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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NINILCHIK TRADITIONAL COUNCIL, Plaintiffs, v. 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 as the Secretary of the U.S. Department of Agriculture, Defendants.	Case No. 3:15-cv-00205-JWS **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)**

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FACTUAL BACKGROUND

The Ninilchik Traditional Council (NTC), is a federally recognized tribe whose members residing in Ninilchik are "rural residents" under the Alaska National Interest Lands Conservation Act (ANILCA) with customary and traditional uses of all fish in the Kasilof and Kenai River drainages. *See* 79 Fed.Reg. 15,569, 15,574 (Jan. 29, 2014); *see* 71 Fed.Reg. 15,574 (March 29, 2006). NTC shares in an annual subsistence allocation of salmon from three federal fisheries on the Kenai River pursuant to ANILCA's mandate to provide NTC with the opportunity to meet its subsistence needs and prioritize that opportunity on public lands. *See* Compl. 10. These existing fisheries are insufficient to meet NTC's subsistence needs.

On March 28, 2014, NTC submitted two proposals to create gillnet fisheries in the federal public waters of the Kenai and Kasilof Rivers. Compl. 18.[1] On October 15, 2014, the Southcentral Regional Advisory Council (SCRAC) considered NTC's proposals. Compl. 20-21; Exhibit 1, Excerpts from SCRAC Meeting October 15, 2014, pp. 1-24. The U.S. Fish & Wildlife Service (FWS) opposed the proposals on conservation grounds. *Id.* at pp. 11-12. The SCRAC determined that gillnet fisheries were necessary to provide NTC with a meaningful preference to meet its subsistence needs and were consistent with conservation. *Id.*, pp. 19-21. The SCRAC unanimously recommended NTC's proposals to the Federal Subsistence Board (FSB or Board) for approval. *Id.*, p. 23.

On January 22, 2015, the FSB considered the SCRAC's recommendation. Exhibit 2, Excerpts from FSB Meeting, January 22, 2015. FWS opposed the proposal on conservation grounds. *Id.*, pp. 2-7. The FSB defers to RAC recommendations if they are supported by substantial evidence, consistent with fish and wildlife management, and not

[1] *See also* Ex. A, Def. Motion to Dismiss, NTC Response to NOPR.

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detrimental to subsistence needs. *See* 16 U.S.C. § 3115(c); 50 C.F.R. § 100.11(c)(3). The FSB agreed that NTC needed gillnet fisheries to meet its subsistence needs, and that the proposals were consistent with conservation. Ex. 2, pp. 28-29. The FSB recommend the proposed regulations for approval. *Id.*, pp. 29-30.

Defendants published final regulations implementing the Kenai and Kasilof gillnet fisheries on May 18, 2015. Exhibit 3, 80 Fed.Reg. 28,187 (May 18, 2015). The Kenai River regulation provides that "[o]ne registration permit will be available and will be awarded by the Federal in-season fishery manager, in consultation with the Kenai National Wildlife Refuge manager, based on the merits of the operational plan." 50 C.F.R. § 100.27(e)(10)(iv)(J)(2). Since May 2015, the FSB has received 731 Requests for Reconsideration (RFRs) for the Kenai River gillnet regulation, and 479 RFRs for the Kasilof River gillnet regulation. *See* Exhibit 4, Transcript from FSB Public Regulatory Meeting, January 12, 2016, p.3.[2]

NTC submitted proposed operational plans to Jeffry Anderson, the in-season manager on May 27, 2015. Compl. 26. Before substantively reviewing either plan, Anderson implemented an emergency closure of the early-run Chinook fishery in all federal public waters in the Kenai River downstream from Skilak Lake from June 17 through August 15, the end of the federal subsistence fishing season. Compl. 27; Def. Exhibit D. This prohibited all subsistence fishing for Chinook salmon, and remained in force despite achievement of the Kenai River early and late-run Chinook salmon escapement goals. Compl. 29.

On July 13, 2015, six weeks after receiving NTC's Kasilof operational plan and a month before the end of the federal subsistence fishing season, Anderson approved the

[2] *See also* Def. Exs. E, F, and G.

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plan and issued NTC a permit. Compl. 31. He refused to consider NTC's operational plan for the Kenai gillnet fishery and kept the emergency closure in place. Compl. 34; Exhibit 5, Special Action Request, July 17, 2015, p. 19.

On July 17 and 21, 2015, NTC filed two special action requests asking the FSB to overturn Anderson's emergency closure of the federal subsistence fishery and address his refusal to consider NTC's operational plan for the Kenai gillnet fishery. Compl. 36; Ex. 5, p. 3. NTC also asked the FSB to rescind its delegation of authority to Anderson to manage subsistence fishing in the Cook Inlet Area, and overturn his emergency closure. Compl. 36; Exhibit 6, Special Action Request, July 21, 2015, p. 3.

The FSB addressed these requests at a public meeting on July 28, 2015. Exhibit 7, Additional Excerpts from the FSB's Work Session on July 28, 2015. Anderson defended his actions by citing conservation concerns. *Id.*, pp. 6-7. But, the Board considered these concerns when it approved the Kenai gillnet proposal. Compl. 38-39; Ex. 2, pp. 2-7. Anderson admitted that he decided not to consider NTC's Kenai operational plan at the start of the 2015 subsistence fishing season. Ex. 7, p. 13. He also admitted that he would never issue a permit for a gillnet fishery in the Kenai River for any reason, *Id*., p. 15, and that even if both early and late-run Chinook salmon escapement goals were met, regardless of that abundance, he would never consider or approve an operational plan. *Id*.

The FSB styled NTC's requests to overturn Anderson's emergency closure of the Kenai subsistence fishery as an RFR. *Id.*, pp. 2-3. Anderson's refusal to consider NTC's operational plan and the request to rescind its delegation of authority were "handled administratively." *Id*. The FSB denied NTC's request to rescind its delegation of in-season management authority. *Id.*, p. 25. The FSB also denied NTC's request to reverse the

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emergency closure. *Id.*, pp. 31-32. The FSB granted NTC's request to address Anderson's refusal to consider the Kenai operational plan, and ordered Anderson to work with NTC to develop an operational plan for the 2016 Kenai River gillnet fishery. *Id.*, pp. 29. The FSB was well-aware of the pending RFRs for both the Kenai and Kasilof gillnet fisheries when it took these actions. *Id.*, pp. 26-27.

STANDARD OF REVIEW

Defendants' challenge this Court's subject matter jurisdiction under rule 12(b)(1). The Court must determine whether a lack of federal jurisdiction appears from the face of the Complaint itself. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The factual allegations in NTC's Complaint are assumed to be true. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003). On a rule 12(b)(6) motion to dismiss, allegations of material fact are taken as true (even if doubtful in fact) and construed in the light most favorable to the nonmoving party. *See Bell A. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). The complaint does not need to establish that it is likely to succeed on the merits. *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir 1978), cert. denied, 441 U.S. 965 (1979). Allegations of fact need only "raise a right to relief that is above the speculative level." *Twombly*, 550 U.S. at 555.

ARGUMENT

I. The Court has Subject Matter Jurisdiction over NTC's Claims.

a. NTC exhausted available administrative remedies consistent with the plain language of §807(a) and FSB regulations.

The plain language of §807(a) establishes that NTC exhausted all applicable administrative remedies: "Local residents . . . aggrieved by a failure of the State or the

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Federal Government to provide for the priority for subsistence uses set forth in section 804 . . . may, upon the exhaustion of any . . . administrative remedy that may be available, file a civil action in the United States District Court." 16 U.S.C. § 3117(a).[3] Pursuant to the plain language of §807, NTC is obligated only to exhaust the administrative remedies available to the tribe. Only a party "aggrieved" by an action of the FSB may file an RFR. 50 C.F.R. § 100.20(b). NTC sponsored the gillnet proposals adopted by the Board and is not aggrieved by the FSB's adoption of the proposal. There is no administrative remedy available to NTC related to the Kenai and Kasilof gillnet regulations.

Moreover, none of the parties who filed the numerous RFRs challenging the gillnet regulations[4] are entitled to bring an action under §807. These parties are not "aggrieved by a failure . . . to provide the priority for subsistence uses." 16 USC § 3117(a). Defendants' interpretation of §807, as limited by 50 C.F.R. § 100.20(b), would deny NTC the right to a meaningful subsistence fishing opportunity merely because someone who disagrees with the Board, and who has no right to judicial review,[5] takes advantage of an ambiguous

[3] When interpreting a statute, the court must adhere to the statute's plain language unless "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Silver v. Babbitt*, 924 F.Supp. 972, 973 (D. Ariz. 1995)(*citing Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). The intent of Title VIII of ANILCA is "to provide the opportunity for rural residents engaged in a subsistence way of life to do so." 16 U.S.C. § 3112(1). The intent of §807(a)'s private right of action is to ensure that subsistence users, "many of whom are among the poorest communities in the nation" are able to seek relief from policies adversely impacting their subsistence lifestyles. *See* 126 CONG. REC. 30,499 (1980)(Rep. Udall); *id.* at 31,109 (Sen. Stevens); *See Native Village of Quinhagak v. United States*, 35 F.3d 388, (9th Cir. 1994)(hereinafter "*Quinhagak I*").

[4] As of January 2016, OSM has yet to provide the FSB with an analysis as to whether any of the hundreds of pending RFRs are justified. *See* 50 C.F.R. § 100.20(f); *see also* Ex. 4, pp. 2-5.

[5] A person may file an RFR who would not have standing in federal court under any provision of law. As described *infr*a at 10, the RFR can be completely without merit and still trigger a months or years long threshold analysis and Board determination. There is no abbreviated process for determining whether a person is "aggrieved" by the Board's action.

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administrative provision to delay the fishery for years.[6] Defendants' convenient litigation position is completely at odds with the intent of Title VIII of ANILCA.[7]

NTC fully exhausted available administrative remedies for its claims. NTC filed two special action requests on July 17, 2015 and July 21, 2015. Exs. 5 & 6. The Board characterized these requests as RFRs under 10 C.F.R. § 100.20, and denied NTC's requested relief. Ex. 7, pp. 2-3, 25, 31-32. The claims in NTC's complaint stem from these final administrative actions. *See* 50 C.F.R. § 100.19(e)("The decision of the Board on any proposed special action will constitute its final administrative action."); *see also* 50 C.F.R. § 100.20(g)("If the request [for reconsideration] is denied, the decision of the Board represents the final administrative action.") NTC's claims relate to final actions and are ripe even under Defendants' reading of the applicable regulations.

Moreover, §807(a)'s exhaustion requirement is not a bar to subject matter jurisdiction. A statute requiring exhaustion of administrative remedies is only jurisdictional if it contains sweeping and direct statutory language that goes beyond a requirement that only exhausted claims be brought. *Rumble v. Hill*, 182 F.3d 1064, 1067-68 (9th Cir. 1999). The language of §807(a) creates a private right of action for an aggrieved party upon exhaustion of *any available* administrative remedies. This not the sweeping and direct statutory language required to foreclose subject matter jurisdiction, especially when the administrative remedies proposed as a bar to jurisdiction are not

[6] In this, case under Defendants' interpretation, NTC would likely lose at least two complete fishing seasons: the 2015 and 2016 seasons.

[7] "[T]he utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources." 16 U.S.C. § 3112(1); *See Quinhagak I*, 35 F.3d at 390; *Kwethluk IRA Council v. Alaska*, 740 F.Supp. 765, 767 (1990).

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applicable to the party bringing suit. *See Anderson v. Babbitt*, 230 F.3d 1158, 1162 (9th Cir. 2000).[8]

b. <u>The pendency of RFRs does not affect the ripeness of NTC's claims, and Defendants' arguments to the contrary are post hoc rationalizations to which no deference is required.</u>

The pendency of RFRs does not affect the ripeness of NTC's claims or the existence of final agency action. A pending RFR only renders the underlying agency action non-final with respect to the party that files the RFR. *See United Transportation Union v. I.C.C.*, 871 F.2d 1114, 1117 (D.C. Ct. App. 1989); *accord Sandwich Isles Communications, Inc. v. National Exchange Carrier Ass'n*, 799 F.Supp.2d 44, 49 (D.C. D. Ct. 2011); *see also ICC v. Board of Locomotive Engineers*, 482 U.S. 270, 284-85 (1987)(the pendency of an optional appeal renders an agency decision non-final only with regard to the appealing party). Because NTC has not, and cannot file a RFR challenging the Kenai and Kasilof gillnet fishery regulations, its claims are ripe.

Defendants' argument interpreting 50 C.F.R. § 100.20(g) as denying this Court's jurisdiction is not owed any deference because it "does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S 452, 462 (1997). Instead, Defendants' interpretation of 50 C.F.R. § 100.20(g) is a "convenient litigating position" and post hoc rationalization advanced to defend past action against attack. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988); *Christopher*

[8] The Ninth Circuit has also rejected the argument that an RFR is an absolute prerequisite to subject matter jurisdiction under §807 even when the plaintiff was aggrieved by the FSB action under litigation and had, but did not exercise, the opportunity to file an RFR pursuant to FSB regulations. *See* Exhibit 8, *Ninilchik Traditional Council et al. v. United States*, 152 F.3d 928 (9th Cir. 1998)(unpublished decision). There is a full record for this Court to review when assessing the claims NTC brings here. Further factual development would not significantly advance the Court's ability to deal with the legal issues presented. *Nat'l Hospitality Ass'n v. Dep's of Interior*, 38 U.S. 803, 812 (2003).

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v. SmithKline Beecham Corp., 132 S.Ct. 2156, 2166 (2012)(declining to apply *Auer* deference to agency interpretation of ambiguous regulations).

Defendants' interpretation of 50 C.F.R. § 100.20(g) is inconsistent with the unambiguous language of the regulation that explicitly defines the Board's process for adopting final regulations. "Following consideration of the proposals the Board shall publish final regulations pertaining to subparts C and D of this part in the Federal Register." 50 C.F.R. § 110.18(a)(5). Neither this regulation nor the RFR regulation makes any mention that the filing of an RFR results in the automatic stay of the published final regulation. Indeed, the 2015 Federal Register notice in which the final gillnet fishery regulations were published makes the Board's position clear: the gillnet regulations were effective, and thus final and ripe for the purposes of this litigation, on the date they were published:

> In the more than 25 years that the Program has been operating, no benefit to the public has been demonstrated by delaying the effective date of the subsistence regulations. A lapse in regulatory control could affect the continued viability of fish or wildlife populations and future subsistence opportunities for rural Alaskans, and would generally fail to serve the overall public interest. Therefore, the Board finds good cause pursuant to 5 U.S.C. 553(d)(3) to make this rule effective upon the date set forth … to ensure continued operation of the subsistence program.

See Ex. 3, p. 3.[9]

It is the Board's practice to implement final regulations despite pending RFRs. Most relevant is the Board's implementation of the Kasilof gillnet fishery in 2015 despite

[9] *See* Wright & Koch, Federal Practice and Procedure: Judicial Review §8185 at p. 254-55, explaining that the "good cause" exception invoked by the Board in the Federal Register notice. The exception allows the rule to become effective on the date of publication rather than 30 days later as it the case with most published final regulations; *See also, Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 442 (9th. Cir. 1993), *reversed on other grounds* 521 U.S. 1113 (1997)(good faith exception authorized when necessary to carry out agency's mission); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992)(30 day waiting period waived for good cause because requiring delay would cause great harm).

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numerous pending RFRs filed before approval of the operation plan and issuance of the gillnet permit. No member of the Board or its legal counsel ever suggested that the pending RFRs challenging the Kenai gillnet regulation prevented the Board from entertaining NTC's RFRs challenging the FWS manager's refusal to consider and approve a gillnet operation plan for the Kenai. Ex. 7, p. 27. In fact, the Board acted on NTC's RFRs as though the Kenai gillnet regulation was in effect. The Board went so far as to order the manager to continue to work on the operational plan for 2016. *Id.*, p. 29. The Board treated the issue of the Kenai gillnet fishery as final, effective, and ripe for review. There is no merit in Defendants' position that the Board's regulations bar this Court from hearing the same claims.

Defendants' position is further undercut by the fact that the Board has implemented final regulations despite pending RFRs on other occasions. In January 2012, the Board closed sheep hunting in the Red Sheep Creek and Cane Creek drainages in the Arctic Village Sheep Management Area to non-federally qualified subsistence users. Exhibit 9, Threshold Analysis RFR 14-01. In June 2014, the State of Alaska filed an RFR of the Board's decision. *Id.* OSM conducted a threshold analysis of the State's RFR, and on July 28, 2015 – the same day that the Board denied NTC's special action requests – the Board rejected the State's RFR. *Id.* While the State's RFR was pending for over a year, the regulation closing the area to non-federally qualified subsistence users remained in effect, and only federally qualified subsistence users could hunt for sheep during the 2012, 2013, and 2014 seasons.

The Red Sheep Creek RFR process demonstrates the impractical and unreasonable outcome for subsistence management under Defendants' litigation-driven interpretation.

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The RFR process consists of two steps. Ex. 7, p. 5. First, there is the threshold analysis to determine whether the RFR meets required criteria. *Id.* This process can take years. *Id*.; *see* Ex. 9. Defendants' position sanctions a practice where any person who disagrees with a Board action, or subsistence in general, could delay providing subsistence opportunities by merely filing an RFR, regardless of whether the RFR had enough merit to meet the threshold. Also under Defendants' interpretation, NTC could file an RFR challenging an in-season closure and the closure could not take effect until the Board took final action on the RFR – a bad result for fishery conservation.

The only reasonable interpretation of "final administrative action" in 50 C.F.R. § 100.20(g) is that the Board's denial of an RFR represents the exhaustion of administrative remedies for the purposes of the aggrieved party that filed the RFR. The FSB's denial of the RFR is the final agency action only with regard to the party filing the RFR. The Board's actions creating a subsistence opportunity become effective, and thus final and ripe, upon the publication of the final regulation in the Federal Register. This interpretation is consistent with the plain meaning and structure of the Board's regulations, the Board's long-standing interpretation and practice in implementing its regulations, the plain language of §807, and the clear intent of ANILCA to provide opportunity for subsistence uses.

The injury that NTC will suffer if this court determines that its claims are not ripe is neither speculative nor imaginary – there is a "realistic danger of sustaining a direct injury." Def. Motion at 12. Defendants' ripeness argument is based on an interpretation of the Board's RFR regulation that would result, in all likelihood, in delaying implementation of the Kenai and Kasilof gillnet fisheries through at least the 2016 fishing

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seasons. If the court dismisses on these grounds it would be sanctioning this delay and NTC would have no remedy before this court that would result in the implementation of the fishery this year.

The FSB and SCRAC have determined that the gillnet fisheries are necessary to provide a meaningful preference for NTC's subsistence uses. Compl. at 21-23. It is clear from the intent and letter of Title VIII that the loss of subsistence opportunity is a realistic and direct injury. Congress could not have been more clear when it found that the "continuation of the opportunity for subsistence uses . . . *is essential* to the "physical, economic, traditional, and cultural *existence"* of subsistence users. 16 U.S.C. § 3111(1). *Quinhagak I*, 35 F. 3d at 394*; Kwethluk*, 740 F. Supp. at 766-67.[10]

c. <u>This Court has subject matter jurisdiction to address NTC's challenges to the FSB's delegations of authority.</u>

i. <u>The FSB's failure to prioritize NTC's subsistence opportunity satisfies the *Bennett* test</u>.

Defendants' arguments[11] confuse and misstate NTC's claims regarding the delegation of closure authority to the in-season manger and the requirement under 50 C.F.R. § 100.27(e)(10)(iv)(J)(2) that the manager issue a gillnet permit "based on the merits of an operational plan." NTC is not challenging the Board's authority to delegate in-season emergency closure authority as provided by 50 C.F.R. § 100.10(d)(6). Nor is NTC challenging the provision in 50 C.F.R. § 100.27(e)(10)(iv)(J)(2) that the manager

[10] Furthermore, the in-season manager's continued power to enforce emergency closures despite their detrimental effect to NTC's subsistence opportunities imposes a significant practical harm upon NTC. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011). NTC's injury was immediate and certain in 2015, and remains immediate and certain to happen again in 2016 if this Court declines review.

[11] Defendants' Brief at 13-18.

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consider the merits of NTC's operational plan before issuing a permit. Therefore, many of Defendants' arguments are simply not relevant.

NTC's claims also do not seek to forever foreclose a delegation of emergency order authority or a manager's future review of the merits of the gillnet plan. NTC's claims target the failure of the Board to rescind the manager's authority to review the 2015 Kenai gillnet operation plan even after the manager stated that he would not consider the plan regardless of its merits.[12] Ex. 7, p. 15. NTC also challenges the Board's failure to rescind the delegation of authority related to the arbitrary closure of the subsistence fishery in 2015.[13] Compl. 48, 50-51; Ex., 7, pp. 31-32. The Board's authority to rescind its delegation for a specific emergency closure action is explicit in the 2002 Letter of Delegation. Ex. I., Def. Motion to Dismiss at 5. The Board also clearly demonstrated its understanding that it has authority to rescind these delegations when it considered NTC's RFRs seeking to rescind both the closure order and the authority to review and approve the 2015 Kenai gillnet operational plan. NTC's actions seek to ensure that such arbitrary actions do not reoccur in the future and repeatedly result in denying the Tribe the fishing opportunity necessary to sustain its subsistence way of life.

Defendants are correct that NTC's claims challenge the Board's implementation of its delegation authority through the 2002 letter which, as far as NTC can determine, did not go through any public notice and comment process. Compl. 42, 47-48. If the Board

[12] The in-season manager's violated 50 C.F.R. § 100.27(e)(10)(iv)(J)(2) when he refused to even consider the merits of NTC's operational plan. His authority to consider the merits of that plan was not at the behest of a delegation of authority from the FSB; rather, that requirement was contained in the plain language of the regulation itself.

[13] Defendants acknowledge that NTC's challenges to specific actions taken through delegated authority are final and therefore justiciable. "Rights and obligations flow from the ultimate decisions of the in-season manager pursuant to his delegated authority." Defendants' Brief at 16.

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delegates in-season management decisions, but it must do so consistent with the procedural and substantive requirements of the APA, Title VIII of ANILCA, Board regulations, and other applicable law.

The FSB's 2002 delegation of authority to the in-season manager, its refusal to rescind that delegation for the 2015 closure order, and the consequent emergency closure of the Kenai subsistence fishery are final agency actions, and satisfy both prongs of the *Bennett* test. *Bennett v. Spear*, 520 U.S. 154 (1997). When considering finality, "it is the effect of the action and not its label that must be considered." *Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1988). "[T]he finality element must be interpreted in a pragmatic and flexible manner." *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1503 (9th Cir. 1995).

The FSB's 2002 delegation of authority to the in-season manager, and its refusal to rescind that delegation or reverse the in-season manager's emergency closure, is the consummation of that agency's decision-making process because the Board "rendered its last word on the matter." *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 478 (2001). Fourteen years ago, the Board delegated authority to the in-season manager to "issue special actions when necessary to assure the conservation of healthy fish stocks and to provide for subsistence uses of fish in Federal waters subject to ANILCA Title VIII (Federal waters) in the Cook Inlet Area." *See* Ex. I, Def. Motion to Dismiss. In July 2015, the Board refused to rescind that delegation related to the closure order. Ex. 7, p. 25. Both of these actions constitute final agency action, and mark the consummation of the Board's decision-making process insofar as that delegation is concerned.

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These actions do much more than "merely set out guidelines for future agency decision-making" such as an agency settlement policy, *see Chemical Manufacturers Ass'n v. EPA*, 26 F.Supp.2d 180 (D.C. Cir. 1998), or agency monitoring, *see Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999). Rather, it is the Board's last word on crucial in-season management decisions and has a direct effect on NTC's subsistence priority and opportunities. *See Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977 (9th Cir. 2006)(recognizing that the issuance of an agency annual operating plan to manage in-season grazing on federally-managed grazing allotments constituted final agency action under the *Bennett* test).

The delegation of authority and refusal to rescind is action "by which rights or obligations have been determined, or from which legal consequences will flow," satisfying *Bennett's* second prong. *Bennett*, 520 U.S. at 178. These actions had a "direct and immediate effect on the day-to-day business of the subject party." *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990). The legal consequence that flows from the Board's actions was the complete closure of an important subsistence fishery directly impacting NTC's meaningful opportunity to meet its subsistence needs. The delegation of authority and refusal to revoke it is a discrete, site-specific action representing the FSB's last word from which binding obligations on subsistence users flow.

ii. 28 U.S.C. § 2401(a) is not jurisdictional and NTC's claims did not accrue until July 2015.

NTC's challenge to the Board's 2002 letter delegating in-season management authority is not barred by the statute of limitations because 28 U.S.C. §2401(a) is not jurisdictional, and less than six years have elapsed since NTC's claim accrued. *Cedars-Sinai Medical Ctr v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997)(§2401(a) is not

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jurisdictional and does not bar claims outside the six-year limitations period). As the text of 28 U.S.C. § 2401(a) does not mention jurisdiction, it merely presents a procedural bar which NTC easily surmounts. *See Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89 (1990). There is a strong presumption in favor of allowing equitable remedies to overcome limitations periods in Federal Tort Claims Act (FTCA) cases, including application of the common law discovery rule. *Id.; see also Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1048 (9th Cir. 2013), *aff'd U.S. v. Kwai Fun Wong*, 135 S.Ct. 1625 (2015)(FTCA statute of limitations is not jurisdictional and may be equitably adjusted). Under the discovery rule, a claim accrues when a plaintiff knows both the existence and the cause of his injury; the rule extends the statute of limitations by delaying the date on which it begins to run. *See Kwai Fun Wong*, 732 F.3d at 1048.

NTC did not discover the injury caused by the Board's 2002 letter of delegation of authority to the in-season manager until June or July of 2015, when the in-season manager used that authority to close the Kenai subsistence fishery and when the FSB refused to revoke that delegation of authority and rescind the emergency closure. §2401(a) does not deprive the court of subject matter jurisdiction to hear these claims.

d. <u>ANILCA and the regulations authorizing a gillnet fishery create a meaningful standard and discrete legal duty by which to judge the FSB's abuse of discretion.</u>

Defendants' argument that NTC fails to identify a relevant legal duty to support its claims ignores the plain language and intent of ANILCA and precedent applying §804 and §807 and the APA to provide the kind of relief that NTC requests.

ANILCA mandates that "the taking on public lands of fish…for non-wasteful subsistence uses shall be accorded priority." 16 U.S.C. § 3114. Congress found that the

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"continuation of the opportunity for subsistence uses was "essential" to the physical, economic, traditional, cultural and social existence of rural residents. 16 U.S.C. § 3111(1). In order to ensure the implementation of this vital right, Congress took the strong step of creating a private right of action, including the award of costs and fees to prevailing subsistence users, to enforce the priority in federal court.[14] These provisions, and the statute read as a whole, plainly establish a meaningful standard by which to judge NTC's claims which explicitly plead and rely on these provisions of law. In *Ninilchik Traditional Council v. United States*, the Ninth Circuit applied §804 in a case brought under §807, and using a §706 of the APA standard of review, provided relief similar to what NTC requests here.[15] The case was remanded "so that the district court can take such actions as are necessary to provide for the subsistence priority." *Ninilchik*, 227 F.3d at 1196.

Defendants' reliance on *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55 (2004) is inapplicable in this case. This case concerns litigants seeking relief pursuant to the APA for alleged violations of FLPMA. However, unlike ANILCA, FLPMA is a procedural statute and does not create a private cause of action. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 614 (9th Cir. 2006), *citing Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108, 1111 (9th Cir. 2005). Furthermore, the Court held that even in a case limited to review under the APA, a discrete action sufficient for the Court to compel agency action exists "if the plan itself creates a commitment binding on the agency." *Id*. at 71. Here, the Board adopted a regulation authorizing a subsistence gillnet fishery in the Kenai River. Ex. 3. An agency must follow and implement its own

[14] *Quinhagak I*, 35 F.3d at 395; *Native Village of Quinhagak v. United States*, 307 F.3d 1076, 1082-83 (9th Cir. 2002)(*Quinhagak II*).
[15] 227 F.3d 1186, 1194-96 (9th Cir. 2000); *see also Quinhagak I*, 35 F.3d at 394; *Kwethluk IRA Council*, 740 F.Supp. at 766-67.

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lawfully enacted regulations. *See Wilderness Soc. v. Tyrrel*, 701 F.Supp. 1473, 1480 (E.D. Cal. 1988), *citing Service v. Dulles*, 354 U.S. 363, 372 (1957). The regulation at issue here creates a binding commitment on the Board, and requires discrete agency action that may be compelled by this court.

Defendants contest NTC's claims challenging the 2002 letter of delegation of authority and urge a strained reading of the Board's regulation authorizing the delegation. *See* 50 C.F.R. §100.10(d)(6). Despite the plain language of the regulation, Defendants argue that the Board is under no duty to establish frameworks for in-season management. The regulation is not ambiguous. "The Board may delegate to agency field officials the authority to . . . close specific fish and wildlife seasons *within frameworks established by the Board. Id*. (emphasis added). The Board *may* delegate authority, but if it chooses to do so, the delegation must be established within frameworks set by the Board.

Pursuant to 50 C.F.R. §100.10(a), the FSB is assigned authority to administer ANILCA's subsistence program and remains ultimately responsible for any delegations it makes pursuant to that program. A Board delegation of authority permitting arbitrary actions violating §804 is thus reviewable under §807 using the APA's standard of review. Were this statutory and regulatory scheme to the contrary, the Board would be permitted to escape judicial review and enforcement of §804 by a simple delegation of authority. This is an end run around ANILCA's private right of action that Congress clearly did not intend.

Although Defendants rely on *Black v. Snow*, 272 F.Supp.2d 21 (D.D.C. 2003), to contest jurisdiction for NTC's challenge to the FSB's delegation of authority through the

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2002 letter, this case supports NTC's claims.[16] In *Black* and the other cases cited in that line of authority, the agency delegations of authority were made through the publication of regulations in the federal register. 272 F. Supp 2d. at 26. In this case, however, the Board's delegation of in-season management authority was not accomplished through the notice and comment process. Rather, the FSB merely sent a letter to the local manager. Defendants' arguments fail to address NTC's claim that the delegation of authority through the 2002 letter is not consistent with the notice and comment provisions of the APA. Compl. 42. The court clearly has subject matter jurisdiction to hear this claim.

The Defendants misconstrue NTC's claims in an attempt to dismiss them. NTC agrees that the issuance of a gillnet fishery permit is not automatic. Under the plain language of the regulation, however, the only relevant grounds for refusing to issue the permit is a lack of merit in the operational plan.[17] *See* 50 F.C.R. § 100.27(e)(10)(iv)(J)(2). At the very least, the in-season manager is obligated to consider the merits of the operational plan. The manager's testimony before the Board makes clear that his refusal to consider the Kenai operational plan was not based on the plan's lack of merit – indeed, his approval of NTC's Kasilof operational plan demonstrates NTC's ability to develop a plan that satisfies those merits. Rather, his refusal to comply with the regulation was due to his own personal disagreement with the regulation. Ex. 7, p. 15. The Board's refusal to

[16] Defendants argue that once a regulation is issued delegating power from one officer to a subordinate, the officer may not thereafter invoke the delegated power himself, as long as the regulation remains in effect. *Black*, 272 F.Supp.2d at 26. However, the ability to file special action requests to challenge in-season management decisions and the provision in the 2002 letter of delegation explicitly providing for Board authority to rescind the delegation, directly contradicts this position.

[17] There are other in-season and post-season reporting conditions and identification requirements in the regulation, but the relevant substantive requirement is that manager must review the merits of the plan and issue the permit pursuant to that review. NTC submitted an operational plan to the manager days after the Kenai gillnet regulation became final. Compl. 26.

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rescind the manager's authority despite his blatant refusal to comply with the Board's own regulation is the epitome of arbitrary and capricious agency action. Nothing in the Defendants' maze of jurisdictional delegation of authority arguments insulates the Defendants' from the reach of §804 and §807.

II. NTC's Second Claim is not Duplicative, Invokes Title VIII of ANILCA as the Relevant Statute and is Consistent with Precedent on the Relationship Between the APA and ANILCA.

The standard for a 12(b)(6) motion is whether the factual allegations in NTC's complaint plausibly suggests an entitlement to relief. *Starr v. Baca*, 652 F.3d 1202, 1217 (9th Cir. 2011). Even if the Court disbelieves the allegations or feels that recovery is remote or unlikely, *see Twombly,* 559 U.S. at 555, the Complaint may be dismissed only if Defendants' "explanation is so convincing that plaintiff's explanation is *im*plausible." *Starr,* 652 F.3d at 1216 (emphasis in original). Defendants fail to meet this burden. The allegations in NTC's complaint "plausibly suggest an entitlement to relief" under both the APA and ANILCA. *See Id*. at 1217.

The Court must examine NTC's complaint as a whole. *See Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992). The first paragraph of the Complaint makes it clear that NTC relies upon the relevant sections of ANILCA for the relief it seeks. The first paragraph of the second claim for relief incorporates all the proceeding paragraphs. There is no basis for the government's claim that NTC's second claim for relief under ANILCA does not "identify" a relevant statute for evaluating Defendants' actions.

NTC's second claim is not duplicative. In *Ninilchik*, 227 F.3d at 1193-94, the Ninth Circuit held that the Board's actions, challenged as a violation of ANILCA, were properly reviewed under the standards set forth in §706 of the APA. The Court held that

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neither of the §706 exceptions the government relies on for dismissal – that "the statute precludes judicial review" or "is committed to agency discretion by law," – are "relevant" for review of a §807 claim. *Id*. at 1193. NTC's Compliant properly pleads claims brought under both ANILCA and the APA.[18]

NTC's claim challenging the 2002 letter of delegation as a violation of the APA is sufficiently supported by the allegations in the Complaint.[19] Paragraph 36 alleges the FSB's confusion and failure to have any clearly defined process for overseeing the delegated authority and the unchecked and arbitrary nature of the process. The unbridled authority delegated to the manager and the FSB's failure to establish any meaningful standards and process is alleged in Paragraphs 41 and 43. Paragraph 42 squarely addresses the APA violation due to the failure of the in-season delegation to incorporate the public notice and comment safeguards of the APA. Paragraph 55 makes a claim for failure to prescribe standards and a process for delegation of in-season management authority consistent with the requirements of the APA. The allegations and claims in NTC's Complaint are supported by Defendants' admission that the delegation of authority was implemented through the letter rather than through the APA notice and comment process. The facts alleged throughout the Complaint demonstrate the harm and arbitrary action resulting from the letter.

The factual allegations in NTC's Complaints also raise a right to relief that is above mere speculation for its ANILCA based claims. There is no dispute that residents of

[18] NTC does not rely on 5 U.S.C. § 706(2)(E) for its second claim for relief.

[19] NTC's claim that the letter of delegation violates APA notice and comment protections is clearly beyond speculation. The delegation of authority through the letter conclusively impacts substantive rights that are explicitly protected through Title VIII of ANILCA. The impacts are alleged throughout NTC's Complaint. Given the effect of the letter it does not fall within one of the exceptions for notice and comment rulemaking. *See, e.g. American Hospital. Association v. Bowen*, 834 F.2d 1037,1044-45 (D.C. Cir 1987).

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Ninilchik are entitled to the subsistence priority. Compl. 10; Def. Motion to Dismiss at 26. Subsistence users must be provided with a "meaningful preference" pursuant to §804. *Ninilchik,* 227 F.3d at 1193. As plead in the Complaint, the FSB has established an allocation of Chinook, Coho, Sockeye and Pink salmon for three rural communities on the Kenai Peninsula – Ninilchik, Cooper Landing, and Hope – from the Kasilof and Kenia Rivers. Compl. 11. The Board's allocation is evidence of what is necessary to provide a meaningful opportunity.

The allocation for Chinook salmon is set at 1000. *Id.* In 2013, not a single Chinook salmon was harvested by a federally qualified subsistence user despite a harvest of over 20,000 Chinook salmon by sport, commercial, personal use and educational fisheries. Compl. 12. This substantiates NTC's allegation that it was not being afforded a meaningful preference. Compl. 11.

In 2014, the SCRAC, which is authorized to recommend subsistence regulations and whose recommendations are entitled to deference, recommended that the FSB approve two gillnet fisheries on the Kenia and Kasilof because the record demonstrated that gillnets were necessary to provide NTC with a meaningful preference. Compl. 18-21; Ex. 1, p. 19. The FSB agreed with the SCRAC and recommended adoption of federal regulations authorizing gillnet fisheries in both rivers. Compl. 23; Ex. 2, pp. 29-30. The Secretaries promulgated final regulations authorizing these fisheries five months later after following notice and comment provisions of the APA. Compl. 24; Ex. 3. The pleadings sufficiently establish the basis for NTC's claim that the opportunity for a gillnet fishery in the Kenai River is necessary to provide a meaningful preference. Compl. 45-51.

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The facts alleging Defendants' arbitrary and illegal conduct in denying NTC a meaningful preference rise above mere speculation. All federal fishery management actions for the Kenai are based on State management regulations and actions. Compl. 14. Escapement goals for the early and late run Chinook salmon stocks are also set through State regulations. Compl. 16-17. Consistent with the practice of federal managers deferring to State actions and regulations, the Chinook closures ordered by the federal manager dovetailed with State ordered closures. Compl. 27-28. However, after escapement goals were met for both early and late-run Chinook salmon, and the State reopened sport fisheries, the in-season manager decided not to manage the federal fisheries according to State spawning escapement goals. Compl. 31-34; Ex. 7, p. 15.

This conduct directly contradicts the manager's justification for the June 17, 2015 emergency closure. The closure order states that the closure was necessary "to ensure that the early-run Chinook Salmon escapement goal is met." *See* Ex. D at 2, Def. Motion to Dismiss. The justification explicitly cites the State escapement goals and management plans. *Id.*[20] NTC's allegations, supported by Defendants' exhibits, provide sufficient facts to support the claim that the decision to maintain the closure was arbitrary and illegal.[21]

The stark fact that the in-season manager testified that he would not consider approving an operational plan for a gillnet on the Kenai even if all the escapement goals

[20] The FSB 2002 letter of delegation to the Kenai Fishery Resource Office also references escapement goals as the tool for conservation management, "Timely local management decisions optimize the opportunity for users to harvest fish when and where they are available, without jeopardizing spawning escapement goals for specific stocks." Ex. I, p. 4, Def. Motion to Dismiss.

[21] Defendants pose an alternative explanation for why the manager maintained the closure after the escapement goals were met. Def. Motion to Dismiss at 29. Merely stating that the run was the fifth lowest return on record and the other factors Defendants' cite without explaining if these factors are already taken into account in State escapement goals and if not why, leaves a lot to question. In any event, Defendants explanation is not "so convincing that plaintiff's explanation is *im*plausible." *Starr,* 652 F.3d at 1216.

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were exceeded by thousands of fish is alone sufficient to support NTC's claims based on the failure to consider the merits of the operational plan. Compl. at 39; *see also* Exhibit 7, p. 15. Moreover, the in-season manager and his agency, the FWS, strongly opposed the Kenai gillnet when the proposal was before the SCRAC and FSB, citing the same concerns about biological impacts to salmon spawning grounds that the manager used to ignore NTC's operational plan. Compl. 22-24.; *see* Ex. 1, pp. 2-7, 9, 17, 21; Ex. 2, p. 2-5, 28-30; Compl. 38-41. The obstructive actions taken in 2015 are consistent with the action of FWS filing a RFR challenging the final regulations authorizing a gillnet in the Kenai. *See* Ex. E, Def. Motion to Dismiss. By keeping the fishery closed and using the closure as a justification for not even considering any kind of plan, FWS got what it wanted: no gillnet in the Kenai River, and no chance for NTC to show that its operational plan could succeed consistent with conservation issues. NTC's Complaint and supporting exhibits provide "enough facts to raise a reasonable expectation that discovery will reveal evidence" to support the allegations related implementation of the Kenai gillnet. *See Starr*, 652 F.3d. at 1217.

CONCLUSION

NTC agrees that Title VIII of ANILCA does not "guarantee" that NTC will be able to meet the allocation the FSB determined necessary to provide a meaningful preference.[22] But before the meaningful preference can be closed, ANILCA requires a genuine balancing of subsistence uses and conservation. Conservation cannot be abused and

[22] Defendants argue that there are numerous other subsistence fishing opportunities available to NTC. This is irrelevant to establishing either subject matter jurisdiction or the sufficiency of NTC's complaint. The issue is not the number of opportunities NTC has, but whether those opportunities give NTC a meaningful preference. The SCRAC and FSB already determined that existing subsistence fishing opportunities did not give NTC a meaningful preference, and that the gillnet fishery was necessary to provide that meaningful preference.

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arbitrarily used as an automatic trump card that undermines meaningful subsistence opportunity. *Quinhagak I*, 35 F.3d at 394, *Kwethluk,* 740 F.Supp. at 766-67. When the manager's closure decisions are arbitrary, and the correct balance is not struck, it is the FSB's legal responsibility to rescind and correct those actions. When the Board fails to fulfil its legal mandates, §807 and the APA grant this court subject matter jurisdiction to address the claims of aggrieved subsistence users. *Ninilchik*, 227 F.3d at 1195-96. For these reasons, Defendants' Motion to Dismiss should be denied.

Dated this 3rd day of March, 2016 at Anchorage, Alaska.

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