

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11312 SENATE RESOURCES

The Honorable Gene Therriault  
March 23, 2004  
Page 2

the state to expand the current level of expertise and gain valuable experience in administering the program and working to resolve program administration issues with the EPA, which retains oversight authority over state NPDES programs. Because administration of the NPDES program is complex and costly, and assumption of the full program would require DEC to develop additional expertise, it makes sense to take measured steps toward full assumption by beginning with a single industry sector.

I urge your prompt and favorable action on this measure

Sincerely yours,

Frank H. Murkowski  
Governor

Enclosure

## DEPARTMENT OF ENVIRONMENTAL CONSERVATION

### HB 546/SB 378

#### PARTIAL NPDES PRIMACY FOR TIMBER-RELATED WASTEWATER DISCHARGES

SB 378 and HB 546 instruct DEC to seek primacy for permitting timber-related waste discharges under the federal National Pollutant Discharge Elimination System (NPDES) discharge permitting program. Upon approval, the Alaska Department of Environmental Conservation (DEC), and not the U.S. Environmental Protection Agency (EPA), would issue discharge permits for the timber industry sector in Alaska.

#### The NPDES Program

The NPDES wastewater discharge permit program is established under Section 402 of the Clean Water Act (CWA). In Alaska, major industries with NPDES permits include timber, seafood, mining, and oil and gas. Municipal sewage treatment facilities also require NPDES permits. The CWA envisions that each state will seek primacy for the program and tailor it to the state's individual needs. Alaska is among only five states that have not yet sought primacy.

#### Partial Primacy

While primacy for the entire NPDES program is the norm, states have the option of seeking partial primacy for one or more specific industry sectors. Under a partial primacy arrangement, the state issues permits and conducts monitoring and compliance activities for the sector. EPA retains oversight authority. The Alaska water quality standards serve as the basis for all NPDES permits regardless of whether the EPA or the State implements the program.

#### Timber Sector Wastewater Discharges

NPDES permitting of timber sector discharges primarily focuses on permitting log transfer facilities.

- 98 log transfer facilities are eligible to be covered under an NPDES General Permit that governs the discharge of bark and wood waste into the marine environment.
- 98 log transfer facilities are eligible for coverage under the NPDES Multi-Sector General Permit for uplands stormwater management.
- All sawmills are eligible for coverage under the NPDES Multi-Sector General Permit for uplands stormwater management.
- Any new timber facility construction that disturbs greater than one acre is eligible for coverage under the NPDES construction general permit for stormwater management.
- Logging camps with domestic wastewater (approx. 12) require a permit. Most of them fall below the current EPA threshold for minor discharges and are currently issued a state, rather than an NPDES domestic wastewater discharge permit.

#### Why the Timber Sector?

The State of Alaska has significant expertise and a significant role in timber sector permitting and compliance activities. Partial primacy for timber-related discharges will provide an opportunity to test state NPDES primacy in a familiar industry sector.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

HB 546/SB 378

PARTIAL NPDES PRIMACY FOR TIMBER-RELATED WASTEWATER DISCHARGES

**Expected Benefits**

*Alaskans Protecting Alaska's Water Resources.* Alaskans should be in charge of protecting Alaska's environment. The State is committed to, and capable of protecting its own resources. Exercising timber sector wastewater permitting authority is an opportunity for the State of Alaska to demonstrate its commitment and competence.

*Rational Rules.* A state timber wastewater discharge permit program will be a part of a broader state program for regulating water quality. The state program will be based on six essential elements of a good regulatory program: unambiguous statutory authority, a documented basis for concern, protective standards, rational regulations, documented compliance, and enforcement.

*Fair, Predictable Enforcement.* A state program will include a coherent system for assessing compliance with permit terms and conditions. Permittees will know exactly what is expected of them. Along with clarity will come higher expectations for compliance and predictable enforcement.

*Efficiency and Timeliness.* With a state-run timber-related discharge permitting program, permit holders can expect their permits to be timely and current.

*Alaskans Accountable to Alaskans.* The mission, priorities, level of effort and performance measures of DEC's regulatory programs are subject to annual review and approval by the State Legislature. Planning and budgeting for a federally run NPDES program does not offer this opportunity for state control.

*Better Access to Rule Makers and Permit Writers.* A state run program will place rule makers and permit writers closer to the Alaskan public and permit holders. No longer will permits be written and enforced by federal staff unfamiliar with the State.

*A Focus on Results, Not Process.* The federal program focuses on consistent federal process instead of site-specific and risk-based results. The state program will focus on results.

**The Costs**

The Department projects a two-year (FY 2005 and FY 2006) effort to complete program development and transition work necessary to apply to EPA for timber sector NPDES primacy. Costs to develop and promulgate regulations, develop permitting procedures, secure legal and technical services, and prepare an application are anticipated at approximately \$400 thousand for each of the two-year development and transition effort. One-time federal grant funds are available to cover approximately one-half of the cost. The balance would be paid for with General Funds. Once the program is operating in FY 2007, annual costs would be about \$130 thousand per year. Permit fees would generate approximately \$30 thousand per year.



## RESOURCE DEVELOPMENT COUNCIL

Growing Alaska Through Responsible Resource Development

April 5, 2004

Senator Scott Ogan  
Chair, Senate Resources Committee  
Alaska State Legislature  
State Capitol, Room 103  
Juneau, Alaska 99801-1182

Re: SB 378 — Pollution Discharge & Waste Treatment/Disposal

Dear Senator Ogan:

On behalf of the Resource Development Council for Alaska, Inc. (RDC), I am writing to express our support for SB 378 — Pollution Discharge & Waste Treatment/Disposal.

RDC is a statewide non-profit business association representing companies from all of Alaska's basic industries — timber, tourism, fisheries, oil and gas and mining. Our membership also includes Native regional and village corporations, organized labor, local communities and industry-support firms. For nearly thirty years we have worked to expand Alaska's economy through the responsible development of the state's natural resources.

Over the past few months we have worked closely with both the Department of Environmental Conservation (DEC) and our members in the timber industry to determine how best to move forward with state primacy over National Pollution Discharge Elimination System (NPDES) permits. While 45 other states administer NPDES permits within their respective boundaries, the cost and complexity of the program have kept Alaska from following suit.

By creating a pilot-program for the timber industry, SB 378 will provide DEC with valuable expertise in administering NPDES permits. Only with this experience will the department and the regulated community truly understand the issues involved with state assumption of the entire NPDES program. A sector-specific program is an important incremental step toward future state assumption of the entire program.

SB 378 is a bill that deserves your full support and one that we urge the committee to pass. Thank you for considering our position on this important and forward-looking piece of legislation. Feel free to contact me with any questions.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL  
for Alaska, Inc.

Tadd Owens  
Executive Director

SJR

4

**SENATE COMMITTEE REPORT**  
**First Committee of Referral**

DATE: 1/21/03

FURTHER:

Date of 5-Day Notice: 1-30-03  
 (in accordance with Uniform Rule 23)

DATE TURNED  
 IN TO OFFICE: 2-3-03

Resources Committee considered SENATE JOINT RESOLUTION NO. 4

**SJR 4 ENDORSING ANWR LEASING**

Urging the United States Congress to pass legislation to open the coastal plain of the Arctic National Wildlife Refuge, Alaska, to oil and gas exploration, development, and production.

and recommends:

be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)

adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)

attached amendment(s)

adopt Letter of Intent by \_\_\_\_\_ Committee

further referral to \_\_\_\_\_ Committee

**Senate Bill:**

same title

new title

**House Bill:**

same title

technical title

new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#
Natural Res			✓	
Revenue			✓	

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
<i>Ben Stevens</i> Stevens	✓			
<i>Keith Seekins</i> SEEKINS	✓			
<i>Thomas A. Waggoner</i> WAGGONER	✓			
<i>Fred Dyson</i> DYSON	✓			
<i>Demetrius Lincoln</i> Lincoln		✓		
<i>Richard E. Epton</i> Epton			✓	
CHAIR: <i>Scott Ogan</i> Ogan	✓			

P. 3

offered  
by  
Sen Ertou  
2-3-03

Line 14

following "extent possible;

add

" and that Arctic  
Nationalal Wildt Wildlife  
Refuge production be  
debated in the context  
of fuel conservation  
efforts;

18

Failed  
4 no  
3 yes

ALASKA STATE CHAMBER OF COMMERCE

2003 Priority

Open ANWR

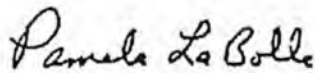
The Alaska State Chamber of Commerce supports Alaska's role in providing this nation with a major portion of its domestic oil and encourages the United States Congress to pass legislation opening the coastal plain of the Arctic National Wildlife Refuge to responsible exploration, development, and production of its oil and gas resources.

Oil exploration and development activity can be conducted in a manner that protects wildlife and the environment.

The Alaska State Chamber of Commerce opposes any efforts to declare the coastal plain of ANWR a wilderness area.

The Alaska State Chamber of Commerce urges the Governor and Legislature to continue to support and actively participate in efforts to open the coastal plain of ANWR to environmentally responsible oil and gas development.

Adopted November 14, 2002



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Pamela La Bolle, President



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Ted Quinn, Chairman

# ALASKA STATE LEGISLATURE



Official Business

## SENATOR THOMAS H. WAGONER

- Chair, Senate Community & Regional Affairs Committee
- Vice-Chair, Senate Resources Committee
- Member, Senate Transportation Committee

Session: January – May  
State Capitol, #427  
Juneau, AK 99801  
Phone: 907-465-2828 Fax: 907-465-4779

Interim: May – December  
145 Main Street Loop; Suite 226  
Kenai, AK 99611  
Phone: 907-283-7996 Fax 907--283-3075

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### Sponsor Statement of SJR 4

**A Resolution urging the United States Congress to pass legislation to open the coastal plain of the Arctic National Wildlife Refuge, Alaska, to oil and gas exploration, development, and production.**

The need for expanding Alaska's resource based industries is imperative if we want to maintain or increase the State's economic base. Development of our oil and gas reserves is our most viable option to increase the revenue stream and supply new jobs for those entering the workforce.

North Slope production peaked in 1988 at 2.005 million barrels per day and has declined steadily since. Current production is approximately half of the peak production. Development of the Coastal Plain will allow Alaska to derive economic benefits and at the same time provide stability to our national energy demands during the ongoing turmoil in the Middle East and Venezuela.

This resolution is not a new piece of legislation. It has been introduced on several occasions and has always enjoyed overwhelming support from the Governor and Legislature, as well as the citizens of Alaska. With George Bush as our current President, and support from the leadership in both the Senate and the House of Representatives, it is the time for the Coastal Plain to be explored and developed.

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SJR4  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Natural Resources  
 Title Endorsing ANWR Leasing BRU Oil & Gas Development  
 Component Oil & Gas Development  
 Sponsor Sen. Wagoner ...  
 Requester (S) RES Component No. 439

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2003) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

No fiscal impact anticipated with passage of this resolution.

Prepared by: Mark Myers, Director Phone 269-8800  
 Division Oil & Gas Date/Time 1/31/03 3:15 PM  
 Approved by: Tom Irwin, Commissioner Date 1/31/2003  
 Agency Natural Resources

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SJR 4  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Revenue  
 Title Endorsing ANWR Leasing BRU Administration and Support  
 Component Office of the Commissioner  
 Sponsor Wagoner  
 Requester Senate Resources Committee Component No. 123

**Expenditures/Revenues (Thousands of Dollars)**

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2003) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

There is no reliable estimate of future potential state revenues from oil and gas exploration in ANWR if this resolution is successful, other than to say the revenues could be substantial.

Prepared by: Larry Persily, Deputy Commissioner Phone 465-5469  
 Division Department of Revenue Date/Time 1/31/03 4:07 PM  
 Approved by: Larry Persily, Deputy Commissioner Date 1/31/2003  
 Agency Department of Revenue



# ALASKA STATE LEGISLATURE

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SENATOR THOMAS H. WAGONER  
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE  
VICE-CHAIR, SENATE RESOURCES COMMITTEE

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Date: January 23, 2003

To: Senator Scott Ogan  
Chair, Resource Committee

From: Senator Tom Wagoner *Tom*

Re: SJR 4 ANWR Leasing

I would appreciate your consideration to schedule SJR 4 before the Senate Resource Committee.

Attached, find the Sponsor Statement for the resolution.

There are many individuals and groups that have indicated their support for this resolution and I would be asking them to present their testimony when the measure is heard.

Thank you for your time and consideration.

SJR

12

**SENATE COMMITTEE REPORT  
First Committee of Referral**

DATE: 3/13/03

FURTHER:

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

DATE TURNED  
IN TO OFFICE: 4-4-03

Resources Committee considered SENATE JOINT RESOLUTION NO. 12

**SJR 12 SUPPORTING HALIBUT BY-CATCH PROJECT**

Supporting the halibut by-catch utilization project of the Alaska Food Coalition.

and recommends:

- be replaced with S CS SJR 12 (RES)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**

- same title
- new title

**House Bill:**

- same title
- technical title
- new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#
F+G	4/1/03		✓	

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	NO REC	AMEND
<i>Alphon Seelunig</i>	✓			
<i>Ben Stevens</i>	✓			
<i>Tom Wagoner</i>	✓			
<i>Donna J. ...</i>	✓			
<i>...</i>	✓			
CHAIR: <i>Scott Olson</i>	✓			



SENATOR SCOTT OGAN Alaska State Legislature

Senate District H Lazy Mountain \* Butte \* Chugiak \* Peters Creek  
Knik-Goose Bay \* Big Lake \* Houston \* Willow \* Talkeetna \* Trapper Creek

State Capitol Room 103, Juneau Alaska 99801 \* (907) 465-3878 \* 1 (800) 862-3878 \* Fax (907) 465-3265

Senator\_Scott\_Ogan@legis.state.ak.us

Http://www.akrepublicans.org/ogan

FACSIMILE TRANSMITTAL SHEET

TO: Leg Legal FROM: Linda Hay  
 COMPANY: DATE: 4-3-03  
 FAX NUMBER: TOTAL NO. OF PAGES INCLUDING COVER: 2  
 PHONE NUMBER: Room 103 RE: SJR 12

URGENT  FOR REVIEW  PLEASE COMMENT  PLEASE REPLY  PLEASE RECYCLE

NOTES/COMMENTS:

SJR 12 moved out of Senate Resources yesterday as amended. Please prepare a Senate CS for review + eventual final.

Thank you

adopted.

AMENDMENT 1

OFFERED IN SENATE RESOURCES

BY SENATOR G. STEVENS

TO: SJR 12, Draft Version "A"

- 1 Page 1, line 6: After "halibut", delete "wastefully".
- 2 Page 1, line 10: delete "wasted", replace with: "at sea discarded".
- 3 Page 1, line 16: after "otherwise", delete "a wasted", replace with: "an unutilized".
- 4 Renumber accordingly.

adopted

Amendment to the Amendment  
page 1 line 16 after the insert  
the word dead

SESSION ADDRESS:  
Alaska State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-4925  
Fax: (907) 465-3517  
Toll Free: 1-800-821-4925

# Senator Gary Stevens

## Alaska State Legislature

INTERIM ADDRESS:  
112 Mill Bay Road  
Kodiak, Alaska 99615  
(907) 486-4925  
Fax: (907) 486-5264



### Sponsor Statement SJR 12

Senate Joint Resolution 12, "Supporting the halibut by-catch utilization project of the Alaska Food Coalition".

Currently, fishermen operating trawl vessels are prohibited from retaining accidentally caught halibut, and are required by federal regulation to dump halibut by-catch at sea, even dead halibut.

Kodiak processors have indicated an interest in handling and processing otherwise wasted halibut by-catch for charitable purposes. The Alaska Food Coalition has established a plan, has acquired funds, and is ready to distribute the halibut by-catch to assist Alaskans in need.

This resolution comes in response to a critical need, one that is growing ever more serious with slowdowns in many of Alaska's fisheries. This proposal would create jobs for fishery workers while providing them and others in need across the state much needed food assistance.

This resolution will be sent to the North Pacific Fishery Council and the National Marine Fisheries Service to develop policy for the project's implementation. I urge your support.

SESSION ADDRESS:  
Alaska State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-4925  
Fax: (907) 465-3517  
Toll Free: 1-800-821-4925

*Senator Gary Stevens*  
*Alaska State Legislature*

INTERIM ADDRESS:  
112 Mill Bay Road  
Kodiak, Alaska 99615  
(907) 486-4925  
Fax: (907) 486-5264



**Memorandum**

DT: March 17, 2003  
TO: Senator Scott Ogan, Chair  
Senate Resources Committee  
FR: Senator Gary Stevens  
RE: SJR 12

I would like to request a hearing at your earliest convenience on Senate Joint Resolution 12, "Supporting the halibut by-catch utilization project of the Alaska Food Coalition".

Thank you for your consideration of this request.

Sincerely,

  
Senator Gary Stevens

Backup

MAR 10 2002



1944 EAST REZANOF DRIVE  
KODIAK, ALASKA 99615  
(907) 486-4126 FAX 486-5567

KODIAK ISLAND FOOD BANK

March 3, 2003

Dear Senator Stevens:

It was a real honor to be your first constituent visitor on 2/24 following your appointment to the Senate, thank you. While there in Juneau with the Alaska Food Coalition I also met with Senator Dyson and he proposed to sponsor a Legislative Resolution supporting our by-catch project. Being the Senator from where this project is originating I thought you should be aware of the proposed resolution in the event that you might desire to cosponsor. In the event that you would be interested I am forwarding some proposed wording that may be helpful toward that end. We are also looking for someone in the House if you have any ideas.

This project is being developed in response to a critical need, one that is growing ever more serious with the progressing fishing crisis now underway in Alaska. In Kodiak and certainly other coastal communities 60% of the people seeking food bank assistance are either un or underemployed workers from the fishing industry. The impact of this project is two fold as it provides labor to those now most in jeopardy (fishery workers) while providing them and others in need across the state much needed food assistance.

Alaska is undeniably blessed with remarkable resources and with these resources we are given the obligation of stewardship. This year in the GOA alone, 4,409,171 pounds of dead caught halibut will simply be dumped at sea. Clearly this is a tragedy, especially when we consider the present need for this resource. Everyone would like to see these otherwise wasted fish put to good use and we are hopeful that this project can play a small part toward that end.

To accomplish this goal our proposal will have to successfully go before and receive the approval of the North Pacific Fishery Council and NMFS. Making NMFS aware that support for this project is not only wide spread but that is also at the highest levels will be quite beneficial. A legislative resolution could go a long way toward that end.

We are very much looking forward to seeing this project mature beyond a dream and a concept to become a tangible expression of this broadly held desire to see an unutilized and presently wasted resource put to good use. Any part you can play in making that happen is greatly appreciated.

Sincerely,

Trevor Jones,  
Alaska Food Coalition Chair

# Prohibited Species Donation Program Proposal and Application Of the Alaska Food Coalition

## Contact Information

**Applicant:** Alaska Food Coalition  
**Primary Agent:** Kodiak Island Food Bank  
**Project Coordinator:** Trevor Jones  
1944 E. Rezanof Kodiak AK 99615  
Telephone (907) 486-4126  
Fax (907) 486-5567  
Email [kbmak@ptialaska.net](mailto:kbmak@ptialaska.net)  
Web Page [www.alaskafood.org](http://www.alaskafood.org)

**Submission Date:** February 21, 2003

## Project History:

When the Kodiak Island Food Bank (KIFB) was established it set three main objectives, to meet the food banking needs of the local community, to make services available to outlying villages and to work with the local fishing industry to develop untapped food resources for food banking. To address the goal of developing untapped resources related to the fishing industry the KIFB formed an advisory committee made up of fishing industry researchers, processors and local government representatives with this specific objective. As the work of this committee took shape the concepts and goals it formulated were presented to the Alaska Food Coalition to form an even larger network of partners and beneficiaries for the program. In 2002 the Coalition adopted this fish project as a primary focus offering the combined expertise of Alaska's largest food banks toward accomplishing its goals. In October of 2002 the Executive committee of the Alaska Food Coalition met with key stakeholders in Kodiak to formulate a strategic plan for implementing the program. Representatives from enforcement, processing, fishing and the Coalition explored the feasibility of the project and voiced their support and participation, setting a goal of 50,000lbs to be processed during the 2003 trawl fishery. In attendance were Ken Hansen, NMFS Assistant Special Agent in Charge, Mitch Kilborn, Western Alaska Plant Manager Matt Moir, APS Plant Manager, Al Burch, Alaska Draggers Association and key members of the Alaska Food Coalition.

## PSDP Project Description

Targeting the 2003 - 2006 Trawl fishery in Kodiak, the Alaska Food Coalition in conjunction with Kodiak fisherman and processors looks to process 50,000lbs of halibut to be distributed throughout its Alaska food bank network. The halibut will be delivered by participating fisherman to Kodiak processors where the fish will be filleted, frozen and packaged. The Kodiak Island Food Bank acting as the Alaska Food Coalition's principal agent will receive the product in Kodiak and forward it on to the coalitions food bank network throughout the State of Alaska.

To our knowledge this project will constitute the second application of the PSDP following the very successful Northwest Food Strategies (now Sea Share) project conducted out of Dutch Harbor. It goes without saying that our project has been significantly furthered by the ground breaking efforts of NWFS and that we are grateful for all of the regulatory hurdles and bridges crossed and built by Tuck Donely and his staff.

While there are significant similarities between the NWFS program and our proposed project there are some noteworthy differences. First it is a much more conservative proposal regarding resource extraction. While the Dutch Harbor program allowed any participating vessel (observed or not) to retain all by-catch Halibut for the program this proposal only looks to employ observed vessels and retain only dead caught halibut. This of course provides enforcement and other politically interested entities a significantly greater level of comfort regarding the potential abuse of sorting and retention regulations. This project also differs from NWFS program in that all of the product will be processed and distributed in Alaska. We are interested in forging a program in which all value-added work will be completed in state and the products produced will be distributed to assist those living in Alaska. This creates jobs and will significantly help our families hit hardest by our current fishing disaster.

### Fishing

All fishing for this PSDP will take place on trawl (dragger) vessels delivering to participating processors operating in Kodiak Alaska §679.26(a)(2). Only vessels participating by pre-arrangement will deliver fish for the PSDP. Participation in the PSDP is purely volunteer. Operators can suspend or cancel participation in the PSDP at anytime. Deliveries will be made only to processors agreeing by pre-arrangement and listed in this application. These vessels must have all the applicable information listed on the Vessel Information Sheet of this application before retaining any fish for the PSDP. Each vessel will be issued a certificate of participation as proof of authorization to retain halibut for the PSDP. Fishing crews will be informed of participation in the PSDP and briefed on regulations and procedures for handling PSDP halibut (see letter to vessel operators and crew enclosed). Halibut for the program will be collected in two ways, as dead caught by-catch and incidental by-catch. For purposes of this project Incidental by-catch is defined as fish that through misidentification during deck sorting are delivered to shore. These fish are typically small and of similar size to the target fish and are as such more difficult to identify and separate. They are fish that are simply lost in the mass of target fish. Only observed vessels will be permitted to retain dead caught fish. All vessels retaining prohibited species under the PSDP must comply with all applicable record keeping and

reporting requirements. A vessel participating in the PSDP must comply with applicable regulations at §§679.7(c)(1) and 679.21(c) that allow for the collection of data and biological sampling by a NMFS-certified observer prior to retaining any fish under the PSDP.

## Sorting

During the sorting of the catch fishing crews will maintain standard practices regarding the sorting of fish §679.21(b)(2)(ii). Due diligence will be maintained to reduce by-catch regardless of participation in the PSDP §679.21(b)(2)(i). On observed vessels dead catch halibut will be retained for inclusion in the PSDP as provided for in §679.21(b)(2)(ii)(A) and §679.21(b)(3) and made allowable by §679.26. All live caught halibut will be returned overboard.

**Procedure.** After the haul has come on deck and the observer has completed collecting data and biological samples and has given the crew the go ahead to sort, the crew will separate dead and live halibut from the catch. Viability determination procedures employed for this procedure are derived from the Alaska Fisheries Science Center's (AFSC) North Pacific Groundfish Observer Manual using the Key to Trawl Condition Codes for Pacific Halibut. When employed by NMFS Observers this viability flowchart not only determines obviously dead fish as dead (step 1) but it also through further tests looks to determine which presently living fish will die (this is done mainly through visual inspection and stimulating the operculum). These fish although alive during the viability test are tallied as dead for research purposes. The drafters of this proposal being quite aware of and sensitive to potential errors arising during the more complicated assessment procedures practiced in step 2 through 5 of the Viability Key, have adopted only the most conservative steps in this procedure and will not proceed beyond steps 1a. and 1b.. As it is employed by this project the Viability Key is utilized more accurately as an assessment of mortality vs. vitality, vitality of course being potentially a much more subjective measure. Halibut showing any signs of life will be returned over the stern ramp. Halibut scored as Excellent (E), Poor (P) or Unknown (U) will be returned over the stern ramp. Only Halibut meeting criteria of 1b. of the Viability Key will be retained (i.e. "*Fish is dead when sorted from catch. Fish is in rigor and lifeless, even if no apparent injuries. Gills appear washed out, i.e., dull red, pink, or white in color. Mouth may contain sediment.*") Regardless of obvious mortal injuries, any fish falling into the category 1a. of the first viability step will be returned over board and the crew assessors will not proceed to step 2. Even though NMFS for its purposes is confident in using steps 2b, 3b, 4b, or 5b as an additional condition to count as fish as dead, this program will only offer the strictest employment of step 1. The only exception to this is a fish that the certified NMFS observer has conducted viability test for, in this case any fish the Observer has assessed as dead may be retained for the program. Fish under 18 inches regardless of mortality will be discarded at sea.

Vessel operators will assign and designate to the observer aboard the vessel a crew person to be responsible for sorting, retention, and storage of halibut as required by §679.21(c)(4). On non-observed vessels there will be no intentional retention of halibut (dead or alive) for the PSDP. Any incidental catch delivered to shore by non-observed boats may be included in the PSDP.

**Observers:** The developers of this project with the training oversight of NMFS enforcement and the Observer Program will coordinate to insure that observers are informed of the project, regulations applicable to it and the observers role on boats retaining halibut for it. For purposes of this project observer will mainly act as a third party aboard a participating vessel, their presence will be a deterrent to crews who might otherwise relax sorting standards as a result of participation in the PSDP. The observer will also act as a training agent and coach crews in the implementation of mortality criteria for the PSDP. Otherwise being aboard a participating boat will not result in any additional duties for an observer. As on any trip observers would be expected to record irresponsible fishing practices and in respect to this project, this would include abuses of PSDP deck procedures. Observers witnessing crews demonstrating no intent or attempt to sort and discard live halibut would be expected to submit affidavits of such violations as they would any violation taking place on an observed vessel. Vessels found to be in violation of project standards will be removed by project administrators from participation in the PSDP. As referenced in the preceding section, halibut determined to be dead by the observer during their normal activities of data collection can be retained for the PSDP and will be disposed to the vessels fish hold.

**Critical Analysis:** This section is offered as a frank and critical discussion of the potential problems arising from the practice of this proposal. Of chief concern is the potential for crews to abuse the sorting of their catch. This of course would result in higher mortality rates for pacific halibut as potentially viable halibut would not be returned to sea.

Worst case scenario – This project intends to operate using vessels fishing only in the GOA. Combined these fisheries have a Mean Discard Mortality Rate of 0.6031 The mean size of the halibut caught during these fisheries is 70.89 cm. equaling 4.17 kg or 9.19 lbs. Based on the mean DMR we can compute the maximum error for determining fish mortality to be 0.3969. Using this figure we can predict that for a 50,000 lbs. project, if the crews were in error 100% of the time they would retain a total of 19,844 pounds in error to achieve the 50,000 lbs. goal. Based on the mean size of the halibut caught in these fisheries, this would equate to 2,159 fish. This scenario is of course absurd but it is offered to demonstrate the maximum potential risk of the project. Although an impossibility, for argument sake if we continue on this scenario at a 100% error rate the program would increase (by weight) halibut mortality in the GOA by 0.0045.

Realistically participation in the PSDP has only this one abusive incentive (not sorting) and many natural disincentives. Most of the vessel operators while not able to retain halibut commercially while trawling, at some point in the season will participate in a commercial halibut fishery. There will be no incentive for them to keep viable PS (for which they receive no compensation) when at a latter time they will be back in these same waters and catching/selling these fish. Fish retained for the PSDP will also cause complications for the operators. First they will occupy valuable hold space and displace capital generating target fish. These PSDP fish will also create delays in off loading that will far out weigh any time saved by not sorting. In most cases the uniformity of target fish allows them to be simply pumped off the boats, the halibut included for this project will be of dissimilar sizes precluding pumping and causing added time and handling for off loading.

Beyond the natural disincentives discouraging abuses this project has intentionally imposed on itself an extremely conservative approach to retaining ½ of 1% of the 4.5 million pounds of dead halibut that will otherwise be wastefully dumped at sea. This restrictive approach is taken to satisfy our own hope to further responsible fishing. It would be quite objectionable to us to find that we have through this project added to by-catch rates full well knowing that there presently exist vastly more than we can already use without having to add to it. It is quite important to us that every fish that goes into this project is without question taken from those that would have otherwise gone to waste.

**Data Collection** As the principal agent for the Alaska Food Coalition the Kodiak Island Food Bank will be collecting data related to the project. We will be seeking from vessels participating in the program volunteers who will offer us access to their fish tickets. This will provide us a means to test our project controls and measure and compare the by-catch rates of participating vessels to the historical numbers for each fishery.

### Stowage

Vessels will store PSDP halibut with the rest of the catch for delivery to a participating processor. Whole fish in the round will be stored on board and maintained at 32F by means of a seawater/ice slurry or a refrigerated seawater system. Vessels lacking available hold capacity may maintain an on deck tote for storage of PSDP halibut. This Tote will be marked Prohibited Species Donation Program Halibut Only. Fish will be iced with a one to two part ice to fish ratio or greater to maintain PSDP product at 32F. PSDP fish will be sorted along with any incidental by-catch by the receiving processor. All fish temperatures will be monitored upon delivery and temperatures along with weight and origin of fish will be recorded.

### Processing

The following procedures were developed in conjunction with the principal processors partnering with this project and are derived from their HACCP plans.

### Receiving

Procedure: PSDP Fish will be stored and transported to the processing facility along with target fish in a seawater/ice slurry or refrigerated seawater system. Fish will be transferred from the vessel via wet pumps or brailer onto the dock sorting area. Prohibited halibut will be sorted from the target fish and placed in a segregated tote marked "Prohibited Species for PSDP Only." Totes will be weighed, top iced and covered with a lid. If fish will be held for more than 5 hours fish will be layer iced.

Potential Hazards: Receiving spoiled, decomposed, or unwholesome fish. Receiving fish that are contaminated or tainted with petroleum products, other chemicals or filth. Fish could be pilfered by crews or mixed up with commercial products.

Monitoring: The temperature and quality of PSDP fish from each hold will be monitored along with the target species as fish are unloaded from the boat. In the event that the target species is rejected due to spoilage, decomposition, contamination or temperature abuse any and all accompanying PSDP fish will also be rejected. Rejected PSDP halibut will be routed back into the plants normal procedure for handling prohibited species in keeping with §679.21(b). To avoid pilfering both boat and dock crews will be trained in the handling of PSDP halibut and the consequences of violations. Presently both vessel operators and processors employ practices recognized to be quite effective in Kodiak. Because of the existing good management practices enforcement presently has few problems with Prohibs. This project will emphasis that because we are now processing certain PS the seriousness of handling prohibs has not changed, that the same due diligence will be required. The potential mixing of PSDP products and other commercial product in the plant will avoided through exhaustive labeling and identification. At each stage from the moment fish enter the plant until they leave PSDP product will be labeled and identified as such.

Critical Limits: Accept no halibut that has been delivered from holds where the target species is being rejected. Accept no PSDP fish that show indications of spoilage, decomposition, or contamination.

Heading and Gutting:

PSDP halibut will be processed separate from any commercial target species. Whole fish will be headed and gutted either mechanically or by hand butchering. The H&G fish will be washed in continuously flowing water containing a trace of free residual chlorine (0.5 to 3.0 PPM).

In the event that there is a delay in processing and the H&G halibut cannot go directly to filleting it will be top and bottom iced in covered totes. Totes will be labeled Prohibited Species PSDP Only. Fish must be kept at no greater than 40 F. and completely processed within three day of entering plant. Temperatures of H&G fish will be monitored as they are taken from the totes for further processing.

Filleting: Fish will be hand or when possible, mechanically filleted. To reduce costs and improve product shelf life, skinning fillets will be optional.

Alternative Products: In addition to fillets halibut may also be processed into Individually Quick Frozen (IQF) halibut steaks.

Packaging Labeling:

Packages will be labeled with the date of processing, the name of the processing facility, the contents and the weight of the fish contained in the package, along with the words "NMFS Prohibited Species Donation Program – Not For Sale Perishable Product – Keep Frozen" §679.26(c)(2).

### Record Keeping:

Processors retaining or receiving fish under the PSDP and an authorized distributor must keep on file and make available for inspection by an authorized officer all documentation, including receipt and cargo manifests setting forth the origin, weight, and destination of all prohibited species by-catch. This documentation will be retained until 3 years after the effective period §679.26(c)(3).

### Shipping and distribution

CSX shipping lines offers the Food Bank of Alaska several containers a year to be shipped at no charge to the food bank. For purposes of this project Food Bank of Alaska is designating two of its donated hauls. Since there are no direct shipping routes to Anchorage from Kodiak PSDP product will be routed through Tacoma and then up to Anchorage.

The Food Bank of Alaska located in Anchorage is coordinating shipment to Homer, Seward and Kenai using their own in-house trucks. They will also coordinate transportation to Nome, Kotzebue, Bethel and Dillingham using by-pass mail, to Valdez by ground, Barrow by air carrier and Juneau by common carrier.

The Fairbanks Food Bank has arranged donated shipment from Anchorage to Fairbanks with Lynden Transport. The Fairbanks Food Bank will act as a distribution hub to the rest of the interior, coordinating product to the communities of Delta Junction, Anderson, Tok, North Pole and Salcha.

The Kodiak Island Food Bank will be the distributing agent in Kodiak Alaska. There will of course be no cost associated with shipping, as Kodiak will be the point of origin for all PSDP product.

### Food Bank Expertise in Distributing Food in Rural Alaska

The Alaska Food Coalition is a collaborating organization made up of representatives from the leading hunger relief organizations throughout Alaska. Working together the Coalition has organized special projects to make new food resources available for distribution around the state, on average the coalition has distributed 167,000lbs of food across the state annually. To understand the significance of what the Alaska Food Coalition represents it is important to know a little about its component agencies. The Food Bank of Alaska has been working in the field of hunger relief since 1979 and presently manages distributions throughout the State of over 3,000,000 pounds. The Fairbanks Food Bank is distributing more 2,000,000 pounds a year throughout the interior, the Kenai Peninsula Food Bank is managing close to 1,000,000pounds in it's area of the State and the Kodiak Island Food bank is making distributions of over 85 tons a year. All of these agencies have a clearly demonstrated track record both individually and as a collaborative organization. Their expertise is demonstrated in quantities of food distributed, the

ability to acquire the necessary funding to back these huge endeavors and the high level of consumer satisfaction with the services delivered. The Alaska Food Coalition has worked with an average annual budget of \$82,500, funding more than adequate for significant accomplishments across Alaska. Even more assuring is the combined budgets of the four main coalition agencies represented in this proposal, a figure exceeding \$ 1.5 million.

### **Distribution Quality Control**

All organizations participating in this project are food distribution professionals operating under the Alaska Food Code regulations with oversight by Department of Environmental Conservation (DEC). Each participating facility employs standard operating procedures adequate to meet Department of Environmental Conservation's requirements to carry a type FM-4 Food bank establishment permit under the Alaska Food Code. All the organizations participating in this project receive at a minimum annual inspections by the DEC and most participants also undergo additional USDA and Second Harvest inspections as required for the handling of their products.

All food distribution organizations participating in this project will maintain the following practices in handling PSDP product. These procedures are modeled after the Good Manufacturing Practices (GMP's) promulgated by the FDA as the current Good Manufacturing, Processing, Packing, or Holding of Human Food; these regulations are found in Chapter 21 of the Code of Federal Regulations, Section 110.1 et. Seg.

### **Sanitation and Safety**

- The participating organization's operations must comply with all applicable health and regulatory requirements for the health and well being of food bank personnel and most importantly the recipients of PSDP products.
- Each food bank must have an organized sanitation and safety program that shall comply with applicable local, state and federal governmental regulations.
- Warehouses must be maintained in the best possible sanitary condition for the protection and safety of all food bank goods, as well as the personnel working therein.
- General orderliness and cleanliness must be maintained in all areas of food storage.

### **Incoming Product – Good Receiving Practices**

- **Carrier Arrival.** Carrier equipment used for delivery on PSDP product must be inspected for adequacy of proper food protection and sanitation. This inspection must identify possible problems before the load is accepted.
- **Temperature Controls.** PSDP products must be received at 0 degrees Fahrenheit or lower.

- During unloading, receiving personnel must be particularly alert for odors: sour, putrid, or chemical odors that could indicate contaminated food.
- **Isolation of damaged or contaminated product.** Product received that has any evidence of contamination must be immediately isolated from acceptable product. (See following section on control of damaged product).

### **Control of Damaged Product.**

- Upon receipt, all items must be inspected; damaged product must be reconditioned before they are placed in storage.
- Any lots of product containing packages that are obviously contaminated, infested, spoiled, leaking, spilling their contents, or demonstrating problem conditions must be isolated upon arrival at the food bank.
- All isolated lots must be properly inspected and reconditioned as follows:
  - Broken or leaking containers must be removed; adjacent soiled containers must be cleaned.
  - Individual boxes or bags where product is exposed must be discarded.
- Any product sorted out as unsatisfactory must be promptly discarded. Every precaution must be taken to avoid transferring or disseminating contamination of such affected lots to satisfactory product in storage.
- Prompt attention must be given to frozen products that have been exposed to abusive temperatures. Quality and shelf life must be established promptly to ensure timely distribution and avoid further quality deterioration.

### **Food Storage Practices**

- **Temperature Controls.** Product must be stored at temperatures according to their specific food category requirements. PSDP product should not exceed 0 degrees Fahrenheit in freezers.
- Adequate air circulation must be provided in freezers and coolers. Product should be stored four inches from walls and four inches from floors.
- Each freezer and cooler unit must be provided with an accurate, easily visible and readable thermometer.

- Temperature readings are to be made daily and recorded on the temperature log posted on freezer.

## Liability

All food banks participating in this project carry adequate liability protection to safe guard their agencies, officers, executives, staff and the public interest. Supporting documentation is included in the insurance section of this application. It is also noteworthy to site specific federal legislation protecting food banks and donors from liability.

**The Bill Emerson Good Samaritan Act of 1996** releases all food donors from liability if the product was good at the time of donation. P.L. 104-210 was named in honor of the late Congressman who championed efforts to expand food donations to the poor and to protect those who make donations. This law is designed to encourage the donation of food and groceries to nonprofit charitable agencies by minimizing the risks of legal actions against donors and distributors of foods. The 1996 amendments excludes from civil or criminal liability a person or nonprofit food organization that, in good faith, donates or distributes donated foods for hunger relief.

**Release from Liability** Agencies distributing PSDP product will in addition to carrying appropriate liability coverage employ the use of a release from liability to be signed by the donee. This statement should contain at a minimum the elements found in the following example:

The recipient accepts this gift of food "as is" and releases the original donor, the Kodiak Island Food Bank, and its suppliers from any liability resulting from the condition of the donated food and further agrees to indemnify and hold the original donor, the Kodiak Island Food Bank and its suppliers against any and all liabilities, damages, losses, claims, causes of actions and suits of law or inequity or any obligation whatsoever arising out of or attributed to storage and use of the donated food.

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:

- be replaced with \_\_\_\_\_ CS SJR 26 ( RES )
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ ( \_\_\_\_\_ )
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

<b>Senate Bill:</b>	
<input checked="" type="checkbox"/>	Same Title
<input checked="" type="checkbox"/>	New Title
<b>House Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	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
<i>Salmon Seekin</i>	✓			
<i>Ben Steiner</i>	✓			
<i>Thompson</i>	✓			
<i>Franklyn</i>	✓			
CHAIR: <i>Scott</i>	✓			

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 RDU \_\_\_\_\_  
Department of the Interior 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE (Thousands of Dollars)**

FUND SOURCE	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

# ALASKA STATE LEGISLATURE



Official Business

## 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

Session: January – May

State Capitol, #427

Juneau, AK 99801

Phone: 907-465-2828 Fax: 907-465-4779

Interim: May – December

145 Main Street Loop; Suite 226

Kenai, AK 99611

Phone: 907-283-7996 Fax 907-283-3075

## 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.

# ALASKA STATE LEGISLATURE



Official Business

## SENATOR THOMAS H. WAGONER

- Co-Chair, Senate Resources Committee
- Co-Chair, Senate Transportation Committee
- Vice-Chair, Senate Community and Regional Affairs Committee
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Session: January – May  
State Capitol, #427  
Juneau, AK 99801  
Phone: 907-465-2828 Fax: 907-465-4779

Interim: May – December  
145 Main Street Loop; Suite 226  
Kenai, AK 99611  
Phone: 907-283-7996 Fax 907--283-3075

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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## LAW OFFICES

**BIRCH, HORTON, BITTNER AND CHEROT**

A PROFESSIONAL CORPORATION

1155 CONNECTICUT AVENUE, N.W. • SUITE 1200 • WASHINGTON, D.C. 20030 • TELEPHONE (202) 659-5800 • FACSIMILE (202) 659-1027

MAL K. HORTON 11844 - 10081

RONALD G. BIRCH\*\*  
 WILLIAM H. BITTNER  
 KATHRYN A. BLAKE  
 SUZANNE CHEROT  
 KIMBERLY A. DOYLE  
 KATHLEEN TODD EARL  
 MARK E. FINKMAN  
 DOUGLAS S. FULLER\*  
 MAX D. GARNER

GRETCHEN L. GASTON\*  
 DAVID KAHN CROSS  
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 DANIEL C. KURT  
 THOMAS R. KUNKNER  
 HARVEY A. LEVIN\*\*

STANLEY T. LEWIS  
 THOMAS H. McDERMOTT  
 MICHELLE MERRICK  
 BARBARA A. MILLER\*  
 GREGORY A. MILLER  
 MICHAEL J. PARISE  
 TIMOTHY J. PETERSONS  
 ELISABETH H. ROSE\*\*  
 HO SIK SHIN\*\*

JENNIFER C. ALEXANDER, OF COUNSEL

1127 WEST SEVENTH AVENUE  
 ANCHORAGE, ALASKA 99501-2359  
 (907) 278-1800  
 FACSIMILE (907) 278-3890

- D.C. BAR  
 \*\* D.C. AND ALASKA BAR  
 \* MARYLAND BAR  
 = VIRGINIA BAR  
 ALL OTHERS ALASKA BAR

**MEMORANDUM**

**TO:** Ted Popely  
 Ron Somerville

**FROM:** Bill Horn *BH*

**DATE:** January 8, 2004

**RE:** Extremely Dangerous Wilderness Act Court Decision

**VIA TELEFAX**

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 (9<sup>th</sup> 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, untrammled, 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",

BIRCH, HORTON, BITTNER AND CHEROT  
A PROFESSIONAL CORPORATION

Ted Popely  
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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 Cuning  
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, untrammelled, 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.

## LAW OFFICES

**BIRCH, HORTON, BITTNER AND CHEROT**

A PROFESSIONAL CORPORATION

1155 CONNECTICUT AVENUE, N.W. • SUITE 1200 • WASHINGTON, D.C. 20036 • TELEPHONE (202) 659-5800 • FACSIMILE (202) 659-1027

MAL P. HORTON (1944 - 1998)

RONALD G. WICH\*\*  
 WILLIAM H. BITTNER  
 KATHRYN A. BLACK  
 SIOZANNE CHEROT  
 RIMBERLY A. DOYLE  
 KATHLEEN TODD EAM  
 MARK E. FINEMAN  
 DOUGLAS S. FULLER\*  
 MAX D. GARNER  
 GLETCHEH L. GASTON\*\*

DAVID KARL CROSS  
 TINA M. GROVIER  
 WILLIAM P. KORN\*  
 STEPHEN H. HUTCHINGS  
 ROY S. JONES, JR.\*  
 DANIEL E. KENT  
 THOMAS F. LINNEMER  
 HARVEY A. LEVINT  
 STANLEY T. LEWIS  
 REVIN J. McCREA

THOMAS M. McDERMOTT  
 MICHELLE MESHKE  
 BARBARA A. MILLER\*  
 GREGORY A. MILLER  
 PETER C. NUSBA\*\*  
 MICHAEL J. PARISE  
 TIMOTHY J. PETUMENOS  
 ELIZABETH M. ROSS\*\*  
 HO SIK SHUN\*\*

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

1127 WEST SEVENTH AVENUE  
 ANCHORAGE, ALASKA 99501-3388  
 (907) 276-1550  
 FACSIMILE (907) 276-2880

**MEMORANDUM**

**TO:** Ted Popely  
 Ron Somerville

**FROM:** Bill Horn *BA*

**DATE:** January 15, 2004

**RE:** Strategy Options for Tustumena Lake and Wilderness Act

**VIA TELEFAX**

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

BIRCH, HORTON, BITTNER AND CHEROT  
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Ted Popely  
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Page 2

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**

**Representative Pete Kott**  
**Speaker of the House**

*During Session:*

State Capitol  
Juneau, Alaska 99801-1182  
Phone: 907-465-4797  
Fax: 907-465-3884

*During Interim:*

119 N. Cushman, Ste 101  
Fairbanks, Alaska 99701  
Phone: 907-488-0857  
Fax: 907-488-4271

*During Session:*

State Capitol  
Juneau, Alaska 99801-1182  
Phone: 907-465-3777  
Fax: 907-465-2819

*During Interim:*

716 West 4th avenue, Ste. 600  
Anchorage, Alaska 99501-2133  
Phone: 907-269-0155  
Fax: 907-269-0154

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 (9<sup>th</sup> 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, untrammled, 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.

January 16, 2004  
Page 2

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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*During Session:*

State Capitol  
Juneau, Alaska 99801-1182  
Phone: 907-465-4797  
Fax: 907-465-3884

*During Interim:*

119 N. Cushman, Ste 101  
Fairbanks, Alaska 99701  
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Juneau, Alaska 99801-1182  
Phone: 907-465-3777  
Fax: 907-465-2819

*During Interim:*

716 West 4th avenue, Ste. 600  
Anchorage, Alaska 99501-2133  
Phone: 907-269-0155  
Fax: 907-269-0154

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:

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January 16, 2004

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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 v. Alaska Center for the Environment v. United States Fish & Wildlife Service, No. 01-35266, (9<sup>th</sup> 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.


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

AMERICAN SPORTFISHING ASSOCIATION

225 REINCKERS LANE, SUITE 420, ALEXANDRIA, VA 22304 • 703-519-9691 • FAX: 703-519-1872  
WEB: WWW.ASAFISHING.ORG • EMAIL: INFO@SAFISHING.ORG

FRANK H. MURKOWSKI  
GOVERNOR  
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

P.O. Box 110001  
JUNEAU, ALASKA 99811-0001  
(907) 465-3500  
FAX (907) 465-3532  
WWW.GOV.STATE.AK.US

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 Honorable Theodore B. Olson  
February 2, 2004  
Page 2

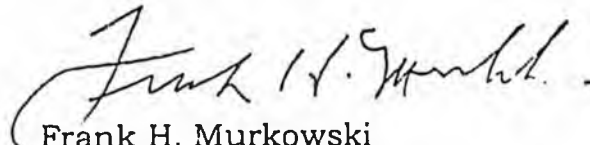
the CIAA to stock salmon fry in Tustumena Lake. CIAA is currently holding six million salmon fry for release this spring as part of this project, that now may need to be destroyed. The Alaska National Interest Lands Conservation Act (ANILCA) allows fisheries enhancement in refuges and supercedes the 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.

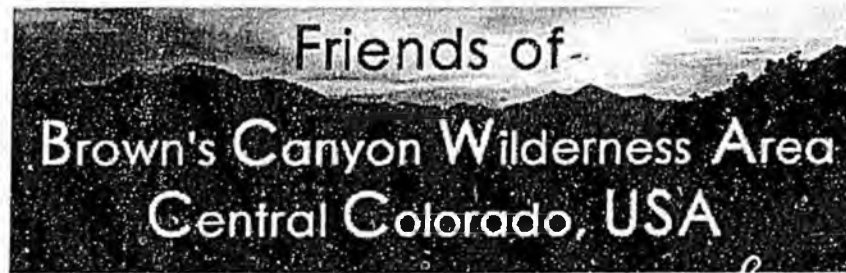
I urge you to take action to correct the Ninth Circuit's erroneous decision in this case. I stand ready to be of assistance and support.

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



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## 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

Rocky MountainElk Foundation

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 untrammelled 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 unsuitability 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. Notwithstanding 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) Notwithstanding 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~~(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 or 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.<sup>1</sup> 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>.<sup>2</sup>

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<sup>1</sup>The material facts essential to determine this case are undisputed by the parties.

<sup>2</sup>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.*<sup>3</sup>

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).

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<sup>3</sup>Congress also may withdraw lands from designated wilderness after a similar process. *See* 16 U.S.C. 1132(e).

**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.<sup>4</sup> 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).<sup>5</sup>

### A

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

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<sup>4</sup>The Crooked Creek Hatchery closed in 1996, and hatchery operations related to the Enhancement Project were transferred to the Trail Lakes Hatchery.

<sup>5</sup>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 rule-making 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).<sup>6</sup> *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*.

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<sup>6</sup>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.

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**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 untrammelled 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, untrammelled 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 non-profit 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.<sup>7</sup> 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.<sup>8</sup> And it might also be considered that, to the extent

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<sup>7</sup>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.

<sup>8</sup>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