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MEMORANDUM

DATE: February 27, 2023

TO: Senator Lisa Murkowski
Senator Dan Sullivan
Representative Mary Peltola

FROM: James H. Lister
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SUBJECT: How the Kenai Refuge and Alaska National Preserves Litigation Connects to the National Park Service Proposed Regulations on Hunting and Predator Control on NPS Preserves

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This memo describes the relationship between three proceedings: (1) the FWS Kenai Refuge litigation, (2) the NPS Alaska National Preserves litigation, and (3) the NPS rulemaking in which NPS proposes to repeal a 2020 rule that had restored State management on Alaska National Preserves. The comment deadline in the NPS rulemaking is March 10, 2023 and the State, SCI, and our client APHA have all requested comment period extensions.

In the FWS Kenai litigation, the Ninth Circuit surprisingly held that the State of Alaska did not obtain management responsibility over all of Alaska's wildlife at the time of Statehood.[1] Rather, based on the Ninth Circuit's reading (or misreading) of Section 6(e) of the Alaska Statehood Act, the Court held that the State only obtained fish and wildlife management authority on those lands that were not set aside as refuges for the preservation of wildlife.[2] The United States retained title (land ownership) for refuges at the time of Statehood, but the Ninth Circuit inferred that the United States also retained plenary wildlife management authority, not just title.

Most but not all of what is now the Kenai National Wildlife Refuge was set aside as the Kenai Moose Range in the 1940s. Having found that the State did not obtain management authority over fish and wildlife on refuges at the time of Statehood, the Ninth Circuit decided that the Federal Government has "plenary" authority to manage fish and wildlife on these refuges. Thus, the Ninth

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[1] *Safari Club International v. Haaland*, 31 F.4th at 1157, 1165, 1168-69 (9th Cir. 2022) (also referred to as "FWS Kenai" case), *cert. pending*, U.S. Supreme Court Case No. 22-401.

[2] The Alaska Statehood Act is Public Law No. 85-508.

Circuit upheld a 2016 rule in which U.S. FWS in the Obama Administration preempted State rules allowing hunting of brown bear through use of bait on the 1.8 million-acre Kenai National Wildlife Refuge.[3] That rule also preempted other State hunting laws regarding the Kenai Refuge.

Various Acts of Congress grant federal land managers certain specific powers over wildlife on refuges and other federal lands, e.g. the powers to prevent hunting that might put a species in danger of extinction, would cause a legitimate public safety issue, or would be "incompatible" with achieving a refuge's statutory purposes. However, the State has always believed that the State was the default regulator and exercised general hunting management authority, unless the criteria in one of the specific statutes for federal preemption was met, e.g. documented public safety risk. Thus, the State's position has been that it exercised general management authority over hunting on federal lands in Alaska, and that federal land managers held limited constrained powers to step in and preempt in certain circumstances defined by statutes.

The Ninth Circuit, in the FWS Kenai case, upset this apple cart by essentially holding that the "plenary" default authority resides in the federal land manager, not the State.[4] The result appears to be that the federal land manager can essentially preempt State hunting rules whenever he or she wishes, as opposed to only in limited circumstances in which a specific federal statute specifically authorizes preemption. The State and SCI were the plaintiffs who challenged the FWS Kenai rule, leading to the Ninth Circuit's decision. The State has petitioned the U.S. Supreme Court for certiorari to hear the case. SCI filed a brief in support of the State's petition. APHA and its partners Sportsmen's Alliance Foundation and Alaska Outdoor Council also filed an amicus brief in support of the State. U.S. FWS and anti-hunting groups filed briefs in January opposing the State's petition for certiorari, and the State filed a reply. The Supreme Court will now decide whether to accept the case for review.

It should also be noted that the Ninth Circuit in the FWS Kenai case read narrowly a 2017 Act of Congress that had abrogated, under the Congressional Review Act (CRA), another FWS rule that was very similar to the FWS Kenai Rule but applied to all National Wildlife Refuges in Alaska.[5] The Ninth Circuit held that the CRA resolution did not in any way invalidate the FWS Kenai rule in spite of the Kenai NWR being a subset of the NWR system in Alaska and the two rules both banning the baiting of brown bears.

APHA is a direct participant (defendant intervenor) in another ongoing litigation involving federal authority over hunting on Alaskan National Park Preserves. Anti-hunting groups (plaintiffs) sued to repeal a rule adopted by NPS in June 2020 that restored preempted State hunting seasons and methods and means on Alaska National Preserves.[6] The current NPS declined to defend the rule. In September of 2022, the U.S. District Court for the District of Alaska ruled the recently discovered plenary wildlife management authority on NWRs in Alaska also extends to Alaska

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3 81 Fed.Reg. 27030 (May 5, 2016) ("FWS Kenai Rule").

4 *Safari Club International,* 31 F.4th at 1165, 1168-69.

5 The CRA resolution that repealed the similar FWS rule is Pub. L. No. 115-20.

6 The citations are: January 2023 Proposed Rule, 88 Fed.Reg. 1176 (Jan. 9, 2023); 2020 Rule, 85 Fed.Reg. 25181 (June 9, 2020).

National Preserves.[7] Extension of the FWS Kenai "plenary" precedent to Alaska National Preserves expands plenary federal jurisdiction over wildlife management within Alaska by approximately 21 million acres. Alaskan NWR and National Preserves, combined, total 98 million acres of land within Alaska. On a more favorable note, the District Court still determined that the 2020 rule restoring State management did not substantially harm the environment, resulting in the rule remaining in effect in the short term but being remanded for further consideration by NPS ("remand without vacatur"). All parties (plaintiffs, defendants, defendant-intervenors) appealed the decision in the Ninth Circuit where the appeals are now on long term hold pending the outcome of the 2023 NPS rulemaking which seeks to repeal the 2020 NPS rule and reinstate federal management. The FWS Kenai precedent has substantially impacted the Alaska National Preserves case.

This memo has discussed the Kenai Refuge litigation, the "plenary" jurisdiction precedent announced in it, and the expansion of this precedent from Alaska NWR to lands managed as Alaska National Preserves. Neither of these actions are final at this time: Kenai is under appeal to SCOTUS and the Alaska Preserves decision is under appeal to the Ninth Circuit.

The third side of this triangle of conflict over wildlife management in Alaska is the January 2023 Alaska NPS Preserve proposed rule. The proposed 2023 rule would repeal the 2020 AK NPS rule and result in an outcome similar to that which would occur if the plaintiffs prevail in the litigation over the NPS 2020 rule (at this point the 2020 rule has, for the moment, survived the plaintiffs' lawsuit, because it was remanded to NPS without vacatur, rather than with vacatur).

In the AK National Preserves rulemaking docket, a new document, "Cost Benefit and Regulatory Flexibility Analysis" (Cost Benefit Analysis), goes deeper into NPS's motivations for issuing its January 2023 proposed rule to repeal the 2020 AK NPS rule (both documents are attached to this memorandum). This document provides part of the rationale as to why the new rule has been proposed. This Cost Benefit Analysis is not easily located and might be more logically part of the original proposed rule. Many people would not easily locate it if just looking at the AK Preserves proposed rule.

Although in the January 2023 proposed rule, NPS mentions neither the Ninth Circuit's decision in the FWS Kenai case nor the term "plenary", NPS does mention both in the Cost Benefit Analysis for the proposed rule. In the Cost Benefit Analysis, NPS explains that the Ninth Circuit's decision shows that federal agencies have "plenary" authority over hunting on federal land reservations and that the decision rejects the concept that the State acquired management authority over such lands at Statehood. NPS says that the Kenai decision is one of three primary supports for NPS now proposing to repeal the 2020 rule. One can search Cost Benefit Analysis for the word "plenary" and for the party names to the FWS Kenai case to find the various pages of discussion in the document.

In the Cost Benefit Analysis, the DOI/NPS played up the precedential impact of the case. Nearly simultaneously, in opposing certiorari for the FWS Kenai case decision, DOI/USFWS played down the precedential impact. The Cost Benefit Analysis did not get posted to www.regulations.gov until 1/9/23 at the earliest, and maybe after that date.

[7] *Alaska Wildlands Alliance v. Haaland*, 2022 WL 17422412, *14 (D. Alaska Sept. 30, 2022), *appeals pending*, Ninth Circuit Case No. 22-36001, et al.

The potential impacts of the FWS Kenai precedent if certiorari is denied by the U.S. Supreme Court, making the Ninth Circuit decision in that case final, will mostly certainly come at the expense of state interests. Should the Ninth Circuit FWS Kenai precedent stand and the 2023 NPS proposed rule be implemented, the precedential impacts on all Conservation Units in Alaska (National Forests and BLM Lands) are likely significant. Recognizing and understanding the complex relationship of the litigation and the proposed regulations is critical. At the least, it provides a strong rationale for an extension of the public comment period on the new NPS proposed regulations. Even if SCOTUS decides to grant or deny certiorari in the FWS Kenai case at the earliest possible time (the Justices are scheduled to consider the State's certiorari petition at conference on March 3, 2023), the public will not have sufficient time to draft comments with the benefit of the SCOTUS decision before the current March 10 comment deadline set by NPS.

(*Litigation status report providing public non-confidential information)*