

No. 22-35097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA DEPARTMENT OF FISH AND GAME,
Plaintiff-Appellant,

v.

FEDERAL SUBSISTENCE BOARD et al.,
Defendants-Appellees,

and

ORGANIZED VILLAGE OF KAKE,
Intervenor-Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA, ANCHORAGE

No. 3:20-cv-00195-SLG

Honorable Sharon L. Gleason

**AMICUS CURIAE BRIEF BY ALASKA OUTDOOR COUNCIL IN
SUPPORT OF STATE OF ALASKA'S APPEAL REQUESTING
REVERSAL OF THE DISTRICT COURT ORDER**

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BRIEF DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1(a), Proposed Amicus Curiae Alaska Outdoor Council submits the following Corporate Disclosure Statement. Alaska Outdoor Council is a non-profit membership association, incorporated in the State of Alaska under Section 501(c)(4) of the Internal Revenue Code. Alaska Outdoor Council is not publicly traded and has no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

The Alaska Outdoor Council (“AOC”), an association of Alaskan hunters and other outdoor recreationalists, respectfully submits this amicus curiae brief regarding Defendant-Appellee Federal Subsistence Board’s closure of portions of Game Management Unit (“GMU”) 13 to hunting of caribou and moose by anyone other than rural Alaskans. AOC supports Plaintiff-Appellant State of Alaska. No parties to this appeal oppose AOC’s participation in filing an amicus brief.

I. INTEREST OF AMICUS CURIAE

AOC is a non-profit organization, incorporated in Alaska, comprised of numerous outdoor clubs and 6,500 individual members. Many of its members are hunters who live in Anchorage, Fairbanks, Juneau or other “non-rural” portions of Alaska and thus cannot be federally-qualified subsistence hunters, even when they hunt ungulates such as the caribou and moose involved in the GMU 13 closure at issue for food rather than sport.

AOC’s mission is to promote the preservation of outdoor pursuits in Alaska—hunting, fishing, trapping, and public access—and the conservation of those public lands where such opportunities occur. AOC regularly advocates for the equal use of Alaska’s public natural resources and the continued preservation and expansion of hunting and other outdoor recreational opportunities for its members, both through the legislative process and participation in the regulatory

processes before agencies such as the Alaska Department of Fish and Game and the Federal Subsistence Board (“FSB”).

AOC’s members include non-subsistence hunters directly impacted by FSB’s decision to close moose and caribou hunting in GMUs 13A and 13B to non-federally qualified subsistence hunters. As a result of the closure, these individuals lost the ability to participate in caribou and moose hunting opportunities on federal lands within those GMU subunits from 2020-2022. Furthermore, the District Court’s final ruling created precedent that may result in significant future impacts further restricting these individuals’ rights to hunt on federal public lands. Unless this Court reverses the District Court’s order or limits its rationale regarding when competition between subsistence and non-federal subsistence hunters justifies closures prioritizing subsistence hunters under ANILCA, this litigation may lead to requests for further restrictions and limitations on hunting opportunities on public lands across Alaska wherever both federally qualified subsistence hunters and non-subsistence hunters hunt.¹

¹ AOC is an independent and separate entity from all parties in this case. Its counsel has authored this brief in whole without contribution financially or otherwise from current parties to this suit or other actors. It has not received funding or other assistance intended to support the submission of this brief.

II. INTRODUCTION AND ISSUE PRESENTED

A. Impending Mootness.

In the context of this litigation, a “closure” is shorthand for a decision by the FSB to leave hunting for identified species on specified portions of federal lands in Alaska open to federally-qualified subsistence users (i.e. rural Alaskans) while closing that hunting to all others, including all urban Alaskans. Such closures are limited in duration. The GMU 13 closure is from July 16, 2020 through to June 30, 2022, the end of the 2021-2022 hunting season. 1-AOCER-2, Federal Subsistence Board News Release, July 31, 2020.²

As of the date this amicus brief is being filed, June 21, 2022, FSB’s GMU 13 closure is set to expire in nine days, on June 30, 2022. To the best of AOC’s knowledge, the FSB has not extended or modified the closure. If the closure does expire, then this lawsuit for judicial review of the GMU 13 closure becomes moot.³ *See Native Vill. of Nuiqsut v. Bureau of Land Mgmt.*, 9 F.4th 1201, 1208 (9th Cir. 2021) (Federal Courts’ jurisdiction requires a case with an active case or

² AOCER refers to AOC’s supplemental excerpts of record submitted with this amicus brief. This press release and the other records comprising AOC’s supplemental excerpt of record are documents contained within the administrative record submitted to the District Court as ECF 32-3 on October 23, 2020.

³ The other portion of the lawsuit, the State’s request for judicial review of the FSB’s decision to open a special short hunt involving the Organized Village of Kake, presents different mootness issues, addressed by the State in its brief. This amicus brief does not address that part of this lawsuit and appeal.

controversy; completion or expiration of a challenged action prior to a judicial decision on the merits renders the matter moot.)

By the time the appeal is fully briefed and argued, the Court will have sufficient information to know if FSB renews the closure or if instead the closure expires, rendering the portion of the appeal regarding GMU 13A and 13B moot. To the extent that the closure remains an active case and controversy before this Court, AOC asks that the Court consider its amicus brief below.

B. Merits Issue Presented.

If the GMU 13 closure issues remains justiciable, the key task for the Court is ensuring that FSB complies with the statutory standard that closures of hunting to non-federally-qualified subsistence hunters must be “necessary ... to assure ... the continuation of subsistence uses” 16 U.S.C. §3112(2). Because ANILCA directs that there be simultaneous non-subsistence and subsistence hunting on federal lands in Alaska (other than the National Parks and Monuments which are wholly reserved for federally-qualified subsistence hunters) the statute expects and tolerates competition for the available huntable animals. The issue then is: *what level of adverse impact on subsistence hunting due to competition from other hunters is needed before closure to all but federally-qualified subsistence hunters reaches the level of being “necessary” for the “continuation” of subsistence hunting.*

This Court’s resolution of this issue has the potential to significantly impact future decisions on hunting restrictions in the management of federal public lands because competition necessarily exists whenever hunting seasons are open to both categories of hunter, even when species populations and harvest opportunities are abundant for all hunters. This is not a case where continued viability of species is at issue, and thus that ground for a closure is not involved. *See* § 3112(2).

C. Factual Background and Procedural History.

1. The FSB’s GMU 13 Closure (July 2020 through June 2022).

On July 16, 2020 the Federal Subsistence Board met and voted in favor of a proposal to restrict hunting in GMU 13, ordering a two-year closure of GMUs 13A and 13B to caribou and moose hunting by non-federally qualified subsistence hunters. *See* 2-ER-79-102 (citations to the “ER” are to the Excerpts of Record filed by Appellant State of Alaska with its opening brief, “Alaska.Op.Br.,” Dkt. 11). Within Alaska, caribou and moose are regularly hunted by both urban and rural Alaskans for food, rather than as a purely recreational activity for sport. Under Alaskan law, eligibility for subsistence hunting cannot be limited to whether or not a citizen resides in a rural part of the state. *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989) (“We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of

the Alaska Constitution.). However, under ANILCA’s definition, which controls, federally-qualified subsistence hunters only include rural Alaskans. 16 U.S.C. § 3113. FSB’s closure thus barred roughly 17,000 Alaskan from hunting caribou and moose in the affected portions of GMU 13 – these were persons who were permitted to hunt caribou and moose previously on these federal lands, but cannot do so during the FSB’s closure. *See* 2-ER-92.⁴

In its decision, the FSB did not find caribou and moose populations levels to be so low or decreasing at such a rate that hunting needed to be limited for species preservation reasons. Lindsey Maas, the acting policy coordinator in the Office of Subsistence Management, analyzed the proposed closure for the FSB, stating “closures for conservation is not warranted as moose and caribou populations are within or above management objectives.” 2-ER-83.⁵ At the time, the management goals for some caribou herds that travel through GMU 13 was actually herd reduction, as the populations in 2019 well exceeded State management goals. 1-AOCER-5-6.⁶ Instead of conservation, FSB’s rationale for closure was a mix of two reasons: (1) the claim that competition from non-federally qualified subsistence hunters pursuing the same animals was limiting the success rates of

⁴ Transcript of the July 16, 2020 Federal Subsistence Board Work Session Meeting (“7/16/20 FSB Tr.”).

⁵ 7/16/20 FSB Tr.

⁶ 7/16/20 FSB Tr.

subsistence hunters, and (2) the large number of hunters present in these GMUs were creating public safety issues relating to persons hunting near each other, and thus discharging weapons near each other. 2-ER-83-84.

With regard to the closure-to-prevent competition rationale, the FSB did not find that any material reductions in the number of harvested animals or the success rate of subsistence hunters had occurred as a result of competitive pressure from the increasing numbers of non-federal subsistence hunters present on the landscape. Between 2001 and 2018, total caribou harvested from Unit 13 remained relatively stable, averaging around 2,744 taken per year with federally qualified subsistence hunters accounting for an average 17% of the total take. 1-AOCER-5.⁷ Federal subsistence hunters historically averaged a success rate of about 31% when hunting caribou between 2001 and 2009; the FSB based the closure in part on a small reduction in that rate, from 31% to 28%, from 2010 and 2018. 2-ER-82.⁸ Ms. Maas informed the FSB that, the declines in federal harvest numbers in recent years were likely because caribou were migrating through Unit 13 at times outside of the federal hunting season. *Id.*

Like caribou, moose populations remained within State management objectives since 2008 and the species' overall population in the unit has grown

⁷ 7/16/20 FSB Tr.

⁸ 7/16/20 FSB Tr.

since 2001. 2-ER-81. On average, 930 moose were harvested from GMU 13 annually between 2006 and 2018 with federal subsistence hunters reporting an 11% success rate and persons hunting with Alaska state permits reporting a 17% success rate. 2-ER-82-83. The FSB did not discuss decreasing federal-subsistence hunter success rates as justification for a closure based on competition, instead assessing the need for closures to address competition based on the 6% difference in success rates between federal subsistence hunters and hunters taking moose on federal lands through State permits. *Id.*

Importantly, these harvest success rates are not accurate representations of true success rates for federally-qualified subsistence hunters. As the State discussed in its brief, many federally-qualified subsistence hunters choose to regularly hunt and report their harvests under a state hunting permit, because that authorizes them to hunt on federal, state, and private land compared to the relatively small number of federal lands comprising only 12.4% of the lands in GMU 13. Alaska.Op.Br. at 44-45 (citing State's explanation of this data quality and interpretation issue in the State's comments to the FSB, with record citations to 2-ER-150, 161 and also 2-ER-83). The 11% harvest success rate represents success rates of federally-qualified hunters, hunting on federal lands with a federal permit, who reported the successful hunt under the federal reports. *See id.* In comparison, the 17% harvest success rate under state licenses includes both non-

subsistence hunters and federally-qualified subsistence hunters hunting under a state permit, who hunted throughout all of GMU 13, on both state and federal land.

Id. Federally-qualified subsistence hunters hunt in two capacities: (1) using their special federal permits on federal land, (2) using state permits on state and private land. Other hunters hunt on all land categories using their state permits, except when a FSB-ordered closure is in place, barring them from affected federal lands.

In other words, the figure for the success rate of federally-qualified subsistence hunters relied upon by the FSB is understated because it does not fairly reflect animals harvested by federally-qualified subsistence hunters when hunting under a state permit on state and private lands. Accordingly, the success rate data upon which the FSB acted cannot be relied upon as evidence that federally-qualified subsistence hunters have worse success than other hunters in GMU 13.⁹

As for the public safety rationale, the FSB did not find that non-subsistence hunters as a class were more likely to hunt in an unsafe manner than subsistence hunters. Nor did FSB take steps to implement hunting regulations prohibiting unsafe hunting practices in game management units, such as restricting or limiting when other hunters are nearby. The Office of Subsistence Management reported to

⁹ Of the two governmental entities involved, the State and the FSB, the State has the broader perspective and is more familiar with the success rate data. The State issues the state permits and has a substantial role regulating hunting on all land categories (federal, state, and private), while the FSB regulates just one aspect of hunting (the federal subsistence priority) for just one land category (federal).

the FSB that public safety concerns may be warranted because of reports of overcrowding, unsafe shooting practices, and other concerns, but also stated that such concerns may be better addressed through other federal agencies such as law enforcement. 2-ER-83-84.¹⁰ However, the federal agencies with enforcement authority that make up the FSB (Bureau of Land Management, National Park Service, U.S. Fish & Wildlife Service, and U.S. Forest Service) all have voting seats on the FSB and all have the regulatory power to adopt hunting safety restrictions on the particular federal lands they own and manage.

Neither the FSB nor the federal agencies making up the FSB adopted or imposed additional hunting safety restrictions or conflict reduction restrictions (e.g. restrictions on parking along roads in impacted areas), or committed to increase enforcement of existing restrictions. Instead of addressing the public safety issue in such a narrowly-tailored fashion, the FSB broadly excluded all non-federally-qualified subsistence hunters (both those who hunt safely and the few who hunt unsafely) while allowing hunting by all federal subsistence hunters.

2. Procedural History of this Litigation.

The State of Alaska filed suit, challenging FSB's closure as unlawful alleging, amongst other reasons, that the closure-imposed restrictions on an improper basis unauthorized by ANILCA, that FSB did not have substantial

¹⁰ 7/16/20 FSB Tr.

scientific evidence supporting the closure, and that its decision was arbitrary and capricious, especially in light of the FSB’s denial of an identical request for closure the year before. 2-ER-70-77 (State’s Complaint). The District Court affirmed FSB’s decision concluding competition is a permissible basis for closures prioritizing federal subsistence hunters. 1-ER-30-50.

D. Authorities.

All relevant statutory authorities appear in the Addendum to this brief.

III. STANDARD OF REVIEW

The State fully covers the standard of review in judicial review cases under the Administrative Procedure Act. State.Op.Br. at 22 (Dkt. 11). That standard is the same in this Court as it was in the District Court.

IV. ARGUMENT

1. Congress Provided for there to be Simultaneous Subsistence and Non-Subsistence Hunting on Most Federal Lands in Alaska.

Speaking to the full array of federal lands in Alaska, the opening section of ANILCA declares Congress’s “intent to ... preserve wilderness resource values and related recreational opportunities including ... sport hunting” 16 U.S.C. § 3101 (emphasis added). “Sport” hunting is the shorthand ANILCA uses to describe all hunting in Alaska, including hunting for food, except for hunting by rural Alaskans qualifying as federal subsistence hunters. *See id.*, and 16 U.S.C. § 3201. Consistent with this decision to preserve sport hunting, Congress reserved

exclusively for federally-qualified subsistence hunters just one category of federal land in Alaska, National Parks and Monuments. 16 U.S.C. § 3126(a). In enacting that one exception, Congress carefully clarified that another related land category, National Preserves, “shall” be open to “sport” hunting, even though administered by the National Park Service. 16 U.S.C. § 3201.¹¹ Thus, with the exception of hunting on National Parks and Monuments, Congress in enacting ANILCA recognized and accepted that all Alaskan hunters will share the natural resource (animals) on the various categories of federal public lands in Alaska, and so will inevitably compete in hunting the same animals, and have to accommodate each other’s presence in the field.

This Court has also recognized that although ANILCA emphasizes the importance of subsistence lifestyles, its other goals include the preservation of recreational opportunities for sport hunting which inherently results in competition. *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1192 (9th Cir. 2000) (citing the reference to sport hunting in § 3101 quoted above and observing: “Read as a whole, then, ANILCA provides for a number of important purposes all

¹¹ Other statutes generally provide for hunting by the public in the other federal land types in Alaska and the other States, subject to regulation. *See* 16 U.S.C. §§ 668dd(a)(3) and (4) and 668ee(2) (National Wildlife Refuges); 16 U.S.C. § 1732(b) (National Forests and Bureau of Land Management lands).

of which must be balanced by the Secretary of the Interior. Subsistence living, although at the heart of ANILCA, is not a per se preemptive statutory priority.”)

Congress provided for a limited override of the above-regime by authorizing the federal agencies, when they manage the subsistence provisions of ANILCA, to close these various categories of federal lands to non-subsistence hunting if “necessary” for subsistence hunting to “continue.” 16 U.S.C. §3112(2) states:

...when it is necessary to restrict taking [i.e. hunting] in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence use of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses.

16 U.S.C. § 3112(2) (emphasis added). Under this statutory structure, the default land management position is that subsistence and non-subsistence hunting occur concurrently on federal lands, because non-subsistence hunting is closed only when “necessary.” *Id.* Significantly, as the quoted passage in § 3112(2) further provides, FSB may also close hunting to non-subsistence hunters when “necessary” to ensure the “continued viability” of animal populations, but here the animal population involved are healthy, and FSB did not find otherwise. Thus, the question under § 3112(2) is whether closing the affected portions of GMU 13 to moose and caribou hunting to non-subsistence hunters was “necessary” to allow “the continuation of subsistence use” of a healthy abundant animal population.

In light of these statutory scheme, the mere existence of competition from non-subsistence hunters, which Congress anticipated and expected, must be insufficient to justify a closure of non-subsistence hunting under the limited subsistence preference ANICLA furnishes in §3114. Section 3114 does not further define the parameters for when subsistence hunting shall have priority, but a savings clause in ANICLA (§ 3125(3)) limits the authority of the federal land agencies (delegated to FSB) to exclude non-subsistence hunters:

Nothing in this subchapter shall be construed as authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law.

16 U.S.C. § 3125(3). Congress’s decision to allow the two types of hunting to co-exist, except when circumstances make it “necessary” to restrict non-subsistence hunting to allow the “continuation” of subsistence hunting, demonstrates that Congress anticipated and accepted some level of permissible detriment to federal subsistence hunters that naturally arises from the presence of other hunters competing to harvest the same animals. 16 U.S.C. §§ 3112(2), 3125(3).

Supreme Court precedent from another area of administrative law aids in construing the key statutory terms “necessary” and “continuation” at issue here, which are not defined in the statute at issue (ANILCA). In the

Telecommunications Act, Congress encouraged competition by mandating that the incumbent carriers allow competing carriers to lease access to even proprietary parts of the incumbent's network at regulated rates, if providing such access was “necessary” and denying such access “would impair the ability of [the competing carrier] seeking access to provide the service that it seeks to offer.” 47 U.S.C. § 251(d)(2) (emphasis added). That statute did not define “necessary” or “impair.” Despite the different subject matter, the necessary to avoid impairment test for invoking the forced network access resembles the necessary for continuation of subsistence uses test in ANILCA for excluding non-subsistence hunters.

The Supreme Court overturned the implementing agency's expansive regulatory interpretation under which just about any detriment to the competitor from denying access would rise to the level of impairment that made access to the incumbent's network necessary. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999). The Court overturned the implementing agency's interpretation that access was mandatory merely because denying access would “decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer” *Id.* The Court explained that:

“The Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element “necessary,” and causes the failure to provide that element to “impair” the entrant's ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms.”

Id. at 390 (emphasis in original). The analogy here is to the FSB’s decision to invoke the ANILCA subsistence priority under the “necessary” and “continuation” standard in reliance on a small reduction in success rates for federally-qualified subsistence hunters, plus the fact that removing competing non-subsistence hunters from the field would benefit subsistence hunters, through reducing competition. As the Supreme Court’s decision construing similar statutory text indicates, the terms “necessary” and “continuation” require more.¹²

2. The FSB mis-applied the statutory “necessity” standard.

In Lindsey Maas’ presentation of the Office of Subsistence Management’s analysis of the proposed closure to the FSB, Ms. Maas never indicated that their analysis concluded closures were “necessary” for continued subsistence use and public safety. Instead, she reported that closures may result in increased hunting opportunities and harvest success and may address some safety concerns. 2-ER-83-84.¹³ Nevertheless, the District Court upheld FSB’s decision, finding it was reasonable for FSB to conclude closures were “necessary” for continued subsistence uses because of competition between hunters. ER-1-37-41. This ruling creates a minimal threshold for justifying closures as “necessary” that is

¹² If anything, the ANILCA test is somewhat more demanding than the Telecommunications Act test, because an activity can be moderately “impaired,” while there is still “continuation” of the activity. Conversely, if the activity is impacted to the point that it cannot continue, then it certainly is impaired.

¹³ 7/16/20 FSB Tr.

incompatible with the purposes and policies of ANILCA. The facts did not demonstrate that closure of non-subsistence hunting was necessary for the continuance of subsistence hunting in GMU 13A and 13B.

Population levels for moose and caribou remain high, exceeding State management goals, and total harvest numbers remained stable in GMU 13. 2-ER-83.¹⁴ The decrease in harvest success rates for federal subsistence hunters considered by FSB was minimal, a change from 31% to 28% in caribou hunting.¹⁵ 2-ER-82. The difference in harvest success rates in taking moose is marginal, 17% compared to 11%. *Id.* The State’s opening brief correctly identifies that whether federally-qualified subsistence hunters are more or less successful than other hunters is irrelevant; closures to non-subsistence hunters are only authorized when “necessary” for the continued practice of subsistence hunting. Alaska.Op.Br. at 43. No ANILCA provision exists requiring equal success between federal subsistence hunters and other hunters. Nor are there hard thresholds requiring

¹⁴ 7/16/20 FSB Tr.

¹⁵ While a larger gap exists in harvest success rates for caribou hunts (58% compared to 38%), clearly a substantial number of federally-qualified subsistence hunters are succeeding in their hunts (over a third achieve success, not counting success they might achieve on state lands and report under their state permit rather than their federal permit). Clearly federal subsistence use is continuing. Caribou hunts have been regularly extended by the State the past few years in order to meet its management goals in reducing population numbers. Ms. Maas reported to FSB that federal harvest rates are lower in recent years likely because caribou migrated through federal lands when the season was closed. *See* 1-AOCER-5, 7/16/20 FSB Tr.

minimum levels of success rates for subsistence hunters. If any detriment to subsistence hunting from the presence of non-subsistence hunters was unacceptable, then Congress would simply have banned non-subsistence hunting on all federal public lands in Alaska, as it did for National Parks and Monuments, 16 U.S.C. § 3126(a).

A modest dip in subsistence hunter success rates, a 3% drop-off from a 31% success rate from 2001 through 2009 to a 28% success rate from 2010 through 2018, is a dubious basis for a closure. Similarly, small differences in inconclusive success rates for hunts conducted on federal permits compared to state permits do not justify a closure as necessary. The fact that the FSB denied an identical request for the closure of all of federal lands in GMU 13 to non-subsistence users for moose and caribou just a year prior, in 2019, supports that these data trends are insufficient to establish conditions where closure is necessary for the continuance of subsistence uses. 2-ER-80.¹⁶ Heavy competition causing substantial drop-offs in subsistence hunter harvest rates may present a different case than ordinary competition which has some impact on harvest rates, but that is not the case here. This is not the discontinuation of the subsistence use, but rather a slight impact that appears entirely normal and permissible under ANILCA.

¹⁶ 7/16/20 FSB Tr.

Additionally, as mentioned above and as the State discusses in its opening brief, the value in comparing these harvest rates is limited because harvest success rates for federally permitted hunts does not accurately reflect hunting results from federally-qualified hunters. Many federally-qualified subsistence hunters choose to use Alaska State hunting permits instead of Federal permits because it allows for hunting on a greater number of lands than the federal lands which comprise only 12.4% of GMU 13. Alaska.Op.Br. at 42-43. These subsistence hunters' successful hunting trips under State permits are included in the start harvest success rates, adding to the appearance of a greater disparity between subsistence and non-subsistence hunting success when in reality the State success rate includes many subsistence hunters.

There may be cases in which the level of competition from non-subsistence hunters reaches the point that subsistence hunter success rates substantially fall, but animal populations remain healthy and viable. That would be a scenario in which continued non-subsistence hunting would threaten "the continuation of subsistence use of such population," thus justifying closure of non-subsistence hunting under the text of 16 U.S.C. §3112. But this case is not such a case.

How this Court ultimately articulates the legal standard that justifies closures due to competition between subsistence and non-subsistence hunters is vital. If this Court agrees that non-subsistence hunting is not threatening the continued

subsistence hunting of these species such that it is “necessary” to close the federal lands to non-subsistence hunting, it should reverse the District Court. The Court should be particularly wary of affirming any closure that FSB orders due to the presence of competition.

3. The FSB arbitrarily switched its position without sufficient explanation.

In 2019 FSB rejected a temporary wildlife special action requesting that federal public lands in GMU 13 be closed to non-federally qualified subsistence hunters. 2-ER-80.¹⁷ An identical request was submitted to the FSB in 2020. 2-ER-79. While the FSB ultimately granted a slightly modified version of the request, limiting the closure to subunits A and B, the rationales for the closure and data provided as support was equivalent to that provided in the denied 2019 request for closure. The State of Alaska thoroughly addresses the FSB’s arbitrary and unsupported change in position, which violated the standard for agency actions set forth by the Supreme Court in *FCC v. Fox Television Stations, Inc.* 566 U.S. 502. Alaska.Op.Br. at 48-52.

4. FSB Arbitrarily Responded to a Public Safety Concern by Broadly Excluding All Non-Subsistence Hunters. FSB or the Federal Land Management Agencies Which Makeup FSB Could and Should Have Adopted Public Safety Restrictions to Resolve that Concern.

¹⁷ 7/16/20 FSB Tr.

AOC does not dispute that the public safety concerns FSB considered as a basis for the closure are legitimate and that all hunters benefit from maintaining public safety when hunting. In attempting to address the matter and issuing a closure however, even on the basis of public safety, FSB still must act in a factually supported and non-arbitrary manner. 5 U.S.C. § 706(2). There is a pertinent statutory construction issue not pursued by the State in proceedings below the District Court, but the APA requirement for supported and non-arbitrary decision-making remain very much at issue here.¹⁸

First, as was the case with its consideration as to whether a closure was “necessary” for the continuance of subsistence hunting, the FSB arbitrarily

¹⁸ At an earlier stage, in briefing its preliminary injunction motion in the District Court, the State addressed a statutory issue regarding public safety, specifically whether FSB and its constituent federal land management agencies have statutory authority to respond to a public safety concern through closing only non-subsistence hunting, as opposed to by adopting public safety restrictions applicable to all hunters. *Compare* 16 U.S.C. § 3112(2) (substantive section providing for subsistence priority to be invoked where necessary to continue subsistence hunting or to ensure viability of animal populations) *with* § 3125(3) (savings clause that by cross-reference to § 3126 confirms a public safety closure imposed on federal subsistence users under § 3126(b) may be extended to non-subsistence users). However, the State then elected not to pursue this issue by not presenting it in its summary judgment merits brief below. District Court ECF 49; *see also*, Alaska.Op.Br. at 46, n. 14 (issue “not raised or conceded by the State below”). The Court should leave this important statutory construction issue for a future case when it is more squarely presented and not withdrawn, such as a situation in which public safety is the sole reason for a FSB action closing non-subsistence hunting.

changed its position on if a closure was necessary for reasons of public safety. In 2019, FSB rejected the closure of GMU 13 to non-subsistence hunters:

The Board determined the requested closure was not warranted for conservation, continuation of subsistence uses or safety reasons...the closure would not have alleviated public safety concerns as non-Federally-qualified users would still have been able to cross Federal public lands to access State and private lands.

2-ER-80.¹⁹ As the State identifies in its brief, no new information was presented to the FSB regarding public safety concerns in 2020, beyond the information presented in 2019. Alaska.Op.Br. at 46-47. The FSB acknowledges that these safety concerns have been “an issue for decades” and sought to act now, not because of a change in circumstances, but because other agencies such as law enforcement that could better address these concerns have not successfully acted to alleviate the concerns. 2-ER-84.

Second, as fully described by the State, the FSB’s public safety rationale (even apart from the change of position from 2019 to 2020) was lacking in multiple other respects. *See* Alaska.Op.Br. at 46-47.

V. CONCLUSION

Closures of public lands to non-subsistence hunters are only permissible when “necessary” to preserve healthy populations of species, continue the practice of subsistence hunting, or when otherwise authorized by law. As Alaska shows in

¹⁹ 7/16/20 FSB Tr.

its opening brief, the facts and data relevant to FSB's decision, when interpreted correctly, do not justify a closure of GMU 13A and 13B to non-federally qualified subsistence hunters. Similarly, the closure is neither necessary for public safety nor targeted to alleviate the public safety concerns that exist in GMU 13.

The District Court's affirmation of FSB's decision creates a minimal threshold for justifying closures as necessary for the continued practice of subsistence hunting or reasons of public safety that conflicts with the statutory language and purposes of ANILCA. If left unaddressed, that order can potentially be read as saying that almost any level of competition between subsistence and non-subsistence hunters is sufficient for FSB to justify closing non-subsistence hunting. That result would be contrary to ANILCA, in which Congress declares its "intent" to preserve "sport" hunting on federal lands in Alaska, 16 U.S.C. § 3101.

In addition to failing to satisfy the elements set forth in ANILCA to implement such a closure, FSB also acted arbitrarily in reversing its position from denying a practically identical request for closure in 2019. Such a change in position was not supported by new evidence or data, and appeared motivated more out of a desire to take experimental action to alleviate safety concerns in light of other agencies failing to address these problems. While perhaps well intentioned, that rationale did not justify a change in position and was arbitrary and capricious.

For the reasons set forth in both this amicus brief and the State of Alaska's appeal, unless the FSB's GMU 13A and 13B closure expires rendering that part of the case moot, AOC respectfully requests this Court reverse the District Court and vacate its order affirming FSB's closure of hunting in GMUs 13A and 13B. If the closure expires and the issue does become moot, the State and all other parties should be heard on the proper steps to take.

June 21, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATUTORY ADDENDUM
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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. § 3112. Congressional statement of policy

It is hereby declared to be the policy of Congress that--

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

16 U.S.C.A. § 3114. Preference for subsistence uses

Except as otherwise provided in this Act and other Federal laws, 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. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

- (1) customary and direct dependence upon the populations as the mainstay of livelihood;
- (2) local residency; and
- (3) the availability of alternative resources.

16 U.S.C.A. § 3125. Limitations and savings clauses

Nothing in this subchapter shall be construed as--

- (1) 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 within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;
- (2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;
- (3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), section 100101(b)(1), chapter 1003, and sections 100751(a), 100752, 100753, and 102101 of Title 54, the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled “An Act for the Protection of the Bald Eagle”, approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Magnuson-Stevens Fishery Conservation and Management Act (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777k), or any amendments to any one or more of such Acts or such title.

16 U.S.C.A. § 3126. Closure to subsistence uses

(a) National parks and park monuments in Alaska; authorization of subsistence uses and sport fishing

All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this subchapter and other applicable laws of the United States and the State of Alaska.

(b) Closure for public safety, administration, or the continued viability of fish and wildlife population

Except as specifically provided otherwise by this section, nothing in this subchapter is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. 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 of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population 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 notice and public hearing, that such closure should be extended.

16 U.S.C.A. § 3201. Administration of national preserves

A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in this Act and except that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed in a national preserve under applicable State and Federal law and regulation. Consistent with the provisions of section 3126 of this title, within national preserves the Secretary may designate zones where and periods when no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment. Except in emergencies, any regulations prescribing such restrictions relating to hunting, fishing, or trapping shall be put into effect only after consultation with the appropriate State agency having responsibility over hunting, fishing, and trapping activities.