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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NINILCHIK TRADITIONAL COUNCIL, Plaintiff v. TIM TOWARAK, in his official capacity as Chairman of the Federal Subsistence Board; S.M.R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior; and TOM VILSACK, in his official capacity as the Secretary of the U.S. Department of Agriculture, Defendants.	Case No. 3:15-cv-0205-JWS **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)**

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INTRODUCTION

Defendants in the above-captioned case hereby reply in support of their motion to dismiss Plaintiff Ninilchik Traditional Council's ("Plaintiff's") Complaint (Doc. No. 1) ("Compl.") for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See* Def. Mot. to Dismiss ("Def. Br.") (Doc. No. 10). Plaintiff's response, Doc. No. 21 ("Pl.'s Resp."), fails to show that their claims, which arise under the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3111–26, and the judicial review provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, should not be dismissed.

The Court lacks subject-matter jurisdiction over these claims for four reasons. First and foremost, Plaintiff lacks standing, and its claims are unripe, because its allegations of injury are predicated on a particular resolution of ongoing agency decision-making. Second, Plaintiff does not have standing to challenge the expired emergency closure order. Third, the Court lacks jurisdiction to hear challenges to the Board's delegations of authority because these are not final agency actions; one of the challenged delegations is barred by the statute of limitations; and the Board's decision not to rescind the delegation is committed to agency discretion by law. Fourth, the Court cannot compel agency action that is discretionary and not legally required.

Plaintiff also fails to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) because its stand-alone APA claim must fail, and because Plaintiff fails to state a claim for failure to provide a subsistence priority under ANILCA.

ARGUMENT

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

A. Plaintiff Lacks Standing, and its Claims are Unripe, Because the Board's Decision to Authorize the Gillnet Fishery is Not Final

Plaintiff's challenges to the Federal Subsistence Board's ("the Board") implementation of the gillnet fishery on the Kenai are unripe because the underlying decision to authorize the gillnet fishery is not final. This decision is not final because many parties have filed Requests for Reconsideration ("RFRs") on the Board's decision to authorize the gillnet fishery. These parties include subsistence communities who would have to exhaust administrative remedies under Section 807 of ANILCA before they could challenge the decision to authorize the gillnet in court. Even if exhaustion was not required of those parties, the mere fact that a party has filed an optional administrative appeal renders the decision authorizing the gillnet non-final as to all parties. Therefore, Plaintiff's challenges to actions that the in-season manager has or has not taken are not yet ripe insofar as Plaintiff complains that those actions fail to implement the fishery.

1. Certain Parties Filing RFRs are Required to Exhaust Administrative Remedies

While Defendants do not dispute that Plaintiff has exhausted its administrative remedies, Defendants dispute Plaintiff's contention that none of the parties who filed RFRs were required to exhaust their administrative remedies under Section 807 of ANILCA. *Contra* Pl.'s Resp. 5 (Doc. No. 21 at 8). To the contrary, residents of Cooper Landing and Hope, which are subsistence communities authorized to fish for Chinook on the Kenai through other fisheries, have filed an RFR on the Board's decision to authorize the Kenai gillnet. *See* Def. Ex. J, attached

hereto; 50 C.F.R. §§ 100.27(e)(10)(A), (D), (E), (F), (G) (subsistence opportunities for communities of Hope and Cooper Landing). These communities argued that authorizing the Kenai gillnet "adversely affects" their Federal subsistence priority because of the non-selective nature of the gillnet, the likelihood of Chinook harvest above sustainable population levels, the high chance of mortality for fish caught in the gillnet, and the location of the gillnet in spawning grounds. Def. Ex. J at 2. Because of these impacts, the communities of Cooper Landing and Hope are concerned that "it will be extremely difficult, if not impossible, to ensure[] the continued viability of fish populations and provide a maximum harvest for all Federal subsistence users . . . ." *See id.* These communities' contention that the Board's decision negatively impacts their subsistence use is a claim that they would have to exhaust under Section 807 before they could bring any claims challenging the gillnet fishery in federal court. *C.f. Native Vill. of Quinhagak v. United States*, 307 F.3d 1075, 1082 (9th Cir. 2002) (acknowledging that Congress required exhaustion of administrative remedies). These communities are precisely the parties whom Plaintiff agrees may bring suit under section 807 after exhaustion of their administrative remedies. *See* Pl.'s Resp. 5 (Doc. No. 21 at 8).

The exhaustion requirement is not changed by the Ninth Circuit's order in *Ninilchik Traditional Council v. United States*. *Contra* Pl.'s Resp. 7 n.8 (Doc. No. 21 at 10). That order should not be considered by the Court because it was marked "not for publication" and pre-dates January 1, 2007. *See* Pl.'s Resp. Ex. 8 (Doc. No. 21-6); 9th Cir. R. 36-3. Defendants have opposed Plaintiffs' motion for judicial notice of the order on that basis. *See* Def. Resp. in Opp'n to Pl.'s Mot. for Judicial Notice, Doc. No. 29. Even if the Court considers the order, however, it does not help Plaintiff here. That case dealt with a specific exception to the exhaustion of

administrative remedies, the doctrine of futility. *See* Pl.'s Ex. 8 at 2 (Doc. No. 21-6 at 2). The doctrine of futility is a recognized exception to the exhaustion requirement. *See Leorna v. U.S. Dep't of State*, 105 F.3d 548, 552 (9th Cir. 1997) (citing *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982)). However, the Ninth Circuit recognized that, had the futility doctrine not applied, ANILCA Section 807 may require exhaustion of administrative remedies as a "jurisdictional prerequisite." *See* Pl.'s Ex. 8 at 1–2 (Doc. No. 21-6 at 1). Just because the Ninth Circuit found that the futility doctrine applied in that case does not mean that the residents of Hope and Cooper Landing would not be required to exhaust their administrative remedies. *See* Pl.'s Ex. 8 at 1 (Doc. No. 21-6 at 1); *Native Vill. of Quinhagak*, 307 F.3d at 1082.

Additionally, Plaintiff relies on overruled case law in its attempt to argue that Section 807 does not require exhaustion of remedies. Plaintiff contends, relying on a statement in *Rumbles v. Hill*, that statutes only require exhaustion of remedies if they contain "sweeping and direct statutory language that goes beyond a requirement that only exhausted claims be brought." Pl.'s Resp. 9 (Doc. No. 21 at 12) (citing 182 F.3d 1064, 1067–68 (9th Cir. 1999), *cert. denied*, 528 U.S. 787 (2000)). Plaintiff does not recognize, however, that the Court's holding that the statute at issue did not require exhaustion in *Rumbles* was subsequently overruled by the Supreme Court in *Booth v. Churner*. *See Booth v. Churner*, 532 U.S. 731, 741 (2001) ("we think that Congress has mandated exhaustion clearly enough . . . .) (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); 42 U.S.C. § 1997e(a). The language of 42 U.S.C. § 1997e(a) that "no action shall be brought…until such administrative remedies as are available are exhausted," is remarkably similar to that of Section 807(a) of ANILCA. *Compare* 42 U.S.C. § 1997e(a) *with* 16 U.S.C.

§ 3117(a). Section 807(a) of ANILCA provides that "[l]ocal residents and other persons and organizations…may, upon exhaustion of any…administrative remedies which may be available, file a civil action…." *See* 16 U.S.C. § 3117(a). Following this requirement, the residents of Cooper Landing and Hope have filed RFRs that the agency must resolve before these subsistence users could pursue judicial review of the decision to authorize the gillnet fishery. [1]

2. The Decision to Authorize the Gillnet is not Final

Regardless of whether the exhaustion requirement is jurisdictional, third parties have made use of the RFR process and thus the Board's action is not final until those administrative processes are exhausted. *See Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996). Plaintiff's argument that a pending RFR only renders the underlying agency action non-final with respect to the party filing the RFR does not make sense. *Contra* Pl.'s Resp. 7 (Doc. No. 21 at 10). While only the Plaintiff is authorized to operate a gillnet fishery under the rules, the decision to authorize the gillnet fishery affects a whole host of groups: other subsistence users, commercial users, sport fishers, and conservation groups, among others. There is no practical way in which this decision can be "final" as to Ninilchik but not as to other groups.

The cases cited by Plaintiff do not discuss party-specific finality. *See* Pl.'s Resp. 7 (Doc. No. 21 at 10). Indeed, they support the Government's position that the pendency of an optional

[1] Plaintiff's point that it could file an RFR on an emergency closure order and thereby delay its effectiveness is not only irrelevant, but is also incorrect. *Contra* Pl.'s Resp. 10 (Doc. No. 21 at 13). RFRs may only be filed on "[r]egulations in subparts C and D . . . ." 50 C.F.R. § 100.20(a). Emergency special actions are dealt with in subpart B. *See* 50 C.F.R. § 100.19. Additionally, in contrast to the regulations on RFRs, which specifies that a final decision follows Board consideration of an RFR, *see* 50 C.F.R. § 100.20 (e–g), the special action regulations specify that "[t]he decision of the Board on any proposed special action will constitute its final administrative action." *See* 50 C.F.R. § 100.19(e).

appeal renders an agency decision non-final. In *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, the seminal case on the effect of pending administrative proceedings on finality, the Supreme Court found that a petition for reconsideration "render[ed] orders under reconsideration nonfinal. *See* 482 U.S. 270, 284–85. The issue of party-specific finality was not before the court in that case, because there the same party who had moved for reconsideration had sought judicial review, but the Court noted that "all of the parties" understood the plaintiff's petition "to be in effect a petition to reopen." *Id.* at 285. Similarly, while the D.C. Circuit in *United Transportation Union v. Interstate Commerce Commission* stated that a petition for rehearing by plaintiff "must render the underlying agency action nonfinal (and hence unreviewable) with respect to the filing party," the question of whether a petition for rehearing would make the action non-final as to a non-petitioning party was not before the court. *See* 871 F.2d 1114, 1116 (D.C. Cir. 1989). In *Sandwich Isles Communications v. National Exchange Carrier Association*, the court found that because an administrative appeal was underway "there can be no dispute that the FCC has not issued a final order for purposes of judicial review," even though some of the parties requesting judicial review were not parties to the administrative appeal. *See* 799 F. Supp. 2d 44, 49 (D.D.C. 2011). Instead of supporting Plaintiff's position, the cases cited by Plaintiff actually shows that filing an administrative appeal renders the underlying decision non-final.

The Board's regulations make clear that an agency appeal renders an agency action non-final as to everyone. In the one case in which the Ninth Circuit found that an administrative appeal rendered an agency action non-final only as to the party challenging the action, this decision relied on explicit agency regulations that limited the effect of a petition for

reconsideration to the party seeking reconsideration. *See Pub. Citizens v. Mineta*, 343 F.3d 1159, 1170 (9th Cir. 2003) (citing 49 C.F.R. § 533.39); 49 C.F.R. § 553.39 ("[t]he filing of a timely petition for reconsideration of any rule . . . postpones the expiration of the statutory period in which to seek judicial review of that rule *only as to the petitioner* . . . .") (emphasis added).

In contrast, here the Board's regulations state that a Board decision represents "final administrative action" *if* the request for reconsideration is denied. *See* 50 C.F.R. § 100.20(g). If the request is justified, the Board implements a "final decision on a request for reconsideration." *See* 50 C.F.R. § 100.20(f). Unlike the agency's regulations at issue in *Mineta*, the Board's regulations do not temper their statements about finality with party-specific language. The Board's regulations are also similar to the Interior Board of Land Appeals' ("IBLA") regulations at issue in *National Parks and Conservation Association v. Bureau of Land Management*. In that case, the Ninth Circuit found that a Record of Decision could not "serve as the agency's final action" because it had been appealed to the IBLA. *See* 606 F.3d 1058, 1065 (9th Cir. 2009) (citing 43 C.F.R. §4.21(a)(2–3)). Consistent with *National Parks*, the Board's regulations here mean that any RFR renders the decision being challenged non-final.

In its response, Plaintiff confuses the effectiveness of the gillnet decision with finality. *See* Plf. Resp. 8–9 (Doc No. 21 at 11–12). In the instances mentioned by Plaintiff, the Board did not stay the effect of a decision while an RFR was pending. *See id*. But regardless of whether the effect of the decision is stayed pending the RFRs, the decision is not final while RFRs are pending. In this same vein, the "effective date" of a final rule is not related to the effect of the RFRs on finality. *Contra* Pl.'s Resp. 8 (Doc. No. 21 at 11). Normally, regulations become final thirty days after publication, but the Board in this case decided to make the gillnet regulations

effective immediately. *Compare* 50 C.F.R. § 100.18 *with* 80 Fed. Reg. 28,187, 28,189 (May 18, 2015) (Pl.'s Ex. 3 at 3) (Doc. No. 21-2 at 3). One of the Board's rationales for making the regulations effective immediately was because it recognized that "an administrative mechanism exists . . . to request reconsideration of the Board's decision on any particular proposal for regulatory change." *See* 80 Fed. Reg. at 28189 (Pl.'s Ex. 3 at 3) (Doc No. 21-2 at 3); *see also* 50 C.F.R. § 100.20(a) ("Regulations in Subpart C and D of this part published in the Federal Register are subject to requests for reconsideration."). In short, the RFR process operates independently of the declared effective date of the regulations. Relevant regulations make clear that an RFR renders a rule non-final regardless of the rule's designated effective date.

The Board's interpretation of its own regulation, which is that the Board's decision is not final while RFRs are pending, is entitled to strong deference and may not be overturned unless plainly erroneous or inconsistent with the language of the regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). This is so even if the interpretation is raised for the first time in a legal brief. *See Auer*, 519 U.S. at 462 (Secretary's interpretation of own regulations, "in the form of a legal brief" was "in no sense a 'post hoc rationalization'" because there was "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgement on the matter in question."); *see also Bigelow v. Dep't of Def.*, 217 F.3d 875, 876, 878 (D.C. Cir. 2000) (deferring to an agency interpretation of a regulation set forth for the first time in a brief signed only by a United States Attorney). The Board's interpretation is consistent with the plain language of the regulation, which contemplates final agency action as occurring *after* a decision is made on a pending RFR.

See 50 C.F.R. § 100.20(e–g). Moreover, the Board has taken the position for over a decade that an agency action is not final while RFRs are pending. *See* Def. Ex. H at 5 (Doc. No. 10-8 at 6) (Order in *Kenaitze Indian Tribe v. United States*) (Oct. 16, 2003) ("[t]he USA argues that because the June 1, 2000 rural classification was subject to an administrative review under 50 C.F.R. § 100.20, the classification did not constitute a final 'determination' . . . ."). Consistency in a long-held interpretation of a regulation is "another reason to accord *Auer* deference." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337–38 (2013) (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012)).

3. Plaintiff's Claims Challenging Implementation of the Gillnet Fishery are not Ripe

Under the Board's regulations, RFRs render the challenged decision non-final, and therefore Plaintiff's challenge to the Board and the in-season manager's actions to implement the fishery are not ripe because they are not fit for judicial review and the parties will not suffer hardship from withholding court consideration until after the Board resolves the RFRs. *See* Def. Br. 10–12 (Doc. No. 10 at 14–16); *Acura of Bellevue*, 90 F.3d at 1408 (setting out ripeness prongs).

Plaintiff's challenge is not fit for judicial review because ongoing administrative proceedings will determine whether the gillnet fishery should have been authorized in the first place. This case is similar to that considered by the District of Utah in *Wopsock v. Nordall*, in which the court determined that a tribe's claims that the agency had failed in its duty to oversee certain transactions was not yet ripe in part because "the existence and scope of that oversight duty is an issue currently pending before the [agency] in an administrative appeal which has yet to be resolved." *See* No. 2:03-cv-826-TC, 2004 WL 4951450, at *5 (D. Utah Sept. 29, 2004).

Here, as in *Wopsock*, the court's considerations of Plaintiff's claims that the Board has failed to implement the gillnet fishery are not fit for judicial review where the decision to authorize the gillnet is itself undergoing administrative review.

Because of the non-final nature of the gillnet decision, Plaintiff's injuries are speculative. Plaintiff's injuries are contingent on the result of the Board's reconsideration process. *See* Def. Br. 11–12 (Doc. No. 10 at 15–16). In *Acura of Bellevue*, the Ninth Circuit determined that the plaintiff's harms were speculative where the result of the ongoing administrative appeal could change the harm that plaintiff would suffer from the challenged rule. *See* 90 F.3d at 1408. Moreover, since their claims are unfit for judicial review, Plaintiff would have to make a showing of "severe hardship" to outweigh a showing of unfitness. *See Pub. Lands for the People v. U.S. Dep't of Agric.*, 733 F. Supp. 2d 1172, 1191 (E.D. Cal. 2010) ("a claim may be unripe despite a showing of definite hardship") (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300 (1979)). Plaintiff's speculative harms are not sufficient. *See Acura of Bellevue*, 90 F.3d at 1408; *c.f. Wopsock*, 2004 WL 4951450 at *5 (concerns raised by plaintiff relating to implementation of their request "may never need to be addressed" if the agency does not approve tribe's request during the administrative review process). Furthermore, judicial review at this stage would cause hardship to both the Defendants and to this Court. Judicial review of an agency decision that is pending reconsideration by the agency "wastes scarce governmental resources . . . poses the possibility that an agency authority and a court would issue conflicting rulings . . . interferes with the agency's right to consider and possibly change its position during its administrative proceedings . . . . ." *Acura of Bellevue*, 90 F.3d at 1408–09. Because Plaintiff's challenges relating to implementation of the gillnet fishery are not ripe, this

Court should dismiss them.

B. Plaintiff Lacks Standing to Challenge the Closure Order

Plaintiff lacks standing to challenge the emergency closure order, or the Board's decision not to rescind the order, because that order expired before this action was filed. Therefore, at the time this action was commenced, it suffered no injury as a result of that order. Furthermore, while it is possible that a similar order may be issued in the future, the "capable of repetition yet evading review" exception to the mootness doctrine is not applicable to standing.

When this action was filed, the emergency closure order had already expired. The closure order at issue was in effect "from June 18 through August 15, 2015." Compl. ¶ 27 (Doc. No. 1 at 10). This action was commenced with the filing of the Complaint on October 22, 2015. *See* Compl. (Doc. No. 1), Fed. R. Civ. P. 3. Therefore, there was no requisite case or controversy regarding that closure order when this action was filed. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).") (quotation omitted); *Haggerty v. City of Tucson*, No. 4-541-TUC-JMR, 2006 WL 449293, at *3 (D. Ariz. Feb. 21, 2006) (dismissing Plaintiff's complaint when Plaintiff "failed to initiate litigation" during the 180-day period the challenged ordinance was in effect). It is axiomatic that this Court's jurisdiction over any action depends on the facts existing at the time the action was commenced. *See Keene Corp. v. United States*, 508 U.S. 200, 208 n. 3 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). If subject matter jurisdiction is absent initially, the parties may not later create it. *See Lujan*, 504 U.S. at 569 n.4 (citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)); *Neirbo Co. v. Bethlehem Shipbuilding*

Corp., 308 U.S. 165, 167 (1939); *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 558 n.1 (9th Cir. 1993). Plaintiff, therefore, lacked the requisite injury for standing when this action was filed.

While it is possible that a similar closure order may again be entered, that does not establish standing for the Plaintiff. As is made clear in *Friends of the Earth v. Laidlaw Environmental Services*, standing must exist at the commencement of the action, and must continue to exist throughout the action. *See* 528 U.S. 167, 189–90 (2000). Significantly, the "capable of repetition yet evading review" exception that may be applicable for consideration of mootness is not applicable to standing. *See id*. at 191 ("if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet avoiding review will not entitle the complainant to a federal judicial forum.") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998)). Therefore, any challenge by Plaintiff to the in-season manager's emergency closure order must be dismissed.

Defendants recognize that this is a new argument. In the Defendants' opening brief, Defendants stated that Plaintiff had standing to challenge the in-season manager's emergency closure order closing "the early-run Chinook fishery…from June 18 through August 15, 2015," because it was a final agency action. *See* Def. Br. 10, n. 2 (Doc. No. 10 at 14). Counsel for Defendants now realize that although the emergency closure order was final, Defendants' statement that Plaintiff has standing to challenge that order was incorrect. Since standing is a jurisdictional issue which cannot be waived, *see WildEarth Guardians v. EPA*, 759 F.3d 1064, 1070 (9th Cir. 2014), and "the court has an independent obligation to assure" its existence, *see Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009), Defendants correct that representation here. Given this correction to Defendants' prior statement, Plaintiff may wish to

address this issue. Should Plaintiff wish to file a response to this argument, Defendants have no objection to a motion by Plaintiff pursuant to D.Ak. L.R. 7.1(i)(1) for leave to file a supplemental response addressing Plaintiff's standing to challenge the emergency closure order.

C. The Court Lacks Jurisdiction to Hear Challenges to the Board's Delegation of Authority

1. The Board's Decision not to Rescind the In-Season Manager's Delegations of Authority are Committed to Agency Discretion by Law

There are no standards to guide the Board in determining whether to rescind the in-season manager's authority to approve the gillnet permit or to revoke the emergency closure order, and thus the Board's decision not to rescind the in-season manager's delegation of authority, *see* Pl.'s Ex. 7 at 25 (Doc. No. 23-4 a 7), is committed to agency discretion by law. *See* Def. Br. 16–18 (Doc. No. 10 at 20–22).

Regarding the Board's decision not to rescind the in-season manager's delegation of authority to approve Plaintiff's operational plan, the regulation authorizing the gillnet provided no standards to govern whether the delegation should be rescinded.[2] *See* 50 C.F.R. § 100.27(e)(10)(iv)(J)(2) (delegation). This lack of guidance around the delegation was intended by Plaintiff when it proposed the gillnet, so that the in-season manager would have flexibility in his approval of the plan. *See* Def. Ex. B at 6 (Doc. No. 10-2 at 7). Therefore, the decision about

[2] Plaintiff also argues that the in-season manager's authority to consider the merits of the plan "was not at the behest of a delegation of authority from the FSB," but rather derived from the regulation itself. *See* Pl.'s Resp. 12 n.12 (Doc. No. 21 at 15). Not only does this argument contradict Plaintiff's argument that the Board could and should have rescinded the in-season manager's authority without going through a full rulemaking process, Pl.'s Resp. 12 (Doc. No. 21 at 15), but it ignores the fact that the Board delegated *its* authority to the in-season manager through the regulations. *See* 50 C.F.R. § 100.27(e)(10)(iv)(J)(2).

whether to rescind the delegation of authority to approve the operational plan was committed to agency discretion by law. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1082 (9th Cir. 2013) (exception to presumption of judicial review applies if the court "would have no meaningful standard against which to judge the agency's exercise of discretion") (citing 5 U.S.C. § 701(a)(2)).

In the same vein, the Government's decision not to rescind the in-season manager's emergency closure authority was committed to agency discretion by law. The delegation letter, which authorized the in-season manager to issue the closure order, provides no parameters for rescission of the delegation in its entirety, only that the delegation is effective "until superseded or rescinded." *See* Def. Ex. I at 3 (Doc. No. 14-1 at 4). The letter also notes that there may be "unusual circumstances" in which the Board may determine that "a special action request should not be handled by the [in-season manager] but by the Board itself," but that this "option[] should be exercised judiciously and may only be initiated where sufficient time allows. Such delegations should not be considered when immediate management actions are necessary for fisheries conservation purposes." *See id.* at 4 (Doc. No. 14-1 at 5). The letter does not specify what "unusual circumstances" would weigh in favor of the Board's handling of the special action request instead of the in-season manager. Additionally, this clause seems to only apply to emergency closure requests generated by third parties, not to emergency closures made *sua sponte* by the Board or by the in-season manager, so it is questionable whether the "unusual circumstances" outlined in the letter would even apply here, where the in-season manager made the decision to issue the closure order without waiting for a request from an outside party. Regardless, the decision to have the Board handle the request is entirely discretionary. Therefore,

there is "no law" for the Court to apply in determining whether the Board's decision not to rescind the in-season manager's emergency closure authority is arbitrary and capricious. *See Drakes Bay Oyster Co.*, 747 F.3d at 1082.

2. The Board's Delegation of Authority to the In-Season Manager to Issue the Closure Order was not a Final Agency Action

In arguing that the delegation to the in-season manager to issue an emergency closure order represents final agency action, Plaintiff confuses the effect of the in-season manager's decisions made pursuant to his delegated authority with the effect of the delegation itself. While the closure order itself was final, the delegation to the in-season manager to issue the closure order is simply an internal procedural matter and not in itself final agency action. The delegation specifies who may issue an emergency action should the need for it arise. *See* Def. Ex. I at 2 (Doc. No. 14-1 at 3). Moreover, the delegation does not have any legal consequences for parties outside the agency. By no means is the delegation the "last word on crucial in-season management decisions." *Contra* Pl.'s Resp. 14 (Doc. No. 21 at 17). The decisions the in-season manager makes pursuant to the delegation, not the delegation itself, determines Plaintiff's rights and obligations. *See Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) ("When an action does not have a 'direct and immediate ... effect on the day-to-day business' of the subject party, it is not 'final.'") (quoting *FTC v. Standard Oil*, 449 U.S. 232, 239 (1980)). Because the delegation is not a final agency action, this Court does not have jurisdiction to review it. *See City of San Diego v. Withman*, 242 F.3d 1097, 1102 (9th Cir. 2001) (district court lacked subject matter jurisdiction under the APA to review letter that was not final agency action).

3. Any Challenge to the Board's 2002 Delegation is Outside the Statute of Limitations

Even if Plaintiff could challenge the 2002 delegation as a final agency action, such a challenge would be time-barred. *See* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). Plaintiff contends that its claim is not time-barred because Section 2401(a) is not jurisdictional and because the claim allegedly accrued in the past six years, but both arguments fail.[3] While the Ninth Circuit has found that Section 2401(a) is not jurisdictional, *see Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), none of the equitable tolling doctrines apply here. In particular, while Plaintiff claims that it did not discover the "injury" caused by the delegation until 2015, *see* Pl.'s Resp. 15 (Doc. No. 21 at 18), Plaintiff's alleged "injury" is from the closure order itself, not from the delegation. Consistent with our argument that the delegation is not a final agency action, there can be no "injury" from the delegation, only from decisions made pursuant to the delegation. Thus, the "discovery rule" cannot apply.

D. Plaintiff's Challenges the Board's Failure to Take Certain Actions under 706(1) of the APA Must Be Dismissed Because Plaintiff Has Failed to Identify a Discrete Obligation that the Board is Required to Take

Even though ANILCA provides a private right of action, complaints brought pursuant to ANILCA § 807 are still reviewed under the APA's standard of review. *See Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1192–93 (9th Cir. 2000). Therefore, where Plaintiff

[3] Plaintiff's reliance on *Kwai Fun Wong v. Beebe*, Pl.'s Resp. 15 (Doc. No. 21 at 18), is in error, since *Kwai Fun Wong* discussed the Federal Tort Claims Act statute of limitations under 28 U.S.C. § 2401(b). *See Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1048 (9th Cir. 2013).

claims that the Board "failed" to act, those claims are reviewed under 706(1) of the APA as the Supreme Court set out in *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"). *See* 542 U.S. 55, 64 (2004) (a civil action under 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*") (emphasis in original). Plaintiff has failed to cite a single case in which a broad statutory pronouncement akin to ANILCA's directive to "provide a subsistence priority" was found to create an obligation that the court could compel under Section 706(1) of the APA. *See* Pl.'s Resp. 16 (Doc. No. 21 at 19).

In three of the cases cited by Plaintiff, the court evaluated the reasonableness of an existing agency action, not a failure to act claim under Section 706(1). In *Ninilchik Traditional Council v. United States*, the Ninth Circuit considered whether two of the Board's restrictions on a moose hunt— an antler size restriction and a time restriction— were reasonable under ANILCA and Section 706(2) of the APA. *See* 227 F.3d at 1189–90. The Ninth Circuit, in remanding the decision, determined that the antler size restriction was reasonable but the time restriction was not. *See id.* at 1195. In *Native Village of Quinhagak v. United States*, the Ninth Circuit considered whether the Secretary's existing determination that certain waters were not navigable for ANILCA purposes was reasonable. *See* 35 F.3d 388, 392 (9th Cir. 1994). In *Kwethluk IRA Council v. State of Alaska*, the court granted an emergency motion to permit a caribou hunt after the Alaska Game Board denied the village's emergency application. 740 F.Supp. 765, 767–68 (D. Alaska 1990).[4] In allowing the hunt to move forward, the court found

[4] *Kwethluk* arose from actions by the State of Alaska before the federal government took over management of subsistence, *see Kwethluk*, 740 F. Supp. 765 at 766–67, and thus did not arise under the APA.

that the Plaintiffs were likely to succeed on challenging the denial. *See id.* There, unlike here, the agency had already denied the request, which would have provided a basis for challenging the denial under Section 706(2) of the APA had the action been brought against the Federal Government. *See* 5 U.S.C. § 706(2). None of these cases apply to a claim seeking to use a broad statutory mandate to compel an agency to issue a discretionary permit.

In both of the cases cited by Plaintiffs that actually consider failure to act claims, the Ninth Circuit found that it could not compel the requested action under Section 706(1) and *SUWA*. In *Center for Biological Diversity v. Veneman*, the Ninth Circuit determined that the Wild and Scenic Rivers Act's ("WSRA") directive "to consider" certain rivers when planning was not sufficiently different from the "'failure to consider' example rejected by the Court in *SUWA*." *See* 394 F.3d 1108, 1113 (9th Cir. 2003) (citing *SUWA*, 542 U.S. at 65). Neither *Center for Biological Diversity* nor *SUWA* even discussed whether the Federal Land Policy and Management Act ("FLPMA") was a procedural statute, nor did they limit their holdings to FLPMA. *See Ctr. for Biological Diversity*, 394 F.3d at 1113; *SUWA*, 542 U.S. at 66–67; *contra* Pl.'s Resp. 16 (Doc. No. 21 at 19). *Center for Biological Diversity* dealt with the WSRA, *see* 394 F.3d at 1113, and the Supreme Court in *SUWA* gave examples of agency actions under other statutes that would create the same problems as compelling compliance with FLPMA's broad statutory mandates. *See* 542 U.S. at 66–67 (ordering "compliance with broad statutory mandates" could "inject the judge into day-to-day agency management" of wild horses under the Wild Horse and Burro Act and historic preservation under the National Historic Preservation Act).

Nor is *Gros Ventre Tribe* limited to FLPMA. In *Gros Ventre Tribe v. United States*, the Ninth Circuit found that it could not compel compliance with FLPMA's mandate to prevent

"unnecessary and undue degradation" because it was a "broad statutory mandate" that did not "require the government to take discrete nondiscretionary actions." *See* 469 F.3d 801, 814 (9th Cir. 2006). While the Ninth Circuit in *Gros Venture* mentioned that FLPMA was primarily procedural in nature, and did not provide a private right of action, this was by way of explaining why the plaintiffs in that case had sought relief under 706(1) of the APA. *See Gros Ventre Tribe*, 469 F.3d at 814 (citing *Ctr. for Biological Diversity*, 394 F.3d at 1111; 5 U.S.C. § 706(1)). Here, Plaintiff has also sought relief under 706(1) of the APA. *See* Compl. at 17 (Doc. No. 1 at 17). As the Ninth Circuit found in *Gros Ventre Tribe*, here this Court cannot compel compliance with a broad statutory mandate because it does not "require the government to take discrete nondiscretionary actions." *See Gros Ventre Tribe*, 469 F.3d at 814.

In its response brief, Plaintiff continues to erroneously argue that the Court can compel the Board to establish "frameworks" for the delegation. *See* Pl.'s Resp. 17 (Doc. No. 21 at 20). We agree with Plaintiff that if the Board delegates authority, it must do so within the frameworks it has established. But Plaintiff has not shown any rule or statute that requires that those frameworks be created, and thus the Court cannot compel the creation of these frameworks. Nor can it require that the delegation comply with frameworks that do not exist.

Additionally, while the Board can, under certain "unusual circumstances" set out in the 2002 letter and discussed more fully in Section C.1 above, rescind the in-season manager's emergency closure authority, *see* Def. Ex. I at 4 (Doc. No. 14-1 at 5), Plaintiff has not shown that such an action is "legally required" under *SUWA*. The circumstances allowing for rescission of the delegation are clearly discretionary on the part of the Board, and even then, that discretion should only be exercised in "unusual circumstances." *See* Def. Ex. I at 4 (Doc. No. 14-1 at 5).

Thus, rescission of the delegation is not "legally required" and cannot be compelled by this Court.

Plaintiff now accepts that issuance of the gillnet permit is not automatic, and thus it seems to only request that the Court order the in-season manager to "consider" the merits of the operational plan. See Pl.s' Resp. 18 (Doc. No. 21 at 21). However, that is precisely what the Board did during its July 28, 2015 meeting. *See* Pl.'s Ex. 7 at 25–30 (Doc No. 23-4 at 7–12). Therefore, this request is prudentially moot. In this circumstance, "[i]t would serve no purpose to order [the agency] to do what it has already done," *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1128 (D. Haw. 2000); see also *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. 06-2845, 2010 WL 4746187, at *2 (E.D. Cal. Nov. 16, 2010) (case was prudentially moot because no meaningful relief could be granted).

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

A. Plaintiff's Second Claim for Relief Must be Dismissed

Defendants' argument that Plaintiff cannot bring a stand-alone APA claim is targeted at Plaintiff's pleading error in setting out an APA claim separate from its ANILCA claim.[5] *See* Compl. at 17–18 (Doc. No. 1 at 17–18); Def. Br. 24–25 (Doc. No. 10 at 28–29). In short, there can be no claim and no determination that Defendants violated the provisions of 5 U.S.C. § 701–706. Those provisions only provide the standards and scope of review.

Defendants agree that Plaintiff's suit lies under ANILCA, and is reviewed under the standards set forth in the APA. *See* Pl.'s Resp. 19 (Doc. No. 21 at 22). However, Plaintiff does

[5] In its response, Plaintiff abandons its claim under 5 U.S.C. § 706(2)(E). *See* Pl.'s Resp. 20 n.18 (Doc. No. 21 at 23).

not confront Ninth Circuit precedent holding that Section 702 of the APA, standing alone, does not provide a right of action. *See El Rescate Legal Servs. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990)); *see also Pub. Lands for the People*, 733 F. Supp. 2d at 1180 ("the APA provides a mechanism for enforcing obligations arising under other authority") (citing *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 798 n.11 (9th Cir. 1996)).

To the extent Plaintiff argues that its second claim arises under the provisions of the APA requiring notice and comment for rulemakings, and that these provisions applied to the 2002 delegation letter, *see* Pl.'s Resp. at 20 & n.19 (Doc. No. 23) (citing *Am. Hosp. Ass'n v. Bowen*, 834 F.2d at 1044–45), this argument must fail because Plaintiff has not alleged a violation of 5 U.S.C. § 553, which is the APA sub-section requiring notice and comment for rulemakings. *See* Compl. (Doc. No. 1); *Am. Hosp. Ass'n*, 834 F.2d at 1044 (citing 5 U.S.C. § 553).

Even if Plaintiff had alleged a violation of the notice and comment provisions of Section 553, Section 553 does not apply to the 2002 delegation because the 2002 delegation is a "rule of agency organization, procedure or practice," not a legislative rule. *See* 5 U.S.C. § 553(b)(A). In a similar case, the Eastern District of California found that a delegation of authority within the Department of Homeland Security to review appeals was procedural because the delegation did not "alter the rights or obligations of the party making an appeal; it only identifies the body that will exercise jurisdiction over the appeal . . . . Since the delegation specifies the internal organization of the agency, it falls within the procedural exception to 5 U.S.C. § 553 . . . ." *United States v. Gonzales*, 1085 F. Supp. 2d 1077, 1085 (N.D. Cal. 2010); *see also Erringer v. Thompson*, 371 F.3d 625, 633 n.15 (9th Cir. 2004) "'[P]rocedural' rules are those that are

legitimate means of structuring [the agency's] enforcement authority.") (quoting *Am. Hosp. Ass'n*, 834 F.2d at 1055). Similarly here, the 2002 delegation is merely a statement of who will issue an emergency closure order; it does not in itself "alter the rights or obligations of the party" affected by the closure order. *See Gonzales*, 1085 F.Supp. 2d at 1085. Therefore, the APA's provisions requiring notice and comment for rulemaking do not apply, and Plaintiff's Second Claim for Relief should be dismissed.

B. Failure to State a Claim for Violation of Subsistence Priority Under ANILCA

Plaintiff fails to state a claim for a violation of its subsistence priority under ANILCA. *See* Def. Br. 26–29 (Doc. No. 10 at 30–33). In its response, Plaintiff merely reiterates the allegations in its complaint in an attempt to show that its claim for relief under ANILCA rises "above mere speculation." *See* Pl.'s Resp. 20–22 (Doc. No. 21 at 23–25). However, it has failed to show that, as a legal matter, the Board has not granted it a *priority* under ANILCA. Plaintiff has a priority to fish in federally-managed waters, and the Board has tried to provide numerous opportunities for Plaintiff to meet its subsistence priority. *See* Def. Br. 26–27 (Doc. No. 10 at 30–31). This is all that ANILCA requires. *See* 16 U.S.C. § 3114 ("the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be *accorded priority* over the taking on such lands of fish and wildlife for other purposes") (emphasis added).

Plaintiff has misconstrued "preference" and "priority" as a mandate that the Board overlook conservation concerns so that Plaintiff can meet its allocation. But ANILCA does not require the Board to prioritize Plaintiff's allocation above conservation concerns. Instead, ANILCA provides that "[w]henever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such

populations, or to continue such uses, such priority shall be implemented through *appropriate limitations* . . . .” 16 U.S.C. § 3114 (emphasis added); *see also* 16 U.S.C. § 3125 (“Nothing in this subchapter shall be construed as . . . permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations . . . .”). As we discussed in our motion to dismiss, the emergency closure order was reasonably based on conservation concerns, and was therefore appropriate under ANILCA and reasonable under the APA. *See* Def. Br. 26–29 (Doc. No. 10 at 30–33). For these reasons, the Court should dismiss Plaintiff’s claim that the Board failed to provide a subsistence priority.

CONCLUSION

The Court lacks jurisdiction over Plaintiff’s claims relating to the gillnet fishery for four reasons. First, Plaintiff’s claims are unripe because the Board’s original decision to authorize the gillnet fishery is pending reconsideration. Second, Plaintiff lacks standing to challenge the emergency closure order. Third, the Court lacks jurisdiction over Plaintiff’s challenges to the Board’s delegation of authority to issue the in-season manager. Fourth, Plaintiff’s claims that the Board and the in-season manager failed to act in a number of ways are not justiciable. Plaintiff also fails to state a claim upon which relief can be granted because Plaintiff cannot bring a stand-alone claim under the Administrative Procedure Act, and Plaintiff fails to state a claim for violation of its subsistence priority under ANILCA. For these reasons, and the reasons discussed in our opening brief, the Court should dismiss Plaintiff’s Complaint, Doc. No. 1.

Respectfully submitted this 24th day of March, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2016 a copy of the foregoing document was served electronically by means of the Court's ECF system on the following:

John Starkey

Anna Crary

/s/ *Rachel K. Roberts*
RACHEL K. ROBERTS