Enclosure

I. ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

ANILCA established over 100 million acres of conservation system units (CSUs), which, for the US Fish and Wildlife Service and the National Park Service, comprise more than half of their respective national systems, and provided for continued state management of fish and wildlife resources as well as methods of public access and continued hunting and fishing. Yet, the Alaska-specific management provisions are either ignored or receive scant recognition in national policies that are applied to all system units equally. Since ANILCA's enactment, the State of Alaska and individual Alaskans have shouldered the continuous burden of reminding federal agencies of their legal responsibility to respect and implement key provisions in ANILCA.

Federal ANILCA implementation has frustrated the State's ability to access and manage its natural resources. DOI agencies often apply legally unsupported and restrictive resource management policies that are inconsistent with ANILCA and disregard the State's authority. The State of Alaska has encountered numerous difficulties in managing fish and wildlife populations in national parks and refuges due to inconsistent and unnecessary NPS and USFWS regulations and policies that either fail to recognize or remove the legitimate authority of the State's management responsibilities.

We offer the following agency-specific recommendations to further improve and enhance meaningful state/federal working relationships and outcomes that honor the statutory intent in ANILCA, the Federal Land Policy and Management Act (FLPMA) and other agency authorities governing federal lands in Alaska.

A. Department-wide ANILCA issues

1. Consultation and Cooperation

ANILCA specifically directs federal agencies to consult with the State of Alaska as the primary manager of fish and wildlife resources on most federal lands. ANILCA planning provisions for the USFWS and NPS also include requirements for consultation and cooperation with the State. FLPMA requires all BLM resource management plans to be consistent with state and local plans to the maximum extent that they remain consistent with applicable federal law, including ANILCA. Further, BLM planning regulations afford State Governor's separate review and appeal opportunities intended to ensure the consistency mandate in FLPMA is adequately addressed. Title XII of ANILCA also established the Alaska Land Use Council, a high-level forum to facilitate state/federal cooperation on implementing ANILCA. These provisions were intended to assure the State of Alaska that it would retain its authority to manage its fish and wildlife resources, and have a meaningful role in the management of ANILCA CSUs and other designated areas.

However, the State has become increasingly frustrated by what federal land management agencies have been offering as consultation and cooperation, which is an essential ingredient in the balance achieved by Congress in both ANILCA and FLPMA. While in most instances we have been invited, formally or otherwise, to the table under the guise of consultation and cooperation, or as a cooperating agency on a planning team, our input has largely been ignored and we have been offered little to no opportunity to work collaboratively toward resolving

conflicts. Further, opportunities to consult are often ill-timed to coincide with the release of a public review document or following leadership or solicitor review, which significantly reduces or effectively eliminates the opportunity to effect change to a draft or final document. We are also provided little or no feedback on internal or formal comments, and in formal public response documents the State is referenced merely as a commenter, with no distinction or recognition of state sovereignty.

- **Recommendation:** Define and strengthen existing definitions and processes for consultation and cooperation to ensure states are provided meaningful opportunities to contribute state expertise, data, and other relevant information in a timely manner to inform federal decision-making. The Western Governors' Association offers its own definition of "true consultation" in its May 15, 2017 comments on regulatory reform.[1] We support their recommendation to engage states and other stakeholders in a collaborative effort to realign and improve the federal government's relationship with states. Additional specific recommendations follow.

2. Disregard for State Fish and Wildlife Management Authority

Current DOI direction inaccurately represents the State's management for sustained yield as required by the Alaska Constitution as being inherently in conflict with DOI statutes, regulations, and policies, where conflict was not perceived in the past. DOI administrative direction also veers away from the intent of Congress in the National Wildlife Refuge System Improvement Act and ANILCA to retain the status quo of the State being the primary manager of fish and resident wildlife populations and their harvest, except in the narrow instances where it decided otherwise (MBTA, MMPA, ESA, etc.). Even though Alaska's national preserves and refuges were created with public hunting and fishing, fisheries projects, and state fish and wildlife management activities clearly in mind, recent DOI direction frames these uses as being in direct and sometimes irreconcilable conflict with NPS and USFWS missions. The following recommendations could be effected by changes to 43 CFR 24 Department of the Interior Fish and Wildlife Policy: State-Federal Relationships, as well as through changes to the individual regulations and policies.

- **Recommendation—Affirm State fish and wildlife management authority:** Direct federal land management agencies to meaningfully work with the states to amend statutes, regulations and policies to properly reflect the management authorities of the states for the management and use of fish and wildlife.

- **Recommendation—Strengthen requirements for meaningful consultation:** Consultation with the State is a statutorily required component of NPS and USFWS planning and closure process for fish and wildlife related issues, but the level of

[1] "Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with *early, meaningful and substantive* input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets and strategic planning." (Western Governors Association comments on regulatory reform, May 15, 2017)

consultation in recent years has declined to mere notification in some instances, recognizing the bare minimum required by law rather than the robust process Congress intended. We request DOI consult with the State within a timeframe that allows for a meaningful exchange of data and other information that informs federal decision-making, including recognition of the State's expertise and science-based data and other relevant information.

- **Recommendation—Assure reasonable access for State fish and wildlife management work on federal lands, including in Wilderness:** DOI direction unnecessarily limits access for state fish and wildlife management activities and adds burdensome bureaucratic hurdles to obtain authorization to conduct even routine management activities using methods of access permitted for public use under ANILCA on DOI and adjoining state lands. We request DOI only require a Minimum Requirements Analysis in designated wilderness, and then only for those state fish and wildlife management activities that involve a method of access not authorized under ANILCA or that is generally prohibited by the Wilderness Act. We also request DOI recognize basic wildlife management tools, such as telemetry, as being necessary to professional science-based management activities in designated Wilderness.

3. Federal Subsistence Board

The regulations promulgated by the Secretaries of Interior and Agriculture should be amended to require the Federal Subsistence Board to meaningfully consult with the State of Alaska concerning subsistence takings and uses of fish and wildlife on public lands. ANILCA recognizes that the State has primary responsibility to manage its fish and wildlife resources. The State has many decades of expertise in subsistence and fish and wildlife management and stands ready to lend its expertise to the board. Too often, and especially in recent years, the board has taken action without consulting the State. The following amendments to 50 CFR Part 100, and corresponding provisions of 36 CFR Part 242, Federal Subsistence Management Program, would alleviate unnecessary regulatory burdens, amend regulations that are outdated and ineffective, and impose costs that exceed benefits.

- **Recommendation:** The Secretaries' regulations mandate that the State "be actively involved as consultant[] to the Board." 50 CFR 100.10(c). In recent years, however, the board and federal managers have increasingly taken important actions affecting subsistence uses of fish and wildlife through temporary "special actions," see 50 CFR 100.19(b), for which the regulations do not require prior consultation with the State. In practice, the board has often failed to consult with the State prior to taking special actions. One way to improve this ineffective practice would be to amend 50 CFR 100.10(c) to make the State a non-voting member of the board entitled to attend all sessions—and not just "public sessions"—of the board. That way, the State would be ensured of an opportunity to consult with the board on important decisions affecting subsistence. The board takes many important actions affecting subsistence in nonpublic sessions where there is no opportunity for the State to attend and act as a consultant.

- **Recommendation:** 50 CFR 100.19(a) & (b) should be amended to require the board to consult with the State prior to taking emergency and temporary special actions. Failing to consult with the State unnecessarily deprives the board and federal managers of the State's considerable expertise in subsistence and fish and wildlife management.

- **Recommendation:** 50 CFR 100.19(c) should be amended to require the board to make regulatory changes at its regularly scheduled meetings unless circumstances require an earlier change. Current regulations only provide that the board "may" reject a request for either an emergency or a temporary special action "if the board concludes that there are no time-sensitive circumstances necessitating a regulatory change before the next regular proposal cycle." This language should be changed to "shall." When the board changes regulations through a special action, as it has done with increasing frequency in recent years, the State and the public are often not given an adequate opportunity to consult the board on those changes.

- **Recommendation:** 50 CFR 100.10(d)(7) should be amended to include the State as a member of the Interagency Staff Committee providing analytical assistance to the board. This would allow the board to take advantage of the State's considerable expertise in subsistence and fish and wildlife management.

- **Recommendation:** 50 CFR 100.14(b) should be amended to require the board to adopt those State openings and closures which serve to achieve the objectives of ANILCA. Current regulations provide that the board "may" adopt such State openings and closures. In many instances, the Secretaries' current regulations rely on State openings and closures in order to carry out the board's responsibility to ensure the conservation of healthy populations of fish and wildlife while continuing subsistence uses of such populations. In recent years, however, when the board by special action closes takings of fish and wildlife for non-subsistence uses, federal managers acting with delegated authority of the board have also taken over the responsibility of opening and closing takings of fish and wildlife rather than continuing to rely on State openings and closures. Though in the case of a special action the State must rely on federal authorities to enforce the federal rural residency requirement, the State is otherwise well equipped (and legally obligated by state law) to conserve populations of fish and wildlife and provide for and prioritize subsistence uses. The board's current practice of taking over the responsibility of opening and closing takings of fish and wildlife in the case of a special action is confusing and inefficient and, if not needed to conserve healthy populations of fish and wildlife or to continue subsistence uses of such populations, contrary to ANILCA's preservation of the State as the entity with primary management authority over fish and wildlife.

- **Recommendation:** 50 CFR 100.10(d) should be amended to require that board meetings be open to the public. Too often the board has elected to meet in nonpublic sessions

depriving the State and members of the public of the opportunity to remain apprised of and understand the reasoning of board actions.

- **Recommendation:** 50 CFR Part 100, Subpart D, should be amended to establish objective guidelines for determining whether the board is providing the required opportunity and preference for subsistence uses. The board's primary task under ANILCA is to balance the competing aims of subsistence use, conservation, and recreation, while at the same time providing subsistence users with a meaningful use preference and opportunity. The best way to assess whether the board is providing a subsistence preference and opportunity is to establish objective criteria to determine subsistence needs, and monitor subsistence uses to help determine if those needs are being met. Without objective criteria, the federal subsistence program risks creating an ever-expanding subsistence priority on federal lands that will unnecessarily impact other uses of fish and wildlife protected by ANILCA.

- **Recommendation:** The Secretary or board should develop a protocol for engagement between the State of Alaska and the federal agencies so that implementation of the federal subsistence program can occur in a transparent way that the State can budget for. In the past there have been sudden changes in how the program is administered causing work to be re-done, done at the last minute, or even abandoned. The board and subsistence users will benefit from the best available information, with mutually agreed upon guiding principles and timelines.

- **Recommendation:** The board's "Policy on Closures to Hunting, Trapping and Fishing on Federal Public Lands in Alaska" contains language that is inconsistent with the direction provided in ANILCA. A current board "Decision Making" criterion states the board will, "Consider the recommendations of the Regional Advisory Councils, with due deference (ANILCA § 805(c))." However, ANILCA does not provide for "due deference" but instead directs the board to, "...consider the report and recommendations of regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses." The distinction between "due deference" and "consider the report and recommendations of regional advisory councils..." is significant and we request that the policy be revised to accurately reflect the direction in ANILCA 805(c) and 816(b) for closures, to state that, "The Board shall consider the report and recommendations of regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses, including consultation with the State (ANILCA § 805(c) and 816(b)."

4. The Alaska Land Use Council (ALUC)

The Alaska Land Use Council was established in Title XII of ANILCA[2] to promote and institutionalize cooperation and coordination between Federal, State, and Native land and resource managers and to provide a forum for the public to meet with land and resource managers collectively to address issues that cut across land ownership boundaries in Alaska. The ALUC was comprised of the heads of federal land management agencies, the Commissioners of several state departments and two Alaska Native regional corporation representatives. A Presidential appointee and Alaska's Governor served as co-chairs. The ALUC was tasked with conducting studies and making recommendations on a variety of land and resource issues, plans and regulations. During its tenure, the ALUC produced guidance materials, and reviewed and made recommendations on numerous federal actions mandated by ANILCA. ANILCA included a December 1990 sunset provision for the ALUC. A report was commissioned to evaluate the effectiveness of the ALUC and inform the Council's recommendations on re-authorization. Given the complexities associated with implementing ANILCA in Alaska, the ALUC determined a continuing need for a cooperative forum and recommended re-authorization with certain structural and procedural modifications. However, despite the recommendation, Congress did not take action and the council was not re-authorized. Had it been reauthorized, most of the recent controversial federal plans, policies and regulations that the State has strongly objected to (e.g. Arctic Refuge CCP and Wilderness recommendations, NPS and USFWS Wildlife and Public Closure Process Regulations) would have come under the purview of the ALUC. Review by the ALUC would have resulted in an open public dialogue with all affected agencies, stakeholders, and members of the public, and likely resulted in more balanced decisions and outcomes that reflect the intent in ANILCA.

- **Recommendation:** Review ALUC recommendations for re-authorization in consultation with the State of Alaska, and recommend mutually-agreed to terms for re-authorization to the Alaska delegation for Congressional action. Reinstatement of the ALUC would ensure ANILCA is implemented faithfully in future federal actions, and implemented consistently across successive state and federal administrations.

5. Alaska Supplement to the Minimum Requirements Decision Guide (MRDG)

The Alaska Supplement to the MRDG was originally the product of a collaborative effort by state and federal staff for use by all four federal land management agencies in Alaska (Departments of Interior and Agriculture) to increase consistency and account for special provisions in ANILCA when determining the "minimum requirements" for commercial services pursuant to Section 4(c) of the Wilderness Act. Implementation of this provision in the Wilderness Act directly impacts state fish and wildlife research, monitoring, and management activities and essential commercial services for accessing fish and wildlife resources in Alaska's remote wilderness areas. The document was revised in 2016 without the State's awareness or involvement, despite the retention of credits to state staff for its initial involvement. Revised material includes some inaccuracies and unsubstantiated guidance.

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2 16 U.S.C. § 3181.

- **Recommendation:** Establish collaborative working group with state participation to update and correct any deficiencies in the document.

B. Bureau of Land Management (BLM)

1. Areas of Critical Environmental Concern and other special area designations

BLM is currently developing Resource Management Plans for two areas of Alaska, Central Yukon and Bering Sea – Western Interior. In recent years many of BLM's key plan decisions have relied on the designation of new Areas of Critical Environmental Concern (ACECs). Where special management is necessary for conservation of fish and wildlife resources, the State has had no objection to ACECs in the past. However, recent ACEC nominations have moved forward despite not meeting the ACEC criteria. Also, BLM has increasingly developed new special area designations similar to ACECs but without objective designation criteria. Placing overly broad area restrictions on development and activities where there is no specific conservation need displaces development and activities onto other land ownerships with potentially more sensitive habitat, and can hinder the State's effectiveness in obtaining project-specific or site-specific project modifications outside of these designated areas to conserve fish and wildlife.

- **Recommendation:** Evaluate ACEC nominations using the established criteria, with an emphasis on whether special management is needed. Use project-specific stipulations developed in consultation with the State where needed instead of developing new types of special area designations.

2. Winter-Use Trapping Cabin Policy

National policies regarding cabin construction and use fail to consider the unique circumstances present in Alaska's public lands, and no clear exception is provided other than for federal subsistence use. To allow for trapping cabins on BLM-managed lands, regional staff worked with the State of Alaska to create a new standard to help the majority of trappers satisfy national guidance and requirements. By classifying trapping as a commercial activity and modifying what must be provided to be considered a commercial user, a trapping cabin could be constructed and maintained in Alaska for use only around the annual trapping season. The policy has both expired and failed to work as promised, owing particularly to new, unofficial BLM requirements to secure bonding and full cost recovery for the permitting process. Alaskans wishing to have a trapping cabin on BLM-managed lands must come up with anywhere from $7000 to $10,000 just to request the authorization. By comparison, the State of Alaska charges $100. Trappers would also have to both build and perform required maintenance on the cabin and site only during the winter months. To date, we are not aware of any trapping cabins that have been authorized by BLM under these guidelines, significantly limiting this legitimate use of public lands.

- **Recommendation:** Commit to work with the State and user groups to develop reasonable regulations and processes to authorize trappers in Alaska to build and maintain trapping cabins on BLM administered lands.

C. National Park Service

1. 36 CFR Part 13 Wildlife and Closure Process Regulations: *State of Alaska v. Zinke*

The 2015 NPS rule significantly expanded discretionary authority to preempt state fish and wildlife regulations, absent a conservation concern, harming the state's ability to manage for sustainable populations, including for subsistence purposes. The rule also significantly alters the public participation procedures for Alaska park units, making it easier for the NPS to close or limit all uses in Alaska park units with limited or no public engagement for extensive, indeterminate periods of time, impacting consistency with state regulations and increasing the complexity of the regulations for the public. The rule is currently in litigation, which has been stayed while the NPS addresses the direct conflicts with state regulations through a new rulemaking process. However, the inadequate closure process from the 2015 rule remains.

- **Recommendation:** Rescind 36 CFR 13.42(f) and (g) and select related definitions per the proposed rule published May 22, 2018, and adopt the additional changes the State recommended in its November 2, 2018, comments on proposed rule; affirm the state's authority to manage sustainable populations of fish and wildlife, including for subsistence; and restore the Alaska-specific closure process, which applies specific criteria for emergency, temporary and permanent closures. Fish and wildlife related restrictions and closures have recently been inappropriately housed within the Superintendent Compendiums without first going through the required regulatory process, including notice, hearing, and implementing permanent restrictions and closures by regulation. Therefore, we also request that the Compendium process no longer be used for restrictions to fish and wildlife uses.

2. Director's Order 41—Wilderness Stewardship

This policy expands on direction in Management Policies 2006 by directing NPS to manage proposed wilderness "as if it were wilderness," and manage lands merely determined "eligible" for recommendation (i.e. meet the Wilderness Act criteria for having wilderness character) but *not* proposed for wilderness designation to "preserve their eligibility for designation."[3] This applies to the vast majority of NPS managed lands in Alaska and impacts public use and state management of fish and wildlife in significant ways. For example, NPS Management Policy 6.3 requires the NPS to complete a minimum requirements analysis for all activities taking place within eligible wilderness, despite the lack of such a statutory requirement in the Wilderness Act of 1964. In Alaska, this means an additional, unnecessary layer of permitting and restrictions on state fish and wildlife monitoring, research, and management activities on the 17.7 million acres of NPS land administratively classified as eligible wilderness. Further, this requirement applies

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3 Nat'l Park Serv., Management Policies 2006, at 25-26.

to proposed wilderness in Alaska even though the wilderness reviews conducted by the NPS in the 1980s were never forwarded to Congress for consideration. This policy ensures all NPS lands in Alaska, both designated and non-designated wilderness, will be managed as de facto wilderness in perpetuity, which can lead to unwarranted public use limits (e.g. group size, capacity, and encounter rate limits) intended to protect wilderness character.

- **Recommendation:** Revise Director's Order 41 and NPS 2006 Management Policies to exempt Alaska from direction to manage proposed and eligible wilderness "as if it were wilderness" and to manage this land to preserve its eligibility for designation, even if it was never recommended to Congress for action.

3. Director's Order 100 Resource Stewardship for the 20th Century

Director's Order 100 was rescinded on August 16, 2017, and the State of Alaska supports that decision. The State supports science-based decision making and use of adaptive management commensurate with the limitations of available data and information, rather than the Order's directive to implement the "precautionary principle" as a default response, which unnecessarily limited valid park uses. However, NPS planning and management staff claim that current agency policy requires application of the precautionary principle, equating Section 1.5 of the 2006 NPS Management Policies[4] to the precautionary principle. NPS has inappropriately proposed limiting public uses mandated by Congress for specific park units, citing the precautionary principle as justification without requiring any additional supporting data or other information to provide an objective rationale for the decision.[5] Use of the precautionary principle has resulted in unnecessary restrictions on public hunting and fishing as well as state fish and wildlife management activities in Alaska. It also places the state in the difficult and impractical position of proving a negative, rather than explaining possible effects and their likelihood according to the available science in order to inform decisions. The precautionary principle also conflicts with Secretarial Order 3369 "Promoting Open Science," which requires DOI to "base its decisions on the best available science and provide the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions."

- **Recommendation:** Reinforce the need for science-based decisions through new policy directives and clarify with Alaska NPS regional staff that Director's Order 100 has been rescinded and that the precautionary principle is no longer agency policy.

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[4] "When proposed park uses and protection of park resources and values come into conflict, the protection of resources and values must be predominant."

[5] Letter from NPS to ADF&G, dated April 3, 2013: "The NPS operates under a precautionary principle, which means until an action is shown ***not*** to disrupt naturally-occurring populations or naturally-occurring ecological processes, those actions are not to be authorized on NPS areas....the burden of proof lies with the ability to prove that there is no possibility of new or additional state authorizations disrupting nationally-functioning ecosystem processes...".

4. Wildlife Stewardship in National Park Service Areas in Alaska, Natural Resource Report NPS/AKSO/NRR-2013/663

The NPS relies on this report to justify restricting state wildlife management, which infringes on the state's ability to manage wildlife into the future. Presented as a technical report that consolidates collective guidance, the report is effectively a policy document that applies the 2006 Management Policies and the Redwoods Amendment to wildlife management in Alaska park units in an exceedingly restrictive and novel manner, contradicting decades of management history. The report does not acknowledge that sport hunting is a Congressionally mandated use on Alaska preserves,[6] or that because NPS lacks discretionary management authority over mandated uses, NPS has different thresholds for mandated uses,[7] such as hunting, than for authorized uses subject to NPS discretionary authority.[8] Despite this lack of discretionary authority to manage hunting, the report calls for NPS to evaluate state methods and means for hunting on preserves. This rationale contradicts the distinction provided in 36 CFR 2.2(b).[9] Among other issues, the report also broadly misapplies other aspects of the 2006 Management Policies, including those related to predator control (see also NPS issue #5 below, 2006 Management Policies).

The concepts in this report were developed internally without state consultation or public review, contradict decades of management, contradict NPS' statements in past litigation, contradict NPS guidance for mandated uses, and ignore Congress' direction in ANILCA for hunting on preserves, yet they have become the NPS' de facto policy for wildlife management on Alaska preserves, resulting in restrictions on general hunting on preserves and subsistence hunting on parks and monuments and form the underlying basis for the 2015 wildlife rule which resulted in the *State of Alaska v. Zinke* litigation.

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[6] ANILCA Section 203, "*Provided, however*, That hunting shall be permitted in areas designated as national preserves under the provisions of this Act. Subsistence uses by local residents shall be allowed in national preserves and, where specifically permitted by this Act, in national monuments and parks."

[6] (1) "Hunting shall be allowed in park areas where such activity is specifically mandated by Federal statutory law."

(2) "Hunting may be allowed in park areas where such activity is specifically authorized as a discretionary activity under Federal statutory law if the superintendent determines that such activity is consistent with public safety and enjoyment, and sound resource management principles. Such hunting shall be allowed pursuant to special regulations."

[7] 2006 Management Policies 1.4.3.1, "the authority to and must manage and regulate the use to ensure, to the extent possible, that impacts on park resources from that use are acceptable."

[8] 2006 Management Policies 1.4.3.1, "the discretionary authority to allow and manage the use, provided that the use will not cause impairment or unacceptable impacts."

[9] (1) "Hunting shall be allowed in park areas where such activity is specifically mandated by Federal statutory law."

(2) "Hunting may be allowed in park areas where such activity is specifically authorized as a discretionary activity under Federal statutory law if the superintendent determines that such activity is consistent with public safety and enjoyment, and sound resource management principles. Such hunting shall be allowed pursuant to special regulations."

- **Recommendation:** Rescind the report and replace with guidance developed with public input and state consultation that appropriately distinguishes between "mandated" and "authorized" uses (see also NPS issue #1 above, 36 CFR Part 13 Wildlife and Closure Process Regulations: *State of Alaska v. Zinke).*

5. 2006 NPS Management Policies

NPS cited the 2006 Management Policies as primary reasons for recent drastic changes in the NPS' approach to wildlife in Alaska which have restricted hunting on preserves where hunting is a mandated use under the enabling legislation; these restrictions resulted in the *State of Alaska v. Zinke* litigation. Simply put, the NPS in Alaska has treated mandated uses, such as hunting and fishing, as if they were activities over which the NPS has discretionary authority. The State did not foresee these implementation problems when reviewing the draft 2006 Management Policies, which overall received little attention regarding fish or wildlife management because they were developed as an update to the 2001 Management Policies[10] [11], not a wholesale reinterpretation of the Organic Act regarding fishing, hunting, or wildlife management. As the NPS itself argued in *Fund for Animals v. Mainella* (2003), "...hunting pursuant to State law in the DWGNRA [Delaware Water Gap National Recreation Area] cannot be considered a violation of the Organic Act, or the NPS Management Policies that interpret the Organic Act, whereas here, Congress expressly mandated the activity." We appreciate the work the NPS has done in the 2018 proposed rule to rescind the portions of the 2015 rule, which inappropriately restricted hunting under state regulations. To prevent future problems, we request the NPS clarify (as noted below) the provisions in the 2006 Management Policies, which apply to state regulated hunting and fishing on a systemwide level.

- **Recommendation:** In consultation with the State, clarify which fish- and wildlife-related policies apply only to discretionary uses over which the NPS has authority, and which policies apply to mandated uses such as legislatively mandated state managed hunting and fishing on preserves (e.g., 4.4.3 does not apply to mandated hunting and trapping). Clarify that other issues addressed in the State's comments on the proposed 2018 wildlife rule, such as applying the concept of non-conflicting regulations or NPS defining "sport hunting" or "fair chase" activities, are not a substitute for applicable provisions of the 2006 Management Policies. Require meaningful consultation with states on these clarifications before taking any action that affects either discretionary or mandated uses, including public hunting and fishing.

a. 1.4.3.1. Park Purposes and Legislatively Authorized Uses

[10] See Senate Hearing 109-313 Parts 1 and 2. National Park Service's Draft Management Policies Hearing before the Subcommittee on National Parks of the Committee on Energy and Natural Resources, United States Senate, November 1, 2005 and June 20, 2006.

[11] See State of Alaska comments available at http://dnr.alaska.gov/commis/opmp/anilca/pdf/06_02_17_NPS_Draft_2005_Policies.pdf

This policy describes the different thresholds for managing mandated and authorized uses:

- Uses mandated by general laws that apply to the national park system as well as enabling legislation or proclamation for individual park units must be allowed but can be managed to ensure "to the extent possible" that impacts from the use are acceptable.
- Authorized uses are discretionary uses that if allowed, must be managed to ensure they will not cause impairment or unacceptable impacts.

Recent NPS actions in Alaska have ignored this policy guidance and justified restrictions on mandated uses, such as hunting and fishing, using the threshold for authorized uses. The appropriate threshold for mandated uses accepts that there could be impacts and that it may not be possible to eliminate them all, i.e. impacts are acceptable "to the extent possible." For example, hunting under state regulations "shall" be allowed in certain park units in Alaska pursuant to ANILCA; however, NPS has inaccurately asserted they must preempt state hunting regulations based on concerns that they could cause impairment, which is the threshold for authorized, not mandated uses. See also NPS issue #1, 36 CFR Part 13 Wildlife and Closure Process Regulations: *State of Alaska v. Zinke.*

- **Recommendation:** To ensure that the appropriate threshold is applied correctly, revise policy to clarify that mandated uses include those identified in enabling legislation as uses that "shall" be allowed and authorized uses include those which "may" be allowed, similar to 36 CFR 2.2(b).[12]

b. 4.4.1 General Principles for Managing Biological Resources

The policy states:

The Service will successfully maintain native plants and animals by

- *preserving and restoring the natural abundances, diversities, dynamics, distributions, habitats, and behaviors of native plant and animal populations and the communities and ecosystems in which they occur;*
- *restoring native plant and animal populations in parks when they have been extirpated by past human-caused actions; and*
- *minimizing human impacts on native plants, animals, populations, communities, and ecosystems, and the processes that sustain them.*

[12] 36 CFR 2.2(b)(1) Hunting **shall** be allowed in park areas where such activity is specifically mandated by Federal statutory law. (2) Hunting **may** be allowed in park areas where such activity is specifically authorized as a discretionary activity under Federal statutory law if the superintendent determines that such activity is consistent with public safety and enjoyment, and sound resource management principles. Such hunting shall be allowed pursuant to special regulations. (Emphasis added)

This policy has been interpreted by the NPS to apply to plants and animals at the individual animal or family level, which is not practical and conflicts with both Congress' intent for harvests by humans (i.e., hunting, fishing, plant gathering) to continue in some units and with the state's ability to manage populations.

- **Recommendation:** Insert language in first line, "The Service will successfully maintain native plants and animals at the population level by...". Add language to address the limits of the Service's management authority, both according to the type of use (e.g., mandated versus authorized uses), and according to location (NPS authority or management do not extend outside Park boundaries, or in Alaska, to state or private lands within Parks).

c. 4.4.3 Harvest of Plants and Animals by the Public

This policy states:

> *The Service does not engage in activities to reduce the numbers of native species for the purpose of increasing the numbers of harvested species (i.e., predator control), nor does the Service permit others to do so on lands managed by the National Park Service.*

The policy speaks entirely to activities and actions under NPS discretionary authority (i.e. NPS activities or NPS authorized activities), but NPS cited 4.4.3 as the reason in the 2015 rule for prohibiting legislatively-mandated state regulated hunting, which NPS deemed to be "predator reduction" activities. The NPS' 2015 interpretation of 4.4.3 directly conflicted with the clear statements of 8.2.2.6 *Hunting and Trapping* and 1.4.3.1. *Park Purposes and Legislatively Authorized Uses*. Harvest under general state hunting or trapping regulations is not an NPS activity or an NPS authorized activity—a fact recognized by NPS in *Fund for Animals v. Mainella (2003)*[13]. NPS also acknowledged in the 2018 proposed rule that the 2015 wildlife rule's interpretation went too far; clarifying this in the 2006 Management Policies would prevent future misapplication.

- **Recommendation:** Add the following clarification: "'Activities' refers to specific activities conducted by the NPS, and specific activities conducted by other federal or state agencies as authorized by the NPS, and does not include the regulation of public hunting or fishing."

6. Foundation Documents

NPS developed the foundation document concept as part of the NPS Director's 2009 Call to Action, with 2017 as the target for completing foundation documents for all park units. Going

[13] "Finally, the provision of the NPS Management Policies cited by Plaintiffs that applies to harvest of animals by the public, section 4.4.3, by its own terms only applies to harvest that is "subject to NPS control." As discussed above, hunting at DWGNRA is not subject to NPS control-it is required by statute and NPS has not exercised its discretion under the same statute to impose controls. 16 U.S.C. § 4600-5. These provisions of the NPS Management Policies therefore do not apply."

beyond the foundation statement concept in the 2006 Management Policies, the foundation documents serve as a basis for all future planning efforts and, as such, influence all management and planning decisions for a park unit. They are internally developed, do not require consideration of public comments, are not subject to the National Environmental Policy Act (NEPA), and vary in the extent to which they adhere to Congressional or Presidential direction in the unit's enabling legislation or proclamation. Essentially, they redirect the highest level of management of a park unit outside of any of the usual parameters established in ANILCA for consultation with the State and Native Corporations and public review. By circumventing the usual consultation process, this can negatively affect state fish and wildlife management by reframing the purposes for which Congress mandated the units be managed.

- **Recommendation:** Eliminate the internal policy and guidance regarding foundation documents, and revert to the 2006 Management Policies 2.2, which house the development of foundation statements within the General Management Plan NEPA and public process. Similarly, other "portfolio" documents which house decisions which have historically been reviewed by the public and state agencies as part of a GMP should either be reintegrated into a GMP revision or otherwise subject to public and NEPA review and consultation with the State and Native Corporations.

D. U.S. Fish and Wildlife Service

1. Alaska Regional Policy on Minimum Requirement Analyses (MRA) for Approving Administrative Activities in Wilderness Areas (RW-29)

In designated wilderness, USFWS regional policy requires Alaska Department of Fish & Game (ADF&G) researchers and managers to conduct an MRA for "...all refuge management activities, whether or not the actions involve a generally prohibited use."[14] This regional policy applies to administrative activities, such as fish and wildlife management and research, conducted by the State using motorized methods of access (such as snowmachines, motorboats and airplanes) allowed pursuant to Section 1110(a) of ANILCA.[15] As such, this policy establishes a higher bar for state agencies to access designated wilderness to conduct fish and wildlife related administrative activities than is required of the public for recreational or subsistence use. ANILCA allows for these methods of access because of the expansive size and remote nature of Alaska's wildlife refuges; therefore, it is inappropriate to distinguish between the State and other user groups in this manner.

- **Recommendation:** Amend RW-29 to require MRAs only for uses (such as helicopter landings) that are generally prohibited by the Wilderness Act and for which there is no ANILCA exception, and clarify that methods of access authorized for public use in designated Wilderness pursuant to ANILCA Section 1110(a) are similarly authorized for state administrative activities, such as fish and wildlife research and management.

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[14] Memorandum from Geoff Haskett to All Regional and Field Office Units (Aug. 20, 2010) (hereinafter "RW-29") at 1.

[15] 16 U.S.C. § 3170(a).

2. **Arctic National Wildlife Refuge Revised Comprehensive Conservation Plan (CCP) (January 2015)**

In addition to wilderness and wild and scenic river recommendations in the plan being inconsistent with subsequent congressional direction in the Tax Cuts and Jobs Act of 2017, which amended ANILCA to authorize an oil and gas exploration program in the 1002 Area, the plan also categorically limits uses, such as public use cabins and otherwise authorized fish and wildlife management activities, to avoid providing project-specific justification for future management decisions. This additionally threatens the State's ability to sustainably manage fish and wildlife resources, which supports traditional subsistence uses and priority public uses such as hunting and fishing.

- **Recommendation**: Revise the management category applied to the 1002 area in the 2015 CCP, and defer to publicly-vetted and cooperatively developed regional management guidelines that were standard in previously finalized CCPs.[16]

3. **Landscape Conservation Design**

A 2013 internally developed USFWS report proposed that a new category of plans called Landscape Conservation Designs be developed by the Landscape Conservation Cooperatives (LCCs), which are typically comprised of both government and non-governmental organization staff. The report requires a Landscape Conservation Design (LCD) be completed before a CCP can be revised. This is an added requirement not identified in ANILCA or the National Wildlife Refuge System Improvement Act. Since the 2013 report, LCCs have faced funding challenges and it is unclear how they will be able to complete the LCDs that are now administratively linked and required prior to initiating CCP revisions. In the meantime, legislatively mandated CCPs are becoming significantly outdated, some by more than 30 years. Severely outdated CCPs, which do not reflect current management needs, can hinder the State's ability to manage fish and wildlife.

- **Recommendation:** Eliminate the policy requirement to complete LCDs prior to initiating CCP planning and direct the USFWS to continue with CCP revisions as directed by Congress in ANILCA and the National Wildlife Refuge System Improvement Act. In Alaska, this applies to the Alaska Maritime, Izembek, Yukon Delta and Yukon Flats National Wildlife Refuges.

4. **50 CFR 36.32(c) (1)(i) - Taking of fish and wildlife**

This regulation requires trappers to obtain a trapping permit to trap on Kenai, Izembek, and Kodiak Refuges and the Aleutian Islands Unit of the Alaska Maritime Refuge. The requirement

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[16] 2007 Management Policies and Guidelines for National Wildlife Refuges in Alaska.

is not necessary for any conservation purposes and duplicates the state requirement to obtain a trapping license. Additionally, refuge managers use discretionary authorities through trapping permits to restrict state trapping allowances, seasons and bag limits through discretionary stipulations, absent any public process or notice, circumventing the regulatory authorities of the Alaska Board of Game and Federal Subsistence Board. In addition, Kenai Refuge has had a Furbearer Management Plan (implemented through 50 CFR 36.2) in place for over 30 years that supersedes the management authorities of the state. The Kenai Refuge has been requested to remove this management plan repeatedly over the past 10 years as both duplicative of state efforts for managing wildlife and their use, and out of date with current conditions on the Kenai Peninsula including habitat, wildlife populations and human uses, but denied all requests to do so. ADF&G maintains its request for the USFWS Furbearer Management Plan to be removed.

- **Recommendation:** Revise the regulations to remove the refuge trapping permit requirement. Trappers will still be required to obtain state trapping licenses, and harvest of furbearers will continue to be regulated by the State on a sustained yield basis. Rescind the USFWS Kenai Refuge Furbearer Management Plan as repetitive and unnecessary.

5. 50 CFR 36.32(c)(1)(iv) – Taking of fish and wildlife

This regulation prohibits same-day take of wolf and wolverine when flying, which unnecessarily duplicates state regulations. If the federal prohibition is removed, same-day take of wolf and wolverine will continue to be prohibited under State hunting regulations.

- **Recommendation**: Repeal repetitive regulation.

6. 50 CFR 36.39 Kenai National Wildlife Refuge Regulations

The 2009 Kenai National Wildlife Refuge Comprehensive Conservation Plan (CCP) committed the USFWS to reevaluate some longstanding issues, such as aircraft access to certain lakes. We are aware that the USFWS plans to issue a proposed rule in early 2019 which will address many of these issues. We support the USFWS' efforts to address these longstanding issues, as well as others raised in the *State of Alaska v. Zinke* litigation (e.g., prohibition on the take of brown bear over bait). We request the NPS consult with the State of Alaska prior to publication of the Kenai Refuge proposed rule to ensure that the regulations will have the desired effect of improving consistency with state regulations and improving public access to fish and wildlife resources.

a. 50 CFR 36.39 Public Use Aircraft- Kenai National Wildlife Refuge

This regulation closes most lakes historically used by aircraft in the Kenai Refuge. None of the closures are necessary for conservation purposes. The closures limit public use and access to these public lands for priority public purposes (i.e., hunting, fishing, trapping). If the closures are lifted, airspace will continue to be regulated by the FAA, with continuation of certain closures or restrictions related to hunting in the Kenai Controlled Use Areas implemented by the Alaska Board of Game. If additional regulatory actions are determined necessary, the Alaska Boards of Fisheries and Game and ADF&G have regulatory authorities,

including emergency powers, to regulate uses, including harvest. The State objected to these closures prior to their implementation. The 2009 Kenai Refuge CCP committed to review and consider a revision to remove unnecessary access restrictions, but, to date, the USFWS has taken no action despite repeated requests by the State to fulfill the commitment in the CCP.

- **Recommendation**: Repeal regulation.

b. 50 CFR 36.39(i)(5)(i) Public Use Kenai Refuge

In 2015 Kenai Refuge expanded the prohibition for the discharge of firearms along the entire length of the Kenai River adjacent to refuge lands and from the Russian River to the Russian River Falls over the State of Alaska's objections. The Russian River area is already closed to hunting by State regulations during June and July. The State is not opposed to closing areas to the discharge of firearms when necessary; however, the closure enacted by the USFWS does not explain why the allowance for discharging firearms for waterfowl and small game hunting does not pose a safety hazard when the use of firearms to take big game apparently does. The closure is not necessary for conservation purposes, is not necessary for public safety, and limits the ability of the public to use public lands for priority public uses. The State objected to this regulation prior to its implementation, and the prohibition should be repealed. If the closures are lifted, State regulations related to hunting and discharge of firearms will be in effect.

- **Recommendation**: Repeal regulation.

c. 50 CFR 36.39 Public Use Kenai Refuge (harvest of bears)

Kenai Refuge regulations related to the harvest of black and brown bears using bait conflict with and supersede existing State regulations. These additional regulations were put in place absent conservation concerns. If the closures are lifted, existing State regulations will continue to be in effect for black and brown bears, and their harvest would be managed under State authorities consistent with sustained yield principles. The State objected to this regulation prior to its implementation, and this regulation is an issue raised in the *State of Alaska v. Zinke* litigation. The USFWS has informed us they will address this issue in upcoming rulemaking. As of December 2018, no efforts have been made by the USFWS to discuss or work cooperatively with the State on the issue.

- **Recommendation:** Repeal regulation.

d. 50 CFR 36.39 (6) (i) Skilak Wildlife Recreation Area Kenai Refuge

The Kenai Refuge has closed the majority of the Skilak Loop Management Area (SLMA) to hunting except for a limited youth hunt and use of falconry and archery. USFWS asserted that the SLMA was set aside for wildlife viewing, but vegetation limits viewing opportunities for wildlife through most of the area, and the USFWS has done little to improve viewing

opportunities over the past 30 years. The closure also implies that wildlife viewing and hunting, two recognized priority public uses, are incompatible with each other. The State, in its objections to the closures, asserted that there are management actions available to ensure compatibility but all options provided by the State were rejected. If the closures are lifted, existing state hunting regulations will still be in effect, with harvest regulated on the sustained yield basis. If user conflicts are identified, management actions are available to both the State and the USFWS to cooperatively reduce or eliminate problems.

- **Recommendation:** Revise SLMA plan and repeal regulation.

e. 50 CFR 36.39 (9) (ii) Public Use Kenai Refuge (use of non-motorized vehicles)

The Kenai Refuge is the only refuge in Alaska which prohibits the use of wheeled game carts. Non-motorized surface transportation for traditional activities, which includes game carts for hunting, are allowed under ANILCA Section 1110(a) in refuges and designated wilderness areas. There is no conservation-based reason for prohibiting the carts. This regulation unnecessarily impedes the public's ability to hunt on the refuge.

- **Recommendation:** Repeal regulation.

7. Government Shutdown Procedure, 50 CFR 25.21(e) and 36.42(a)

In 2013 and 2015, the USFWS closed access to national wildlife refuges in Alaska, except for federal subsistence use, as part of the government shutdown related to funding lapses. The USFWS determined these predicted closures were "emergencies" and used 50 CFR 25.21(e) and 36.42(a) to close refuges without notice, over the objections of the states where refuges were located and inconsistent with actions by other DOI agencies and the Department of Agriculture, which simply closed facilities requiring staff presence and left general lands open for public use and access. Full refuge closures were unnecessary and impacted many members of the public who rely on refuges for priority public uses, including hunting and fishing. Commercial use providers with valid authorizations were also prohibited from accessing refuges, despite remaining subject to extensive existing regulatory requirements for permitted activities and despite USFWS law enforcement staff remaining on duty as essential personnel. State wildlife managers and researchers were prohibited from accessing refuges, impacting activities necessary for the management of fish and wildlife.

- **Recommendation:** Revise closure processes in 50 CFR 25.21(e) and 36.42(a) to clarify that when the federal government is shut down for budgetary concerns that general public lands not in need of direct supervision by staff (public use facilities, visitor centers, administrative offices, etc.) will remain open for access and use by the public.

8. Refuge Management Policies, Service Manual Series 600

The Refuge Management Policies were developed piecemeal following the development of the 1997 National Wildlife Refuge System Improvement Act. These policies have led to an unnecessarily complex regime of layered refuge management guidance which, in places,

conflicts with Congressional intent for management of refuges and the coordination and cooperation with the states, fails to establish a hierarchy between inconsistent policies, lacks a clear process for decision making, and does not provide adequate consultation with state fish and wildlife managers.

- **Recommendation:** Reexamine the Policies in a coordinated context to develop a clear, step-by-step decision-making approach and criteria for refuge managers that recognizes the intent of Congress for the individual states to manage fish and wildlife on all lands, including refuges, and incorporates a process of meaningful consultation with state fish and wildlife managers on federal land management actions. Recommendations for individual policies follow below.

9. Biological Integrity, Diversity & Environmental Health Policy, 601 FW 3 (66 FR 3810, Jan. 16, 2001)

Derived from one of 14 directives in the National Wildlife Refuge System Improvement Act, the Biological Integrity, Diversity and Environmental Health Policy (BIDEH) has been provided a status in refuge management far in excess of the intent of Congress. It has been interpreted by the USFWS to provide wholly discretionary authority to refuge managers to eliminate any uses on refuges the manager unilaterally determines are inconsistent with the policy in any way, including the elimination of congressionally allowed consumptive, priority public uses, such as hunting, fishing and trapping, and state authorized management. It was the underlying justification for the USFWS Alaska wildlife rule that preempted state wildlife management authorities, which Congress repealed in 2017 under the Congressional Review Act. The policy provides no direction to meaningfully involve state fish and wildlife agencies in the implementation of the policy, including the USFWS determination of "consistent to the extent possible" with state law.

- **Recommendation:** The BIDEH Policy should be revoked and then opened for revision by the USFWS, with particular emphasis on recognizing the management authorities of state fish and wildlife managers for management of all fish and wildlife (subject only to specific limitations as provided by Congress, such as is found in the Endangered Species Act, Marine Mammal Protection Act and others), including the setting of population goals and objectives, the ability to regulate methods and means of harvest, and to be required to consult, cooperate and coordinate with the states in a meaningful manner in all aspects of refuge management, including using the advance notice of proposed rulemaking process for considering rulemaking. We specifically request that the revision recognize that sustained yield management as practiced by the individual states through guidance of the North American Model is consistent with the BIDEH Policy.

10. Compatibility Policy, 603 FW 2 and Compatibility Regulations at 50 CFR 29.1

No administrative mechanism is provided to appeal a compatibility determination decision made by a refuge manager and the required expiration dates are frequently ignored. Also, there is no requirement to revisit negative compatibility determinations, such as a Compatibility Determination issued by the Kenai National Wildlife Refuge, which determined specific new

commercial activities on the refuge were incompatible, which will remain in effect indefinitely and preclude consideration of new proposed projects and the use of evolving technology to protect refuge resources.

- **Recommendation:** The Policy should be revised to include an appeals process that extends beyond the refuge manager and allow for reconsideration of categorical negative Compatibility Determinations to determine if new circumstances warrant a different decision.

11. Strategic Growth Policy, 602 FW 5

The Strategic Growth Policy implements aspects of the Refuge Improvement Act providing for expansion of the refuge system, but ignores all provisions in ANILCA which would modify such a policy for Alaska refuges, such as the protections for refuge inholders and prohibitions on unilateral land acquisitions, administrative based studies, and additions to conservation system units. Criteria for lands which would be approved and/or prioritized for procurement and as additions to refuges are highly subjective on a national basis and would be readily met by any area in Alaska. The Policy was objected to by many conservation organizations and western states due to lack of reference for working with the states in application of the policy and no commitments for priority public uses such as hunting or fishing.

- The policy should be withdrawn to correct deficiencies in selection criteria for priority acquisition of land, develop cooperative processes for working with the states and recognize priority public uses, particularly hunting and fishing.

12. Refuge System Mission, Goals, and Purposes Policy, 601 FW 1

This policy authorizes the USFWS to administratively redefine and reprioritize refuge purposes without state fish and wildlife management agency or public involvement.

- Recommendation: Revise the policy to require the USFWS consult with the states when it is not clear from the refuge's enabling legislation or proclamation how or if the refuge purposes should be prioritized for a particular situation.

II. THREATENED, ENDANGERED, AND SPECIAL STATUS SPECIES

A. Working with States

The State of Alaska appreciates the positive efforts made by the USFWS in recent years to work more closely with States to implement the Endangered Species Act (ESA), through avenues such as the ESA Joint Task Force (JTF). Alaska urges the Service to continue to improve implementation of the ESA in partnership with States to fully realize the strong role for States envisioned by Congress.

- **Recommendation:** We ask the Service to invest in cooperative and collaborative work with States by a) maintaining the positive momentum generated by the ESA-JTF; and b)

basing ESA-JTF initiatives on the principles developed jointly by States through the Association of Fish and Wildlife Agencies.

B. Endangered Species Act—Critical Habitat Designation

Since 2013 the USFWS and the National Marine Fisheries Service (NMFS) have pursued several sets of regulatory changes related to listing and designation of critical habitat under the ESA, on which the State of Alaska has submitted extensive comments. On July 25, 2018, the Services proposed rules to revise some of the regulations promulgated in 2016. Among other topics, the 2018 proposals would modify the regulations at 50 CFR Part 424 regarding listing and designation of critical habitat, as well as interagency consultation. We first discuss our responses to the 2013 and 2016 rules, along with remaining concerns that were not addressed. We then summarize the State of Alaska comments on the 2018 proposed rules, which if adopted would address many of the concerns we expressed regarding the earlier rules.

2013 and 2016 Rules

The USFWS and NMFS in August 2013 finalized a joint rule that revised the regulations for impact analyses of critical habitat under the Endangered Species Act (ESA). The USFWS and NMFS (Services) in 2016 issued two related final rules and one policy to revise other portions of the critical habitat regulations, aiming to clarify the process of designating and protecting critical habitat for a listed species. As issued, the revised rules and policy:

- vastly expanded the discretion given to the Secretary;
- minimized input from Alaska and other states;
- worked against State interests within designated critical habitat; and
- limited judicial review of the Services' actions.

The revisions greatly increased the Services' administrative reach in designating critical habitat for listed species, allowing inclusion of areas not occupied by the species at the time of listing. The revised rules allow critical habitat designations that dilute the ecological importance of habitat that is highly critical for species recovery, yet impose unnecessary regulatory burdens on state, municipal, and private lands, often with little to no conservation benefit to the listed species. The revised rules have the potential to increase the number of adverse modification or destruction findings on non-federal lands due to the overall increased acreage of land designated as critical habitat. This in turn will subject more projects on non-federal land to Section 7 consultation.

These four interrelated actions are described below, along with the State's recommendations.

1. Final Rule: Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat (revising a portion of 50 CFR Part 424). 78 Fed. Reg. 53058 (Aug. 28, 2013)

This 2013 rule was revised to clarify 1) the Service process for making economic analysis information available to the public and 2) how the Services will consider the economic and other relevant impacts of critical habitat designations, as well as exclusions from critical habitat. Alaska expressed concerns about the proposed rule in comments submitted on October 16, 2012, and February 6, 2013. In those comments, we took issue with the following provisions:

a) adoption of the "incremental" (or "baseline") approach to economic analysis, which conflicts with the statutory language and legislative intent of ESA Section 4(b)(2);
b) broad Secretarial discretion to determine the scale of economic analysis (similar to the scale of critical habitat designation, discussed above);
c) scope of analysis of "probable" economic impacts, including limiting the analysis to activities subject to Section 7 consultation; and
d) conclusion that the Section 4(b)(2) impact analysis is not judicially reviewable.

Incremental approach:
The Services' adoption of the incremental approach severely limits the scope of economic impacts considered during designation of critical habitat. The burdens imposed by listing the species are considered part of the regulatory "baseline" and are not factored into the economic analysis, which is limited to effects of the critical habitat designation itself. The plain language of Section 4(b)(2) imposes no such limitation on the economic impact analysis. By disregarding impacts that might result from a species listing, versus just those arising from the critical habitat designation, the Services' "incremental analysis" violates the plain language of Section 4(b)(2).

This limited analysis also controverts Congress' intent to require a meaningful economic analysis as part of the critical habitat designation. The incremental approach, by definition, disallows an accurate weighing of the total costs and benefits of critical habitat designation, which occurs only after listing; the two provisions work in tandem. Disallowing impacts from listing minimizes the impacts considered in the exclusion analysis, likely resulting in fewer exclusions. The agencies must consider *all* economic impacts, not merely incremental impacts, to give full effect to Congress's intent that these impacts play a meaningful role in the Services' critical habitat designation decision. Alaska recommends rejecting the "incremental" or "baseline" approach and instead adopting the "coextensive" approach supported by the Tenth Circuit.

Secretarial discretion:
The Services in this rule afforded themselves such broad discretion that the statutory requirement for analysis of impacts is effectively negated. Following this revision, the Services need only consider a narrow range of incremental administrative costs in the economic impact analysis: those related to Section 7 consultations, at a scale considered "appropriate" by the agency. The agencies also maintain that they have complete discretion to refuse to exclude areas from critical habitat, regardless of the outcome of the exclusion analysis, if they elect to engage in one. To the contrary, in Section 4(b)(2), Congress intended that the Service perform a mandatory economic analysis when designating critical habitat.[17]

Scope of analysis:
Section 4(b) does not contain any language limiting the analysis to just those activities requiring Section 7 consultation. Contrary to the analysis in the DOI 2008 memorandum on which the Services rely, designating critical habitat that includes private or state-owned lands does have

[17] *New Mexico Cattle Growers' Ass'n v. FWS*, 248 F. 3d 1277, 1285 (10th Cir. 2001) ("Congress clearly intended that economic factors were to be considered in connection with the CHD."). *See also* H.R. Rep. No. 95-1625, at 17, reprinted in 1978 U.S.C.C.A.N. at 9467 ("Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species.").

economic and other impacts, regardless of whether activities on such property would implicate Section 7. In particular, the designation of property as critical habitat creates a cloud of uncertainty for the owner as to what actions may be taken on that property. Investment in development is less likely to occur on property designated as critical habitat than upon property with no such regulatory impairment. Likewise, an owner of property designated as critical habitat may decline to take any action with respect to the property out of concerns over potential Section 9 liability. Additional economic impacts such as these are "probable" and should be considered by the Services, regardless of whether Section 7 consultation would be implicated.

- **Recommendation:**
  Judicial review: We request that the Services recognize that the decision not to exclude areas from critical habitat is subject to judicial review, and not entirely unreviewable, as currently claimed. Pursuant to the Administrative Procedure Act (APA), an agency *must* respond to "significant comments" that, "if adopted, would require a change in the agency's proposed rule."[18] The Services' failure to provide a meaningful response to a request made by the public or other entity during the designation rulemaking process, such as providing findings regarding the relative costs and benefits of including the area as part of the final designation, would be arbitrary, capricious, and in violation of law. Similarly, if a state or other entity requested that a certain area be excluded from critical habitat but the Service does not exclude the requested area, the agency must respond meaningfully in the final designation by explaining its decision not to exclude the area. Even if the Service rejects a request to exclude an area from critical habitat but provides an explanation for its decision, the agency's decision would be subject to APA review.

  Legislative clarification: In addition, Alaska recommends the statute be revised consistent with the following underlined changes:

  > 4(b)(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts considered shall include impacts to local governments, states and state agencies, and commercial impacts to individuals and business entities. The Secretary's economic assessment shall fully account for administrative costs, delay costs of projects, and uncertainty and risk likely to result from the critical habitat designation. These impacts shall include reasonable direct and indirect costs and may not be limited to merely the incremental cost to the Services in administering the Act. The Secretary shall ~~may~~ exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

[18] *Idaho Farm Bureau Fed'n. v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) (quotes and citation omitted); *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (the failure to respond to comments is grounds for reversal "if it reveals that the agency's decision was not based on consideration of the relevant factors").

The decision by the Secretary to exclude or not exclude any area shall be subject to judicial review.

Related 2018 Proposed Rule Change: Economic Impacts. The Services in July 2018 proposed to modify portions of ESA Section 424.11—Factors for Listing, Delisting, or Reclassifying Species. The proposed rule would remove the phrase, "without reference to possible economic or other impacts of such determination" from paragraph (b). The Services' rationale for so doing is that the change would more closely align with the statutory language: Section 4(b)(1)(A) requires that listing determinations be based "solely on the basis of the best scientific and commercial data available." Although listing determinations would still be based solely on the best available biological information, there may be instances where economic information would be valuable to inform the public about the costs and benefits of a listing decision. Therefore there is no need to prohibit reference to these economic impacts in the listing decision.

In our September 24, 2018, comments on the proposal, the State of Alaska did not object to this proposed revision, because the phrase proposed for removal is unnecessary and overbroad. The statute clearly distinguishes between the criteria for listing and for designation of critical habitat. Listing decisions must be based "solely" on the best scientific and commercial data available. Designation of critical habitat similarly must be based on the best scientific data available but also "after taking into consideration the economic impact" and other impacts of specifying any area as critical habitat.

2. **Final Rule: Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat" (revising portions of 50 C.F.R. § 424). 81 Fed. Reg. 7413–40 (Feb. 11, 2016)**

This 2016 rule defines the physical and biological features considered by the Services when designating lands as critical habitat. The revised rule allows the Services to designate as critical habitat areas that are currently not occupied by the listed species or are considered peripheral or potential future habitat. Alaska maintains that the Service's interpretation is inconsistent with the plain language and intent of the statute to designate as critical habitat to those areas within the species' current range in which essential physical or biological features **are present *at the time of listing***. Section 5(A)(ii) does allow the Secretary to include "specific areas" of unoccupied habitat determined to be "essential for the conservation of the species," a provision that is an exception rather than the rule. But in this revision the Services greatly expand that authority, in the name of climate change, to include in critical habitat areas that clearly do not presently support the species or the essential physical and biological features. The possibility or likelihood of shifting climate regimes and changing habitat conditions is more appropriately addressed during 5-year status reviews and the critical habitat revision process, 16 U.S.C. § 1533(a)(3)(A)(ii) (the Services "may, from time-to-time thereafter as appropriate, revise such designation"), not by attempting to base current designations on unknown and speculative future conditions.

The rule also gives the Services unbounded discretion to determine the scale at which critical habitat should be designated for a listed species. The Service can then justify designating critical

habitat areas that are larger than necessary, especially where data on physical or biological features is unavailable at a smaller scale that is more relevant to the essential habitat needs of the species. Excessively large designations, such as for polar bear critical habitat, do little to help the species yet unnecessarily burden individuals, states, local governments, and Native organizations due to enhanced permitting and mitigation actions that are then required under other laws such as the Clean Water Act. The increase in costs and permitting time periods is a great concern, especially for currently abundant species listed solely on the basis of potential climate-change effects 100 years into the future.

The revised rule also makes no allowance for consultation with affected states prior to critical habitat designation, as directed in Section 7(a)(2) and as repeatedly requested by Alaska.

- **Recommendations:**

i. Critical habitat designations must be based not just on the best available scientific information, but on information that has been a) objectively evaluated and b) judiciously applied to designate that specific area within a species' range that is genuinely *essential* for conservation of the species.

ii. Designation of critical habitat should be made "to the maximum extent prudent and determinable" (as provided by ESA Section 4(a)(3)(A)), not when, at the Secretary's discretion, designation is deemed "appropriate."

iii. The ESA provides for 5-year status reviews and a process for revision of critical habitat designations. 16 U.S.C. §§ 1533(c)(2)(A), (a)(3)(B). The appropriate process to revise critical habitat to address shifting habitat patterns is to base revisions on observed changes in habitat conditions and species, not on speculative future conditions that result in designating ever-larger areas. The Services should commit to periodically reevaluate critical habitat designations, particularly for species listed based on habitat threats associated with climate change.

iv. The definition of "geographical area occupied by the species" should be revised as follows:

> *Geographical area occupied by the species.* The species' range, or an area a species regularly or consistently inhabits and that the Secretary can identify and delineate. ~~An area which may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range).~~ Such areas may include those portions of the range areas used throughout all or part of the species' life cycle ~~even if not used on a regular basis~~ (e.g., migratory corridors and seasonal habitats), ~~and habitats used periodically,~~ but not areas used solely by vagrant or dispersing individuals.

v. The scale of a critical habitat designation should not be left to the Secretary's absolute discretion. Critical habitat should instead be selected and justified at a scale that is a) relevant to the habitat needs of the species (individual territories, etc.), and b) fine enough to demonstrate that the physical or biological features are actually found in each "specific area" of occupied habitat, as required by ESA Section 3(5)(A). Alaska recommends the following revised language for Section 424.12(b):

> > (1) The Secretary will identify, at a scale consistent with the geographical extent of the physical or biological features essential to the species' conservation ~~at a scale determined by the Secretary to be appropriate~~, specific

areas within the geographical area occupied by the species for consideration as critical habitat.
(2) The Secretary will identify, at a scale consistent with the geographical extent of the physical or biological features essential to the species' conservation ~~at a scale determined by the Secretary to be appropriate~~, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species.

vi. Alaska also recommends **adding a new Section 424.12(c)** that requires that designation will be made after consultation with the affected States, as described in the proposed regulatory language below:

§ 424.12 Criteria for designating critical habitat
(c) In designating any area as critical habitat, the Secretary shall consult with affected States (those in which the proposed critical habitat is located or those that may be affected by the designation of the habitat) prior to completing the designation, and the fact of and findings of such consultation shall be addressed in the final rulemaking for the designation.

Related 2018 Proposed Rule Change: Designating Unoccupied Areas. The July 25, 2018 rule proposed to revise section 424.12(b)(2) by restoring the requirement that the Services first evaluate areas occupied for the conservation of the species before designating unoccupied areas as critical habitat. The Services would only consider unoccupied areas to be essential in two situations: when a designation limited to occupied habitat would 1) be inadequate to ensure conservation of the species or 2) result in less-efficient conservation for the species. Here, "efficient" would mean that the "conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species."

An area unoccupied at the time of listing may be considered essential if there is a "reasonable likelihood that the area will contribute to the conservation of the species," if, for example, inclusion of the unoccupied area would allow for future population growth or expansion. This situation may be more likely on public than on private lands, along with the likelihood of a federal nexus requiring section 7 consultation.

The Services' rationale for proposing the change was to reverse the 2016 revision, which eliminated the provision that the Service would "designate as critical habitat outside the geographical area presently occupied by a species **only when** a designation limited to its present range would be inadequate" for conservation. The Services indicated in the 2018 proposed rule that this revision was misconstrued as an intent by the Services to designate large areas of unoccupied habitat. The July 2018 proposal would allow the Services to consider unoccupied habitat to be essential, for example, when a designation limited to occupied habitat would result in a geographically larger but less effective designation.

In our September 24, 2018 comments, Alaska applauded the proposed restoration of the requirement that the Services first evaluate areas occupied by the species before designating unoccupied habitat as critical. We consider the 2016 revision to be inconsistent with the plain language and intent of the statute to designate as critical habitat those areas within the current

range in which essential physical or biological features are ***present*** **at the time of listing**. The 2016 revision was also couched in terms of identifying unoccupied habitat that may become essential in the future as a result of shifting climate regimes, which Alaska pointed out could be addressed during revisions of critical habitat.

We remain concerned, however, that the rule still gives the Services unbounded discretion to determine the scale at which critical habitat should be designated for a listed species (i.e., section 424.12(b)(2): The Secretary will designate critical habitat, **at a scale determined by the Secretary to be appropriate** . . .). As expressed in previous comments on the 2016 change, this approach allows the Services to justify designating critical habitat areas that are larger than necessary, especially where data on physical or biological features is unavailable at a smaller scale, which would be more relevant to the essential habitat needs of the species.

In addition, the revised rule still fails to make any allowance for consultation with affected states prior to critical habitat designation, as directed in ESA section 7(a)(2) and as repeatedly requested by Alaska in previous communications.

- **Recommendations:**

i. Alaska once again recommends adding a new Section 424.12(c), which would require that designation will be made only after consultation with the affected States, as described in the proposed regulatory language below:

> § 424.12 Criteria for designating critical habitat
> (c) In designating any area as critical habitat, the Secretary shall consult with affected States (those in which the proposed critical habitat is located or those that may be affected by the designation of the habitat) prior to completing the designation, and the fact of and findings of such consultation shall be addressed in the final rulemaking for the designation.

Related 2018 Proposed Rule Change: Geographical area occupied by the species. The July 25, 2018 Federal Register notice did not propose a new definition of the phrase "geographical area occupied by the species," which occurs in the statutory definition of "critical habitat" at section 3(5)(A)(i). The Services did, however, seek comments on whether they should modify the definition of this phrase, which was added to the regulations by the 2016 Final Rule, 81 Fed. Reg. 7414 (February 11, 2016)

In our September 24, 2018 comments, the State of Alaska wrote that, as we indicated in our letter of October 9, 2014, Alaska considers the proffered definition to be vague, unnecessarily wordy, and likely to create confusion and uncertainty. The Services in the 2016 Rule did purport to address our comments but misconstrued our intent, as detailed below.

First, the proposed definition refers to "species' occurrences . . . (i.e., range)." The term "range" is a generally accepted biological concept, for which the phrase "species' occurrences" is an awkward substitute. "Range," then, should appear first, followed by an explanation.

Second, the phrase "even if not used on a regular basis" should be deleted. Indeed, the examples given demonstrate regular, *albeit seasonal or periodic*, use of areas considered to be occupied.

Migratory corridors, seasonal habitats, and habitats used periodically are all used "regularly" although they may not be used continuously throughout the year.

This interpretation is also consistent with previous definitions of occupied habitat applied by the Services and accepted by the courts. For example, in *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir. 2010) (emphases added), the court upheld the application of the USFWS' definition of occupied habitat for the Mexican spotted owl as "areas that the owl uses *with sufficient regularity* that it is *likely to be present* during any reasonable span of time." In *CHAPA*, 334 F. Supp. 2d at 120, the USFWS looked for "consistent use" of an area by the piping plover, which it defined to mean "observations over more than one wintering season." Thus, the court in *CHAPA* found that wintering habitat in North Carolina could be designated, even though not used continuously, if it was used consistently during the season in which the species wintered in the area. Thus, regular or consistent use is a hallmark of a finding of occupied habitat, and should be required by the definition, not excluded.

The 2016 Rule interpreted this comment from Alaska's 2014 letter incorrectly, stating that they disagree that the definition of "geographical area occupied by the species" should be limited to:

> [O]nly those areas in which the use by the species is ''regular or consistent.'' As discussed at length in our proposal, we find that the phrase ''geographical area occupied by the species'' should also include areas that the species uses on an infrequent basis such as ephemeral or migratory habitat or habitat for a specific life-history phase. . . . [T]his more inclusive interpretation is consistent with legislative history and *Arizona Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010), and congressional intent.

81 Fed. Reg. 7418. Alaska was in fact making the same argument, by including in "regular or consistent use" seasonal or periodic uses, even if not continuous. Therefore, we suggested removing the phrase "even if not used on a regular basis" because we argue that seasonal or consistent use *does* constitute "use on a regular basis." Including the phrase is therefore redundant and confusing.

Third, Alaska supports the Services' declaration that information that an area used "solely by a vagrant individual" will not be sufficient to find those areas occupied. However, additional clarification is needed given the Services' simultaneous statements in the preamble that indirect or circumstantial information may be used to define the extent of occupied habitat. 79 Fed. Reg. at 27069. In the past, the Services have relied on outdated information about a single individual to identify the extent of occupied habitat. Use of this type of data is inappropriate, particularly where more recent, population-level data is available. The Services should rely on data at the population level, as opposed to data on individual animals.

- **Recommendations:**

ii. Alaska also recommended in our September 2018 comments the same revised language for this definition:

> *Geographical area occupied by the species.* <u>The species' range, or an area within which a species regularly or consistently can be found and that the Secretary can identify and delineate, in consultation with affected states.</u> ~~An~~

~~area which may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range).~~ Such areas may include those portions of the range ~~areas~~ used throughout all or part of the species' life cycle ~~even if not used on a regular basis~~ (e.g., migratory corridors and seasonal habitats), ~~and habitats used periodically,~~ but not areas used solely by vagrant or dispersing individuals.

3. **Final Rule: Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat" (revising 50 C.F.R. § 402.02). 81 Fed. Reg. 7214–26 (Feb. 11, 2016)**

This 2016 rule amended the definition of "destruction or adverse modification of critical habitat," parts of which were invalidated by rulings in the Fifth and Ninth Circuits. The revised definition reads as follows:

> *Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

As with the revised rule on designation of critical habitat, which expanded the Secretary's authority to designate critical habitat in areas not currently occupied by the species, the revised definition expands the scope of Section 7 consultation by the Service regarding alterations to designated critical habitat that would "preclude or significantly delay development" of essential physical or biological features. This provision would allow the Services to evaluate the effects of a proposed project on habitat features that do not presently—and may never—exist. This approach is clearly beyond the intended reach of the statute, which envisions protecting essential habitat features that **are present at the time of listing**. Thus, the revised rule imposes unnecessary regulatory burdens on non-federal landowners.

- **Recommendations:**

i. Rescind the rule and revise the wording consistent with court findings and with the statute. In particular, the phrase "preclude or significantly delay development" should be struck because it requires the Services to speculate regarding potential future conditions that are currently not present in a habitat.

ii. In conducting Section 7 reviews, the Services should concurrently determine and disclose the current "value of critical habitat for the conservation of a species" within the designated habitat. For this purpose, the Services should coordinate with States to develop unambiguous and objective criteria by which to a) evaluate an area's conservation value and b) by which States and the public can evaluate and comment on the Service's determination of value. Indeed, the information the Services expect to consider in the analysis of an area's conservation value is the very information that should inform a critical habitat designation in the first place.

iii. The Services should require the determination of the conservation value of a particular habitat unit for all critical habitat designations. To do otherwise would allow the Services to engage in a *de facto* modification of a critical habitat designation during Section 7

consultations, by determining the conservation value after the critical habitat designation process has been completed—likely to the surprise of consulting parties. This *de facto* approach would also impermissibly preclude the opportunity for public review and comment on the Services' determination of the conservation value of designated critical habitat units and would inject increased regulatory uncertainty into the Section 7 process. Documented changes in the conservation value of habitat should be addressed in periodic re-evaluations of the designation (e.g., during 5-year status reviews) rather than during Section 7 consultations.

Related 2018 Proposed Rule Change: Definition of Destruction or Adverse Modification. This proposed rule would add the phrase "as a whole" to the first sentence and remove the second sentence of the current (i.e., 2016) definition. It also would make a minor clarification to the first sentence by changing "conservation value of critical habitat for listed species" to "the value of critical habitat for the conservation of listed species."

The Services' rationale for the proposed change was to clarify the 2016 rule change. The definition was changed in 2016 to address the findings of cases in the Fifth (2001) and Ninth (2004) Circuits that facially invalidated portions the original definition. 81 Fed. Reg. 7214, February 11, 2016. The changed definition engendered some confusion regarding the scale at which the determination of "destruction or adverse modification" of critical habitat should be made. The addition of the phrase "as a whole" is designed to clarify that the scale of reference for whether an activity destroys or adversely modified critical habitat is over the **totality** of the designated critical habitat area. The Service notes that although "an action may result in adverse effects to critical habitat **within** the action area, those effects may not necessarily rise to the level of destruction or adverse modification of the designated critical habitat." 83 Fed. Reg. 35178, 35180. The size or proportion of the affected area is not determinative. Instead, its **function** is more important, meaning that a smaller, more critical area could result in a destruction or adverse modification finding while impacts to a larger area may not. The emphasis should be "on the value of the designated critical habitat **as a whole** for the conservation of a species, in light of **the role the action area serves with regard to the *function* of the overall designation**" (emphasis added). *Id.* at 35181.

The second sentence from the 2016 rulemaking created substantial controversy. The phrase "preclude or significantly delay the development of the physical or biological features that support" recovery of a listed species was perceived as an attempt by the Services to focus on habitats that may not currently contain features important for conservation. The Services determined that the sentence was unnecessary and caused confusion.

Alaska supports this proposed revision but for reasons somewhat distinct from those expressed by the Services. We view the issue of scale in the determination of "destruction or adverse modification" within critical habitats as working hand in hand with the other aspects of critical habitat designation we discuss in our concurrent comments on the proposed revisions to the listing and critical habitat regulations. We fully recognize the value of designating critical habitat for species at risk, even if the threats at hand cannot be managed through the section 7 consultation processes. The appropriate action for conservation, however, is to designate as critical habitat the **specific areas** within the geographic area occupied by the species that are

truly critical for conservation of the species, particularly for species listed due to climate change. Designating overly large areas as critical habitats dilutes the value overall, by making it less likely that any one project might be found to adversely modify critical habitat as a whole. For example, we maintain that the critical habitat designated by the USFWS for polar bears is overly large. As such, section 7 consultations for activities impacting critical habitat within that area rarely result in additional conservation benefits to the species, but do add an additional, substantial layer of regulation for landowners and permit holders. We do not consider this to be an efficient implementation of the Act.

The current language also clarifies the intent to evaluate whether an action would "appreciably diminish" the value of critical habitat for species conservation. The 2016 version relied on an undefined phrase ("conservation value" of critical habitat) that was not based on objective criteria. The difference is subtle, but meaningful. The Act in section 3(3) defines the term "conserve" quite broadly: "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." This definition necessarily brings the concept of species recovery into the equation where "conservation value" or "species conservation" are being evaluated. As we noted in our October 9, 2014, comments on the proposed previous version, the Services appeared to be importing section 4 recovery standards into the section 7 consultation context. Although the Services must **consider** recovery in the section 7 analysis, recovery is not intended to be the driving factor in evaluating whether an activity jeopardizes a species or adversely modifies critical habitat. he proposed revision addresses our previous concerns on this point.

Regarding removal of the second sentence, Alaska supports this proposed revision, because we agree that the phrase proposed for removal is unnecessary and confusing. In the context of the revisions proposed in 2014, which emphasized and appeared to expand the designation of unoccupied habitat as critical, the implication that any action that would delay the development of important features not present at the time of listing was unacceptable. The revised version clarifies the Services' intent and appropriately simplifies the definition.

4. **Policy: Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (announcing a final policy on exclusions from critical habitat under the Endangered Species Act), 81 Fed. Reg. 7226 (Feb. 11, 2016).**

The final Policy explains the criteria used by the Services to determine whether to exclude areas from critical habitat (81 Fed. Reg. 7226). This policy was issued to "complement" revisions to 50 C.F.R. 424.19, modifying the process and standards for implementing ESA Section 4(b)(2), issued on August 28, 2013 (78 FR 53058; see above). Alaska takes issue with the following elements:

1) the considerable expansion of the Services' discretion in implementing this section;
2) the Services' disavowal of any applicable standards to the Services' exercise of its discretion to exclude areas from critical habitat designation; and
3) the lack of adequate consideration given under the Policy to State interests and conservation efforts.

Section 4(b)(2) consists of two sentences: the first mandates that the Secretary designate critical habitat "on the basis of the best scientific data available *and* after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying *any particular area* as critical habitat" (emphasis added). The second sentence allows the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits" of including the area as part of the critical habitat. According to the Policy, the second sentence "outlines a separate, discretionary process by which the Secretar[y] *may elect* to determine whether to exclude an area from the designation, by performing an exclusion analysis." 81 FR 7227(emphasis added). Based on the word "may" in the second sentence, the Policy heavily emphasizes the discretionary nature of the decision to conduct an exclusion analysis, and the policy outlines "specific categories of information that [the Services] 'often consider' when [they] enter into the discretionary 4(b)(2) exclusion analysis . . . ." *Id.*

Although the Services acknowledge the mandate in the first sentence of 4(b)(2) to consider economic and other impacts, they decline to commit to considering those impacts in the exclusion analysis, discussed in the second sentence, which they maintain is itself discretionary. Instead, the Services in this Policy urge that the Secretary has unbounded discretion to determine:

a) whether to engage in an exclusion analysis;
b) which factors to consider as benefits of inclusion and exclusion;
c) what weight to assign those factors; and
d) whether to exclude an area based on an analysis—*if* the Secretary decides to engage in an analysis.

Given the extensive discretion already afforded by courts to Service expertise, the expansion of discretion in this instance is concerning, particularly where the Services intend to rely on speculative future conditions and possible occupation of critical habitat. The Services not only seek to expand critical habitat into unoccupied areas that may develop habitat features, but also seek to opt out of the impact analyses ordered by Congress.

Congress required (i.e., "The Secretary *shall* designate critical habitat . . .") the Services to look not only at the best scientific data available, but *also* to consider economic and other relevant impacts (i.e., "*and* after taking into consideration the economic . . . and any other relevant impact, of specifying *any particular area* as critical habitat.") Consideration of economic impacts was added in the 1982 ESA amendments, and economics may only be considered as part of designating critical habitat, not listing decisions. Given the obvious potential for economic impacts to states and private individuals from designation of critical habitat, common sense suggests that the reason Congress, in the first sentence, directed that economic and other impacts "shall" be considered was *to inform* the "benefits" analysis discussed in the second sentence.[19]

[19] The Services appear to accept this interpretation:

> An economic analysis serves *to inform* the relevant Service's consideration of the economic impact of a critical habitat designation. That consideration is mandatory under the first sentence of section 4(b)(2) of the Act. That consideration, in turn, informs the Service's decision as to whether to undertake the *discretionary* exclusion analysis under the second sentence of section 4(b)(2) of the Act, and, if the Service chooses to do so, the ultimate outcome of that exclusion analysis.

The Services' very narrow interpretation of this section ignores this common-sense interpretation and adds Secretarial discretion where Congress did not intend it. Although we agree that the Secretary does have discretion on whether ultimately to exclude an area, the exclusion analysis leading to that decision must be a mandatory exercise; to find otherwise renders meaningless the required consideration of "economic . . . and any other relevant impacts" in the first sentence. Further, the Policy ignores the comments of Alaska and other states reminding the Services of the strong role for states envisioned by Congress in ESA implementation. The ESA's language on that point is plain, and the Services recently updated an interagency policy that promotes using the expertise of and collaborating with State agencies on listing and critical habitat designations. Because of its potential for substantial economic effects on state interests and economies, designation of critical habitat, including evaluation of possible exclusions, is a critical ESA process for states to fully participate in. In this vein, the Policy fails to adequately implement Congressional intent in the ESA for the deference, collaboration, and cooperation due to States because the Policy declines to give "great weight" to State conservation programs.

The Policy also fails to address Alaska's concerns that the Services apply different standards to evaluate State or private conservation plans that do not closely follow the ESA model (e.g., plans such as HCAs, CCAAs, and SHAs, designed specifically to benefit listed or candidate species). States commonly establish wildlife conservation regimes based on an ecosystem, versus individual species, approach; this is particularly true for Alaska, where many ecosystems are largely intact. The Services should not discount programs because they are not tailored solely for the benefit of one species. The Services instead should develop evaluation criteria that can be applied to all types of plans, including state plans and programs.

- **Recommendations:** (*see also* related Recommendations for 1, above)**:**

i. The Services should broaden their interpretation of Section 4(b)(2) to *require* a) consideration of economic and other relevant impacts, as well as b) an exclusion analysis based on those impacts, after which the Secretary may exercise due discretion on whether to exclude an area from designated critical habitat. The Service in the final designation must discuss the mandatory exclusion analysis and present its rationale for excluding or failing to exclude an area requested by States.

ii. The Services should revise the Policy to: (1) provide states the same special considerations provided to tribal and national and homeland security lands and requests for exclusions; and (2) commit to give "great weight" to state conservation plans, whether or not those plans have been subject to the Services' review, based on their effectiveness at conserving species. Alaska proposes that the policy be revised to include a separate identification of the States' role in the critical habitat designation process **and include the following specific language:**

> In light of the important role provided for States by the Act in the critical habitat designation process, when we undertake a discretionary exclusion analysis we will always consider exclusions requested by States under section 4(b)(2) of the

78 Fed. Reg. 53067 (August 28, 2013) (emphasis added). Alaska disagrees that the exclusion analysis is itself discretionary.

Act prior to finalizing a designation of critical habitat and will give great weight to State concerns and State conservation plans in analyzing the benefits of exclusion.

iii. When evaluating areas for possible exclusion, the Services should carefully consider the conservation benefits provided by State conservation programs and refuges, critical habitat areas, and wildlife sanctuaries that directly *or* indirectly benefit a listed or candidate species. The Services' primary consideration should be how such programs or plans provide conservation benefits to listed or candidate species. After consideration of all State conservation programs, species-specific or broadly implemented, the conservation benefits of such areas should weigh heavily against designation of the area as critical habitat, and weigh heavily in favor of exclusion.

5. Clarification of ESA Section 3(5)(A)(C)[20]

The State of Alaska requests clarification on the Service's interpretation of this section, which provides that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." This provision seems to be intended to allow for protection of the entire occupied range for a species, such as an endemic plant that occurs only in a small area, which may require special management in its entirety. Yet the Services have designated or proposed critical habitat for wide-ranging species (e.g., polar bear, ringed seal) that encompasses virtually the entire range of the species.

Overly large critical habitat designations dilute the conservation value of habitats that are genuinely critical to species conservation, while increasing the regulatory burden on entities that seek to use or develop areas within the designated critical habitat. This creates a serious inconsistency of adding regulatory costs and burden that not only exceed benefits but actually diminish the conservation value of the critical habitat designation.

Expansive designations of critical habitat decrease the potential of a destruction or adverse modification finding, because such a finding is based on "appreciably diminish[ing] the conservation value of critical habitat for a listed species." The conservation value of critical habitat is based on the whole of critical habitat. Therefore, the larger the designation the less likely a habitat alteration will cross the threshold of diminishing the conservation value of the entire critical habitat designation.

Large critical habitat designations increase regulatory burden by adding a permitting layer and costs to permitting activities in a designated area. The additional costs include lengthening the time to attain all necessary permit approvals, work associated with evaluating potential impacts to critical habitat, and the potential for higher mitigation costs for habitat impacts based on the additional value agencies place on "critical" habitat.

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[20] 16 U.S.C. § 1532(5)(A)(C).

- **Recommendation:** The Services should clarify that critical habitat designations must not include most or even a large proportion of the habitat used by wide-ranging species.

6. ESA Definition and Application of "Foreseeable future"

The phrase "foreseeable future" is found in the definition of "threatened species," which means "any species which is likely to become an endangered species within the foreseeable future in all or a significant portion of its range," 16 U.S.C. §1533(20), but is otherwise not defined. The Services' interpretation of "foreseeable future" has been inconsistent and has led to listings of species before they decline or become depleted, especially for climate change-based listings. This practice preempts state management authority for wildlife populations that are not depleted at the time of listing. The Service's approach has four primary flaws:

1) Lack of full assessment of uncertainty in variables under consideration;
2) Lack of a science-based or mathematical framework for considering what is "foreseeable." Whether a threat is "foreseeable" should be considered in terms of probability or forecasting theory, with a specified policy regarding a probability threshold that should be considered "foreseeable" (e.g., an event is foreseeable when one can reasonably expect the result 8 times out of 10);
3) Failure to fully consider any limitations on predictability (i.e., barriers beyond which forecasting methods cannot reliably predict); and
4) Foreseeability should not be defined for each threat alone, but for the combination of a) the foreseeability of a *threat* along with b) the foreseeability of the *biological response* to that threat.

- **Recommendations:**

i. One solution within the current statutory framework would be to establish a joint Service policy or a regulation that:
   a. Defines foreseeable future in terms of a forecast probability that is significantly different from 50:50 (e.g., one can reasonably expect the result 8 times out of 10);
   b. Provides a framework to fully consider and discuss all sources of uncertainty in listing decisions, including additive and multiplicative effects of non-independent and independent sources; and
   c. Identifies any potential limitations on predictability (e.g., random events or errors that compound or limit the ability to make accurate predictions).

ii. Potential statutory changes to address the issue include the following:
   a. Define "foreseeable future" to mean the result can be predicted the majority of the time.
   b. Require a scientifically based explanation of how the agency fully considered uncertainty in the calculus of the foreseeable future, both for threats and for projected biological responses to threats.
   c. Replace "within the foreseeable future" in the threatened species definition with a reasonable specified time frame – e.g., "within 15 years."
   d. Provide that species cannot be listed unless they are depleted (for example, defined as a fraction of carrying capacity or abundance).

e. Include language to constrain the foreseeable future analysis to 1-3 generations for long-lived species.

Related 2018 Proposed Rule Change: Foreseeable Future. The July 25, 2018 rule proposed to add a new paragraph to section 424.11 that sets forth a framework for how the Services will consider the 'foreseeable future" phrase in the definition of 'threatened' species (i.e., "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"). The proposed framework is based largely on a 2009 Solicitor's Opinion on the subject of "foreseeable future."

The proposed revision would clarify that the term foreseeable future "would extend only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction [i.e., threats] in the foreseeable future are probable." In listing decisions, the foreseeable future would be described on a case-by-case basis, considering the species' life-history characteristics, threat projection timelines, and environmental variability. The decision need not identify a specific period of time, but "may instead explain the extent to which [the Service] can reasonably determine that **both** the future **threats** ***and*** the **species' responses** to those threats are **probable**" (emphases added).

The Services' rationale for the proposed change is that "foreseeable future" is not defined in the Act. Thus, for each species, the Services must review the best scientific and commercial data available regarding the likelihood of extinction over time, and then determine, with each status review, whether the species meets the definition of an endangered species or a threatened species.

- The proposed rule cites *In Re Polar Bear* D.C. Circuit opinion: the USFWS "determines what constitutes the 'foreseeable' future on a case-by-case basis in each listing decision" based on how far into the future the available data allow for reliable prediction of effects to the species from key threats.
- Clarifies that " 'reliable' does not mean 'certain;' it means sufficient to provide a reasonable degree of confidence in the prediction," and is not necessarily used in a statistical sense. "The Services assess the best available data for each threat and the degree to which reliable predictions can be made . . . [t]he amount or quality of data available is likely to vary . . .; consequently, the Services may find varying degrees of foreseeability with respect to the multiple threats and their effects on a particular species . . .[T]he final conclusion is a synthesis of that information."
- Predictions may be based on quantitative population viability models and modelling of threats and may rely on the exercise of professional judgment of experts. In instances where predictions are based on modelling, "the time horizon presented in these analyses does not necessarily **dictate what constitutes the 'foreseeable future'** or **set the specific threshold for determining *when* a species may be in danger of extinction. *Rather, the foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction and avoid speculation and preconception."*** (emphases added).

The State of Alaska **concurs** with the proposed approach to clarifying how the Services will determine the term "foreseeable future" in listing decisions, which addresses several of our

concerns with the Services' previous approach. **The proposal does not go far enough, however.** We have previously commented to the Services that analyses of foreseeable future should formally and fully consider and discuss **all sources of uncertainty and identify any potential limitations on predictability**.

The proposed revisions take positive steps toward addressing our concerns regarding uncertainty, including separate evaluations of the likelihood, timing, and magnitude of identified threats, as well as environmental variability, but they do not go far enough. We appreciate, for example, that the proposed revisions make clear that "regardless of the type of data available . . . the key to any analysis is a clear articulation of the facts, the rationale, and conclusions regarding foreseeability," and that "the Services must be able to determine that the conditions potentially posing a danger of extinction in the future are probable." **We recommend, however, a more objective, formalized approach to address this critical factor.**

We agree strongly with the revisions' emphasis on **evaluating the probability of both a) the *threats* facing a species as well as b) the species' *responses* to those threats.** We caution, however, that when analyzing the presences and effects of threats to the listing entity, the listing decision must evaluate the species response **at the population level, as defined.** Appropriate listing entities include the species, subspecies, or distinct population segments. Threats faced by one segment of the population do not necessarily result in a negative response by the population as a whole, particularly a response that would warrant listing as threatened or endangered.

We also agree strongly with the admonition that **the time horizon used by population or other modelling (e.g., climate modelling) efforts should not determine the foreseeable future** determined by the agency or set an extinction threshold. This is particularly relevant in the use of IPCC models to evaluate habitat loss for ice-associated species facing threats due to climate change.

The outcomes of habitat modelling exercises are but one of several factors in the determination of whether and over what timeframe a species should be listed under the Act. In making a listing determination, it is critical to evaluate projected habitat losses, in conjunction with the level of associated uncertainties over time, ***along with other factors*** such as **current population level** and **health status** of the population. As the Ninth Circuit held in *Defenders of Wildlife v. Norton*[21], "it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing. A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat . . .." The likelihood of modelling projections and associated levels of uncertainty, along with the current status of the population, are critical considerations. This is especially true for species such as the polar bear and ice seals, which presently have abundant, healthy populations but are listed due to projected habitat losses due to climate change decades into the future.

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[21] *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001). *See also Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) ("[t]he identification of a downward trend in habitat by itself is not sufficient to establish that a species should be listed under the ESA"); U.S. Dep't of the Interior, USFWS, Memo from Acting Director Daniel M. Ashe to Polar Bear Listing Determination File (Dec. 22, 2010) at 5 ("Range reduction in and of itself does not necessarily mean that a species is in danger of extinction . . ..")

C. Marine Mammal Protection Act

1. Definition of *Authentic native articles of handicrafts and clothing;* 50 CFR §18.3

The Marine Mammal Protection Act (MMPA), 16 U.S.C §1371(b), exempts Alaska Natives from the moratorium on taking and importing of marine mammals and marine mammal parts if such taking is done for subsistence purposes or is done for purposes of creating and selling authentic native articles of handicrafts and clothing. The MMPA defines the term "authentic native articles of handicrafts and clothing" to mean items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing and painting. In implementing the MMPA, the U.S. Fish and Wildlife Service promulgated regulations incorporating the term "significantly altered from their natural form" into the definition of "authentic native articles of handicrafts and clothing" (50 CFR §18.3). This definition has led to confusion and enforcement concerns among Alaskan Native harvesters of sea otters and has impeded what would otherwise be lawful harvest of sea otters and commerce in products made from sea otter pelts, including raw and tanned sea otter pelts, which are traditional Alaska Native handicraft, clothing, and trade products. USFWS reviewed this matter in 2013, after hearing concerns from Alaska Natives and other residents of coastal Alaskan communities, and chose not to amend the definition.

- **Recommendation:** USFWS should amend the definition of "authentic native articles of handicrafts and clothing" (50 CFR §18.3) and repeal the term "significantly altered from their natural form" so the definition more closely matches that contained in the Marine Mammal Protection Act.

2. Conflicting provisions of MMPA and ESA (multiple sections)

The MMPA and the ESA are similar in several ways. Congress enacted the MMPA in 1972 to prohibit the "take" of all marine mammals in U.S. waters and by U.S. citizens on the high seas because of concerns that some marine mammal species or stocks may be in danger of depletion or extinction as a result of human activities. Congress enacted the ESA the following year to conserve and recover endangered and threatened species, also primarily through restrictions on take.

The two statutes provide comprehensive protection against unauthorized take of covered species, employing almost identical definitions of "take."[22] Both statutes were amended to provide for

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[22] "Take" is defined under the MMPA as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 U.S.C. 1362) and further defined by regulation (50 CFR 216.3) as "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal." Under the ESA,

exceptions to take prohibitions through similar "incidental take" permitting processes. Both statutes provide for a recovery process: a Conservation Plan, under the MMPA, and a Recovery Plan, under the ESA. The principal difference between protections under the MMPA and ESA is the mandatory designation of critical habitat under the ESA, which adds an additional regulatory process by requiring agencies to engage in "Section 7" consultation for projects with a federal nexus.
Marine mammals such as polar bears, bearded seals, and ringed seals are for the most part not "depleted" in the common sense. Therefore, required processes such as defining objective criteria for "recovery" under the ESA or implementing conservation actions to maintain an Optimum Sustainable Population under the MMPA are nonsensical and duplicative. For the polar bear, for example, to fulfill both the ESA requirement for a Recovery Plan along with the MMPA requirement for a Conservation Plan, the USFWS produced a "Conservation Management Plan." In that plan, the Service acknowledged that the ESA was neither designed address habitat loss due to climate change nor an appropriate vehicle for doing so.

Thus, when a marine mammal species—previously protected only under the MMPA—is listed under the ESA, the two statutes create overlapping and uncoordinated requirements. Most problematic is the situation, unique to Alaska, where currently abundant and widespread marine mammal species are listed under the ESA on the basis of anticipated future habitat loss due to climate change. In that situation, several MMPA provisions, such as maintaining an "optimum sustainable population" level, are simply unworkable or not scientifically ascertainable.

Conflicts in implementation can be even greater in the permitting context. For example, when a marine mammal species is listed as "threatened" or "endangered" under the ESA, provisions from *both* the MMPA and ESA are triggered to evaluate and authorize incidental take, resulting in uncoordinated regulatory overlap. Under the MMPA, an incidental harassment authorization (IHA) or Letter of Authorization (LOA) is used to authorize incidental take. Similarly, an incidental take statement (ITS) can also be authorized under the ESA. Generally, an IHA/LOA is required to obtain an ITS – since both outline the conditions for authorizing take of species in a project – but the ITS is also a critical component of Section 7 consultation, meaning it is required for multiple permits and activities beyond those that require an IHA/LOA. The delays and regulatory burden created by interaction between the two statutes is substantial.

Further, listing of a marine mammal species under the ESA automatically triggers "depleted" and "strategic stock" designations under the MMPA. Provisions for "depleted" status under the MMPA then apply, such as maintaining an Optimal Sustainable Population and developing a Conservation Plan. These requirements overlap with similar provisions of the ESA, such as developing a Recovery Plan. Thus, if a marine mammal, protected from take since 1972 under the MMPA, becomes listed and protected from take under the ESA, overlapping requirements for conservation and recovery become applicable, making compliance redundant. Additional requirements, such as Section 7 consultation, make compliance even more challenging.

"take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

- **Recommendations:**

i. USFWS and NMFS should, in coordination with affected States, convene a joint working group to evaluate the areas of overlap between the MMPA and ESA. The working group should develop a joint policy or statutory process to minimize overlapping regulatory requirements for species that are protected by both the MMPA and ESA.

ii. The ESA should be modified to provide for species that may be of conservation concern due to projected future habitat loss due to climate change. Options may include a separate ESA category for climate-concern species, with accompanying monitoring and recovery planning requirements.

D. Migratory Bird Treaty Act

1. Conflict of Migratory Bird Treaty Act and ESA: Incidental Take of Steller's Eider by Alaska Natives under the MBTA

The intentional or unintentional take by an Alaska Native of a Steller's eider (listed as threatened under the Endangered Species Act) would be allowed under the ESA due to the Section 10(e) exemption for Alaska Natives that allows the taking of listed species primarily for subsistence purposes. The same unintentional take of a Steller's eider by an Alaska Native while engaged in lawful subsistence hunting during a season prescribed by FWS under the Migratory Bird Treaty Act (MBTA), can be and has been prosecuted under the MBTA. The MBTA needs an incidental take provision for the unintentional take of threatened species by Alaska Natives.

Section 10(e) of the ESA provides an exception for Alaska Natives from the section 9 provisions against "take" of threatened or endangered species, "if such taking is primarily for subsistence purposes." However, if the FWS determines that take of threatened or endangered species by Alaska Natives "materially and negatively affects" a threatened or endangered species, FWS may promulgate regulations to proscribe take of that species within geographic and seasonal bounds. Any such regulations "shall be removed as soon as the [FWS] determines that the need for their impositions has disappeared." 16 USC § 1539(3)(4). There is currently no regulatory prohibition against take by an Alaska Native of the "threatened" Steller's eider under the ESA, because there is no evidence that the limited take in the open subsistence season has "materially and negatively" affected the species.

For the same species, however, the MBTA imposes a "strict liability" approach for an unintentional taking by an Alaska Native while lawfully engaged in hunting for other species during an open subsistence season. In at least one instance, an Alaska Native was prosecuted by the FWS for the unintentional, accidental act of taking one bird.

Court cases involving prosecution of take under the MBTA have upheld the strict liability approach when an otherwise lawful act is the "proximate cause"—a foreseeable consequence—of that activity. Here, legal subsistence harvest of other species by Alaska Natives creates a certain likelihood that threatened species may inadvertently be shot—i.e., the taking is foreseeable. But given the exception for Alaska Natives for subsistence harvest of this species under the ESA, the statute that applied the "threatened" status, and the objectively low number of

individuals taken in the subsistence seasons, the MBTA should be made consistent with the ESA on this point, to allow for unintentional or incidental take by Alaska Natives engaged in subsistence hunting activities.

- **Recommendations:**

i. The MBTA should be amended to include an incidental take provision for the unintentional take of threatened species by Alaska Natives.

ii. The ESA and MBTA should be reconciled by amendment or regulation to avoid conflicts among the exceptions from the provisions against "take" of threatened or endangered species, if such taking is primarily for subsistence purposes or incidental to otherwise lawful hunting activity.