

LANDYE BENNETT BLUMSTEIN LLP
701 WEST EIGHTH AVENUE, SUITE 1200
ANCHORAGE, ALASKA 99501
TELEPHONE (907) 276-5152, FAX (907) 276-8433

John M. Starkey (ABA No. 8611141)
Landye Bennett Blumstein LLP
701 West Eighth Avenue, Suite 1200
Anchorage, Alaska 99501
Telephone (907) 276-5152
Facsimile (907) 276-8433
jskys@lbblawyers.com
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NINILCHIK TRADITIONAL COUNCIL,)
)
)
Plaintiff,)
)
)
v.) Case No. 3:15-cv-_____
)
TIM TOWARAK, in his official capacity as)
Chairman of the Federal Subsistence Board;)
SALLY JEWELL, in her official capacity as)
Secretary of the U.S. Department of Interior,)
and TOM VILSACK, in his official capacity) **COMPLAINT**
as the Secretary of the U.S. Department of)
Agriculture,)
)
Defendants.)

INTRODUCTION

1. This action seeks relief under section 807 of the Alaska National Interests Lands Conservation Act (ANILCA), 16 U.S.C. § 3117, as a result of the Federal Subsistence Board's (FSB) failure to provide the members of Ninilchik Village, a federally recognized tribe, represented through its governing body, the Ninilchik Traditional Council (NTC) with the subsistence opportunity and priority necessary to provide for tribal members' subsistence uses as mandated by section 804 of ANILCA, 16 U.S.C. § 3114.

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JURISDICTION AND VENUE

2. The Court has jurisdiction over this action pursuant to section 807 of ANILCA, 16 U.S.C. § 3117; the Administrative Procedure Act (APA), 5 U.S.C. §§ 706(1), 706(2)(A), (E); 28 U.S.C. § 131 (federal question); and 28 U.S.C. § 1362 (Indian tribes).

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 3117.

4. Plaintiff has exhausted all administrative remedies.

PARTIES

5. Ninilchik Village is a federally recognized Indian tribe. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4,748, 4,753 (Jan. 29, 2014). Plaintiff, NTC, presides over tribal governance affairs and represents the interests of its tribal members, the majority of whom comprise the community of Ninilchik Village. One of NTC's central purposes is to protect the customary and traditional subsistence hunting and fishing rights of Ninilchik Village's tribal members. The continued opportunity and priority for subsistence salmon fishing is essential to the physical, economic, traditional and cultural existence of the NTC tribal community and tribal families and individuals. Through this action, NTC seeks to protect the continuation of its customary and traditional subsistence way of life, as protected through Title VIII of ANILCA.

6. Defendant Tim Towarak is the Chairman of the Federal Subsistence Board and in that capacity is responsible for implementing Title VIII of ANILCA. He is sued in his official capacity.

7. Defendant Sally Jewell is the Secretary of the U.S. Department of the Interior. Section 804 of ANILCA, 16 U.S.C. § 3114, imposes a nondiscretionary duty on Defendant

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Secretary of the Interior to take appropriate administrative action to provide an opportunity and priority for subsistence uses of fish and wildlife on federal public lands for rural residents. She is sued in her official capacity.

8. Defendant Tom Vilsack is the Secretary of the U.S. Department of Agriculture. Section 804 of ANILCA, 16 U.S.C. § 3114, imposes a nondiscretionary duty on Defendant Secretary of Agriculture to take appropriate administrative action to provide an opportunity and priority for subsistence uses of fish and wildlife on federal public lands for rural residents. He is sued in his official capacity.

FACTS

9. NTC's ancestors and tribal members have engaged in and depended on subsistence fishing since time immemorial. Ninilchik Village was established by NTC tribal ancestors. The Village is located on the southern Kenai Peninsula. The community of Ninilchik is located within the Village's traditional territory.

10. Ninilchik tribal members and other persons permanently residing in the community of Ninilchik are "rural residents" under ANILCA. The FSB determined that the rural residents of Ninilchik have customary and traditional uses of all fish in the Kasilof and Kenai River Drainages. Significant parts of these drainages lie within or adjacent to the boundaries of the Kenai National Wildlife Refuge and are "public lands" subject to the opportunity and priority for subsistence uses mandated by Title VIII of ANILCA. Accordingly, NTC tribal members permanently residing in the rural community of Ninilchik are entitled to ANILCA-based subsistence fishing rights on federal waters within the Kenai drainage, including three established fisheries: Russian River Falls, Kenai River Mile 48, and Moose Range Meadows.

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11. Along with the rural communities of Hope and Cooper Landing, Ninilchik shares an annual subsistence allocation of salmon from the Kasilof and Kenai federal fisheries: 1,000 late-run Chinook salmon, 2,000 Pink salmon, 3,000 Coho salmon, and 4,000 Sockeye salmon. Due to restrictive federal subsistence regulations limiting methods and means of harvest, and restrictive and arbitrary federal in-season subsistence management actions such as complete closures of fishing opportunity, NTC's tribal community has been unable to harvest this subsistence salmon allocation and has suffered hardship and irreparable harm.

Background of Fishing Management on the Kenai River

12. The Kenai River is one of the most politically divisive bodies of water in Alaska. Sport, commercial, and subsistence interests all compete for opportunities to fish for all species of salmon in the state and federal public waters of the Kenai River. Despite ANILCA's mandate to prioritize rural residents' subsistence opportunities on federal public lands, NTC's subsistence opportunities and needs have been consistently subrogated to commercial and sport fishing interests in the Kenai River. For example, on information and belief, in 2013, 20,176 Chinook salmon were harvested from the Cook Inlet Area, which includes the Kenai and Kasilof Rivers. Subsistence fisheries accounted for 0% of the Chinook salmon harvest. Meanwhile, sport fisheries harvested 14,592 Chinook salmon, commercial fisheries harvested 5,399 Chinook salmon, and educational and personal use harvests took 185 Chinook Salmon. Similar disproportional opportunity and harvest exists for red salmon and other fish stocks on the Kenai Peninsula.

13. In *McDowell v. State*, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court declared that ANILCA's rural priority violated the equal access clauses of the Alaska Constitution, and prohibited the State from managing fish and wildlife resources for a rural priority.

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Consequently, the federal government became responsible for implementing ANILCA's subsistence priority on federal public lands pursuant to 16 U.S.C. § 3115(d), effective July 1, 1990. The U.S. Departments of Interior and Agriculture are currently responsible for implementing ANILCA on the public lands that comprise the Kenai National Wildlife Refuge.

14. Federal subsistence fishery management for the Kenai River is implemented largely through an extremely broad and largely unchecked delegation of authority from the FSB to the Kenai Refuge manager. The Refuge is delegated authority to make in-season decisions for all essential aspects of subsistence opportunity and harvest, including the authority to completely close all subsistence fishing for a salmon stock. Fishing closures are presumable supposed to be based on a demonstrated need to conserve a salmon stock, and subsistence fishing is to close, if the priority for subsistence uses is followed, only after all other non-subsistence takings of salmon have been eliminated. Salmon escapement goals established by the State of Alaska Department of Fish and Game (ADFG) and the Alaska Board of Fisheries serve as the foundation for federal in-season salmon management actions for the Kenai drainage.

15. Chinook salmon return to the Kenai River watershed to spawn in two distinct waves, referred to as the "early run" and the "late run." Early-run Chinook salmon return to the Kenai River in May, and spawn throughout the Kenai River during May and June. Late-run Chinook salmon return to the Kenai River after the beginning of July. The late-run lasts through till the end of August, after which the Chinook salmon spawn throughout the Kenai River.

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16. Early-run Chinook salmon are managed under the State of Alaska Kenai River and Kasilof River Early-run King Salmon Management Plan. 5 AAC 57.160. These regulations set the optimal escapement goal (OEG) for early-run Chinook salmon at 5,300-9,000 fish and authorize the Commissioner to liberalize sport fisheries downstream from the outlet of Skilak Lake if the spawning escapement is projected to fall within the optimal escapement goal. 5 AAC 57.160(b), (d)(3).

17. Late-run Chinook salmon are managed by a separate State management plan, the Kenai River Late-Run King Salmon Management Plan. 5 AAC 21.359. These regulations set the sustainable escapement goal (SEG) for late-run Chinook salmon at 15,000-30,000 fish. 5 AAC 21.359(b). These State regulations also permit liberalization of the Kenai River sport fisheries if certain late-run Chinook salmon escapement benchmarks are met by a certain date. *See* 5 AAC 21.359(c)(1)-(3).

Administrative Consideration of NTC's Proposed Subsistence Fishery Regulations

18. In January 2014, the FSB published a Notice of Public Rule Making and solicited proposals for federal fishing regulations for the 2015-2017 regulatory cycle. 78 Fed.Reg. 1791 (January 10, 2014). In response to this notice, NTC submitted two proposed fishing regulations on March 28, 2014. These proposals sought to amend existing subsistence regulations to authorize residents of Ninilchik to operate two community subsistence gillnets: one in the federal public waters of the Kenai River, and a second gillnet in federal public waters of the Kasilof River. The proposed gillnets were a means to provide the opportunity necessary to meet Ninilchik's subsistence uses of salmon.

19. Pursuant to section 805 of ANILCA, 16 U.S.C. § 3115, Regional Advisory Councils (RACs) for each subsistence resource region are authorized to provide opinions and

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recommendations to the FSB on matters related to subsistence taking and uses of fish and wildlife resources on federal public lands. 50 C.F.R. § 100.11(a), 50 C.F.R. § 100.11(c)(1)(vi)(D) and (xi). RAC recommendations are due deference by the FSB as long as they are: 1) supported by substantial evidence; 2) consistent with recognized principles of fish and wildlife conservation; and 3) not detrimental to the satisfaction of subsistence needs. 16 U.S.C. § 3115(c), 50 C.F.R. § 100.11(c)(3).

20. The Southcentral RAC (SCRAC) has authority to recommend hunting and fishing regulations for subsistence uses within the Kenai National Wildlife Refuge. On October 15 and 16, 2014, the SCRAC met and considered NTC's proposals. FP 15-10 proposed a community subsistence gillnet to harvest Chinook, Sockeye, Coho, and Pink salmon in the federal public waters of the Kenai River north of and including the Kenai River drainage within the Kenai National Wildlife Refuge from June 15 through October 31 of the 2015 regulatory season. FB 15-11 proposed authorizing a community subsistence gillnet to harvest all species of salmon in the federal public waters of the Kasilof River during the same season. NTC's proposals included rigorous conservation requirements, including net size restrictions, net location restrictions, and the development of an operational plan, identifying how the net would be operated and by whom. The proposals also included season start and end dates, bag limits, annual and seasonal household limits, and a 72 hour reporting period to allow for rapid special management actions if the season limit was met.

21. When the SCRAC considered NTC's proposed regulations, its deliberations were informed by a substantial amount of biological, historical, and technical information presented through public comments and agency presentations. Kenai National Wildlife Refuge in-season manager Jeffry Anderson and staff from the Office of Subsistence

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Management (OSM) provided a detailed analysis of each proposal, including each agency's biological and regulatory concerns. After thoughtful deliberation, the SCRAC unanimously recommended both of NTC's proposals to the FSB for approval, based on a record demonstrating the proposals were necessary to provide NTC with a meaningful preference to meet its subsistence needs, and that a determination that the proposed gillnet fisheries did not violate recognized principles of fish conservation.

22. Pursuant to its powers and duties specified at 50 C.F.R. §100.10(d)(4)(xv), the FSB reviewed both of the SCRAC recommendations during a public meeting in Anchorage on January 21 and 22, 2015. FSB deliberations were informed by substantial evidence presented to it through public and agency comments. Kenai National Wildlife Refuge in-season manager Jeffry Anderson, as well as staff from the Office of Subsistence Management (OSM), testified about their concerns with the proposed regulations. Their testimony discussed potential biological impacts a gillnet could have on Chinook salmon, including potential effects of a gillnet on identified Chinook salmon spawning grounds in both the Kenai and Kasilof River; the effects of expanding subsistence opportunities in federal waters of the Kenai River in light of recent low escapement for early and late-run Chinook salmon; and whether it would be possible to develop an operational plan that identified a window of time to use a gillnet while avoiding unintended mortality, and incidental catch of prohibited species, such as steelhead trout and under-sized Chinook salmon.

23. The FSB determined that despite the biological and conservation concerns raised by FWS and OSM, the proposed community gillnets did not violate recognized principles of fish and wildlife conservation. The FSB voted to recommend the adoption of federal regulations

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authorizing the use of community subsistence gillnets in the federal public waters of the Kenai and Kasilof Rivers.

24. On May 18, 2015, after a five month notice and comment period, the Secretaries of Interior and Agriculture promulgated final regulations authorizing Ninilchik residents to harvest all special of salmon with a gillnet in the federal public waters of both the Kenai and Kasilof Rivers. 80 Fed.Reg. 28192 (May 18, 2015). The final regulation set the season date for both subsistence fisheries from June 15 through August 15, 2015, and provided that one registration permit would be available and would be awarded by the federal in-season manager, based on an operational plan that included set fishing times, descriptions of how fish would be allocated among residents, persons responsible for managing the gillnet, and rigorous record-keeping provisions. While the final regulation specified an exact location for a gillnet on the Kasilof River, it did not specify an exact location for a gillnet on the Kenai River. 50 C.F.R. § 100.27(e)(10)(J).

**The Failure to Implement a Gillnet Fishery for the Kenai River and the Institution of
Emergency Closures on the Kenai River**

25. The FSB delegated its in-season authority to manage the federal subsistence fishery in the Kenai National Wildlife Refuge to the Refuge, and in this case to in-season manager Jeffry Anderson. The delegated in-season authority included authority to open or close subsistence fisheries. 50 C.F.R. § 100.10(d)(6). Mr. Anderson was also delegated authority to review NTC's operational plans for the Kenai and Kasilof gillnet fisheries and issue permits after review.

26. On May 27, 2015, NTC submitted an operational plan to Mr. Anderson for community subsistence gillnet fisheries in the Kasilof and Kenai Rivers. On June 9, 2015,

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before substantively reviewing either plan, Mr. Anderson informed NTC that he was preparing an emergency closure of the federal subsistence fishery for early-run Chinook in all federal public waters in the Kenai River downstream from Skilak Lake, and that the closure would prohibit the use of a gillnet in those waters. The reason given for the pending closure order was the need to conserve early-run Chinook salmon.

27. One week later, on June 17, 2015, Mr. Anderson issued an emergency special action closing the early-run Chinook fishery, prohibiting all subsistence fishing for early-run Chinook salmon in federal public waters downstream from the outlet of Skilak Lake from June 18 through August 15, 2015. 10 KS 01-15 (June 17, 2015). The closure prohibited the use of dip nets, rod and reel, and gillnets to target early-run Chinook salmon.

28. The federal emergency closure dovetailed with two emergency closures established by ADFG. The first emergency closure, established by an emergency order issued in February 2015, concerned early-run Chinook salmon and closed all sport fishing for early-run Chinook salmon in state waters of the Kenai River from the mouth of the river upstream to the outlet of Skilak Lake. This order also closed sport fishing for early-run Chinook salmon from July 1, 2015 through July 31, 2015 from 300 yards downstream of Slikok Creek to upstream at the outlet of Skilak Lake. (EO 2-KS-1-05-15). The second emergency closure, established by an emergency order issued on June 25, 2015, prohibited the use of bait or multiple hooks to take late-run Chinook salmon on the Kenai River from its mouth upstream to the outlet of Skilak Lake from July 1 through July 31, 2015. (EO-2-KS-1-35-15).

29. On June 30, 2015, the Kenai River early-run Chinook salmon optimal escapement goal was achieved. The estimated escapement of 6,190 early-run Chinook salmon surpassed the low-end range of the OEG, 5,300, by more than 800 fish. Mr. Anderson maintained the

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closure of the federal subsistence Chinook fishery despite the fact that the escapement goal for early-run Chinook was met.

30. Throughout June and July, NTC continued soliciting feedback from Mr. Anderson on its proposed community gillnet operational plans. Mr. Anderson's commentary on NTC's operation plan for the Kasilof River community subsistence gillnet was slow and delayed. Mr. Anderson refused to provide NTC with any feedback on its plan for the Kenai River community subsistence gillnet, advising NTC that it should complete the Kasilof River gillnet operational plan first.

31. On July 13, 2015, six weeks after receiving NTC's operational plan and less than a month before the closure of the 2015 federal subsistence fishing season, Mr. Anderson approved the operational gillnet plan for the Kasilof River and issued the permit to NTC.

32. On July 24, 2015, ADFG rescinded its emergency closure order for the Kenai River, previously issued on June 25, 2015, because the return of late-run Chinook salmon was projected to exceed the amount needed to meet escapement goals and was strong enough to allow for a harvest in the sport fishery. Consequently, ADFG opened the sport fishery for late-run Chinook salmon from the mouth of the Kenai River upstream to 300 yards downstream of Slikok Creek. EO-KS-1-46-15. ADFG also opened the use of bait and scent sport fishing for late-run Chinook salmon in the Kenai River from its mouth upstream to the outlet of Skilak Lake. EO-KS-2-46-15.

33. Notwithstanding the increased harvest opportunity in the Kenai River state sport fisheries, Mr. Anderson declined to rescind his emergency order closing the federal subsistence Chinook fishery.

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34. Mr. Anderson also refused to consider, offer feedback on, or authorize NTC's operational plan for a subsistence gillnet on the Kenai River despite the fact that both the Kenai River early-run and late-run Chinook stocks exceeded escapement goals and the State opened sport fisheries for late-run Chinook salmon in the Kenai River.

NTC's Exhaustion of Administrative Remedies

35. The FSB is authorized to address subsistence fishing issues that arise as a result of in-season management decisions and outside of the standard regulatory cycle. The FSB may take either emergency or temporary special action to open or close public lands for the taking of fish and wildlife for subsistence uses, modify the requirements for take of subsistence uses, or restrict take for non-subsistence uses. 50 C.F.R. § 100.19(a), (b). The FSB may also revisit its decisions relating to its determinations and regulations governing the subsistence taking of fish and wildlife if any aggrieved person files a request for reconsideration. 50 C.F.R. §100.20.

36. On July 17, 2015 and July 21, 2015, respectively, NTC filed two special action requests with the FSB, seeking relief from Anderson's refusal to rescind the emergency closure for the federal subsistence Chinook fishery on the Kenai River and his failure to issue NTC a community subsistence gillnet permit for salmon on the Kenai River. The FSB struggled to determine what process to use for hearing NTC's appeal for relief from the delegation of in-season management authority to Anderson, his in-season closures, and his failure to permit a community gillnet on the Kenai. The FSB's confusion and failure to have a clearly defined process for overseeing in-season management actions undermined NTC's ability to effectively bring its claim for relief and demonstrates the unchecked and arbitrary nature of the process the FSB has instituted for critical in-season decision-making. The FSB

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finally settled on an administrative review process which remains uncertain, confusing and ad hoc.

37. On July 28, 2015, two weeks before the closure of the 2015 federal fishing season, the FSB convened in Anchorage and addressed NTC's requests. Before opening the meeting to the public, the FSB spent over an hour in executive session. On information and belief, during executive session the FSB developed a strategy to address NTC's request outside of the public process and away from the public eye. Because the FSB convened in executive session, there is no record for the NTC or the Court to review that fully reflects the reasoning for the FSB's actions.

38. When the FSB officially convened on the record, Mr. Anderson defended his refusal to lift his emergency order prohibiting all subsistence fishing for early-run Chinook salmon by raising the same conservation concerns for early-run Chinook salmon that he had raised to the SCRAC and FSB when these bodies were considering subsistence fishery proposals for the Kenai Refuge in October 2014 and January 2015, and which were rejected by both the SCRAC the FSB at those times.

39. Mr. Anderson also did not present any significant new information to support his refusal to confer with NTC regarding a permit for a community subsistence gillnet in the Kenai River. To the contrary, Mr. Anderson plainly stated that he would never consider approving an operational plan or issuing a subsistence gillnet permit for the Kenai River. According to Mr. Anderson, regardless of whether conservation concerns existed or not, and regardless of whether escapement goals for early and late-run Chinook salmon were exceeded by thousands of fish, he would never approve an operational plan or issue a permit for a community subsistence gillnet on the Kenai River.

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40. Despite Mr. Anderson's testimony eschewing federal and state subsistence regulations in favor of his own conservation beliefs, and despite the harm Mr. Anderson's arbitrary and unreasonable conduct caused NTC, the FSB voted not to rescind Mr. Anderson's emergency order closing the federal subsistence fishery on the Kenai River. The FSB also failed to take any action to provide NTC an opportunity take salmon with a community subsistence gillnet on the Kenai River for the 2015 season.

41. Instead, despite Mr. Anderson's unambiguous statements that under no conditions would he ever approve an NTC operational plan for a community subsistence gillnet on the Kenai, the FSB merely directed Mr. Anderson to work with NTC to develop an operational plan. The FSB failed to require the actual development of an operational plan, failed to set any time frame for the development of a plan, failed to set a process to review the development of the operational plan, and failed to establish any standard for the development of the operational plan. The FSB failed to take any action to limit the unbridled authority of the in-season manager to arbitrarily and unreasonably delay, frustrate, and prevent the permitting of a community subsistence gillnet for the Kenai River.

42. The FSB also failed to provide standards, such as achieving escapement goals, or any oversight to guide Mr. Anderson's future in-season management decisions to prevent future arbitrary and illegal closures which eliminate opportunities for subsistence uses and are not consistent with ANILCA. Additionally, the FSB failed to ensure a process for in-season management decision-making that incorporates legal safeguards, pursuant to the APA, for public notice and comments and an avenue to seek timely relief.

43. As a result of the FSB's failure to establish any meaningful process and substantive standards to guide Mr. Anderson, no permit was issued to NTC for a community subsistence gillnet in federal waters of the Kenai River for the 2015 season.

44. As a direct consequence of Mr. Anderson's arbitrary and unreasonable conduct, and the FSB's failure to take action to rescind his in-season closure and to issue a gillnet permit for the Kenai River, NTC was not provided with a meaningful subsistence opportunity during the 2015 subsistence salmon fishing season, nor was NTC able to meet its subsistence needs, causing the tribal members and community great hardship and irreparable harm.

FIRST CLAIM FOR RELIEF

Failure to provide an opportunity and a priority for the subsistence uses of rural residents
(Violation of ANILCA § 804, 16 U.S.C. § 3114)

45. NTC repeats and reincorporates by reference the allegations contained in the foregoing paragraphs 1 – 44.

46. Defendants violated Section 804 of ANILCA, 16 U.S.C. § 3114, which imposes nondiscretionary duties on Defendants to take appropriate administrative action to provide a priority and opportunity for subsistence uses of fish on federal public lands for rural residents. Defendants' actions and failures to act violated Section 804 of ANILCA in the following ways:

47. The FSB's delegation of in-season management authority failed to provide the in-season manager of the Kenai National Wildlife Refuge with any substantive standards to ensure that in-season management actions were consistent with providing for subsistence uses and were supported by recognized principles of fish management and facts. The FSB failed to exercise any independent oversight on actions taken by the in-season manager,

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leaving critical subsistence fishery management actions up to the unbridled discretion of a single agency biologist. As such, the FSB's illegal delegation of in-season management authority and the in-season manager's arbitrary and illegal subsistence fishery closure implemented under the illegal delegation of authority denied NTC the subsistence fishing opportunity and priority required by Section 804 of ANILCA.

48. The FSB's illegal and unbridled delegation of in-season management authority enabled the in-season manager to arbitrarily close NTC's fishing season for Chinook salmon on the Kenai River before it began, and keep it closed throughout the season. The in-season manager closed these federal priority subsistence fisheries despite the fact that Kenai River early- and late-run Chinook salmon escapement goals were exceeded, and despite actions taken by State of Alaska fishery managers to allow the taking of late-run Chinook salmon in other state managed fisheries on the Kenai River. The FSB's failure to rescind the emergency closure and open the subsistence fishery denied NTC the opportunity and priority necessary to meet the tribe's subsistence uses and required by section 804 of ANILCA.

49. The FSB delegated authority to Mr. Anderson, the in-season manager of the Kenai National Wildlife Refuge, to develop an operational plan for a community subsistence gillnet on the Kenai River. The FSB failed to provide any standards or oversight to the in-season manager in carrying out this delegation of authority. The in-season manager was allowed to completely undermine the FSB regulation to permit the Kenai subsistence gillnet. The in-season manager abused his delegated authority, led NTC along in its quest to obtain a subsistence gillnet permit, and when the salmon season was waning, made it clear that no permit for the Kenai would be issued. The in-season manager's actions, taken under authority

delegated by the FSB, were arbitrary and illegal and denied NTC the opportunity and priority necessary to meet the tribe's subsistence uses and required by section 804 of ANILCA.

50. The FSB's failure to revoke the in-season manager's delegated authority to permit the Kenai River subsistence gillnet fishery, despite evidence of his arbitrary and capricious conduct, and the FSB's failure to issue a Kenai River subsistence gillnet permit for the 2015 season, denied NTC the opportunity and priority necessary to meet the tribe's subsistence uses for the 2015 season and required by section 804 of ANILCA.

51. Due to the FSB's failure to take corrective action, the in-season manager remains the only person with the authority to ensure the implementation of federal regulations for permitting a subsistence gillnet in the Kenai River for the 2016 subsistence fishing season. The FSB's failure to take any action to prevent continued arbitrary and capricious action by the in-season manager, and ensure the implementation of a federal subsistence regulation authorizing a subsistence gillnet fishery in the federal waters of the Kenai National Wildlife Refuge deprives NTC of the opportunity and priority necessary to meet the tribe's subsistence uses for the 2016 season and beyond, and thereby violates Section 804 of ANILCA.

SECOND CLAIM FOR RELIEF

Failure To Comply with the Administrative Procedures Act (Violation of APA, 5 U.S.C. §§ 706(1), (2)(A), (2)(E))

52. NTC repeats and incorporates by reference the allegations contained in the foregoing paragraphs 1-51.

53. Defendants' actions and failure to act regarding the in-season manager's closure of the Kenai River federal subsistence fishery, coupled with the in-season manager's failure to

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develop an operation plan and issue a permit for a subsistence gillnet fishery in the Kenai River, were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with 5 U.S.C. § 706(2)(A).

54. No pertinent new information was presented to the FSB in July 2015 that would support the FSB's change in position and failure to implement its previous decision and regulation. The FSB illegally and arbitrarily ignored its own record and acted in such a way as to prevent implementation of its own regulation.

55. The FSB's failure to prescribe standards and a process for in-season fishery management actions that are consistent with the requirements of the APA is a violation of law.

RELIEF SOUGHT

WHEREFORE PLAINTIFF prays that the Court:

1. Enter a judgment that Defendants violated Section 804 of ANILCA, 16 U.S.C. § 3114, through the FSB's failure to provide standards and oversight in its delegation of in-season management authority to the Kenai National Wildlife Refuge which ensure that in-season management actions are not arbitrary, are consistent with providing for subsistence uses, and are supported by recognized fishery management standards and facts;

2. Enter a judgment that the FSB's failure to rescind the in-season manager's special action closing the 2015 federal subsistence fishery, and failure to open the subsistence fishery, denied NTC the opportunity and priority required by section 804 of ANILCA;

3. Enter a judgment that the FSB's failure to issue NTC a community subsistence gillnet permit on the Kenai River for the 2015 season denied NTC the opportunity and priority required by section 804 of ANILCA;

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4. Enter a judgment that the FSB's failure to take any action preventing continued arbitrary actions by the Kenai National Wildlife Refuge in-season manager regarding the permitting of a gillnet subsistence fishery in the waters of the Kenai Refuge in 2016, denies NTC the opportunity and priority required by section 804 of ANILCA;

5. Enter an order directing the FSB to submit regulations consistent with the judgment of the Court to be made a part of the final judicial order;

6. Enter an Order requiring the FSB to issue a community subsistence gillnet permit to NTC for the Kenai River for the 2016 season under 5 U.S.C. § 706(1);

7. Enter a judgment that the FSB's delegation of authority to the in-season manager for the Kenai National Wildlife Refuge, the closure of federal subsistence fisheries in the Kenai Refuge, and the failure to issue a subsistence gillnet permit for the Kenai River in 2015 violated the APA, 5 U.S.C. §§ 706(2)(A) and (2)(E);

8. Grant all relief, including preliminary injunctive relief, that is necessary to provide for the subsistence opportunity and priority NTC is entitled to pursuant to Section 804 of ANILCA;

9. Pursuant to section 807 of ANILCA and other applicable law, award NTC its costs and reasonable attorney fees incurred in bringing this action; and

10. Award NTC such other relief as the court deems just and equitable, and to which Plaintiff is entitled.

Dated this 22st day of October, 2015 at Anchorage, Alaska.

LANDYE BENNETT BLUMSTEIN LLP
Attorneys for Ninilchik Traditional Council

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LANDYE BENNETT BLUMSTEIN LLP
701 WEST EIGHTH AVENUE, SUITE 1200
ANCHORAGE, ALASKA 99501
TELEPHONE (907) 276-5152, FAX (907) 276-8433

/s/John M. Starkey

John M. Starkey

Alaska Bar No.: 8611141

Landye Bennett Blumstein LLP

701 West Eighth Avenue, Suite 1200

Anchorage, Alaska 99501

Telephone (907) 276-5152

Facsimile (907) 276-8433

E-mail: jskys@lbblawyers.com

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