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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

STATE OF ALASKA,)
)
 Plaintiff,)
)
 v.)
)
 ROWAN GOULD, in his official capacity as)
 Acting Director, United States Fish and)
 Wildlife Service; KEN SALAZAR, in his)
 official capacity as the United States Secretary)
 of the Interior, and UNITED STATES FISH)
 AND WILDLIFE SERVICE)
)
 Defendants.)

CIVIL ACTION NO.:

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff State of Alaska (“Alaska” or the “State”) brings this action to challenge the decision by Rowan Gould, Acting Director of the United States Fish and Wildlife Service, acting under the authority of Ken Salazar, United States Secretary of the Interior, and the United States Fish and Wildlife Service (collectively, “the Service”) to deny the State access to lands on Unimak Island, Alaska, administered by the Service, during the current year’s calving season for

the purpose of protecting newly-born caribou calves from wolf predation and thereby preserving the Unimak Caribou Herd from further decline and the risk of extirpation.

2. Alaska brings this action under (1) the National Wildlife Refuge System Administration Act, as amended, 16 U.S.C. § 668dd; (2) Sections 802, 815 and 1314 of the Alaska National Interest Lands Conservation Act (“ANILCA”), 16 U.S.C. § 3112, 3125 and 3202; (3) Section 303(1) of ANILCA, Pub. L. 96-487 and (4) the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, to address Defendants’ failure to comply with legal requirements, as “agency action unlawfully withheld or unreasonably delayed,” and as being arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and without observance of procedures required by law.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 16 U.S.C. § 668dd(a)(4)(E) (National Wildlife Refuge System Administration Act, as amended, cooperative federalism provision), and 5 U.S.C. §§ 702 and 706 (Administrative Procedure Act).

4. Alaska notified the Defendants of the emergent situation of the Unimak Caribou Herd in December 2009, and repeatedly thereafter. (Exhibit A). On May 24, 2010, the Defendants issued their final decision denying access during the imminent calving season to the State of Alaska for purposes of protecting newly-born caribou calves by reducing predation on Refuge lands, and stating that if Alaska took action to do so, the matter would be immediately referred to the United States Attorney as a trespass.

5. An actual, justiciable controversy now exists between Alaska and the Defendants, and the requested relief is proper under 28 U.S.C. §§ 2201–2202, 5 U.S.C. §§ 701–706, and 16 U.S.C. § 668(a)(4)(E).

6. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702, and 16 U.S.C. § 668(a)(4)(E).

7. Alaska has exhausted all administrative remedies.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because this action is brought against officers of agencies in the United States in their official capacities and against the Service. Most actions and decisions challenged by this lawsuit were made, at least in part, in the District of Alaska.

PARTIES

Plaintiff

9. Alaska is a sovereign state, which has a compelling interest in the management, conservation, and regulation of all wildlife and other natural resources within its jurisdiction, including the Unimak Caribou Herd and its habitat, for sustained yields and the maximum use and benefit of the of the Alaskan people. Alaska Const. Art. VIII, §§ 1, 2, 4; AS 16.05.020. 16 U.S.C. § 668dd(m) and § 3202(a). As a steward of its wildlife resources, Alaska directly manages wildlife and habitat through its Department of Fish and Game (“Department”), Department of Natural Resources, and Department of Environmental Conservation.

10. The National Wildlife Refuge System Administration Act, as amended, requires the Service to ensure effective coordination, interaction, and cooperation with the Alaska Department of Fish and Game in administering the Alaska Maritime National Wildlife Refuge. 16 U.S.C. § 668dd(a)(4)(E). Likewise, ANILCA requires the Service to cooperate with the

Alaska Department of Fish and Game, except as otherwise provided by federal law, in managing the public lands and protecting the continued viability of all renewable resources in Alaska. 16 U.S.C. §3112.

11. The Service's denial of access to the State of Alaska during the imminent caribou calving season for purposes of protecting newly-born calves from predation will have a significant adverse impact on Alaska because the Unimak Caribou Herd will continue its precipitous decline, increasing the risk that it may not recover and may, in fact, be extirpated, is substantially increased. Even if extirpation does not occur, the Service's decision will deprive Alaskans, and especially subsistence-dependant Alaskans, of subsistence resources for an additional 3-5 years beyond what they must already suffer due to the decline, as a result of the Service's decision.

12. Municipal governments located on or near Unimak Island, which are political subdivisions of the State of Alaska under Title 29 of the Alaska Statutes, will be adversely affected by the Service's decision because the existence of harvestable subsistence resources in their areas is critical to community health, both physical and mental, and, ultimately, to the ongoing viability of the communities themselves.

13. Alaska has standing to bring this action, and the challenged agency decisions are final and ripe for review by this Court.

Defendants

14. Defendant Ken Salazar is the Secretary of the United States Department of the Interior and is being sued in his official capacity. The Secretary is federal official responsible for the administration, within the scope of federal laws, of the National Wildlife Refuge System and the wildlife located thereon.

15. Defendant Rowan Gould is the Acting Director of the United States Fish and Wildlife Service and is being sued in his official capacity. The Acting Director is also responsible for the administration of the National Wildlife Refuge System, under Secretary Salazar.

16. Defendant United States Fish and Wildlife Service is a federal agency within the Department of the Interior that has been delegated the responsibility for administering the National Wildlife Refuge System. Hereafter the Defendants shall be referred to collectively as the "Service."

LEGAL BACKGROUND

A. National Wildlife Refuge System Administration Act, as amended

17. The National Wildlife Refuge System Administration Act, as amended, directs the Secretary of the Interior to administer the National Wildlife Refuge System for the conservation, management, and, where appropriate, restoration of the fish, wildlife, and plant resources, and their habitats within the United States for the benefit of present and future generations of Americans. 16 U.S.C. § 668dd(a)(2).

18. The Act also directs that each refuge in the system be managed to fulfill the above mission statement, as well as the specific purposes for which it was established. 16 U.S.C. § 668dd(a)(3).

19. The Act requires the Secretary to provide for the conservation of fish, wildlife, and plants and their habitats within the system; ensure the biological integrity, diversity, and environmental health of the system; and ensure effective coordination with the fish and wildlife agencies of the states in which the system units are located in administering the system. 16 U.S.C. § 668dd(a)(4).

20. Section (m) of the Act provides that, “Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.” 16 U.S.C. § 668dd(m).

B. Alaska National Interest Lands Conservation Act (General Provisions)

21. ANILCA has a number of provisions that direct generally how federal public lands, including Alaskan National Wildlife Refuges, must be administered. One of Congress’ stated policies in enacting ANILCA is that,

consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands... [and,]

except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with...appropriate State...agencies....

16 U.S.C. § 3112(1), (3).

22. Section 815 of ANILCA provides that nothing in subchapter II is to be construed as “authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands...unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law....” 16 U.S.C. § 3125.

23. Section 1314 provides that nothing in ANILCA is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in subchapter II of the Act. 16 U.S.C. § 3202.

C. ANILCA Section 303(1)

26. Section 303(1) of ANILCA (which was not codified in the U.S. Code) reserved and reconstituted the Alaska Maritime National Wildlife Refuge, which is the Refuge at issue in this case. Pub. L. 96-487, § 303(1) (1980). It provides that, “The purposes for which the Alaska Maritime National Wildlife Refuge is established and shall be managed include--(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to,...caribou... [and] (iii) to provide, in a manner consistent with the purposes set forth in paragraphs (i)..., the opportunities for continued subsistence uses by local residents...”. *Id.* § 303(1)(B).

D. Administrative Procedure Act

24. The APA provides for judicial review of final agency action by persons “aggrieved” by such action. 5 U.S.C. § 702. The actions reviewable under the APA include “preliminary, procedural, or intermediate agency action or ruling . . . on the review of the final agency action,” such as the final decision at issue here. *Id.* § 704.

25. Under the APA, a reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed, and hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(1), (2)(A).

FACTUAL BACKGROUND

A. The Unimak Caribou Herd

26. The Unimak Caribou Herd is recognized as a distinct , naturally-occurring herd occupying Unimak Island, the easternmost of the Aleutian Islands. It is the only naturally occurring

insular caribou herd in the nation, and represents the southwestern-most extension of natural caribou range on the North American continent.

27. In 2002, the Unimak Caribou Herd was believed to be at a sustainable, and healthy, population level, numbering approximately 1260 animals. By 2010, based on a survey by National Wildlife Refuge staff and confirmed by Alaska Department of Fish and Game observations, the herd has declined to approximately 400 animals.

28. The causes of this precipitous decline are unknown. However, managers have determined that the decline is continuing due, in large part, to high levels of predation on newborn calves, resulting in a prolonged period of chronic poor calf recruitment.

29. Moreover, this decline has been accompanied by a concurrent decline in the bull/cow ratio that has resulted in reduced pregnancy rates and lowered calf production. In October 2009, the Alaska Department of Fish and Game conducted a composition survey of 221 Unimak caribou. Only 10 of these animals were adult bulls, giving a bull/cow ration of 4.9 bulls per hundred cows, the lowest bull/cow ratio ever recorded in Alaska.

30. That same 2009 survey also showed that almost no calves survived into recruitment, such that the calf/cow ratio was 3.4 calves per 100 cows. This lack of calf recruitment results in ongoing, and increasing, depletion of the bull population. The result of the declining bull and calf ratios creates a negative feedback loop that further drives the herd towards extirpation.

31. Both wolves and bears are predators of caribou calves on Unimak Island. However, wolf predation has been determined by the Department to be the primary cause limiting calf recruitment. Between 15 and 30 wolves are currently estimated to exist on the island.

32. If the current Unimak Caribou herd population trends continue, the caribou herd will, at minimum, experience a prolonged population low, such that no subsistence or other hunting may be permitted for the foreseeable future, and may be extirpated. If the imminent calving season, typically occurring during June, is allowed to follow the same pattern as the past several seasons, these risks are substantially increased, and managers predict that, if calf protection efforts are initiated in subsequent years, the herd would not return even to its currently depleted state for an additional 3-5 years.

33. Because of the herd's precipitous and disastrous decline, all hunting, including subsistence hunting, has been prohibited by the state since March 2009 and the federal authorities since July 2009. Prior to that time, harvests were low, so it is unlikely that human harvest caused the decline. As of the date of this complaint, subsistence hunters in the vicinity of Unimak Island have no place to hunt caribou, as hunting has been prohibited on all herds on the Alaska Peninsula due to severe declines.

B. Service Decision

34. On December 22, 2009, the State of Alaska, Department of Fish and Game ("Department") formally notified the Service by letter of the emergency facing the Unimak Caribou Herd. Subsequently, various representatives from the Service orally informed the Department that a multi-year NEPA (National Environmental Policy Act, 42 U.S.C. §4321 et seq.) process would have to be completed before any action could be taken to control predation on the Refuge.

35. Both the Ninth and D.C. Circuit Courts of Appeal have held that no NEPA process is required when the Secretary of the Interior elects to simply permit the State of Alaska to proceed with its predator control plans and programs. *State of Alaska, et al. v Cecil D. Andrus*,

et al., 591 F.2d 537 (9th Cir. 1979) and *Defenders of Wildlife, et al. v. Cecil D. Andrus, et al.*, 627 F.2d 1238 (D.C. Cir. 1980).

36. From February through early May 2010, representatives from the Service informed the Department that, in addition to the NEPA process, various findings and permits would have to be issued before any predation control efforts could commence, including, but not limited to, a Minimum Requirements Analysis, separate Special Use Permits for the caribou collaring and wolf removal aspects of the State's program, and additional Institutional Animal Care and Use Committee authorizations.

37. In early March of 2010, the Alaska Board of Game adopted a predation control implementation plan, authorizing the Department to undertake predation control to protect caribou calves on Unimak Island. 5 Alaska Administrative Code (AAC) 92.125(l).

38. All documents demanded from the Department by the Service have been provided and, as of the date of this complaint, approved except for the SUP for wolf removal. In addition, the Department prepared and submitted to the Service an Environmental Review that could have formed the basis for an Environmental Assessment under NEPA, had it been accepted as such by the Service. However, the Service decided to submit the Environmental Assessment task to an outside contractor, stating, on May 6, 2010, that a minimum of six months would immediately be needed to complete that contract.

39. On May 20, 2010, Department Commissioner Denby Lloyd wrote to Acting Director of the Service Rowan Gould, explaining the emergency situation and outlining the State's plans to take action to protect caribou calves beginning on June 1, 2010.

40. On May 24, 2010, the Service responded that the State is prohibited from engaging in predator management on the Refuge without the Special Use Permit, which the

Service has refused to issue, and that if the State proceeded with its program, state employees or agents would be considered to be in trespass and the matter would be referred to the U.S. Attorney.

FIRST CLAIM FOR RELIEF
National Wildlife Refuge System Administration Act, As Amended

41. Alaska incorporates by reference each of the allegations in paragraphs 1 through 40.

42. The National Wildlife Refuge System Administration Act Section (a), as amended, requires that, as to its administration of the Alaska National Maritime National Wildlife Refuge, the Service must provide for the conservation, management, and, where appropriate, restoration of wildlife resources; ensure the biological integrity, diversity, and environmental health of the Refuge, and ensure effective coordination with the Department in doing so. Section (m) explicitly recognizes the states' authorities to manage, control, and regulate wildlife on refuges, and requires Service consistency with state management plans to the extent practicable. 16 U.S.C. § 668dd(a) and (m).

43. The Service's failure to halt, or even treat, the current disastrous decline of the Unimak Caribou Herd, and its refusal to allow the Department to take action to protect caribou calves by limiting predation, thereby ensuring the biological integrity, species diversity, and environmental health of the Refuge, violates these provisions and entitles Alaska to the relief requested below.

SECOND CLAIM FOR RELIEF
(Violation of ANILCA Title VIII)

44. Alaska incorporates by reference each of the allegations in paragraphs 1 through 43.

45. The Alaska National Interest Lands Conservation Act requires the Service to administer the Refuge so as to cause the least adverse impact possible on dependant subsistence users and cooperate with State of Alaska agencies in protecting the continued viability of wild renewable resources. 16 U.S.C. § 3112. Moreover, the Act states that it is not to be interpreted to allow the Service to prohibit the nonsubsistence taking of wildlife, including, presumably, taking by the State of Alaska for management purposes, except for enumerated reasons, none of which apply in this case. 16 U.S.C. § 3125. Finally, ANILCA also recognizes that the State of Alaska retains authority for managing wildlife on the public lands, including the Refuge. 16 U.S.C. § 3202.

46. The Service's failure to take any action to halt, or even address, the disastrous decline of the Unimak Caribou Herd, coupled with its prohibition of the Department's attempts to take action, has resulted in the elimination of all subsistence hunting for caribou in the area and will continue to significantly adversely impact subsistence hunting for the foreseeable future. Also, the Service's failure essentially ignores the command to cooperate with the State to protect the ongoing viability of the Unimak Caribou Herd, and so violates 16 U.S.C. § 3112 and entitles Alaska to the relief requested below.

47. The Service's prohibition of the Department's efforts to protect the ongoing viability of the Unimak Caribou Herd violates the cooperative federalism principles embodied in 16 U.S.C. §§ 3125 and 3202, and entitles Alaska to the relief requested below.

THIRD CLAIM FOR RELIEF
(Violation of ANILCA Section 303(1))

48. Alaska incorporates by reference each of the allegations in paragraphs 1 through 47.

49. Section 303(1) of Public Law 96-487 requires the Service to administer the Alaska Maritime National Wildlife Refuge so as to conserve, among other things, the caribou population and also so as to provide ongoing subsistence opportunities for dependant users.

50. The Service's failure to take any action to halt, or even address, the precipitous decline of the only naturally occurring caribou herd within the Refuge, compounded by its prohibition of the Department's efforts to take action on point, violates these provisions and entitles Alaska to the relief requested below.

FOURTH CLAIM FOR RELIEF
(Violation of the APA)

51. Alaska incorporates by reference each of the allegations in paragraphs 1 through 50.

52. The APA provides that courts shall compel agency action unlawfully withheld, or unreasonably delayed. 5 U.S.C. § 706(1).

53. The Service has refused to grant a Special Use Permit or otherwise allow the Department access to Refuge lands for the purpose of protecting caribou calves by reducing predation on them during the imminent calving season. Likewise, in the face of contrary caselaw, the Service insisted that, even before emergency action could be taken, a full NEPA process must be completed. Given the mandates outlined above, requiring protection of the caribou resource and cooperation with the State in doing so, these decisions constitute the unlawful withholding or unreasonable delay of agency action and entitle Alaska to the relief requested below.

54. The APA also provides that courts shall set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706(2).

55. The Service's refusal to act to meet the statutory obligations outlined above and its threat of legal action to halt or prevent the State's efforts to protect caribou calves during the imminent calving season is arbitrary, capricious, and not in accordance with the several legal provisions set forth above, and entitles Alaska to the relief requested below.

PRAYER FOR RELIEF

WHEREFORE, the State of Alaska respectfully requests that this Court enter judgment providing the following relief:

- A. Declare that Defendants violated the National Wildlife Refuge System Administration Act, as amended; ANILCA Sections 303(1), 802, 815 and 1314; and the APA.
- B. Declare that Defendants' actions, as set forth above, are arbitrary and capricious, an abuse of discretion, and not in accordance with law;
- C. Enjoin Defendants from interfering with the State of Alaska's efforts to restore the productivity and health of the Unimak Caribou Herd.
- D. Order the Defendants to permit emergency actions to protect wildlife populations undergoing severe population declines.
- E. Award Alaska its attorneys' fees and costs incurred in bringing and maintaining this action pursuant to 28 U.S.C. § 2412 and other applicable authorities;
- G. Vacate and remand with an order with instructions requiring full compliance with the 16 U.S.C. § 668dd; with ANILCA Sections 303(1), 802, 815 and 1314; and with the APA.
- H. Grant Plaintiff such other and further relief as the Court may deem necessary and appropriate.

DATED this 28th day of May , 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2010, a
copy of the foregoing document was served by certified, express mail on:

Rowan Gould
Ken Salazar
Eric Holder
Karen Loeffler (also by electronic mail)
United States Fish and Wildlife Service

s/ Kevin M. Saxby
Kevin M. Saxby