position that public lands exclude navigable waters," it would have "undermine[d] congressional intent to protect and provide the opportunity for subsistence fishing." Id. at 704. On the other hand, if the circuit court had "adopt[ed] Katie John's position, that public lands include all navigable waters," it would have given "federal agencies control over all such waters in Alaska. ANILCA does not support such a complete assertion of federal control ...." Id. The circuit court acknowledged that both "federal and state regulation" of navigable waters "is necessary,"[2] but also realized that attempting to find some balance between these two regulatory authorities was not a task for which courts were well-suited. Id. But, plainly, the circuit court believed that the reserved water rights doctrine was the best means for attempting to achieve a balance between state and federal management of fisheries, even if it were an

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[2] Presumably, the circuit court so states because of the McDowell decision, which had the effect of requiring separate fish and wildlife regimes in Alaska rather than the unified regime for subsistence hunting and fishing that Congress had intended.

imperfect means. As the circuit court observed, "[o]nly legislative action by Alaska or Congress [would] truly resolve the problem." Id. In the absence of a legislative solution, however, the task fell to the Secretaries to "determine promptly which navigable waters are public lands subject to federal subsistence management." Id.

Respectfully, the foregoing decision of the Ninth Circuit Court of Appeals was more imperfect and more unsatisfactory than that court realized. In focusing upon the "vast parcels of land in Alaska [reserved] for federal purposes," id. at 703, the circuit court overlooked the fact that the congressional purpose of preserving the subsistence way of life was not limited to those reserved lands – not limited to conservation system units. The preference for subsistence hunting and fishing expressly applies to all "public lands," not just CSUs created by ANILCA. The reserved water rights doctrine has no application to federal lands which are undisputedly public land, but are not reserved for any governmental purpose. But clearly Title VIII is to apply to such lands; and if Title VIII applies to uplands, where is the logic and the protection of the subsistence priority in navigable waters on or abutting such public lands? Moreover, in seeking to achieve what it perceived as a necessary balance between federal and state jurisdiction of fish and wildlife in Alaska, the circuit court failed to realize that Title VIII of ANILCA does not preempt state regulation, even as to federal lands.[3] Rather, the

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[3] Some CSUs (e.g., some national parks) do foreclose state jurisdiction.

Secretaries' jurisdiction trumps state jurisdiction of federal lands only when it is necessary to effect the priority (as opposed to the preference) created by section 804 of ANILCA. 16 U.S.C. § 3114. The balance of federal and state jurisdiction which the circuit court sought was already in place and in operation. The State of Alaska regulated sport fishing, AS 16.05.330, and had its own free-standing subsistence hunting and fishing regime, AS 16.05.258, which operated in parallel with section 804 of ANILCA. 16 U.S.C. § 3114.

On remand from the Ninth Circuit Court of Appeals, this court vacated the portion of its March 30, 1994 order defining public lands and deemed that issue controlled by the Katie John I decision.[4] Following the decision in Katie John I, the Secretaries timely undertook rule-making proceedings to identify navigable waters in which the federal government had federal reserved water rights. On April 4, 1996, the Secretaries published an advance notice of proposed rule-making. See Subsistence Management Regulations for Public Lands in Alaska, Identification of Waters Subject to Subsistence Priority Regulation and Expansion of the Federal Subsistence Program & the Federal Subsistence Board's Authority, 61 Fed. Reg. 15,014 (April 4, 1996). Public hearings were held on the advance notice, and written comments were also invited. On December 17, 1997, the Secretaries published proposed regulations. See Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, & D, Redefinition to Include Waters Subjects to Subsistence Priority, 62 Fed. Reg. 66,216

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[4] Docket No. 229, Case No. A90-0484-CV (HRH).

(Dec. 17, 1997). Public hearings were held on the proposed regulations and the Secretaries also accepted written comments on the proposed regulations. However, promulgation and implementation of the final regulations were delayed by Congress through a series of appropriation act restrictions. On January 8, 1999, the final rule was published. See Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, & D, Redefinition to Include Waters Subject to Subsistence Priority, 64 Fed. Reg. 1276 (Jan. 8, 1999). The 1999 final rule became effective on October 1, 1999.

While the foregoing rule-making was underway, the consolidated Katie John litigation was essentially dormant. By early 2000, this court became convinced that the consolidated cases which dated back to the early 1990s should terminate and not become the vehicle for further litigation over the Secretaries' new regulations. In an order dated January 6, 2000, the court "readopt[ed] all of its rulings on the merits of plaintiffs' claims heretofore made"[5] and deemed those rulings final "for all purposes and to all parties."[6] Judgment was entered on January 7, 2000.[7]

The State appealed. The Ninth Circuit Court of Appeals voted to hear this second appeal en banc rather than by a three-judge panel. After oral argument, "[a] majority of the en banc court ... determined that the judgment rendered by the prior

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5 Order re Case Status at 2, Docket No. 268, Case No. A90-0484-CV (HRH).

6 Id.

7 Judgment, Docket No. 269, Case No. A90-0484-CV.

panel, and adopted by the district court, should not be disturbed or altered by the en banc court." John v. United States, 247 F.3d 1032, 1033 (9th Cir. 2001) (Katie John II).

Proposed amendments to the 1999 final rule were published on December 8, 2004. See Subsistence Management Regulations for Public Lands in Alaska, 69 Fed. Reg. 70,940 (Dec. 8, 2004). Following public comment, the amendments were published as a final rule on December 27, 2005. See Subsistence Management Regulations for Public Lands in Alaska, Subpart A, 70 Fed. Reg. 76,400 (Dec. 27, 2005). The current litigation was commenced prior to the publication of the 2005 final rule, and the challenges under consideration here are to the 1999 final rule, not the 2005 final rule.

II. The 1999 Final Rule

The 1999 final rule had several purposes, three of which are directly related to the "which waters" issues. First, the 1999 final rule "amend[ed] 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." 64 Fed. Reg. at 1276. The 1999 final rule did not, however, separately list the specific water bodies that were public lands by reason of a federal reserved water right. Rather, the 1999 final rule "identifies Federal land units[8] in which reserved

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8 Presumably the equivalent of "conservation system units" as defined by ANILCA. See 16 U.S.C. § 3102(4).

water rights exist." Id. More specifically, § ___.3 of the 1999 final rule provides that the federal subsistence regulations apply

> on all public lands including all non-navigable waters located on 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;
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> (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.

Id. at 1286-87 (emphasis added).

"Public lands" are defined in the 1999 final rule as:

> (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.

Id. at 1288. "Federal lands" are defined in the 1999 final rule as "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." Id. at 1287.

The 1999 final rule defines "inland waters" as

> 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.

Id.

"Marine waters" are defined as

> 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.

Id.

In the "analysis of public comments" section of the 1999 final rule, the Secretaries provided some explanation for their assertion of federal subsistence jurisdiction as it related to the reserved water rights doctrine. They explained that they had asserted federal jurisdiction over "waters where the Federal government holds a reserved water right or holds title to the waters or submerged lands" and that "[a] federal water right exists in inland waters within or adjacent to Federal conservation units and national forests." Id. at 1279. The Secretaries further explained that they were not asserting federal jurisdiction over "marine waters in the Tongass Proclamation" because that issue was the subject of pending litigation between the State of Alaska and the United States over ownership

of submerged lands within Tongass National Forest.[9] Id.

A second purpose of the 1999 final rule was to

> 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).

Id. at 1276. The Secretaries explained that this extension of jurisdiction was based on section 906(o)(2) of ANILCA. Id. At 1280. This assertion of jurisdiction is encompassed in the regulatory definition of "public lands", which is quoted above. The Secretaries explained that the regulatory definition of "public lands" was intended to "clarif[y] that selected land will be treated as public lands until they are conveyed." Id.

The Secretaries delegated certain authority to the Federal Subsistence Board (FSB) in the 1999 final rule. The 1999 final rule "provide[s] the Federal Subsistence Board with authority to investigate and make recommendations regarding the possible existence of additional Federal reservations, Federal reserve water

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[9] See Alaska v. United States, No. 128, Original.

rights or other Federal interests, including those which attach to lands in which the United States has less than fee ownership." Id. at 1276 (emphasis added). Specifically, § ___.10(d)(4)(xviii) of the 1999 final rule provides that the FSB has the authority to

> [i]dentify, 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.

Id. at 1290. One way the Secretaries envisioned that the FSB would use this authority was to "determine[] on a case-by-case basis" whether there are federal reserved water rights associated with certain Native allotments. Id. at 1279.

III. The Current Litigation

As stated above, the current litigation involves challenges to the 1999 final rule. In Case No. 3:05-cv-0006-HRH, the plaintiffs are Katie John, Charles Erhart, the Alaska Inter-Tribal Council and the Native Village of Tanana. These plaintiffs are referred to collectively herein as the "Katie John plaintiffs." The defendants are the United States of America and the Secretaries of the Interior and Agriculture. The State of Alaska is a defendant-intervenor. The Katie John plaintiffs assert three claims: (1) that the federal defendants violated ANILCA by refusing to provide a subsistence priority for plaintiffs who reside in areas

upstream or downstream from conservation system units (CSUs);[10] (2) that the federal defendants violated the Alaska Native Allotment Act and Title VIII of ANILCA by refusing to provide a subsistence priority on Native allotments;[11] and (3) that the federal defendants' restrictive application of the reserved water rights doctrine was arbitrary and capricious under the Administrative Procedure Act (APA).[12]

In Case No. 3:05-cv-0158-HRH, the State of Alaska is the plaintiff and the defendants are the Secretaries of the Interior and Agriculture. The Alaska Fish and Wildlife Federation and Outdoor Council (AOC), the Alaska Fish and Wildlife Conservation Fund, Michael Tinker, and John Conrad are plaintiff-intervenors. These plaintiff-intervenors are referred to collectively herein as the "AOC intervenors." The Katie John plaintiffs and the Alaska Federation of Natives (AFN) are defendant-intervenors. The State of Alaska asserts four claims: (1) that the federal defendants violated ANILCA and the APA by failing to properly apply the reserved water rights doctrine;[13] (2) that the federal defendants violated ANILCA and the APA by unlawfully extending their authority to marine waters;[14] (3) that the federal defendants violated ANILCA and the APA by unlawfully extending their

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[10] Complaint at 17, Docket No. 1, Case No. 3:05-cv-0006-HRH.

[11] Id. at 17-18.

[12] Id. at 18.

[13] Complaint at 14-15, D.D.C. Docket No. 1.

[14] Id. at 15-16.

authority to selected-but-not-yet-conveyed lands;[15] and (4) that the federal defendants violated ANILCA and the APA by improperly extending their jurisdiction to waterways that have no connection to Federal lands, CSUs, or National Forests.[16] The AOC intervenors' complaint-in-intervention adopted the State's claims against the federal defendants.[17]

Also participating in this phase of the litigation are the plaintiffs[18] in Peratrovich v. United States, Case No. 3:92-cv-0734-HRH, who are referred to collectively herein as the "Peratrovich plaintiffs."[19] In their

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[15] Id. at 16-17.

[16] Id. at 17-18.

[17] Docket No. 55, Case No. 3:05-cv-0006-HRH.

[18] The original Peratrovich plaintiffs were Lincoln Peratrovich, J.K. Samuel, Shakan Kwaan, and Taanta Kwaan. In the briefing of issues now under consideration, the parties took up the question of whether or not the Peratrovich plaintiffs had standing. The court called for separate briefing on that issue. It developed that plaintiff J.K. Samuel was deceased, so he has been deleted as a party. The court declined to substitute George Samuel in J.K. Samuel's place. See Order re Motion to Substitute George Samuel (July 16, 2009), Docket No. 234; Order re Motion to Substitute Franklin H. James, Sr. (July 16, 2009), Docket No. 235; and Order re Peratrovich Plaintiffs' Standing (Sept. 3, 2009), Docket No. 252; Case No. 3:05-cv-0006-HRH.

[19] In the course of the briefing on the "which waters" issue, the federal defendants argued that the Peratrovich plaintiffs did not have standing to pursue their claim. The court resolved the standing issue in the Peratrovich plaintiffs' favor in a separate order. See Order re Peratrovich Plaintiffs' Standing (Sept. 3, 2000), Docket No. 197, Case No. 3:92-cv-0734-HRH (The same order was entered at Docket No. 252 in Case No. 3:05-cv-0006-HRH).

amended complaint,[20] the Peratrovich plaintiffs assert a single claim alleging that the federal defendants have failed to provide them with the priority for subsistence uses for which they are entitled under Title VIII. They seek to have the Secretaries amend the federal subsistence regulations to include all navigable waters within Tongass National Forest, and they rely upon the reserved water rights doctrine as the basis for requiring such an amendment.

At an April 24, 2006, status conference it was agreed by all of the parties to all three of the above-mentioned cases that two overarching issues were raised by these cases:

(1) Did the Secretaries employ a proper administrative procedural process for determining the existence of reserved water rights within navigable waters for purposes of ANILCA? This issue is referred to by the parties as the "what process" issue.

(2) What specific water bodies are "public lands" for purposes of ANILCA as a result of the Ninth Circuit Court's determination that public lands include navigable waters within which the Government has reserved water rights? This issue is referred to by the parties as the "which waters" issue.

All of the conferees and the court agreed that the "what process" issue should be briefed and decided first; and, when that decision had been made, the "which waters" issue would be briefed and decided.

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[20] Docket No. 79, Case No. 3:92-cv-0734-HRH.

The court issued its "What Process" order on May 17, 2007,[21] in which it held "that the Secretaries' use of the rule-making process to identify federal reserved water rights for purposes of federal subsistence management was lawful and was a procedure authorized by law."[22] A briefing schedule was then established for the "which waters" phase of this litigation.[23] In their briefing, the parties were to address the following six substantive issues: (1) marine waters and tidally influenced waters, (2) waters bounded by non-federal land within the boundaries of federal reservations, (3) waters adjacent to federal reservations, (4) selected-but-not-yet-conveyed lands and appurtenant waters, (5) waters upstream or downstream of federal reservations, and (6) waters appurtenant to Native allotments.[24] The parties were to address these substantive issues by presenting test case waterways which implicated each issue.[25] The parties' briefing on the "which waters" phase of the litigation is now complete.[26]

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[21] Docket No. 110, Case No. 3:05-cv-0006-HRH.

[22] Id. at 32.

[23] Docket No. 115, Case No. 3:05-cv-0006-HRH.

[24] Id. at 3.

[25] Id.

[26] The various briefs of the parties are located in the record as follows: State of Alaska, Docket Nos. 134 and 169; United States (the Secretaries), Docket No. 167; Katie John plaintiffs, Docket Nos. 137 and 181; AFN, Docket No. 176; AOC Intervenors, Docket No. 147; and Peratrovich plaintiffs, Docket Nos. 150 and 188; Case No. 3:05-cv-0006-HRH.

IV. Reserved Water Rights Doctrine

The reserved water rights doctrine was judicially created by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908). Winters involved a priority dispute between irrigators and the Fort Belknap Indian Tribe over the waters of the Milk River in central Montana. The Court determined that in reserving land as an Indian reservation, the federal government had impliedly reserved sufficient water to fulfill the purpose of the reservation. Id. at 575-77. In 1955, the Supreme Court extended the reserved water rights doctrine to all federal reservations. See Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955). The essence of the doctrine is "that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert v. United States, 426 U.S. 128, 138 (1976). However, the government "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Id. at 141.

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. [Such] [i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Id. at 139. But, the Court has limited the doctrine to the water necessary to fulfill the primary purposes of

the reservation. In United States v. New Mexico, 438 U.S. 696, 716-18 (1978), the Court held that in reserving Gila National Forest, the federal government reserved water only where necessary to preserve timber in the forest or to secure favorable water flows, but that the government did not reserve water for aesthetic, recreational, wildlife preservation, or stock watering purposes. While the Court recognized that the foregoing purposes might be secondary purposes of the reservation, they were not the primary purposes of the reservation, and the Court held that there was no intent by the federal government to reserve water for these secondary purposes. Id. at 714-18. In analyzing whether a federal reserved water right exists, the court must "carefully examine[] both the asserted water right and the specific purpose for which the land was reserved and conclude[] that without the water the purposes of the reservation would be entirely defeated." Id. at 700.

While the case law makes fairly clear how the court is to determine if a federal reserved water right exists, the case law says little about the nature of a federal reserved water right. But, there is nothing to suggest that a federal reserved water right is somehow different from a water right acquired by an individual. The term "water right" "is frequently used to describe a mere usufructuary right or interest in a stream or other body of water, or the right to the use of another's premises for the conveyance of water."[27] This is how the dissent in Katie John II characterized a federal reserved water right, calling it "a usufructuary right to

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[27] 78 Am. Jur. 2d Waters § 5 (2002).

waters adjacent to" land owned by the United States. Katie John II, 247 F.3d at 1046-47 (Kozinski, Circuit Judge, dissenting). A usufructuary right is the "right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time."[28] A water right has also been referred to as an incorporeal hereditament,[29] which is "[a]n intangible right in land, such as an easement."[30] Regardless of whether we call a water right a usufructuary right or an incorporeal hereditament, one thing is clear. A water right is not a right to the water itself. Rather, it is a right to use the water. Because it is not a right to the water itself, a water right does not have a geographical location. Rather, a water right is an aspect of the ownership of uplands that takes on a geographical feature only when water is withdrawn or the flow employed or when the holder of the right seeks to enforce the right against others who are appropriating or using water from the same water body. In this case, we are concerned with neither the appropriation nor the use of water from a water body nor are we concerned with the enforcement of a water right. Rather, the Secretaries were required to determine the extent of federal subsistence management jurisdiction by identifying navigable waters in which, as a matter of reserved water rights law, a federal reserved water right exists.

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[28] Black's Law Dictionary 1580 (8th ed. 2004).

[29] 78 Am. Jur. 2d Waters § 5 (2002).

[30] Black's Law Dictionary 743 (8th ed. 2004).

As the panel recognized in Katie John I, the reserved water rights doctrine is not very well suited to serve as a basis for allocating jurisdiction over navigable waters for purposes of fish management by state and federal authorities. Nevertheless, the Secretaries were given the job of using the doctrine to effect a proper balance between state and federal jurisdiction over the management of fisheries in navigable waters of Alaska. What the court must decide here is whether the Secretaries have properly employed federal reserved water rights law for purposes of achieving a reasonable division of jurisdiction between state regulation which applies to all Alaskans, and federal regulation which applies to public lands and all rural Alaskans in furtherance of one of the congressional purposes of ANILCA: perpetuating "the opportunity for rural residents [to] engage[] in a subsistence way of life[.]" 16 U.S.C. § 3101(c).

To that end, the parties debate the nuances of reserved water rights law as between cases involving Indian reservations and those involving other federal reservations. ANILCA deals with neither Indian reservation lands, Indians, nor Native Alaskans. The circuit decisions require the Secretaries to determine which navigable waters in the State of Alaska are subject to federal reserved water rights;[31] and to the extent that such rights exist, the Secretaries'

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[31] Federal reserved water rights can exist in non-navigable waters as well as navigable waters. See Cappaert, 426 U.S. at 138. However, the circuit court only directed the Secretaries to identify which navigable waters were subject to federal reserved water rights. See Katie John I, 72 F.3d at 700 & n.3.

regulations will apply. What the reach of those water rights should be for purposes of ANILCA is the substance of disagreement between the parties in this case.

V. Standard of Review

The court's scope of review is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-06. The pertinent part of section 706 provides that

> [t]he reviewing court shall –
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
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> (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....

5 U.S.C. § 706(2).

There is considerable disagreement among the parties as to what standard of review applies to what claims. Although the court did not expressly so indicate in its order which set the briefing schedule for the "which waters" phase of this litigation, the court envisioned that it would be focusing on the legal issues that the parties had raised, as opposed to deciding issues of navigability or the evidence of federal reserved water rights as to the specific reservations

listed in § ____.3(b) of the 1999 final rule. It was the court's view that in any decision it rendered on the "which waters" issues, it would be making legal rulings of general application. How those rulings should be applied to specific waters will presumably be addressed by the Federal Subsistence Board. The court is mindful that it imposed a requirement upon the parties to brief the legal issues in the context of "test waters," but in doing so, the court did not intend to decide whether the Secretaries had properly identified federal reserved water rights in any specific body of water. The final 1999 rule does not purport to do that. Rather, the court's purpose was to obtain some context within which to consider the broad categories of waters over which the parties disagreed. In short, the court is deciding legal issues, which are reviewed de novo. See Akiak Native Cmty. v. U.S. Postal Srvc. 213 F.3d 1140, 1144 (9th Cir. 2000).

To the extent that the issues before the court involve questions of statutory interpretation, those issues are also reviewed de novo. See Rodriguez v. Smith, 541 F.3d 1180, 1183 (9th Cir. 2008). Because the Secretaries administer ANILCA, the court's "'analysis is governed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837[.]'" Id. (quoting Mujahid v. Daniels, 413 F.3d 991, 997 (9th Cir. 2005)). "Under the Chevron framework [the court] must 'first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear.'" Id. at 1184 (quoting Mujahid, 413 F.3d at 997). "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id.

(quoting Chevron, 467 U.S. at 842-43). "Where, however, a statute is ambiguous or silent on a particular point, review of an agency's interpretation is limited to whether the agency's conclusion is based on a permissible construction of the statute." Saberi v. Commodity Futures Trading Comm'n, 488 F.3d 1207, 1212 (9th Cir. 2007). To determine whether an agency's construction of a statute is permissible, the court "'look[s] to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and case law, and to the legislative purpose and intent'" and "take[s] into account the consistency of the agency's position over time." Natural Resources Defense Council v. U.S. E.P.A., 526 F.3d 591, 605 (9th Cir. 2008) (quoting Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1022 (9th Cir. 2005)).

Finally, as to the standard of review, contrary to the State's contention, the Katie John and Peratrovich plaintiffs' claims are not "failure to act" claims reviewable under 5 U.S.C. § 706(1). In Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62 (2004), the Court explained that "a failure to act" as used in section 706(1) "is ... properly understood as a failure to take an agency action-that is, a failure to take one of the agency actions (including their equivalents) ... defined in ... § 551(13)." The agency actions listed in § 551(13) are rules, orders, licenses, sanctions, and relief. Id. An agency's "failure to promulgate a rule or to take some decision by a statutory deadline" is the type of discrete agency action that can be challenged under section 706(1). Id. Here, the Secretaries did not fail to promulgate a rule or take some other agency action. Rather, they promulgated a rule that the Katie John and Peratrovich plaintiffs allege failed to include

every body of water in Alaska that has a federal reserved water right. The Katie John and Peratrovich plaintiffs do not seek to compel the Secretaries to take action; rather, they seek review of the validity of the final agency action that was taken, i.e., the 1999 final rule.

VI. Marine and Tidally Influenced Waters

There are two broad legal issues that must be resolved as to to marine and tidally-influence waters. The first is whether the Secretaries' use of a headland-to-headland methodology for delineating marine waters and inland waters was lawful. The second is whether federal reserved water rights can exist in marine waters. Because the court's resolution of the second issue impacts its resolution of the first issue, the discussion begins with the question of whether federal reserved water rights can exist in marine waters.

A. Federal Reserved Water Rights in Marine Waters

In § ___.3(b) of the 1999 final rule, the Secretaries expressly excluded the marine waters of Tongass and Chugach National Forests, but they did not expressly exclude other marine waters. To the extent that it was not clear that the Secretaries intended to exclude all marine waters in the 1999 final rule, in the 2005 final rule, the Secretaries clarified that "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.[32] 70 Fed. Reg. at 76,401 (emphasis added).

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[32] Although the 2005 final rule is not the subject of this litigation, the 2005 rule was intended, in part, to "clarif[y] the jurisdiction of the Federal Subsistence Management Program for

"Marine waters" for purposes of the 1999 final rule mean "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." 64 Fed. Reg. at 1287. The Secretaries explained that

> [e]xtending the Winters doctrine assertion of reserved water rights to marine waters would be without precedent and would represent a considerable leap in reasoning. Instead of asserting a federal need to protect a given level of water in a stream or other freshwater body against diversions or other appropriations of the water that could significantly diminish that level, the federal government would be asserting a need to reserve part of the most abundant waters on the earth. 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).[33]

The Peratrovich plaintiffs argue that, as a matter of law, federal reserved water rights can exist in marine

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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." 70 Fed. Reg. at 76,400. To the extent that the 2005 rule is a clarification of the 1999 final rule, the court may consider it in its analysis. See, e.g., Clay v. Johnson, 264 F.3d 744, 749 (7th Cir. 2001).

33 Admin. Rec. at 1711-12, Tab 88, Vol. 4.

waters.[34] As all the parties acknowledge, no court has ever held that federal reserved water rights exist in marine waters. However, as the Peratrovich plaintiffs point out, the fact "[t]hat no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so." In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 745 (Ariz. 1999).

As 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. The doctrine of reserved water rights grew out of disputes between potential users of water in the arid West, where water was scarce. The doctrine was developed as a means of allocating a scarce resource among many users. In contrast, marine waters are abundant and generally are not appropriated for beneficial use. It is difficult to conceive of a situation in which marine waters would need to be allocated among users who wanted to put those waters to beneficial use. That said, the court is not prepared to conclude that, as a matter of law, federal reserved water rights cannot exist in marine

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[34] The Peratrovich plaintiffs define "marine waters" as including "sea water, ocean water, salt water, and brackish water whether found in the open sea or tidally influenced areas." Supplemental Brief of Related Case Plaintiffs Peratrovich, et al., on the "Which Waters" Issue at 1, n.2, Docket No. 150, Case No. 3:05-cv-0006-HRH. "Marine waters" are generally understood to mean waters of or pertaining to the sea. In the discussion that follows, unless otherwise noted, any reference to "marine waters" is to the term as it is generally understood, not to how it is defined in the 1999 final rule.

waters.[35] However, the court is convinced that there is no legal basis for claiming federal reserved water rights in marine waters that were reserved as part of a national forest which was created pursuant to the Organic Administration Act of June 4, 1897.

The Peratrovich plaintiffs have framed their arguments to the contrary in the context of Tongass National Forest. The creation of Tongass National Forest began in 1902, when the Alexander Archipelago Forest Reserve was created by Executive Order, pursuant to the Forest Reserve Act of 1891. On September 10, 1907, Tongass National Forest was created by Executive Order, also pursuant to the Forest Reserve Act of 1891. In 1908, by Executive Order, Tongass National Forest and the Alexander Archipelago were combined under the name of Tongass National Forest. In 1909, by Executive Order, Tongass National Forest was expanded. The expansion was made pursuant to the Organic Administration Act of 1897. After the expansion, the Tongass included most of the mainland of Southeast Alaska, the Alexander Archipelago, and all of the seaward islands and waters out to a point 60 miles to the west of the southernmost point of the Alexander Archipelago.

The parties agree that the original purposes of the Tongass should be determined in accordance with the Organic Administration Act of 1897. In New Mexico, 438 U.S. at 718, the Supreme Court held that national

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[35] The court supposes without deciding that Congress could, in the course of reserving federal lands, express a primary purpose that would require the court to imply an intent to reserve marine waters as opposed to fresh water.

forests created under the Organic Administration Act were reserved for only two primary purposes: "to preserve the timber [and] to secure favorable water flows[.]" The Court also held that there was no intent by the federal government to reserve water for any of the secondary purposes of the forest. Id. at 715.

The Peratrovich plaintiffs contend that, in the case of Tongass National Forest, marine waters are necessary to furnish a continuous supply of timber, and they submit evidence to support this contention.[36] The Peratrovich plaintiffs argue that this evidence shows that marine waters are necessary for trees to grow in a marine forest such as Tongass National Forest. Ignoring for the moment that this evidence was not part of the administrative record, it does not establish conclusively that marine water is necessary for the growth of trees in a marine forest. The evidence that the Peratrovich plaintiffs have submitted illustrates that the theory that decaying fish provide necessary nutrients to trees in a marine forest is hypothetical and speculative, and more importantly, the theory has not been subjected to the give-and-take or testing of regulatory proceedings. In sum, the evidence provided by the Peratrovich plaintiffs simply does not establish that reserving marine water is necessary to fulfill one of the primary purposes of Tongass National Forest.

The Peratrovich plaintiffs next argue that because Tongass National Forest was expanded as part of

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[36] See Exhibits 1-3, Related Case Peratrovich Plaintiffs' Supplemental Reply Brief on the "Which Waters" Issue and Notice of Continued Filing of Exhibits Attached to Peratrovich Supplemental Reply Brief in the "Which Waters" Issue, Docket Nos. 188-190, Case No. 3:05-cv-0006-HRH.

ANILCA, it now has more than two primary purposes. In section 501 (a) (2) of ANILCA, Tongass National Forest was expanded "by the addition of three areas, Kates Needle, Juneau Icefield, and Brabazon Range[.]" 16 U.S.C. § 539(a)(2). Section 501(b) provides that "lands added to the Tongass and Chugach National Forests by this section shall be administered by the Secretary in accordance with the applicable provisions of this Act and the laws, rules, and regulations applicable to the national forest system[.]" Id. § 539(b). In section 505(a) of ANILCA, the Secretary of Agriculture is directed to manage the forests in order "to maintain the habitats, to the maximum extent feasible, of anadromous fish and other food fish, and to maintain the present and continued productivity of such habitat when such habitats are affected by mining activities on national forest lands in Alaska." Id. § 539b(a). Thus, the Peratrovich plaintiffs argue that ANILCA added fisheries protection as a primary purpose of the Tongass. The Peratrovich plaintiffs further argue that marine water is necessary to fulfill this purpose because anadromous fish need marine water as part of their life cycle.

This argument fails for two reasons. First, it is by no means clear that marine water, as opposed to fresh water, is necessary for the maintenance of habitat. Vegetation in or near streams and the integrity of stream beds generally and fresh water spawning grounds in particular do not require marine water. Second, "[i]n determining the scope of implied reserved water rights, a court may look only to the primary purpose of a reservation at the time the land was first reserved by the federal government, and may not consider other purposes later given to the reservation."

Totemoff v. State, 905 P.2d 954, 963 (Alaska 1995) (citing New Mexico, 438 U.S. at 713-715). In determining whether federal reserved water rights can exist in the marine waters within a national forest generally, and Tongass National Forest specifically, the court may only consider the purposes for which the forest was originally reserved. Fisheries protection was not an original purpose of any forest, such as Tongass National Forest, that was reserved pursuant to the Organic Administration Act.

The Supreme Court has held that national forests which were created pursuant to the Organic Administration Act have two primary purposes, neither of which require marine water to fulfill. In the court's view, that is the end of the matter, at least as concerns whether the marine waters of Tongass National Forest have federal reserved water rights. However, because the parties have devoted a fair amount of space to a disclaimer issue, the court will briefly address that issue.

In an original action before the United States Supreme Court, the State of Alaska sought a determination of its claim to all lands underlying marine waters in Southeast Alaska. See Alaska v. United States, No. 128, Original. As part of that litigation, the United States disclaimed title to certain marine waters within Tongass National Forest, and that disclaimer was accepted by the Court. See Alaska v. United States, 546 U.S. 413 (2006). The disclaimer provides that

> [p]ursuant to the Quiet Title Act, 28 U.S.C. § 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the

> marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.

Id. at 415. For purposes of the disclaimer, the term "marine submerged lands" means "'all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide.'" Id. at 416 (quoting 43 U.S.C. § 1301(a)(2)). There are four exceptions in paragraph (2) of the disclaimer:

> (a) any submerged lands that are subject to the exceptions set out in § 5 of the Submerged Lands Act, 67 Stat. 32 (43 U.S.C. § 1313);
>
> (b) any submerged lands that are more than three geographic miles seaward of the coastline;
>
> (c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;
>
> (d) any submerged lands that were held for military, naval, Air Force, or Coast Guard purposes on the date that Alaska entered the Union.

Id. at 415-16. Only exceptions (a) and (c) may have relevance here. As to exception (a), section 5 of the Submerged Lands Act, excepts from the transfer of title to the states "any rights the United States has in lands presently and actually occupied by the United States under claim of right," and lands "expressly retained by or ceded to the United States when the State entered the Union[.]" 43 U.S.C. § 1313(a). The

disclaimer further limits the (a) exception by providing that

> [t]he exception set out in § 5(a) of the Submerged Lands Act, 67 Stat. 32 (43 U.S.C. § 1313(a)), for lands "expressly retained by or ceded to the United States when the State entered the Union" does not include lands under the jurisdiction of the Department of Agriculture unless, on the date Alaska entered the Union, that land was:
>
> (i) withdrawn pursuant to act of Congress, Presidential Proclamation, Executive Order, or public land order of the Secretary of Interior, other than Presidential Proclamation No. 37, 32 Stat. 2025, which established the Alexander Archipelago Forest Reserve; Presidential Proclamation of Sept. 10, 1907 (35 Stat. 2152), which created the Tongass National Forest; or Presidential Proclamations of Feb. 16, 1909 (35 Stat. 2226), and June 10, 1925 (44 Stat. 2578), which expanded the Tongass National Forest[.]

Id. at 416-17 (emphasis added). The parties disagree as to what effect this disclaimer has on whether there are federal reserved water rights in the marine waters of the Tongass.

The court concludes that the disclaimer and exception (c) to paragraph (2) of the disclaimer has nothing to do with the issues that are currently before the court. The task before the court is to determine whether the Secretaries properly identified the navigable waters in the State of Alaska in which the United States has federal reserved water rights. The court' s task is not to decide who has title to what

submerged land. Who has title of the submerged land is irrelevant to the question of whether a federal reserved water right can exist for a navigable waterway. A federal reserved water right in navigable water does not depend upon the United States holding title to the submerged lands. What was necessary for purposes of the Secretaries' analysis was a navigable waterway and an upland reservation, a primary purpose of which required water.

In Katie John I, the Ninth Circuit Court of Appeals held that navigable waters fall within the scope of "public lands" for purposes of ANILCA because the United States had "interests in some navigable waters" "[b]y virtue of its reserved water rights[.]" Katie John I, 72 F.3d at 703. Plainly, the inclusion of navigable waters within the scope of "public lands" for purposes of federal subsistence management jurisdiction was not based on the United States having title to the submerged lands. The question of whether the United States has disclaimed title to lands underlying the marine waters of the Tongass is irrelevant to the question of whether a federal reserved water right can exist in marine waters.

As discussed above, the court concludes that federal reserved water rights do not exist in marine waters within a national forest created pursuant to the Organic Administration Act. The court cannot conceive of a situation in which marine waters would be necessary to fulfill either of the two purposes of such a forest. Moreover, when the Ninth Circuit mandated that the Secretaries identify which waters in Alaska had federal reserved water rights, it did so for the purpose of effecting a balance between state and federal jurisdiction over fisheries in navigable waters.

If federal reserved water rights were found to exist in the marine waters of southeast Alaska, as the Peratrovich plaintiffs urge, the result would be virtually the equivalent of holding, as this court originally did, that all navigable waters are public lands. It is that division of jurisdiction which the circuit court expressly disapproved of in Katie John I. This court feels constrained by extant reserved water rights law and the holding in Katie John I to conclude that the Secretaries' exclusion of all marine waters, including the marine waters of Tongass National Forest, was lawful and reasonable, despite the fact that this court continues to believe that the circuit court in Katie John I overlooked or was unaware of the balance which already existed as regards state and federal jurisdiction of fisheries. In Southeast Alaska (and perhaps elsewhere) exclusion of marine waters from public lands forecloses rural Alaskans from fishing in traditionally used, resource rich, and culturally significant waters as contemplated by Congress. See 16 U.S.C. §§ 3101(c), 3114.

B. Headland-to-Headland Issue

§ ____.3(b) of the 1999 final rule makes that rule applicable to all public lands including "inland waters adjacent to the exterior boundaries of [listed] areas." 64 Fed. Reg. at 1286-87. The Secretaries defined "inland waters" as

> [t]hose 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.

Id. at 1287 (emphasis added). In 2005, the Secretaries explained that because federal reserved water rights

can exist in rivers and other inland waters, in identifying which navigable waters had such water rights, they had "to determine where the river ends and the sea begins." 70 Fed. Reg. at 76,402. The Secretaries further explained that

> [s]ome 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.

Id. To make the determination of "where the river ends and the sea begins," the Secretaries used a headland-to-headland methodology. This methodology is expressed in the 1999 final rule in not only the definition of "inland waters" quoted above, but also in the definition of "marine waters" which is narrower than the ordinary meaning of that term. The 1999 final rule defines "marine waters" as

> [t]hose waters located seaward of 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.

64 Fed. Reg. at 1287 (emphasis added).

The Secretaries take the position that, in using the head-land-to-headland methodology to define marine and inland waters, they have not identified any federal reserved water rights in any marine waters, although they have identified federal reserved water rights in tidally-influenced waters. They contend that federal reserved water rights can exist in tidally-influenced

waters and that their use of the headland-to-headland methodology was reasonable. The State contends that the use of the headland-to-headland methodology was not reasonable because it has resulted in marine and tidally-influenced waters being converted into inland waters.

As an initial matter, the Secretaries argue that the State cannot challenge the use of the headland-to-headland methodology because the State did not timely object to the use of this methodology. "The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 965 (9th Cir. 2006). In general, the court will not consider arguments that were not made before the agency. See Portland General Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1023 (9th Cir. 2007). The Secretaries argue that the State never specifically challenged the use of the headland-to-headland methodology in its comments on the proposed rule,[37] and thus they argue that the State has waived the right to raise this argument.

During the administrative process, the State never used the precise phrase "headland-to-headland" when objecting to the Secretaries' identification of federal reserved water rights in marine and tidally-influenced waters. The State however consistently stated that it believed that no federal jurisdiction exists in those waters.[38] These objections put the Secretaries on

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[37] See Admin. Rec. at 8440-42, Tab 352, Vol. 15.

[38] Id. at 8424-26 (State does not agree that federal reserved waters exist in marine waters); id. at 8440-42 (federal agencies do

notice that, insofar as the "headland-to-headland" language in the proposed regulations included marine and/or tidally-influenced waters, the State was challenging the use of that methodology.

But even if the State did not raise the headland-to-headland issue during the administrative proceedings, the State still would not be deemed to have waived its right to challenge the use of this methodology. An issue is not considered waived for purposes of judicial review "if the agency had an opportunity to consider the issue [and t]his is true even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party." PGE, 501 F.3d at 1024.

During the administrative process, the Katie John Policy Group[39] first recommended that

> [w]here a federal reservation with reserved water rights includes rivers or streams flowing into marine water, reserved water rights will apply to all waters above the mean high tide line. The freshwater influence will be considered dominant above the point of the

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not adequately address the extent of federal jurisdiction over marine waters); id. at 8446-50 (objections to identification of federal reserved waters in marine waters) ; and id. at 8490 (objections to shellfish regulations because they will not apply in marine waters).

[39] The Katie John Policy Group was established "to assess the Katie John [I] decision and to begin planning for implementation of the decision[.]" Admin Rec. at 1688, Tab 88, Vol. 4. The Katie John Policy Group consisted of representatives from the Bureau of Indian Affairs, Minerals Management Service, Fish and Wildlife Service, National Park Service, Department of Agriculture, Bureau of Land Management, and Department of Interior. Id.

> mean high tide line and the channel of these waters will be more defined for management purposes.[40]

The policy group also noted that "[r]eserved 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."[41] Later, members of the policy group recommended that "[w]here 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 and streams, where the mouths are within the exterior boundaries of the reservation."[42] It was recommended that "[t]he mouth [be] defined by a line drawn between the termini of the headlands on either bank of the river. The fact that portions of the river are subject to tidal influence is not considered determinative of the extent of reserved water rights."[43] Based on the foregoing, it is plain that the Secretaries considered the appropriateness of applying the headland-to-headland methodology during the administrative process, and the court can consider whether the Secretaries' use of this methodology was reasonable.

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40 Id. at 1700.

41 Id. at 1716.

42 Admin. Rec. at 1748-49, Tab 90, Vol. 4.

43 Id. at 1749.

As to that question, the State argues that the use of the headland-to-headland methodology was not reasonable because it is contrary to two provisions of ANILCA. First, the State argues that the headland-to-headland methodology runs afoul of section 102(3)(A) of ANILCA which provides that "public lands" do not include "lands which have been confirmed to ... the State ...." 16 U.S.C. § 3102(3)(A). The State contends that submerged lands underlying marine and tidally-influenced waters were confirmed to the State upon its entry into the Union. See Submerged Lands Act of 1953, 43 U.S.C. § 1311(a) ; Alaska Statehood Act, Pub. L. 85-508, § 6(m), 72 Stat. 339, 343 (1959).

This argument fails because, as discussed above, the existence of federal reserved water rights do not depend upon federal ownership of the land underlying waters in which it has claimed a federal reserved water right. In Arizona v. California, 373 U.S. 546, 595 (1962), the Court considered whether the United States held reserved water rights in the mainstream of the Colorado River. "Arizona argue[d] that the United States had no power to make a reservation of navigable waters after Arizona became a State[.]" Id. at 596. The Court rejected this argument because the United States has "broad powers ... to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution." Id. at 597-98. The Court had "no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property." Id. at 598. If the federal government can reserve water rights in navigable waters after statehood, then it follows that the federal government

does not have to hold title to the lands underlying waters in which it claims federal reserved water rights.

Second, the State contends that the headland-to-headland methodology is contrary to section 103(a) of ANILCA, which provides that "the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems 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). The State contends that this statutory provision makes clear that marine and tidally-influenced waters are outside the boundaries of federal reservations and thus cannot be subject to federal reserved water rights because those rights cannot exist outside the boundaries of federal reservations.

A federal reserved water right exists in waters that are appurtenant to the federal reservation. Cappaert, 426 U.S. at 138. The State cites to cases which have characterized "appurtenant waters" as those "in", "on", "within", "under", or "not beyond the borders" of a reservation. See Colville Confederated Tribes v. Walton, 647 F.2d 42, 53 (9th Cir. 1981) (federal reserved water rights relate "to water use on a federal reservation") (emphasis added); Sierra Club v. Block, 622 F. Supp. 842, 862 (D. Colo. 1986) ("under the implied-reservation-of-water doctrine, it is implied from the Wilderness Act that Congress reserved water rights in the wilderness areas to the extent necessary to accomplish the purposes specified in the Act") (emphasis added); Potlatch Corp. v. United States, 12 P.3d 1260, 1267-68 (Idaho 2000) (express federal reserved water right existed within the Hells Canyon

reservation but no implied federal reserved water right existed beyond the borders of the federal reservation); United States v. City of Challis, 988 P.2d 1199, 1201 (Idaho 1999) (United States claimed federal reserved water rights within several National Forests in Idaho); Gila River General Adjudication, 989 P.2d at 748 (federal reserved water right doctrine applies to ground water as well as surface water, thereby implying that it applies to water under the reservation).

The fact that the headland-to-headland methodology may extend federal management jurisdiction to water outside the boundaries of a federal reservation does not make the Secretaries' use of this methodology unlawful or unreasonable. In Winters, 207 U.S. 564, the seminal federal reserved water rights case, the United States Supreme Court recognized a federal reserved water right in waters that bordered the federal reservation.[44] Fresh water necessarily invades marine waters on an outgoing tide, just as navigable river water becomes brackish with an incoming tide. Thus there is uncertainty as to where tidally influenced waters cease to serve the purposes of a federal reservation of land for purposes of reserved

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[44] The court is unpersuaded by the State's contention that we cannot look to cases involving federal reserved water rights on Indian reservations for purposes of evaluating the 1999 final rule because non-Indian reservations are governed by a different body of water rights jurisprudence than those governing Indian reservations. Given that the primary focus of Title VIII of ANILCA is the perpetuation of a subsistence lifestyle, it was not unreasonable for the Secretaries to look to what may arguably be a more generous take on federal reserved water rights.

water rights. Given the circuit court's directive to achieve balance between state and federal management of fisheries, the Secretaries' definition of inland waters was, as a general proposition,[45] a reasonable way of deciding where a river ends and the sea begins: where federal jurisdiction under ANILCA ends and state jurisdictions begins.

In sum, on de novo review, the court concludes that the Secretaries' decision to exclude marine waters from the operation of the 1999 final rule was not unlawful. However, the court further concludes that the Secretaries' decision to employ the headland-to-headland methodology for purposes of determining the dividing line between marine and inland waters was, as a general proposition, reasonable and not arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

VII. Waters Bounded by Non-federal Land within Federal Reservations

Many CSUs surround State or privately owned lands (inholdings). § ____.3(b) of the 1999 final rule extends federal jurisdiction to "all public lands including ... all navigable and non-navigable water

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[45] The court qualifies this holding out of concern that, when it comes to applying the 1999 final rule to specific water bodies, it may be apparent that the headland-to-headland methodology for determining the Secretaries' jurisdiction in fact unreasonably extends that jurisdiction into marine waters. That is, it may develop in the future that the headland-to-headland methodology incorporates navigable waters which cannot possibly include reserved waters, or it may develop that particular CSUs have been created for specific, primary purposes which require brackish or marine waters.

within the exterior boundaries" of the listed CSUs and national forests. 64 Fed. Reg. at 1286-87. In order to include all navigable waters within the exterior boundaries of CSUs and national forests within the scope of "public lands", the Secretaries necessarily had to determine that federal reserved water rights existed in all navigable waters physically located on non-federally owned lands within CSUs and national forests.[46]

In its 1995 issue paper, the Katie John Policy Group recommended that

> [a]dministrative jurisdiction over all inland water within the exterior boundaries of a federal reservation in Alaska with reserved water rights should generally be asserted. Any such assertion must, of course, be based on a determination that the inland waters are necessary to meet the purposes of the federal reservation. Although the federal government could take the narrower view that reserved water rights only attach where at least one side of the water body is in federal ownership, it is not required to make such a narrow interpretation. 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. Inclusion of all waters also

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[46] For purposes of this discussion, the court assumes, and no party has argued otherwise except as discussed below in the text, that the federal reservations listed in § ____.3(b) of the 1999 final rule include purposes that trigger the reservation of water rights in navigable waters.

> prevents bifurcated fishery management within the boundaries of a federal reservation.[47]

The Secretaries adopted this recommendation, as reflected in the the comments section of the 1999 final rule. There, the Secretaries explained that they had included "waters on inholdings" within the boundaries of CSUs and national forests because "[w]e have determined that a Federal reserve water right exists in those waters and that their inclusion is necessary for effective management of subsistence fisheries." 64 Fed. Reg. at 1279. In the 2005 final rule, the Secretaries again explained that assertion of jurisdiction over waters on inholdings was "necessary":

> As work began following the [Katie John I] 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 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

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47 Admin. Rec. at 1698-1700, Tab 88, Vol. 4.

> and scattered areas of different jurisdictions. Therefore, we determined in the January 1999 regulations that all waters within or adjacent to the boundaries of the 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 purposes of the subsistence use priority.

70 Fed. Reg. at 76,401.

The State contends that the identification of federal reserved water rights in water on inholdings is unlawful for at least three reasons. First, the State argues that nothing in the reserved water rights doctrine allows the Secretaries to claim federal reserved water rights based on administrative convenience. While the State is correct that federal reserved water rights cannot exist simply because of the Secretaries' perception of what is convenient for purposes of administrating ANILCA, that does not mean that a federal reserved water right cannot exist in navigable waters on inholdings. A federal reserved water right exists because water is necessary to fulfill the purpose of a federal reservation. Regardless of the administrative convenience factor, federal reserved water rights can exist in waters on inholdings.

The State next argues that claiming federal reserved water rights in waters on inholdings is wholly contrary to the fundamental legal precondition that only waters appurtenant to reserved federal lands can contain a federal reserved water right. The State is basically arguing that a federal reserved water right cannot exist in waters that do not touch federally owned land, even if the water is within the boundaries

of a federal reservation, because such water is not "appurtenant" to reserved land.

This argument misperceives the flexibility of the reserved water rights doctrine. A federal reserved water right is premised on the concept that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert, 426 U.S. at 138. But, "appurtenant" does not necessarily mean "touching" or "bounded by" or even "adjoining." As a 1977 law review article noted "[n]o case defines or explains" "appurtenant", but it "probably means 'located' or 'bordering on,' possibly 'underlying,' possibly 'nearby.'"[48] And, as one court observed: "'A thing is deemed to be incidental or appurtenant when it is by right used with the land for its benefit, as in the case of a way, or water-course ....'" Dermody v. City of Reno, 931 P.2d 1354, 1356 n.1 (Nev. 1997) (quoting Mattix v. Swepston, 155 S.W. 928, 930 (Tenn. 1913)). While a federal reserved water right is necessarily associated with some land, the water right itself has no geographic location.[49] Appurtenancy has to do with the relationship between reserved federal land and the use of the water, not the location of the water. The fact that a navigable water body is on only

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[48] Frank J. Trelease, Federal Reserved Water Rights Since PLLRC, 54 Denv. L.J. 473, 474 n.3 (1977).

[49] As discussed above, a water right has no geographic scope until it comes to appropriation or enforcement, and this litigation is not about appropriating water or enforcing federal reserved water rights.

non-federal lands does not foreclose that water body from being appurtenant to associated federal land.

Lastly, the State argues that ANILCA expressly deems non-federally owned inholdings located within the exterior boundaries of CSUs as not being part of the unit and provides that such inholdings are not "public lands" for purposes of the Title VIII subsistence priority. Section 103(c) of ANILCA provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.

16 U.S.C. § 3103(c). This section of ANILCA plainly states that lands which have been conveyed to the State, a Native corporation, or a private individual, even if within a CSU, are not subject to the Secretaries' regulations.

Land totally surrounded by a federal reservation and owned by a third party is not public land for purposes of ANILCA and may not be regulated by the Secretaries. However, the United States' ability to reserve public lands and create reserved water rights as to such reserves is not conveyed away to third parties when the federal government conveys land which is or comes to be within a federal reservation. See Ariz. v. Calif., 373 U.S. 546, 597-98 (1962); Cal. Or. Power Co. v. Beaver Portland Cement Co., 294 U.S.

142, 162 (1935). When, as here, the federal government has retained its reserved water rights and/or the ability to create such rights in navigable waters, it retains an interest in the navigable waters on or appurtenant to those reserved lands sufficient to support ANILCA jurisdiction. Section 103(a) of ANILCA does not preclude the Secretaries from asserting federal reserved water rights in navigable waters physically located on non-federally owned lands within CSUs and national forests. The assertion of such rights may have more to do with enforcement, and as the court observes elsewhere, this is not a water rights enforcement action. But, because federal reserved water rights could reach waters on inholdings, it was not unreasonable for the Secretaries to treat navigable waters on inholdings as appurtenant to the associated federal reserve. The fact that we deal here with lands totally surrounded by a federal reservation requiring water for one its primary purposes underscores the appropriateness of the Secretaries' assertion of a property interest in all waters within a federal reservation. The fact that the inholdings are by definition surrounded by public lands distinguishes this situation from the upstream/downstream issue discussed hereinafter. Here, as elsewhere, the reserved water rights doctrine is not a perfect vehicle for allocating jurisdiction of fisheries between the state and federal regulators; but, as to inholdings, the Secretaries' 1999 final rule is reasonable and not unlawful. The 1999 final rule is not a regulation of state or other third-party lands, for the rule is founded upon federally-owned reserved water rights which are public lands.

VIII. Waters Adjacent to Federal Reservations

In the 1999 final rule, the Secretaries identified federal reserved water rights in "inland waters adjacent to the exterior boundaries" of the listed federal reservations. 64 Fed. Reg. at 1286-87. In the comments section of the 1999 final rule, the Secretaries explained that the inclusion of these waters "is necessary for effective management of subsistence fisheries." Id.

The regulations do not define "adjacent." During the administrative process, the Secretaries did not expressly define "adjacent" but "adjacent" waters were referred to as those "adjoining" an inland water body.[50] The common meaning of "adjacent" is "not distant or far off" or "nearby but not touching[.]"[51] The common meaning of "[a]djoining" is "touching or bounding at some point[.]"[52] In 1999, after the final rule was promulgated, the Secretaries were asked "[w]hat exactly does the department mean by 'adjacent to the exterior boundary?'"[53] They explained that "'[i]nland waters adjacent to the exterior boundaries' means those portions of inland waterways (such as rivers or lakes) which form segments of the boundaries of the national petroleum reserve in Alaska, certain conservation system units, national recreation and conservation areas, and the national forest."[54] In the

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50 See Admin. Rec. at 1642-43, Tab 84, Vol. 4.

51 Webster's Third New Int'l Dictionary 26 (1981).

52 Id. at 27.

53 Admin. Rec. at 10653, Tab 449, Vol. 19.

54 Id. at 10653-54.

comment section of the 2005 amendments, the Secretaries added that "adjacent" meant "immediately adjacent." 70 Fed. Reg. at 76,403 ("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.").

"A court must defer to an agency's interpretation of its own regulations unless it is plainly erroneous." Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 843 (9th Cir. 2003). The Secretaries have chosen to define "adjacent" somewhat more narrowly than the usual dictionary definition of that term. This definition is not a post hoc rationalization but rather is the definition that the Secretaries have consistently given the term. For purposes of the discussion here, the court will defer to the Secretaries' definition of "adjacent" and consider whether the identification of federal reserved water rights in waters immediately adjacent to and forming a segment of the exterior boundary of a federal reservation was reasonable and lawful.

The State first argues that the traditional reserved water rights doctrine cannot reach a water body beyond the boundaries of a federal reserve. The court has already rejected this argument in its discussion in Part VI.B of this decision.

But even if federal reserved water rights can exist in waters that are immediately adjacent to a federal reservation, which they can, the State argues that a federal reserved water right cannot be claimed in the entire width of any such water body. The State contends that the Secretaries should have considered

whether a federal reserved water right in a more limited band of water next to a federal reservation would satisfy ANILCA objectives, as opposed to claiming a federal reserved water right in the entire width of an adjacent water body.

This argument again evinces misunderstanding of the flexibility of the reserved water rights doctrine which the Secretaries are obligated to employ in assessing the reach of ANILCA and balancing jurisdiction over navigable waters for purposes of fish management by state and federal authorities. In the abstract, federal reserved water rights have no precise location as discussed in Part IV of this decision. Water necessary to effect the primary purposes of a federal reservation may or may not be "immediately" adjacent to the reserved land. Surely the appurtenant, incorporeal right of reserved water associated with a federal reservation, the primary purposes of which require water, includes both the flow and right to withdraw water from the far side of a water body as well as the near side of which is immediately adjacent to a federal reserve. The reserved water rights doctrine reasonably accommodates the Secretaries' final 1999 rule.

More importantly, Katie John I requires the Secretaries to employ the reserved water rights doctrine as the basis for allocating jurisdiction of fisheries management between state and federal authorities. Dividing rivers longitudinally would surely inject unacceptable complexities of management into both the state and federal regimes. As to navigable waters in which federal reserved water rights exist because the water is immediately adjacent to a federal reservation, there is a reasonable nexus

between the bordering upland and the entire width of the river for purposes of ANILCA jurisdiction. The Secretaries' application of ANILCA to the entire width of the river effects a reasonable division of jurisdiction, especially in light of the Secretaries' decision on upstream/downstream jurisdiction, which is discussed below.

In concluding that the Secretaries' assertion of federal authority over the entire width of a river which is immediately adjacent to a federal reservation was reasonable, the court has kept in the mind the illustration offered by the State to show the contrary. As one of its test waters on this issue, the State discussed the portion of the Yukon River that is adjacent to the northern border of the Nowitna National Wildlife Refuge. The Yukon River flows from Canada on the east to the Bering Sea on the west. During its course, the Yukon River flows by and along, but largely outside of, the northern border of the Nowitna National Wildlife Refuge in central Alaska.[55] The Refuge's boundary is fixed on the south bank of the River, and the entire bank of the north side of the Yukon is non-federal, non-reserved lands. In the 1999 final rule, the Secretaries identified federal reserved water rights in the Nowitna National Wildlife Refuge, "[i]ncluding the portion of the Yukon River adjoining the boundary."[56] Because the north bank of the Yukon River is non-federal, non-reserved land, the State

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[55] See Exhibit 12, State of Alaska's Opening Brief on Which Waters Specifying Test Case Categories with Sample Water Bodies, Docket No. 134, Case No. 3:05-cv-0006-HRH.

[56] Admin. Rec. at 1726, Tab 88, Vol. 4.

suggests that a person standing on the north bank of the Yukon River on state-owned, non-federal land who was fishing in the river would be subject to federal regulations.

The State's illustration is apt, but the State's conclusion is basically wrong. What the State suggests could happen; but the State's argument confuses the priority for rural residents which the Secretaries' regulations may lead to with the more general preference that section 804 of ANILCA creates. 16 U.S.C. § 3114. As the Secretaries point out, unless there has been a specific closure of a fishery for non-federally qualified subsistence users, others may still take fish as permitted by state regulations. It is this concept that this court believes the circuit court may have misunderstood. For purposes of the issue under discussion, determining certain portions of a water body to be "public lands" for purposes of ANILCA does not preempt state management of fisheries unless it becomes necessary to implement the federal priority. In times of insufficient supply of fish for federal subsistence purposes, Congress obviously intended exactly that of which the State complains. See 16 U.S.C. § 3114. However, the point to be emphasized here is not the latter exceptional case situation, but rather the norm, which is that both state and federal regulators are successful in their management of resources such that there is sufficient supply for everyone. In those normal situations, the person on the north bank who is not a rural resident (he may be a resident of Anchorage, Alaska, or New York, New York) can fish in the Yukon River at the same time that the rural resident fishes from the south bank

pursuant to federal subsistence regulations and the Secretaries' 1999 final rule.

Again, the court concludes that federal reserved water rights can and do exist in navigable waters beyond the boundaries of a federal reservation. The Secretaries reasonably applied the 1999 final rule to the entire width of a water body, which is immediately adjacent to a segment of reserved federal lands, the primary purposes of which require water.

IX. Waters Upstream or Downstream of Federal Reservations

In the 1999 final rule, the Secretaries did not identify federal reserved water rights in waters that were upstream or downstream of federal reservations. The reasons for this decision were set forth by the Katie John Policy Group in its final issue paper:

> Assertion of federal reserved water rights beyond the boundaries of a reservation raises additional issues. The federal agency asserting water rights beyond reservation boundaries would have to establish that those waters were needed for the purposes of the reservation and that those needs cannot be satisfied by waters within or adjacent to the reservation. This is a component of the reserved water rights doctrine itself and may be difficult to establish for the federal reservations in water plentiful Alaska.
>
> In addition, the United States has not generally claimed reserved water rights beyond the boundaries of a reservation. The United States has claimed water rights outside of the boundaries of a reservation where the water right is necessary to support rights

reserved to Indians by treaty and where a reservation has been diminished in size but the Indians have been given continuing rights (such as to hunt and fish) in the area of the original reservation. In both of these situations the filings have generally been for instream flows to support fisheries at certain specified locations, that is, the reserved right is for a certain amount of water to flow between points A and B. Although these flow rights may have the effect of curtailing consumptive use with a junior priority date, either up or down stream of the site of the protected activity, the water rights are claimed for or are attached to specific sites.

The situation in Alaska would not support either of these types of off reservation water rights claims for Indians. The United States has not entered into treaties with the Tribes in Alaska and so there are no treaty rights to be supported....

In Alaska there do not appear to be areas that were formerly reserves where the United States has committed to preserving or guaranteeing a use of the area that would support a reserved water right. In most instances, areas of former Indian reservations are now included within current conservation system units where there exists a federal reserved water right sufficient to support subsistence management.

In addition, assertion of reserved water rights up and down stream from a federal reservation would conflict with the parts of the Katie John

> decision holding that ANILCA did not extend subsistence fishing to all navigable waters in Alaska. Limiting assertion of reserved waters to waters within the exterior boundaries of a federal reservation is also in keeping with the Ninth Circuit's recognition that there would be bifurcation of fishery management between the United States and the State of Alaska.[57]

In the 2005 final rule, the Secretaries again explained that they had not identified federal reserved water rights in the waters upstream and downstream of federal reservations because they

> believe[d] that including all upstream and downstream reaches would constitute an overly broad interpretation of "Federal reserved waters." The Ninth Circuit Court in [Katie John I] 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 guarant[ee] 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

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57 Admin. Rec. at 1704-1708, Tab 88, Vol. 4 (footnote omitted).

> 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.

70 Fed. Reg. at 76,402.

If for no other reason than possible future consideration by the Federal Subsistence Board, the court feels a need to comment on the policy group's statement. The policy group's discussion appears to lack focus on the Secretaries' principal obligation, which is to implement Title VIII of ANILCA in furtherance of the congressional purpose of making it possible for rural Alaskans to continue a subsistence lifestyle. The day may come when the Secretaries will have to be concerned about water flows, both upstream and downstream from CSUs. Anadromous fish such as salmon require a good flow of water both up- and downstream to permit access to upper reaches of navigable waters to spawn and to exit them to mature. But given the constraints upon the Secretaries as a result of Katie John I, for the present time, the 1999 final rule correctly determines, as discussed above, that federal reserved water rights exist as to navigable waters within and immediately adjacent to (the court would say "abutting") CSUs.

The Secretaries' above 2005 explanation aptly focuses upon the circuit court's rejection in Katie John I of navigable waters as a basis for implementation of Title VIII of ANILCA. Today, that holding is at the heart of the problem confronting the Secretaries in deciding how to address the Katie John plaintiffs' contentions that where reserved waters exist as to navigable water bodies, Title VIII of ANILCA should

have application both upstream and downstream from the CSU in question.

Federal reserved water rights (the right to an amount of water necessary to fulfill the primary purposes of a federal reserve) can, of course, be enforced both up- and downstream. The Katie John plaintiffs argue that if federal reserved water rights can exist upstream and downstream of a federal reservation, then the Secretaries should have identified the waters in which such rights exist. The Katie John plaintiffs contend that the Katie John I decision left no discretion to the Secretaries as to the identification of federal reserved water rights. The Katie John plaintiffs insist that the Secretaries were required to identify all waters in which federal reserved water rights exist.

The court is reluctant to say that federal reserved water rights exist upstream or downstream of federal reserves, for federal reserved water rights have no geographic location except when it becomes necessary to enforce those rights. This is not an enforcement action. In this case, the proper question is whether the upstream or downstream waters are appurtenant to and necessary for the fulfillment of a primary purpose of a federal reservation. Here, we deal in the abstract with the identification of those public lands that are benefitted by federal reserved water rights. It is the CSU having a primary purpose requiring water that enjoys a federal reserved water right. Such rights are one aspect (one of the bundle of rights) that make up the United States' ownership of uplands. Thus there is a fair argument that federal reserved water rights do not exist upstream or downstream of a federal reservation. The Secretaries' and the court have

recognized that legal concept with respect to inholdings which contain navigable waters. The court concludes that navigable waters upstream and downstream of CSUs may one day be impacted by federal reserved water rights that are appurtenant to the CSU.

There is, however, a more fundamental problem with the Katie John plaintiffs' argument, which is best illustrated by consideration of the Katie John plaintiffs' "test water" on this issue, the Yukon River. As noted above, the Yukon River, which is a navigable river, flows from Canada on the east to the Bering Sea on the west. The Yukon River flows through or is adjacent to six CSUs: 1) the Yukon-Charley Rivers National Preserve, 2) the Yukon Flats National Wildlife Refuge, 3) the Nowitna Wildlife Refuge, 4) the Koyukuk National Wildlife Refuge, 5) the Innoko National Wildlife Refuge, and 6) the Yukon Delta National Wildlife Refuge. The Secretaries identified federal reserved water rights in the portion of the Yukon River within the exterior boundaries of these six CSUs and in inland waters adjacent to the exterior boundaries of these CSUs.

The Katie John plaintiffs argue that the Secretaries should have identified federal reserved water rights in the entire portion of the Yukon River that runs through the State of Alaska. One of the primary purposes of the Yukon River CSUs is the protection or conservation of habitat for, and populations of, fish and wildlife. There can be no dispute that water is necessary for the protection and conservation of fish habitats. Because one of the most important fish in the Yukon is salmon, which are anadromous, the Katie John plaintiffs contend that upstream and downstream waters are necessary to protect the salmon. More

specifically, they argue that downstream water is necessary because if a downstream user were to interfere with the ability of salmon to reach their spawning grounds within a CSU, this would defeat one of the primary purposes of that CSU. Likewise, the Katie John plaintiffs argue that if an upstream user were to interfere with the ability of a salmon to spawn, hatch, and return through the CSU to the sea, one of the primary purposes of the CSU would be defeated. In sum, the Katie John plaintiffs argue that the entire length of the Yukon River should be subject to federal subsistence jurisdiction because upstream and downstream water may be necessary to fulfill the purposes of the Yukon River CSUs.

What the Katie John plaintiffs argue here is what persuaded this court to hold that all navigable waters in Alaska were subject to the Title VIII priority. That decision was reversed by the Ninth Circuit Court of Appeals in Katie John I. Katie John I made it clear that something less than all navigable waters would have to serve as the basis for Title VIII regulation in order to achieve a balance between state and federal management of fisheries. Claiming federal reserved water rights in those navigable waters which are within or are immediately adjacent to a CSU plainly achieves a balance between state and federal regulators, even if it is more limited than what this court believes Congress intended.

What the Katie John plaintiffs request here is defensible in terms of the purpose of section 101(c) of ANILCA, 16 U.S.C. § 3101(c), and may be necessary at some future time; but for the present, the Secretaries were obligated to apply Katie John I, and their application of Katie John I as to upstream and

downstream waters was reasonable. The discussion of how water might be used on any particular CSU or how the need for that water might be enforced in a time of insufficient flow has little do to with the problem of which navigable waters are public lands for purposes of ANILCA. The fact that a federal reserved water right might some day be asserted at some distance point upstream or downstream from a CSU is certainly consistent with the reserved water rights doctrine. But as the court has repeatedly observed here, this litigation does not involve the enforcement of federal reserved water rights. Rather, the Secretaries' task was to determine the extent of federal jurisdiction for purposes of ANILCA. The Secretaries' handling of the upstream/downstream issue is a reasonable and lawful application of the reserved water rights doctrine for purposes of striking a balance between state and federal jurisdiction of fisheries in navigable waters in the spirit of Katie John I. The Secretaries' lawfully and reasonably concluded that at the present time federal water rights associated with reserved lands do not extend to waters upstream and downstream of federal reservations.

X. Waters Appurtenant to Native Allotments

In the 1999 final rule, by § ____.10((d)(4)(xviii), the Secretaries delegated to the FSB the authority to

> [i]dentify, 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[.]

64 Fed. Reg. at 1290.[58] This delegation of authority was intended to address, in part, the issue of whether federal reserved water rights existed on Native allotments.[59] As the Secretaries explained in the comment section of the 1999 final rule, "[m]any 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." 64 Fed. Reg. at 1279. "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." Id.

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[58] This provision of the Secretaries' 1999 final rule might have but did not quite address this court's concern that there are rural residents of Alaska entitled to preferential fishing rights under Title VIII of ANILCA whose opportunities to continue a subsistence way of life are limited because those rural residents, although they reside near a navigable water body, do not reside near navigable waters having federal reserved water rights. The court understands, however, that Katie John I probably does not permit the Secretaries to address this concern inasmuch as the circuit court has hitched the balancing process to reserved waters.

[59] Pursuant to the Alaska Allotment Act, individual Alaska natives were able to "acquire title to individual parcels of land important for traditional use and occupancy." Cohen's Handbook of Federal Indian Law 348 (Nell Jessup Newton et al. eds., 2005).

The Katie John plaintiffs argue that the Secretaries should have identified federal reserved water rights on all Native allotments, as opposed to only identifying federal reserved water rights on allotments which are within the boundaries of a federal reservation. The Katie John plaintiffs argue that the Katie John I decision did not give the Secretaries any discretion but rather compelled them to identify all waters within Alaska in which the United States had a federal reserved water right.

As an initial matter, the Secretaries argue that the Katie John plaintiffs do not have standing to present this claim. "'[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Witt v. Dep't of Air Force, 527 F.3d 806, 811 (9th Cir. 2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). "Second, [a] plaintiff must present a 'causal connection between the injury and the conduct complained of--the injury has to be fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court.'" Id. at 811-12 (quoting Lujan, 504 U.S. at 560). "Finally, 'it must be "likely," as opposed to merely "speculative," that the injury will be 'redressed by a favorable decision.'" Id. at 812 (quoting Lujan, 504 U.S. at 560). The Secretaries contend that the Katie John plaintiffs have not shown an injury in fact. The Katie John plaintiffs have submitted a declaration from Charles Erhart to support this claim. Erhart owns an interest in a Native allotment that is located on the left

bank of the Tanana River, near Eightmile Island.[60] The allotment is used for subsistence purposes.[61] But, because the allotment is on a stretch of the Tanana River that flows outside of a CSU, subsistence fishing activities along the allotment are regulated by the State under state law.[62]

The Secretaries argue that Erhart has not shown that he is a rural Alaska resident or a resident of an area that would be entitled to participate in the Title VIII priority on the waters at issue, and thus he cannot show that he has been injured in fact by the 1999 final rule. This argument is meritless. Erhart expressly states in his declaration that he is "a rural resident"[63] and there is no contrary evidence. Erhart's declaration establishes that he has an interest in a Native allotment that is outside a CSU and that the Title VIII priority does not currently apply to the waters flowing past his allotment.[64]

Erhart's affidavit is sufficient to establish standing to bring the Katie John plaintiffs' Native allotment claim, which is brought pursuant to section 807 (a) of ANILCA. Section 807 provides, in pertinent part, that "[l]ocal residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence

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60 See Declaration of Charles Erhart at 1, ¶¶ 3-4, 6, Docket No. 95.

61 Id. at ¶ 3.

62 Id. at ¶ 3.

63 Id. at 2, ¶ 6.

64 Id. at 1, ¶¶ 3-4.

uses ... may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority." 16 U.S.C. § 3117 (a). Erhart's affidavit establishes that, as to the Native allotment in which he has an interest, the Secretaries have failed to provide a preference for subsistence uses and that he, as a rural resident, would be entitled to benefit from such a preference.

If Erhart is entitled to a subsistence preference, the Secretaries' denial of the same is an actual harm. Clearly that harm flows from the Secretaries' decision. An order of this court can remedy the harm by requiring the Secretaries to extend Title VIII of ANILCA to Native allotments that are outside any of the lands identified in § ____.3 of the 1999 final rule. Erhart therefore has standing to challenge the 1999 final rule as regard the Secretaries' treatment of Native allotments.[65]

As a further preliminary matter, it is important to note that the Secretaries treated Native allotments which are within the exterior boundaries of the federal reservations listed in § ____.3(b) in the same manner that they treated all inholdings, concluding that federal water rights have been reserved as to <u>all</u> navigable waters within the exterior boundaries of the listed federal reservations, regardless of who has title to the

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[65] None of the Katie John plaintiffs are allotment applicants. As a consequence, this decision deals with Native allotments which have been granted.

land adjoining the water. Allotments within a CSU are properly subjected to the Secretaries' 1999 final rule, not because of federal reserved water rights associated with the allotments per se, but rather because they are inholdings. See Part VII of this decision. The question raised by the Katie John plaintiffs as to Native allotments is whether the Secretaries should have, as a matter of law, identified federal reserved water rights appurtenant to Native allotments which are outside the boundaries of federal reservations.

As a final preliminary matter, the Katie John plaintiffs' argument that Katie John I required the Secretaries to identify all waters within Alaska in which the United States has a federal reserved water right misconstrues the circuit court's decision. Katie John I holds that "public lands" for purposes of Title VIII of ANILCA includes federal waters in which there are federal reserved water rights. However, it is plain that the circuit court intended that the Secretaries look to the reserved water rights doctrine for purposes of striking a balance between state and federal jurisdiction over fisheries. That is what the Secretaries have undertaken to do.

The 1906 version of the Alaska Native Allotment Act provided:

> That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall

> be deemed the homestead of the allotee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

Act of May 17, 1906, Pub. L. 59-171, ch. 2469, 34 Stat. 197. In 1956, the Act was amended to provide, in relevant part:

> Section 1. ...That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in the district of Alaska, or subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. 376-377), vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil or gas deposits, to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allotee and his heirs in perpetuity, and shall be inalienable and nontaxable unless otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres: Provided, That any Indian, Aleut, or Eskimo

> who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions[.]

43 U.S.C. § 270-1 (repealed 1971)[66]. Thus, Alaska natives who have been granted Native allotments own the lands conveyed to them in fee, the only restrictions (not reservations) being that the lands are non-taxable unless authorized by Congress and the lands cannot be conveyed without approval from the Secretary of Interior. These restrictions upon taxation and alienation patently have nothing to do with water rights. There is no evidence in the record to suggest that either the allotment application itself or the Alaska Native Allotment Act effects a reservation of any water rights. As the Regional Solicitor explained,

> lands claimed or conveyed as Alaska Native allotments are not generally considered "federal reservations." The claimed or

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[66] In 1971, the Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal title and claims in Alaska and terminated the authority to establish allotments under the 1906 Act. 43 U.S.C. §§ 1603, 1617(a).

> conveyed lands are not set aside for a specific federal purpose evidenced by a treaty, Indian reservation or other special reserved status. The lands are only "segregated," not reserved, by the filing of an allotment application, and once conveyed, they become private lands whose title is in the individual Native allotee, subject to restrictions on alienation and taxation.[67]

The Katie John plaintiffs argue that the federal government has a property interest in a Native allotment because of the restriction on alienation. As long as there is a restriction on alienation, the Katie John plaintiffs insist that the federal government retains an interest in the allotment land. What the circuit court said in Katie John I was that "[b]y virtue of its reserved water rights, the United States has interests in some navigable waters." 72 F.3d at 703 (emphasis added). Katie John I does not stand for the proposition that a restriction on alienation is the kind of interest which triggers application of Title VIII of ANILCA. The reason the circuit court selected the reserved water rights doctrine to address whether Title VIII applied to navigable water is that (1) there is a nexus between federal reserved water rights and fisheries and (2) using water rights as a reference point for purposes of dividing state and federal jurisdiction of the management of fisheries was deemed by the circuit court to effect a proper balance between resource

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67 Exhibit 1 at 6, Plaintiffs Katie John et al's Opening Brief on the "Which Waters" Issue, Docket No. 139, Case No. 05-cv-0006-HRH.

management regimes. The restraint on alienation has nothing to do with fisheries management and is not at all instructive as regards the allocation of jurisdiction between state and federal resource managers.

The Katie John plaintiffs also make much of the fact that the purpose of the Alaska Native Allotment Act was to protect critical lands used by Alaska Natives for purposes of hunting and fishing, see Olympic v. United States, 615 F. Supp. 990, 995 (D. Alaska 1985), and that these uses require water. While it is correct that at both the time the Alaska Native Allotment Act was passed in 1906 and when it was amended in 1956, Alaska Natives had aboriginal and hunting rights, those rights were extinguished by ANCSA. 43 U.S.C. § 1603. What the Katie John plaintiffs are entitled to enforce at this time is the statutory priority available to all rural residents as a consequence of Title VIII of ANILCA. For purposes of the 1999 final rule adopted by the Secretaries and for purposes of this litigation, the Katie John plaintiffs have to convince the court that there are federal reserved water rights retained by the United States on Native allotments which lie on navigable waters outside the boundaries of federal reservations. Harking back to aboriginal rights lends no support to the Katie John plaintiffs' contentions.

The Katie John plaintiffs further argue that because federal reserved water rights have been recognized in connection with Indian allotments, they should be recognized in connection with all Alaska Native allotments. The Dawes Act, 24 Stat. 388 (1887), and how allotments which were created pursuant to it have been treated have no application here. We are dealing here with allotments which were created pursuant to the Alaska Native Allotment Act, which had different

purposes than the Dawes Act and which did not involve lands that were ever part of an Indian reservation. Moreover, we are concerned here with the allocation of jurisdiction of fisheries management in navigable waters between state and federal regulators for purposes of effecting ANILCA for all rural residents of Alaska, not just Native allotment holders. What the Katie John plaintiffs urge would have the Secretaries treat Native rural residents differently from non-Native rural residents who own land outside of a CSU and on a navigable water body. Moreover, what the Katie John plaintiffs urge would result in the checkerboarding of jurisdiction along navigable waterways such that the applicable regulations (both state and federal) would differ as between private, non-Native lands, state lands, and federal public domain on the one hand, and each individual segment of a water body adjoining a 160-acre (or smaller) Native allotment.

In sum, the court rejects the Katie John plaintiffs' argument that federal reserved water rights exist on all Native allotments. The court concludes that the United States has no property interest in Native allotments and that there are no federal reserved water rights in navigable waters on or abutting conveyed Native allotments which lie outside the boundaries of federal reservations and are not immediately adjacent to the boundary of a federal reservation.[68] Because Native allotments do not give rise to waters that are public lands for purposes of

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[68] E.g., a Native allotment separated from a CSU by a navigable water body.

federal subsistence jurisdiction, the Secretaries' delegation of authority to the FSB to decide which Native allotments falling outside the lands and waters identified in the 1999 final rule, although unnecessary, was lawful and reasonable.

XI. Selected-but-not-yet-Conveyed Lands and Appurtenant Waters

§ ____.3(b) of the 1999 final rule provides that federal subsistence regulations "apply on all public lands" within the 34 listed areas. 64 Fed. Reg. at 1286-87 (emphasis added). § ____.4 defines "public lands" as

> (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.

Id. at 1288.

"Public lands" is a defined term in ANILCA. Section 102 (3) of ANILCA defines "public lands" as:

> 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)].

16 U.S.C. § 3102(3).

Subsection (1) of the Secretaries' regulatory definition of "public lands" tracks the statutory definition of "public lands" word for word. Subsection

(2) of the Secretaries' regulatory definition is not found in the statutory definition of "public lands." This regulatory addition to the statutory definition of "public lands"

> extends [federal] 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 ... (ANILCA).

64 Fed. Reg. at 1276. In extending federal management jurisdiction to selected-but-not-yet-conveyed lands, the Secretaries correctly recognized that "selected lands do not fall within the definition of 'public lands' found in ANILCA[.]" Id. at 1280. However, the Secretaries explained that

> section 906(o)(2) [of ANILCA] 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.

Id. at 1280. In other words, because selected-but-not-yet-conveyed lands within ANILCA CSUs remain "federal lands" and because they have not been conveyed, the Secretaries interpreted section 906(o)(2) of ANILCA as requiring them to treat such lands as "public lands" for purposes of Title VIII of ANILCA. Based on this interpretation, the Secretaries included selected-but-not-yet-conveyed lands within CSUs in their regulatory definition of "public lands" as an exception to the statutory exclusion of selected-but-not-yet-conveyed lands from the definition of "public lands."

The State argues that the Secretaries have, in effect, changed the statutory definition of "public lands" to include selected-but not-yet-conveyed lands and that the Secretaries had no authority to make such a change. The State contends that Congress, in defining "public lands," clearly intended to exclude selected-but-not-yet-conveyed lands from the reach of federal subsistence management jurisdiction.

As the Secretaries first point out, the 1999 final rule does not define selected-but-not-yet-conveyed lands as "public lands." Rather, the express language of the 1999 final rule provides that certain selected-but-not-yet-conveyed lands "shall be treated as public lands for the purposes" of Title VIII of ANILCA. The Secretaries seem to be suggesting that there is a difference between defining selected-but-not-yet-conveyed lands as "public lands" and treating them as such. For purposes of determining the reach of Title VIII of ANILCA, this is a distinction without a

difference. Whether the Secretaries have defined some selected-but-not-yet-conveyed lands as public lands or are merely treating such lands as public lands, the Secretaries are asserting federal subsistence management jurisdiction over those lands. The question remains whether that assertion of jurisdiction is lawful and reasonable.

In answering that question it is important to recognize that this issue has nothing to do with the reserved water rights doctrine or the Katie John I decision. The extension of federal subsistence management jurisdiction at issue here is not limited to navigable waters nor is it based on the United States having a federal reserved water right in navigable waters. In determining that selected-but-not-yet-conveyed lands within ANILCA CSUs must be treated as public lands for purposes of Title VIII jurisdiction, the Secretaries have extended federal jurisdiction to lands and waters that were not previously subjected to federal jurisdiction based on their interpretation of section 906(o), and not based on any direction from the circuit court.

The State argues that the Secretaries, in effect, expanded the statutory definition of "public lands" to include selected-but-not-yet-conveyed lands. "In determining whether the [Secretaries were] empowered to make such a change, we begin, of course, with the language of the statute." Board of Governors, Federal Reserve Sys. v. Dimension Financial Corp., 474 U.S. 361, 368 (1986). "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron, 467 U.S. at 842-43). "The traditional

deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." Id.

In section 102(3) of ANILCA, Congress clearly and unambiguously excluded selected-but-not-yet-conveyed lands from the definition of the "public lands." 16 U.S.C. § 3102(3). At first blush, that would seem to end the discussion because when Congress has spoken on a matter, that is the end of the matter, for both the agency and the court. An agency may have the authority to fill gaps left by Congress, see River Runners for Wilderness v. Martin, 574 F.3d 723, 734 (9th Cir. 2009), but it does not have the authority to alter Congress' intent.

Here, the Secretaries not only had the statutory definition of "public lands" to consider; they also had to consider the Congressional direction given them in section 906(o)(2) of ANILCA. Section 906(o)(2) is in Title IX of ANILCA, which deals with the "Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act" and provides:

> 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.

43 U.S.C. § 1635(o)(2). The Secretaries contend that Title VIII of ANILCA is a "law" applicable to the units referred to in section 906(o), and thus the plain language of section 906(o)(2) requires that federal lands within CSUs that have been selected but not yet conveyed must be administered in accordance with

Title VIII. The Secretaries insist that this means that they are required to apply the subsistence preference to selected-but-not-yet-conveyed lands. The Secretaries argue that to do otherwise would effectively write an exception into section 906(o)(2) that does not exist. If selected-but-not-yet-conveyed lands within a CSU are not subject to the Title VIII subsistence preference, then, according to the Secretaries, section 906(o) would effectively read that all federal lands shall be managed in accordance with the laws applicable to such units except for Title VIII of ANILCA.

Section 804 of ANILCA creates the preference for subsistence uses and expressly makes provision for the taking of fish "on public lands." "Public lands" by definition (section 102(3)) expressly exclude selected-but-not-yet-conveyed lands. Section 906(o)(2) provides that "Federal lands" which are within the boundaries of ANILCA CSUs are to be administered in accordance with all laws which are applicable to such units. There can be no doubt that selected-but-not-yet-conveyed lands are "federal lands" for purposes of section 906(o)(2). "Federal lands" are not statutorily defined for purposes of section 906(o)(2).[69] "'When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.'" Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009) (quoting Smith v. United States, 508 U.S. 223, 228 (1993)). "Federal land" generally means "[l]and

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[69] As set out above, "federal land" is defined in section 102 of Title I of ANILCA. See 16 U.S.C. § 3102(2). However, section 102 of Title I expressly provides that the definitions in Title I do not apply to Title IX, of which section 906(o)(2) is part.

owned by the United States government."[70] Title to selected-but-not-yet-conveyed lands is still in the United States. Thus, the plain language of section 906(o)(2) provides that selected-but-not-yet-conveyed lands that are within the boundaries of ANILCA CSUs are to be administered in accordance with all laws which are applicable to such land units.

We have two provisions of ANILCA which, on the basis of the foregoing, appear to conflict. Section 906(o)(2) tells the Secretaries to manage federal lands, which include selected-but-not-yet-conveyed lands, in accordance with Title VIII. Sections 804 and 102(3) read together tell the Secretaries that the subsistence preference created by Title VIII exists as to "public lands" which do not include selected-but-not-yet-conveyed lands.

This appearance of conflict vanishes when one considers the introductory clause of section 804. 16 U.S.C. § 3114. Section 804 applies to "public lands" as defined by § 102(3) "[e]xcept as otherwise provided in this Act[.]" Section 906(o)(2) is part of the "Act"; and as to selected-but-not-yet-conveyed lands, it provides "otherwise." The court concludes that Congress unambiguously provided that Title VIII applies to selected-but-not-yet-conveyed lands "within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition[.]"[71] 43 U.S.C.

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[70] Black's Law Dictionary 893 (8th ed. 2004).

[71] Whether or not such lands will continue to be subject to Title VIII of ANILCA post-conveyance is not before the court at this time. Once conveyed, such lands may be caught up in the

§ 1635(o)(2). Thus, the 1999 final rule lawfully and reasonably "treat[s]" selected-but-not-yet-conveyed lands as though they were "public lands" for purposes of Title VIII of ANILCA. 64 Fed. Reg. at 1288.

XII. Conclusion

Based on the foregoing, the court concludes that:

(1) federal reserved water rights do not exist, as a matter of law, in marine waters that were reserved as part of a national forest which was created pursuant to the Organic Administration Act, for which reason the Secretaries' exclusion of marine waters from the 1999 final rule was lawful;

(2) the Secretaries' use of the headland-to-headland methodology for purposes of defining where federal jurisdiction ends and state jurisdiction begins was, as a general proposition, lawful and reasonable;

(3) the Secretaries' identification of federal reserved water rights in waters bounded by non-federal land within federal reservations was lawful and reasonable;

(4) the Secretaries' identification of federal reserved water rights in waters that are adjacent to federal reservations was lawful and reasonable;

(5) the Secretaries lawfully and reasonably concluded that at the present time federal reserved water rights do not extend to waters upstream and downstream of federal reservations;

(6) the United States has not reserved water rights on Native allotments which lie outside the boundaries of federal reservations and are not immediately

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reserved waters analysis for the balancing of state and federal jurisdiction of fish management.

adjacent to the boundary of a federal reservation, for which reason the Secretaries' decision to defer identification of such rights was lawful and reasonable; and

(7) the Secretaries' interpretation of section 906(o)(2) of ANILCA was lawful and reasonable.

With the foregoing, the court has decided both the "what process" and the "which waters" issues. As to the latter, the court believes that it has resolved the legal issues raised by the Peratrovich, Katie John, and State plaintiffs in their respective complaints. After ten days from the filing of this decision, the court intends entering a final judgment dismissing the plaintiffs' respective complaints in both the consolidated cases and the Peratrovich case.

DATED at Anchorage, Alaska, this 29th day of September, 2009.

/s/ H. Russel Holland
United States District Judge

16 U.S.C. § 3102

§ 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, 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)].

* * *

16 U.S.C. § 3114

§ 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.

43 U.S.C. § 1311

§ 1311. Rights of the 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 hereby, 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;

* * *

DEPARTMENT OF AGRICULTURE
Forest Service
36 CFR Part 242
DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
50 CFR Part 100
RIN 1018-AD68

Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, and D, Redefinition to Include Waters Subject to Subsistence Priority

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 denied* 517 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 re-served 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 Rule-making 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 denied* 517 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 rule-making, 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 pro-posed 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 in-formation 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 com-mentor 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 pro-posed 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 statewide.

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 ALASKA

1. 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.

Subpart B—Program Structure

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 re-moving 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 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 In-formation 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;

(ii) Elect officers;

(iii) Review, evaluate, and make recommendations to the Board on proposals for regulations, policies, management plans, and other matters relating to the subsistence take of fish and wildlife under these regulations within the region;

(iv) Provide a forum for the expression of opinions and **[1291]** recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(v) Encourage local and regional participation, pursuant to the provisions of the regulations in this part in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

(vi) Prepare and submit to the Board an annual report containing—

(A) An identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(B) An evaluation of current and anticipated subsistence needs for fish and wildlife populations from the public lands within the region;

(C) A recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs related to the public lands; and

(D) Recommendations concerning policies, standards, guidelines, and regulations to implement the strategy;

(vii) Appoint members to each Subsistence Resource Commission within their region in ac-accordance with the requirements of Section 808 of ANILCA;

(viii) Make recommendations on determinations of customary and traditional use of subsistence resources;

(ix) Make recommendations on determinations of rural status;

(x) Make recommendations regarding the allocation of subsistence uses among rural Alaska residents pursuant to §___.17;

(xi) Develop proposals pertaining to the subsistence taking and use of fish and wildlife under these regulations, and review and evaluate such proposals submitted by other sources;

(xii) Provide recommendations on the establishment and membership of Federal Advisory Committees.

(2) The Regional Councils shall:

(i) Operate in conformance with the provisions of FACA and comply with rules of operation established by the Board;

(ii) Perform other duties specified by the Board.

§___.12 Local advisory committees.

(a) The Board shall establish such local Federal Advisory Committees within each region as necessary at such time that it is determined, after notice and hearing and consultation with the State, that the existing State fish and game advisory committees do not adequately provide advice to, and assist, the particular Regional Council in carrying out its function as set forth in §___.11.

(b) Local Federal Advisory Committees, if established by the Board, shall operate in conformance with the provisions of the FACA, and comply with rules of operation established by the Board.

§___.13 Board/agency relationships.

(a) General. (1) The Board, in making decisions or recommendations, shall consider and ensure compliance with specific statutory requirements regarding the management of resources on public lands, recognizing that the management policies

applicable to some public lands may entail methods of resource and habitat management and protection different from methods appropriate for other public lands.

(2) The Board shall issue regulations for subsistence taking of fish and wildlife on public lands. The Board is the final administrative authority on the promulgation of subpart C and D regulations relating to the subsistence taking of fish and wildlife on public lands.

(3) Nothing in the regulations in this part shall enlarge or diminish the authority of any agency to issue regulations necessary for the proper management of public lands under their jurisdiction in accordance with ANILCA and other existing laws.

(b) Section 808 of ANILCA establishes National Park and Park Monument Subsistence Resource Commissions. Nothing in the regulations in this part affects the duties or authorities of these commissions.

§___.14 Relationship to State procedures and regulations.

(a) State fish and game regulations apply to public lands and such laws are hereby adopted and made a part of the regulations in this part to the extent they are not inconsistent with, or superseded by the regulations in this part.

(b) The Board may close public lands to hunting and fishing, or take actions to restrict the taking of fish and wildlife despite any State authorization for taking fish and wildlife on public lands. The Board may review and adopt State openings, closures, or restrictions which serve to achieve the objectives of the regulations in this part.

(c) The Board may enter into agreements with the State in order to coordinate respective management responsibilities.

(d) Petition for repeal of subsistence rules and regulations. (1) The State of Alaska may petition the Secretaries for repeal of the subsistence rules and regulations in this part when the State has enacted and implemented subsistence management and use laws which:

(i) Are consistent with sections 803, 804, and 805 of ANILCA; and

(ii) Provide for the subsistence definition, preference, and participation specified in sections 803, 804, and 805 of ANILCA.

(2) The State's petition shall:

(i) Be submitted to the Secretary of the Interior, U.S. Department of the Interior, Washington, D.C. 20240, and the Secretary of Agriculture, U.S. Department of Agriculture, Washington, D.C. 20240;

(ii) Include the entire text of applicable State legislation indicating compliance with sections 803, 804, and 805 of ANILCA; and

(iii) Set forth all data and arguments available to the State in support of legislative compliance with sections 803, 804, and 805 of ANILCA.

(3) If the Secretaries find that the State's petition contains adequate justification, a rulemaking proceeding for repeal of the regulations in this part will be initiated. If the Secretaries find that the State's petition does not contain adequate justification, the petition will be denied by letter or other notice, with a statement of the ground for denial.

§___.15 Rural determination process.

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

(1) A community or area with a population of 2500 or less shall be deemed to be rural unless such a community or area possesses significant characteristics of a non-rural nature, or is considered to be socially and economically a part of an urbanized area.

(2) Communities or areas with populations above 2500 but not more than 7000 will be determined to be rural or non-rural.

(3) A community with a population of more than 7000 shall be presumed non-rural, unless such a community or area possesses significant characteristics of a rural nature.

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

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

(i) Use of fish and wildlife;

(ii) Development and diversity of the economy;

(iii) Community infrastructure;

(iv) Transportation; and

(v) Educational institutions.

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

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

(c) Current determinations are listed at §___.23.

§___.16 Customary and traditional use determination process.

(a) The Board shall determine which fish stocks and wildlife populations have been customarily and traditionally used for subsistence. These determinations shall identify the specific community's or area's use of specific fish stocks and wildlife populations. For areas managed by the National Park Service, where subsistence uses are allowed, the determinations may be made on an individual basis.

(b) A community or area shall generally exhibit the following factors, which exemplify customary and traditional use. The Board shall make customary and traditional use determinations based on application of the following factors:

(1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;

(2) A pattern of use recurring in specific seasons for many years;

(3) A pattern of use consisting of methods and means of harvest which are characterized by efficiency

and economy of effort and cost, conditioned by local characteristics;

(4) The consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from the community or area;

(5) A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to re-cent technological advances, where appropriate;

(6) A pattern of use which includes the handing down of knowledge of fishing and hunting skills, values and lore from generation to generation;

(7) A pattern of use in which the harvest is shared or distributed within a definable community of persons; and

(8) A pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.

(c) The Board shall take into consideration the reports and recommendations of any appropriate Regional Council regarding customary and traditional uses of subsistence resources.

(d) Current determinations are listed in §___.24.

§___.17 Determining priorities for subsistence uses among rural Alaska residents.

(a) Whenever it is necessary to restrict the subsistence taking of fish and wildlife on public lands in order to protect the continued viability of such populations, or to continue subsistence uses, the Board shall establish a priority among the rural Alaska

residents after considering any recommendation submitted by an appropriate Regional Council.

(b) The priority shall be implemented through appropriate limitations based on the application of the following criteria to each area, community, or individual determined to have customary and traditional use, as necessary:

(1) Customary and direct dependence upon the populations as the mainstay of livelihood;

(2) Local residency; and

(3) The availability of alternative resources.

(c) If allocation on an area or community basis is not achievable, then the Board shall allocate subsistence opportunity on an individual basis through application of the criteria in paragraphs (b) (1) through (3) of this section.

(d) In addressing a situation where prioritized allocation becomes necessary, the Board shall solicit recommendations from the Regional Council in the area affected.

§___.18 Regulation adoption process.

(a) Proposals for changes to the Federal subsistence regulations in subpart D of this part shall be accepted by the Board according to a published schedule. The Board may establish a rotating schedule for accepting proposals on various parts of subpart D regulations over a period of years. The Board shall develop and publish proposed regulations in the **Federal Register** and publish notice in local newspapers. Comments on the proposed regulations in the form of proposals shall be distributed for public review.

(1) Proposals shall be made available for at least a thirty (30) day review by the Regional Councils.

Regional Councils shall forward their recommendations on proposals to the Board. Such proposals with recommendations may be submitted in the time period as specified by the Board or as a part of the Regional Council's annual report described in §___.11, whichever is earlier.

(2) The Board shall publish notice throughout Alaska of the availability of proposals received.

[1293] (3) The public shall have at least thirty (30) days to review and comment on proposals.

(4) After the comment period the Board shall meet to receive public testimony and consider the proposals. The Board shall consider traditional use patterns when establishing harvest levels and seasons, and methods and means. The Board may choose not to follow any recommendation which the Board determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation approved by a Regional Council is not adopted by the Board, the Board shall set forth the factual basis and the reasons for its decision in writing to the Regional Council.

(5) Following consideration of the proposals the Board shall publish final regulations pertaining to subpart D of this part in the **Federal Register**.

(b) Proposals for changes to subpart C of this part shall be accepted by the Board according to a published schedule. The Board shall develop and publish proposed regulations in the **Federal Register** and publish notice in local newspapers. Comments on the proposed regulations in the form of proposals shall be distributed for public review.

(1) Public and governmental proposals shall be made available for a thirty (30) day review by the regional councils. Regional Councils shall forward their recommendations on proposals to the Board. Such proposals with recommendations may be submitted within the time period as specified by the Board or as a part of the Regional Council's annual report described in §___.11, whichever is earlier.

(2) The Board shall publish notice throughout Alaska of the availability of proposals received.

(3) The public shall have at least thirty (30) days to review and comment on proposals.

(4) After the comment period the Board shall meet to receive public testimony and consider the proposals. The Board may choose not to follow any recommendation which the Board determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation approved by a Regional Council is not adopted by the Board, the Board shall set forth the factual basis and the reasons for their decision in writing to the Regional Council.

(5) Following consideration of the proposals the Board shall publish final regulations pertaining to subpart C of this part in the Federal Register. A Board decision to change a community's or area's status from rural to non-rural will not become effective until five years after the decision has been made.

(c) [Reserved]

(d) Proposals for changes to subparts A and B of this part shall be accepted by the Secretary of the Interior in accordance with 43 CFR Part 14.

§___.19 Closures and other special actions.

(a) The Board may make or direct restriction, closure, or opening for the taking of fish and wildlife for non-subsistence uses on public lands when necessary to assure the continued viability of particular fish or wildlife population, to continue subsistence uses of a fish or wildlife population, or for reasons of public safety or administration.

(b) After consulting with the State of Alaska, providing adequate notice to the public, and holding at least one public hearing in the vicinity of the affected communities, the Board may make or direct temporary openings or closures to subsistence uses of a particular fish or wildlife population on public lands to assure the continued viability of a fish or wildlife population, or for reasons of public safety or administration. A temporary opening or closure will not extend beyond the regulatory year for which it is promulgated.

(c) In an emergency situation, the Board may direct immediate openings or closures related to subsistence or 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. The Board shall publish notice and reasons justifying the emergency closure in the **Federal Register** and in newspapers of any area affected. The emergency closure 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 hearing, that such closure should be extended.

(d) The Board may make or direct a temporary change to open or adjust the seasons or to increase the

bag limits 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 or bag limits. Prior to implementing a temporary change, the Board shall consult with the State, shall comply with the provisions of 5 U.S.C. 551-559 (Administrative Procedure Act or APA), and shall provide adequate notice and opportunity to comment. The length of any temporary change shall be confined to the minimum time period or bag limit determined by the Board to be necessary to satisfy subsistence uses. In addition, a temporary change may be made only after the Board deter-mines that the proposed temporary change will not interfere with the conservation of healthy fish and wildlife populations. The decision of the Board shall be the final administrative action.

(e) 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.

(f) You may not take fish and wildlife in violation of a restriction, closure, opening, or temporary change authorized by the Board.

§___.20 Request for reconsideration.

(a) Regulations in subparts C and D of this part published in the **Federal Register** are subject to requests for reconsideration.

(b) Any aggrieved person may file a request for reconsideration with the Board.

(c) To file a request for reconsideration, you must notify the Board in writing within sixty (60) days of the

effective date or date of publication of the notice, whichever is earliest, for which reconsideration is requested.

(d) It is your responsibility to provide the Board with sufficient narrative evidence and argument to show why the action by the Board should be reconsidered. You must include the following information in your request for reconsideration:

(1) Your name, and mailing address;

(2) The action which you request be reconsidered and the date of **Federal Register** publication of that action;

(3) A detailed statement of how you are adversely affected by the action;

(4) A detailed statement of the facts of the dispute, the issues raised by the request, and specific references to any law, regulation, or policy that you believe to be violated and your reason for such allegation;

(5) A statement of how you would like the action changed.

(e) Upon receipt of a request for reconsideration, the Board shall transmit a copy of such request to any appropriate Regional Council for review and recommendation. The Board shall consider any Regional Council recommendations in making a final decision.

(f) If the request is justified, the Board shall implement a final decision on a request for reconsideration after compliance with 5 U.S.C. 551–559 (APA).

(g) If the request is denied, the decision of the Board represents the final administrative action.

§___.21 [Reserved]

Subpart C—Board Determinations

§___.22 Subsistence resource regions.

(a) The Board hereby designates the following areas as subsistence resource regions:

(1) Southeast Region;

(2) Southcentral Region;

(3) Kodiak/Aleutians Region;

(4) Bristol Bay Region;

(5) Yukon-Kuskokwim Delta Region;

(6) Western Interior Region;

(7) Seward Peninsula Region;

(8) Northwest Arctic Region;

(9) Eastern Interior Region;

(10) North Slope Region.

(b) You may obtain maps delineating the boundaries of subsistence resources regions from the U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503.

§___.23 Rural determinations.

(a) The Board has determined all communities and areas to be rural in accordance with §___.15 except the following:

Adak;

Fairbanks North Star Borough;

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

Juneau area—including Juneau, West Juneau and Douglas;

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

[1294] Ketchikan area—including Ketchikan City, Clover Pass, North Tongass Highway, Ketchikan East, Mountain Pass, Herring Cove, Saxman East, and parts of Pennock Island;

Municipality of Anchorage;

Seward area—including Seward and Moose Pass;

Valdez; and

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

(b) You may obtain maps delineating the boundaries of non-rural areas from the U.S. Fish and Wildlife Service at the address in §___.22(b).

§___.24 Customary and traditional use determinations.

(a) The Board has determined that rural Alaska residents of the listed communities and areas have customary and traditional subsistence use of the specified species on Federal public lands in the specified areas. When there is a determination for specific communities or areas of residence in a Unit, all other communities not listed for that species in that Unit have no Federal subsistence for that species in that Unit. 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.

(1) Wildlife determinations.

Area	Species	Determination
Unit 1(C)……	Black Bear	Rural residents of Unit 1(C) and Haines, Gustavus, Klukwan, and Hoonah.
1(A)…….	Brown Bear	Rural residents of Unit 1(A) except no subsistence for residents of Hyder.
1(B)…….	Brown Bear	Rural residents of Unit 1(A), Petersburg, and Wrangell, except no subsistence for residents of Hyder.
1(C)…….	Brown Bear	Rural residents of Unit 1(C), Haines, Hoonah, Klukwan, Skagway, and Wrangell, except no subsistence for residents of Gustavus.
1(D)…….	Brown Bear	Residents of 1(D).
1(A)…….	Deer…….	Rural residents of 1(A) and 2.
1(B)…….	Deer…….	Rural residents of Unit 1(A), residents of 1(B), 2 and 3.
1(C)…….	Deer…….	Rural residents of 1(C) and (D), and residents of Hoonah and Gustavus.
1(D)…….	Deer…….	No Federal subsistence priority.

Area	Species	Determination
1(B)…….	Goat…….	Rural residents of Units 1(B) and 3.
1(C)…….	Goat…….	Residents of Haines, Klukwan, and Hoonah.
1(B)…….	Moose……..	Rural residents of Units 1, 2, 3, and4.
1(C) Berner's Bay…….	Moose ……..	No Federal subsistence priority.
1(D)…….	Moose……..	Residents of Unit 1(D).
Unit 2…….	Brown Bear	No Federal subsistence priority.
2……...	Deer…….	Rural residents of Unit 1(A) and residents of Units 2 and 3.
Unit 3…….	Deer…….	Residents of Unit 1(B) and 3, and residents of Port Alexander, Port Protection, Pt. Baker, and Meyer's Chuck.
3, Wrangell and Mitkof Islands……...	Moose ……..	Rural residents of Units 1(B), 2, and 3.
Unit 4……...	Brown Bear	Residents of Unit 4 and Kake.
4…….	Deer…….	Residents of Unit 4 and residents of Kake, Gustavus, Haines, Petersburg, Pt. Baker, Klukwan, Port Protection, Wrangell, and Yakutat.

Area	Species	Determination
4……	Goat…….	Residents of Sitka, Hoonah, Tenakee, Pelican, Funter Bay, Angoon, Port Alexander, and Elfin Cove.
Unit 5……...	Black Bear	Residents of Unit 5(A).
5……	Brown Bear	Residents of Yakutat.
5……	Deer…….	Residents of Yakutat.
5……	Moose……..	Residents of Unit 5(A).
Unit 6(A)…….	Black Bear	Residents of Yakutat and residents of6(C) and 6(D), except no subsistence for Whittier.
6, Remainder	Black Bear	Residents of Unit 6(C) and 6(D), except no subsistence for Whittier.
6……	Brown Bear	No Federal subsistence priority.
6(C) and (D)	Goat…….	Rural residents of Unit 6(C) and (D).
6……	Moose……..	No Federal subsistence priority.
6……	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16-26.
Unit 7	Brown BearNo Federal subsistence priority.	

Area	Species	Determination
7……	Caribou…...	No Federal subsistence priority.
7, Brown Mountain hunt area	Goat…….	Residents of Port Graham and English Bay.
7, that portion draining into Kings Bay	Moose……..	Residents of Chenega Bay and Tatitlek.
7, Remainder	Moose……..	No Federal subsistence priority.
7……	Sheep……....	No Federal subsistence priority.
Unit 8	Brown Bear	Residents of Old Harbor, Akhiok, Larsen Bay, Karluk, Ouzinkie, and Port Lions.
8……	Deer…….	Residents of Unit 8.
8……	Elk…….....	Residents of Unit 8.
8……	Goat…….	No Federal subsistence priority.
Unit 9(D)…….	Bison……	No Federal subsistence priority.
9(A) and (B)…	Black Bear	Residents of Units 9(A) and (B), and17(A), (B), and (C).
9(A), (C) and (D)	Brown Bear	No Federal subsistence priority.
9(B)……..	Brown Bear	Residents of Unit 9(B).

Area	Species	Determination
9(E)……..	Brown Bear	Residents of Chignik Lake, Egegik, Ivanof Bay, Perryville, and Port Heiden/Meshik.
[1295] 9(A) and (B)	Caribou…...	Residents of Units 9(B), 9(C) and 17.
9(C)……..	Caribou…...	Residents of Units 9(B), 9(C) and 17 and residents of Egegik.
9(D)……..	Caribou…...	Residents of Unit 9(D), and residents of False Pass.
9(E)……..	Caribou…...	Residents of Units 9(B), (C), (E), 17, and residents of Nelson Lagoon and Sand Point.
9(A), (B), (C) and(E)	Moose……..	Residents of Unit 9(A), (B), (C) and(E).
9(D)……..	Moose……..	No Federal subsistence priority.
9(B)……..	Sheep……...	Residents of Iliamna, Newhalen, Nondalton, Pedro Bay, and Port Alsworth.
9, Remainder	Sheep……...	No determination.
9……	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16-26.
9(A), (B), (C), &(E)	Beaver…….	Residents of Units 9(A), (B), (C), (E), and 17.

Area	Species	Determination
Unit 10 Unimak Island	Caribou…...	Residents of False Pass.
10, Remainder	Caribou…...	No determination.
10……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11-13 and the residents of Chickaloon and 16-26.
Unit 11…….	Bison……	No Federal subsistence priority.
11……..	Brown Bear	No Federal subsistence priority.
11, north of the Sanford River.	Caribou…...	Residents of Units 11, 12, and 13(A)–(D) and the residents of Chickaloon and Dot Lake.
11, remainder	Caribou…...	Residents of Units 11 and 13 (A)–(D) and the residents of Chickaloon.
11……..	Goat…….	Residents of Unit 11 and the residents of Chitina, Chistochina, Copper Center, Gakona, Gulkana, Mentasta Lake, Tazlina, Tonsina, and Dot Lake.
11, north of the Sanford River.	Moose……..	Residents of Units 11, 12, and 13(A)–(D) and the residents of Chickaloon and Dot Lake.
11, remainder	Moose……..	Residents of Unit 11 and Unit 13 (A)–(D) and the residents of Chickaloon.

Area	Species	Determination
11, north of the Sanford River.	Sheep……..	Residents of Unit 12 and the communities and areas of Chistochina, Chitina, Copper Center, Dot Lake, Gakona, Glennallen, Gulkana, Kenny Lake, Mentasta Lake, Slana, McCarthy/South Wrangell/South Park, Tazlina and Tonsina; Residents along the Nabesna Road—Milepost 0–46 (Nabesna Road), and residents along the McCarthy Road—Milepost 0–62 (McCarthy Road).
11, remainder	Sheep……..	Residents of the communities and areas of Chisana, Chistochina, Chitina, Copper Center, Dot Lake, Gakona, Glennallen, Gulkana, Kenny Lake, Mentasta Lake, Slana, McCarthy/South Wrangell/South Park, Tazlina and Tonsina; Residents along the Tok Cuttoff—Milepost 79–110 (Mentasta Pass), residents along the

Area	Species	Determination
		Nabesna Road—Milepost 0–46 (Nabesna Road), and residents along the McCarthy Road—Milepost 0–62 (McCarthy Road).
11……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11-13 and the residents of Chickaloon and 16-26.
11……..	Grouse (Spruce, Blue, Ruffed and Sharp-tailed).	Residents of Units 11, 12, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.
11……..	Ptarmigan (Rock, Willow and White-tailed).	Residents of Units 11, 12, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.
Unit 12…….	Brown Bear	Residents of Unit 12 and Dot Lake.
12……..	Caribou…...	Residents of Unit 12 and residents of Dot Lake and Mentasta Lake.
12, South of a line from Noyes Mountain, southeast of the	Moose……..	Residents of Unit 11 north of 62nd parallel (excluding North Slana Homestead and South Slana Homestead); and residents of Unit 12,

Area	Species	Determination
confluence of Tatschunda to Nabesna River Creek.		13(A)–(D) and the residents of Chickaloon and residents of Dot Lake.
12, East of the Nabesna River and Nabesna Glacier, south of the Winter Trail from Pickerel Lake to the Canadian Border.	Moose……..	Residents of Unit 12.
12, Remainder	Moose……..	Residents of Unit 12 and residents of Dot Lake and Mentasta Lake.
12……..	Sheep……....	Residents of Unit 12 and residents of Chistochina and Mentasta Lake.
12……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11-13 and the residents of Chickaloon and 16-26.
Unit 13…….	Brown Bear	No Federal subsistence priority.
13……..	Caribou Nelchina Herd	Residents of Units 11, 13 and the residents of Chickaloon, and 12(along Nabesna Road).

Area	Species	Determination
13(E).....	Caribou.....	Residents of McKinley Village, and the area along the Parks Highway between milepost 216 and 239 (except no subsistence for residents of Denali National Park headquarters)
13(D).....	Goat.....	No Federal subsistence priority.
13(A), (B), and (D)	Moose.....	Residents of Unit 13 and the residents of Chickaloon.
13(C).....	Moose.....	Residents of Units 12, 13 and the residents of Chickaloon and Dot Lake.
[1296] 13(E)	Moose.....	Residents of McKinley Village, and the area along the Parks Highway between milepost 216 and 239 (except no subsistence for residents of Denali National Park headquarters).
13(D).....	Sheep.....	No Federal subsistence priority.

Area	Species	Determination
13……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon, and 16-26.
13……..	Grouse (Spruce, Blue, Ruffed & Sharp-tailed)	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 & 23.
13……..	Ptarmigan (Rock, Willow and White-tailed)	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 & 23.
Unit 14(B) and (C)	Brown Bear	No Federal subsistence priority.
14……..	Goat…….	No Federal subsistence priority.
14……..	Moose……..	No Federal subsistence priority.
14(A) and (C)	Sheep……..	No Federal subsistence priority.
Unit 15(C)	Black Bear	Residents of Port Graham and Nanwalek only.
15, Remainder	Black Bear	No Federal subsistence priority.
15……..	Brown Bear	No Federal subsistence priority.

Area	Species	Determination
15(C), Port Graham and English Bay hunt areas	Goat…….	Residents of Port Graham and Nanwalek.
15(C), Seldovia hunt area	Goat…….	Residents Seldovia area.
15……..	Moose……..	Residents of Ninilchik, Nanwalek, Port Graham, and Seldovia.
15……..	Sheep	No Federal subsistence priority.
15……..	Ptarmigan (Rock, Willow and White-tailed)	Residents of Unit 15.
15……..	Grouse (Spruce)	Residents of Unit 15.
15……..	Grouse (Ruffed)	No Federal subsistence priority.
Unit 16	Brown Bear	No Federal subsistence priority.
16(A)	Moose……..	No Federal subsistence priority.
16(B)	Moose……..	Residents of Unit 16(B).
16……..	Sheep……..	No Federal subsistence priority.

Area	Species	Determination
16……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon, and 16–26.
16……..	Grouse (Spruce, Blue, Ruffed and Sharp-tailed)	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.
16……..	Ptarmigan (Rock, Willow and White-tailed)	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.
Unit 17…….	Black Bear	Residents of Units 9(A) and (B), and17(A), (B), and (C).
17(A)……	Brown Bear	Residents of Unit 17, and residents of Goodnews Bay and Platinum.
17(A) and (B) Those portions north and west of a line beginning from the Unit 18 boundary at the northwest end of	Brown Bear	Residents of Kwethluk.

Area	Species	Determination
Nenevok Lake, to the southern point of upper Togiak Lake, and northeast to the northern point of Nuyakuk Lake, northeast to the point where the Unit 17 boundary intersects the Shotgun Hills.		
17(B) and (C)	Brown Bear	Residents of Unit 17.
17……..	Caribou…...	Residents of Units 9(B), 17 and residents of Lime Village and Stony River.
17(A) and (B) Those portions north and west of a line beginning from the Unit 18 boundary at the northwest	Caribou…...	Residents of Kwethluk.

Area	Species	Determination
end of Nenevok Lake, to the southern point of upper Togiak Lake, and northeast to the northern point of Nuyakuk Lake, northeast to the point where the Unit 17 boundary intersects the Shotgun Hills.		
17(A) and (B) Those portions north and west of a line beginning from the Unit 18 boundary at the northwest end of Nenevok Lake, to the	Moose……..	Residents of Kwethluk.

Area	Species	Determination
southern point of upper Togiak Lake, and northeast to the northern point of Nuyakuk Lake, northeast to the point where the Unit 17 boundary intersects the Shotgun Hills.		
17(A)……	Moose……..	Residents of Unit 17 and residents of Goodnews Bay and Platinum; however, no subsistence for residents of Akiachak, Akiak and Quinhagak.
[1297] 17(B) and (C)	Moose……..	Residents of Unit 17, and residents of Nondalton, Levelock, Goodnews Bay and Platinum.
17……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11-13 and the residents of Chickaloon, and 16–26.

Area	Species	Determination
17……..	Beaver……	Residents of Units 9(A), (B), (C), (E), and 17.
Unit 18…….	Black Bear	Residents of Unit 18, residents of Unit 19(A) living downstream of the Holokuk River, and residents of Chuathbaluk, Aniak, Lower Kalskag, Holy Cross, Stebbins, St. Michael, and Togiak.
18…….	Brown Bear	Residents of Akiachak, Akiak, Eek, Goodnews Bay, Kwethluk, Mt. Village, Napaskiak, Platinum, Quinhagak, St. Mary's, and Tuluksak.
18…….	Caribou (Kilbuck caribou herd only).	INTERIM DETERMINATION BY FEDERAL SUBSISTENCE BOARD (12/18/91): residents of Tuluksak, Akiak, Akiachak, Kwethluk, Bethel, Oscarville, Napaskiak, Napakiak, Kasigluk, Atmanthluak, Nunapitchuk, Tuntutliak, Eek, Quinhagak, Goodnews Bay, Platinum, Togiak,

Area	Species	Determination
		and Twin Hills.
18 North of the Yukon River	Caribou (except Kilbuck caribou herd).	Residents of Alakanuk, Andreafsky, Chevak, Emmonak, Hooper Bay, Kotlik, Kwethluk, Marshall, Mountain Village, Pilot Station, Pitka's Point, Russian Mission, St. Mary's, St. Michael, Scammon Bay, Sheldon Point, and Stebbins.
18, Remainder	Caribou (except Kilbuck caribou herd).	Residents of Kwethluk.
18, that portion of the Yukon River drainage upstream of Russian Mission and that portion of the Kuskokwim River drainage upstream of, but not including the Tuluksak	Moose……..	Residents of Unit 18 and residents of Upper Kalskag, Lower Kalskag, Aniak, and Chuathbaluk.

Area	Species	Determination
River drainage		
18, remainder	Moose……..	Residents of Unit 18 and residents of Upper Kalskag and Lower Kalskag.
18…….	Muskox…...	No Federal subsistence priority.
18…….	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16–26.
Unit 19(C), (D)	Bison……	No Federal subsistence priority.
19(A)……	Brown Bear	Residents of Unit 19(A), (D), and Residents of Tuluksak, Lower Kalskag and Kwethluk.
19(B)……	Brown Bear	Residents of Kwethluk.
19(C)……	Brown Bear	No Federal subsistence priority.
19(D)……	Brown Bear	Residents of Unit 19(A) and (D), and residents of Tulusak and Lower Kalskag.
19(A) and (B)	Caribou…...	Residents of Unit 19(A) and (B) and Kwethluk; and residents of Unit 18 in Kuskokwim Drainage and Kuskokwim Bay during the winter season.

Area	Species	Determination
19(C)……	Caribou…...	Residents of Unit 19(C), and residents of Lime Village, McGrath, Nikolai, and Telida.
19(D)……	Caribou…...	Residents of Unit 19(D), and residents of Lime Village, Sleetmute and Stony River.
19(A) and (B)	Moose…….	Residents of Unit 18 within Kuskokwim River drainage upstream from and including the Johnson River, and Unit 19.
19(C)……	Moose……..	Residents of Unit 19.
19(D)……	Moose……..	Residents of Unit 19 and residents of Lake Minchumina.
19……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16–26.
Unit 20(D)…...	Bison……	No Federal subsistence priority.
20(F)…….....	Black Bear	Residents of Unit 20(F) and residents of Stevens Village and Manley.
20(E)……	Brown Bear	Residents of Unit 12 and Dot Lake.
20(F)……	Brown Bear	Residents of Unit 20(F) and residents of Stevens Village and Manley.

Area	Species	Determination
20(A), (C) (Delta, Yanert, and 20(C) herds) and (D)	Caribou…...	No determination, except no subsistence for residents of households of the Denali National Park Headquarters.
20(D) and 20(E)	Caribou 40-Mile Herd	Residents of Unit 12 north of Wrangell Park-Preserve, rural residents of 20(D) and residents of 20(E).
20(A)……	Moose……..	Residents of Cantwell, Minto, and Nenana, McKinley Village, the area along the Parks Highway between mileposts 216 and 239, except no subsistence for residents of households of the Denali National Park Headquarters.
20(B)……	Moose……..	Minto Flats Management Area—residents of Minto and Nenana.
20(B)……	Moose……..	Remainder—rural residents of Unit20(B), and residents of Nenana and Tanana.
20(C)……	Moose……..	Rural residents of Unit 20(C) (except that portion within Denali National Park and Preserve and that

Area	Species	Determination
		portion east of the Teklanika River), and residents of Cantwell, Manley, Minto, Nenana, the Parks Highway from milepost 300–309, Nikolai, Tanana, Telida, McKinley Village, and the area along the Parks Highway between mileposts 216 and 239. No subsistence for residents of households of the Denali National Park Headquarters.
[1298] 20(D)…	Moose……..	Rural residents of Unit 20(D) and residents of Tanacross.
20(F)……	Moose……..	Residents of Unit 20(F), Manley, Minto and Stevens Village.
20(F)……	Wolf…….	Residents of Unit 20(F) and residents of Stevens Village and Manley.
20, remainder	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16–26.
20(D)……	Grouse, (Spruce, Blue, Ruffed and Sharp-	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.

Area	Species	Determination
	tailed)	
20(D).....	Ptarmigan (Rock, Willow and White-tailed)	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.
Unit 21.....	Brown Bear	Rural residents of Units 21 and 23.
21.....	Caribou, Western Arctic Caribou Herd only	Residents of Unit 21(D) west of the Koyukuk and Yukon Rivers, and residents of 23 and 24.
21(A) and (E)..	Caribou.....	Residents of Unit 21(A) and Aniak, Chuathbaluk, Crooked Creek, Grayling, Holy Cross, McGrath, Shageluk and Takotna.
21(A).....	Moose.....	Residents of Unit 21(A), (E), Takotna, McGrath, Aniak and Crooked Creek.
21(B) and (C)	Moose.....	Residents of Unit 21(B) and (C), residents of Tanana and Galena.
21(D).....	Moose.....	Residents of Unit 21(D), and residents of Huslia and Ruby.
21(E).....	Moose.....	Residents of Unit 21(E) and residents of Russian Mission.

Area	Species	Determination
21……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon, and 16–26.
Unit 22(A)…...	Black Bear	Residents of Unit 22(A) and Koyuk.
22(B)……	Black Bear	Residents of Unit 22(B).
22(C), (D), and (E)	Black Bear	No Federal subsistence priority.
22……..	Brown Bear	Residents of Unit 22
22(A)	Caribou…..	Residents of Unit 21(D) west of the Koyukuk and Yukon Rivers, and residents of Units 22 (except residents of St. Lawrence Island), 23, 24, and residents of Kotlik, Emmonak, Hooper Bay, Scammon Bay, Chevak, Marshall, Mountain Village, Pilot Station, Pitka's Point, Russian Mission, St. Mary's, Sheldon Point, and Alakanuk.
22, Remainder	Caribou…...	Residents of Unit 21(D) west of the Koyukuk and Yukon Rivers, and residents of Units 22 (except residents of St. Lawrence Island), 23,

Area	Species	Determination
		24.
22……..	Moose……..	Residents of Unit 22.
22(B)……	Muskox…...	Residents of Unit 22(B).
22(C)……	Muskox…...	Residents of Unit 22(C).
22(D)……	Muskox…...	Residents of Unit 22(D) excluding St. Lawrence Island.
22(E)……	Muskox…...	Residents of Unit 22(E) excluding Little Diomede Island.
22……..	Wolf…….	Residents of Units 23, 22, 21(D) north and west of the Yukon River, and residents of Kotlik.
22……..	Grouse (Spruce, Blue, Ruffed and Sharp-tailed).	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.
22……..	Ptarmigan (Rock, Willow and White-tailed).	
Unit 23…….	Brown Bear	Rural residents of Units 21 and 23.
23……..	Caribou…...	Residents of Unit 21(D) west of the Koyukuk and Yukon Rivers, residents of Galena, and residents of Units 22, 23,

Area	Species	Determination
		24 including residents of Wiseman but not including other residents of the Dalton Highway Corridor Management Area, and 26(A).
23……..	Moose……..	Residents of Unit 23.
23 South of Kotzebue Sound and west of and including the Buckland River drainage.	Muskox…...	Residents of Unit 23 South of Kotzebue Sound and west of and including the Buckland River drainage.
23, Remainder	Muskox…...	Residents of Unit 23 east and north of the Buckland River drainage.
23……..	Sheep……..	Residents of Unit 23 north of the Arctic Circle.
23……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon, and 16–26.
23……..	Grouse (Spruce, Blue, Ruffed and	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.

Area	Species	Determination
	Sharp-tailed).	
23……..	Ptarmigan (Rock, Willow and White-tailed).	Residents of Units 11, 13 and the residents of Chickaloon, 15, 16, 20(D), 22 and 23.
Unit 24, that portion south of Caribou Mountain, and within the public lands composing or immediately adjacent to the Dalton Highway Corridor Management Area.	Black Bear	Residents of Stevens Village and residents of Unit 24 and Wiseman, but not including any other residents of the Dalton Highway Corridor Management Area.
24, remainder	Black Bear	Residents of Unit 24 and Wiseman, but not including any other residents of the Dalton Highway Corridor Management Area.
24, that portion south of Caribou Mountain, and within	Brown Bear	Residents of Stevens Village and residents of Unit 24 and Wiseman, but not including any other residents of the

Area	Species	Determination
the public lands composing or immediately adjacent to the Dalton Highway Corridor Management Area.		Dalton Highway Corridor Management Area.
[1299] 24, remainder	Brown Bear	Residents of Unit 24 including Wiseman, but not including any other residents of the Dalton Highway Corridor Management Area
24……..	Caribou…...	Residents of Unit 24 including Wiseman, but not including any other residents of the Dalton Highway Corridor Management Area; residents of Galena, Kobuk, Koyukuk, Stevens Village, and Tanana.
24……..	Moose……..	Residents of Unit 24, and residents of Koyukuk and Galena.
24……..	Sheep……..	Residents of Unit 24 residing north of the Arctic Circle and residents of Allakaket,

Area	Species	Determination
		Alatna, Hughes, and Huslia.
24……..	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16–26.
Unit 25(D)…..	Black Bear	Residents of Unit 25(D).
25(D)……	Brown Bear	Residents of Unit 25(D).
25, remainder.	Brown Bear	No Federal subsistence priority.
25(A)……	Moose……..	Residents of Unit 25(A) and 25(D).
25(D) West…..	Moose……..	Residents of Beaver, Birch Creek and Stevens Village.
25(D), Remainder.	Moose……..	Residents of Remainder of Unit 25.
25(A)……	Sheep……..	Residents of Arctic Village, Chalkytsik, Fort Yukon, Kaktovik and Venetie.
25(B) and (C)..	Sheep……..	No Federal subsistence priority.
25(D)……	Wolf…….	Residents of Unit 25(D).
25, remainder.	Wolf…….	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16–26.
Unit 26…….	Brown Bear	Residents of Unit 26 (except the Prudhoe Bay-Deadhorse Industrial Complex) and

Area	Species	Determination
		residents of Anaktuvuk Pass and Point Hope.
26(A).....	Caribou.....	Residents of Unit 26 and the residents of Anaktuvuk Pass and Point Hope.
26(B).....	Caribou.....	Residents of Unit 26 and the residents of Anaktuvuk Pass, Point Hope, and Wiseman.
26(C).....	Caribou.....	Residents of Unit 26 and the residents of Anaktuvuk Pass and Point Hope.
26.....	Moose.....	Residents of Unit 26, (except the Prudhoe Bay-Deadhorse Industrial Complex), and residents of Point Hope and Anaktuvuk Pass.
26(A).....	Muskox.....	Residents of Anaktuvuk Pass, Atqasuk, Barrow, Nuiqsut, Point Hope, Point Lay, and Wainwright.
26(B).....	Muskox.....	Residents of Anaktuvuk Pass, Nuiqsut, and Kaktovik.
26(C).....	Muskox.....	Residents of Kaktovik.

Area	Species	Determination
26(A).....	Sheep.....	Residents of Unit 26, Anaktuvuk Pass, and Point Hope.
26(B).....	Sheep.....	Residents of Unit 26, Anaktuvuk Pass, Point Hope, and Wiseman.
26(C).....	Sheep.....	Residents of Unit 26, Arctic Village, Chalkytsik, Fort Yukon, Point Hope, and Venetie.
26.....	Wolf.....	Residents of Units 6, 9, 10 (Unimak Island only), 11–13 and the residents of Chickaloon and 16–26.

(2) Fish determinations.

Area	Species	Determination
KOTZEBUE AREA	All fish.....	Residents of the Kotzebue Area.
NORTON SOUND—PORT CLARENCE AREA	All fish.....	Residents of the Norton Sound-Port Clarence Area.
YUKON-NORTH-ERN AREA:		
Yukon River drainage.	Salmon, other than Yukon	Residents of the Yukon Area, Including the community of Stebbins.

Area	Species	Determination
	River Fall Chum salmon.	
Yukon River drainage.	Yukon River Fall chum salmon.	Residents of the Yukon River drainage, including the communities of Stebbins, Scammon Bay, Hooper Bay, and Chevak.
Yukon River drainage.	Freshwater fish species (other than salmon), including sheefish, whitefish, lamprey, burbot, sucker, grayling, pike, char, and blackfish.	Residents of the Yukon-Northern Area.
Remainder…..	All fish…….	Residents of the Northern Area, except for those domiciled in Unit 26-B.
KUSKOK-WIM AREA	Salmon……	Residents of the Kuskokwim Area, except those persons residing on the United States military installation located on

Area	Species	Determination
		Cape Newenham, Sparevohn USAFB, and Tatalina USAFB.
	Rainbow trout.	Residents of the communities of Quinhagak, Goodnews Bay, Kwethluk, Eek, Akiachak, Akiak, and Platinum.
	Pacific cod...	Residents of the communities of Chevak, Newtok, Tununak, Toksook Bay, Nightmute, Chefornak, Kipnuk, Mekoryuk, Kwigillingok, Kongiganak, Eek, and Tuntutuliak.
	All other fish other than herring.	Residents of the Kuskokwim Area.
[1300] Waters around Nunivak Island.	Herring and herring roe.	Residents within 20 miles of the coast between the westernmost tip of the Naskonant Peninsula and the terminus of the Ishowik River and on Nunivak Island.

Area	Species	Determination
BRISTOL BAY AREA:		
Nushagak District, including drainages flowing into the District.	Salmon and other freshwater fish.	Residents of the Nushagak District and freshwater drainages flowing into the district.
Naknek-Kvichak District—Naknek River drainage.	Salmon and other freshwater fish.	Residents of the Naknek and Kvichak River drainages.
Naknek-Kvichak District—Iliamna-Lake Clark drainage.	Salmon and other freshwater fish.	Residents of the Iliamna-Lake Clark drainage.
Togiak District, including drainages flowing into the District.	Salmon and other freshwater fish.	Residents of the Togiak District, freshwater drainages flowing into the district, and the community of Manokotak.
Togiak District.	Herring spawn on kelp.	Residents of the Togiak District.
Remainder…..	All fish…….	Residents of the Bristol Bay Area.

Area	Species	Determination
ALEUTIAN ISLANDS AREA	All fish…….	Residents of the Aleutian Islands Area and the Pribilof Islands.
ALASKA PENIN-SULA AREA	Halibut……	Residents of the Alaska Peninsula Area and the communities of Ivanof Bay and Perryville.
	All other fish in the Alaska Peninsula Area.	Residents of the Alaska Peninsula Area.
CHIGNIK AREA	Halibut, salmon and fish other than steelhead and rainbow trout.	Residents of the Chignik Area.
KODIAK AREA—except the Mainland District, all waters along the south side of the Alaska Peninsula bounded by the latitude of Cape	Salmon……	Residents of the Kodiak Island Borough, except those residing on the Kodiak Coast Guard Base.

Area	Species	Determination
Douglas (58° 52' North latitude) mid-stream Shelikof Strait, and east of the longitude of the southern entrance of Imuya Bay near Kilokak Rocks (57° 11'22" North latitude, 156° 20'30" W longitude).		
Kodiak Area.	Fish other than steelhead and rainbow trout and salmon.	Residents of the Kodiak Area.
COOK INLET AREA	Fish other than salmon, Dolly Varden, trout, char, grayling, and burbot	Residents of the Cook Inlet Area.

Area	Species	Determination
PRINCE WILLIAM SOUND AREA:		
South-Western District and Green Island.	Salmon.....	Residents of the Southwestern District which is mainland waters from the outer point on the north shore of Granite Bay to Cape Fairfield, and Knight Island, Chenega Island, Bainbridge Island, Evans Island, Elrington Island, Latouche Island and adjacent islands.
North of a line from Porcupine Point to Granite Point, and south of a line from Point Lowe to Tongue Point.	Salmon.....	Residents of the villages of Tatitlek and Ellamar.
Glennallen Subdistrict of the Upper Copper River District and the waters of	Salmon.....	Residents of the Prince William Sound Area.

Area	Species	Determination
the Copper River.		
Copper River District—remainder	Salmon.....	Residents of the Prince William Sound Area.
YAKUTAT AREA:		
Freshwater upstream from the terminus of streams and rivers of the Yakutat Area from the Doame River to the Tsiu River.	Salmon.....	Residents of the area east of Yakutat Bay, including the islands within Yakutat Bay, west of the Situk River drainage, and south of and including Knight Island.
Freshwater upstream from the terminus of streams and rivers of the Yakutat Area from the Doame River to Point Manby.	Dolly Varden, steelhead trout, and smelt.	Residents of the area east of Yakutat Bay, including the islands within Yakutat Bay, west of the Situk River drainage, and south of and including Knight Island.

Area	Species	Determination
SOUTH-EASTERN ALASKA AREA:		
District 1—Section1-E in waters of the Naha River and Roosevelt Lagoon.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Saxman.
District 1—Section 1-F in Boca de Quadra in waters of Sockeye Creek and Hugh Smith Lake within 500 yards of the terminus of Sockeye Creek.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Saxman.
District 2—North of the latitude of the northern-most tip of Chasina Point and west of a line from the	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Kasaan and in the drainage of the southeastern shore of the Kasaan Peninsula west of132° 20’ W. long. and east of 132° 25’ W. long.

Area	Species	Determination
northern-most tip of Chasina Point to the eastern-most tip of Grindall Island to the eastern-most tip of the Kasaan Peninsula.		
District 3—Section 3-A	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the townsite of Hydaburg.
District 3—Section A	Halibut and bottomfish.	Residents of Southeast Area.
District 3—Section 3-B in waters east of a line from Point Ildefonso to Tranquil Point.	Salmon, Dolly Varden, trout, smelt and eulachon	Residents of the City of Klawock and on Prince of Wales Island within the boundaries of the Klawock Heenya Corporation land holdings as they exist in January 1989, and those residents of the City of Craig and on Prince of Wales Island within the boundaries of the Shan Seet Corporation land

Area	Species	Determination
		holdings as they exist in January 1989.
District 3—Section3-C in waters of Sarkar Lakes.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Klawock and on Prince of Wales Island within the boundaries of the Klawock Heenya Corporation land holdings as they exist in January 1989, and those residents of the City of Craig and on Prince of Wales Island within the boundaries of the Shan Seet Corporation land holdings as they exist in January 1989.
District 5—North of a line from Point Barrie to Boulder Point.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Kake and in Kupreanof Island drainages emptying into Keku Strait south of Point White and north of the Portage Bay boat harbor.
District 9—Section 9-A	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Kake and in Kupreanof Island drainages emptying into Keku Strait south of Point White and north of the Portage Bay boat harbor.

Area	Species	Determination
District 9—Section 9-B north of the latitude of Swain Point.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Kake and in Kupreanof Island drainages emptying into Keku Strait south of Point White and north of the Portage Bay boat harbor.
District 10—West of a line from Pinta Point to False Point Pybus.	Salmon, Dolly Varden, trout, smelt and eulachon	Residents of the City of Kake and in Kupreanof Island drainages emptying into Keku Strait south of Point White and north of the Portage Bay boat harbor.
District 12—South of a line from Fishery Point to south Passage Point and north of the latitude of Point Caution.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Angoon and along the western shore of Admiralty Island north of the latitude of Sand Island, south of the latitude of Thayer Creek, and west of 134° 30' W. long., including Killisnoo Island.
District 13—Section 13-A south of the latitude of Cape	Salmon, Dolly Varden, trout, smelt and	Residents of the City and Borough of Sitka in drainages which empty into Section 13-B north of the latitude of

Area	Species	Determination
Edward.	eulachon.	Dorothy Narrows.
District 13—Section 13-B north of the latitude of Redfish Cape.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City and Borough of Sitka in drainages which empty into Section 13-B north of the latitude of Dorothy Narrows.
District 13—Section 13-C	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City and Borough of Sitka in drainages which empty into Section 13-B north of the latitude of Dorothy Narrows.
District 13—Section 13-C east of the longitude of Point Elizabeth.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Angoon and along the western shore of Admiralty Island north of the latitude of Sand Island, south of the latitude of Thayer Creek, and west of 134° 30' W. long., including Killisnoo Island.
District 14—Section 14-B and14-C.	Salmon, Dolly Varden, trout, smelt and eulachon.	Residents of the City of Hoonah and in Chichagof Island drainages on the eastern shore of Port Frederick from Gartina Creek to Point Sophia.

(3) Shellfish determinations.

Area	Species	Determination
BERING SEA AREA	All shellfish	Residents of the Bering Sea Area.
ALASKA PENIN-SULA-ALEUTIAN ISLANDS AREA.	Shrimp, Dunge-ness, king, and Tanner crab.	Residents of the Alaska Peninsula- Aleutian Islands Area.
KODIAK AREA	Shrimp, Dunge-ness, and Tanner crab.	Residents of the Kodiak Area.
Kodiak Area, except for the Semidi Island, the North Mainland, and the South Mainland Sections.	King crab…	Residents of the Kodiak Island Borough except those residents on the Kodiak Coast Guard base.
PRINCE WILLIAM SOUND AREA	Shrimp, clams, Dunge-ness, king, and Tanner crab.	Residents of the Prince William Sound Area.

Area	Species	Determination
SOUTH-EASTERN ALASKA—YAKUTAT AREA:		
Section 1-E south of the latitude of Grant Island light.	Shellfish, except shrimp, king crab, and Tanner crab	Residents of the Southeast Area.
[1302] Section 1-F north of the latitude of the northernmost tip of Mary Island, except waters of Boca de Quadra.	Shellfish, except shrimp, king crab, and Tanner crab	Residents of the Southeast Area.
Section 3-A and 3-B	Shellfish, except shrimp, king crab, and Tanner crab	Residents of the Southeast Area.

Area	Species	Determination
District 13	Dungeness crab, shrimp, abalone, sea cucumbers, gum boots, cockles, and clams, except geoducks	Residents of the Southeast Area.

Subpart D—Subsistence Taking of Fish and Wildlife

3. In subpart D, revise §§___.26 and ___27 of 36 CFR part 242 and 50 CFR part 100 to read as follows:

§___.26 Subsistence taking of fish.

(a) *Applicability.* (1) Regulations in this section apply to the taking of fish or their parts for subsistence uses.

(2) You may take fish for subsistence uses at any time by any method unless you are restricted by the subsistence fishing regulations found in this section. The harvest limit specified in this section for a subsistence season for a species and the State harvest limit set for a State season for the same species are not cumulative. This means that if you have taken the harvest limit for a particular species under a subsistence season specified in this section, you may not after that, take any additional fish of that species under any other harvest limit specified for a State season.

(b) *Definitions*. The following definitions shall apply to all regulations contained in this section and §___.27:

Abalone Iron means a flat device which is used for taking abalone and which is more than one inch (24 mm) in width and less than 24 inches (610 mm) in length, with all prying edges rounded and smooth.

ADF&G means the Alaska Department of Fish and Game.

Anchor means a device used to hold a fishing vessel or net in a fixed position relative to the beach; this includes using part of the seine or lead, a ship's anchor, or being secured to another vessel or net that is anchored.

Beach seine means a floating net which is designed to surround fish and is set from and hauled to the beach.

Cast net means a circular net with a mesh size of no more than one and one-half inches and weights attached to the perimeter which, when thrown, surrounds the fish and closes at the bottom when retrieved.

Char means the following species: Arctic char (*Salvelinus alpinis*); lake trout (*Salvelinus namaycush*); brook trout (*Salvelinus fontinalis*), and Dolly Varden (*Salvelinus malma*).

Crab means the following species: red king crab (*Paralithodes camshatica*); blue king crab (*Paralithodes platypus*); brown king crab (*Lithodes aequispina*); *Lithodes couesi*; all species of tanner or snow crab (*Chionoecetes* spp.); and Dungeness crab (*Cancer magister*).

Depth of net means the perpendicular distance between cork line and lead line expressed as either

linear units of measure or as a number of meshes, including all of the web of which the net is composed.

Dip net means a bag-shaped net supported on all sides by a rigid frame; the maximum straight-line distance between any two points on the net frame, as measured through the net opening, may not exceed five feet; the depth of the bag must be at least one-half of the greatest straight-line distance, as measured through the net opening; no portion of the bag may be constructed of webbing that exceeds a stretched measurement of 4.5 inches; the frame must be attached to a single rigid handle and be operated by hand.

Diving Gear means any type of hard hat or skin diving equipment, including SCUBA equipment, a tethered, umbilical, surface-supplied, or snorkel.

Drainage means all of the waters comprising a watershed including tributary rivers, streams, sloughs, ponds and lakes which contribute to the water supply of the watershed.

Drift gillnet means a drifting gillnet that has not been intentionally staked, anchored or otherwise fixed.

Fishwheel means a fixed, rotating device, with no more than four baskets on a single axle, for catching fish which is driven by river current or other means.

Freshwater of streams and rivers means the line at which freshwater is separated from saltwater at the mouth of streams and rivers by a line drawn between the seaward extremities of the exposed tideland banks at the present stage of the tide.

Fyke net means a fixed, funneling (fyke) device used to entrap fish.

Gear means any type of fishing apparatus.

Gillnet means a net primarily designed to catch fish by entanglement in a mesh that consists of a single sheet of webbing which hangs between cork line and lead line, and which is fished from the surface of the water.

Grappling hook means a hooked device with flukes or claws, which is attached to a line and operated by hand.

Groundfish or *bottomfish* means any marine fish except halibut, osmerids, herring and salmonids.

Hand purse seine means a floating net which is designed to surround fish and which can be closed at the bottom by pursing the lead line; pursing may only be done by hand power, and a free-running line through one or more rings attached to the lead line is not allowed.

Handline means a hand-held and operated line, with one or more hooks attached.

Harvest limit means the maximum legal take per person or designated group, per specified time period, in the area in which the person is fishing, even if part or all of the fish are preserved. A fish, when landed and killed becomes part of the harvest limit of the person originally hooking it.

Herring pound means an enclosure used primarily to contain live herring over extended periods of time.

Household means a person or persons having the same residence.

Hung measure means the maximum length of the cork line when measured wet or dry with traction applied at one end only.

Hydraulic clam digger means a device using water or a combination of air and water to remove clams from their environment.

Jigging gear means a line or lines with lures or baited hooks, drawn through the water by hand, and which are operated during periods of ice cover from holes cut in the ice, or from shore ice and which are drawn through the water by hand.

Lead means either a length of net employed for guiding fish into a seine, set gillnet, or other length of net, or a length of fencing employed for guiding fish into a fishwheel, fyke net or dip net.

Legal limit of fishing gear means the maximum aggregate of a single type of fishing gear permitted to be used by one individual or boat, or combination of **[1303]** boats in any particular regulatory area, district or section.

Long line means either a stationary, buoyed, or anchored line, or a floating, free-drifting line with lures or baited hooks attached.

Mechanical clam digger means a mechanical device used or capable of being used for the taking of clams.

Mechanical jigging machine means a mechanical device with line and hooks used to jig for halibut and bottomfish, but does not include hand gurdies or rods with reels.

Mile means a nautical mile when used in reference to marine waters or a statute mile when used in reference to fresh water.

Possession limit means the maximum number of fish a person or designated group may have in possession if the fish have not been canned, salted,

frozen, smoked, dried, or otherwise preserved so as to be fit for human consumption after a 15 day period.

Pot means a portable structure designed and constructed to capture and retain live fish and shellfish in the water.

Purse seine means a floating net which is designed to surround fish and which can be closed at the bottom by means of a free-running line through one or more rings attached to the lead line.

Ring net means a bag-shaped net suspended between no more than two frames; the bottom frame may not be larger in perimeter than the top frame; the gear must be nonrigid and collapsible so that free movement of fish or shellfish across the top of the net is not prohibited when the net is employed.

Rockfish means all species of the genus *Sebastes.*

Rod and reel means either a device upon which a line is stored on a fixed or revolving spool and is deployed through guides mounted on a flexible pole, or a line that is attached to a pole.

Salmon means the following species: pink salmon (*Oncorhynchus gorbuscha*); sockeye salmon (*Oncorhynchus nerka*); chinook salmon (*Oncorhynchus tshawytscha*); coho salmon (*Oncorhynchus kisutch*); and chum salmon (*Oncorhynchus keta*).

Salmon stream means any stream used by salmon for spawning or for traveling to a spawning area.

Salmon stream terminus means a line drawn between the seaward extremities of the exposed tideland banks of any salmon stream at mean lower low water.

Scallop dredge means a dredge-like device designed specifically for and capable of taking scallops by being towed along the ocean floor.

Sea urchin rake means a hand-held implement, no longer than four feet, equipped with projecting prongs used to gather sea urchins.

Set gillnet means a gillnet that has been intentionally set, staked, anchored, or otherwise fixed.

Shovel means a hand-operated implement for digging clams or cockles.

Spear means a shaft with a sharp point or fork-like implement attached to one end which is used to thrust through the water to impale or retrieve fish and which is operated by hand.

Stretched measure means the average length of any series of 10 consecutive meshes measured from inside the first knot and including the last knot when wet; the 10 meshes, when being measured, shall be an integral part of the net, as hung, and measured perpendicular to the selvages; measurements shall be made by means of a metal tape measure while the 10 meshes being measured are suspended vertically from a single peg or nail, under five-pound weight.

Subsistence fishing permit means a permit issued by the Alaska Department of Fish and Game, unless specifically identified otherwise.

To operate fishing gear means any of the following: to deploy gear in the water; to remove gear from the water; to remove fish or shellfish from the gear during an open season or period; or to possess a gillnet containing fish during an open fishing period, except that a gillnet which is completely clear of the water is not considered to be operating for the purposes of minimum distance requirement.

Trawl means a bag-shaped net towed through the water to capture fish or shellfish, and includes beam, otter, or pelagic trawl.

Troll gear means a power gurdy troll gear consisting of a line or lines with lures or baited hooks which are drawn through the water by a power gurdy; hand troll gear consisting of a line or lines with lures or baited hooks which are drawn through the water from a vessel by hand trolling, strip fishing or other types of trolling, and which are retrieved by hand power or hand-powered crank and not by any type of electrical, hydraulic, mechanical or other assisting device or attachment; or dinglebar troll gear consisting of one or more lines, retrieved and set with a troll gurdy or hand troll gurdy, with a terminally attached weight from which one or more leaders with one or more lures or baited hooks are pulled through the water while a vessel is making way.

Trout means the following species: cutthroat trout (*Oncorhynchus clarki*) and rainbow trout or steelhead trout (*Oncorhynchus mykiss*).

(c) Methods, means, and general restrictions. (1) Unless otherwise specified in this section or under terms of a required subsistence fishing permit, you may use the following legal types of gear for subsistence fishing:

(i) A set gillnet;

(ii) A drift gillnet;

(iii) A purse seine;

(iv) A hand purse seine;

(v) A beach seine;

(vi) Troll gear;

(vii) A fish wheel;

(viii) A trawl;
(ix) A pot;
(x) A ring net;
(xi) A longline;
(xii) A fyke net;
(xiii) A lead;
(xiv) A herring pound;
(xv) A dip net;
(xvi) Jigging gear;
(xvii) A mechanical jigging machine;
(xviii) A handline;
(xix) A shovel;
(xx) A mechanical clam digger;
(xxi) A hydraulic clam digger;
(xxii) An abalone iron;
(xxiii) A scallop dredge;
(xxiv) A grappling hook;
(xxv) A sea urchin rake;
(xxvi) Diving gear;
(xxvii) A cast net;
(xxviii) A handline;
(xxix) A rod and reel; and
(xxx) A spear.

(2) You must include an escape mechanism on all pots used to take fish or shellfish. The escape mechanisms are as follows:

(i) A sidewall, which may include the tunnel, of all shellfish and bottomfish pots must contain an opening equal to or exceeding 18 inches in length, except that in shrimp pots the opening must be a minimum of six inches in length. The opening must be laced, sewn, or

secured together by a single length of untreated, 100 percent cotton twine, no larger than 30 thread. The cotton twine may be knotted at each end only. The opening must be within six inches of the bottom of the pot and must be parallel with it. The cotton twine may not be tied or looped around the web bars. Dungeness crab pots may have the pot lid tie-down straps secured to the pot at one end by a single loop of untreated, 100 percent cotton twine no larger than 60 thread, or the pot lid must be secured so that, when the twine degrades, the lid will no longer be securely closed;

(ii) All king crab, Tanner crab, shrimp, miscellaneous shellfish and bottomfish pots may, instead of complying with (i) of this paragraph, satisfy the following: a sidewall, which **[1304]** may include the tunnel, must contain an opening at least 18 inches in length, except that shrimp pots must contain an opening at least six inches in length. The opening must be laced, sewn, or secured together by a single length of treated or untreated twine, no larger than 36 thread. A galvanic timed release device, designed to release in no more than 30 days in salt water, must be integral to the length of twine so that, when the device releases, the twine will no longer secure or obstruct the opening of the pot. The twine may be knotted only at each end and at the attachment points on the galvanic timed release device. The opening must be within six inches of the bottom of the pot and must be parallel with it. The twine may not be tied or looped around the web bars.

(3) For subsistence fishing for salmon, you may not use a gillnet exceeding 50 fathoms in length, unless otherwise specified in this section. The gillnet web must contain at least 30 filaments of equal diameter or

at least 6 filaments, each of which must be at least 0.20 millimeter in diameter.

(4) You may not obstruct more than one-half the width of any stream with any gear used to take fish for subsistence uses. You may not obstruct more than one-half the width of any stream with any stationary fishing.

(5) You may not use live non-indigenous fish as bait.

(6) You must have your first initial, last name, and address plainly and legibly inscribed on the side of your fishwheel facing midstream of the river.

(7) You may use kegs or buoys of any color but red on any permitted gear.

(8) You must have your first initial, last name, and address plainly and legibly inscribed on each keg, buoy, stakes attached to gillnets, stakes identifying gear fished under the ice, and any other unattended fishing gear which you use to take fish for subsistence uses.

(9) You may not use explosives or chemicals to take fish for subsistence uses.

(10) You may not take fish for subsistence uses within 300 feet of any dam, fish ladder, weir, culvert or other artificial obstruction, unless otherwise indicated.

(11) The limited exchange for cash of subsistence-harvested fish, their parts, or their eggs, legally taken under Federal subsistence management regulations to support personal and family needs is permitted as customary trade, so long as it does not constitute a significant commercial enterprise. The Board may recognize regional differences and define customary trade differently for separate regions of the State.

(12) Individuals, businesses, or organizations may not purchase subsistence-taken fish, their parts, or

their eggs for use in, or resale to, a significant commercial enterprise.

(13) Individuals, businesses, or organizations may not receive through barter subsistence-taken fish, their parts or their eggs for use in, or resale to, a significant commercial enterprise.

(14) Except as provided elsewhere in this section, you may not take rainbow trout or steelhead trout.

(15) You may not use as bait for commercial or sport fishing purposes fish taken for subsistence use or under subsistence regulations.

(16) You may not accumulate harvest limits authorized in this section or §___.27 with harvest limits authorized under State regulations.

(17) Unless specified otherwise in this section, you may use a rod and reel to take fish without a subsistence fishing permit. Harvest limits applicable to the use of a rod and reel to take fish for subsistence uses shall be as follows:

(i) If you are required to obtain a subsistence fishing permit for an area, that permit is required to take fish for subsistence uses with rod and reel in that area. The harvest and possessions limits for taking fish with a rod and reel in those areas are the same as indicated on the permit issued for subsistence fishing with other gear types;

(ii) If you are not required to obtain a subsistence fishing permit for an area, the harvest and possession limits for taking fish for subsistence uses with a rod and reel is the same as for taking fish under State of Alaska subsistence fishing regulations in those same areas. If the State does not have a specific subsistence season for that particular species, the limit shall be the

same as for taking fish under State of Alaska sport fishing regulations.

(18) Unless restricted in this section, or unless restricted under the terms of a subsistence fishing permit, you may take fish for subsistence uses at any time.

(19) You may not intentionally waste or destroy any subsistence-caught fish or shellfish; however, you may use for bait or other purposes, whitefish, herring, and species for which bag limits, seasons, or other regulatory methods and means are not provided in this section, as well as the head, tail, fins, and viscera of legally-taken subsistence fish.

(d) *Fishing by designated harvest permit.* (1) Any species of fish that may be taken by subsistence fishing under this part may be taken under a designated harvest permit.

(2) If you are a Federally-qualified subsistence user, you (beneficiary) may designate another Federally-qualified subsistence user to take fish on your behalf. The designated fisherman must obtain a designated harvest permit prior to attempting to harvest fish and must return a completed harvest report. The designated fisherman may fish for any number of beneficiaries but may have no more than two harvest limits in his/her possession at any one time.

(3) The designated fisherman must have in possession a valid designated fishing permit when taking, attempting to take, or transporting fish taken under this section, on behalf of a beneficiary.

(4) The designated fisherman may not fish with more than one legal limit of gear.

(5) You may not designate more than one person to take or attempt to take fish on your behalf at one time.

You may not personally take or attempt to take fish at the same time that a designated fisherman is taking or attempting to take fish on your behalf.

(e) *Fishing permits and reports.* (1) You may take salmon only under the authority of a subsistence fishing permit, unless a permit is specifically not required in a particular area by the subsistence regulations in this part, or unless you are retaining salmon from your commercial catch consistent with paragraph (f) of this section.

(2) If a subsistence fishing permit is required by this section, the following permit conditions apply unless otherwise specified in this section:

(i) You may not take more fish for subsistence use than the limits set out in the permit;

(ii) You must obtain the permit prior to fishing;

(iii) You must have the permit in your possession and readily available for inspection while fishing or transporting subsistence-taken fish;

(iv) If specified on the permit, you shall keep accurate daily records of the catch, showing the number of fish taken by species, location and date of catch, and other such information as may be required for management or conservation purposes; and

(v) If the return of catch information necessary for management and conservation purposes is required by a fishing permit and you fail to comply with such reporting requirements, you are ineligible to receive a subsistence permit for that activity during the following calendar year, unless you demonstrate that failure to report was due to loss in the mail, accident, **[1305]** sickness, or other unavoidable circumstances.

(f) *Relation to commercial fishing activities.* (1) If you are a Federally-qualified subsistence user who also commercial fishes, you may retain fish for subsistence purposes from your lawfully-taken commercial catch.

(2) When participating in a commercial and subsistence fishery at the same time, you may not use an amount of combined fishing gear in excess of that allowed under the appropriate commercial fishing regulations.

(g) You may not possess, transport, give, receive or barter subsistence-taken fish or their parts which have been taken contrary to Federal law or regulation or State law or regulation (unless superseded by regulations in this part).

(h) [Reserved]

(i) *Fishery management area restrictions.* (1) *Kotzebue Area.* The Kotzebue Area includes all waters of Alaska between the latitude of the westernmost tip of Point Hope and the latitude of the westernmost tip of Cape Prince of Wales, including those waters draining into the Chukchi Sea.

(i) You may take fish for subsistence purposes without a permit.

(ii) You may take salmon only by gillnets, beach seines, or a rod and reel.

(iii) In the Kotzebue District, you may take sheefish with gillnets that are not more than 50 fathoms in length, nor more than 12 meshes in depth, nor have a mesh size larger than 7 inches.

(iv) You may not subsistence fish for char from June 1 through September 20, in the Noatak River one mile upstream and one mile downstream from the mouth of

the Kelly River, and in the Kelly River from its mouth to 1/4 mile upstream.

(2) *Norton Sound-Port Clarence Area.* The Norton Sound-Port Clarence Area includes all waters of Alaska between the latitude of the westernmost tip of Cape Prince of Wales and the latitude of Canal Point light, including those waters of Alaska surrounding St. Lawrence Island and those waters draining into the Bering Sea.

(i) In the Port Clarence District, you may take fish at any time except as specified by emergency regulation.

(ii) In the Norton Sound District, you may take fish at any time except as follows:

(A) In Subdistricts 2 through 6, if you are a commercial fishermen, you may not fish for subsistence purposes during the weekly closures of the commercial salmon fishing season, except that from July 15 through August 1, you may take salmon for subsistence purposes seven days per week in the Unalakleet and Shaktoolik River drainages with gillnets which have a mesh size that does not exceed 4 1/2 inches, and with beach seines;

(B) In the Unalakleet River from June 1 through July 15, you may take salmon only from 8:00 a.m. Monday until 8:00 p.m. Saturday;

(C) In Subdistricts 1–3, you may take salmon other than chum salmon by beach seine during periods established by emergency regulations.

(iii) You may take salmon only by gillnets, beach seines, fishwheel, or a rod and reel.

(iv) You may take fish other than salmon by set gillnet, drift gillnet, beach seine, fish wheel, pot, long

line, fyke net, jigging gear, spear, lead, or a rod and reel.

(v) In the Unalakleet River from June 1 through July 15, you may not operate more than 25 fathoms of gillnet in the aggregate nor may you operate an unanchored fishing net.

(vi) You may take fish for subsistence purposes without a subsistence fishing permit except that a subsistence fishing permit is required in the Norton Sound District: for net fishing in all waters from Cape Douglas to Rocky Point.

(vii) Only one subsistence fishing permit will be issued to each household per year.

(3) *Yukon-Northern Area.* The Yukon-Northern Area includes all waters of Alaska between the latitude of Canal Point Light and the latitude of the westernmost point of the Naskonat Peninsula, including those waters draining into the Bering Sea, and all waters of Alaska north of the latitude of the westernmost tip of Point Hope and west of 141° W. long., including those waters draining into the Arctic Ocean and the Chukchi Sea.

(i) Unless otherwise restricted in this section, you may take salmon in the Yukon-Northern Area at any time.

(ii) In the following locations, you may take salmon only during the open weekly fishing periods of the commercial salmon fishing season and may not take them for 24 hours before the opening of the commercial salmon fishing season:

(A) District 4, excluding the Koyukuk River drainage;

(B) in Subdistricts 4–B and 4–C from June 15 through September 30, salmon may be taken from 6:00 p.m. Sunday until 6:00 p.m. Tuesday and from 6:00 p.m. Wednesday until 6:00 p.m. Friday;

(C) District 6, excluding the Kantishna River drainage, salmon may be taken from 6:00 p.m. Friday until 6:00 p.m. Wednesday.

(iii) During any commercial salmon fishing season closure of greater than five days in duration, you may not take salmon during the following periods in the following districts:

(A) In District 4, excluding the Koyukuk River drainage, salmon may not be taken from 6:00 p.m. Friday until 6:00 p.m. Sunday;

(B) In District 5, excluding the Tozitna River drainage and Subdistrict 5–D, salmon may not be taken from 6:00 p.m. Sunday until 6:00 p.m. Tuesday.

(iv) Except as provided in this section, and except as may be provided by the terms of a subsistence fishing permit, you may take fish other than salmon at any time.

(v) In Districts 1, 2, 3, and Subdistrict 4–A, excluding the Koyukuk and Innoko River drainages, you may not take salmon for subsistence purposes during the 24 hours immediately before the opening of the commercial salmon fishing season.

(vi) In Districts 1, 2, and 3:

(A) After the opening of the commercial salmon fishing season through July 15, you may not take salmon for subsistence for 18 hours immediately before, during, and for 12 hours after each commercial salmon fishing period;

(B) After July 15, you may not take salmon for subsistence for 12 hours immediately before, during, and for 12 hours after each commercial salmon fishing period.

(vii) In Subdistrict 4–A after the opening of the commercial salmon fishing season, you may not take salmon for subsistence for 12 hours immediately before, during, and for 12 hours after each commercial salmon fishing period; however, you may take king salmon during the commercial fishing season, with drift gillnet gear only, from 6:00 p.m. Sunday until 6:00 p.m. Tuesday and from 6:00 p.m. Wednesday until 6:00 p.m. Friday.

(viii) In the upper Yukon River drainage, you may not subsistence fish in Birch Creek and waters within 500 feet of its mouth, except that you may take whitefish and suckers under the authority of a subsistence fishing permit.

(ix) You may not subsistence fish in the following drainages located north of the main Yukon River:

(A) Kanuti River upstream from a point five miles downstream of the state highway crossing;

(B) Bonanza Creek;

(C) Jim River including Prospect and Douglas Creeks; and (D) North Fork of the Chandalar River system upstream from the mouth of Quartz Creek.

[1306] (x) You may not subsistence fish in the Delta River.

(xi) You may not subsistence fish in the following rivers and creeks and within 500 feet of their mouths: Big Salt River, Hess Creek, and Beaver Creek.

(xii) You may not subsistence fish in the Deadman, Jan, Fielding, and Two-Mile Lakes.

(xiii) You may not subsistence fish in the Toklat River drainage from August 15 through May 15.

(xiv) You may take salmon only by gillnet, beach seine, fish wheel, or rod and reel, subject to the restrictions set forth in this section.

(xv) In District 4, if you are a commercial fisherman, you may not take salmon for subsistence purposes during the commercial salmon fishing season using gillnets with mesh larger than six-inches after a date specified by ADF&G emergency order issued between July 10 and July 31.

(xvi) In Districts 4, 5, and 6, you may not take salmon for subsistence purposes by drift gillnets, except as follows:

(A) In Subdistrict 4–A upstream from the mouth of Stink Creek, you may take king salmon by drift gillnets less than 150 feet in length from June 10 through July 14, and chum salmon by drift gillnets after August 2;

(B) In Subdistrict 4–A downstream from the mouth of Stink Creek, you may take king salmon by drift gillnets less than 150 feet in length from June 10 through July 14.

(xvii) Unless otherwise specified in this section, you may take fish other than salmon and halibut by set gillnet, drift gillnet, beach seine, fish wheel, long line, fyke net, dip net, jigging gear, spear, lead, or rod and reel, subject to the following restrictions, which also apply to subsistence salmon fishing:

(A) During the open weekly fishing periods of the commercial salmon fishing season, if you are a commercial fisherman, you may not operate more than one type of gear at a time, for commercial, personal use, and subsistence purposes;

(B) You may not use an aggregate length of set gillnet in excess of 150 fathoms and each drift gillnet may not exceed 50 fathoms in length; and

(C) In Districts 4, 5, and 6, you may not set subsistence fishing gear within 200 feet of other operating commercial, personal use, or subsistence fishing gear except that, at the site approximately one mile upstream from Ruby on the south bank of the Yukon River between ADF&G regulatory markers containing the area known locally as the "Slide," you may set subsistence fishing gear within 200 feet of other operating commercial or subsistence fishing gear and in District 4, from Old Paradise Village upstream to a point four miles upstream from Anvik, there is no minimum distance requirement between fish wheels.

(xviii) During the commercial salmon fishing season, within the Yukon River and the Tanana River below the confluence of the Wood River, you may use drift gillnets and fish wheels only during open subsistence salmon fishing periods.

(xix) In District 4, from September 21 through May 15, you may use jigging gear from shore ice.

(xx) Except as provided in this section, you may take fish for subsistence purposes without a subsistence fishing permit.

(xxi) You must possess a subsistence fishing permit for the following locations:

(A) For the Yukon River drainage from the mouth of Hess Creek to the mouth of the Dall River;

(B) For the Yukon River drainage from the upstream mouth of 22 Mile Slough to the U.S.-Canada border;

(C) For whitefish and suckers in Birch Creek and within 500 feet of its mouth;

(D) For the Tanana River drainage above the mouth of the Wood River.

(xxii) Only one subsistence fishing permit will be issued to each household per year.

(xxiii) In Districts 1, 2, and 3, you may not possess king salmon taken for subsistence purposes unless the dorsal fin has been removed immediately after landing.

(xxiv) If you are a commercial salmon fisherman who is registered for District 1, 2, or 3, you may not take salmon for subsistence purposes in any other district located downstream from Old Paradise Village.

(4) *Kuskokwim Area.* The Kuskokwim Area consists of all waters of Alaska between the latitude of the westernmost point of Naskonat Peninsula and the latitude of the southernmost tip of Cape Newenham, including the waters of Alaska surrounding Nunivak and St. Matthew Islands and those waters draining into the Bering Sea.

(i) Unless otherwise restricted in this section, you may take fish in the Kuskokwim Area at any time without a subsistence fishing permit.

(ii) In District 1 and in those waters of the Kuskokwim River between Districts 1 and 2, excluding the Kuskokuak Slough, you may not take salmon for 16 hours before, during, and for six hours after, each open commercial salmon fishing period for District 1.

(iii) In District 1, Kuskokuak Slough only from June 1 through July 31, you may not take salmon for 16 hours before and during each open commercial salmon fishing period in the district.

(iv) In Districts 4 and 5, from June 1 through September 8, you may not take salmon for 16 hours before, during, and 6 hours after each open commercial salmon fishing period in each district.

(v) In District 2, and anywhere in tributaries that flow into the Kuskokwim River within that district, from June 1 through September 8 you may not take salmon for 16 hours before, during, and six hours after each open commercial salmon fishing period in the district.

(vi) You may not take subsistence fish by nets in the Goodnews River east of a line between ADF&G regulatory markers placed near the mouth of the Ufigag River and an ADF&G regulatory marker placed near the mouth of the Tunulik River 16 hours before, during, and six hours after each open commercial salmon fishing period.

(vii) You may not take subsistence fish by nets in the Kanektok River upstream of ADF&G regulatory markers placed near the mouth 16 hours before, during, and six hours after each open commercial salmon fishing period.

(viii) You may not take subsistence fish by nets in the Arolik River upstream of ADF&G regulatory markers placed near the mouth 16 hours before, during, and six hours after each open commercial salmon fishing period.

(ix) You may take salmon only by gillnet, beach seine, fish wheel, or rod and reel subject to the restrictions set out in this section, except that you may also take salmon by spear in the Holitna, Kanektok, and Arolik River drainages, and in the drainage of Goodnews Bay.

(x) You may not use an aggregate length of set gillnets or drift gillnets in excess of 50 fathoms for taking salmon.

(xi) You may take fish other than salmon by set gillnet, drift gillnet, beach seine, fish wheel, pot, long line, fyke net, dip net, jigging gear, spear, lead, or rod and reel.

(xii) You must attach to the bank each subsistence gillnet operated in tributaries of the Kuskokwim River and fish it substantially perpendicular to the bank and in a substantially straight line.

(xiii) Within a tributary to the Kuskokwim River in that portion of the Kuskokwim River drainage from the north end of Eek Island upstream to the mouth of the Kolmakoff River, you may not set or operate any part of a set gillnet within 150 feet of any part of another set gillnet.

(xiv) The maximum depth of gillnets is as follows:

[1307] (A) Gillnets with six-inch or smaller mesh may not be more than 45 meshes in depth;

(B) Gillnets with greater than six-inch mesh may not be more than 35 meshes in depth.

(xv) You may take halibut only by a single hand-held line with no more than two hooks attached to it.

(xvi) You may not use subsistence set and drift gillnets exceeding 15 fathoms in length in Whitefish Lake in the Ophir Creek drainage. You may not operate more than one subsistence set or drift gillnet at a time in Whitefish Lake in the Ophir Creek drainage. You must check the net at least once every 24 hours.

(xvii) Rainbow trout may be taken by residents of Goodnews Bay, Platinum, Quinhagak, Eek, Kwethluk,

Akiachak, and Akiak, subject to the following restrictions:

(A) You may take rainbow trout only by the use of gillnets, rod and reel, or jigging through the ice;

(B) You may not use gillnets for taking rainbow trout from March 15–June 15;

(C) If you take rainbow trout incidentally in other subsistence net fisheries and through the ice, you may retain them for subsistence purposes.

(5) *Bristol Bay Area.* The Bristol Bay Area includes all waters of Bristol Bay including drainages enclosed by a line from Cape Newenham to Cape Menshikof.

(i) Unless restricted in this section, or unless under the terms of a subsistence fishing permit, you may take fish at any time in the Bristol Bay area.

(ii) In all commercial salmon districts, from May 1 through May 31 and October 1 through October 31, you may subsistence fish for salmon only from 9:00 a.m. Monday until 9:00 a.m. Friday. From June 1 through September 30, within the waters of a commercial salmon district, you may take salmon only during open commercial salmon fishing periods.

(iii) In the Egegik River from 9:00 a.m. June 23 through 9:00 a.m. July 17, you may take salmon only from 9:00 a.m. Tuesday to 9:00 a.m. Wednesday and 9:00 a.m. Saturday to 9:00 a.m. Sunday.

(iv) You may not take fish from waters within 300 feet of a stream mouth used by salmon.

(v) You may not subsistence fish with nets in the Tazimina River and within one-fourth mile of the terminus of those waters during the period from September 1 through June 14.

(vi) Within any district, you may take salmon, herring, and capelin only by drift and set gillnets.

(vii) Outside the boundaries of any district, you may take salmon only by set gillnet, except that you may also take salmon as follows:

(A) By spear in the Togiak River excluding its tributaries;

(B) From August 30 through September 30, by spear, dip net, and gillnet along a 100 yard length of the west shore of Naknek Lake near the outlet to the Naknek River as marked by ADF&G regulatory markers;

(C) From August 15 through September 15, by spear, dip net, and gillnet at Johnny's Lake on the northwestern side of Naknek Lake;

(D) From October 1 through November 15, by spear, dip net, and gillnet at the mouth of Brooks River at Naknek Lake;

(E) At locations and times specified in paragraphs (i)(5)(vii) (B) through (D) of this section, gillnets may not exceed five fathoms in length and may not be anchored or tied to a stake or peg, and you must be present at the net while fishing the net.

(viii) The maximum lengths for set gillnets used to take salmon are as follows:

(A) You may not use set gillnets exceeding 10 fathoms in length in the Egegik, River;

(B) In the remaining waters of the area, you may not use set gillnets exceeding 25 fathoms in length.

(ix) You may not operate any part of a set gillnet within 300 feet of any part of another set gillnet.

(x) You must stake and buoy each set gillnet. Instead of having the identifying information on a keg

or buoy attached to the gillnet, you may plainly and legibly inscribe your first initial, last name, and subsistence permit number on a sign at or near the set gillnet.

(xi) You may not operate or assist in operating subsistence salmon net gear while simultaneously operating or assisting in operating commercial salmon net gear.

(xii) During closed commercial herring fishing periods, you may not use gillnets exceeding 25 fathoms in length for the subsistence taking of herring or capelin.

(xiii) You may take fish other than salmon, herring, capelin, and halibut by gear listed in this part unless restricted under the terms of a subsistence fishing permit.

(xiv) You may take salmon and char only under authority of a subsistence fishing permit.

(xv) Only one subsistence fishing permit may be issued to each household per year.

(xvi) After August 20, you may not possess coho salmon for subsistence purposes in the Togiak River section and the Togiak River drainage unless the head has been immediately removed from the salmon.

(6) *Aleutian Islands Area.* The Aleutian Islands Area includes all waters of Alaska west of the longitude of the tip of Cape Sarichef, east of 172° East longitude, and south of 54° 36' North latitude.

(i) You may take fish, other than salmon, rainbow trout, and steelhead trout, at any time unless restricted under the terms of a subsistence fishing permit. If you take rainbow trout and steelhead trout incidentally in

other subsistence net fisheries, you may retain them for subsistence purposes.

(ii) In the Unalaska District, you may take salmon for subsistence purposes from 6:00 a.m. until 9:00 p.m. from January 1 through December 31, except:

(A) That from June 1 through September 15, you may not use a salmon seine vessel to take salmon for subsistence 24 hours before, during, or 24 hours after an open commercial salmon fishing period within a 50-mile radius of the area open to commercial salmon fishing;

(B) That from June 1 through September 15, you may use a purse seine vessel to take salmon only with a gillnet and you may not have any other type of salmon gear on board the vessel while subsistence fishing; or

(C) As may be specified on a subsistence fishing permit.

(iii) In the Adak, Akutan, Atka-Amilia, and Umnak Districts, you may take salmon at any time.

(iv) You may not subsistence fish for salmon in the following waters:

(A) The waters between Unalaska and Amaknak Islands, including Margaret's Bay, west of a line from the "Bishop's House" at 53° 52.64' N. lat., 166° 32.30' W. long. to a point on Amaknak Island at 53° 52.82' N. lat., 166° 32.13' W. long., and north of line from a point south of Agnes Beach at 53 ° 52.28' N. lat., 166° 32.68' W. long. to a point at 53° 52.35' N. lat., 166° 32.95' W. long. on Amaknak Island;

(B) Within Unalaska Bay south of a line from the northern tip of Cape Cheerful to the northern tip of Kalekta Point, waters within 250 yards of any anadromous stream, except the outlet stream of

Unalaska Lake, which is closed under paragraph (i)(6)(iv)(A) of this section;

(C) Waters in Reese Bay from July 1 through July 9, within 500 yards of the outlet stream terminus to McLees Lake;

(D) All freshwater on Adak Island and Kagalaska Island in the Adak District.

(v) You may take salmon by seine and gillnet, or with gear specified on a subsistence fishing permit.

[1308] (vi) In the Unalaska District, if you fish with a net, you must be physically present at the net at all times when the net is being used.

(vii) You may take fish other than salmon by gear listed in this part unless restricted under the terms of a subsistence fishing permit.

(viii) You may take salmon, trout and char only under the terms of a subsistence fishing permit, except that you do not require a permit in the Akutan, Umnak and Atka-Amlia Islands Districts.

(ix) You may take no more than 250 salmon for subsistence purposes unless otherwise specified on the subsistence fishing permit, except that in the Unalaska and Adak Districts, you may take no more than 25 salmon plus an additional 25 salmon for each member of your household listed on the permit. You may obtain an additional permit.

(x) You must keep a record on the reverse side of the permit of subsistence-caught fish. You must complete the record immediately upon taking subsistence-caught fish and must return it no later than October 31.

(xi) The daily bag limit for halibut is two fish and the possession limit is two daily bag limits. You may

not possess sport-taken and subsistence-taken halibut on the same day.

(7) *Alaska Peninsula Area.* The Alaska Peninsula Area includes all Pacific Ocean waters of Alaska between a line extending southeast (135°) from the tip of Kupreanof Point and the longitude of the tip of Cape Sarichef, and all Bering Sea waters of Alaska east of the latitude of the tip of Cape Menshikof.

(i) You may take fish, other than salmon, rainbow trout, and steelhead trout, at any time unless restricted under the terms of a subsistence fishing permit. If you take rainbow trout and steelhead trout incidentally in other subsistence net fisheries or through the ice, you may retain them for subsistence purposes.

(ii) You may take salmon, trout and char only under the authority of a subsistence fishing permit.

(iii) You must keep a record on the reverse side of the permit of subsistence-caught fish. You must complete the record immediately upon taking subsistence-caught fish and must return it no later than October 31.

(iv) You may take salmon at any time except within 24 hours before and within 12 hours following each open weekly commercial salmon fishing period within a 50-mile radius of the area open to commercial salmon fishing, or as may be specified on a subsistence fishing permit.

(v) You may not subsistence fish for salmon in the following waters:

(A) Russell Creek and Nurse Lagoon and within 500 yards outside the mouth of Nurse Lagoon;

(B) Trout Creek and within 500 yards outside its mouth.

(vi) You may take salmon by seine, gillnet, rod and reel, or with gear specified on a subsistence fishing permit.

(vii) You may take fish other than salmon by gear listed in this part unless restricted under the terms of a subsistence fishing permit.

(viii) You may not use a set gillnet exceeding 100 fathoms in length.

(ix) You may take halibut for subsistence purposes only by a single handheld line with no more than two hooks attached.

(x) You may take no more than 250 salmon for subsistence purposes unless otherwise specified on your subsistence fishing permit.

(xi) The daily bag limit for halibut is two fish and the possession limit is two daily bag limits. No person may possess sport-taken and subsistence-taken halibut on the same day.

(8) *Chignik Area.* The Chignik Area includes all waters of Alaska on the south side of the Alaska Peninsula enclosed by 156° 20.22' West longitude (the longitude of the southern entrance to Imuya Bay near Kilokak Rocks) and a line extending southeast (135°) from the tip of Kupreanof Point.

(i) You may take fish, other than rainbow trout and steelhead trout, at any time, except as may be specified by a subsistence fishing permit. If you take rainbow trout and steelhead trout incidentally in other subsistence net fisheries, you may retain them for subsistence purposes.

(ii) You may not take salmon in the Chignik River, upstream from the ADF&G weir site or counting

tower, in Black Lake, or any tributary to Black and Chignik Lakes.

(iii) You may take salmon, trout and char only under the authority of a subsistence fishing permit.

(iv) You must keep a record on the reverse side of the permit of subsistence-caught fish. You must complete the record immediately upon taking subsistence-caught fish and must return it no later than October 31.

(v) If you hold a commercial fishing license, you may not subsistence fish for salmon from 48 hours before the first commercial salmon fishing opening in the Chignik Area through September 30.

(vi) You may take salmon by seines, gillnets, rod and reel, or with gear specified on a subsistence fishing permit, except that in Chignik Lake you may not use purse seines.

(vii) You may take fish other than salmon by gear listed in this part unless restricted under the terms of a subsistence fishing permit.

(viii) You may take halibut for subsistence purposes only by a single handheld line with no more than two hooks attached.

(ix) You may take no more than 250 salmon for subsistence purposes unless otherwise specified on the subsistence fishing permit.

(x) The daily bag limit for halibut is two fish and the possession limit is two daily bag limits. No person may possess sport-taken and subsistence-taken halibut on the same day.

(9) *Kodiak Area.* The Kodiak Area includes all waters of Alaska south of a line extending east from Cape Douglas (58° 51.10' N. lat.), west of 150° W. long.,

north of 55° 30.00' N. lat.; and east of the longitude of the southern entrance of Imuya Bay near Kilokak Rocks (156° 20.22' W. long.).

(i) You may take fish, other than salmon, rainbow trout and steelhead trout, at any time unless restricted by the terms of a subsistence fishing permit. If you take rainbow trout and steelhead trout incidentally in other subsistence net fisheries, you may retain them for subsistence purposes.

(ii) You may take salmon for subsistence purposes 24 hours a day from January 1 through December 31, with the following exceptions:

(A) From June 1 through September 15, you may not use salmon seine vessels to take subsistence salmon for 24 hours before, during, and for 24 hours after any open commercial salmon fishing period;

(B) From June 1 through September 15, you may use purse seine vessels to take salmon only with gillnets and you may have no other type of salmon gear on board the vessel.

(iii) You may not subsistence fish for salmon in the following locations:

(A) All waters closed to commercial salmon fishing in the Chiniak Bay and all waters closed to commercial salmon fishing within 100 yards of the terminus of Selief Bay Creek and north and west of a line from the tip of Last Point to the tip of River Mouth Point in Afognak Bay;

(B) From August 15 through September 30, all waters 500 yards seaward of the terminus of Little Kitoi Creek;

(C) All freshwater systems of Afognak Island.

(iv) You must have a subsistence fishing permit for taking salmon, trout, and char for subsistence purposes. You **[1309]** must have a subsistence fishing permit for taking herring and bottomfish for subsistence purposes during the commercial herring sac roe season from April 15 through June 30.

(v) With a subsistence salmon fishing permit you may take 25 salmon plus an additional 25 salmon for each member of your household whose names are listed on the permit. You may obtain an additional permit if you can show that more fish are needed.

(vi) You must keep a record of the number of subsistence fish taken each year. You must record on the reverse side of the permit the number of subsistence fish taken. You must complete the record immediately upon landing subsistence-caught fish, and must return it by February 1 of the year following the year the permit was issued.

(vii) You may take fish other than salmon and halibut by gear listed in this part unless restricted under the terms of a subsistence fishing permit.

(viii) You may take salmon only by gillnet, rod and reel, or seine.

(ix) You must be physically present at the net when the net is being fished.

(x) You may take halibut only by a single hand-held line with not more than two hooks attached to it.

(xi) The daily bag limit for halibut is two fish and the possession limit is two daily bag limits. You may not possess sport-taken and subsistence-taken halibut on the same day.

(10) *Cook Inlet Area.* The Cook Inlet Area includes all waters of Alaska enclosed by a line extending east

from Cape Douglas (58° 51'06" N. lat.) and a line extending south from Cape Fairfield (148° 50'15" W. long.).

(i) Unless restricted in this section, or unless restricted under the terms of a subsistence fishing permit, you may take fish, other than rainbow trout and steelhead trout, at any time in the Cook Inlet Area. If you take rainbow trout and steelhead trout incidentally in other subsistence net fisheries or through the ice, you may retain them for subsistence purposes.

(ii) You may not take salmon, Dolly Varden, trout, grayling, char, and burbot for subsistence purposes.

(iii) You may only take smelt with dip nets or gillnets in fresh water from April 1 through June 15. You may not use a gillnet exceeding 20 feet in length and two inches in mesh size. You must attend the net at all times when it is being used. There are no harvest or possession limits for smelt.

(iv) You may take fish by gear listed in this part unless restricted in this section or under the terms of a subsistence fishing permit.

(11) *Prince William Sound Area.* The Prince William Sound Area includes all waters of Alaska between the longitude of Cape Fairfield and the longitude of Cape Suckling.

(i) Unless restricted in this section or unless restricted under the terms of a subsistence fishing permit, you may take fish, other than rainbow trout and steelhead trout, at any time in the Prince William Sound Area.

(ii) You may take salmon in the Upper Copper River District only as follows:

(A) In the Glennallen Subdistrict, from June 1 through September 30;

(B) You may not take salmon in the Chitina Subdistrict.

(iii) You may take salmon, other than chinook salmon, in the vicinity of the former Native village of Batzulnetas only under the authority of a Batzulnetas subsistence salmon fishing permit issued by ADF&G and under the following conditions:

(A) You may take salmon only in those waters of the Copper River between ADF&G regulatory markers located near the mouth of Tanada Creek and approximately one-half mile downstream from that mouth and in Tanada Creek between ADF&G regulatory markers identifying the open waters of the creek;

(B) You may use only fish wheels and dip nets on the Copper River and only dip nets and spears in Tanada Creek;

(C) You may take salmon only from June 1 through September 1 or until the season is closed by emergency regulation; fishing periods are to be established by emergency regulation and are two days per week during the month of June and 3.5 days per week for the remainder of the season;

(D) You must release chinook salmon to the water unharmed; you must equip your fish wheel with a livebox or monitor it at all times;

(E) You must return the permit no later than September 30.

(iv) You may take salmon for subsistence purposes with no bag or possession limits in those waters of the Southwestern District and along the northwestern

shore of Green Island from the westernmost tip of the island to the northernmost tip, only as follows:

(A) You may use seines up to 50 fathoms in length and 100 meshes deep with a maximum mesh size of four inches, or gillnets up to 150 fathoms in length, except that you may take pink salmon only in fresh water using dip nets;

(B) You may take salmon only from May 15 until two days before the commercial opening of the Southwestern District, seven days per week; during the commercial salmon fishing season, only during open commercial salmon fishing periods; and from two days following the closure of the commercial salmon season until September 30, seven days per week;

(C) You may not fish within the closed waters areas for commercial salmon fisheries.

(v) You may take salmon for subsistence purposes with no bag or possession limits in those waters north of a line from Porcupine Point to Granite Point, and south of a line from Point Lowe to Tongue Point, only as follows:

(A) You may use seines up to 50 fathoms in length and 100 meshes deep with a maximum mesh size of four inches, or gillnets up to 150 fathoms in length with a maximum mesh size of six and one-quarter inches, except that you may only take pink salmon in fresh water using dip nets;

(B) You may take salmon only from May 15 until two days before the commercial opening of the Eastern District, seven days per week during the commercial salmon fishing season, only during open commercial salmon fishing periods; and from two days following the closure of the commercial salmon season until October 31, seven days per week;

(C) You may not fish within the closed waters areas for commercial salmon fisheries.

(vi) If you take rainbow trout and steelhead trout incidentally in other subsistence net fisheries, you may retain them for subsistence purposes.

(vii) You may take herring spawn on kelp for subsistence purposes from above water from March 15 through June 15 and underwater using dive gear only during open periods for the wild herring spawn-on-kelp commercial fishery.

(viii) You may not take salmon in the tributaries of the Copper River and waters of the Copper River not in the Upper Copper River District.

(ix) You may take fish by gear listed in this part unless restricted in this section or under the terms of a subsistence fishing permit.

(x) You may take salmon only by the following types of gear:

(A) In the Glennallen Subdistrict by fish wheels, rod and reel, or dip nets; and

(B) In salt water by gillnets and seines.

(xi) You may not rent, lease, or otherwise use your fish wheel used for subsistence fishing for personal gain. You must register your fish wheel with ADF&G. Your registration number and name and address must be permanently affixed and plainly visible on the fish **[1310]** wheel when the fish wheel is in the water; only the current year's registration number may be affixed to the fish wheel; you must remove any other registration number from the fish wheel. You must remove the fish wheel from the water at the end of the permit period. You may operate only one fish wheel at any one time. You may not set or operate a fish wheel

within 75 feet of another fish wheel. No fish wheel may have more than two baskets. A wood or metal plate at least 12 inches high by 12 inches wide, bearing your name and address in letters and numerals at least one inch high, must be attached to each fish wheel so that the name and address are plainly visible.

(xii) You must personally operate the fish wheel or dip net. You may not loan or transfer a subsistence fish wheel or dip net permit except as permitted.

(xiii) You may take halibut only by a single hand-held line with not more than two hooks attached to it.

(xiv) You may take herring spawn on kelp only by a hand-held unpowered blade-cutting device. You must cut kelp plant blades at least four inches above the stipe (stem). The provisions of this paragraph do not apply to Fucus species.

(xv) Except as provided in this section, you may take fish other than salmon and freshwater fish species for subsistence purposes without a subsistence fishing permit.

(xvi) You may take salmon and freshwater fish species only under authority of a subsistence fishing permit.

(xvii) Only one subsistence fishing permit will be issued to each household per year.

(xviii) The following apply to Upper Copper River District subsistence salmon fishing permits:

(A) Only one type of gear may be specified on a permit;

(B) Only one permit per year may be issued to a household;

(C) You must return your permit no later than October 31, or you may be denied a permit for the following year;

(D) If your household has a Chitina Subdistrict personal use salmon fishing permit, you will not be issued a Copper River subsistence salmon fishing permit;

(E) A fish wheel may be operated only by one permit holder at one time; that permit holder must have the fish wheel marked as required by this section and during fishing operations;

(F) Only the permit holder and the authorized member of the household listed on the subsistence permit may take salmon;

(G) A permit holder must record on ADF&G forms all salmon taken immediately after landing the salmon.

(xix) The total annual possession limit for an Upper Copper River District subsistence salmon fishing permit is as follows:

(A) For a household with one person, 30 salmon, of which no more than 5 may be chinook salmon if taken by dip net;

(B) For a household with two persons, 60 salmon, of which no more than five may be chinook salmon if taken by dip net; plus 10 salmon for each additional person in a household over 2, except that the household's limit for chinook salmon taken by dip net does not increase;

(C) upon request, permits for additional salmon will be issued for no more than a total of 200 salmon for a permit issued to a household with one person, of which no more than 5 may be chinook salmon if taken by dip net; or no more than a total of 500 salmon for a permit

issued to a household with 2 or more persons, of which no more than 5 may be chinook salmon if taken by dip net.

(xx) A subsistence fishing permit may be issued to a village council, or other similarly qualified organization whose members operate fish wheels for subsistence purposes in the Upper Copper River District, to operate fish wheels on behalf of members of its village or organization. A permit may only be issued following approval by ADF&G of a harvest assessment plan to be administered by the permitted council or organization. The harvest assessment plan must include: provisions for recording daily catches for each fish wheel; sample data collection forms; location and number of fish wheels; the full legal name of the individual responsible for the lawful operation of each fish wheel; and other information determined to be necessary for effective resource management. The following additional provisions apply to subsistence fishing permits issued under this paragraph (i)(11)(xx):

(A) The permit will list all households and household members for whom the fish wheel is being operated;

(B) The allowable harvest may not exceed the combined seasonal limits for the households listed on the permit; the permittee will notify the department when households are added to the list, and the seasonal limit may be adjusted accordingly;

(C) Members of households listed on a permit issued to a village council or other similarly qualified organization, are not eligible for a separate household subsistence fishing permit for the Upper Copper River District.

(xxi) You may not possess salmon taken under the authority of an Upper Copper River District subsistence fishing permit unless both lobes of the caudal (tail) fin have been immediately removed from the salmon.

(xxii) In locations open to commercial salmon fishing other than described for the Upper Copper River District, the annual subsistence salmon limit is as follows:

(A) 15 salmon for a household of one person;

(B) 30 salmon for a household of two persons and 10 salmon for each additional person in a household;

(C) No more than five king salmon may be taken per permit.

(xxiii) The daily bag limit for halibut is two fish and the possession limit is two daily bag limits. You may not possess sport-taken and subsistence-taken halibut on the same day.

(12) *Yakutat Area.* The Yakutat Area includes all waters of Alaska between the longitude of Cape Suckling and the longitude of Cape Fairweather.

(i) Unless restricted in this section or unless restricted under the terms of a subsistence fishing permit, you may take fish at any time in the Yakutat Area.

(ii) You may not take salmon during the period commencing 48 hours before an opening until 48 hours after the closure of an open commercial salmon net fishing season. This applies to each river or bay fishery individually.

(iii) When the length of the weekly commercial salmon net fishing period exceeds two days in any Yakutat Area salmon net fishery, the subsistence

fishing period is from 6:00 a.m. to 6:00 p.m. on Saturday in that location.

(iv) You may take salmon, steelhead trout in the Situk and Ahrnklin Rivers, other trout and char only under authority of a subsistence fishing permit.

(v) If you take salmon, trout, or char incidentally by gear operated under the terms of a subsistence permit for salmon, you may retain them for subsistence purposes. You must report any salmon, trout, or char taken in this manner on your permit calendar.

(vi) You may take fish by gear listed in this part unless restricted in this section or under the terms of a subsistence fishing permit.

(vii) In the Situk River, each subsistence salmon fishing permit holder shall attend his or her gill net at all times when it is being used to take salmon.

[1311] (viii) You may block up to two-thirds of a stream with a gillnet or seine used for subsistence fishing.

(ix) You must remove the dorsal fin from subsistence-caught salmon when taken.

(x) You may not possess subsistence-taken and sport-taken salmon on the same day.

(13) *Southeastern Alaska Area.* The Southeastern Alaska Area includes all waters between a line projecting southwest from the westernmost tip of Cape Fairweather and Dixon Entrance.

(i) Unless restricted in this section or under the terms of a subsistence fishing permit, you may take fish, other than rainbow trout and steelhead trout, in the Southeastern Alaska Area at any time.

(ii) You may take herring at any time, except that in the 72 hours before and 72 hours after an open

commercial herring fishing period in the Southeastern Alaska Area, a vessel that, or crew member or permit holder who, participates in that commercial herring fishery opening may not take or possess herring in any district in the Southeastern Alaska Area.

(iii) From July 7 through July 31, you may take sockeye salmon in the waters of the Klawock River, and Klawock Lake only from 8:00 a.m. Monday until 5:00 p.m. Friday.

(iv) You must possess a subsistence fishing permit to take salmon, trout, or char.

(v) Permits will not be issued for the taking of chinook or coho salmon, but if you take chinook or coho salmon incidentally with gear operated under terms of a subsistence permit for other salmon, they may be kept for subsistence purposes. You must report any chinook or coho salmon taken in this manner on your permit calendar.

(vi) If you take salmon, trout, or char incidentally with gear operated under terms of a subsistence permit for other salmon, they may be kept for subsistence purposes. You must report any salmon, trout, or char taken in this manner on your permit calendar.

(vii) No permits for the use of nets will be issued for the salmon streams flowing across or adjacent to the road systems of Petersburg, Wrangell, and Sitka

(viii) You shall immediately remove the pelvic fins of all salmon when taken.

(ix) You may not possess subsistence-taken and sport-taken salmon on the same day.

§___.27 Subsistence taking of shellfish.

(a) Regulations in this section apply to subsistence taking of Dungeness crab, king crab, Tanner crab, shrimp, clams, abalone, and other shellfish or their parts.

(b) You may take shellfish for subsistence uses at any time in any area of the public lands by any method unless restricted by the subsistence fishing regulations of §___.26 or this section.

(c) Methods, means, and general restrictions. (1) The harvest limit specified in this section for a subsistence season for a species and the State harvest limit set for a State season for the same species are not cumulative. This means that if you have taken the harvest limit for a particular species under a subsistence season specified in this section, you may not after that, take any additional shellfish of that species under any other harvest limit specified for a State season.

(2) Unless otherwise provided in this section, you may use gear as specified in the definitions of §___.26 for subsistence taking of shellfish.

(3) You are prohibited from buying or selling subsistence-taken shellfish, their parts, or their eggs, unless otherwise specified.

(4) You may not use explosives and chemicals, except that you may use chemical baits or lures to attract shellfish.

(5) Marking requirements for subsistence shellfish gear are as follows:

(i) You shall plainly and legibly inscribe your first initial, last name, and address on a keg or buoy attached to unattended subsistence fishing gear, except when fishing through the ice, you may substitute for the keg or buoy, a stake inscribed with your first

initial, last name, and address inserted in the ice near the hole; subsistence fishing gear may not display a permanent ADF&G vessel license number;

(ii) kegs or buoys attached to subsistence crab pots also must be inscribed with the name or United States Coast Guard number of the vessel used to operate the pots.

(6) Pots used for subsistence fishing must comply with the escape mechanism requirements found in §___.26.

(7) You may not mutilate or otherwise disfigure a crab in any manner which would prevent determination of the minimum size restrictions until the crab has been processed or prepared for consumption.

(d) Taking shellfish by designated harvest permit. (1) Any species of shellfish that may be taken by subsistence fishing under this part may be taken under a designated harvest permit.

(2) If you are a Federally-qualified subsistence user (beneficiary), you may designate another Federally-qualified subsistence user to take shellfish on your behalf. The designated fisherman must obtain a designated harvest permit prior to attempting to harvest shellfish and must return a completed harvest report. The designated fisherman may harvest for any number of beneficiaries but may have no more than two harvest limits in his/her possession at any one time.

(3) The designated fisherman must have in possession a valid designated harvest permit when taking, attempting to take, or transporting shellfish taken under this section, on behalf of a beneficiary.

(4) a person may not fish with more than one legal limit of gear as established by this section.

(5) You may not designate more than one person to take or attempt to take shellfish on your behalf at one time. You may not personally take or attempt to take shellfish at the same time that a designated fisherman is taking or attempting to take shellfish on your behalf.

(e) If a subsistence shellfishing permit is required by this section, the following conditions apply unless otherwise specified by the subsistence shellfishing regulations this section:

(1) You may not take shellfish for subsistence in excess of the limits set out in the permit;

(2) You must obtain a permit prior to subsistence fishing;

(3) You must have the permit in your possession and readily available for inspection while taking or transporting the species for which the permit is issued;

(4) The permit may designate the species and numbers of shellfish to be harvested, time and area of fishing, the type and amount of fishing gear and other conditions necessary for management or conservation purposes;

(5) If specified on the permit, you shall keep accurate daily records of the catch involved, showing the number of shellfish taken by species, location and date of the catch and such other information as may be required for management or conservation purposes;

(6) Subsistence fishing reports must be completed and submitted at a time specified for each particular area and fishery;

(7) If the return of catch information necessary for management and conservation purposes is required by a subsistence fishing permit and you fail to comply with such reporting requirements, you are ineligible to

receive a subsistence permit for that activity during the following calendar year, unless you demonstrate that failure to report was due to loss in the **[1312]** mail, accident, sickness or other unavoidable circumstances.

(f) Subsistence take by commercial vessels. No fishing vessel which is commercially licensed and registered for shrimp pot, shrimp trawl, king crab, Tanner crab, or Dungeness crab fishing may be used for subsistence take during the period starting 14 days before an opening until 14 days after the closure of a respective open season in the area or areas for which the vessel is registered. However, if you are a commercial fisherman, you may retain shellfish for your own use from your lawfully taken commercial catch.

(g) You may not take or possess shellfish smaller than the minimum legal size limits.

(h) Unlawful possession of subsistence shellfish. You may not possess, transport, give, receive or barter shellfish or their parts taken in violation of Federal or State regulations.

(i)(1) An owner, operator, or employee of a lodge, charter vessel, or other enterprise that furnishes food, lodging, or guide services may not furnish to a client or guest of that enterprise, shellfish that has been taken under this chapter, unless:

(i) the shellfish has been taken with gear deployed and retrieved by the client or guest;

(ii) the gear has been marked with the client's or guest's name and address; and

(iii) the shellfish is to be consumed by the client or guest or is consumed in the presence of the client or guest.

(2) The captain and crewmembers of a charter vessel may not deploy, set, or retrieve their own gear in a subsistence shellfish fishery when that vessel is being chartered.

(j) Subsistence shellfish areas and pertinent restrictions. (1) *Southeastern Alaska-Yakutat Area.* No marine waters under jurisdiction for Federal subsistence management.

(2) *Prince William Sound Area.* No marine waters under jurisdiction for Federal subsistence management.

(3) *Cook Inlet Area.* You may not take shellfish for subsistence purposes.

(4) *Kodiak Area.* (i) You may take crab for subsistence purposes only under the authority of a subsistence crab fishing permit issued by the ADF&G.

(ii) The operator of a commercially licensed and registered shrimp fishing vessel must obtain a subsistence fishing permit from the ADF&G before subsistence shrimp fishing during a closed commercial shrimp fishing season or within a closed commercial shrimp fishing district, section or subsection. The permit shall specify the area and the date the vessel operator intends to fish. No more than 500 pounds (227 kg) of shrimp may be in possession aboard the vessel.

(iii) The daily harvest and possession limit is 12 male Dungeness crab per person; only male Dungeness crab with a shell width of six and one-half inches or greater may be taken or possessed. Taking of Dungeness crab is prohibited in water 25 fathoms or more in depth during the 14 days immediately before the opening of a commercial king or Tanner crab fishing season in the location.

(iv) In the subsistence taking of king crab:

(A) The annual limit is six crabs per household; only male king crab may be taken or possessed;

(B) All crab pots used for subsistence fishing and left in saltwater unattended longer than a two-week period shall have all bait and bait containers removed and all doors secured fully open;

(C) You may not use more than five crab pots, each being no more than 75 cubic feet in capacity to take king crab;

(D) You may take king crab only from June 1–January 31, except that the subsistence taking of king crab is prohibited in waters 25 fathoms or greater in depth during the period 14 days before and 14 days after open commercial fishing seasons for red king crab, blue king crab, or Tanner crab in the location;

(E) The waters of the Pacific Ocean enclosed by the boundaries of Womans Bay, Gibson Cove, and an area defined by a line 1/2 mile on either side of the mouth of the Karluk River, and extending seaward 3,000 feet, and all waters within 1,500 feet seaward of the shoreline of Afognak Island are closed to the harvest of king crab except by Federally-qualified subsistence users.

(v) In the subsistence taking of Tanner crab:

(A) You may not use more than five crab pots to take Tanner crab;

(B) You may not take Tanner crab in waters 25 fathoms or greater in depth during the 14 days immediately before the opening of a commercial king or Tanner crab fishing season in the location;

(C) The daily harvest and possession limit is 12 male crab with a shell width five and one-half inches or greater per person.

(5) *Alaska Peninsula-Aleutian Islands Area.* (i) The operator of a commercially licensed and registered shrimp fishing vessel must obtain a subsistence fishing permit from the ADF&G prior to subsistence shrimp fishing during a closed commercial shrimp fishing season or within a closed commercial shrimp fishing district, section, or subsection; the permit shall specify the area and the date the vessel operator intends to fish; no more than 500 pounds (227 kg) of shrimp may be in possession aboard the vessel.

(ii) The daily harvest and possession limit is 12 male Dungeness crab per person; only crabs with a shell width of five and one-half inches or greater may be taken or possessed.

(iii) In the subsistence taking of king crab:

(A) The daily harvest and possession limit is six male crab per person; only crabs with a shell width of six and one-half inches or greater may be taken or possessed;

(B) All crab pots used for subsistence fishing and left in saltwater unattended longer than a two-week period shall have all bait and bait containers removed and all doors secured fully open;

(C) You may take crabs only from June 1-January 31.

(iv) The daily harvest and possession limit is 12 male Tanner crab per person; only crabs with a shell width of five and one-half inches or greater may be taken or possessed.

(6) *Bering Sea Area.* (i) In that portion of the area north of the latitude of Cape Newenham, shellfish may only be taken by shovel, jigging gear, pots and ring net.

(ii) The operator of a commercially licensed and registered shrimp fishing vessel must obtain a subsistence fishing permit from the ADF&G prior to subsistence shrimp fishing during a closed commercial shrimp fishing season or within a closed commercial shrimp fishing district, section or subsection; the permit shall specify the area and the date the vessel operator intends to fish; no more than 500 pounds (227 kg) of shrimp may be in possession aboard the vessel.

(iii) In waters south of 60° N. lat., the daily harvest and possession limit is 12 male Dungeness crab per person.

(iv) In the subsistence taking of king crab:

(A) In waters south of 60° N. lat., the daily harvest and possession limit is six male crab per person;

(B) All crab pots used for subsistence fishing and left in saltwater unattended longer than a two-week period shall have all bait and bait containers removed and all doors secured fully open;

(C) In waters south of 60° N. lat., you may take crab only from June 1–January 31;

(D) In the Norton Sound Section of the Northern District, you must have a subsistence permit.

[1313] (v) In waters south of 60° N. lat., the daily harvest and possession limit is 12 male Tanner crab.

Dated: December 22, 1998.

James A. Caplan,

Acting Regional Forester, USDA-Forest Service.

Dated: December 18, 1998.

Bruce Babbitt,

Secretary of the Interior.

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