SJR

26

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 2/6/04

FURTHER:

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 2-23-04

Resources Committee considered SENATE JOINT RESOLUTION NO. 26

SJR 26 SALMON ENHANCEMENT IN WILDERNESS AREAS

Requesting the United States Department of the Interior and the United States Department of Justice to appeal the decision of the United States Court of Appeals for the Ninth Circuit in The Wilderness Society v. United States Fish and Wildlife Service and to seek an emergency stay of the decision pending an appeal of the decision to the United States Supreme Court.

and recommends:

[X] be **replaced** with _____ **CS** SJR 26 (RES)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[ ] Same Title
[X] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
F+G	2/13/04			✓	

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
Lorna Siekaniec	✓			
Ben Stevens	✓			
Ken Wagoner	✓			
Fred Dyson	✓			
CHAIR: Lesil Ore	✓			

Sen. Ogan

Alaska State Legislature

Senate Majority Web: http://www.akrepublicans.org

Sponsor: Senator Tom Wagoner
Current Version: CSSJR 26(RES)
Contact: Amy Seitz 465-3421

Fact Sheet for: Senate Joint Resolution 26

Short Title: Salmon Enhancement in Wilderness Areas

Summary:

- Requests the U.S. Department of Interior and the US Department of Justice to appeal the Ninth Circuit Court's decision in The Wilderness Society v. US Fish and Wildlife Service.
- Requests these Departments to seek a temporary emergency stay of the decision to allow the Tustumena Lake salmon enhancement project to continue for this year.

Benefits:

- Impacts future decisions on what activities are permitted inside a designated wilderness area.
- Without the Tustumena project, Cook Inlet/Kasilof River area will lose about 60,000 to 120,000 adult sockeye salmon every year.
- Six million salmon fry will be terminated this year without an emergency stay of the decision

Background:

For about 30 years the Alaska Department of Fish & Game, in cooperation with the Cook Inlet Aquaculture Association, have stocked Tustumena Lake with about 6 million sockeye salmon every year.

The Wilderness Society filed suit that this does not comply with the 1964 Wilderness Act because it is a "commercial enterprise" and does not preserve the "natural conditions" of the Kenai Wilderness.

After a District Court ruling, and a three-judge panel of the Ninth Circuit Court both ruling in favor of continuing the project, an eleven-judge panel of the Ninth Circuit Court ruled in favor of the Wilderness Society.

ADF&G Proposed Amendments to SJR 26

Page 1, Line 13:

Insert: "Whereas a three-judge panel of the Ninth Circuit found the stocking of salmon fry in Tustumena Lake to be consistent with The Wilderness Act and the Alaska National Interest Lands Conservation Act (ANILCA); and"

Page 1, Line 14:

After "Whereas," insert "an en banc panel of"

Page 2, Line 20:

Strike the existing "Whereas" clause in its entirety.
Insert "Whereas the United States Court of Appeals for the Ninth Circuit noted that the stocking of salmon fry in the wilderness area may not be inconsistent with wilderness and refuge values; and"

Page 2, Line 31:

After "(Case No. 01-35266) to" Insert "either the entire U.S. Court of Appeals for the Ninth Circuit or"

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SJR 26
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Fish and Game

Title: Requesting the United States Department of the Interior
RDU
Component

Sponsor: Senator Wagoner
Requester: Senate Resources
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Passage of this legislation would have no fiscal impact.

Prepared by: Sarah Gilbertson, Legislative Liaison — Phone 465-6137
Division: Alaska Department of Fish & Game — Date/Time 2/13/04 5:20 PM

Approved by: Commissioner Kevin Duffy — Date 2/13/2004
Agency: Alaska Department of Fish & Game

(Revised 12/2003 OMB)

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER

- Co-Chair, Senate Resources Committee
- Co-Chair, Senate Transportation Committee
- Vice-Chair, Senate Community and Regional Affairs Committee
- Member, Legislative Council

Official Business

Session: January – May
State Capitol, #427
Juneau, AK 99801
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SJR 26

SALMON ENHANCEMENT IN WILDERNESS AREAS

For about 30 years the Department of Fish and Game, in cooperation with Cook Inlet Aquaculture Association have stocked Tustumena Lake with Sockeye salmon. 6 million salmon fry are dumped into the lake every year in early spring where they stay for a year and follow the regular cycle of a salmon; swim out to the Cook Inlet, mature, then return to Tustumena Lake.

On December 30, 2003 the Ninth Circuit Court of Appeals decided that the salmon stocking enhancement project in Tustumena Lake is an improper commercial activity-taking place inside a wilderness area, which violates the Wilderness Act. Tustumena Lake falls within the Wilderness area set out in the 1980 Alaska National Interest Lands Conservation Act as part of the Wilderness System initially created in 1964, but the Hatchery and areas where the various fisheries take place are outside of the area.

This enhancement program was designed to smooth out those times when the numbers of fish returning to this region are low. It was not designed to add income to commercial fisheries, although they do benefit from the program, as do others.

SJR 26 requests that the federal defendants in this case seek an immediate_temporary stay of the Ninth Circuit Court decision to allow for this established enhancement program to continue until the appeal process is completed. SJR 26 also requests that the Department of the Interior and the United States Department of Justice support appealing this far-reaching decision made by the court. If the decision is not stayed and reversed, 6 million salmon fry will have to be disposed of, and in future years there will not be the cushion those salmon provide. It will also set a strict guideline for what constitutes a commercial activity, which will affect more than just the Kenai Peninsula, commercial fishing and the State of Alaska.

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February 12, 2004

MEMORANDUM

To: Senator Scott Ogan, Chairman
Senate Resources Committee

From: Senator Tom Wagoner

Subject: SJR 26 hearing

I would like to request a hearing for SJR 26 in the Senate Resources committee at your earliest convenience.

I will be providing a packet of information prior to the meeting, and if you have any questions please contact my staff, Amy at 3421.

Thank you.

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** D.C. AND ALASKA BAR
† MARYLAND BAR
‡ VIRGINIA BAR
ALL OTHERS ALASKA BAR

MEMORANDUM

TO: Ted Popely
Ron Somerville

FROM: Bill Horn BH

VIA TELEFAX

DATE: January 8, 2004

RE: Extremely Dangerous Wilderness Act Court Decision

United States Court of Appeals for the Ninth Circuit (surprise!) has just released a ruling that "Congress spoke clearly to preclude commercial enterprise in designated wilderness regardless of the form of commercial activity." The Wilderness Society v. U.S. Fish and Wildlife Service (9th Cir. December 30, 2003). The en banc opinion takes an extremely broad view of the phrase "there shall be no commercial enterprise . . . within any wilderness area" within the 1964 Wilderness Act. 16 U.S.C. s1133(c). The court sums up its holding as follows: "In light of the clear statutory mandate, the Wilderness Act requires that lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce." As a result, all guides and outfitters operating within Wilderness area are likely to be subject to new attacks.

A salmon enhancement program in Alaska was the issue in the case. For over 25 years, the Alaska Department of Fish and Game and the non-profit Cook Inlet Aquaculture Association have stocked sockeye salmon fry in Tustumena Lake on Alaska's Kenai Peninsula. The Lake has been within the Kenai National Wildlife Refuge since the 1940's and was included in a Wilderness area in 1980. The U.S. Fish and Wildlife Service (FWS) had continuously authorized the program. By stocking additional fry in the Lake, sockeye salmon runs were enhanced and more fish were available downstream (and in Cook Inlet) to commercial, recreational, and subsistence fishermen.

Since commercial fishermen were a primary beneficiary of the salmon enhancement program, the Ninth Circuit concluded that the program was a prohibited commercial enterprise. Although the Wilderness Act does not define the term "commercial enterprise",

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the court relied on an dictionary definition of the term and held that a commercial enterprise is any "project or undertaking of or relating to commerce." Since there was a relationship between the salmon stocking and benefits to commercial fishermen, the project was deemed a prohibited commercial undertaking. It did not matter that the fry stocking was considered environmentally "benign" and benefitted other fishing interests.

The opinion did not address the 1964 Act's "recreation" exception: "(6) Commercial services may be performed within wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational and other wilderness purposes of the areas." 16 U.S.C. s 1133(d)(6). Unfortunately, the opinion starts from the premise that "Congress has absolutely proscribed commercial enterprise in wilderness" and exceptions to the rule need to be carefully scrutinized. I am persuaded that there will be new efforts to read narrowly "the extent necessary" part of the exception and that Wilderness proponents will try to use this ruling to limit the scope of the recreation exception as it relates to commercial outfitters and guides.

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

FRANK H. MURKOWSKI, GOVERNOR

State-Federal Issues;
ANILCA Program
333 Raspberry Road
Anchorage, AK 99518-1599
PHONE: (907) 267-2248
FAX: (907) 267-2472

TO: David Bedford and Wayne Regelin
Deputy Commissioners
AND: John Katz
Washington, D.C.

FROM: Tina Cunning
Program Manager

DATE: January 12, 2004

SUBJECT: Ninth Circuit Court of Appeals, No. 01-35266; CV-98-00409-JKS
Tustumena Lake sockeye salmon enhancement project Decision

Staff identified questions and problems due to the En Banc decision in this case filed December 30, 2003. Any major concerns that support an appeal to the Supreme Court should be directed to the Department of Justice and copied to the Secretary of the Interior's offices within approximately two weeks—sooner is better. This is a significant decision with major ramifications for activities protected by ANILCA in wilderness areas of Alaska parks and refuges, as well as for activities in wilderness nation-wide.

The District Court decision and the original Ninth Circuit Court of Appeals decision (January 13, 2003) provided excellent guidance on a number of issues (e.g., determining compatibility with the purpose of the refuge). The recent Ninth Circuit Court decision narrowly focuses on whether (1) the enhancement project is a "*commercial enterprise*" and (2) occurring "*within*" designated wilderness, thus prohibited by the Wilderness Act:

> *We conclude that as a general rule both the purpose and the effect of challenged activities must be carefully assessed in deciding whether a project is a "commercial enterprise" within the wilderness that is prohibited by the Wilderness Act.* (13264[8])

Purpose and Effect: This is a frightening extension of the Wilderness Act prohibition. This interpretation could involve weirs, egg takes, stocking to rehabilitate, counting towers, fish camps, wildlife check stations, and other projects which have a "*purpose*" that is not research but are "*practical operations*" (13267) related to "*the catch of fish* [and wildlife] *and the commerce*

thereon." While these projects do not themselves "*catch*", they are operations necessary to indicate run strength or harvest rates thus lead to regulation of "*catch*" activities such as commercial fishing, trapping, and guided wildlife activities occurring outside of the designated area.

The Court states: "*the State regulates an array of commercial enterprises, from cruise ship operation to oil exploration . . .. That an industry or activity is regulated does not mean that it is no longer a commercial activity.*" Thus, any project conducted within the wilderness area that is necessary for the conduct of an activity outside the wilderness area that may benefit economically falls into the Court's interpretation of a prohibited "*commercial enterprise*". This could affect hunting and fishing guides who operate lodges outside the designated wilderness. This could affect subsistence harvests for fish and wildlife that are traded or sold outside the wilderness area.

Inflexible and Narrow Reading of Wilderness Act: The Wilderness Act, Section 1133(d) Special Provisions (5) Commercial services states: "*Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.*" Wilderness purposes include conservation, thus we've assumed our management activities are protected. The Court does not judge whether the activity impacts the resources. It argues that the Wilderness Act "*requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce*". The enhancement project is not commercial nor is it commerce itself. Furthermore, the Wilderness Act specifically says: "*Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, education, conservation, and historical use.*"

Ignores many ANILCA Provisions: The above assumption is reinforced in legislative history to ANILCA:

> *Of particular interest to the Committee is the future of fish enhancement and aquaculture activities in the State. The committee adopted language making it very clear that various fisheries enhancement activities could be permitted by the appropriate Secretary within wilderness or wilderness study areas, subject only to reasonable regulation.* (SR 96-413, pp 308-309)

ANILCA Section 707 states that Wilderness areas are to be managed consistent with the Wilderness Act "*except as otherwise expressly provided for in this Act . . ..*" ANILCA Title III and XIII provide for enhancement and rehabilitation in refuges and thus amend the Wilderness Act. One such provision, Section 1315(b), specifically permits fishery enhancement in Wilderness but is discarded by the Court in footnote (13272) as "*not helpful or persuasive in interpreting the Wilderness Act.*"

Miscellaneous: There are a number of disturbing steps taken by the Court in reaching its decision besides the blatant disregard for ANILCA:

- The opinion letter prepared by the Regional Solicitor and other solicitor documents are given less deference than internal writings of the Refuge Manager

- The Wilderness Act requirements are selectively quoted, omitting provisions for pre-existing uses and activities "substantially unnoticeable"
- The state permits activities that support state management (conservation, rehabilitation, and enhancement) of resources—an activity which ANILCA 1314 specifically indicated would not be changed by the unit designations. These activities, such as permitting non-profit aquaculture operations to essentially operate as our agent, provides an effective tool to increase fish and wildlife for recreation, personal use, subsistence, as well as commercial.
- The fact that the commercial fishery harvests the largest proportion of returning salmon is true in most anadromous fisheries, but the enhancement benefits all users and wildlife as described in the original Ninth Circuit Court decision, thus should not diminish the ability to conduct enhancement in Wilderness.
- If we determined the Tustumena Project primarily now enhances recreational fisheries, under this Court interpretation it would be allowed—or would it? It provides tremendous economic benefits to the Kenai Peninsula businesses **outside** of the wilderness area.

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MEMORANDUM

TO: Ted Popely
Ron Somerville

FROM: Bill Horn

VIA TELEFAX

DATE: January 15, 2004

RE: Strategy Options for Tustumena Lake and Wilderness Act

As you are aware, the Ninth Circuit's ruling on the Tustumena Lake case will have serious and far reaching repercussions adversely impacting a wide array of public land users in Alaska and the Lower 48. The following outlines some the litigation and legislative options available to strike down the Ninth Circuit's absurd and damaging decision.

Supreme Court

Obviously this case needs to be appealed to the U.S. Supreme Court. Unfortunately, the State's decision to not participate in the case (apparently made during the Knowles Administration) means that the State and other interests must rely on the United States to seek Supreme Court review. The immediate need is to persuade the Bush Administration (Secretary of the Interior Norton and Solicitor General Olson) to file a certiorari petition with the high court. Only the U.S. has the ability to appeal.

It would behoove the State (and the Legislature) to persuade as many parties and interests as possible to press the Bush Administration for an appeal. Importantly, it would be very beneficial to have Lower 48 states and interests weigh in so that the genuine national implications of the ruling are understood. If this is perceived only as a highly unique Alaska fish stocking case, it is highly improbable that the Solicitor General will pursue an appeal.

If the U.S. can be persuaded to seek certiorari, it is imperative that the State, the Legislature, and other interests file the necessary papers with the Supreme Court supporting the petition. Both the Governor/Attorney General and the Legislature could submit supporting briefs. Within Alaska, fishing interests, Native interests, and recreationists should all be on board because of the adverse consequences of leaving the Ninth Circuit's ruling intact. Similarly, a major effort should be made to enlist a variety of Lower 48 interests so that the Court appreciates that this case has major

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implications for a wide array of public lands users outside of Alaska. States that have significant commercial recreation operations within wilderness areas (e.g., Idaho, Montana) stand to be harmed by the ruling.

Legislation

There is also the possibility of amending the 1964 Wilderness Act (P.L. 87 -577) to overturn the Ninth Circuit. Changes to section 4 of the Act including a new definition of "commercial enterprises", insertion of a new general exception for fish and wildlife management activities, or a highly discrete "fix" to allow fish stocking in Tustumena Lake are among the available options. Although possible, I am persuaded that amending the 1964 is extraordinarily improbable except for the latter option.

A specific Tustumena fix is the most probable (but still unlikely), but would leave the Ninth Circuit's rationale intact to inflict harm on other users in Alaska and the Lower 48. Moreover, Congressional action to fix only the Tustumena situation would likely be viewed by other courts as an indication that Congress does not disagree with the Ninth's thinking regarding the commercial enterprise prohibition.

A broader amendment to effectively reverse the Ninth Circuit means taking on one of the "holy grail" statutes of the environmental movement. This issue would become cause celebre of groups such as The Wilderness Society, Sierra Club, Friends of the Earth, et al. and I am convinced that very few Members of Congress east of the Mississippi (or on the Left Coast) could be persuaded to back the needed statutory change. The adverse impacts of the decision are limited to a handful of states with federal wilderness without enough votes to carry the day. Please note that the Endangered Species Act (another "holy grail" law) has had enormous national impacts without translating into any appreciable amendments for nearly two decades.

Conclusion

I recommend that a major effort be put forth to persuade the Bush Administration to appeal the ruling. This should include efforts to enlist non-Alaska interests so that the Solicitor General in particular understands that this is not merely a narrow, unique Alaska matter. If that effort is successful, the State and others need to file briefs with the Supreme Court supporting the federal certiorari petition.

Conversely, I would discount any notions of amending the Wilderness Act. The only amendment that is politically possible could fix the fish stocking issue but leave the remainder of the ruling and its damaging implications intact.

Alaska State Legislature

Senator Gene Therriault
President of the Senate

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January 16, 2004

Honorable Theodore Olson
Solicitor General
Department of Justice
960 Pennsylvania Ave., NW
Washington, D.C. 20530

(Fax: 202-514-9769)

Dear Solicitor General Olson:

The U.S. Court of Appeals for the Ninth Circuit recently issued an overbroad and extremely damaging opinion that misconstrues a key provision of the 1964 Wilderness Act (P.L. 88-477). It is imperative that this adverse and incorrect ruling be appealed to the U.S. Supreme Court to ensure that a host of legitimate and important wildlife management and recreational activities are not unnecessarily banned in designated wilderness areas.

In The Wilderness Society v. U.S. Fish and Wildlife Service (9th Cir. December 30, 2003) the Appeals Court broadly and impermissibly interpreted the "no commercial enterprise" clause of the 1964 Act. It held that fish stocking in Tustumena Lake by the Alaska Department of Fish and Game, an activity that predated designation of the area as wilderness, was a prohibited "commercial enterprise" because some of the stocked salmon fry would grow up to be caught outside of the wilderness area by commercial fishermen. This absurd decision is genuinely Orwellian: an activity outside the wilderness (commercial fishing) is deemed to be "within" it and a noncommercial action (fish stocking by the State) is held to be "commercial."

Unfortunately, the adverse features of this opinion will reach far beyond Tustumena Lake. The court vests the no commercial enterprise clause with broad absolutist impact: "lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce." It goes on to state that "Congress has absolutely proscribed commercial enterprise in wilderness" and indicates that statutory exceptions to this prohibition need to be narrowly construed. The subsequent narrow construction of the exceptions will create enormous problems in Alaska.

Over 50 million acres (equivalent of half of California) of federally designated wilderness exist in Alaska. Many of these lands host guides, outfitters, lodges, and eco-tourism operations pursuant to the Wilderness Act's section 4 (d)(6) exception that provides "commercial services may be performed within wilderness areas . . . to the extent necessary for activities which are proper for realizing . . . wilderness purposes." (Emphasis added). The Ninth Circuit clearly means to read this exception very narrowly and threaten a multitude of traditional Alaska recreation enterprises that cannot demonstrate that their services to the public are "necessary" or "proper for realizing wilderness purposes."

Other activities are similarly at risk. For example, federal law (i.e., the Alaska National Interest Lands Conservation Act (ANILCA) P.L. 96-487) authorizes limited commercial activities in conjunction with subsistence hunting and fishing on federal lands. The ruling appears to terminate those forms of subsistence on wilderness lands and waters since commercial enterprise of any form is "absolutely proscribed" by the Wilderness Act. Our Fish and Game Department also engages in wide variety of management activities designed to assure healthy populations of popular game fish and wildlife. Since commercial benefits can flow from such management (e.g., tourists travel to Alaska to fish and hunt and buy licenses, hire guides, charter bush planes etc), under the Ninth Circuit's "logic" these traditional State-sponsored activities must also be banned within designated wilderness areas.

Given this array of negative consequences, it is critical that the Ninth Circuit's decision be appealed to the Supreme Court. The latter has regularly and routinely overruled the judicial activists in San Francisco and needs to be afforded the chance to do so again and restore sanity to interpretation of the 1964 Wilderness Act.

Sincerely,

Gene Therriault
President of the Senate

Pete Kot
Speaker of the House

Alaska State Legislature

Senator Gene Therriault
President of the Senate

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January 16, 2004

Honorable Gale Norton
Secretary
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

(Fax: 202-208-6956)

Dear Secretary Norton:

The U.S. Court of Appeals for the Ninth Circuit recently issued an overbroad and extremely damaging opinion that misconstrues a key provision of the 1964 Wilderness Act (P.L. 88-477). It is imperative that this adverse and incorrect ruling be appealed to the U.S. Supreme Court to ensure that a host of legitimate and important wildlife management and recreational activities are not unnecessarily banned in designated wilderness areas.

In The Wilderness Society v. U.S. Fish and Wildlife Service (9th Cir. December 30, 2003) the Appeals Court broadly and impermissibly interpreted the "no commercial enterprise" clause of the 1964 Act. It held that fish stocking in Tustumena Lake by the Alaska Department of Fish and Game, an activity that predated designation of the area as wilderness, was a prohibited "commercial enterprise" because some of the stocked salmon fry would grow up to be caught outside of the wilderness area by commercial fishermen. This absurd decision is genuinely Orwellian: an activity outside the wilderness (commercial fishing) is deemed to be "within" it and a noncommercial action (fish stocking by the State) is held to be "commercial."

Unfortunately, the adverse features of this opinion will reach far beyond Tustumena Lake. The court vests the no commercial enterprise clause with broad absolutist impact: "lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce." It goes on to state that "Congress has absolutely proscribed commercial enterprise in wilderness" and indicates that statutory exceptions to this prohibition need to be narrowly construed. The subsequent narrow construction of the exceptions will create enormous problems in Alaska.

Over 50 million acres (equivalent of half of California) of federally designated wilderness exist in Alaska. Many of these lands host guides, outfitters, lodges, and eco-tourism operations pursuant to the Wilderness Act's section 4 (d)(6) exception that provides "commercial services may be performed within wilderness areas . . . to the extent necessary for activities which are proper for realizing . . . wilderness purposes." (Emphasis added). The Ninth Circuit clearly means to read this exception very narrowly and threaten a multitude of traditional Alaska recreation enterprises that cannot demonstrate that their services to the public are "necessary" or "proper for realizing wilderness purposes."

Other activities are similarly at risk. For example, federal law (i.e., the Alaska National Interest Lands Conservation Act (ANILCA) P.L. 96-487) authorizes limited commercial activities in conjunction with subsistence hunting and fishing on federal lands. The ruling appears to terminate those forms of subsistence on wilderness lands and waters since commercial enterprise of any form is "absolutely proscribed" by the Wilderness Act. Our Fish and Game Department also engages in wide variety of management activities designed to assure healthy populations of popular game fish and wildlife. Since commercial benefits can flow from such management (e.g., tourists travel to Alaska to fish and hunt and buy licenses, hire guides, charter bush planes etc), under the Ninth Circuit's "logic" these traditional State-sponsored activities must also be banned within designated wilderness areas.

Given this array of negative consequences, it is critical that the Ninth Circuit's decision be appealed to the Supreme Court. The latter has regularly and routinely overruled the judicial activists in San Francisco and needs to be afforded the chance to do so again and restore sanity to interpretation of the 1964 Wilderness Act.

Sincerely,

Gene Therriault
President of the Senate

Pete Kott
Speaker of the House

GREGG D. RENKES
ATTORNEY GENERAL OF ALASKA

January 26, 2004

Honorable Theodore B. Olson
Solicitor General
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Re: Support for filing of petition for a writ of certiorari in Wilderness Society; Alaska Center for the Environment v. United States Fish & Wildlife Service, No. 01-35266, (9th Cir. Dec. 30, 2003)

Dear Solicitor General Olson:

We urge your office to file for a writ of certiorari in Wilderness Society v. United States Fish & Wildlife Service. The *en banc* decision, issued December 30, 2003, should not stand unchallenged.

According to the Ninth Circuit, the Fish & Wildlife Service may not issue a permit to a long-standing and well-regarded fishery enhancement program because the Court finds it to be a "commercial enterprise" which may not operate within the refuge wilderness. The court did not find the program inconsistent with refuge or wilderness values. Instead, the court found the activity barred as a "commercial enterprise" operating within the wilderness, even though the usual hallmarks of a commercial enterprise are lacking. The non-profit that runs the program does not have its office or facilities in the wilderness, nor does it engage in any transactions or commerce in the wilderness. All that occurs within the wilderness boundaries is the usual practical action required for an enhancement program. In the fall, there is the unobtrusive, controlled collection of eggs; and in the spring, fry that have been incubated off-site are released into the lake.

In reaching its decision, the *en banc* Ninth Circuit panel ignored the reasoned interpretation of the agency charged with managing the wilderness, as well as the carefully considered decisions of the district court and the previous panel. In their place, the Ninth Circuit adopts an exceptionally broad approach to identifying what constitutes a "commercial enterprise" by interjecting a purpose and effects test.

123 4th Street • Suite 450 • Dimond Courthouse • P.O. Box 110300 • Juneau, AK 99811-0300
(907) 465-2133 • Fax • (907) 465-2075 • Gregg_Renkes@law.state.ak.us

The court's decision steps beyond what Congress intended when it prohibited commercial enterprises in wilderness areas. Under the logic of the Ninth Circuit decision, many of the actions taken by the State of Alaska in the conduct of its fishery management programs could also be deemed "commercial enterprises." Because commercial fishermen harvest the majority of anadromous fish, essentially any program affecting or even monitoring a salmon run will primarily benefit or affect commercial fishermen. But subsistence, recreational, and personal use fishermen necessarily benefit from such programs too.

Regardless of the ultimate beneficiaries, unless an operational activity taking place within the wilderness is of a directly commercial character, it should be up to the Fish & Wildlife Service to decide whether the activity might be permitted consistent with wilderness and refuge values. The court's contrary approach is overbroad.

Moreover, the impact of the decision is not limited to Alaska. The court did not rely on any Alaska-specific provisions contained in the Alaska National Interest Lands Conservation Act (ANILCA). Instead, the decision interprets provisions of the Wilderness Act that apply nationwide. The potential reach of the decision is limited only by imagination. Under the Ninth Circuit's novel approach, any activity that has a commercial benefit – even if enjoyed far from the wilderness and by third parties – may be considered a "commercial enterprise" that is barred from use of the wilderness. Few activities are so insulated from commerce as to be assured that they are outside the scope of the Court's new rule.

If allowed to stand, the Ninth Circuit's decision may be used to burden or eliminate legitimate non-commercial activities in wilderness that Congress never meant to bar. We urge you to take action to correct the Ninth Circuit's overreaching. Please let me know if we can be of any other assistance or support.

Sincerely,

Gregg D. Renkes
Attorney General

cc: Gale A. Norton,
Secretary of the Interior

Thomas Sansonetti,
AAG for Environmental & Natural Resources

Ron Somerville

From: "Tina Cunning" <tina_cunning@fishgame.state.ak.us>
To: "'Nelson, Lance'" <lance_nelson@law.state.ak.us>; "'Bottger, Laura'" <laura_bottger@law.state.ak.us>
Cc: "gtaylor" <gtaylor@sso.org>; "Wayne L. Regelin" <wayne_regelin@fishgame.state.ak.us>; "David G Bedford" <david_bedford@fishgame.state.ak.us>; "John W Katz" <jwkatz@sso.org>
Sent: Wednesday, January 28, 2004 5:34 PM
Subject: FW: Tustumena Lake Case

RE: Wilderness and Wildlife impacts; Utah
I am presuming, Lance, that you will contact him to be sure he contacted the SG directly and this is a courtesy copy? I'm headed to Juneau for Thursday and Friday so won't be on e-mail. Tina

-----Original Message-----
From: Martin Bushman [mailto:martinbushman@utah.gov]
Sent: Wednesday, January 28, 2004 12:23 PM
To: tina_cunning@fishgame.state.ak.us
Cc: Cindee Jensen; Kevin Conway; Miles Moretti
Subject: Tustumena Lake Case

I am legal counsel for the Utah Division of Wildlife Resources and Kevin Conway, its director, requested that I respond to Alaska's request for support in appealing the 9th Circuit's recent opinion in The Wilderness Society v. U.S. Fish and Wildlife Service case.

The State of Utah does not conduct any projects in wilderness area for the "primary" benefit of a commercial enterprise. We have but one commercial fishery in the state and it is for brine shrimp in the Great Salt Lake. Fortunately, wilderness designations have yet to be approved for any lands in and around the lake.

Nevertheless, the 9th Circuit decision and its rationale cause concern for the Utah Division of Wildlife Resources. The concern stems from the nebulous "purpose and effect" analysis used by the court in determining prohibited commercial activities. The Division is very active in wilderness areas transplanting big horn sheep, mountain goats, and otherwise undertaking projects designed to benefit terrestrial and aquatic game species. While the purpose of the transplants and projects is to primarily benefit recreational hunting, trapping, fishing and viewing opportunities, a residual benefit is received by commercial interests. For instance, state law permits sportsmen possessing a recreational license to take furbearer species to sell the pelts. Likewise, sportsmen with recreational licenses to take big game species may sell the cape and horns. The same is true for cougar and bear hides taken by licensed recreational hunters. Additionally, considerable revenue is expended every year by recreational hunters employing the services of fishing and hunting guides.

Taken one step further, every successful wildlife enhancement project expands recreational hunting, fishing and viewing opportunities which, in turn, results in increased sales of guns, ammunition, optics, fishing

tackle, clothing, fuel, camping gear, food, lodging, travel, etc. Local and national wildlife conservation organizations also financially benefit, through increased membership and dues, from expansion of wildlife related activities. According to the U.S. Fish and Wildlife Service's publication on the 2001 National Survey of Fishing, Hunting and Wildlife-Associated Recreation, nearly 1.4 billion dollars was expended in Utah in 2001 in wildlife-related recreation.

Although the Division's wildlife enhancement projects in wilderness areas are not undertaken with the intent to benefit commercial interests, they nevertheless have a residual "EFFECT" on commercial activities. Because of the inextricable link between wildlife-related recreation and commercial enterprise, the 9th Circuit's "purpose and effect" analysis will undoubtedly be used as a litigation bludgeon by some groups to forestall and even prevent beneficial wildlife enhancement projects in wilderness areas. This will harm both wildlife management and wilderness areas.

Given the 800,000 acres of designated wilderness area already in Utah and the 5.7 million acres proposed, Utah has a compelling interest in maintaining use of its traditional wildlife management tools in wilderness areas. The 9th Circuit's decision poses a serious threat to this interest, and the Division strongly urges the Justice Department to appeal it.

Should you have any questions or require additional information, please do not hesitate to contact me at (801) 538-7273.

January 28, 2004

The Honorable Gale A. Norton
Secretary of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Norton:

The American Sportfishing Association is requesting that you urge the Solicitor General of the Department of Justice to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in Wilderness Society v. United State Fish & Wildlife Service. This decision issued on December 30, 2003 by the Ninth Circuit raises serious implications for the future of fisheries management and sportfishing within designated wilderness areas.

The American Sportfishing Association is the sportfishing industry's trade association, uniting more than 600 members of the sportfishing and boating industries with state fish and wildlife agencies, conservation organizations, angler advocacy groups, and outdoor journalists. The American Sportfishing Association safeguards and promotes the enduring social, economic, and conservation values of sportfishing.

In this overreaching decision of the Ninth Circuit, it took an unbelievably broad approach to interpreting what constitutes a "commercial enterprise" in the Wilderness Act, while ignoring other portions of the statute that provide for "... public purposes for recreational, scenic, scientific, education, conservation and historical use."

This damaging decision impacts far more than Alaska. Fisheries management and sportfishing in wilderness designations in seven other states, at a minimum, may be damaged by this decision as managers attempt to comply with this decision at the expense of the fisheries resource and the angling constituency who supports it. Again, we strongly encourage you to urge the Department of Justice to take action.

Sincerely,

Gordon C. Robertson
Vice President

cc: The Honorable Craig Manson
David P. Smith
Director Williams

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February 2, 2004

The Honorable Theodore B. Olson
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Request for filing of petition for a writ of certiorari in Wilderness Society v. United States Fish & Wildlife Service, No. 01-35266 (9th Cir. 2003).

Dear Solicitor General Olson:

My Attorney General, Gregg D. Renkes, wrote you on January 26, 2004, to urge you to file for a writ of certiorari in Wilderness Society v. United States Fish & Wildlife Service. Appealing this case is so important to Alaska that I join him in respectfully, but strongly, urging you to file such a petition.

In addition to the letter from Attorney General Renkes, the Alaska State Legislature through the Senate President and the Speaker of the House sent you a letter dated January 16. I share the high level of concern expressed in those letters for the Ninth Circuit's rationale in the decision, and its apparent failure to fully consider important facts, the U.S. Fish and Wildlife Service's (USFWS) reasonable interpretation of their wilderness management discretion, and the district court's and Ninth Circuit's prior carefully considered decisions.

The issue is whether the USFWS may permit the Cook Inlet Aquaculture Association (CIAA), under contract with the Alaska Department of Fish and Game (ADF&G), to conduct a fisheries enhancement project in Tustumena Lake. The lake is part of a congressionally designated wilderness area inside the Kenai National Wildlife Refuge. The Tustumena Lake/Kasilof River watershed sustains several species of fish, including sockeye salmon, on which the Cook Inlet commercial fishery happens to depend. The court held the enhancement project to be a commercial enterprise, and therefore prohibited within designated wilderness.

This decision places an unreasonably heavy burden on our ability to enhance and monitor our fisheries because we have several programs that take place in wilderness areas. The permit that was the subject of the suit allowed

the CIAA to stock salmon fry in Tustumena Lake. CIAA is currently holding six million salmon fry for release this spring as part of this project, that now may need to be destroyed. The Alaska National Interest Lands Conservation Act (ANILCA) allows fisheries enhancement in refuges and supercedes the Wilderness Act in this regard. The decision ignores allowable commercial uses listed in ANILCA, and essentially glosses over discussing any part of ANILCA.

In addition, if this decision is allowed to stand, the recreational exception in the Wilderness Act may not be enough to protect recreational activities in wilderness areas. I am concerned that absolutely anything sounding of a "commercial enterprise" may be prohibited. The decision implicates obvious activities like commercial guiding and eco-tourism, but also important subsistence uses because of traditional trading practices.

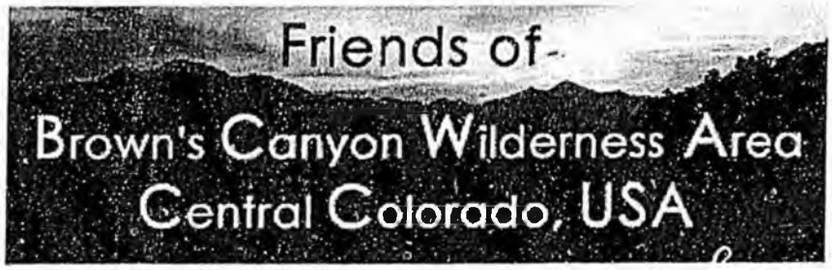
The decision has tremendous relevance for state resource management in Alaska and the Lower 48 states. The court placed no restriction on its decision; its rationale encompasses all wilderness areas within the Ninth Circuit's jurisdiction.

I urge you to take action to correct the Ninth Circuit's erroneous decision in this case. I stand ready to be of assistance and support.

Sincerely yours,

Frank H. Murkowski
Governor

cc: Gale A. Norton, Secretary of the Interior
John Ashcroft, United States Attorney General
Thomas Sansonetti, Assistant Attorney General for Environment and Natural Resources



Browns Canyon

HOME

Browns Canyon Wilderness Proposal

Truths & Fallacies about Colorado Wilderness

1964 Wilderness Act

S.1013 Public Lands Landscapes Wildlife

Colorado Environmental Coalition

National Wilderness Preservation System

Wilderness Land Trust

BLM Wilderness

Wilderness Information Network

The Wilderness Society

John Fielder's Colorado

Foundation for North American Wild Sheep

Colorado Outfitters Association

The 1964 Wilderness Act

Public Law 88-577
88th Congress, S. 4
September 3, 1964

An Act

To establish a National Wilderness Preservation System for the permanent good of the whole people, and for other purposes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Title

Section 1. This Act may be cited as the "Wilderness Act".

Wilderness System Established Statement of Policy

Sec. 2. (a) In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act.

(b) The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress. No appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness Preservation System as a separate unit nor shall any appropriations be available for additional

personnel stated as being required solely for the purpose of managing or administering areas solely because they are included within the National Wilderness Preservation System.

Definition of Wilderness

(c) A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

National Wilderness Preservation System -- Extent of System

Sec. 3. (a) All areas within the national forests classified at least 30 days before the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness", "wild", or "canoe" are hereby designated as wilderness areas. The Secretary of Agriculture shall --

(1) Within one year after the effective date of this Act, file a map and legal description of each wilderness area with the Interior and Insular Affairs Committees of the United States Senate and the House of Representatives, and such descriptions shall have the same force and effect as if included in this Act: Provided, however, That correction of clerical and typographical errors in such legal descriptions and maps may be made.

(2) Maintain, available to the public, records pertaining to said wilderness areas, including maps and legal descriptions, copies of regulations governing them, copies of public notices of, and reports submitted to Congress regarding pending additions, eliminations, or modifications. Maps, legal descriptions, and regulations pertaining to wilderness areas within their respective jurisdictions also shall be available to the public in the offices of regional foresters, national forest supervisors, and forest rangers.

(b) The Secretary of Agriculture shall, within ten years after the enactment of this Act, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on the effective date of this Act by the Secretary of Agriculture or the

Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. Such advice shall be given with respect to not less than one-third of all the areas now classified as "primitive" within three years after the enactment of this Act, not less than two-thirds within seven years after the enactment of this Act, and the remaining areas within ten years after the enactment of this Act. Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress. Areas classified as "primitive" on the effective date of this Act shall continue to be administered under the rules and regulations affecting such areas on the effective date of this Act until Congress has determined otherwise. Any such area may be increased in size by the President at the time he submits his recommendation to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. Not withstanding any other provisions of this Act, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.

(c) Within ten years after the effective date of this Act the Secretary of the Interior shall review every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges, under his jurisdiction on the effective date of this Act and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendation with respect to the designation as wilderness of each such area or island on which review has been completed, together with a map thereof and a definition of its boundaries. Such advice shall be given with respect to not less than one-third of the areas and islands to be reviewed under this subsection within three years after enactment of this Act, not less than two-thirds within seven years of enactment of this Act, and the remainder within ten years of enactment of this Act.

A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress. Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system.

(d) (1) The Secretary of Agriculture and the Secretary of the Interior shall, prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness --

(A) give such public notice of the proposed action as they deem appropriate, including publication in the Federal Register and in a newspaper having general circulation in the area or areas in the vicinity of the affected land;

(B) hold a public hearing or hearings at a location or locations convenient to the area affected. The hearings shall be announced through such means as the respective Secretaries involved deem appropriate, including notices in the Federal Register and in newspapers of general circulation in the area: Provided, That if the lands involved are located in more than one State, at least one hearing shall be held in each State in which a portion of the land lies;

(C) at least thirty days before the date of a hearing advise the Governor of each State and the governing board of each county, or in Alaska the borough, in which the lands are located, and Federal departments and agencies concerned, and invite such officials and Federal agencies to submit their views on the proposed action at the hearing or by not later than thirty days following the date of the hearing.

(D)(2) Any views submitted to the appropriate Secretary under the provisions of (1) of this subsection with respect to any area shall be included with any recommendations to the President and to Congress with respect to such area.

(E) Any modification or adjustment of boundaries of any wilderness area shall be recommended by the appropriate Secretary after public notice of such proposal and public hearing or hearings as provided on subsection (d) of this section. The proposed modification or adjustment shall then be recommended with map and description thereof to the President. The President shall advise the United States Senate and the House of Representatives of his recommendations with respect to such modification or adjustment and such recommendations shall become effective only on the same manner as provided for in subsections (b) and (c) of this section.

Use of Wilderness Areas

Sec. 4. (a) The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and --

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

(2) Nothing in this Act shall modify the restrictions and provisions of the Shipstead-Nolan Act (Public Law 539, Seventy-first Congress, July 10, 1930; 46 Stat. 1020),the Thye-Blatnik Act (Public Law 733, Eightieth Congress, June 22, 1948; 62 Stat. 568), and the Humphrey-Thye-Blatnik-Andresen Act (Public Law 607, Eighty-fourth Congress, June 22.1965; 70 Stat. 326), as applying to the Superior National Forest or the regulations of the Secretary of Agriculture.

(3) Nothing in this Act shall modify the statutory authority under which units of the national park system are created. Further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant to this Act shall in no manner lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system in accordance with the Act of August 25, 1916, the statutory authority under which the area was created, or any other Act of Congress which might pertain to or affect such area, including, but not limited to, the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 432 et seq.); section 3(2) of the Federal Power Act (16 U.S.C. 796 (2)); and the Act of August 21,1935 (49 Stat. 666; 16 U.S.C. 461 et seq.).

(b) Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

Prohibition of Certain Uses

(c) Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of

motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Special Provisions

(d) The following special provisions are hereby made:

(1) Within wilderness areas designated by this Act the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.

(2) Nothing in this Act shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. Furthermore, in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values , if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress.

(3) Not withstanding any other provisions of this Act, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the extent as applicable prior to the effective date of this Act, extend to those national forest lands designated by this Act as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drilling, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and , in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations lying within the boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this Act as wilderness areas shall convey title to the mineral deposits within the claim, together with the right to cut and

use so much of the mature timber therefrom as may be needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available, and if the timber is cut under sound principles of forest management as defined by the national forest rules and regulations, but each such patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this Act: Provided, That, unless hereafter specifically authorized, no patent within wilderness areas designated by this Act shall issue after December 31, 1983, except for the valid claims existing on or before December 31, 1983. Mining claims located after the effective date of this Act within the boundaries of wilderness areas designated by this Act shall create no rights in excess of those rights which may be patented under the provisions of this subsection. Mineral leases, permits, and licenses covering lands within national forest wilderness areas designated by this Act shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed. Subject to valid rights then existing, effective January 1,1984, the minerals in lands designated by this Act as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

(4) Within wilderness areas in the national forests designated by this Act, (1) the President may, within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial; and (2) the grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.

(5) Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams,and portages: Provided, That nothing in this Act shall preclude the continuance within the area of any already established

use of motorboats.

(6) Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

(7) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(8) Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.

State and Private Lands Within Wilderness Areas

Sec. 5. (a) In any case where State-owned of privately owned land is completely surrounded by national forest lands within areas designated by this Act as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: Provided, however, That the United States shall not transfer to a state or private owner any mineral interests unless the State or private owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.

(b) In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

(c) Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this Act as wilderness if

(1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress.

Gifts, Bequests, and Contributions

Sec. 6. (a) The Secretary of Agriculture may accept gifts or bequests of land within wilderness areas designated by this Act for preservation

as wilderness. The Secretary of Agriculture may also accept gifts or bequests of land adjacent to wilderness areas designated by this Act for preservation as wilderness if he has given sixty days advance notice thereof to the President of the Senate and the Speaker of the House of Representatives. Land accepted by the Secretary of Agriculture under this section shall become part of the wilderness area involved. Regulations with regard to any such land may be in accordance with such agreements, consistent with the policy of this Act, as are made at the time of such gift, or such conditions, consistent with such policy, as may be included in, and accepted with, such bequest.

(b) The Secretary of Agriculture or the Secretary of the Interior is authorized to accept private contributions and gifts to be used to further the purpose of this Act.

Annual Reports

Sec. 7. At the opening of each session of Congress, the Secretaries of Agriculture and Interior shall jointly report to the President for transmission to Congress on the status of the wilderness system, including a list and descriptions of the areas in the system, regulations in effect, and other pertinent information, together with any recommendations they may care to make.
Approved September 3, 1964.
Legislative History
House Reports: No. 1538 accompanying H.R. 9070 (Comm. on Interior & Insular affairs) and No. 1829 (Comm. of Conference).
Senate Report No. 109 (Comm. on Interior & Insular Affairs).
Congressional Record:
Vol. 109 (1963): Apr. 4, 8, considered in Senate. Apr. 9, considered and passed Senate.
Vol. 110 (1964): July 28, considered in House. July 30, considered and passed House, amended, in lieu of H. R. 9070. Aug. 20, House and Senate agreed to conference report.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE WILDERNESS SOCIETY; ALASKA CENTER FOR THE ENVIRONMENT,
Plaintiffs-Appellants,

v.

UNITED STATES FISH & WILDLIFE SERVICE,
Defendant-Appellee.

No. 01-35266
D.C. No. CV-98-00409-JKS
OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, Chief Judge, Presiding

Argued and Submitted En Banc
September 16, 2003—San Francisco, California

Filed December 30, 2003

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Stephen Reinhardt, Thomas G. Nelson, Michael Daly Hawkins, Barry G. Silverman, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, Marsha S. Berzon, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Gould

COUNSEL

Rebecca L. Bernard and Jack K. Sterne, Trustees For Alaska, Anchorage, Alaska, for the plaintiffs-appellants.

Kathryn E. Kovacs, U.S. Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the defendant-appellee.

OPINION

GOULD, Circuit Judge:

We consider an action brought by the Wilderness Society and the Alaska Center for the Environment ("Plaintiffs") challenging a decision by the United States Fish and Wildlife Service ("USFWS"), to grant a permit for a sockeye salmon enhancement project ("Enhancement Project") that annually introduces about six million hatchery-reared salmon fry into Tustumena Lake, the largest freshwater lake in the Kenai National Wildlife Refuge ("Kenai Refuge") and the Kenai Wilderness. Plaintiffs assert that the USFWS permit for the Enhancement Project violated the Wilderness Act, 16 U.S.C. §§ 1131-1136, by offending its mandate to preserve the "natural conditions" that are a part of the "wilderness character" of the Kenai Wilderness, *id.* §§ 1131, 1133, and by sanctioning an impermissible "commercial enterprise" within a designated wilderness area. *Id.* § 1133(c). Plaintiffs also claim that the Enhancement Project violates the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee ("Refuge Act"), because the project is not consistent with the purposes of the Kenai Refuge as set forth in the Refuge Act. *Id.* § 668dd. The district court denied Plaintiffs' motion for summary judgment and sua sponte entered summary judgment in favor of the USFWS. After final judgment was entered a timely appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1331. We conclude that the district court erred in finding that the Enhancement Project is not a "commercial enterprise" that Congress prohibited within the designated wilderness. We reverse and remand so that the final decision of the USFWS may be set aside, the Enhancement Project enjoined, and judgment entered for Plaintiffs.

I

A

The area now known as the Kenai Refuge has been recognized as protected wilderness by the federal government for more than sixty years.[1] In 1941, President Franklin D. Roosevelt issued an Executive Order designating about two million acres of land on Alaska's Kenai Peninsula, including Tustumena Lake, as the Kenai National Moose Range for the purpose of "protecting the natural breeding and feeding range of the giant Kenai moose." Exec. Order No. 8979, 6 Fed. Reg. 6471 (Dec. 16, 1941).

In 1964 Congress passed the Wilderness Act, which established the National Wilderness Preservation System with the explicit statutory purpose "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. § 1131(a). Congress thereby expressed support for the principle that wilderness has value to society that requires conservation and preservation. As President Lyndon B. Johnson reportedly said upon signing of the Wilderness Act in 1964, "[i]f future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it." National Park Service, Grand Canyon National Park Wilderness Management Plan 1-2 (1989), *available at* http://www.nps.gov/grca/wilderness/documents/sec-one.pdf.[2]

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[1]The material facts essential to determine this case are undisputed by the parties.

[2]For views of conservationists who focused on the unspoiled areas of the western United States, see the selected bibliography in Peter Wild, Pioneer Conservationists of Western America 209-36 (Mountain Press Publishing Co. 1979).

The Wilderness Act required the Secretary of the Interior to make recommendations to the President as to the suitability of existing national parks, refuges, and game ranges for preservation as wilderness. 16 U.S.C. § 1132(c). Upon recommendation of the President, Congress was empowered to designate existing national park, wildlife refuge, and game range lands as wilderness. *Id.*[3]

Two years after enacting the Wilderness Act, Congress passed the Refuge Act for the purpose of "consolidating the authorities relating to the various categories of areas that are administered . . . for the conservation of fish and wildlife." 16 U.S.C. § 668dd(a)(1). In furtherance of this goal, the Refuge Act established the "National Wildlife Refuge System," under the administration of USFWS. *Id.*

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, Title III, § 702(7), 94 Stat. 2371 (1980), to control the management of Alaska refuge lands. ANILCA expanded the Kenai National Moose Range by nearly a quarter-million acres, renamed it the Kenai National Wildlife Refuge, ANILCA § 303(4); 16 U.S.C. § 668dd notes, and further set aside 1.35 million acres of the Refuge, including Tustumena Lake, as the Kenai Wilderness, a designated wilderness pursuant to Congress's authority to protect lands under § 1132(c) of the Wilderness Act. ANILCA § 702(7); 16 U.S.C. § 1132(c) & notes. ANILCA recited that the purposes of the Kenai Refuge encompass, among other aims, the "conserv[ation of] fish and wildlife populations and habitats in their natural diversity." ANILCA § 303(4).

[3]Congress also may withdraw lands from designated wilderness after a similar process. *See* 16 U.S.C. 1132(c).

B

Tustumena Lake lies near the western edge of the Kenai Refuge and within the Kenai Wilderness. Tustumena Lake is the largest freshwater lake located within the Kenai Refuge and is the fifth largest freshwater lake in the State of Alaska. The lake's outlet is the Kasilof River, which drains into the Cook Inlet, a tidal estuary that flows into the Gulf of Alaska and the Pacific Ocean.

As a result of its remote location, the ecosystem around and within Tustumena Lake is in a natural state. This ecosystem supports several species of anadromous fish, including sockeye salmon, which spawn within the Kasilof River watershed. A commercial fishing fleet, operating outside the boundaries of the Kenai Refuge, intercepts and harvests these sockeye salmon during their annual run from the Gulf of Alaska back to the Kasilof River, Tustumena Lake, and other spawning streams.

The antecedents of the present Enhancement Project date back to 1974, when the Alaska Department of Fish and Game ("ADF&G") first conducted a sockeye salmon egg collection at Tustumena Lake as part of a research project designed to test the ability of the ecosystem to produce fish. The eggs were incubated at the Crooked Creek Hatchery, outside of the Kenai Refuge, and the resulting fry were stocked outside of the Kenai Refuge in the spring of 1975. In 1976, fry were first released into Tustumena Lake, and since have been released into Tustumena Lake in all but two subsequent years. The number of fry stocked yearly in Tustumena Lake has ranged from a low of 400,000 in 1978 to a high of 17,050,000 in 1984. Since 1987, the number of fry released annually into the lake has been slightly greater than 6 million.

Before 1980, ADF&G operated the Enhancement Project without a special use permit, and ADF&G did not seek permits for the operation of the project. In 1980, following pas-

sage of ANILCA, the USFWS's Refuge Manager for the Kenai Refuge notified ADF&G that special use permits would be required for all ongoing projects within the Refuge. In 1985, the USFWS and ADF&G entered into a Memorandum of Understanding that allowed ADF&G annually to obtain a special use permit for the Enhancement Project to study the effect of stocking on native lake fish and on the incidence of disease within the fish population.

In 1989, the USFWS and ADF&G reached a joint agreement that by 1993 a decision should be made either to discontinue the research project at Tustumena Lake or to elevate it to enhance commercial fishing operations for the benefit of the Cook Inlet fishing industry. In a 1992 report, ADF&G requested that the project become an operational enhancement project. This report cited two reasons for conversion of the project. First, ADF&G concluded that the risk of adverse impacts on the Tustumena Lake ecosystem appeared to be lowered at a stocking rate of about 6 million fry per year. Second, ADF&G noted that, beginning in fiscal year 1992, a reduced state budget would require curtailing project evaluation. In 1993, ADF&G entered into a contract with the Cook Inlet Aquaculture Association ("CIAA") to staff and run the Crooked Creek Hatchery and its hatchery programs.

The CIAA is a private, non-profit corporation "comprised of associations representative of commercial fishermen in the region" as well as "other user groups interested in fisheries within the region." Alaska Stat. § 16.10.380(a) (2003). According to the USFWS's final Environmental Assessment of the Enhancement Project, the CIAA is "organized for the purpose of engaging in salmon enhancement work throughout the Cook Inlet Region." The mission statement of the CIAA, according to the Environmental Assessment, is to:

> (1) protect self-perpetuating salmon stocks and the habitat upon which they depend; (2) rehabilitate self-perpetuating salmon stocks; (3) rehabilitate salmon

> habitat and (4) maximize the value of the Cook Inlet . . . common property salmon resources by applying science and enhancement technology to supplement the value attained from protection and habitat rehabilitation of self-perpetuating salmon stocks.

The CIAA relies on funding from two sources. First, the Cook Inlet commercial salmon industry imposes a voluntary two percent tax on the value of its fishermen's annual salmon harvest. Second, the CIAA generates income through producing hatchery-raised salmon from the surplus fry not used to stock Tustumena Lake.

In May 1994, the USFWS's Regional Director contacted ADF&G in order to implement an evaluation of the Enhancement Project's status and its future. Acknowledging that the Enhancement Project was initiated as an experimental project with the purpose of "supplement[ing] the commercial sockeye salmon fishery in the Cook Inlet," the Regional Director set forth environmental concerns regarding the project and recommended that the Enhancement Project be evaluated through the National Environmental Policy Act ("NEPA") review process. Among the concerns raised were that the Enhancement Project potentially violated "the intent and purpose of the Wilderness Act, ANILCA, and regional policy," and that the project would threaten "a unique, glacial, natural freshwater spawning and rearing aquatic ecosystem . . . merely to provide additional economic benefit primarily for Cook Inlet east side net fishermen."

In late 1995, the CIAA submitted a draft Environmental Assessment ("EA") to the USFWS for comment and review. *See* 40 C.F.R. § 1506.5(b) (2003); 550 FW 1 § 2.5(E) (2002 draft). The draft assessment proposed consideration of five action alternatives, from a total elimination of the Enhancement Project to a tripling of the number of salmon fry stocked in Tustumena Lake, and recommended that the Enhancement Project continue at the same scale, with an annual stocking of

about six million fry. After circulation and agency comment on the 1995 draft, in June 1997 the USFWS and the CIAA jointly released a draft EA of the Enhancement Project, which addressed concerns regarding the project, but the USFWS in a separate document concluded that mitigation measures could minimize risks of the project. During the 45-day period for public comment and review, the Wilderness Society submitted comments challenging the legality of "any fisheries enhancement program in designated Wilderness for the purpose of providing for the stocking of commerce" and questioning the compatibility of the project with the area's wilderness designation. In August 1997, the final EA of the Enhancement Project was released. In a simultaneously released "Mitigated Finding of No Significant Impact," the USFWS concluded that "mitigative measures" contained in the Special Use Permit would minimize risks associated with the Enhancement Project, and that preparation of an Environmental Impact Statement was not required.

Also in August 1997, the Kenai Refuge Manager issued a Wilderness Act Consistency Review, addressing legal concerns regarding whether the Enhancement Project was consistent with the Wilderness Act's mandate to preserve wilderness in its natural condition and whether the project was a prohibited commercial enterprise. Referring to a legal opinion prepared by the United States Department of Interior's Regional Solicitor's Office, which concluded that the Enhancement Project "does not have to contribute to achieving Refuge purposes but it may not significantly conflict with them," the Kenai Refuge Manager, in the Consistency Review, dismissed concerns that the project altered natural conditions and was a commercial enterprise. The Kenai Refuge Manager concluded that the Enhancement Project was consistent with the Wilderness Act, which he viewed as a legislative compromise not reflecting absolute preservationist values. The Refuge Manager also suggested that, because the State of Alaska had previously administered the project, criticism that the Enhancement Project was a commercial enterprise raised "a

distinction without a difference." In August 1997, the Refuge Manager also released a Compatibility Determination, which concluded that the Enhancement Project "cannot . . . be considered as supporting refuge purposes, but neither can it be found incompatible with them."

After issuance of these documents, the USFWS on August 8, 1997, issued a Special Use Permit to the CIAA for the Enhancement Project. Under the terms of this permit, each summer the CIAA establishes a temporary camp within the Kenai Wilderness at the mouth of Bear Creek, which flows into Tustumena Lake, and catches about 10,000 returning sockeye salmon, which yield about 10 million eggs. These eggs are transported to a hatchery outside the Kenai Wilderness.[4] The following spring about six million salmon fry produced by the eggs are stocked and returned to the wilderness in Bear Creek.

II

The Administrative Procedure Act ("APA") governs judicial review of agency action. 5 U.S.C. § 701 *et seq.* Under the APA, we may set aside formal agency action only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A); *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 853 (9th Cir. 2003).[5]

A

There is disagreement among the parties as to what level of deference, if any, we should accord the USFWS's decision to

[4]The Crooked Creek Hatchery closed in 1996, and hatchery operations related to the Enhancement Project were transferred to the Trail Lakes Hatchery.

[5]We review de novo a district court's order granting or denying summary judgment. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003).

permit the Enhancement Project. Defendant USFWS maintains that the case is controlled by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and that USFWS decisions interpreting the Wilderness Act and Refuge Act must be given broad deference. Plaintiffs, on the other hand, argue that the challenged project offends the literal terms of the Wilderness Act by not preserving the designated wilderness area and by sanctioning a commercial enterprise within it. Responding to the defendant's argument for *Chevron* deference, which was adopted by the district court, Plaintiffs rely on the Supreme Court's clarification of *Chevron* in *United States v. Mead Corp.*, 533 U.S. 218 (2001), urging that the USFWS's permitting decision is entitled at most to "respect" as set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Chevron*, the Supreme Court set forth a two-step test for judicial review of administrative agency interpretations of federal law. Under the first step: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Congressional intent may be determined by "traditional tools of statutory construction," and if a court using these tools ascertains that Congress had a clear intent on the question at issue, that intent must be given effect as law. *Id.* at 843 n.9; *see Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999) (stating that questions of congressional intent "are still firmly within the province of the courts under *Chevron*"). Conversely, at step two of *Chevron*, when applicable, we recognize that if a statute is silent or ambiguous with respect to the issue at hand, then the reviewing court must defer to the agency so long as "the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. In such a case an agency's interpretation of a statute will be permissible, unless "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Chevron considered only formal notice-and-comment rulemaking and did not state what other types of agency decisions should be given such deference. In *Mead*, the Supreme Court clarified that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27 (emphasis added).[6] *Mead* also clarified the weight that a reviewing court should give to administrative decisions not meeting these standards. Quoting *Skidmore*, the Court held that the deference to be accorded to such decisions depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

With the Supreme Court's precedents in mind, we adopt the following analysis: Under *Chevron*'s first-step test, we ask whether the Enhancement Project offends the plain meaning and manifest congressional intent of the Wilderness Act or the Refuge Act. If so, Congress's intent must be enforced and that is the end of the matter. Conversely, if the statutory terms are ambiguous, then we must give *Chevron* deference only upon a conclusion that the USFWS's statutory interpretation has the "force of law." Otherwise, we give the USFWS's view respect if persuasive based on the factors recited in *Skidmore* and endorsed in *Mead*.

[6]Although *Mead* did not state with specificity what types of agency powers are indicative of authority "generally to make rules carrying the force of law," the Court provided this guidance: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." 533 U.S. at 227.

B

Addressing the first step in the *Chevron* analysis, we ask "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

Canons of statutory construction help give meaning to a statute's words. We begin with the language of the statute. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) ("It is well settled that the starting point for interpreting a statute is the language of the statute itself.") (internal quotation marks and citation omitted); *Assoc. to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1015 (9th Cir. 2002). Another fundamental canon of construction provides that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998).

It is also "a fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2001) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). If necessary to discern Congress's intent, we may read statutory terms in light of the purpose of the statute. Thus, the structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *United States v. Lewis*, 67 F.3d 225, 228-29 (9th Cir. 1995) ("Particular phrases must

be construed in light of the overall purpose and structure of the whole statutory scheme."). If, under these canons, or other traditional means of determining Congress's intentions, we are able to determine that Congress spoke clearly to preclude the Enhancement Project, then we may not defer to the USFWS's contrary interpretation. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) ("Where the language of the statute is clear, resort to the agency's interpretation is improper.").

[1] With these principles in mind, we assess Plaintiffs' contention that the Enhancement Project offends the Wilderness Act. Most pertinent to our analysis is the Wilderness Act's prohibition of commercial enterprise within designated wilderness. Section 4(c) of the Wilderness Act states that, subject to exceptions not relevant here, "there shall be no commercial enterprise . . . within any wilderness area." 16 U.S.C. § 1133(c). The Wilderness Act does not define the terms "commercial enterprise" or "within." The district court considered these terms ambiguous and concluded that they do not bar the Enhancement Project.

[2] Because no statutory or regulatory provision expressly defines the meaning of the term "commercial enterprise" as used in the Wilderness Act, we first consider the common sense meaning of the statute's words to determine whether it is ambiguous. *See Iverson*, 162 F.3d at 1022. Webster's defines "enterprise" to mean "a project or undertaking." Webster's Ninth New Collegiate Dictionary 415 (1985). Webster's defines "commercial" as "occupied with or engaged in commerce or work intended for commerce; of or relating to commerce." *Id* at 264-65. The American Heritage Dictionary of the English Language provides a strikingly similar definition, viewing "commercial" as meaning "1.a. of or relating to commerce, b. engaged in commerce, c. involved in work that is intended for the mass market." American Heritage Dictionary of the English Language 371 (4th ed. 2000). Black's Law Dictionary adds that "commercial" may be defined as "relates to or is connected with trade and traffic or commerce in gen-

eral; is occupied with business or commerce." Black's Law Dictionary 270 (6th ed. 1990). These definitions suggest that a commercial enterprise is a project or undertaking of or relating to commerce.

[3] We also consider the purposes of the Wilderness Act. The Act's declaration of policy states as a goal the "preservation and protection" of wilderness lands "in their natural condition," so as to "leave them unimpaired for future use and enjoyment as wilderness and so as to provide for the protection of these areas, [and] the preservation of their wilderness character." 16 U.S.C. § 1131(a). The Wilderness Act further defines "wilderness," in part, as "an area where the earth and its community of life are untrammeled by man." *Id.* § 1131(c). These statutory declarations show a mandate of preservation for wilderness and the essential need to keep commerce out of it. Whatever else may be said about the positive aims of the Enhancement Project, it was not designed to advance the purposes of the Wilderness Act. The Enhancement Project to a degree places the goals and activities of commercial enterprise in the protected wilderness. The Enhancement Project is literally a project relating to commerce.

The structure of the relevant provisions of the Wilderness Act may also be considered. The Wilderness Act's opening section first sets forth the Act's broad mandate to protect the forests, waters and creatures of the wilderness in their natural, untrammeled state. 16 U.S.C. § 1131. Section 1133, devoted to the use of wilderness areas, contains a subsection entitled "[p]rohibition provisions." *Id.* § 1133(c). Among these provisions is a broad prohibition on the operation of all commercial enterprise within a designated wilderness, except as "specifically provided for in this Act." *Id.* The following subsection of the Act enumerates "special provisions," including exceptions to this prohibition. *Id.* § 1133(d). This statutory structure, with prohibitions including an express bar on commercial enterprise within wilderness, limited by specific

and express exceptions, shows a clear congressional intent generally to enforce the prohibition against "commercial enterprise" when the specified exceptions are not present. *See United States v. Smith*, 499 U.S. 160, 167 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)); *Far West Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1097 (9th Cir. 1991) ("[W]hen Congress explicitly enumerates exceptions to a general scheme, exceptions not explicitly made should not be implied, absent evidence of contrary legislative intent."). There is no exception given for commercial enterprise in wilderness when it has benign purpose and minimally intrusive impact.

[4] The language, purpose and structure of the Wilderness Act support the conclusion that Congress spoke clearly to preclude commercial enterprise in the designated wilderness, regardless of the form of commercial activity, and regardless of whether it is aimed at assisting the economy with minimal intrusion on wilderness values.

C

[5] Because the aim of Congress in the Wilderness Act to prohibit commercial enterprise within designated wilderness is clear, we do not owe deference to the USFWS's determination regarding the permissibility of the Enhancement Project if it is a commercial enterprise. *Chevron*, 467 U.S. at 842-43.

The district court grounded its decision in part on an assessment that the impact on wilderness of millions of fry unseen beneath the waters of Bear Creek and Tustumena Lake was not terribly intrusive on wilderness values and that the project would hardly be noticed by those visiting the wilderness. The district court also was impressed that the CIAA was a nonprofit entity, that the State of Alaska heavily regulated the

Enhancement Project, and that commercial effects of the project generally occurred years after the collection of salmon eggs and later release of the fry and were realized by commercial fishermen who sought their catch outside the wilderness bounds.

We thus deal with an activity with a benign aim to enhance the catch of fishermen, with little visible detriment to wilderness, under the cooperative banner of a non-profit trade association and state regulators. Surely this fish-stocking program, whose antecedents were a state-run research project, is nothing like building a McDonald's restaurant or a Wal-Mart store on the shores of Tustumena Lake. Nor is it like conducting a commercial fishing operation within designated wilderness, which we have previously proscribed. *See Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1069 (9th Cir. 1997). Nor is the project like cutting timber, extracting minerals, or otherwise exploiting wilderness resources in a way that is plainly destructive of their preservation.

Conversely, the challenged activities do not appear to be aimed at furthering the goals of the Wilderness Act. The project is not aimed at preserving a threatened salmon run.[7] Looked at most favorably, for the proponents of the fish-stocking project, it might be concluded that the project only negligibly alters the wild character of Tustumena Lake and is not incompatible with refuge values, though those issues are disputed.[8] And it might also be considered that, to the extent

[7]In describing the present Enhancement Project, the Kenai Refuge Manager has stated: "The activity is no longer experimental in nature, nor is restoration of fish stocks an objective. It is strictly an enhancement effort to increase the number of sockeye salmon available to the commercial fishery." This declaration occurs as part of a broader statement about the primary purpose of the project to enhance the commercial catch of sockeye salmon. *See infra* 18265.

[8]In footnote 18 we decline to reach the issues of whether the challenged project alters "natural conditions" that are part of the "wilderness character" to be preserved by the Wilderness Act and whether it is "compatible" with purposes of the Kenai Refuge.

the project is a servant of commerce, it may pose a threat to the wild, even if it operates under the eye of state and federal regulators.

[6] Before further addressing the reasoning of the district court, we acknowledge that none of our precedent, and no explicit guidance from the United States Supreme Court, has addressed how to assess "commercial enterprise" when faced with activities involving mixed purposes and effects. The lack of explicit guidance on this issue in part led the district court to defer to the agency action. Yet we have determined that Congress absolutely proscribed commercial enterprise in the wilderness, and it is a traditional judicial function to apply that prohibition to the precise facts here, to determine if the challenged project may continue consistent with the will of Congress.

[7] In light of Congress's language and manifest intent, we conclude that the most sensible rule of decision to resolve whether an activity within designated wilderness bounds should be characterized as a "commercial enterprise" turns on an assessment of the purpose and effect of the activity. *See Sierra Club v. Lyng*, 662 F. Supp. 40, 42-43 (D.D.C. 1987); *see also Jensen*, 108 F.3d at 1069 (9th Cir. 1997). *Lyng*, though it involves a different issue under the Wilderness Act, is instructive on the issue of whether the Enhancement Project should be considered a commercial enterprise. In *Lyng*, plaintiffs challenged the legality of a United States Forest Service program to control pine beetle infestations in designated wilderness areas by an extensive tree-cutting and chemical-spraying campaign. Defendant urged that the eradication program was permissible, without justification, under section 4(d)(1) of the Wilderness Act, 16 U.S.C. § 1133(d)(1), under which the Secretary of Agriculture may take "such measures . . . as may be necessary in the control of fire, insects, and diseases," within the designated wilderness. Rejecting this contention, the district court stressed that the "purpose and effect of the program [was] solely to protect commercial timber

interests and private property," and imposed an affirmative burden on the Secretary of Agriculture to justify the eradication program in light of wilderness values. *Lyng*, 662 F. Supp. at 42-43.[9]

The consideration of purpose and effect of challenged actions not infrequently assists in determining whether a prohibition is to be applied to complex conduct. For example, the United States Supreme Court has long looked to the purpose and effect of state action to determine whether it violates the Establishment Clause. *E.g., Agostini v. Felton*, 521 U.S. 203, 218 (1997); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002). It is also commonplace to assess purpose and effect to determine whether a trade restraint is unreasonable. *E.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Palladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1156 & n.9 (9th Cir. 2003). Similarly, the Supreme Court has directed us to rely on considerations of purpose and effect in determining whether there is a conflict between state and federal law that leads to preemption of the state law. *E.g. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106-07 (1992); *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 672 (9th Cir. 2003). The Supreme Court has also focused our review on purpose and effect in evaluating whether a statute

[9]The USFWS contends that *Lyng* is not persuasive authority because the district court later found a scaled-back version of the eradication program permissible under the Wilderness Act. *Sierra Club v. Lyng*, 663 F. Supp. 556, 557, 560-61 (D.D.C. 1987). However, this subsequent holding does not undercut the stress the *Lyng* court placed on consideration of purpose and effect. The district court only later approved the eradication program upon the Secretary of Agriculture's showing that the scaled-back program's primary purpose and effect was to protect wilderness resources, not commercial interests, *id.* at 558, and that the program was "necessary to effectively control the threatened outside harm" to designated wilderness. *Id.* at 559. Thus the second *Lyng* decision equally supports the important role of purpose and effect in our analysis of the Enhancement Project.

is properly characterized as civil or criminal. *E.g.*, *Hudson v. United States*, 522 U.S. 92, 99 (1997); *Rivera v. Pugh*, 194 F.3d 1064, 1068 (9th Cir. 1999).

The importance of considering purpose and effect to judge the legality of challenged action is also a recurring theme in statutory law. Section five of the Voting Rights Act requires that a covered jurisdiction seeking preclearance of a proposed change to voting qualifications, prerequisites, standards, practices, or procedures demonstrate that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c; *see Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000). And copyright law prohibits the import, manufacture or distribution of devices or services with the primary purpose or effect of circumventing controls on the reproduction of copyrighted works. 17 U.S.C. § 1002(c).

[8] For all these reasons, we conclude that as a general rule both the purpose and the effect of challenged activities must be carefully assessed in deciding whether a project is a "commercial enterprise" within the wilderness that is prohibited by the Wilderness Act. Thus we will give great weight to an assessment of purpose and effect in deciding whether the Enhancement Project is a proscribed commercial enterprise within the Kenai Wilderness. This familiar test looking to "purpose and effect" is persuasive here because it gets to the heart of what has occurred in the wilderness.

[9] The primary purpose of the Enhancement Project is to advance commercial interests of Cook Inlet fishermen by swelling the salmon runs from which they will eventually make their catch. The Enhancement Project is operated by an organization primarily funded by a voluntary self-imposed tax instituted by the Cook Inlet fishing industry on the value of its salmon catch. In the words of the Kenai Refuge Manager, in a memorandum to the Department of Interior's Regional Solicitor:

> The *primary purpose of the enhancement activity is to supplement sockeye catches* for East Side Cook Inlet set-net commercial fishermen, and for lower Cook Inlet enhancement projects.
>
> A secondary purpose is use of the excess eggs taken from Tustumena in a CIAA cost recovery project to help finance the Tustumena lake and lower Cook Inlet sockeye salmon enhancement projects.
>
> *The activity is no longer experimental in nature, nor is restoration of fish stocks an objective. It is strictly an enhancement effort to increase the number of sockeye salmon available to the commercial fishery.*

Memorandum from Kenai Refuge Manager to Regional Solicitor 2-3 (undated), ER 224-26 (emphasis added). The Fishery Management Plan for the Kenai Refuge characterizes the purpose of the Enhancement Project as "commercial enhancement of sockeye salmon populations in . . . Tustumena lake[ ]." This primary purpose is not contradicted by evidence that the Enhancement Project serves other secondary non-commercial purposes, including providing a general benefit to the fishery commonly used by commercial and recreational fishermen alike. Incidental purposes do not contradict that the Enhancement Project's principal aim is stock enhancement for the commercial fishing industry.[10]

[10] The primary effect of the Enhancement Project is to aid commercial enterprise of fishermen. More than eighty percent of the salmon produced by the Enhancement Project are

[10]USFWS's own definition of "commercial enhancement," as set forth in the Kenai Refuge Fishery Management Plan, confirms this conclusion. According to this definition, although commercial enhancement "is primarily directed toward maintaining commercial fisheries," "[s]ome sport and subsistence harvest of the enhanced fish may occur."

caught by commercial fishermen, who realize over $1.5 million in additional annual revenue from project-produced fish. USFWS documents highlight the primary effect of the Enhancement Project to aid commercial enterprise. For example, the July 1997 EA states that "[i]t is apparent because commercial fishing economics is emphasized . . . the main reason for continuing the project is economic[ ] in nature." Similarly a USFWS "Briefing Statement" concludes that "[w]e should consider [CIAA's cost-recovery harvest] to be a commercial fishing operation." The 1997 Compatibility Determination concludes that the Enhancement Project "primarily benefits Eastside Cook Inlet set-net commercial fishermen." In light of this primary effect, any incidental benefit to sport fishermen or others is not controlling. The incidental benefit that the program may provide to recreational and sport fishermen is subordinate to the primary benefit conferred on the commercial fishing industry.

In light of the unmistakable primary purpose and effect of the Enhancement Project, we reject arguments advanced by the USFWS that were credited by the district court.[11] The district court reasoned in part that the CIAA is itself a non-profit organization. But the non-profit status of the CIAA cannot be controlling because its non-profit activities are funded by the fishing industry and are aimed at providing benefits to that industry. The CIAA's continued funding and operation is dependent upon the revenues of commercial fishermen, and we have previously recognized that even non-profit entities may engage in commercial activity. *Dedication and Everlasting Love to Animals v. Humane Soc.*, 50 F.3d 710, 713 (9th Cir. 1995) ("A nonprofit organization . . . may engage in commercial activity.").[12]

[11]The district court did not give the same weight to considerations of purpose and effect as we do here. That is perhaps because, as above indicated, our prior precedent has not given guidance on this issue.

[12]The CIAA itself, to some extent, engages in commercial activity through its cost-recovery sale of the excess salmon produced each year by

In addition, the district court relied on the involvement of the State of Alaska, which previously had run the stocking project to research the viability of artificially enhancing salmon runs. But prior management activity and present regulatory control by the State of Alaska is irrelevant to assessing the primary purpose and effect of the current Enhancement Project. When the State had direct control of operations, the project's primary purpose was research-oriented. As set forth in the 1985 Memorandum of Understanding, the project was aimed at researching the viability of techniques to enhance the salmon run and evaluating the side effects of stocking, including its effect on lake-reared fish, escapement levels, and the incidence of disease in the salmon population. But now the project, as run by the CIAA, is aimed at enhancing salmon runs to increase the catch of commercial fishermen. The purpose of the project has changed from research on techniques to practical operations to swell the catch of fish and the commerce thereon. That the State maintains regulatory control over the Enhancement Project, by its permitting authority over the CIAA's hatchery operations, *see* Alaska Stat. §§ 16.10.380, 16.10.400(a) (2003), does not matter. The State regulates an array of commercial enterprises, from cruise ship operation to oil exploration. *See, e.g.,* Alaska Stat. §§ 31.05.090, 46.03.460 *et seq.* (2003). That an industry or activity is regulated does not mean that it is no longer a commercial activity.

Furthermore, the essential nature of the Enhancement Proj-

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the Enhancement Project, from which it realizes nearly one million dollars in annual revenue. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975) ("[T]he exchange of . . . a service for money is 'commerce' in the most common usage of that word."). We need not stress this factor, for in light of the primary purpose and effect to benefit the commercial activities of fishermen, our conclusion that a commercial enterprise prohibited within wilderness has been shown would remain the same even if the CIAA discarded without sale all fry supplementary to the stocking program.

ect is not changed merely because the commercial benefit derived from the Enhancement Project is conferred when fishermen make their salmon catch outside the bounds of the Kenai Wilderness. It is correct that what the Wilderness Act bars is the operation of a "commercial enterprise . . . *within* any wilderness area." 16 U.S.C. § 1133(c) (emphasis added). But it is not disputed that substantial and essential parts of the Enhancement Project's operation, the collection of eggs taken to a hatchery and the stocking of six million fry returned to Bear Creek, occur within the Kenai Wilderness.[13]

Implicit in the justifications urged for the project is the premise that we may recognize that the benign purposes of the project should be permitted to continue because the Wilderness Act resulted from a "compromise" of the legislature.[14] But regardless of any tradeoffs considered by Congress in enacting the Wilderness Act, we interpret and apply the language chosen by Congress, for that language was chosen in order to incorporate and effectuate those tradeoffs. The plain language of the Wilderness Act states that there shall be "*no* commercial enterprise" within designated wilderness. 16 U.S.C. § 1133(c) (emphasis added). This mandatory language does not provide exception to the prohibition on commercial enterprise within wilderness if aimed at achieving a benign goal for commerce with modest impact on wilderness. That

[13]If we were to accept the argument that the Enhancement Project, despite its commercial aims, is exempt from the Wilderness Act because the project's commercial benefit is conferred outside the wilderness, we would likely soon face arguments that other commercial operations, more intrusive on the wilderness, might be sustained under the Wilderness Act, if transactions constituting commerce occur outside of the wilderness area's bounds. The weakness in this line of argument is obvious if we consider that a logging operation within the wilderness could not sensibly be urged to be permissible, even though the trees harvested were sold outside of the wilderness area.

[14]The Regional Solicitor's opinion on which USFWS relied urges that "[the Wilderness Act] is a legislative compromise that by no means reflects pure or absolute preservationism."

compromises may have been made in the legislative process does not alter an analysis of Congress's words of proscription based on traditional canons of statutory construction. *See American Ass'n of Retired Persons v. E.E.O.C.*, 823 F.2d 600, 604 (D.C. Cir. 1987) ("[S]tatutes are records of legislative compromise, and the best guide to the purposes of a statute is the language of the statute itself.").

[11] We must abide by Congress's prohibition of commercial enterprise in wilderness and may not defer to the contrary interpretation argued by the USFWS. In light of the clear statutory mandate, the Wilderness Act requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce. By contrast, the Enhancement Project is a commercial enterprise within the boundaries of a designated wilderness and violates the Wilderness Act.

III

As an alternative holding in support of our decision, even if we were to assume that the Wilderness Act's prohibition on commercial enterprise within the wilderness is ambiguous, we would reach the same conclusion that the Enhancement Project offends the Wilderness Act. Assuming ambiguity in the scope of the prohibition, under *Mead* agency action is not entitled to heightened *Chevron* deference unless the agency can demonstrate that it has the general power to "make rules carrying the force of law" and that the challenged action was taken "in the exercise of that authority." *Mead*, 533 U.S. at 226-27. Administrative interpretations not meeting these standards are entitled not to deference, but to a lesser "respect" based on the persuasiveness of the agency decision. *Id.* at 228; *Skidmore*, 323 U.S. at 139-40.

Applying *Mead*, we conclude that this case involves only an agency's application of law in a particular permitting context, and not an interpretation of a statute that will have the

force of law generally for others in similar circumstances. The issuance of a permit by a federal agency cannot in this case be characterized as the exercise of a congressionally delegated legislative function. *Mead*, 533 U.S. at 229-30. Even when considered together, the Special Use Permit and the underlying documents supporting it do not "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling." *Id.* at 232.

Pursuant to the NEPA process, the USFWS issued several documents before granting the CIAA a Refuge Special Use Permit for the Enhancement Project. These documents included the EA, a Mitigated Finding of No Significant Impact, a Wilderness Act Consistency Review, and a Compatibility Determination. Only the Consistency Review and Compatibility Determination contain legal analysis of the Wilderness Act. Both the Consistency Review and the Compatibility Determination speak in terms specific to the Enhancement Project, and do not address general principles of law.[15] The analysis that these documents give to the permissibility of the Enhancement Project relies on an opinion letter prepared by the Department of the Interior's Regional Solicitor's office. Entitled "Kenai National Wildlife Refuge; Tustumena Lake Enhancement Project," this opinion letter speaks only to the permissibility of the CIAA-operated Enhancement Project in Tustumena Lake, and does not attempt to draw broader conclusions regarding the permissibility of this type

[15]In answering the question of whether fishery enhancement is an appropriate activity in the designated wilderness, the Consistency Review quotes an opinion of the Department of the Interior Regional Solicitor's office concluding that the "[USFWS] has administrative discretion sufficient to grant [CIAA] a special use permit for operation of a compatible enhancement project in the Kenai Wilderness." The Consistency Review relies on the same Solicitor's opinion, and concludes that "the proposed action is consistent with the legal requirements of the Wilderness Act and ANILCA." These conclusions are inconsistent with a view that the USFWS intended the analyses in these documents to have legal force beyond determination of the permissibility of this Enhancement Project.

of enterprise within wilderness. Nothing in the review documents or the Solicitor's opinion would bind the USFWS to permit a similar activity in another wilderness.

We recently stated in the context of the National Marine Fisheries Service's interpretation of the High Seas Compliance Act, 16 U.S.C. § 5501-5509, that "[i]nterpretations such as those in opinion letters . . . do not warrant *Chevron*-style deference." *Turtle Island Restoration Network v. Nat'l Marine Fisheries Service*, 340 F.3d 969, 975 n.10 (9th Cir. 2003) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).[16] The Solicitor's opinion relied upon by the USFWS in issuing the Special Use Permit to CIAA was not a document intended to have the general force of law. *See* generally Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 58 (1990) (surveying the landscape of deference to agency action and concluding that "[i]nterpretations presented in [opinion letters] do[ ] not have the force of law"). Neither can the project-specific documents that rely upon this opinion be considered to carry the general force of law.

Under *Mead* and *Skidmore*, the weight that we are to give an administrative interpretation not intended by an agency to carry the general force of law is a function of that interpretation's thoroughness, rational validity, and consistency with

[16]There has been judicial suggestion that Solicitor's opinions specifically are not entitled to *Chevron* deference. *Manning v. United States*, 146 F.3d 808, 814 n.4 (10th Cir. 1998) (addressing a Department of the Interior Solicitor's opinion regarding the Multiple Use Mining Act of 1955). In terms of the principles set forth in *Chevron* and *Mead*, we likewise conclude that Solicitor's opinions, helpful as they may be to agencies which study them, cannot properly be viewed as an administrative agency interpretation of statute that has the force of law. Such opinions, which normally are the product of individual lawyers advising their client agencies, and which do not in their formulation involve procedural protections comparable to an agency's rulemaking procedures, do not invoke *Chevron* deference.

prior and subsequent pronouncements. *Skidmore*, 323 U.S. at 140. *Mead* adds as other relevant factors the "logic[ ] and expertness" of an agency decision, the care used in reaching the decision, as well as the formality of the process used. *Mead*, 533 U.S. at 228, 235. Even if we assume the Wilderness Act's prohibition on commercial enterprise to be ambiguous, the USFWS's permitting of the Enhancement Project "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 481 (2001). Whatever else might be done permissibly within wilderness in extraordinary circumstances for purposes relating to conservation or preservation of the wilderness, we conclude that it is "quite clear" that conduct with the primary purpose and effect to aid commercial enterprise cannot be countenanced.

Moreover, the USFWS's decision-making process shows little attention to the precise question of whether the Enhancement Project is a commercial enterprise. Although the USFWS argues that the Regional Solicitor was specifically asked if the project was a precluded commercial enterprise, the issue of commercial enterprise was not addressed explicitly by the Solicitor's opinion upon which the USFWS relied; the Solicitor's opinion cannot be considered persuasive on interpretation of a statutory term that it does not discuss with specificity.[17] And the record before the agency in our view supports a conclusion squarely contrary to that reached by the USFWS.

[17]On the day before the USFWS's issuance of the Special Use Permit, the Regional Solicitor issued a second letter giving further consideration to the issues addressed in the initial opinion letter. This second letter concludes that § 1315(b) of ANILCA does not prohibit fishery enhancement projects in Alaskan refuge wilderness areas. ANILCA § 1315(b) permits fishery enhancement "[i]n accordance with the goal of restoring and maintaining fish production in the State of Alaska." *Id.* However, this letter gives no express consideration to the Wilderness Act's specific prohibition on commercial enterprise within a designated wilderness. As such it is not helpful or persuasive in interpreting the Wilderness Act.

The final USFWS decision that the Enhancement Project is not a commercial enterprise contains little analysis of the commercial enterprise issue. Relying on the Regional Solicitor's opinion, the Wilderness Act Consistency Review devotes only a few sentences to the question of whether the Enhancement Project is a commercial enterprise, concluding that close state regulation of the project obviates the commercial enterprise issue. We have concluded to the contrary that state regulation does not preclude characterizing as a commercial enterprise an activity with the primary purpose and effect to benefit commerce. The USFWS analysis on consistency was not thorough, *see Skidmore*, 323 U.S. at 140, and we are not impressed by "persuasiveness of the agency's position." *See Mead*, 533 U.S. at 228. We do not consider the USFWS decision to have significant "rational validity," *Skidmore*, 323 U.S. at 140, or to reflect the product of specialized agency expertise. *Mead*, 533 U.S. at 228, 235.

[12] Having considered the *Mead* and *Skidmore* factors, we are not persuaded by the agency's analysis. We hold, alternatively, that even if the term "commercial enterprise" within designated wilderness is ambiguous, the Enhancement Project under the total circumstances is a prohibited commercial enterprise within wilderness.[18]

[18]Plaintiffs also assert that the Enhancement Project violates the Wilderness Act's requirement that any action taken within a federally-designated wilderness area preserve the "natural conditions" that are a part of the "wilderness character" of such an area, 16 U.S.C. §§ 1131, 1133, and also that the project violates the Refuge Act's mandate that special use permits be issued only after a determination that "such uses are compatible with the major purposes for which such areas were established." 16 U.S.C. § 668dd(d)(1)(A). Because we have determined that the district court erred in granting summary judgment to the USFWS because the Enhancement Project is a prohibited commercial enterprise, we need not and do not consider these additional claims.

IV

[13] Plaintiffs were entitled to prevail on their motion for summary judgment establishing that the USFWS's permit for the commercial enhancement program violated the Wilderness Act. Plaintiffs were entitled to gain a final judgment setting aside the USFWS's permit. Plaintiffs were entitled to gain a final judgment enjoining operation of the Tustumena Lake Sockeye Salmon Enhancement Project.

REVERSED and **REMANDED** for further proceedings not inconsistent with this opinion. Costs shall be borne by Defendant.[19]

[19]Plaintiff Wilderness Society has requested an award of reasonable attorney's fees under the Equal Access to Justice Act. We do not reach this issue. Plaintiffs may file a motion seeking such an award of fees, to be addressed after defendant has had an opportunity to be heard.

United Southeast Alaska Gillnetters
P.O. Box 23378, Ketchikan, AK 99901 Phone & Fax (907) 247-2471 Email. usa_gillnetters@att.net

February 19, 2004

The Honorable Scott Ogan, Chair
Senate Resources Committee
State Capitol, Room 103
Juneau, AK 99801 Send Via Fax: 465-3265

Dear Senator Ogan,

The United Southeast Alaska Gillnetters (USAG) is an association of about 150 small business owners who catch salmon by drift gillnetting in Southeast Alaska and market salmon throughout the United States. Many of our members also participate in other fisheries such as crab, shrimp, longline, and dive fisheries.

USAG strongly supports SJR 26 asking the Justice Department to appeal the decision by the Ninth Circuit Court of Appeals to exclude salmon enhancement from Tustumena Lake. This resolution rightly identifies the fact that in Alaska we have a large number of acres of wilderness and to be restricted from using these areas in traditional ways would be a very real hardship on the many Alaskans who depend on them one way or another for their livelihood or recreational enjoyment. More than this, we are seeing a gradual erosion of what can be done in and around wilderness areas. The commercial fishing industry has been restricted from fishing the waters of Glacier Bay National Park, a wilderness area, and now we cannot enhance fish runs by using a freshwater lake in a wilderness area. Many of our fishing districts here in Southeast are located adjacent to wilderness areas (Misty Fjords National Monument in district 1 for example) and I am sure the Wilderness Society would like nothing better than to stop our fishing along the shorelines in these areas. We believe that this movement toward restricting the uses in and around wilderness areas must be stopped now and this resolution is one step in this direction.

SJR 26 calls for the Departments of Interior and Justice to appeal the Tustumena decision and we believe this is appropriate. Certainly the Cook Inlet Regional Aquaculture Association does not have the resources to pursue such an appeal. It is our hope that if Interior or Justice will not accept this duty, that the State of Alaska will pursue correcting this wrongful court action. The decision itself harms commercial and subsistence fishermen in Cook Inlet but even more important is the precedence it sets

concerning activities in and around Alaska's wilderness areas. We are again on a slippery slope that will lead to reduced activity and economic health of the communities that depend in part on the resources of these wilderness areas. We urge the Senate Resources Committee to approve this resolution.

Yours truly,

Kenneth Duckett
Executive Director

cc: Senator Wagoner Via Fax: 465-4779
Southern Southeast Regional Aquaculture Association Via fax to: 225-1348
Northern Southeast Regional Aquaculture Association Via fax to: 747-1470
Douglas Island Pink and Chum Via fax to: 463-3213
United Fishermen of Alaska Via email

COOK INLET
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February 19, 2004

The Honorable Thomas Wagoner
State Capitol, Room 427
Juneau, AK 99801-1182

Re: Senate Joint Resolution 26 – Salmon Enhancement in Wilderness Areas

Dear Senator Wagoner:

The Cook Inlet Aquaculture Association (CIAA) would like to thank you for recognizing the importance of the Tustumena Lake Sockeye Salmon Enhancement Project to the Cook Inlet fishing community; and, in recognizing the important implications to the State of Alaska as a result of the 9th Circuit Court of Appeals' failure to fully consider all the facts in their decision to enjoin the Tustumena Lake project.

The Tustumena Lake Salmon Enhancement Project has been in continuous operation since 1974, developed and managed first by the Alaska Department of Fish and Game, and now managed by the CIAA. For over 29 years this well designed project has provided fish for sport, personal use, subsistence and commercial users in the heart of Alaska's Cook Inlet fishery. It has evolved into a model for hatchery supported enhancement projects throughout Cook Inlet and the rest of the State.

On behalf of CIAA, I support SJR 26 and recognize the following facts:

- CIAA is not a "commercial operation." We were formed under Alaska Statutes Section 16.10.380 as a "qualified" not-for-profit Regional Association that includes all user groups and representative local communities.
- All fish released by CIAA are considered part of the common property fishery resource whose harvest is determined through the State's public process.
- The only user group restricted from harvesting fish from a CIAA project is commercial fishermen.
- CIAA may harvest some of the fish returning to a project to recover project costs. Cost recovery goals are set in the Annual Management Plan through a public process.
- The Tustumena Lake project is limited in size to prevent conflicts with the State's management priorities and other interests.

- CIAA collects gametes (eggs and sperm) from broodstock in proportion to the spawning migration. CIAA does not collect broodstock based on any phenotypic (genetic) characteristics.
- All fish released to Tustumena Lake are screened for disease prior to release.
- All fish released to Tustumena Lake are marked. CIAA annually monitors Tustumena Lake tributaries to assess the impact on other spawning populations.
- All fish released to Tustumena Lake are "incubated" at Trail lakes Hatchery. Hatchery rearing (growth) is minimal.
- The Tustumena Lake project supports three lower Cook Inlet sockeye projects which provide a substantial resource for both commercial and personal use harvests.
- CIAA annually monitors the Tustumena Lake smolt migration. This information is important to the management of the Cook Inlet fishery and would not be available without the project.

The 9th Circuit Court of Appeals decision to enjoin the Tustumena Lake project severely restricts CIAA's ability to complete its goal of providing for and protecting the Cook Inlet salmon resource. The decision also limits the ability of the State to manage its fishery resources, particularly those resources providing the basis for the State's rural economy.

Sincerely,

Gary Fandrei

Gary Fandrei, Executive Director
FAXed 2/19/04, original to follow

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Web posted Sunday, January 4, 2004

Impact of court decision unknown in salmon project

Staff and wire reports

The impact of Tuesday's decision by the 9th Circuit Court of Appeals to declare a long-running salmon enhancement project in Tustumena Lake illegal under federal law has yet to sink in, but it may be appealed to the U.S. Supreme Court, an official with the nonprofit agency that has conducted the stocking operations since the mid-1990s said Friday.

Though the court said the stocking program that releases 6 million salmon fry into the lake each year likely doesn't harm the environment or diminish the enjoyment of visitors to the Kenai National Wildlife Refuge, the program clearly runs counter the intent of Congress when it passed the Wilderness Act of 1964.

"At this point, we haven't had a chance to fully evaluate the impact of decision," said Gary Fandrei, Cook Inlet Aquaculture Associa-tion's executive director. "Until we do, we probably don't fully understand the repercussions of the decision."

He went on to say he wasn't certain what the appeal procedure was, but said CIAA might be the entity to file such an appeal.

"We haven't made a decision yet," he said.

The CIAA board of directors' executive committee is expected to meet this week to discuss the decision's fallout, followed by a full board meeting Jan. 17, where members likely would "come up with a decision for future plans with respect to this decision and the Tustumena Lake project," Fandrei said.

In ordering a halt to the long-running salmon stocking program, the federal appeals court called it an improper commercial activity inside a wilderness area.

The court overturned two earlier decisions Tuesday, ruling that the project at Tustumena Lake to help commercial fishing is barred inside wilderness areas of the Kenai National Wildlife Refuge.

"There is no exception given for commercial enterprise in wilderness when it has benign purpose and minimally intrusive impact," the court ruled.

Hatchery-incubated red salmon make up about 10 percent of the run up the Kasilof River into Alaska's fifth-largest lake. The fish are caught primarily by commercial fishers and by dipnetters and anglers. Eggs from Tustumena Lake also are used to enhance several other runs in Southcentral Alaska.

"It's another nail in our coffin," said Paul Shadura, president of the Kenai Peninsula Fishermen's Association, a setnetter group that helps pay for the salmon project. "This program is extremely important to

pay for the salmon project. "This program is extremely important to the commercial fishermen."

The lawsuit was brought by The Wilderness Society and the Alaska Center for the Environment.

"This goes right to the heart of the Wilderness Act and whether any type of extractive resource activities are going to be allowed in a wilderness area," said Allen Smith, Alaska senior policy analyst for The Wilderness Society. "The court ruled 11-0 that the Wilderness Act had a bright line in it."

The ruling overturned a 2000 decision by U.S. District Judge James Singleton and a 2-1 9th Circuit decision by a three-judge panel last January supporting the salmon enhancement program.

Both earlier decisions deferred to the administrative decisions of the Kenai National Wildlife Refuge, which allowed the project. The ruling last week says the agency does not have that latitude.

"What's important here is the agencies don't have discretion to fudge around the edges" of what's permissible in wilderness, said Trustees for Alaska attorney Rebecca Bernard, who argued the case last September.

In their decision Tuesday, the appeals court judges said the enhancement project was unlikely to destroy the area's wilderness values.

"Surely this fish-stocking program, whose antecedents were a state-run research project, is nothing like the building of a McDonald's restaurant or a Wal-Mart store on the shores of Tustumena Lake," Judge Ronald Gould wrote.

But, he concluded, the law is absolute.

"The Wilderness Act requires that the lands and waters duly be designated as wilderness must be left untouched, untrammeled and unaltered by commerce," he wrote.

The project, which hatches eggs from salmon native to the lake and returns them as fingerlings, was started by the state and later turned over to CIAA.

Federal biologists have long had concerns that the project might introduce disease or disrupt the genetic mix of natural sockeye salmon runs in Tustumena Lake.

A list of 34 regulations was meant to protect the several genetic strains in the lake, said Gary Sonnevil, a field supervisor with the U.S. Fish and Wildlife Ser-vice.

Advocates of the program say it's not a big moneymaker ‹ fewer than 100,000 adult salmon return thanks to the stocking, they say. But it can help smooth out production in years when natural runs decline.

"It's a very key element of our programs," Fandrei said.

THE WILDERNESS SOCIETY * ALASKA CENTER FOR THE ENVIRONMENT

February 18, 2004

Hon. Scott Ogan, Chair
Senate Resources Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Re: SJR 26, Salmon Enhancement in Wilderness Areas

Dear Senator Ogan:

We write to offer our comments on SJR 26, Salmon Enhancement in Wilderness Areas. This resolution is scheduled for hearing before the Senate Resources Committee on February 20, 2004. We ask that these comments be included in the hearing record.

As an initial matter, we believe strongly that the Ninth Circuit decision is a common sense decision that respects Congress' intent in creating wilderness areas. The decision also protects the long-term health of the Kasilof River wild sockeye salmon run and the Tustumena Lake ecosystem. We are aware, though, that because of the timing of the Court's decision, the Cook Inlet Aquaculture Association (CIAA) now has a problem on its hands – what to do with the 6 million sockeye salmon fry that it planned to stock into Tustumena Lake this spring. In an effort to help solve this immediate problem in the final phase of the project, we've contacted the CIAA and the U.S. Fish and Wildlife Service and have scheduled a meeting for Friday, February 20, to learn more about the situation and to brainstorm about possible solutions.

The Wilderness Society decision was issued on December 30, 2003, by eleven judges of the Ninth Circuit (a full quarter of the Court's judges), who held unanimously that the Tustumena Lake salmon stocking project violates the Wilderness Act's prohibition on commercial activities in federally designated wilderness. The judges looked to the plain language of the Wilderness Act, in which the United States Congress stated that "there shall be no commercial enterprise . . . within any wilderness area . . . ." (16 U.S.C. § 1133(c).) The decision recognizes that Congress' goal in enacting the Wilderness Act was to set aside some areas as wild places off limits to commercial activity: "These statutory declarations show a mandate of preservation for wilderness

and the essential need to keep commerce out of it." The opinion quotes President Lyndon B. Johnson as remarking, as he signed the Wilderness Act into law in 1964:

> "If future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it."

In short, the Ninth Circuit decision gives effect to Congress' intent that wilderness areas be left in their natural state, off-limits to man's commercial undertakings.

The Wilderness Society and the Alaska Center for the Environment initiated this lawsuit in 1998 both because this commercial salmon enhancement operation doesn't belong in a designated wilderness, and because of the project's potential to harm the wild sockeye run by introducing disease, reducing genetic diversity, and altering the natural balance of the Tustumena Lake ecosystem. By bringing the project to a close, the Ninth Circuit decision helps to perpetuate the wild sockeye salmon run and ensure that it will remain healthy for future generations of people seeking to use and enjoy the wilderness areas of the Kenai National Wildlife Refuge.

The decision will not affect the State of Alaska's fish and wildlife management and research programs designed to monitor and manage the resources for all Alaskans. Legitimate state management activities aimed at protecting the fishery resource so that it remains available to commercial, sport, subsistence, and recreational users are not undertaken for the primary purpose and benefit of commercial fisheries and will not be affected by this decision. The decision also will not affect outfitting and guiding activities in designated wilderness, because these are governed by a different provision of the Wilderness Act, 16 U.S.C. § 1133(d)(5), that is not addressed in *The Wilderness Society* decision.

Enclosed is a factsheet that gives more information about the Ninth Circuit decision in *The Wilderness Society v. U.S. Fish and Wildlife Service* and its implications. We hope this information will assist you and the members of the Senate Resources Committee as you consider taking action on SJR 26.

Sincerely,

Nicole Whittington-Evans

Nicole Whittington-Evans
Assistant Regional Director
The Wilderness Society

Nicole Whittington-Evans for

Cliff Eames
Public Lands Director
Alaska Center for the Environment

The Wilderness Society comments on SJR 26, cont.

cc: Governor Frank Murkowski
Rowan Gould, Regional Director, U.S. Fish & Wildlife Service
Gary Fandrei, Executive Director, Cook Inlet Aquaculture Association

THE WILDERNESS SOCIETY * ALASKA CENTER FOR THE ENVIRONMENT

FACTSHEET

The Wilderness Society v. U.S. Fish & Wildlife Service (9th Cir., Dec. 30, 2003) (en banc)
Tustumena Lake Sockeye Salmon Enhancement Project
Andy Simons Wilderness, Kenai National Wildlife Refuge, Alaska

- The Tustumena Lake Sockeye Salmon Enhancement Project is run by a commercial fishermen's association that takes sockeye salmon eggs from a tributary of Tustumena Lake within designated wilderness in the Kenai National Wildlife Refuge, grows these eggs into fry at the Trail Lakes Hatchery, and stocks 6 million fry back into the wilderness lake, where they feed and grow into oceangoing smolts. The project produces 60,000 surplus sockeye salmon each year, over 95% of which are caught and sold by Cook Inlet commercial fishermen.

- Conservation groups have objected to the Tustumena Project for years because:

  - It is a commercial activity operating in violation of the Wilderness Act prohibition on commercial enterprise within wilderness areas;
  - It could harm the wild sockeye salmon run by introducing disease and reducing genetic diversity;
  - It is inconsistent with the purpose of the Kenai Refuge to protect the natural diversity of fish and wildlife populations.

- Agency biologists have for years raised concerns about the Tustumena Project's potential to harm the wild sockeye salmon run by introducing disease, reducing genetic diversity, and altering the natural balance of the Tustumena Lake ecosystem.

- When the U.S. Fish & Wildlife Service undertook an environmental analysis of the project in the 1990s, conservation groups commented that the project violates the Wilderness Act. When the Service concluded its environmental analysis and issued a special use permit for the project in 1997, The Wilderness Society and Alaska Center for the Environment, represented by Trustees for Alaska, took the federal agency to court.

- On December 30, 2003, an "en banc"[1] 11-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled unanimously that the Tustumena Project is a commercial enterprise operating within a federal designated wilderness area in violation of the Wilderness Act. (*slip op.* at 13247.)

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[1] An "en banc" panel of 11 judges is convened to rehear an appeal when a majority of the Court's active judges concludes that the initial decision by the usual 3-judge panel was wrong. "En banc" means "full court," but in the Ninth Circuit an en banc panel is composed of 11 randomly selected judges rather than all 44 of the Court's judges.

- The Court's common sense analysis is based on the plain meaning of the Wilderness Act, which states that, subject to exceptions not relevant in this case, "there shall be no commercial enterprise . . . within any wilderness area . . . ." (16 U.S.C. § 1133(c).)

- The Court found that the Tustumena Project is an illegal commercial activity within wilderness because both its primary purpose and its primary effect are "to advance commercial interests of Cook Inlet fishermen by swelling the salmon runs from which they will eventually make their catch." (*slip op.* at 13264.) Because "substantial and essential parts" of the project occur within the wilderness boundaries, (*slip op.* at 13268), the project violates the prohibition.

- The Court's opinion recognizes that Congress' goal in enacting the Wilderness Act was to set aside some areas as wild places off limits to commercial activity: "These statutory declarations show a mandate of preservation for wilderness and the essential need to keep commerce out of it." (*slip op.* at 13259.) The opinion quotes President Lyndon B. Johnson as remarking, as he signed the Wilderness Act into law in 1964:

  > "If future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it." (*slip op.* at 13248.)

  This decision has important implications for wilderness nationwide in light of increasing pressure for commercialization of wilderness areas.

- The Ninth Circuit sent the case back to the District Court for issuance of an order halting the Tustumena Project. (*slip op.* at 13247.) By shutting down the project, the decision helps to perpetuate the wild sockeye salmon run and ensure that it will remain healthy for future generations of people seeking to use and enjoy the wilderness areas of the Kenai National Wildlife Refuge.

- The Court declined to reach a second issue in the case – whether the Tustumena Project impairs the wilderness area's "natural conditions" in violation of the Wilderness Act. (*slip op.* at 13273 n.18.) The Court acknowledged, however, that this issue is in dispute, and agreed with The Wilderness Society and Alaska Center for the Environment that the Tustumena Project does "not appear to be aimed at furthering the goals of the Wilderness Act." (*slip op.* at 13261.)

- Because the Tustumena enhancement project was increasing the lake's sockeye salmon run by only about 10%, halting the project should have little impact on the Cook Inlet sockeye salmon commercial fishery. The benefits of maintaining the "natural condition" of the wild run, as called for by the Wilderness Act, and eliminating the potential of introducing disease and reducing genetic diversity, far outweigh the relatively small gain to commercial fishermen.

Fairbanks Daily News-Miner

Court ruling leaves 6 million salmon fry in limbo

By HAL SPENCE

Saturday, January 31, 2004 -

KENAI

Six million salmon fry swim now in a kind of limbo at the Trail Lakes Hatchery in Moose Pass since the 9th U.S. Circuit Court of Appeals banned their release into Tustumena Lake.

The fry represent a potential return of 100,000 salmon, averaging four pounds apiece, if eventually released to grow in the wild.

The ruling last month, in a lawsuit filed in 1998 by The Wilderness Society and the Alaska Center for the Environment, overturned lower court decisions that had upheld the program run by Cook Inlet Aquaculture Association, which has stocked the lake with juvenile salmon since 1997.

The plaintiffs had argued that the stocking program, started in 1993 by the aquaculture organization under a contract with the Alaska Department of Fish and Game, violated provisions of the 1964 Wilderness Act.

The 9th Circuit agreed, ruling 11-0 that the stocking program, while likely harmless to the environment, did run counter to the intent of Congress that no commercial activities be conducted in wilderness areas.

Robin West, manager of the Kenai National Wildlife Refuge where Tustumena Lake is located, said the Department of the Interior is considering an appeal to the U.S. Supreme Court.

In the meantime, Cook Inlet Aquaculture Association has a growing problem, said director Gary Fandrei.

"The ruling enjoining the project leaves us in question about what we would do with the 6 million fish we have in the hatchery," he said. "We have had no guidance from the U.S. Fish and Wildlife Service as to whether or not we are going to be able to stock those fish. We have had no direction from Fish and Game as to what we can do with those fish."

In the past, he said, the state has directed the association to kill any surplus fry. That would be costly and environmentally problematic.

The association has spent between $125,000 and $150,000 on the young salmon.

Of 6 million fry released into the lake, 600,000 to 900,000 would survive to the smolt stage and swim to the ocean. Some 60,000 to 120,000 adult salmon could then be expected to return _ to the nets and lines of commercial, sport and subsistence fishers or to spawn in Tustumena Lake.

"You'd be looking at a 4-pound average," Fandrei said, which would represent roughly $400,000 worth of fish.

But the program wasn't designed to add income to commercial fisheries, Fandrei said. It was meant to smooth out periodic dips in the numbers of fish returning from the sea.

Return rates are cyclic, he said. When runs are big, CIAA's stocking program has little effect. When runs are small, however, the added fish enhance the chances for fishermen, he said.

If the association has no choice but to kill the fish, a couple of bottles of bleach will do it. Essentially, it's just a matter of chlorinating the water, Fandrei said.

Once the fish are killed, the association would have as much as two tons of remains to get rid of.

Dead fish have been buried in landfills, and small amounts have been burned at the hatchery, but the hatchery's incinerator is too small to handle 6 million dead fry, he said.

Fandrei said he hopes it doesn't come to that. Perhaps the fish could be released into other Cook Inlet lakes, he said, suggesting Ursus, Bruin, Chenik and the upper and lower Paint lakes as possible choices.

Another alternative would be to keep the fish and raise them until they are smolt, which would take another 14 months. However, that would still mean transferring the fry to the Tutka Bay hatchery at Kachemak Bay.

The Trail Lakes Hatchery doesn't have the room, Fandrei said. For permitting purposes, some decision is needed by the middle of February as to where the fish might go.

If, by chance, a decision were reached allowing release into Tustumena, the hatchery would have until June.

The Interior Department contends that the 9th Circuit erred by not giving some deference to the administrative decision of the refuge regarding the stocking, West said. Additionally, the 9th Circuit, in an attempt to clear up some ambiguity used a definition of commercial enterprise not seen before.

West also said provisions of the Alaska National Interest Lands Conservation Act didn't appear to have received any attention in the court's review. He said that though nothing is written down specifically, it was Interior's opinion that the intent was to permit such noncommercial stocking programs.

"In a nutshell, the court focused directly on the Wilderness Act without any tempering by ANILCA," West said.

Allen Smith, Alaska senior policy analyst for The Wilderness Society, said recently that the issues went to the heart of the Wilderness Act and whether any type of extractive resource activities would be allowed in a wilderness area.

"The court ruled 11-0 that the Wilderness Act had a bright red line in it," he said.

Rebecca Bernard, attorney for Trustees for Alaska who argued the case for the plaintiffs, said the ruling meant agencies "don't have discretion to fudge around the edges."

Ninth Circuit Judge Ronald Gould wrote that under the act, areas designated wilderness "must be left untouched, untrammeled and unaltered by commerce."

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UNITED FISHERMEN OF ALASKA

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February 20, 2004

The Honorable Scott Ogan
Chair, Senate Resources Committee
State Capitol (Mail Stop 3100)
Juneau, AK 99801

Dear Senator Ogan,

United Fishermen of Alaska strongly supports SJR 26 asking the U.S. Department of Interior and U.S. Department of Justice to appeal the decision by the Ninth Circuit Court of Appeals to prohibit salmon enhancement in Tustumena Lake. We agree with the language of the resolution that this court decision erroneously concluded that the stocking of fry was an impermissible commercial activity, even though no commercial fishing takes place within the Wilderness area. We also agree that the threat that the decision imposes on fishery enhancement programs throughout the State has grave ramifications for a broad range of other recreation activities enjoyed by many Alaskans.

United Fishermen of Alaska represents 33 Alaska Commercial fishing organizations and hundreds of individual fishermen and fishing related businesses, altogether representing over 10,000 Alaska fishermen. We wholeheartedly support SJR 26.

Sincerely,

Bob Thorstenson, Jr.
President

CC: Senator Tom Wagoner

adn.com
Anchorage Daily News

Halt ordered to Tustumena fish stocking

COURT: Even harmless commercial activity not OK in wilderness areas.

By TOM KIZZIA
Anchorage Daily News

(Published: January 2, 2004)

HOMER -- A federal appeals court has ordered a halt to a long-running salmon stocking program in Tustumena Lake on the Kenai Peninsula, calling it an improper commercial activity inside a wilderness area.

The 9th U.S. Circuit Court of Appeals overturned two earlier decisions Tuesday, ruling that the project to help commercial fishing is barred inside wilderness areas of the Kenai National Wildlife Refuge.

"There is no exception given for commercial enterprise in wilderness when it has benign purpose and minimally intrusive impact," the court ruled.

Hatchery-incubated red salmon make up about 10 percent of the run up the Kasilof River into Alaska's fifth-largest lake. The fish are caught primarily by commercial fishermen and also by dipnetters and anglers. Eggs from Tustumena Lake also are used to enhance several other runs in Southcentral Alaska.

"It's another nail in our coffin," said Paul Shadura, president of the Kenai Peninsula Fishermen's Association, a setnetter group that helps pay for the salmon project. "This program is extremely important to the commercial fishermen."

The lawsuit was brought by The Wilderness Society and the Alaska Center for the Environment.

"This goes right to the heart of the Wilderness Act and whether any type of extractive resource activities are going to be allowed in a wilderness area," said Allen Smith, Alaska senior policy analyst for The Wilderness Society. "The court ruled 11-0 that the Wilderness Act had a bright line in it."

The ruling by the 11 judges sitting en banc overturned a 2000 decision by U.S. District Judge James Singleton and a 2-1 9th Circuit decision by a three-judge panel last January supporting the salmon enhancement program.

Both earlier decisions deferred to the administrative decisions of the Kenai National Wildlife Refuge, which allowed the project. This week's ruling says the agency doesn't have that latitude.

"What's important here is the agencies don't have discretion to fudge around the edges" of what's permissible in wilderness, said Trustees for Alaska attorney Rebecca Bernard, who argued the case last September.

In their Dec. 30 decision, the appeals court judges said the enhancement project was unlikely to destroy the area's wilderness values.

"Surely this fish-stocking program, whose antecedents were a state-run research project, is nothing like the building of a McDonald's restaurant or a Wal-Mart store on the shores of Tustumena Lake," Judge Ronald Gould wrote.

But, he concluded, the law is absolute.

"The Wilderness Act requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled and unaltered by commerce," he wrote.

The project, which hatches eggs from salmon native to the lake and returns them as fingerlings, was started by the state and later turned over to a nonprofit aquaculture association.

Federal biologists have long had concerns that the project might introduce disease or disrupt the genetic mix of natural sockeye salmon runs in Tustumena Lake. A list of 34 regulations was meant to protect the several genetic strains in the lake, said Gary Sonnevil, a field supervisor with the U.S. Fish and Wildlife Service.

"We don't want to lose any of those populations," Sonnevil said.

Red flags went up in 2002 after hatchery-reared salmon were found mixing with other genetic strains in the lake, Sonnevil said. Project managers say that problem was probably a one-time result of flooding in creeks that flushed spawners back into the lake.

Advocates of the program say it's not a big moneymaker -- fewer than 100,000 adult salmon return thanks to the stocking, they say. But it can help smooth out production in years when natural runs decline, they say.

"It's a very key element of our programs," said Gary Fandrei, executive director of the Cook Inlet Aquaculture Association, the fishermen-funded group that runs the salmon project. "I assume it's the end of the project, but there may be some other alternatives."

The program hatches eggs from Tustumena Lake at the Trail Lakes hatchery near Seward, then returns 6 million fingerlings annually to grow and migrate. Eggs from Tustumena Lake are used for other enhanced runs targeted by commercial boats, including China Poot Lake near Homer and Kirschner Lake in Kamishak Bay, Fandrei said.

The program started as an experiment in 1974 as the state looked for ways to invest its new oil wealth to improve then-depressed salmon runs, Sonnevil said. The number of fry released grew to 17 million by 1984. That proved to be too many for the food available in the lake, he said. Fry release was cut back to 6 million annually after 1987.

Meanwhile the lake had been designated as wilderness under the 1980 Alaska National Interest Lands and Conservation Act.

By 1993, the state was backing out of its enhancement role around Alaska and turned the Tustumena project over to Cook Inlet Aquaculture. The federal government prepared an environmental assessment in 1997 that concluded the commercial operation could go forward. Environmentalists sued in 1998.

Since then, plummeting salmon prices have meant a struggle both for fishermen and for the

aquaculture association, which depends on a tax based on the value of salmon catches. The association has kept the Tustumena project going lately with loans and federal grants aimed at helping the troubled industry.

Shadura said setnet fishermen from Ninilchik north to the Kasilof River would feel the most impact from loss of the hatchery fish.

Commercial fishermen, whose side was represented in the appeal by federal attorneys, say the project shouldn't be deemed "commercial" because other fishermen benefit and municipal representatives sit on the aquaculture association board.

"Once we release the fish they're public domain. This is not a fish farm situation or sea ranching," Shadura said.

The judges disagreed, calling it plainly commercial in purpose.

Environmentalists said they weren't out to target commercial fishermen, with whom they share many common interests.

"We both have at heart the goal of maintaining our wildlands to protect a fishery resource," Smith said. "When they try to get that little amount on top is where we have a conflict."

Reporter Tom Kizzia can be reached at tkizzia@adn.com or in Homer at 1-907-235-4244.

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