

No. 22-35097

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA,
Plaintiff/Appellant,
v.

FEDERAL SUBSISTENCE BOARD, et al.,
Defendants/Appellees,
and
ORGANIZED VILLAGE OF KAKE,
Intervenor-Defendant/Appellee.

Appeal from the United States District Court for the District of Alaska
No. 3:20-cv-00195-SLG (Hon. Sharon L. Gleason)

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GLOSSARY

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| ANILCA | Alaska National Interest Lands Conservation Act |
| APA | Administrative Procedure Act |
| BLM | Bureau of Land Management |
| OSM | Office of Subsistence Management |

INTRODUCTION

The Federal Subsistence Board (Board) manages subsistence uses of fish and wildlife on public lands in Alaska pursuant to the Alaska National Interest Lands Conservation Act (ANILCA). Alaska challenges two expired actions taken by the Board. The first authorized the Organized Village of Kake, a federally recognized Indian tribe, to conduct an emergency subsistence hunt on federal lands to address food insecurity resulting from the COVID-19 pandemic. That one-time authorization expired in August 2020. The second temporarily closed a small amount of federal land in Alaska's Game Management Unit 13 to *nonsubsistence* hunting to promote public safety and ensure continued opportunities for subsistence uses. That one-time closure expired in June 2022, after the State filed this appeal. The district court held that Alaska's challenge to the first action was moot and that its challenge to the second lacked merit.

All of Alaska's claims are now moot because both of the challenged actions have expired by their terms, and there is no reasonable expectation that either action will recur. The Board's approval of the Kake hunt was a unique action designed to address one rural community's needs during the early phases of the COVID-19 pandemic. The extraordinary circumstances that gave rise to the Board's decision no longer exist. And if the Board again decides to impose a comparable closure in Unit 13, which is speculative, its decision would be based

on different facts, analyses, and evidence. This controversy is therefore moot—the challenged actions are not capable of repetition yet evading review.

If this Court decides that the district court erred by dismissing the claims challenging the Kake hunt as moot, the proper course is to remand for the district court to consider the merits of those claims in the first instance. In any event, the claims lack merit. Alaska’s argument that the Kake hunt was unlawful because the Board lacks authority to open federal lands to subsistence hunting is untenable. ANILCA vests the federal government—not the State—with broad authority to manage federal lands in Alaska for subsistence uses. Congress’s broad grant of power to *manage* those lands for subsistence uses plainly includes the logically antecedent power to *open* them to subsistence hunting. The State argues otherwise based on legislative history, but that history—even if relevant—is consistent with the Board’s regulations, which reflect the best interpretation of the statute.

The Board also reasonably determined that the temporary closure of certain federal lands in Unit 13 was necessary for public safety and to continue subsistence uses. The administrative record shows that overcrowding and user conflicts had created unsafe conditions and reduced opportunities for successful subsistence hunting on those lands. The Board’s conclusion that the closure would at least partially address the problems is supported by the record and entitled to deference under the narrow Administrative Procedure Act (APA) standard of review.

STATEMENT OF JURISDICTION

(a) The district court had statutory subject-matter jurisdiction under 28 U.S.C. § 1331 because Alaska's claims arose under ANILCA, 16 U.S.C. §§ 3101-3233, and the APA, 5 U.S.C. §§ 701-706. 2-ER-54–77. However, as discussed below (pp. 26-30), the district court correctly held that it was divested of Article III jurisdiction to review the Board's authorization of the Kake hunt when that authorization expired. *See* 1-ER-24–30.

(b) The district court's judgment was final because it disposed of all claims against all defendants. 2-ER-53. This Court has jurisdiction under 28 U.S.C. § 1291. However, as discussed below (pp. 45-48), the expiration on June 30, 2022, of the Board's temporary closure of federal lands in Unit 13 has divested this Court of Article III jurisdiction to review the district court's rejection of Alaska's claims challenging that closure.

(c) Judgment was entered on December 3, 2021. 2-ER-53. Plaintiffs filed their notice of appeal on February 1, 2022, or 60 days later. 2-ER-52. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether Alaska's challenge to the Board's authorization of the Kake hunt is moot because the hunt has ended, the authorization has expired, and the extraordinary circumstances that gave rise to the authorization no longer exist.

2. If this Court reaches the merits of Alaska’s challenge to the Kake hunt, whether that challenge fails because the Board plainly has authority under ANILCA to open federal lands to subsistence hunting to ensure the safety and food security of rural Alaskans during a global pandemic.

3. Whether Alaska’s challenge to the Board’s closure of certain federal lands in Unit 13 is moot because the closure has expired, and any decision by the Board to impose a comparable closure in the future would be based on different facts, new analyses, and a new administrative record.

4. If this Court reaches the merits of Alaska’s challenge to the temporary closure, whether that challenge lacks merit because the Board’s conclusion that the closure was necessary for public safety and to continue subsistence uses was reasonable and supported by the record.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not included in the Addendum to Alaska’s Opening Brief are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

I. Legal background

A. The Alaska National Interest Lands Conservation Act

In 1980, Congress enacted Title VIII of ANILCA to ensure that rural Alaskans could continue practicing their subsistence way of life. *See* 16 U.S.C.

§§ 3101(c), 3111-3126. Title VIII’s central objective is “to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.” *Id.* § 3111(4). To further that objective, Section 804 mandates that “the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.” *Id.* § 3114. “Public lands” generally means federally owned lands. *See id.* § 3102(1)-(3). “Subsistence uses” means “the customary and traditional uses by rural Alaska residents of wild, renewable resources” for (among other reasons) “direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation.” *Id.* § 3113.

Congress found that “the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life” required a new “administrative structure” to enable rural residents to “have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands.” *Id.* § 3111(5). Congress therefore directed the “Secretary”—meaning the Secretary of the Interior or, with respect to National Forest lands, the Secretary of Agriculture, *id.* § 3102(12)—to establish subsistence resource regions, local advisory committees, and regional advisory councils. *Id.* § 3115(a). Congress also authorized the Secretary to act on each council’s “recommendations concerning

policies, standards, guidelines, and regulations to implement” a “strategy for the management of fish and wildlife populations within the region to accommodate ... subsistence uses and needs.” *Id.* § 3115 (a)(3)(D)(iii)-(iv), (c). And Congress broadly authorized the Secretary to “prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this subchapter.” *Id.* § 3124.

In recognition of Alaska’s traditional authority over the fish and wildlife within its borders, Congress gave Alaska the first option to enact its own laws in place of the federal regulatory scheme envisioned by Title VIII. *See* 16 U.S.C. § 3115(d). To avoid federal regulation, the State had to “enact[] and implement[] laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in,” Sections 803, 804, and 805. *Id.* The State also had to establish a comparable “system of local advisory committees and regional advisory councils” and require the “State rulemaking authority” to consider the “recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses.” *Id.* If the State did not implement a compliant program, Section 805(d) required the Secretaries to “step in and do the job.” *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988).

Sections 815 and 816 of ANILCA detail the Secretaries’ authority to close public lands to nonsubsistence and subsistence hunting, which the Secretaries

would retain even if the State implemented the required subsistence management program. *See* 16 U.S.C. §§ 3125(3), 3126(b). Section 815(3) provides that nothing in Title VIII may be construed as “authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands” unless “necessary for the conservation of healthy populations of fish and wildlife,” to “continue subsistence uses,” “for the reasons set forth in” Section 816, “or pursuant to other applicable law.” 16 U.S.C. § 3125(3). Section 816, in turn, authorizes the Secretaries to temporarily close public lands “to subsistence uses of a particular fish and wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population.” *Id.* § 3126(b). Section 804 also describes how the rural subsistence priority is to be implemented “[w]henever it is necessary to restrict the taking of populations of fish and wildlife on [the public] lands for subsistence uses.” *Id.* § 3114.

Section 1314 of ANILCA generally addresses the taking of fish and wildlife on public lands in Alaska. It first provides that nothing in ANILCA “is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in [Title VIII]*, or to amend the Alaska constitution.” *Id.* § 3202(a) (emphasis added). Section 1314 also preserves the Secretaries’ responsibility and authority to manage the public lands in Alaska, *id.* § 3202(b), and provides that “all hunting therein

‘shall be carried out in accordance with the provisions of this Act and other applicable State and Federal law,’” *Safari Club Int’l v. Haaland*, 31 F.4th 1157, 1168 (9th Cir. 2022) (quoting 16 U.S.C. § 3202(c)).

B. Federal subsistence management regulations

Given the choice between federal regulation of subsistence uses on public lands “or self-regulation with federal oversight, Alaska chose the latter.” *Kenaitze Indian Tribe*, 860 F.2d at 314. Indeed, Alaska “enacted the necessary statutes in 1978, while Congress was still working on the final version of ANILCA.” *Id.* In 1982, the Secretary of the Interior certified that the State’s legislative program complied with ANILCA, and federal regulations were withheld. *See id.*

In 1989, however, the Alaska Supreme Court held that state laws limiting eligibility for subsistence hunting to rural residents, as required by ANILCA, violated the Alaska Constitution. *See McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989). The Court stayed its decision to give the state legislature an opportunity to amend the constitution, but the legislature failed to act. *See Alaska v. Babbitt*, 72 F.3d 698, 701 (9th Cir 1995). The Secretaries therefore stepped in and promulgated federal regulations establishing the subsistence management program

required by ANILCA. *See* 55 Fed. Reg. 27,114 (June 29, 1990) (temporary regulations); 57 Fed. Reg. 22,940 (May 29, 1992) (permanent regulations).¹

The regulations created the Board to “administer[] the subsistence taking and uses of fish and wildlife on public lands.” 50 C.F.R. § 100.10(a). The Board is comprised of eight voting members, including a chair and two members of the public appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture, and the Alaska state or regional directors of the U.S. Fish and Wildlife Service, National Park Service, U.S. Forest Service, Bureau of Land Management (BLM), and Bureau of Indian Affairs. *Id.* § 100.10(b).

The regulations provide that subsistence hunting seasons on public lands “are closed unless opened by Federal regulation.” *Id.* §§ 100.25(b), 100.26(a). The Board issues biennial regulations establishing the “seasons, harvest limits, and methods and means related to the taking of wildlife for subsistence uses” on public lands. 85 Fed. Reg. 74,796 (Nov. 23, 2020) (regulations for 2020-2022 regulatory cycle). State hunting regulations also apply, but only if “they are not inconsistent with, or superseded by,” federal regulations. 50 C.F.R. § 100.14.

In an effort to prioritize subsistence uses, the Board sometimes establishes open seasons for subsistence hunting on federal lands that extend beyond the

¹ The Secretary of the Interior’s regulations are codified at 50 C.F.R. Part 100. The Secretary of Agriculture’s identical regulations are codified at 36 C.F.R. Part 242. For simplicity, this brief refers only to Interior’s regulations.

general hunting seasons established under state law. *See, e.g.*, 2-ER-131 (in 2012, the Board added nine days to the beginning of the fall caribou season in Unit 13 “to provide more opportunity to Federally qualified subsistence users”); 2-ER-133, 150 (in 1995, the opening date for federal moose season in Unit 13 was changed from August 25 to August 1 “to provide additional opportunity for Federally qualified subsistence users without interference from” certain state hunters); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1195 (9th Cir. 2000) (upholding Board’s determination that a ten-day advance federal moose season in Unit 15 provided a meaningful preference for subsistence users).

The Board may also approve “[e]mergency special actions” and [t]emporary special actions” outside its normal two-year regulatory cycle. 50 C.F.R. § 100.19. “In an emergency situation,” the Board “may immediately open or close public lands for the taking of fish and wildlife for subsistence uses” if “necessary to ensure the continued viability of a fish or wildlife population, to continue subsistence uses ... , or for public safety reasons.” *Id.* § 100.19(a). The Board must first consult with Alaska and with the appropriate regional advisory council, and the term of special action may not exceed 60 days. *Id.* § 100.19(a)(2).²

² Although the special action regulation was amended in 2010, it has authorized the Board to make “a temporary change to open or adjust” subsistence hunting seasons since 1992. *See* 57 Fed. Reg. at 22,957.

After providing notice and a public hearing, the Board may also take a range of temporary special actions, including actions to “close public lands for the taking of fish and wildlife for nonsubsistence uses.” *Id.* § 100.19(b). The Board must first determine that the temporary action “will not interfere with the conservation of healthy fish and wildlife populations, will not be detrimental to the long-term subsistence use of fish or wildlife resources, and is not an unnecessary restriction for nonsubsistence uses.” *Id.* § 100.19(b)(1). The length of a temporary special action must “be confined to the minimum time period ... determined by the Board to be necessary under the circumstances,” and a temporary closure may “not extend longer than the end of the current regulatory cycle.” *Id.* § 100.19(b)(2).

C. Prior litigation regarding the scope of the Secretaries’ regulatory authority under Title VIII.

After the Secretaries promulgated the federal subsistence regulations, Alaska brought suit alleging that the regulations were unlawful because the Secretaries lacked authority under ANILCA “to adopt a comprehensive scheme for fish and wildlife management on ‘public lands.’” *John v. United States*, No. A90-0484-CV (HRH), 1994 WL 487830, at *5 (March 30, 1994), *rev’d on other grounds Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). One of the two key questions there at issue was “who is entitled to regulate the taking of fish and game on public lands in Alaska for subsistence purposes?” *Id.* at *2. The State argued that it alone retained that privilege—even though its constitution prevented it from enacting

laws implementing ANILCA’s rural subsistence priority—and that Congress did not vest the Secretaries “with authority to assume day-to-day management of fish and game for subsistence purposes on public lands.” *Id.* at *5.

The district court in *John* disagreed. The court held that under ANILCA, if the State does not adopt a compliant subsistence program, “the Secretary, not the State of Alaska, is entitled to manage fish and game on public (federal) lands in Alaska for purposes of Title VIII,” *id.* at *8, and “has the authority to adopt regulations for the purpose of implementing Sections 803, 804, and 805,” *id.* at *5.

Alaska appealed the district court’s ruling that “Title VIII of ANILCA authorizes the federal government to manage subsistence fishing and hunting on public lands in the absence of Alaska laws implementing the subsistence priority.” 72 F.3d at 700 n.2. After briefing was completed, however, “the parties, including the [State], stipulated to the dismissal with prejudice of that issue,” and this Court “accepted the stipulation.” *Id.* “In light of the dismissal with prejudice on that issue, the district court’s holding on this issue stands.” *Id.*³

³ The private plaintiffs in *John* challenged the Secretaries’ interpretation of the “public lands” subject to ANILCA’s rural subsistence preference. The district court held that the Secretaries’ definition was too narrow and adopted its own expansive definition. Alaska and the federal government appealed, and this Court reversed the district court’s judgment on that issue. *See* 72 F.3d at 700-04.

II. Factual background

A. The Kake emergency subsistence hunt

In spring 2020, during the onset of the COVID-19 pandemic, rural Alaska communities began requesting permission from the Board to conduct emergency subsistence hunts on federal lands to address food shortages resulting from supply chain disruptions. *See* SER-28–30, 31.

In April 2020, the Organized Village of Kake, a federally recognized Indian tribe, requested permission to conduct an emergency subsistence hunt for moose and deer on adjacent National Forest lands. SER-14, 57. The request was processed by the local Forest Service district ranger under a special delegation of authority from the Board “to respond to requests for the taking of deer and moose for reasons of public safety and food security during the COVID-19 pandemic.” SER-15, 23–26. After unsuccessfully attempting to secure the State’s views on the request, the district ranger referred the matter back to the Board for decision in accordance with the terms of the special delegation. SER-15, 56–59.

On June 22, 2020, after a telephonic public hearing attended by State representatives, SER-50–76, the Board granted the emergency request, SER-20–21. Pursuant to 50 C.F.R. § 100.19(a), the Board authorized a community harvest of up to two moose and five black-tailed deer per month for 60 days (June 24, 2020–August 22, 2020) on National Forest lands in one section of Alaska’s Game

Management Unit 3. SER-20–21. The special harvest season was outside of the state-approved moose and deer seasons for the area. *See id.* The Board approved the special action “for reasons of public safety related to food security concerns in Kake due to intermittent and unreliable food deliveries caused by the COVID-19 pandemic and limited ferry Service.” SER-21. The Board found that the special action raised no conservation concerns “for the growing population of moose and stable population of Sitka black-tailed deer in the harvest area.” *Id.* The Board directed the local Forest Service district ranger to administer the hunt and to conduct an initial 30-day review to determine whether an additional 30-day harvest period was necessary. SER-20.

The district ranger issued Kake an initial 30-day permit which resulted in the harvest of two moose and five deer from the authorized harvest area. SER-13. The yield was distributed to 135 households in Kake. *Id.* The 30-day permit expired in July 2020 and no additional permits were issued. SER-13, 20. The authorization itself expired in August 2020. SER-20. The pandemic-related delegation of authority under which Kake’s special action request was processed expired on June 1, 2021, and was not renewed. SER-18.

B. The temporary closure of federal lands in subunits 13A and 13B to nonsubsistence hunting

In February 2020, the Board received a request from a rural Alaskan to temporarily close federal lands in Game Management Unit 13 to nonsubsistence

hunting for moose and caribou. 2-ER-116–23.⁴ Unit 13 is a popular area for moose and caribou hunting because of its road-accessibility and proximity to Fairbanks and Anchorage. 2-ER-82, 147, 149. Overcrowding, competition among local and nonlocal hunters, and unsafe conditions are longstanding problems in the area, which has been described as a “combat hunting zone.” 2-ER-82; *see also* 2-ER-96, 145–47. The individual requesting the closure asserted that it would allow for an evaluation of whether low subsistence hunting success rates would improve and address the unsafe conditions and reduced opportunities for subsistence hunting in the area. 2-ER-116–17.

The Board denied a similar request in 2019, finding that a closure was not needed for public safety or to continue subsistence uses. 2-ER-163.⁵ The Board’s policy, however, is to evaluate each request “on a case-by-case basis.” SER-6. To assist the Board in its evaluation of the 2020 request, the federal Office of Subsistence Management (OSM) held a public hearing and prepared an analysis of

⁴ “Nonsubsistence hunting” here means hunting that does not qualify as a “subsistence use” by “rural Alaska residents” under Section 803 of ANILCA. 16 U.S.C. § 3113. Alaska may authorize its own subsistence hunts, *see* Opening Brief 7, but they are open to all Alaska residents and thus do not qualify for the subsistence priority under ANILCA.

⁵ Four Board members voted in favor of the 2019 proposal and four voted against it, resulting the proposal’s rejection. *See* 50 C.F.R. § 100.10(d)(3) (the Board may take no action “unless a majority of voting members are in agreement”); *see also* www.doi.gov/sites/doi.gov/files/uploads/fsb_work_session_19_july_19.pdf (page 46) (last visited August 12, 2022).

the request, public comments, and comments submitted by the State. 2-ER-124–56; *see also* SER-3–4. OSM focused on whether the closure might be warranted for public safety or continued subsistence uses because a closure for experimental purposes (as suggested by the proponent) is unauthorized. 2-ER-152, 154.

OSM noted that federal lands comprise 12.4 percent of Unit 13, although about half of those lands are already closed to nonsubsistence hunting and another quarter are remote and do not experience user conflicts. 2-ER-152. The remaining federal lands (about 4.5 percent of Unit 13) are administered by BLM, and about a third of those lands also are not areas of reported user conflicts. *Id.* The remaining BLM lands in subunits 13A and 13B along the Richardson Highway, the Gulkana River, and the Delta River comprise about 2.7 percent of Unit 13, are “extremely accessible,” and are “the focus of immense hunting, competition, overcrowding, and safety concerns.” 2-ER-152–53; *see also* 2-ER-83, 145–47.

During its deliberations on the 2019 proposed closure, some Board members expressed concern about closing all federal lands in Unit 13 when only a few areas may be experiencing problems. 2-ER-153. In response, OSM focused its analysis of the 2020 proposal on the problem areas in subunits 13A and 13B. *Id.*

OSM determined that a targeted closure of those areas could be warranted for public safety because “[s]afety concerns resulting from intense hunting pressure, overcrowding of hunters, disruption of hunts, and unsafe shooting

practices have been repeatedly cited by all user groups.” 2-ER-153; *see also* 2-ER-137, 145–47. OSM recognized (as it had in 2019) that nonsubsistence hunters could still use federal lands to access adjacent, unrestricted nonfederal lands. 2-ER-153; *see also* 2-ER-193. But OSM found that the targeted closure could “spread hunters out” by requiring nonsubsistence hunters to travel farther from the congested roadway and river corridors in order to hunt, “alleviating some of the overcrowding concerns” on the federal lands in subunits 13A and 13B. 2-ER-153.

OSM determined that the effects of the targeted closure on subsistence uses of caribou were uncertain because in recent years, caribou had migrated through the area in October, when the season is closed. *Id.* OSM nevertheless concluded that because caribou on the accessible federal lands in subunits 13A and 13B experience heavy hunting pressure when they are available, the targeted closure could reduce competition and limit disruptions to migration, which could increase harvest success rates for rural subsistence users. 2-ER-83, 153.

OSM concluded that a targeted closure could ensure continue subsistence uses of moose in those areas. *Id.* The Board had previously attempted to prioritize subsistence hunting of moose by opening the federal season several weeks before the start of the state season. 2-ER-133. But the effort likely provided limited subsistence benefits because most moose are harvested in mid-September, when the state season is open. 2-ER-150, 153. The available data, though subject to

several qualifications, also indicated that despite the longer season, moose harvest success rates were significantly lower under federal regulations than under state regulations. 2-ER-82–83, 150–51. This data was not presented in OSM’s analysis of the 2019 proposal. *See* 2-ER-168–94. OSM concluded that the targeted closure could increase subsistence success rates by alleviating congestion and reducing competition in the problem areas in subunits 13A and 13B. 2-ER-153, 154.

OSM therefore supported the proposed closure, as modified to target only the federal lands in subunits 13A and 13B. 2-ER-154. OSM recommended that the Board apply the closure for the remainder of 2020-2022 regulatory cycle because overcrowding, safety concerns, and diminished opportunities for subsistence hunting were “longstanding issues” in the area that were unlikely to change during that period. 2-ER-155. OSM attached Alaska’s comments and noted that the State had concluded that the closure would not address the problems in Unit 13 or increase subsistence harvest success rates. 2-ER-136, 157–62.

The Interagency Staff Committee then reviewed the closure request. *See* 2-ER-156. The Committee is comprised of representatives of the U.S. Fish and Wildlife Service, National Park Service, BLM, Bureau of Indian Affairs, and U.S. Forest Service, and provides analytical and administrative support to the Board. *See* 50 C.F.R. § 100.10(d)(7). The Committee concurred with OSM’s conclusion that a targeted closure was justified “to improve safety and reduce user conflicts,

while continuing, and potentially increasing, the opportunity for subsistence uses of moose and caribou” on the covered federal lands. 2-ER-156. The Committee explained that the “spatial and temporal concentration of hunters” on those lands has “the potential to lead to serious safety issues and has already led some subsistence users to avoid the area, thus reducing opportunity.” *Id.* Of the options within the Board’s regulatory authority, the Committee explained, the targeted closure “may increase safety and allow for the continuation of subsistence uses of the resource and provide for a meaningful subsistence priority.” *Id.*

In July 2020, the Board held a telephonic public hearing on the proposed closure. During the hearing, OSM presented the results of its analysis and the Interagency Staff Committee’s recommendation. 2-ER-79–84, 92–93. The Board also heard testimony from members of the public, 2-ER-95–96, and brief remarks from a representative of the State of Alaska, 2-ER-96–97.

One Board member expressed concern that the Board had rejected a similar proposal in 2019. 2-ER-88. OSM explained that its analysis of the 2019 proposal evaluated the closure of *all* federal lands in Unit 13, whereas its new analysis and the recommended targeted closure “really honed in” on the problem areas in subunits 13A and 13B “where most of the conflicts occur.” 2-ER-88, 91. Another Board member highlighted OSM’s point—not specifically addressed in its 2019 analysis—that the targeted closure could at least partially address the safety issues

on the small amount of federal lands in subunits 13A and 13B by significantly reducing the density of active hunters on those lands. 2-ER-91–92, 101. Another Board member noted that the new data on moose harvest success rates had not previously been presented to the Board. 2-ER-101.

After its deliberations, the Board voted six-to-one to approve a targeted closure covering only the federal lands in subunits 13A and 13B “where most overcrowding, disruption of hunts, and serious safety concerns have occurred.” 2-ER-114; *see also* 2-ER-99–102. The Board’s order, which incorporates OSM’s analysis and the Interagency Staff Committee’s recommendation, found that the targeted closure was necessary for public safety and to continue subsistence uses of moose and caribou. 2-ER-114. The order also stated that the closure would remain in effect for the remainder of the 2020-2022 regulatory cycle. *Id.*

The closure expired by its terms on June 30, 2022. *Id.*; SER-10.

III. Proceedings below

In August 2020, Alaska brought suit challenging the Board’s authorization of the Kake hunt and the temporary closure of federal lands in subunits 13A and 13B. 2-ER-54–77. Alaska alleged that both actions exceeded the Board’s authority and were arbitrary and capricious. *See id.*⁶ The State moved for

⁶ Alaska also brought claims under the Government in the Sunshine Act, 5 U.S.C. § 552b, which the district court rejected, 1-ER-16–24. Because Alaska has not pursued those claims on appeal, they are not discussed further.

preliminary injunctions against both actions but the district court denied the motions. 3-ER-353, 354. Alaska did not appeal those orders.

After the Organized Village of Kake intervened as a defendant, the State moved for summary judgment. In December 2021, the district court denied Alaska's motion and entered judgment for Defendants. 1-ER-1–50. The court concluded that the State's challenge to the Kake hunt (which had expired) was moot, 1-ER-24–30, and that the challenge to the closure order (which had not then expired) failed on the merits, 1-ER-31–49. The court held that the Board had instituted the closure for permissible reasons; that it had reasonably found that the closure was necessary for public safety and to continue subsistence uses; that it had reasonably explained its decision to approve the targeted closure despite rejecting a blanket closure in 2019; and that the two-year term closure was reasonable and consistent with federal regulations. 1-ER-31–49.

This appeal followed.

SUMMARY OF ARGUMENT

1. Alaska's challenge to the Board's authorization of the Kake hunt is moot because the authorization expired by its own terms, now nearly two years ago. Any injury Alaska may have suffered as a result of the modest hunt (which yielded two moose and five deer) is no longer redressable.

Alaska has not met its burden to show that the same controversy is likely to both recur and evade review. The Board's approval of the Kake hunt was a unique action designed to address one rural community's needs during the early phases of the COVID-19 pandemic, and the circumstances that underlay the Board's decision no longer exist. Although the special action regulation itself remains on the books, that fact alone does not establish that this controversy is likely to recur.

Alaska maintains that the merits question it presses in this Court—whether the Board has *any* authority to open federal lands to subsistence hunting—is likely to arise elsewhere. But the question for mootness purposes is whether a particular Article III controversy will recur, not whether an abstract legal issue will recur. Furthermore, the Board's regulatory authority to establish open seasons is not confined to short-term emergency actions. As a result, Alaska cannot meet its burden to show that the merits question it presses will forever evade review, as required to save its claims against the Kake hunt from mootness. The district court's dismissal of those claims should be affirmed.

2. If this Court decides that Alaska's claims challenging the Kake hunt are not moot, it should remand them for the district court to decide the merits in the first instance. If the Court decides that it can and should resolve the merits itself, it should reject Alaska's claims.

Alaska argues that the Kake hunt was unlawful because the Board lacks authority to open federal lands to subsistence hunting for any reason. That argument is untenable. ANILCA vests the federal government—not the State—with broad authority to manage federal lands in Alaska for subsistence uses. That broad authority plainly includes the basic power to *open* federal lands to subsistence hunting when appropriate. Alaska’s contrary reading of the statute would impermissibly negate Title VIII’s central purpose and render several key provisions inoperative. And even if the statute were ambiguous, the Secretaries’ interpretation, reflected in the federal subsistence regulations, is the best interpretation. The legislative history, even if relevant, does not suggest otherwise.

3. Alaska’s challenge to the Board’s temporary closure of federal lands in subunits 13A and 13B is moot because the closure has expired and any injury Alaska may have suffered is not redressable. The two-year length of the closure means the controversy did not evade review; rather, Alaska did not press for faster review. Nor is the controversy likely to recur. At bottom, Alaska has brought an arbitrary-and-capricious challenge to the Board’s factual determinations in support of the expired closure. But even if the Board were to impose a comparable closure in the future, which is speculative, its decision would be based on different facts and a different administrative record. This Court thus cannot grant Alaska any effective relief on its record-based claims challenging the closure decision.

4. Alaska’s challenge to the expired closure also fails on the merits. The Board’s judgment that the closure was necessary for public safety and to continue subsistence was rational and supported by the record. The Board also reasonably explained its decision to approve a partial closure in 2020 despite rejecting a blanket closure in 2019, and the two-year duration of the expired closure was consistent with federal regulations. Therefore, if the Court reaches the merits, it should affirm the district court’s judgment upholding the closure decision.

STANDARD OF REVIEW

On mootness, “[t]he existence of subject matter jurisdiction is a question of law reviewed de novo.” *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

On the merits, the Court reviews the district court’s grant of summary judgment de novo, *Center for Biological Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017), evaluating whether the Board’s decisions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Ninilchik Traditional Council*, 227 F.3d at 1193-94. Agency action is arbitrary and capricious only if the agency “relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Kalispel Tribe of Indians v. U.S. Dep’t of the*

Interior, 999 F.3d 683, 688 (9th Cir. 2021) (citation omitted). Under that deferential standard, the Court’s “review is narrow, and [it] cannot substitute [its] judgment for that of the agency.” *Id.*

When reviewing the Secretaries’ interpretation of ANILCA reflected in the federal subsistence regulations, courts apply “the familiar analytical framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).” *Corrigan v. Haaland*, 12 F.4th 901, 906-07 (9th Cir. 2021). The court first employs “traditional tools of statutory construction” to “determine ‘whether Congress has directly spoken to the precise question at issue,’ or, instead whether the statute is ambiguous.” *Id.* (quoting *Chevron*, 467 U.S. at 842 & 843 n.9). “If the intent of Congress is clear, that is the end of the matter.” *Chevron*, 467 U.S. at 842-43. “If instead the ‘statute is silent or ambiguous with respect to the specific issue,’ the court defers to the administering agency’s interpretation as long as it reflects ‘a permissible construction of the statute.’” *John v. United States*, 720 F.3d 1214, 1228 (9th Cir. 2013) (quoting *Chevron*, 467 U.S. at 843).

ARGUMENT

I. Alaska’s claims challenging the Board’s authorization of the Kake hunt are moot.

“The mootness doctrine ‘requires that an actual, ongoing controversy exist at all stages of federal court proceedings.’” *Leigh v. Salazar*, 677 F.3d 892, 896 (9th Cir. 2012) (citation omitted). For an actual case or controversy to exist within the

meaning of Article III, the plaintiff ““must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.”” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

The Kake hunt lasted 30 days, raised no conservation concerns, and yielded two moose and five deer from federal land in one section of one game management unit in Alaska. SER-13, 20–21. To the extent the State was injured by that modest hunt, its injury is not redressable because the hunt has ended and the authorization has expired. The controversy is therefore moot. *See Brach v. Newsom*, 38 F.4th 6, 11 (9th Cir. 2022) (challenge to expired orders moot because there was “no longer any ... order for the court to declare unconstitutional or to enjoin”).

Alaska does not contend that it can be granted any effective relief with respect to the Kake hunt. The State instead argues that its challenge is not moot because it is capable of repetition yet evading review. Opening Brief 25-27. Alaska’s argument fails because that doctrine does not apply here.

A suit for prospective relief may go forward despite abatement of the underlying injury “only in the exceptional situations where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be

subjected to the same action again.” *Lewis*, 494 U.S. at 481 (cleaned up). “The ‘same action’ generally refers to particular agency policies, regulations, guidelines, or recurrent identical agency actions.” *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 79 (D.C. Cir. 2011) (cleaned up). “Unlike the initial mootness question, where the *defendants* have the burden, under the ‘capable of repetition’ prong of the exception to the mootness doctrine, the *plaintiffs* have the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity.” *Native Village of Nuiqsut v. BLM*, 9 F.4th 1201, 1209 (9th Cir. 2021) (cleaned up).

Alaska has not met its burden. Although the 60-day duration of the Board’s authorization of the Kake hunt may have been too short to allow for judicial review, the State has not shown that the same action will recur. The challenged authorization was a unique action designed to address one rural community’s needs during the early phases of the COVID-19 pandemic. *See* SER-13, 15, 20–21, 56–75. The extraordinary circumstances that gave rise to the authorization no longer exist. As the Court recently noted in dismissing a challenge to other pandemic-related orders that have expired, “circumstances have changed since July 2020.” *Brach*, 38 F.4th at 14. The “trajectory of the pandemic has been altered by the introduction of vaccines ... , medical evidence of the effect of vaccines, and expanded treatment options.” *Id.* at 15.

Alaska argues that this controversy will recur because the Board “regularly receives requests for it to authorize emergency hunts.” Opening Brief 26. But that statement is not supported by the cited document, which shows that the Board received eleven requests related to food security in the spring of 2020—only one of which was granted—because of the “unprecedented” uncertainty “caused by the ongoing public health concerns.” 2-ER-329. Again, those unprecedented circumstances no longer exist. *See Brach*, 38 F.4th at 14-15.

Alaska correctly notes that in 2018, the Board authorized another community far from Kake to conduct a 14-day subsistence hunt in a different game management unit for different reasons. *See* Opening Brief 26. But that single prior authorization hardly establishes a likelihood that this same controversy will recur. Indeed, there is no indication that the 2018 emergency subsistence hunt harmed any wildlife population or prevented the State from achieving any of its management objectives—or that the State even objected to the hunt.

To be sure, the special action regulation (50 C.F.R. § 100.19) will remain on the books, and the Board could always approve another action somewhere in Alaska that may or may not harm the State’s interests. But that possibility alone is not enough to avoid mootness. *See Brach*, 38 F.4th at 14 (that the government “has the power to issue executive orders cannot itself be enough to skirt mootness, because then no suit against the government would ever be moot”) (cleaned up).

Alaska instead must establish a reasonable expectation that the same action will recur. *Lewis*, 494 U.S. at 481. “Reasonable expectation means something more than ‘a mere physical or theoretical possibility.’” *Brach*, 38 F.4th at 14 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

Alaska counters that it is pursuing a purely legal claim—that the Board’s approval of the Kake hunt and 50 C.F.R. § 100.19 are both invalid because the Board lacks authority to open federal lands to subsistence hunting for any reason—and this “underlying issue” is capable of repetition. Opening Brief 20; *see also id.* at 24-25, 31-32. But the question for mootness purposes is “whether the same controversy will recur.” *Murphy*, 455 U.S. at 482 (emphasis added). Alaska’s abstract belief that the Board lacks statutory authority to open federal lands to subsistence hunting is not an Article III controversy. *See Shell Gulf of Mexico v. Center for Biological Diversity*, 771 F.3d 632, 637 (9th Cir. 2014) (“It is axiomatic that differing views of the law are not enough to satisfy Article III.”).

Regardless, even if the possible recurrence of a purely legal issue is enough to satisfy the “capable of repetition” requirement, Alaska has not shown that the legal issue it wishes to resolve is “likely forever to evade review.” *Lewis*, 494 U.S. at 481. The legal question of whether the Board has authority to open federal lands to subsistence hunting is not confined to short-term emergency actions taken under 50 C.F.R. § 100.19. *See supra*, pp. 9-10. For example, in 1995, the Board

established an open season for subsistence moose hunting on federal lands in Unit 13 in advance of the state-authorized season, and “[f]ederal regulations have not changed since.” 2-ER-133. Alaska thus cannot show (as it must) that the legal issue of “whether the Board has the statutory authority to open hunts,” Opening Brief 21, is implicated only by short-term actions that will “*always* [be] so short as to evade review.” *Spencer v. Kemna*, 523 U.S. at 18 (emphasis added).

The district court therefore properly dismissed Alaska’s challenge to the Kake hunt as moot. *See* 1-ER-24–30.

II. The Board acted within the scope of its authority under ANILCA when it approved the Kake hunt.

If the Court decides that Alaska’s claims challenging the Kake hunt are not moot, it should remand them for the district court to decide the merits in the first instance. The district court’s judgment on appeal provides that “the Court lacks jurisdiction over the issues associated with the Kake hunt.” 2-ER-53. Alaska’s merits arguments have no bearing on the validity of that judgment and thus are not properly before this Court on appeal. However, if the Court decides to consider the merits in the first instance, Alaska’s arguments should be rejected. The federal government plainly has authority under ANILCA to open federal lands to subsistence hunting when appropriate, and ensuring the food security of rural Alaskans during a global pandemic was a permissible reason for the Board to authorize a subsistence hunt. Alaska’s arguments to the contrary are meritless.

As an initial matter, prior litigation long ago resolved a basic disagreement between Alaska and the United States that relates directly to the instant dispute. *See John*, 1994 WL 487830 at *5-*9. In *John*, the district court held that in light of Alaska’s inability under its constitution to implement the subsistence program required by ANILCA, the federal government—not the State—must “manage fish and game on public (federal) lands in Alaska for purposes of Title VIII.” *Id.* at *9. Alaska appealed, but subsequently dismissed its appeal with prejudice, 72 F.3d at 700 n.2, which “bars any further action between the parties on the issues subtended by the case,” *In re Marino*, 181 F.3d 1142, 1144 (9th Cir. 1999).

As between Alaska and the United States, therefore, the law is clear: Title VIII of ANILCA broadly authorizes the federal government—not the State—to manage subsistence takings on federal lands. Alaska nevertheless argues that the Board unlawfully approved the Kake hunt because ANILCA does not allow the federal government to *open* federal lands to subsistence hunting for any reason. Opening Brief 3, 20, 24-25, 31-32, 34-35. The State maintains that it alone decides when to establish open seasons for hunting on federal lands. *See id.* The Board may prioritize subsistence hunting on federal lands, the State argues, only when it becomes necessary to *restrict* hunting that the State has decided to authorize to meet its own objectives. Opening Brief 3, 20-21, 27-28, 34.

Alaska's argument is untenable on its face and inconsistent with ANILCA's plain language and purposes. The legislative history, if relevant, does not suggest otherwise. And even if the statute were ambiguous, the Secretaries' interpretation reflected in the federal subsistence regulations is the best reading of the statute. The Board's authorization of the Kake hunt should therefore be upheld.

A. ANILCA authorizes the federal government to open federal lands to subsistence hunting.

Title VIII of ANILCA was enacted "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c); *see also id.* §§ 3111(4), 3112(a). To further that objective, Section 804 mandates that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." *Id.* § 3114. Congress also directed the Secretaries to create a new "administrative structure" of resource regions, local advisory committees, and regional advisory councils, *id.* §§ 3111(4), 3115(a), and authorized the Secretaries to act on each council's recommendations regarding a "strategy for the management of fish and wildlife populations within the region to accommodate ... subsistence uses and needs," *id.* § 3115(a)(3)(D)(iii), (c). Congress then broadly authorized the Secretaries to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities." *Id.* § 3124.

Title VIII thus reflects a comprehensive grant of authority to the Secretaries to manage fish and wildlife on public lands as necessary to preserve and prioritize the subsistence way of life of rural Alaskans. Subsistence uses logically cannot be *prioritized* on federal lands if those lands cannot be *opened* to subsistence uses.

Congress's broad grant of authority to the Secretaries thus necessarily includes the basic power to open federal lands to subsistence uses, as long as federal seasons are "consistent with sound management principles" and with "the conservation of healthy populations of fish and wildlife." *Id.* § 3112(1). A contrary reading of Title VIII would impermissibly nullify its central objective, particularly in light of the State's inability under its constitution to fulfill that objective. *See McDowell*, 785 P.2d at 9; *see also New York State Dep't of Social Services. v. Dublino*, 413 U.S. 405, 419-20 (1973) (courts "cannot interpret federal statutes to negate their own stated purposes"); *John v. United States*, 247 F.3d 1032, 1037-38 (9th Cir. 2001) (ANILCA must be given "the breadth and scope sufficient to achieve Congress's express purpose") (Tallman, Circuit Judge, concurring).

The Secretaries' authority to open federal lands to subsistence hunting thus is necessarily implied from its express management and prioritization mandates. Moreover, no provision of Title VIII purports to prohibit the Secretaries from opening federal lands to subsistence uses. Alaska correctly notes that Section 804, which establishes the rural subsistence priority, also explains how to implement

that priority when it is “necessary to restrict the taking of populations of fish and wildlife on [public] lands for subsistence uses.” *Id.* § 3114. And Section 816 limits the circumstances in which the Secretaries may close public lands to subsistence uses. *Id.* § 3126(b). But no one could reasonably argue that the Secretaries may prioritize subsistence uses only by restricting them. Congress specified when the Secretaries may restrict subsistence uses on federal lands not because that is the full extent of their authority, but because excessive restrictions would undermine Title VIII’s central purpose: “to protect and provide the opportunity for continued subsistence uses.” *Id.* § 3111(4).

Nor is the Secretaries’ authority limited to restricting *nonsubsistence* hunting under Section 815(3). That savings clause states only that nothing in Title VIII is to be construed as “authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses unless necessary” for the specified reasons. *Id.* § 3125(3). Section 815(3) does not purport to prohibit the Secretaries from *opening* federal lands to the taking of fish and wildlife *for subsistence uses*. *See id.*

Alaska’s cramped view of the Secretaries’ authority would also contravene Title VIII by rendering several of its key provisions inoperative. If the Secretaries could only restrict hunting under Sections 815 and 816, then Section 804’s mandate that the Secretaries affirmatively prioritize subsistence hunting would have no independent legal effect. Other provisions of the statute would also be

rendered largely superfluous, including Section 805 (authorizing the Secretaries to act on each regional council’s recommendations for a “strategy for the management of fish and wildlife populations within the region to accommodate ... subsistence uses and needs,” *id.* § 3115), Section 802(3) (directing federal agencies to cooperate with adjacent landowners when “managing subsistence activities on the public lands,” *id.* § 3112(3)), and Section 824 (directing the Secretaries to “prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities” under Title VII, *id.* § 3124). And it is a basic principle of statutory construction that a statute should be construed, if possible, such that “no clause, sentence, or word” is rendered “superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Section 1314(a) of ANILCA does not bolster Alaska’s position. *See* Opening Br. 33-34. It states that nothing in ANILCA “is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in [Title VIII]*, or to amend the Alaska constitution.” 16 U.S.C. § 3202(a) (emphasis added). Title VIII clearly diminishes the State’s traditional authority by authorizing *the Secretaries* “to manage fish and game on public (federal) lands” for subsistence uses. *John v. United States*, 1994 WL 487830 at *9. And if state hunting regulations conflict

with federal regulations promulgated under ANILCA, “the latter control under standard principles of conflict preemption.” *Safari Club*, 31 F.4th at 1168.

Finally, ensuring the food security of rural Alaskans during a global pandemic was a permissible reason for the Board to authorize a subsistence hunt. Congress enacted the subsistence priority because it recognized that rural Alaskans depend on subsistence uses for their physical well-being, and “in most cases, no practical alternative means are available to replace the food supplies” obtained by subsistence hunting. 16 U.S.C. § 3111(1)-(2). Thus, as the district court correctly held in denying Alaska’s motion for a preliminary injunction, “ANILCA’s priority for subsistence uses aims, among other things, to ensure the physical well-being of rural residents of Alaska.” *Alaska v. Federal Subsistence Board*, 501 F. Supp. 3d 671, 692 (D. Alaska 2020).

The Board plainly had authority under ANILCA to open federal lands to subsistence hunting to ensure the food security of rural Alaskans during a global pandemic. Because Alaska advances no other grounds for setting aside either the Board’s authorization of the Kake hunt or the special action regulation on which that authorization was based, 50 C.F.R. § 100.19(a), Alaska’s challenge would fail on the merits even if it were justiciable.

B. The legislative history confirms that the federal government has authority to open federal lands to subsistence hunting.

Because the Board's authority to open federal lands to subsistence hunting is clear from ANILCA itself, the Court need not examine the legislative history. *See Halaim v. INS*, 358 F.3d 1128, 1134 (9th Cir. 2004). The history is also of limited utility here because it assumes that the State would implement a compliant rural subsistence program, as Congress "could not have anticipated" that the Alaska Supreme Court would hold that state laws establishing the required program violated the Alaska state constitution. *Alaska v. Babbitt*, 72 F.3d at 700-01. The legislative history thus gives no extended consideration to the current situation in which the State is prohibited as a matter of state constitutional law from implementing a compliant program. Regardless, the statute itself makes clear that if the State failed to implement the required program, the responsibility and authority to do so would fall to the Secretaries. *See* 16 U.S.C. § 3115(d); *Kenaitze Indian Tribe*, 860 F.2d 316-18; *John*, 1994 WL 487830, at *9. When viewed through that lens, the legislative history confirms that the Secretaries possess the basic power to open federal lands to subsistence hunting.

Alaska first argues that a Senate committee report shows that the Secretaries may prioritize subsistence hunting only when it becomes necessary to restrict hunting. *See* Opening Brief 28-29 (citing S. Rep. No. 96-413, at 269 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5283). Alaska is incorrect. The report's

discussion of the provision that became Section 804 does describe how the subsistence priority is to be implemented when it is necessary to restrict hunting on public lands. *See* S. Rep. No. 96-413, at 269. But the report *also* states that Section 804 “envisions that governmental action affecting subsistence resources and uses shall be undertaken in a manner which adequately provides for the preference *on an ongoing basis* and *not only* when critical allocation decisions may be necessary because a particular subsistence resource may be threatened with depletion.” *Id.* (emphasis added).

Moreover, the report shows that the State understood that in its presumed role of manager of the subsistence program, the regional councils required by Section 805 would “have a major role in the State rulemaking authority’s *establishment of seasons*, bag limits and the provision of the preference for subsistence uses in their respective areas.” S. Rep. No. 96-413, at 270 (emphasis added). Because the State cannot implement a compliant program, the Secretaries (acting through the Board) are now the “rulemaking authority” responsible for “the establishment of seasons, bag limits and the provision of the preference for subsistence uses” on federal lands. *Id.*

Alaska next argues that “Congress rejected a version of the bill [H.R. 39] that gave the Secretaries authority to open seasons” in certain circumstances, which supposedly proves that Congress did not intend to grant the Secretaries such

authority. Opening Brief 29-31. But that argument is misguided because the final legislation *expanded* the Secretaries' management authority in the event that the State failed to implement a compliant program.

The version of H.R. 39 cited in Alaska's brief "authorize[d] the State to regulate the taking of fish and wildlife on public lands for subsistence uses" as long as the State developed a "subsistence management program" that met certain requirements. H. Rep. No. 95-1945, Part II, at 89-91 (1978); *see also id.* at 23-25. Importantly, the bill did *not* allow the Secretaries to "suspend the State's authority to manage subsistence resources or to take over the management of those resources on the public lands" if Alaska failed to implement a compliant program. *Id.* at 91. "Rather, the Secretary's discretion would be limited to closing the public lands to subsistence and nonsubsistence uses under certain circumstances and opening the lands to subsistence uses by local residents under very extraordinary circumstances." *Id.*; *see also id.* at 25-27, 91-93.

The enacted statute is fundamentally different because the State "is delegated no authority." *Kenaitze Indian Tribe*, 860 F.2d at 315. The statute "only provides that if the state wishes to regulate in a manner consistent with federal law, federal regulations will be withheld." *Id.* And if the State does not implement a compliant program, ANILCA makes clear that the Secretaries "will step in and do the job." *Id.*; *see also* 16 U.S.C. § 3115(d).

In comparison to the early version of H.R. 39, the enacted law represents a significant expansion—not a restriction—of the Secretaries’ authority if the State failed to implement a compliant program: instead of being “limited to closing the public lands ... under certain circumstances and opening the lands to subsistence uses” in extraordinary circumstances, H. Rep. 95-1045, Part II, at 91, the Secretaries assume general responsibility for managing the entire program. *See John*, 1994 WL 487830, at *8-9. And, as the Senate committee report cited above indicates, that broad management responsibility includes “the establishment of seasons” for subsistence hunting on federal lands. S. Rep. No. 96-413, at 270.

Alaska’s own Attorney General reached the same conclusion in a legal memorandum issued shortly after ANILCA’s enactment. *See* Office of the Attorney General, State of Alaska, File No. 661-81-0370, 1981 WL 38891, at *4 (April 23, 1981). The State Attorney General concluded that if Alaska failed to maintain a compliant rural subsistence program, ANILCA would authorize the Secretaries to assert “federal control over subsistence management” and to implement “substantive fish and game management regulations, *including such subjects as seasons*, bag limits, and methods and means, controlling the subsistence taking of fish and wildlife on all federal lands in Alaska.” *Id.* (emphasis added). That conclusion is consistent with the text, purpose, and history

of Title VIII of ANILCA—and it further demonstrates the unreasonableness of Alaska’s current litigating position in this case.

C. To the extent ANILCA is ambiguous, the Secretaries’ interpretation is the best reading of the statute.

The Secretaries’ authority to establish open seasons for subsistence hunting to ensure the safety and food security of rural Alaskans during a global pandemic is clear from ANILCA’s text and confirmed by the legislative history. A statute is ambiguous only if it is “susceptible to more than one reasonable interpretation,” *Guido v. Mount Lemmon Fire District*, 859 F.3d 1168, 1173 (9th Cir. 2017), and Alaska’s position that ANILCA does not grant the Secretaries the basic power to open federal lands to subsistence hunting in any circumstances is not reasonable. But even if the statute were ambiguous, then for all of the reasons set forth above, the Secretaries’ interpretation (codified in 50 C.F.R. § 100.19) is clearly the best reading of the statute, and it should be upheld on that basis.

Alaska argues that the Court should not accord *Chevron* deference to the Secretaries’ regulation interpreting ANILCA because a reading of the statute that allows the Secretaries to establish open seasons for subsistence hunting for any reason would represent a “shift in the balance of federal-state management” that “requires clear ... congressional intent.” Opening Brief 36. But “there is no need to decide what deference, if any, a regulation should receive” where (as here) the Court can conclude that “the agency’s interpretation of the statute is the best one.”

Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, No. 21-5045, 2022 WL 3205889, at *4 (D.C. Cir. Aug. 9 2022); *accord County of Amador v. U.S. Dep’t of the Interior*, 872 F.3d 1012, 1021-22 (9th Cir. 2017) (the Court “need not decide” whether *Chevron* deference is warranted when the Court reaches the same interpretative conclusion as the agency reviewing the statute de novo).

Regardless, Alaska’s argument fails for two independent reasons.

First, the argument is foreclosed by this Court’s precedent. The Court has consistently deferred to the Secretaries’ reasonable interpretation of other ambiguous provisions of ANILCA, even when those provisions implicate the State’s traditional management authority. *See, e.g., John*, 720 F.3d at 1228, 1231-45 (applying *Chevron* and deferring to the Secretaries’ interpretation of the “public lands” subject to Title VIII’s subsistence-fishing provisions); *Ninilchik Traditional Council*, 227 F.3d at 1191-92 (applying *Chevron* and deferring to the Secretaries’ interpretation of the term “priority” in Section 804). In short, “*Chevron* deference applies to questions of ANILCA’s interpretation ... where ANILCA is ambiguous as to the answer.” *John*, 720 F.3d at 1228.

Second, deference to the Secretaries’ regulation is appropriate because Congress’s intent to alter the traditional balance of authority between state and federal regulators *is* clear. In enacting Title VIII, Congress did not defer to the State’s management authority; it expressly invoked “its constitutional authority

under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands” by rural Alaskans. 16 U.S.C. § 3111(4). Congress then delegated its authority to the Secretaries by directing them—not the State—to manage fish and wildlife populations on the public lands for subsistence uses in the absence of a compliant state program. *See supra*, pp. 31-35; *John*, 1994 WL 487830, at *9; *Kenaitze Indian Tribe*, 860 F.2d at 315. And precisely because Title VIII *does* alter the traditional balance of authority between state and federal regulators, Section 1314(a) expressly acknowledges that shift. *See* 16 U.S.C. § 3202(a).

Alaska’s contrary arguments confuse “the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive,” *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996). Title VIII is clearly preemptive. *See* 28 U.S.C. § 3202(a). Whether the statute’s management and prioritization mandates to the Secretaries convey the power to open federal lands to subsistence hunting goes to the substantive meaning of those provisions, which is resolved under *Chevron*. *See id.* It makes no difference that the asserted ambiguity relates to the scope of the Secretaries’ regulatory authority or jurisdiction. *See City of Arlington v. FCC*, 569 U.S. 290, 305 (2013) (dispute over the meaning of ambiguous statutory provision concerning the scope of an agency’s regulatory authority had “nothing to do with federalism” because the

statute “explicitly supplants state authority,” and the meaning of the ambiguous provision “indisputably is a question of federal law” resolved under *Chevron*).

The “preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the [Secretaries] with general authority to administer [ANILCA] through rulemaking ... , and the agency interpretation at issue was promulgated in the exercise of that authority.” *Id.* at 307. Under *Chevron*, when agency regulations fill a statutory gap “in a way that is reasonable in light of the legislature’s revealed design, [courts] give [that] judgment ‘controlling weight.’” *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844). Because the Secretaries’ interpretation of ANILCA in 50 C.F.R. § 100.19 is, at minimum reasonable and fully aligned with Title VIII’s purposes, that interpretation controls.

The Board’s authorization of the Kake hunt pursuant to 50 C.F.R. § 100.19 was lawful and should be upheld.

III. Alaska’s challenge to the closure of subunits 13A and 13B is moot.

Alaska’s challenge to the Board’s closure of certain federal lands in Unit 13 is moot because the closure expired on June 30, 2022, SER-10, after Alaska filed its appeal, and any injury Alaska may have suffered is no longer redressable, *see Brach*, 38 F.4th at 11. “If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the

action can no longer proceed and must be dismissed as moot.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (cleaned up).

Nor is this controversy capable of repetition yet evading review. *See supra*, p. 27. Alaska could have secured appellate review of the two-year closure before it lapsed by promptly appealing the district court’s judgment (instead of waiting the full 60 days) and by seeking expedited review. *See* 9th Cir. Rule 27-12 (allowing for expedited briefing and hearing “upon a showing of good cause”); *see also Hamamoto v. Ige*, 881 F.3d 719, 723 (9th Cir. 2018) (capable-of-repetition exception inapplicable in part because plaintiffs had “not demonstrated that expedited review would have been unavailable”). But even if the two-year duration of the closure order were inherently too short to allow for judicial review, Alaska’s claims still would be moot because this same controversy will not recur.

The Board determined that the temporary closure was necessary for public safety and to continue subsistence uses on the covered lands. 2-ER-114. Both are indisputably permissible reasons for a closure. *See* 16 U.S.C. §§ 3125(3), 3126(b). Alaska’s claims thus center on the adequacy of the Board’s factual determinations regarding the need for the closure and whether those determinations were arbitrary or capricious. *See* Opening Brief 39-55. That dispute will not recur because any future decision by the Board to impose a comparable closure would be based on new analyses, different factors, and a new administrative record. In these

circumstances, the capable-of-repetition doctrine does not apply. *See Native Village of Nuiqsut v. BLM*, 9 F.4th 1201, 1210 (9th Cir. 2021); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996); *see also Noem v. Haaland*, No. 21-2542, ___ F.4th ___, 2022 WL 2963478, at *2 (8th Cir. July 27, 2022).

Native Village of Nuiqsut is instructive. There, this Court held that when an agency analysis for an expired action is “confined to the challenged action only,” and will not be used to approve future actions, a dispute over the adequacy of that analysis is not capable of repetition. 9 F.4th at 1210. Two prior decisions illustrate the scope of that principle. In *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1992), the Court held that a challenge to an expired 1991 fishing regulation based on an allegedly inadequate analysis was “likely to recur in future years” because the agency was using the same analysis to set 1992 harvest levels. *Id.* at 1329-30. By contrast, in *Ramsey*, the Court distinguished *Franklin* and held that a challenge to an expired fishing regulation was not capable of repetition, even though the agency would be relying on the same biological opinion to make future harvesting decisions, because the agency would be “using a different method of calculating the baseline” for its analyses. 96 F.3d at 446. The Court explained that a controversy is not capable of repetition when the agency “will be basing its rulings on different criteria or factors in the future.” *Id.*

Ramsey controls here. Even if the Board were to consider imposing a comparable closure in Unit 13 in the future, which is speculative, the Board evaluates each proposed closure “on a case-by-case basis.” SER-6. Any future closure decision thus would be based on a new administrative record, including OSM’s analysis of the proposal; public comments and testimony received during the mandatory public hearing; consultation with Alaska the affected regional advisory councils; and the recommendations of the councils and the Interagency Staff Committee. *See* 50 C.F.R. § 100.19(b); *see also* SER-5–8. Perhaps most importantly, any future closure decision would need to account for the effects of the expired closure, *see* 2-ER-89, 100, a “different ... factor[],” *Ramsey*, 96 F.3d at 446, that almost certainly would have a significant impact on the Board’s decision.

“In arbitrary-and-capricious review, even small factual differences can matter.” *Noem v. Haaland*, 2022 WL 2963478, at *2. Because any future closure decision would be based on different facts, new analyses, and a new record, Alaska’s arbitrary-and-capricious challenge to the Board’s approval of the expired closure will not recur. *See id.* (arbitrary-and-capricious challenge to agency’s denial of July 4 fireworks permit not capable of repetition, even though state applicant intended to reapply, because the circumstances surrounding each application “are likely to be different”).

Alaska's challenge to the Board's decision to approve the expired closure should be dismissed as moot.

IV. The Board reasonably determined that the targeted closure was necessary for public safety and to continue subsistence uses.

Alaska's challenge to the expired closure also fails on the merits because the Board's conclusion that the closure was necessary for public safety and to continue subsistence uses was reasonable and supported by the administrative record.⁷

A. The Board reasonably determined that the targeted closure was necessary for public safety.

The Board reasonably determined that temporarily closing federal lands in subunits 13A and 13B to nonsubsistence hunting for moose and caribou was necessary for public safety. That determination alone was a legally sufficient basis for the closure. *See* 16 U.S.C. §§ 3125(3), 3126(b).

As Alaska concedes, "there are longstanding safety concerns in Unit 13."

Opening Brief 46. Local residents have described federal lands in the Richardson

⁷ Although Alaska suggests that the "substantial evidence" standard applies, Opening Brief 23, the Court reviews the Board's decisions under the APA's arbitrary and capricious standard, *Ninilchik Trad'l Council*, 227 F.3d at 1193-94, particularly where (as here) the Board proceedings were more analogous to a rulemaking than to an adjudication, *John*, 720 F.3d at 1232 n.106. But the Board's decision should be upheld under either standard. Under the substantial evidence test, agency findings of fact must be upheld "unless the evidence in the record would *compel* a reasonable finder of fact to reach a contrary result." *Ursack Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958 & n.4 (9th Cir. 2011) (cleaned up). As shown below, nothing in the record here compels the conclusion that a closure was unwarranted for public safety or to continue subsistence uses.

Highway corridor in particular as a “combat hunting zone” during caribou season, 2-ER-82, 147, with the area “too crowded to safely hunt as people aim guns at one another and shoot over people’s heads,” 2-ER-81, 137. “Safety concerns resulting from intense hunting pressure, overcrowding of hunters, disruption of hunts, and unsafe shooting practices have been repeatedly cited by all user groups.” 2-ER-153. OSM concluded that a closure targeting the highly-accessible BLM lands in subunits 13A and 13B, including the lands along Richardson Highway and the Gulkana and Delta rivers, was justified because those areas “are the focus of immense hunting competition, overcrowding, and safety concerns.” 2-ER-153, 154. The Interagency Staff Committee concurred that a targeted closure was “justifiable to improve safety and reduce user conflicts” because the concentration of hunters “has the potential to lead to serious safety issues.” 2-ER-156. The record thus provides a rational basis for the Board’s conclusion that the closure was necessary for public safety. *See* 2-ER-114; SER-11.

Alaska questions whether the Board can lawfully close federal lands to nonsubsistence hunting solely for safety reasons. Opening Brief 46 n.14. It can. ANILCA lists the permissible reasons for a closure (including public safety) in the disjunctive. 16 U.S.C. §§ 3125(3), 3126(b). Statutes written in the disjunctive set out “separate and distinct alternatives.” *In re Pac.-Atlantic Trading Co.*, 64 F.3d 1292, 1302 (9th Cir. 1995); *United States v. Sheldon*, 755 F.3d 1047, 1050 (9th

Cir. 2014). Moreover, when overcrowding causes unsafe conditions, restricting nonsubsistence uses first complies with ANILCA’s mandate that subsistence hunting “be accorded priority.” 16 U.S.C. § 3114. Under the plain language of the statute, therefore, the Board’s finding that the closure was necessary for public safety was a legally sufficient basis for its decision.

Alaska argues that the Board’s decision is inconsistent with its finding in 2019 that a closure would not address the unsafe conditions in Unit 13 because nonsubsistence hunters “would still be able to cross Federal public lands to access State and private lands.” Opening Brief 46 (quoting 2-ER-163). There is no inconsistency. The Board recognized in 2020 that even under the targeted closure, nonsubsistence hunters could still use federal lands in subunits 13A and 13B to access adjacent nonfederal lands open to hunting. *See* 2-ER-153 (OSM analysis incorporated into the Board’s decision). Nevertheless, the record shows that the targeted closure could at least partially address the safety problems by reducing the density of active hunters on the covered federal lands. *See id.*; *see also* 2-ER-91–92, 101. As one Board member explained, “there’d be 17,000-plus [state hunters] who would not be able to hunt on those lands.” 2-ER-192.

The reduced density of active hunters on the small amount federal land covered by the targeted closure—a point not specifically addressed in OSM’s 2019 analysis, *see* 2-ER-168-94—provided a rational basis for the Board’s conclusion

that the targeted closure would at least partially address the safety problems in those areas. That the closure might not completely resolve the issues is immaterial. “Nothing prohibits federal agencies from moving in an incremental manner.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009).

Alaska next asserts that the closure was over-inclusive because it covered the Gulkana River and Delta River corridors in addition to the Richardson Highway corridor, which most witnesses identified as the key problem area. Opening Brief 47. That argument also lacks merit. OSM’s analysis incorporated into the Board’s decision included the accessible river corridors (segments of which are directly adjacent to Richardson Highway) in the “primary areas of concern” that are “the focus of immense hunting competition, overcrowding, and safety concerns.” 2-ER-153; *see also* 2-ER-147, 152. Alaska cites no contrary record evidence that the Board or OSM allegedly failed to consider.

Alaska also asserts that the closure was not truly designed to enhance public safety because the Board “did not close all hunting by [nonsubsistence] hunters. It closed hunting for moose and caribou.” Opening Brief 47. But again, the State cites no evidence that significant numbers of nonlocal hunters drawn to area in the fall, when the overcrowding and unsafe conditions occur, are targeting species other than moose and caribou. The Board thus had no reason to close the areas to nonsubsistence hunting for other species.

The Board reasonably concluded that the targeted closure was necessary for public safety. That finding alone provided a legally sufficient basis for the Board's decision to approve the closure. *See* 16 U.S.C. §§ 3125(3), 3126.

B. The Board reasonably determined that the targeted closure was necessary to continue subsistence uses.

The Board also reasonably determined that the closure was necessary to ensure continued opportunities for rural subsistence hunting of moose and caribou on the federal lands in subunits 13A and 13B. *See* 2-ER-114; SER-11.

The record shows that overcrowding, user conflicts, and unsafe conditions were causing local subsistence users to avoid those areas. 2-ER-83–84, 146, 153, 156. Local users also explained that the large number of better-equipped urban hunters that descend on the areas during fall caribou season (which overlaps with moose season) were hindering access, outcompeting local subsistence users, and driving game away, further reducing opportunities for successful subsistence hunting according to customary and traditional practices. 2-ER-82, 145–46, 150. The available harvest data, though qualified in several respects, also indicated that harvest success rates were lower under federal regulations than under state regulations. 2-ER-82–83, 101, 150–51, 153. OSM and the Interagency Staff Committee concluded that the targeted closure was justified to continue subsistence uses of moose and caribou on the covered federal lands. 2-ER-154–55,

156. The record thus provides a rational basis for the Board’s conclusion that the targeted closure was necessary to continue subsistence uses.

Alaska asserts that “competition” is not a permissible basis under ANILCA for closing federal lands to nonsubsistence hunting. Opening Brief 40-41. But the Board did not approve the closure because of competition per se; the Board approved the closure because competition, overcrowding, and unsafe conditions were substantially reducing opportunities for successful subsistence hunting. *See* 2-ER-114. And ensuring continued opportunities for subsistence hunting is a permissible basis for restricting nonsubsistence uses. *See* 16 U.S.C. § 3125(3).

Moreover, the term “necessary” in Section 825(3) does not mean that the Board must allow overcrowding, user conflicts, and unsafe conditions to continue until rural subsistence users become physically “unable” to hunt. *See* Opening Brief 39-40. “When interpreting a statute, words and phrases must not be read in isolation, but with an eye toward the purpose and context of the statute.” *United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013) (cleaned up). Congress enacted Title VIII to ensure that rural residents engaged in a subsistence way of life could continue to do so. 16 U.S.C. §§ 3101(c), 3112(1). Congress also recognized that the “continuation of the opportunity for subsistence uses” on public lands “is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources,” and “by increased accessibility of remote areas containing

subsistence resources,” *id* § 3111(3). Because the record shows that traditional subsistence uses of moose and caribou in subunits 13A and 13B were threatened by those same factors, 2-ER-82–84, 145–47, 150, the Board reasonably concluded that the temporary closure was necessary to address the threat.

That the relevant moose and caribou populations as a whole were healthy and within state management objectives (Opening Brief 41-42) is immaterial. The need to conserve healthy populations of fish and wildlife is a *separate* basis for restricting nonsubsistence hunting, *see* 16 U.S.C. § 3125(3), which the Board appropriately did not invoke, 2-ER-83. Moreover, the Board must act to protect and prioritize subsistence uses on the federal lands under its jurisdiction. *See* 16 U.S.C. §§ 3114, 3125(3). Because such uses on the federal lands in subunits 13A and 13B were threatened by overcrowding, competition, and unsafe conditions, the Board properly restricted nonsubsistence hunting in those areas, regardless of the status of moose and caribou populations in Unit 13 as a whole.

Alaska next argues that the Board unreasonably relied on the data showing disparate harvest success rates under state and federal regulations because federal subsistence users may also hunt under state regulations. *See* Opening Brief 44-45. But OSM specifically noted that fact (and other limits of the data) in its presentation to the Board. *See* 2-ER-82, 148, 150–51. Despite the acknowledged limits, the data before the Board was consistent with witness statements and other

evidence indicating that overcrowding, competition, and unsafe conditions were reducing opportunities for traditional subsistence hunting. *See* 2-ER-81–84, 145–46, 150. On the record as a whole, therefore, the Board could rationally conclude that the closure would ensure continued subsistence uses, even if the data did not definitively show the extent to which the adverse conditions in subunits 13A and 13B were reducing opportunities for successful subsistence hunting. *See Greenpeace Action*, 14 F.3d at 1336 (when “an agency relies on the analysis and opinion of experts and employs the best evidence available, the fact that the evidence is ‘weak,’ and thus not dispositive, does not render the agency’s determination ‘arbitrary and capricious’”).

C. The Board reasonably explained why it adopted a targeted closure despite previously rejecting a blanket closure.

Alaska argues that the Board failed to adequately explain the “reversal of its position” from 2019, when it concluded that a blanket closure of all federal lands in Unit 13 was unnecessary. Opening Brief 48-52. This argument also lacks merit.

As an initial matter, the Board’s 2020 decision did not represent a “reversal of its position.” In 2019, the Board denied a proposal to close *all* federal lands in Unit 13 to nonsubsistence hunting; in 2020, the Board approved a targeted closure of only those federal lands in subunits the 13A and 13B. The 2020 decision thus is not a “reversal” of the 2019 decision or even a change in policy, as the Board had not previously considered imposing the same targeted closure.

Regardless, an agency changing its policy need only “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Fox Television Stations*, 556 U.S. at 515. The Board did both here. It recognized that it had previously denied a proposal to close all federal lands in Unit 13, 2-ER-132, and it gave good reasons for approving the more targeted closure of federal lands in subunits 13A and 13B only: “this is the area where most overcrowding, disruption of hunts, and serious safety concerns have occurred.” 2-ER-114.

Alaska argues that narrowing the geographic scope of the closure from all federal lands in Unit 13 to only federal lands in subunits 13A and 13B made “no meaningful difference” because subunit 13C contains “almost no” federal lands, hunting “is uncommon” on the BLM lands in subunit 13E, and “nearly all of road-accessible” federal lands in subunit 13D are “closed to motorized hunting” and have “limited moose hunting in any event.” Opening Brief 50-51. But the exclusion of those lands made all the difference. Precisely because only limited hunting occurs in the excluded areas, there were no comparable public safety issues or threats to subsistence uses—and thus no lawful basis under ANILCA (in the absence of conservation concerns) to close those areas to nonsubsistence hunting. *See* 16 U.C.C. §§ 3125(3), 3126. Indeed, during the deliberations on the 2019 proposal, some Board members expressed concern over closing the entire unit when targeting the few problem areas might suffice. *See* 3-ER-153. Limiting

the geographic scope of the closure to the problem federal lands in subunits 13A and 13B directly addressed those concerns and meant the difference between a lawful closure and a potentially unlawful one.

Nor did the Board “disregard[] facts and circumstances that underlay” its 2019 decision. *Fox Television Stations*, 556 U.S. at 516. As discussed, the Board recognized that nonsubsistence hunters could still use federal lands in subunits 13A and 13B to access adjacent nonfederal lands open to hunting. 2-ER-153. But the record indicates that the targeted closure could at least partially address the unsafe conditions on the relatively small areas of federal land now at issue by reducing the density of active hunters in those areas, 2-ER-91–92, 101, 153, a point not specifically addressed in the analysis of the 2019 proposal, *see* 2-ER-168–94. And in concluding that the targeted closure was needed to continue subsistence uses, the Board relied on new data regarding harvest success rates, which, though not dispositive, was consistent with witness statements indicating that the adverse conditions in subunits 13A and 13B were limiting opportunities for successful subsistence hunting. *See* 2-ER-82–83, 101, 150–51, 153.

The record thus shows that the Board’s approval of the targeted closure was reasonable and permissible under ANILCA. The Board was not also required to demonstrate “that the reasons for the new policy are *better* than the reasons for the old one.” *Fox Television Stations*, 556 U.S. at 515.

D. The two-year duration of the targeted closure was reasonable and consistent with the Board’s regulations.

The Board’s regulations provide that the “length of any temporary action will be confined to the minimum time period ... determined by the Board to be necessary under the circumstances. In any event, a temporary opening or closure will not extend longer than the end of the current regulatory cycle.” 50 C.F.R. § 100.19(b)(2). Alaska argues that the Board violated that regulation by imposing the closure for the remainder of two-year regulatory cycle to reduce administrative burdens. Opening Brief 52-53. Alaska’s argument lacks merit.

In its analysis incorporated into the Board’s decision, OSM determined that applying the closure for the full two-year regulatory cycle would *justifiably* reduce administrative burdens because the “public safety and subsistence use concerns” in the relevant areas were unlikely to change between the 2020-2021 regulatory year and the 2021-2022 regulatory year. 2-ER-155. That determination is supported by the record, which shows that the overcrowding, user conflicts, competition, and unsafe conditions on the federal lands in subunits 13A and 13B were longstanding problems. *See* 2-ER-81–84, 145–47, 150, 153, 156. Consequently, the Board’s determination that it was necessary to apply the closure for the remainder of the regulatory cycle was reasonable and consistent with the regulations.

* * * *

To the extent the Court reaches the merits, the Board's decision to approve the expired closure should be upheld.

CONCLUSION

For the foregoing reasons, this Court should hold that Alaska's claims are moot and, to the extent any claims are not moot, the Court should reject them.

Respectfully submitted,

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ADDENDUM

Alaska National Interest Lands Conservation Act

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16 U.S.C. § 3101 - Congressional statement of purpose

(a) Establishment of units

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

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

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

(c) Subsistence way of life for rural residents

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

(d) Need for future legislation obviated

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic

and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

16 U.S.C. § 3113 - Definitions

As used in this Act, the term “subsistence uses” means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term--

(1) “family” means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) “barter” means the exchange of fish or wildlife or their parts, taken for subsistence uses--

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

16 U.S.C. § 3115 - Local and regional participation

(a) Establishment of subsistence resources regions, local advisory committees, and regional advisory councils; membership, duties, and authority of regional advisory councils

Except as otherwise provided in subsection (d) of this section, the Secretary in consultation with the State shall establish--

- (1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;
- (2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and
- (3) a regional advisory council in each subsistence resource region.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

- (A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;
- (B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to subsistence uses of fish and wildlife within the region;
- (C) the encouragement of local and regional participation pursuant to the provisions of this subchapter in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

(D) the preparation of an annual report to the Secretary which shall contain—

- (i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;
- (ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;
- (iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and
- (iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) Assignment of staff and distribution of data

The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) Consideration of reports and recommendations of regional advisory councils

The Secretary, in performing his monitoring responsibility pursuant to section 3116 of this title and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of

subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) Supersedure by enactment and implementation of State laws governing State responsibility; consideration of recommendations by State rulemaking authority

The Secretary shall not implement subsections (a), (b), and (c) of this section if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with this section shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

(e) Reimbursement to State; limitation; report to Congress

(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to

any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

(2) Total payments to the State under this subsection shall not exceed the sum of \$5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 3114 of this title.

**16 U.S.C. § 3116 - Federal monitoring; reports
to State and Congressional committees**

The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 3114 of this title and shall advise the State and the Committees on Natural Resources and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as he deems necessary of his views on the effectiveness of the implementation of this subchapter including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

16 U.S.C. § 3124 - Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this subchapter.

50 C.F.R. § 100.10 - Federal Subsistence Board

(a) The Secretary of the Interior and Secretary of Agriculture hereby establish a Federal Subsistence Board, and assign it responsibility for administering the subsistence taking and uses of fish and wildlife on public lands, and the related promulgation and signature authority for regulations of subparts C and D of this part. The Secretaries, however, retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands when such activities interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority.

(b) Membership.

(1) The voting members of the Board are: A Chair to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; two public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; Alaska Regional Director, National Park Service; Alaska Regional Forester, U.S. Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs. Each Federal agency member of the Board may appoint a designee.

(2) [Reserved]

(c) Liaisons to the Board are: a State liaison, and the Chairman of each Regional Council. The State liaison and the Chairman of each Regional Council may attend public sessions of all Board meetings and be actively involved as consultants to the Board.

(d) Powers and duties.

(1) The Board shall meet at least twice per year and at such other times as deemed necessary. Meetings shall occur at the call of the Chair, but any member may request a meeting.

- (2) A quorum consists of five members.
- (3) No action may be taken unless a majority of voting members are in agreement.
- (4) The Board is empowered, to the extent necessary, to implement Title VIII of ANILCA, to:
 - (i) Issue regulations for the management of subsistence taking and uses of fish and wildlife on public lands;
 - (ii) Determine which communities or areas of the State are rural or non-rural;
 - (iii) Determine which rural Alaska areas or communities have customary and traditional subsistence uses of specific fish and wildlife populations;
 - (iv) Allocate subsistence uses of fish and wildlife populations on public lands;
 - (v) Ensure that the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes;
 - (vi) Restrict the taking of fish and wildlife on public lands for nonsubsistence uses or close public lands to the take of fish and wildlife for nonsubsistence uses when necessary for the conservation of healthy populations of fish or wildlife, to continue subsistence uses of fish or wildlife, or for reasons of public safety or administration. The Board may also reopen public lands to nonsubsistence uses if new information or changed conditions indicate that the closure is no longer warranted;
 - (vii) Restrict the taking of a particular fish or wildlife population on public lands for subsistence uses, close public lands to the take of fish and wildlife for subsistence uses, or otherwise modify the requirements for take from a particular fish or wildlife population on public lands for subsistence uses when necessary to ensure the continued viability of a fish or wildlife population, or for reasons of public safety or administration. As soon as

conditions warrant, the Board may also reopen public lands to the taking of a fish and wildlife population for subsistence users to continue those uses;

(viii) Establish priorities for the subsistence taking of fish and wildlife on public lands among rural Alaska residents;

(ix) Restrict or eliminate taking of fish and wildlife on public lands;

(x) Determine what types and forms of trade of fish and wildlife taken for subsistence uses constitute allowable customary trade;

(xi) Authorize the Regional Councils to convene;

(xii) Establish a Regional Council in each subsistence resource region and recommend to the Secretaries, appointees to the Regional Councils, pursuant to the FACA;

(xiii) Establish Federal Advisory Committees within the subsistence resource regions, if necessary, and recommend to the Secretaries that members of the Federal Advisory Committees be appointed from the group of individuals nominated by rural Alaska residents;

(xiv) Establish rules and procedures for the operation of the Board, and the Regional Councils;

(xv) Review and respond to proposals for regulations, management plans, policies, and other matters related to subsistence taking and uses of fish and wildlife;

(xvi) Enter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program;

(xvii) Develop alternative permitting processes relating to the subsistence taking of fish and wildlife to ensure continued opportunities for subsistence;

(xviii) Evaluate whether hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority, and after appropriate consultation with the State of Alaska, the Regional Councils, and other Federal agencies, make a recommendation to the Secretaries for their action;

(xix) Identify, in appropriate specific instances, whether there exists additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches, and make appropriate recommendation to the Secretaries for inclusion of those interests within the Federal Subsistence Management Program; and

(xx) Take other actions authorized by the Secretaries to implement Title VIII of ANILCA.

(5) The Board may implement one or more of the following harvest and harvest reporting or permit systems:

(i) The fish and wildlife is taken by an individual who is required to obtain and possess pertinent State harvest permits, tickets, or tags, or Federal permit (Federal Subsistence Registration Permit);

(ii) A qualified subsistence user may designate another qualified subsistence user (by using the Federal Designated Harvester Permit) to take fish and wildlife on his or her behalf;

(iii) The fish and wildlife is taken by individuals or community representatives permitted (via a Federal Subsistence Registration Permit) a one-time or annual harvest for special purposes including ceremonies and potlatches; or

(iv) The fish and wildlife is taken by representatives of a community permitted to do so in a manner consistent with the community's customary and traditional practices.

(6) The Board may delegate to agency field officials the authority to set harvest and possession limits, define harvest areas, specify methods or means of harvest, specify permit requirements, and open or close specific fish or wildlife harvest seasons within frameworks established by the Board.

(7) The Board shall establish a Staff Committee for analytical and administrative assistance composed of members from the U.S. Fish and Wildlife Service, National Park Service, U.S. Bureau of Land Management, Bureau of Indian Affairs, and USDA Forest Service. A U.S. Fish and Wildlife Service representative shall serve as Chair of the Staff Committee.

(8) The Board may establish and dissolve additional committees as necessary for assistance.

(9) The U.S. Fish and Wildlife Service shall provide appropriate administrative support for the Board.

(10) The Board shall authorize at least two meetings per year for each Regional Council.

(e) Relationship to Regional Councils.

(1) The Board shall consider the reports and recommendations of the Regional Councils concerning the taking of fish and wildlife on public lands within their respective regions for subsistence uses. The Board may choose not to follow any Regional Council recommendation which it determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, would be detrimental to the satisfaction of subsistence needs, or in closure situations, for reasons of public safety or administration or to assure the continued viability of a particular fish or wildlife population. If a recommendation is not adopted, the Board shall set forth the factual basis and the reasons for the decision, in writing, in a timely fashion.

(2) The Board shall provide available and appropriate technical assistance to the Regional Councils.

50 C.F.R. § 100.14 - Relationship to State procedures and regulations

(a) State fish and game regulations apply to public lands and such laws are hereby adopted and made a part of the regulations in this part to the extent they are not inconsistent with, or superseded by, the regulations in this part.

(b) The Board may close public lands to hunting, trapping, or fishing, or take actions to restrict the taking of fish and wildlife when necessary to conserve healthy populations of fish and wildlife, continue subsistence uses of such populations, or pursuant to other applicable Federal law. The Board may review and adopt State openings, closures, or restrictions which serve to achieve the objectives of the regulations in this part.

(c) The Board may enter into agreements with the State in order to coordinate respective management responsibilities.

(d) Petition for repeal of subsistence rules and regulations.

(1) The State of Alaska may petition the Secretaries for repeal of the subsistence rules and regulations in this part when the State has enacted and implemented subsistence management and use laws which:

(i) Are consistent with sections 803, 804, and 805 of ANILCA; and

(ii) Provide for the subsistence definition, preference, and participation specified in sections 803, 804, and 805 of ANILCA.

(2) The State's petition shall:

(i) Be submitted to the Secretary of the Interior, U.S. Department of the Interior, Washington, D.C. 20240, and the Secretary of Agriculture, U.S. Department of Agriculture, Washington, D.C. 20240;

(ii) Include the entire text of applicable State legislation indicating compliance with sections 803, 804, and 805 of ANILCA; and

(iii) Set forth all data and arguments available to the State in support of legislative compliance with sections 803, 804, and 805 of ANILCA.

(3) If the Secretaries find that the State's petition contains adequate justification, a rulemaking proceeding for repeal of the regulations in this part will be initiated. If the Secretaries find that the State's petition does not contain adequate justification, the petition will be denied by letter or other notice, with a statement of the ground for denial.

**50 C.F.R. § 100.25 - Subsistence taking of fish,
wildlife, and shellfish: general regulations.**

* * * *

(b) Taking fish, wildlife, or shellfish for subsistence uses by a prohibited method is a violation of this part. Seasons are closed unless opened by Federal regulation. Hunting, trapping, or fishing during a closed season or in an area closed by this part is prohibited. You may not take for subsistence fish, wildlife, or shellfish outside established Unit or Area seasons, or in excess of the established Unit or Area harvest limits, unless otherwise provided for by the Board. You may take fish, wildlife, or shellfish under State regulations on public lands, except as otherwise restricted at §§ 100.26 through 100.28. Unit/Area-specific restrictions or allowances for subsistence taking of fish, wildlife, or shellfish are identified at §§ 100.26 through 100.28.

* * * *

50 C.F.R. § 100.26 - Subsistence taking of wildlife.

(a) General taking prohibitions. You may take wildlife for subsistence uses by any method, except as prohibited in this section or by other Federal statute. Taking wildlife for subsistence uses by a prohibited method is a violation of this part. Seasons are closed unless opened by Federal regulation. Hunting or trapping during a closed season or in an area closed by this part is prohibited.

* * * *

96TH CONGRESS }
1st Session }

SENATE

{ REPORT
No. 96-413

ALASKA NATIONAL INTEREST LANDS

REPORT

OF THE

COMMITTEE ON ENERGY
AND NATURAL RESOURCES
UNITED STATES SENATE

together with

ADDITIONAL VIEWS

TO ACCOMPANY

H.R. 39



NOVEMBER 14 (legislative day, NOVEMBER 5), 1979.—Ordered to be printed

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(iii)

cultural, or scientific resources of the special management area would be adversely affected.

Subsection 706(c) withdraws the land in special management areas from the operation of the United States Mining law. The provision for classification and opening of these lands are identical to those provided for national conservation areas established pursuant to Title IV. The Committee does not intend that these lands be managed as wilderness.

Subsection 706(d) directs the Secretary of Agriculture to monitor timber supply and demand in Southeastern Alaska. At any time after ten years after the date of enactment, the Secretary is directed to request a waiver of the prohibition on timber sales if he finds that timber in any special management area must be sold to maintain the supply to dependent industry at a rate of 520 million board feet per year.

Subsections 706 (e) and (f) provide an expedited procedure for a Congressional approval of any waiver request.

Subsection 706(g) gives the State of Alaska standing to seek a Federal Court Order directing the Secretary of Agriculture to make the finding required and transmit a proposed statutory waiver. The Committee included this provision so as to give the State an opportunity to challenge the Secretary's failure to seek a waiver if it believes that the Secretary of Agriculture should have made the finding required by subsection 706(d). Of course, the State would have to present evidence substantiating its claim and the Secretary of Agriculture would have the opportunity to rebut such evidence.

Section 707: National Forest Timber Utilization Program

Section 707 establishes a special timber utilization program for the Tongass National Forest. The program is designed to help make Federal timber available from marginal lands. The program includes construction and maintenance of forest development roads under subsection 707(a) and a special loan program to assist timber purchasers under subsection 707(b).

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

Section 801: Findings

The findings are based on the hearings, town meetings and workshops held by the committee in Alaska and Washington. The findings provide the factual and legal foundation for Congressional action to protect subsistence resources and uses on the public lands. The committee recognizes the importance of continued subsistence uses to the economy and lifestyle of rural Alaska, and particularly to the culture of the Alaska Natives. Alternative food sources generally are not available in most rural village to offset a diminution of the traditional subsistence harvest. However, the continuation of subsistence uses in rural Alaska is threatened by the rapid population growth of Anchorage, Fairbanks and other urban centers and the resultant pressure which urban residents engaged in subsistence and sports uses have placed upon important fish and wildlife populations in heretofore remote areas of the State. The subsistence management and use title is the culmination of Congressional action initiated

by Congress by the Alaska Native Claims Settlement Act to protect and provide for continued subsistence uses by Alaska Natives and other rural residents, and is based upon the constitutional authority of Congress over Native affairs and its authority under the Property Clause and the Commerce Clause. The committee also has determined that the protection of the subsistence way of life and the fish and wildlife populations upon which that lifestyle depends necessitates the establishment of an administrative structure which enables rural residents with personal knowledge of local conditions and requirements to have a meaningful role in the regulations and management of fish and wildlife and subsistence uses on the public lands.

Section 802: Policy

Based upon the findings in the preceding section, three basic policies have been established which shall guide the activities of the Federal government and the State on the public lands: that the utilization of the public lands is to cause the least adverse impact possible upon rural residents who depend upon subsistence uses for their economic and physical well-being and cultural vitality; the nonwasteful subsistence uses of fish, wildlife and other renewable resources, e.g., berries, timber, grasses, shall be the first priority consumptive use of such resources on the public lands, and when or where it is necessary to restrict the taking of such resources, taking for nonwasteful subsistence uses shall be given preference over other consumptive uses; and that the successful management of subsistence resources and activities requires long term cooperation between adjacent landowners and managers, including appropriate State and Federal agencies, Native corporations, and other nations.

Section 803: Definition

The committee has adopted a definition of "subsistence uses" based on the definition of that term set forth in section 15, ch. 151 SLA 1978 (A.S. 16.05.940) of the Alaska Statutes. In turn, the State definition was modeled on section 703 of the House bill. "Subsistence uses" are defined as the customary and traditional use in Alaska of fish, wildlife and other renewable resources for direct personal or family consumption, for the making and selling of handicraft articles from the non-edible by-products of fish and wildlife taken for direct personal or family consumption, and for customary trade, barter, or sharing for personal or family consumption. The definition of "family" recognizes extended family patterns common to all of Alaska's Native cultures. "Family" includes any person living in a household on a permanent basis as well as those persons living outside the household who are related by blood, marriage or adoption (legal or equitable). "Barter" means the exchange or trade of fish or wildlife, or their parts, for other fish or wildlife, or their parts, or for other food or nonedible items other than money if the exchange is of a limited and noncommercial nature. This definition of "barter" recognizes that in many rural villages the subsistence diet must be supplemented with other foods which may be available from the village store and other sources, and that the limited noncommercial barter of subsistence resources for nonedible items is an essential element of the rural subsistence lifestyle. The definition of "subsistence uses" is intended to include all

Alaska residents who utilize renewable resources for direct personal or family consumption.

However, the phrase “customary and traditional” is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources in areas of, and by persons (both Native and non-Native) resident in, areas of Alaska in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation. The factors of local residency, economic dependence, and availability of alternative resources have been included in section 804 rather than in the definition. Although a truly comprehensive definition of “subsistence uses” must include a mix of those factors, the committee has determined that they should be incorporated through appropriate action by the State rulemaking authority in conjunction with the recommendations of the regional councils established pursuant to section 805 to implement the subsistence preference set forth in section 804. Sections 803–805 are intended to establish a dynamic process for the regulation of subsistence resources and uses which will enable rural people to participate in the decisionmaking process of the State rulemaking authority in the inclusion of the local residency, economic dependence, and availability of alternative resources factors into the definition of “subsistence uses” on a case-by-case basis to meet the needs of a particular management situation in a particular area.

Section 804: Preference for Subsistence Uses

This section requires both the State and the Federal government to accord nonwasteful subsistence uses a preference over the taking of such resources for other purposes on the public lands. Although the committee recognizes that only rarely will the failure to adequately provide for the preference result in the threat of literal starvation, in many instances the failure to obtain fish to dry for winter use or fresh meat to supplement other foods can engender considerable individual, community and cultural trauma and hardship. Consequently, this section envisions that governmental action affecting subsistence resources and uses shall be undertaken in a manner which adequately provides for the preference on an ongoing basis and not only when critical allocation decisions may be necessary because a particular subsistence resource may be threatened with depletion, so long as such action is conducted in a manner which is consistent with the protection of the continued viability of fish and wildlife populations which may be affected by such action. If a particular fish or wildlife population (e.g. salmon, moose or caribou) in a particular area is sufficient to sustain a harvest by all persons engaged in subsistence and other uses, the implementation of restrictions on taking set forth in this section need not be imposed by the State rulemaking authority. However, if the continued viability of a particular population or the ability of rural subsistence-dependent residents to satisfy their subsistence needs would be threatened by a harvest by all such persons, the State rulemaking authority, in conjunction with the recommendations of the regional council representing the affected area, is required by this section

to establish regulations which restrict the taking of such population to Alaska residents engaged in subsistence uses.

If “subsistence uses” must be further restricted to protect the continued viability of the population or to ensure the satisfaction of rural subsistence needs, the State rulemaking authority, in conjunction with the recommendations of the regional council, must limit such uses to local residents of the affected area, or, if necessary, only those local residents with the most customary and direct dependence on the population as the mainstay of livelihood and with the least access to alternative food supplies. In the latter situation, the committee believes that in making such difficult allocation decisions, the State rulemaking authority, in conjunction with the recommendations of the regional council, should endeavor to utilize the special knowledge of local conditions and requirements of the local advisory committees within the affected region. This section also requires the Secretary of the Interior and the Secretary of Agriculture to give subsistence uses preferential consideration in their management activities on the public lands which directly relate to the taking of fish and wildlife, and to take appropriate action to protect such uses and the continued viability of fish and wildlife populations upon which the continuation of such uses depend.

Section 805: Local and Regional Participation

The committee has determined that the opportunity for rural residents of Alaska with personal knowledge of local conditions and requirements to participate effectively in the management and regulation of subsistence resources on the public is important in order to assure both the continued viability of fish and wildlife populations of national importance and the ability of rural people engaged in a subsistence lifestyle to continue to do so. Although the State has indicated that it intends to provide greater support to its existing local advisory committees and establish a system of regional councils throughout the rural areas of the state which will have a major role in the State rulemaking authority’s establishment of seasons, bag limits and the provision of the preference for subsistence uses in their respective areas, the State still is in the process of establishing such a system. Section 805 implements section 801(5) by requiring the Secretary of the Interior to establish a regional council, and if necessary a local committee, system on the public lands if within one year from the date of enactment of this Act the State has not yet established a system for local and regional participation which satisfies the requirement of this section.

The State system of local and regional participation shall be in compliance with the requirements of this section and the Secretary shall not establish local committees or regional councils if the State: (1) divides the public lands into at least six regions. The number and boundaries of the regions must be sufficient to assure that regional differences in subsistence uses are adequately accommodated.

However, it is the intent of the Committee that the number and boundaries of the regions be established in a manner which does not permit the large urban population centers to dominate the regional council system and exercise control over the regulation of subsistence resources in the rural areas; (2) strengthens the existing State local

fish and game advisory committee system by adequately funding committee activities, assigning appropriate staff and distributing available support data to the committees, and encouraging the committees to work closely with the regional councils to develop a recommended strategy for the management of subsistence resources within each region and recommendations concerning policies, standards, guidelines, and regulations to implement the strategy; (3) establishes a regional council within each region composed of residents of the region with duties and responsibilities analogous to those set forth in section 805(a)(3), and assigns staff and distributes available support data to the councils; and (4) provides by statute or regulation that recommendations made by the regional councils to the State rulemaking authority concerning the taking of fish and wildlife populations on the public lands within their respective regions for subsistence uses shall be considered by the authority during the course of its administrative proceedings.

The rulemaking authority may choose not to follow a recommendation if it determines that based on the evidence presented during the course of the administrative proceedings of the board the recommendation is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If the authority makes such a determination and chooses not to follow the recommendation it shall set forth the factual basis and the reasons for its decision.

So long as the State is in full compliance with the requirements of this section, the Secretary of the Interior shall reimburse the State for reasonable costs relating to the operation of the local committees and the establishment and operation of the regional councils. Such reimbursement may not exceed 50 per centum of such costs in any fiscal year, and total payments to the State shall not exceed the sum of \$5,000,000 in any one fiscal year.

If the Secretary determines, one year after the date of this Act and after notice and hearing, that the State is not in full compliance with the requirements of this section, he shall establish a regional council system, and if necessary a local committee system, on the public lands pursuant to the requirements of this section. In performing this monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands the Secretary of the Interior and the Secretary of Agriculture shall be guided by the annual report and advice of the regional councils established by the Secretary of the Interior pursuant to this section, and shall follow such advice unless he determines in writing that such evidence is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs.

Section 806: Federal Monitoring

This section requires the Secretary of the Interior to monitor the State's provision of the preference for subsistence uses on the public lands including, in consultation with the Secretary of Agriculture, units of the National Forest System. Such monitoring responsibilities should include ongoing communication and cooperation between Federal land and resources managers and Alaska Department of Fish and

Game personnel, local fish and game advisory committees, regional councils, the State Board of Game and the State Board of Fisheries. In addition, the Secretary must develop a capability to monitor both the status of fish and wildlife populations on the public lands harvested for subsistence uses and State regulatory and enforcement activities to provide the preference for subsistence uses, particularly in the rural areas of Alaska. The monitoring capability must enable the Secretary to aid in the identification of potential problems before fish or wildlife populations become threatened with depletion with resultant hardship to rural subsistence-dependent residents, and communicate information about, and suggested recommendations for the solutions of, such problems to the State, the local committees, and the regional councils in a timely manner. However, such monitoring capability need not necessarily require the creation of a new or separate administrative structure within the Department of the Interior.

Section 807: Judicial Enforcement

In addition to his monitoring responsibilities set forth in section 806, this section requires the Secretary of the Interior to investigate any allegation made by a local committee or regional council established by the Secretary or the State pursuant to section 805 that the State is not adequately providing for the preference for subsistence uses within a particular area of the public lands, as to the taking of a particular fish or wildlife population on such lands, or in some other manner. The Secretary shall investigate and report publicly on the results of his investigation. After communicating the results of his investigation to the State, if the Secretary determines that the State still is not adequately providing for the preference after having had a reasonable opportunity to do so, he shall file a civil action against the State in the District Court on behalf and at the request of the local committee or regional council which made the allegation to require the State to take such actions as are necessary to adequately and timely provide such preference.

The failure to adequately restrict the harvest of a particular fish or wildlife population by persons engaged in subsistence or other uses in a particular area (e.g. salmon on the Copper River, moose on the lower Yukon, or caribou in the northwest arctic) pursuant to the criteria set forth in section 804 may threaten such population with immediate and irreparable harm and engender considerable hardship among residents of rural communities which are dependent upon such populations. Consequently, the committee believes that in many situations time may be of the essence to prevent such threat of harm to subsistence resources or human hardship and that temporary judicial relief may be necessary.

The committee also recognizes that because of the location of the Federal courts, inclement weather, poor communication and transportation systems, and the geographical, and in many instances cultural, isolation of many rural communities, timely and effective temporary relief may not be possible under normal judicial procedures. In recognition of these unusual circumstances, this section requires that upon the filing of the complaint, if the District Court makes appropriate findings based upon the pleadings as set forth in this section it shall issue an order to the State to show cause why relief requested in the

complaint should not be granted, and also requires the court to expedite the action in every way. However, no order granting temporary relief shall be issued until the State has been provided an opportunity for hearing. Temporary relief may not be necessary in every case and should terminate upon the alleviation of the circumstances which required such relief. Based upon the circumstances of each situation, the court should endeavor to give due deference to the expertise of the Alaska Department of Fish and Game in regulating and conserving fish and wildlife populations in Alaska which are the subject of subsistence uses. Temporary relief should be limited to an order directing the State to issue an emergency regulation either closing a portion of the public lands to the taking of a particular fish or wildlife population except for subsistence uses by local residents of the affected area (or the most subsistence dependent residents of the area), or, less frequently, opening the harvest of such population to such residents. The taking of fish or wildlife for subsistence uses as directed in the order shall be conducted in conformance with applicable State regulations governing such taking which are not directly related to the regulations which have been superseded by the order, or are not in conflict with such order.

To the extent practicable the court should endeavor to fashion a temporary order which draws upon the expertise and special knowledge of the Alaska Department of Fish and Game. Permanent relief shall be limited to directing the State to submit new regulations to the court which adequately provide for the preference for subsistence uses in the situation which gave rise to the action. When, and if, the court determines that such regulations adequately provide for the preference such regulations shall be incorporated as part of the final order. Such final order shall terminate upon the expiration of the normal period of validity under State law (generally one year) of the regulations which were superseded by the regulations incorporated in the order. Although local committee or regional council may obtain immediate judicial review in State court of a determination of the Board of Game or Board of Fisheries that a regional recommendation should not be adopted because it is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs, this section shall be the sole Federal judicial remedy created by this title for a local committee or regional council which determines that the preference for subsistence uses has not been adequately provided by the State in its region. Consequently, such board or council could simultaneously seek judicial review in State court of the refusal of the Board of Game or Board of Fisheries to adopt a regional recommendation and request an investigation by the Secretary, and potentially the filing of a civil action, pursuant to this section.

Section 808 : Park and Monument Resources Commissions

This section establishes a subsistence resources commission for each national park or monument within which subsistence uses are permitted by this Act. Each council shall be composed of nine members: Three members appointed by the Secretary of the Interior, three members appointed by the the Governor of Alaska, and three members

appointed by the regional council established by the Secretary or the State pursuant to section 805 which has jurisdiction within the area in which the park or monument is located. Members of the commission appointed by the regional council must be a member of either the regional council or a local committee within the region, and also a resident of a village within or adjacent to the park or monument or whose residents engage in subsistence uses within the park or monument. The commissions shall be established within one year from the date of enactment of this Act, and within eighteen months from the date of enactment of this Act shall devise and recommend a program which provides for subsistence uses of wildlife within the park or monument. Each commission should work closely with the local committees and regional boards in its region and with local communities whose residents are dependent upon the continuation of subsistence uses within the park or monument.

Each year thereafter each commission shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which it deems necessary, if any. The Secretary shall promptly implement the subsistence program, or yearly recommendations, unless he determines in writing that such program, or yearly recommendation, violates recognized principles of wildlife conservation, is contrary to the purposes for which the park or monument is established, or would be detrimental to the satisfaction of subsistence needs. Pending development and implementation of the subsistence program in each park or monument, the Secretary shall manage such park or monument to permit subsistence uses by local residents.

Section 809: Cooperative Agreements

This section authorizes and encourages the Secretary of the Interior and the Secretary of Agriculture to enter into cooperative agreements and otherwise cooperate with other Federal agencies, the State, Native corporations, and other appropriate persons and organizations, including other nations, to manage and protect fish and wildlife resources utilized for subsistence purposes and to otherwise effectuate the purposes and policies of this title.

Section 810: Subsistence and Land Use Decisions

This section requires all Federal land managers and Federal agencies with primary jurisdiction over the public lands, including conservation system unit managers and the Bureau of Land Management, to evaluate the effect on subsistence uses and needs in determining whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of the public lands under any provision of law authorizing such actions. Prior to any withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses, the head of the appropriate Federal agency shall give notice to the appropriate State agency and local committees and regional councils, give notice to local residents of the area and hold a hearing in the vicinity of the area involved, and determine that such a significant restriction of subsistence uses is necessary and consistent with sound management principles for the utilization of the public lands, that the proposed activity will involve the minimal amount of public lands necessary to accom-

plish the purposes of the proposed action, and that reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources. If the Secretary is also required to prepare an environmental impact statement pursuant to the National Environmental Policy Act as well as comply with the requirements of this section, he shall provide the notice and hearing as part of the preparation of, and include the findings required by this section in, such environmental impact statement. This section is not to be construed as prohibiting, impairing or in any manner affecting the selection by, and conveyance to the State of Alaska or any Native corporation of any portion of the public lands selected or conveyed pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

Section 811: Access

This section requires the Secretary of the Interior and Secretary of Agriculture to ensure that residents engaged in subsistence uses shall have appropriate access to subsistence resources on the public lands, and shall permit the taking of fish and wildlife for subsistence uses in areas of Alaska designated as national preserves, national conservation areas, national recreation areas, national parks and monuments in which subsistence uses specifically are permitted by this Act, and areas of the National Wildlife Refuge, National Forest, and Wild and Scenic Rivers Systems in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

The committee intends that access to fish and wildlife populations shall be provided to local residents engaged in subsistence uses regardless of where such populations may be located in the future (except that the section is not intended to permit the subsistence use of wildlife in national parks and monuments which are permanently closed to such uses). Traditional habitat and migration routes may be altered by transportation systems and development activities on the public lands. By focusing on access to the resource itself, rather than on the particular portion of the public lands upon which the resources may presently be located, this section provides the flexibility necessary to ensure the continuation of subsistence uses in the future, subject to reasonable regulation.

This section also recognizes the importance of the use of snow-machines, motorboats, and other means of surface transportation traditionally employed for subsistence purposes on the public lands. Although aircraft are not included within the purview of this section, reference to means "traditionally employed" for subsistence purposes is not intended to foreclose the use of new, as yet unidentified means of surface transportation, so long as such means are subject to reasonable regulation necessary to prevent waste or damage to fish, wildlife or terrain.

Section 812: Research

This section requires the Fish and Wildlife Service and the National Park Service to work in close cooperation with each other and with the State of Alaska and other appropriate Federal agencies in conducting new and ongoing research on fish and wildlife populations utilized for subsistence purposes on the public lands, and on the subsistence use of such populations. The section requires both agencies to utilize the

special knowledge of local conditions and requirements of local residents engaged in subsistence uses in their area.

The expertise of the local committees and regional councils also is a valuable source of information about subsistence resources and uses, and the committee expects all Federal agencies engaged in subsistence related research to inform the appropriate committees and councils about research projects being planned or conducted in their respective areas and work closely with those organizations. The results and data obtained from research conducted pursuant to this section shall be made available to the State, the local committees and regional councils, and other appropriate persons and organizations. The committee also respects that research conducted pursuant to this section will be undertaken in a manner which does not disrupt the traditional activities of rural residents engaged in subsistence uses, as well as the communities and cultures of which such residents may be a part.

Section 813: Periodic Reports

Four years after the date of enactment of this Act and every three years thereafter, the Secretary of the Interior, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the congress which shall include a description and evaluation of monitoring activities undertaken pursuant to section 806, the status of fish and wildlife populations on the public lands harvested for subsistence uses, a description of the nature and extend of subsistence and other uses of fish and wildlife on the public lands, a description of the role of subsistence uses in the economy and culture of rural Alaska, comments on the report by the State of Alaska, the local committees and regional councils and other appropriate persons and organizations, a description of those actions taken by the Secretary or the State, or which may need to be taken in the future to protect and continue subsistence uses on the public lands, and such other recommendations as the Secretary deems appropriate. A notice of the report shall be published in the Federal Register and the report made available to the public.

Section 814: Regulations

This section requires the Secretary of the Interior and the Secretary of Agriculture to prescribe such regulations as are necessary and appropriate to carry out their respective responsibilities under this title.

Section 815: Limitations; Savings Clauses

This section provides that nothing in this Act is intended to be construed as granting any property right in any subsistence resource on the public lands; permitting the level of subsistence uses to be inconsistent with the conservation of healthy populations of fish and wildlife, within a conservation system unit, and with the conservation of natural and healthy populations within a national park or monument; permitting any privilege which may be granted by the State to any person with respect to subsistence uses to be assigned; permitting any subsistence use of fish or wildlife on any portion of the public lands which was permanently closed to such uses on January 1, 1978; vesting elsewhere than in the Secretary any authority to manipulate habitat on any portion of the public lands; enlarging or diminishing the responsibility and authority of the State of Alaska for the management

of fish and wildlife on the public lands except as specifically provided in this Act; amending the Alaska constitution; or modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife.

Section 816: Closure to Subsistence Uses

This section provides that all national parks and monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence and sport fishing shall be permitted in such areas in accordance with the provisions of this title and other applicable laws of the United States and the State of Alaska. Except as specifically provided in this section nothing in this title is intended to enlarge or diminish the authority of the Secretary under existing law including the Wildlife Refuge Administration Act, and the BLM Organic Act, to designate areas where, and establish periods when, no taking of fish or wildlife shall be permitted on the public lands for reasons of public safety, administration, to assure the continued viability of a particular fish or wildlife population or for other purposes. Thus, the Secretary remains empowered to authorize a more restrictive hunting season than is otherwise permitted by State law. However, in recognition of the importance of subsistence uses by rural residents of Alaska, notwithstanding any other provision of this Act or other law, subsistence uses of a particular fish or wildlife population on the public lands, and such uses by local residents within conservation system units which are open to subsistence uses (including national parks and monuments), may be prohibited on the public lands, or on any portion thereof, only temporarily for reasons of public safety, administration, or to assure the continued viability of such population.

Such a closure must be preceded by consultation with the State and adequate notice and hearing in the vicinity of the area of the closure, unless the Secretary determines that an emergency situation exists and that emergency measures must be taken to protect the public safety or the continued viability of a particular fish or wildlife population. In the latter situation, the Secretary may immediately close the public lands, or any portion thereof, to subsistence uses of a particular fish or wildlife population for a period not to exceed sixty days, which may not be subsequently extended unless the Secretary affirmatively establishes, after notice and hearing, that such an extension is justified. No closure for purposes of administration may be made prior to notice and hearing in the vicinity of the area of the closure. No closure order to the taking of a fish or wildlife population for subsistence uses authorized by this section shall extend longer than necessary to achieve the immediate purpose for the closure established at the hearing held prior to the issuance of such order.

Thus, for example, while the Secretary may prohibit the taking of wildlife for subsistence uses for reasons of public safety in a certain area surrounding a public campground, roadway or hiking trail, such a closure should not be limited to any arbitrary or inflexible time period. Rather, it should remain in effect only so long as reasonably necessary to provide for the public safety during normal periods of consistent public use, and only apply to the minimum portion of

the public lands reasonably necessary to achieve this purpose. Although, this section authorizes the restriction of subsistence uses for purposes of administration, recognition of the importance of subsistence activities to most rural residents requires that this authority be utilized narrowly and with consistent restraint. In exercising his authority to protect the continued viability of a fish or wildlife population, it is not the intent of the Committee that actual depletion of a population or an emergency exist before a closure under this section may be justified. Continued subsistence uses by rural residents can only be maintained if the continued viability of fish and wildlife populations utilized for subsistence purposes can be maintained.

TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS
SETTLEMENT ACT AND ALASKA STATEHOOD ACT

Section 901: Conveyances to Village Corporations

This section provides for the conveyance by legislative action of surface rights to eligible Village Corporations, and in some cases, sub-surface rights to eligible Regional Corporations. All conveyances made by this section are subject to valid existing rights and may be subject to public easement reservations as provided in Section 903(a).

Subsection (a) provides that the provisions of this section shall be applicable only to Native corporations which elect to receive conveyance pursuant to this section within 180 days.

Subsection (b) legislatively conveys land to eligible Village Corporations where such land is mandated by ANCSA to be selected by the Village Corporation.

Paragraph (1) conveys to a Village Corporation, found eligible by the Secretary, the surface estate to public land in its “core” township or townships. A “core” township is that township which encloses all or part of the improved area constituting the Village. The conveyance is immediate, subject to valid existing rights, and must be otherwise consistent with provisions of the ANCSA such as acreage limitations, contiguity, and location in respect to Home Rule or First-class cities.

Where two or more Villages, by reason of locality, have claim to the same township, the conveyance is delayed until the Village Corporations involved agree to the division of the township, or such dispute is settled by arbitration (see subsection (c)).

Paragraph (2) conveys to a Village Corporation, found eligible by the Secretary, the surface estate to State of Alaska “selected” lands (such are not public lands under Section 3(e) of the ANCSA) in the “core” township. The conveyance procedures and criteria are the same as for paragraph (1) except that certain types of lands, currently in litigation or dispute, are not conveyed by this legislation. These types of land are those lands selected, but not yet patented to the State, under the School or University Land Grants, the Mental Health Land Grant, or where the State had by December 18, 1971, conditionally granted title to a third party pursuant to the tentative approval authority of Section 6(g) of the Alaska Statehood Act. Should the results of the litigation or settlement of the disputes be in favor of the Native Corporation, the Secretary would be required to subsequently convey such lands under either the procedures of Section 902 or the ANCSA, as appropriate.

95th Congress, 2d Session

House Report No. 95-1045, Part II

ALASKA NATIONAL INTEREST LANDS
CONSERVATION ACT OF 1978

R E P O R T
OF THE
COMMITTEE ON MERCHANT MARINE
AND FISHERIES
HOUSE OF REPRESENTATIVES

together with
ADDITIONAL AND SUPPLEMENTAL
VIEWS

TO ACCOMPANY

H.R. 39

(Including the cost estimate of the
Congressional Budget Office)



MAY 4, 1978.—Committed to the Committee of the Whole House
on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1978

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95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 95-1045
2d Session } { Part 2

ALASKA NATIONAL INTEREST LANDS CONSERVATION
ACT OF 1978

MAY 4, 1978.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. MURPHY of New York, from the Committee on Merchant Marine
and Fisheries, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 39 which on April 7, 1978, was sequentially referred from
the Committee on Interior and Insular Affairs to the Committee on Merchant
Marine and Fisheries]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was
referred the bill (H.R. 39) to designate certain lands in the State of
Alaska as units of the National Park, National Wildlife Refuge, Wild
and Scenic Rivers and National Wilderness Preservation Systems, and
for other purposes, having considered the same, report favorably
thereon with amendments and recommend that the bill as amended
do pass.

The amendments are as follows:

On page 29, in the Table of Contents, strike all of Title III, and
insert a new Title III to read as follows:

TITE III—NATIONAL WILDLIFE REFUGE SYSTEM

- Sec. 301. Definitions.
- Sec. 302. Purposes of refuges.
- Sec. 303. Administration of refuges.
- Sec. 304. Establishment of refuges.
- Sec. 305. Cooperative management agreements.
- Sec. 306. Bristol Bay Cooperative Region.
- Sec. 307. Barren Ground Caribou Study.
- Sec. 308. Miscellaneous provisions.

(1)

On page 110, after line 10, insert the following:

(2) Those fish incubator sites identified on the map of Kenai Wilderness as “Potential Wilderness Areas” are designated as wilderness effective ten years after the date of enactment of this Act, unless during the ten-year period the Secretary authorizes development of a fish incubator in any such potential wilderness area. The Secretary shall manage each such area pursuant to the Wilderness Act until he authorizes such development or until the end of the ten-year period specified in the preceding sentence. Any fish incubator authorized for any such area shall be constructed, managed, and operated in a manner that minimizes any adverse impacts on the wilderness character of the adjacent wilderness.

On page 115, line 24, after the word “of” insert “fish and”.

On page 116, line 3, strike out “continued viability”, and insert “natural stability and continued productivity”.

On page 116, delete all of lines 17 through 24, and all that follows through line 9 on page 133, and insert the following in lieu thereof:

DEFINITION

SEC. 703. As used in this Act, the term “subsistence uses” means the noncommercial (except as provided under paragraph (2)) customary and traditional utilization within the State of wild, renewable resources for—

(1) direct personal or family use for food, shelter, fuel, clothing, tools, or transportation;

(2) the making and selling of handicraft articles (including clothing), but only out of nonedible byproducts of fish and wildlife taken for such personal or family use; or

(3) customary trade, barter, or sharing among subsistence users for personal or family use.

STATE REGULATION

SEC. 704. IN GENERAL.—Except as otherwise provided by this Act and other Federal laws, the State may regulate, in a manner consistent with the policies set forth in section 702, the taking of fish and wildlife on public lands for subsistence uses by developing and implementing a subsistence management program which meets the requirements set forth in subsection (b).

(b) STATE PROGRAM REQUIREMENTS.—The subsistence management program of the State shall include at least the following elements:

(1) The maintenance of the natural stability and continued productivity of fish and wildlife populations which are on public lands and which are the subject of subsistence uses.

(2) A system capable of regulating and monitoring subsistence uses and other consumptive uses of such

populations to ensure that timely and appropriate State action will be taken to carry out the purposes and policies of this title.

(3) A grievance procedure whereby any local council or regional council, required to be established under paragraph (6), which determines that the State is not in compliance, in whole or in part, with the State subsistence management program can obtain timely review of such determination by, and obtain appropriate relief from, the State agency referred to in paragraph (5) (A) or any other State rulemaking authority.

(4) The establishment of not less than five management regions which, taken together, shall include all public lands where the State is exercising regulatory authority under this title. The number and boundaries of the management regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated.

(5) State laws or regulations which—

(A) provide for the regulation by a professionally staffed agency of the taking of fish and wildlife populations on the public lands for subsistence uses, provide that such agency have an administrative structure compatible with the provisions of this section, and provide for an agency which has adequate enforcement authority;

(B) provide preference for nonwasteful subsistence uses by local residents over other consumptive uses of fish and wildlife populations on the public lands; and

(C) provide, whenever it is necessary to restrict the taking of such populations on public lands for subsistence uses in order to protect their natural stability and continued productivity, or to continue such uses, for the establishment of appropriate restrictions and limitations on, and preferences for, such uses which shall be based on—

(i) customary and direct dependence upon the populations as the mainstay of livelihood,

(ii) local residency, and

(iii) the availability of alternative resources.

(6) A system of local and regional fish and wildlife councils within each management region established pursuant to paragraph (4). Each regional council shall be composed of residents of the region concerned and shall have the following functions:

(A) The review, development, and evaluation of proposals for regulations, policies, management plans, and other matters relating to the conservation and utilization of fish and wildlife within such region.

(B) The provision of a forum for the expression of opinions and recommendations by persons in-

interested in any phase of fish and wildlife conservation and utilization.

(C) The taking of appropriate action to ensure local and regional participation in the decision-making process affecting the taking of fish and wildlife populations on public lands within the region for subsistence uses.

(D) The preparation of a recommended subsistence management plan for such region which shall be submitted to the State agency referred to in paragraph (5) (A). The plan shall be updated annually and shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations necessary to implement the plan.

The local councils within each management region shall provide advice to, and shall assist, the regional council with respect to carrying out the functions set forth in this paragraph.

(7) The assignment of adequate and necessary qualified staff to the regional councils and the timely distribution of all available relevant technical and scientific support data to the local councils and regional councils.

(8) A requirement that the State agency referred to in paragraph (5) (A) or any other State rulemaking authority shall be guided by the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses and shall implement such recommendations unless the agency or authority, after a public hearing, determines that any such recommendation is not supported by substantial evidence presented at the hearing, violates recognized scientific principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs.

ENFORCEMENT DUTIES OF SECRETARY OF THE INTERIOR

SEC. 705. (a) REVIEW BY THE SECRETARY.—The Secretary shall monitor the State subsistence management program and the implementation of such program. If the Secretary, after notice and hearing, determines that the program or its implementation is not in compliance with this title, the Secre-

tary shall so notify the State and shall indicate changes in the program or its implementation which he considers necessary to bring the State into compliance.

(b) **REVIEW BY LOCAL AND REGIONAL COUNCILS.**—If a local council or regional council required to be established under section 704(b) (6) determines that the State is not in compliance, in whole or in part, with the State subsistence management program, such council shall notify the Secretary in writing outlining the factual basis for such determination and detailing efforts which have been made to obtain timely relief through the grievance procedure referred to in section 704(b) (3). If the Secretary finds that based upon the representations of the council there is cause to believe that the State is not in compliance, in whole or in part, with the State program and that such council has failed to obtain timely relief through the State grievance procedure, he shall investigate and report publicly on the results of his investigation. If such results support the contention of the council, the Secretary shall so notify the State and shall indicate changes in its program or its implementation which he considers necessary to bring the State into compliance.

(c) **HEARINGS AND CLOSURES.**—If the State fails—

(1) to implement a subsistence management program within eighteen months after the date of the enactment of this Act or by such later date as the Secretary deems reasonable; or

(2) to make, after a reasonable date, the changes in the subsistence management program or its implementation as indicated by the Secretary under subsection (a) or (b);

and the Secretary determines that such failure threatens the natural stability and continued productivity of the fish and wildlife populations on public lands in the area concerned, or the ability of subsistence-dependent Alaska residents in such area to satisfy their subsistence needs, the Secretary may close the public lands in such area to all consumptive uses except subsistence uses by local residents. The Secretary shall afford the State an opportunity to appeal such closure. Within thirty days after receipt of notice of such appeal, the Secretary shall afford the State a public hearing and, within thirty days after such hearing, shall make his final decision on such appeal. Unless the Secretary affirmatively establishes that the State is not in compliance with this title or with the subsistence management program, and that the resulting threat determined under the preceding sentence exists, the Secretary shall revoke the closure. If the Secretary establishes that the State is not in such compliance, and that such resulting threat does exist, he may continue the closure, in whole or in part, until the State adopts measures complying with the Secretary's determination, or until such threat is otherwise ameliorated.

(d) **EMERGENCY AUTHORITY.**—(1) Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses if necessary for reasons of public safety, administration, or to assure the natural stability and continued productivity of one or more fish or wildlife populations on such lands which are subject to such uses. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the natural stability and continued productivity of one or more fish and wildlife populations on such lands which are subject to such uses, the Secretary may immediately close the public lands, or any portion thereof, to subsistence uses and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after adequate notice and public hearing, that such closure should be extended.

(2) If such notice to the State under subsection (a) or (b), the Secretary determines that extraordinary measures must be taken to protect public welfare, he may open public lands, or any portion thereof, to subsistence uses by local residents and publish the reasons justifying such action in the Federal Register. Such emergency action shall be effective when made, but shall not extend for a period of time greater than sixty days, or until such time as the threat to the public welfare which necessitated such action has been resolved, whichever time first occurs.

COOPERATIVE ARRANGEMENTS

SEC. 706. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title.

SUBSISTENCE AND LAND USE DECISIONS

SEC. 707. In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on the subsistence needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation,

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lease, permit, or other use, occupancy, or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice of the State agency referred to in section 704(b)(5) and the appropriate local councils and regional councils required to be established under section 704(b)(6) if such councils have been established,

(2) gives notice of, and holds, a hearing in the vicinity of the area involved, and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands,

(B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and

(C) adequate steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

ACCESS

SEC. 708. The Secretary shall ensure that persons engaged in traditional or customary subsistence activities shall have appropriate access to subsistence resources on the public lands.

SNOWMOBILES AND MOTORBOATS

SEC. 709. Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes, subject to such regulations as are necessary to prevent abuse, waste, or damage to fish and wildlife, habitat, or other natural values.

RESEARCH

SEC. 710. The Secretary, acting through the United States Fish and Wildlife Service and in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence activities on the public lands, seek data from, consult with and utilize the special knowledge of subsistence users; and make the results of such research available to the State, the local councils and regional councils required to be established under section 704(b)(6), subsistence users, and other appropriate persons and organizations.

PERIODIC REPORTS

SEC. 711. Within four years after the date of the enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 705(a);

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local councils and regional councils required to be established under section 704(b)(6), and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public.

REGULATIONS

SEC. 712. The Secretary and the Secretary of Agriculture shall each prescribe such regulations as are necessary and appropriate to carry out their respective responsibilities under this title.

OTHER LAWS

SEC. 713. Nothing in this title shall be deemed to modify or repeal the provisions of any Federal law governing the conservation or protection of fish and wildlife.

LIMITATIONS

SEC. 714. (a) **NO PROPERTY RIGHT; LEVELS OF USE.**—Nothing in this title shall be construed as granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife on such lands to be significantly expanded beyond the level of such uses occurring during the ten-year period before January 1, 1978. No privilege which may be granted by the State to any individual with respect to subsistence uses under the State subsistence management program may be assigned to any other individual.

(b) **CLOSED AREAS; HABITAT.**—Nothing in this title shall be construed as permitting any subsistence use of the resources of any portion of the public lands (whether or not within any conservation system unit) if any such use was not permitted on the date of the enactment of this Act or as vesting elsewhere than in the Secretary any authority to manipulate habitat on any portion of the public lands.

REIMBURSEMENT TO THE STATE

SEC. 715. (a) **AUTHORITY.**—The Secretary may reimburse the State wildlife agency, from funds appropriated to the Department of the Interior, for reasonable costs relating to the establishment and operation of the local councils and regional councils required to be established under section 704(b)(6). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this section shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior. The Secretary shall ensure that such grants, payments, or other sums are expended in a manner consistent with the policies set forth in section 702.

(b) **LIMITATION.**—Total payments to the State under this section shall not exceed the sum of \$5,000,000 in any one fiscal year.

(c) **REVIEWS.**—The Secretary shall periodically review the financial aspects of operating the local and regional council system and shall advise the Congress at least once in every five years as to whether or not the maximum amount of payments specified in subsection (b) is adequate.

On page 159, line 17, strike the word “Corporation ,” and insert “Corporation (other than any such holdings located within units of the National Wildlife Refuge System),”.

On page 167, line 11, change the period to a comma and insert “other than lands within units of the National Wildlife Refuge System.”.

On page 167,, lines 18 and 19, strike “all public lands in Alaska,” and insert “such public lands,”.

On page 170, add the word “and” at the end of line 6.

On page 170, strike lines 7 and 8.

On page 170, line 9, strike “(3),” and insert “(2)”.

On page 170, strike lines 11 through 16, and the words “under section 906(c).” on line 17.

On page 173, line 19, strike the word “This”, and all of lines 20 through 23.

On page 210, line 5, after the word “with”, insert “the comprehensive conservation plans prepared under section 303(c),”.

On page 214, strike all of lines 7 through 11, and the words “section to the Congress),” on line 12, and insert “years after the date of the enactment of this Act,”.

On page 214, line 15, strike “titles II and III”, and insert “title II”.

On page 224, line 23, strike all following “ices.” through line 25, and the words “such features.” on line 1, page 225.

On page 228, line 19, after “Sec. 1303.”, insert “(a) **EXISTING CIVIL AND MILITARY NAVIGATION AND OTHER FACILITIES.**—(1)”.

On page 229, line 2, strike the words “notwithstanding any other provisions” and all of lines 3 through 14 thereon, and insert the following:

areas where it has existed in the past. The committee notes that some commercial trappers in Alaska must, by necessity, use snowmachines for access and feels that the Secretary should not prohibit the use of snowmachines by commercial trappers within Refuge wilderness areas where they have been used in the past, but he may regulate their use.

TITLE VII—SUBSISTENCE

The committee adopted a large number of amendments to title VII as reported by the Interior Committee. These amendments adopt the basic structure of title VII as reported by the Interior Committee, but make several important changes designed to ensure a workable administrative structure and a more effective State-Federal relationship in this area.

Section 703—Definition

The committee amended the definition of “subsistence uses” to emphasize that, with the exception of handicraft articles made from the nonedible byproducts of fish and wildlife taken for personal or family use, “subsistence uses” should not include commercial uses of fish and wildlife. It is intended with the above noted caveat that legitimate subsistence uses of wild resources shall be those involving the direct personal or family use for food, shelter, fuel, clothing, tools, or transportation.

The committee, however, recognizes that an important part of the subsistence lifestyle in Alaska involves trading, bartering, and sharing among subsistence users. The inclusion of “trade, barter or sharing among subsistence users” within the purview of the definition of accepted subsistence uses of wild, renewable resources recognizes the use of these subsistence resources by members of the traditional Native community who are dependent upon such resources for personal or family consumption, but have not participated in the actual subsistence harvest. In addition, the definition permits the trade or barter of subsistence resources by subsistence users in exchange for nonsubsistence commodities, so long as the person to whom the resource is traded or bartered himself utilizes the resources for personal or family consumption. Nevertheless, the committee does not intend that the reference to trade or barter in the definition should permit any commercial or quasi-commercial use of fish and wildlife resources. The reference to “customary” trading and sharing is intended to emphasize that these activities are sanctioned by this section only to the extent that they have been commonly occurring in Alaska.

The committee notes that the commercial exception for the making and selling of handicraft articles out of nonedible byproducts only applies to fish and wildlife taken for personal or family use. In other words, this provision is not intended to cover the commercial sale of articles from fish and wildlife whose edible parts have not been taken for consumption by the subsistence user or his family.

Section 704—State regulation

The committee amendments to section 704 authorizes the State to regulate the taking of fish and wildlife on public lands for subsistence uses by developing a subsistence management program meeting the standards specified in section 704(b).

Section 704(a) authorizes the State to regulate, in a manner consistent with the policies set out in section 702, the taking of fish and wildlife on public lands for subsistence purposes. This regulatory authorization does not, however, override the other provisions of this act or of existing Federal law. The most obvious example of an existing Federal statute which remains unchanged by the language in section 704 would be the National Wildlife Refuge System Administration Act of 1966. The Secretary of the Interior's regulatory jurisdiction over the taking of fish and wildlife within national wildlife refuges would, therefore, remain unaffected by the enactment of this act. Thus, the Secretary would still be empowered to authorize a more restrictive sport hunting season within refuges than is otherwise allowed by State law. Such routine restrictions based upon the authority of the National Wildlife Refuge System Administration Act would not be required to go through the closure process outlined in section 705(c) of this title.

The standards adopted by the committee in section 704(b) parallel those in the Interior Committee version of title VII.

Thus, the State program should include the following elements:

(1) The maintenance of the natural stability and continued productivity of fish and wildlife populations. The committee feels that any State subsistence management program should seek to maintain fish and wildlife populations at healthy levels permitting a sustained yield. The committee recognizes that animal populations tend to fluctuate in the wild naturally, and the reference to "natural stability" recognizes this fact.

(2) A system capable of regulating and monitoring subsistence uses and other consumptive uses of fish and wildlife populations.

(3) A grievance procedure.

(4) The establishment of not less than five management regions. This provision is intended to insure that regional differences in subsistence uses are adequately accommodated. The upper limit of 12 regions adopted by the Interior Committee has been eliminated.

(5) State laws or regulations which—

(a) provide for the regulation of the taking of fish and wildlife by a professionally staffed agency and provide for an enforcement agency. This section recognizes that in Alaska the Department of Fish and Game has primary responsibility for the regulation of fish and game, but the department of public safety has primary enforcement responsibility. This section would permit the continuation of the present arrangement or the transfer of enforcement to the department of fish and game.

(b) provide preference for nonwasteful subsistence uses by local residents over other consumptive uses of fish and wildlife populations. The committee does not intend that this general statement of a preference for local subsistence users should be construed as authorizing different treatment of subsistence versus nonsubsistence users, except as provided in section 704(b) (5) (C).

(c) provide for the establishment of a preference system when necessary in order to reduce hunting or fishing pressure on the resource. Such a system shall be established on the basis of (i) customary and direct dependence upon the resource as the main-

stay of livelihood, (ii) local residency, and (iii) the availability of alternative resources. This section is central to the provision of a preference for subsistence users. It recognizes that in Alaska there may be circumstances where it is necessary to restrict the taking of fish and wildlife in order to assure the continued abundance of fish and wildlife populations. This section establishes a method of restricting the taking of fish and wildlife in such circumstances while permitting those most in need of subsistence resources to continue hunting and fishing. The section also recognizes that in some cases it may be necessary to give preference to one subsistence user over another. In such a situation, preference should be given to the local user who has the greatest need for the resource. The transient subsistence user could, therefore, be precluded under a preference system from taking fish and wildlife.

(6) A system of local and regional fish and wildlife councils within each management region.

Section 704(b) (8) requires the State agency to be guided by the advice of the regional councils concerning the taking of fish and wildlife on public land within their respective region. This section makes it clear that the State agency need be guided by the advice of the councils only if such advice is supported by substantial evidence, does not violate a recognized principle of fish and wildlife conservation or is not detrimental to the satisfaction of subsistence needs.

Section 705—Enforcement Duties of the Secretary of the Interior

Section 705 authorizes the Secretary to take special actions to protect the fish and wildlife populations on the public lands and the ability of subsistence-dependent Alaska residents to satisfy their subsistence needs. In contrast to the Interior Committee version of title VII, the Secretary would not be authorized to suspend the State's authority to manage subsistence resources or to take over the management of those resources on the public lands. Rather, the Secretary's discretion would be limited to closing the public lands to subsistence and nonsubsistence uses under certain circumstances and opening the lands to subsistence uses by local residents under very extraordinary circumstances.

Section 705(c) authorizes the Secretary to close the public lands to all consumptive uses, except subsistence uses by local residents, if he determines that the State has either failed to develop a subsistence program or has failed to make necessary changes in the program as indicated by the Secretary pursuant to section 705(a). Before the Secretary could close public lands, however, he would have to make the further finding that the State's failure threatens the natural stability and continued productivity of the fish and wildlife populations on public lands or the ability of subsistence dependent Alaska residents to satisfy their subsistence needs. This closure could only be effective for 60 days before the Secretary would have to affirmatively establish that the State is not in compliance with this title or with its subsistence program, and that the threat to wildlife populations or to subsistence users exists.

Section 705(d) authorizes the Secretary to utilize the full extent of his constitutional authority over Native affairs and the public lands

to close the public lands, including units of the conservation system, or portions thereof, to all consumptive uses, including subsistence uses for one of three reasons. First, the Secretary could close the public lands to subsistence activities for reasons of public safety. As the public's use and enjoyment of the Alaskan parks and refuges increases, so too does the potential danger to human safety resulting from subsistence hunting activities. While recognizing the importance of subsistence uses to rural people in Alaska, units of the conservation system are nevertheless of national importance and the Secretary should be empowered to accommodate subsistence activities to visitor use when warranted for reasons of public safety. Thus, for example, the Secretary might prohibit subsistence hunting within a certain area surrounding public campgrounds or hiking trails. Such restrictions would probably be necessary for as long as the public used the particular park or refuge.

The Secretary would also be authorized to restrict or prohibit subsistence activities for reasons of administration. The committee does not expect this broad authorization to be frivolously used, yet it was felt necessary to give the Secretary sufficient discretion to respond to the needs of a developing park and refuge system in Alaska. This is in addition to his regular authority to protect parks and refuges under existing law.

Finally, the Secretary would be authorized to prohibit subsistence activities in order to ensure the natural stability and continued productivity of one or more populations of fish and wildlife. This authorization merely reflects the obvious: that the subsistence needs of rural people can only be satisfied if healthy and productive populations of fish and wildlife species can be maintained. While according subsistence a priority over sport hunting and other consumptive uses, the committee recognizes that this may not always be enough to maintain a distinct population of a particular species. In such a situation, subsistence users could be required to diminish or halt their consumption of that species. This approach reflects the fact that healthy populations of fish and wildlife on public lands are a national resource of great significance and that all Americans, whether subsistence user or not, must be prepared to contribute to their preservation. This is consistent with the major purposes for the refuge system set forth in section 302.

Two final points need to be stressed concerning Secretarial closures for one of the three enumerated reasons. First, this section recognizes that any total ban on subsistence uses can have a disastrous effect on the well-being of rural Alaskans. Thus, the Secretary could only close the public lands to subsistence uses for 60 days without affirmatively establishing the need for continued closure. The committee notes that the Secretary could initially close the public lands only after providing notice of his intended action to the State and after conducting a public hearing.

Second, although located in a subsection entitled "Emergency Authority", it is not the intent of the committee that an emergency exist before the Secretary may exercise his closure authority. The prudent management of fish and wildlife resources and national parks and refuges would dictate that the Secretary be allowed to act prior to the existence of an actual emergency.

Section 705 (d) (2), however, authorizes the Secretary to open public land to subsistence uses in certain very limited circumstances. In order to take this extraordinary action, the Secretary would first have to provide notice to the State. After providing the requisite notice to the State, the Secretary could open the public lands to subsistence uses by local residents if he determines that extraordinary measures must be taken to protect the public welfare. This extraordinary action could not be extended for greater than 60 days under any circumstances. The committee anticipates that this section would only be employed in very unusual situations.

It should be noted that section 705 gives the Secretary certain oversight responsibilities. Recognizing that a deficient State program can have a significant adverse impact upon subsistence users and upon populations of fish and wildlife, the committee believes that time may be of the essence in the exercise of the Secretary's responsibilities. It is, therefore, the committee's view that formal hearings on the record under the Administrative Procedure Act will be too time-consuming and cumbersome. Therefore, wherever section 705 requires the Secretary to hold a "hearing" before taking a certain action, the committee intends it to be an informal public hearing and not a formal hearing on the record under 5 U.S.C. § 556.

Section 706—Cooperative Agreements

Section 706 authorizes the Secretary to enter into cooperative agreements or to otherwise cooperate with other Federal agencies, the State, Native corporations, or other appropriate persons or organizations to protect subsistence resources and uses.

Section 707—Subsistence and Land-Use Decisions

Section 707 directs the Federal land-managing agencies to consider potential impacts on subsistence of various land-use decisions which may be taken in the future.

Section 708—Access

Section 708 directs the Secretary to ensure that persons engaged in traditional or customary subsistence activities shall have appropriate access to subsistence resources on the public land.

Section 709—Snowmobiles and Motorboats

Section 709 requires the Secretary to permit the appropriate use of snowmobiles and motorboats for subsistence purposes on the public lands, subject to reasonable regulations which are necessary to protect the natural values of those lands.

Section 710—Research

Section 710 recognizes the importance of research in the effective management and protection of fish and wildlife resources and subsistence uses. The committee feels that the United States Fish and Wildlife Service is best suited to coordinate the wildlife research activities of the Federal Government, the Alaska Department of Fish and Game, the University of Alaska and other State agencies. The committee also expects both the Federal Government and the State to engage in additional research pursuant to their expanded responsi-

bilities under this title. Finally, the committee recognizes that many rural residents have special knowledge of subsistence resources which has not been fully utilized in the past in Federally sponsored research. Section 710 requires the Secretary to consult with and utilize the special knowledge of subsistence users.

Section 711—Periodic Reports

Section 711 directs the Secretary to report to the Congress on the implementation of this title within 4 years after enactment and every 3 years thereafter.

Section 712—Regulations

Section 712 authorizes the Secretary of the Interior and the Secretary of Agriculture to issue such regulations as may be necessary to carry out their duties under this title.

Section 713—Other laws

Section 713 provides that this title is not intended to modify or repeal the provisions of any Federal law governing the conservation or protection of fish and wildlife. The list of laws covered by this provision includes those listed in section 713 of H.R. 39 as reported by the Interior Committee and any other appropriate Federal law.

The committee decided against compiling a long list of Federal environmental statutes dealing with fish and wildlife matters which would remain unaffected by the language of title VII. Such a compendium approach would inevitably overlook conservation statutes otherwise qualifying for exemption. In order to be all inclusive, the Committee adopted general language exempting existing Federal conservation statutes. It is, however, the clear intent of the committee that statutes like the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., and the Marine Mammal Protection Act, 16 USC § 1361 et seq. fit within this language and are exempted from the provisions of title VII.

Section 714—Limitations

Section 714 makes it clear that nothing in this title is to be construed as granting a property right in subsistence resources, as permitting the level of subsistence uses of fish and wildlife on the public lands to be significantly expanded beyond those occurring between January 1, 1968, and January 1, 1978, as opening to subsistence uses any public lands now closed to such uses, or as vesting elsewhere than in the Secretary any authority to manipulate habitat on any portion of the public lands. The ten-year period preceding January 1, 1978, was chosen as the benchmark period because the data base on levels of harvest are the best during these years. It was also believed that this time-period would be of sufficient length to take into account fluctuations in harvest resulting from the natural shifts in wildlife population levels.

This section recognizes that Alaska is nearly stretched to the limit in its ability to satisfy the subsistence needs of its rural residents. The committee is concerned that the rural Alaskan population will continue to increase, thereby putting even more pressure on the beleaguered wildlife population. This section is intended to set an outer limit on the level of subsistence uses in Alaska. The committee's intent is not to measure the level of future subsistence uses against the hypotheti-

cal statistical yardstick, but rather to reflect congressional concern for the protection of the opportunity for subsistence uses by persons now residing in rural areas. Thus, what constitutes a "significant" expansion in harvest would be expected to vary from species to species. While acknowledging the need for some expansion in the level of harvest in subsequent years, the committee nevertheless feels that such expansion should not adversely affect the natural stability and continued productivity of the fish and wildlife populations in Alaska.

Thus, if increased subsistence pressures prevent a particular fish or wildlife population from expanding its numbers or maintaining its population, the provisions of this subsection would require the imposition of restrictions on subsistence activities by the State or the Secretary.

Section 715—Reimbursement to the State

Section 715 authorizes reimbursement to the State for not to exceed 50 percent of the costs relating to the operation of the local and regional councils established pursuant to section 704(b)(6) and requires the Secretary to ensure that payments pursuant to this section and other sums are expended in a manner consistent with the policies set forth in section 702.

TITLE IX—MINERALS ASSESSMENTS, EXPLORATION, DEVELOPMENT, AND EXTRACTION ON CONSERVATION SYSTEM UNITS

The committee only adopted technical and conforming amendments to title IX as reported by the Interior Committee.

Section 903—Continuation of mineral assessment programs in Alaska

The amendment to section 903 provides that the mineral assessment program shall not apply to units of the National Wildlife Refuge System.

Section 905—Areas subject to the mineral access process

The amendment adopted by the committee makes a conforming change in section 905. The amendment deletes national wildlife refuges from the minerals access process and deletes any reference to the Arctic Range Special Study Area.

Section 906—Initiation of the minerals access process by application of secretarial motion

The amendment adopted by the committee makes a conforming change in this section to delete any references to the Arctic Range Special Study Area.

TITLE X—TRANSPORTATION AND UTILITY SYSTEMS ON CONSERVATION SYSTEM UNITS

The committee did not adopt any amendments to title X.

TITLE XI—COORDINATION

The committee did not adopt any amendments to title XI.

TITLE XII—ADMINISTRATIVE PROVISIONS

The committee amendments merely make conforming changes in title XII.