

# United States Senate

June 7, 2016

The Honorable Dan Ashe  
Director  
U. S. Fish and Wildlife Service  
1849 C Street, N. W.  
Washington, D. C. 20240

Director Ashe,

I am writing to express my deepest concern over the U.S. Fish and Wildlife Service (FWS) proposed rule, entitled *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*. I share the concerns of the State of Alaska and many of my constituents over this proposed rule.

It is apparent that the FWS did not accurately portray the significant issues involved and did not adequately analyze the significant impacts of both this proposed rule and the recently finalized Kenai Refuge specific rule. The way in which the FWS pursued these regulations reveals a pattern of the FWS dismantling required processes before restricting refuge uses. Further, substantive comments reveal intentional errors and omissions in presenting background information, which suggest possible government malfeasance in justifying the rulemaking.

The Proposed Rule will significantly impact 16 Alaska refuges—76 million acres—and wildlife conservation and uses far beyond those lands within Alaska. The rulemaking closes harvests of wildlife for subsistence purposes under state regulations, preempts State of Alaska efforts to sustainably manage wildlife under its constitutional mandate, and minimizes participation of Alaskans in future decisions affecting uses of the refuges. **I request you withdraw the rulemaking until you can resolve these issues summarized below.**

## Failures of Process:

*Preemption lacked compliance with Presidential Executive Orders on consultation with States:* The promulgation of the Proposed Rule did not comply with Presidents Clinton and Obama Executive Orders 12866 and 13132, which require genuine consultation with the State prior to preemption of state law. Over several years in numerous meetings, the FWS merely informed the Alaska Department of Fish and Game and the Alaska Board of Game of its reinterpretations of administrative authority to preempt the state and intent to close refuges to state-authorized seasons and methods and means of harvest. Notification is not the same as consultation, and it appears that no genuine effort was made to reach resolution.

*Rulemaking skipped Requirements for Tribal Consultation:* The Alaska Native corporations and tribes were merely notified of intentions to adopt regulations very late in the rulemaking

processes, if at all, rather than engaged in consultation as required by President Obama's Executive Order 13175.

*Justifications lacked adequate analysis of impacts:* Presentations to the public, the Federal Subsistence Regional Advisory Councils, Alaska Department of Fish and Game, and Alaska Board of Game announced the FWS's intent to reduce seasons and to prohibit certain state-authorized methods of harvest without criteria and without providing factual supporting information as to subsequent effects on wildlife populations, their habitats, and their uses.

*Falsely claimed rulemaking did not impact subsistence:* As evidenced by the title of the Proposed Rule, the FWS sidestepped acknowledging that the rule would result in restrictions on subsistence uses by all Alaskans and management of wildlife that provides for those uses. The misleading title of the Proposed Rule is reinforced by assertions that federally qualified users harvesting under federal subsistence regulations would not be affected. Many Alaskans, rural and nonrural, harvest for subsistence purposes under state hunting and trapping regulations.

*Significantly reduce public participation in future refuge closures:* The Proposed Rule significantly diminishes public participation in future rulemakings and individual refuge restrictions, which is contrary to Congressional direction in the Alaska National Interest Lands Conservation Act (ANILCA) to collaboratively address refuge management issues with the public and state on an ongoing basis and to avoid unnecessary restrictions.

*Justified the rulemaking with factual errors and omissions:* Information provided prior to and in the Proposed Rule misled the public about wildlife management practices conducted by both the FWS and states, contributing to a large number of comments that support the rule without basis in facts or law. For example, the Proposed Rule asserts that extended harvest seasons or methods viewed as distasteful is predator control, when data shows no increased harvest occurs with the increased harvest opportunities. The Proposed Rule also claims that "predator control" is not allowed on refuges, whereas there is no such prohibition.

*The environmental analysis is inadequate under NEPA:* The Environmental Assessment fails to fully evaluate social, economic, and environmental impacts of the rule, in part due to the Proposed Rule's failure in acknowledging the extent of subsequent effects on sustainable wildlife populations, their habitats, and subsistence and nonsubsistence users.

*Public comment was hindered:* First, the public and state were promised a minimum of 90 days for review, but the published Proposed Rule provided only 60 days—insufficient for information to circulate to and from rural Alaska, an area that is often internet poor. The public comment period was structured without respect to already scheduled meetings of rural residents' organizations and advisory committees. Later, the FWS responded late during the review period with only a 30-day extension. After the extension was announced, the FWS failed to fix the website when notified that it was misleading reviewers to believe the site was closed to further comment.

#### Content Errors and Omissions:

*Inaccurate assertions of authority to preempt state management of wildlife:* Contrary to its assertions, the FWS has no basis in the provisions of the National Wildlife Refuge System Improvement Act of 1997 to diminish state authority for management of fish and wildlife. In this Proposed Rule, the FWS selectively elevates one guideline in that law over fourteen others, reinterprets its own policies adopted over a decade ago, then proposes to administratively transfer preemptive authority to itself. Despite attempts to justify such a significant expansion of authority, Congress simply has not granted the FWS with the authority to preempt management of fish and wildlife by the State of Alaska. Administrative policies cannot supersede law as is being attempted.

All states enter the Union on Equal Footing, having the authority and responsibility for the sustainable management of fish and wildlife on all lands except as specifically diminished by acts of Congress. Where ANILCA and other laws do allow for some case by case preemption, specific limits to that authority are identified. Congress has not diminished that authority in Alaska except as specifically authorized to assure a federal subsistence priority through regulation of consumptive uses on federal lands by rural residents in ANILCA Title VIII and as specifically diminished in other laws, such as those listed in Section 815. ANILCA Section 815 also directs that the ANILCA authorization does not allow unnecessary impacts on the nonsubsistence uses of fish and wildlife. Public comments expressed opposition to the unnecessary limits on both subsistence and nonsubsistence uses that will result from the Proposed Rule, including impacts on future abilities of federally qualified subsistence users to harvest as populations become unsustainable and out of balance due to federal interference in state management.

The Proposed Rule impacts the state's sustainable management of fish and wildlife populations on all lands, not just on the 76 million acres of refuge lands, because wildlife do not know political boundaries. Consequently, Alaskans, as well as national interests, are significantly impacted just as subsistence and non-subsistence take both off and on refuges lands will be impacted. The Proposed Rule:

- Limits hunting and trapping without being necessary for the conservation of wildlife and without being necessary for the management of the National Wildlife Refuges in Alaska or to fulfill the mission of the National Refuge System.
- Interferes with the State's abilities to assure sustainability of fish and wildlife populations in balance with their habitat and providing for beneficial uses as required under the Alaska Statehood Act and Constitution, thus diminishing harvest and associated economic and social opportunities both on and off refuge lands.

The assumption of federal authority is fundamentally and factually inconsistent with Congressional reaffirmation of state management of all fish and wildlife in the Alaska Statehood Act, ANILCA, and the National Wildlife Refuge System Improvement Act. The following administrative grants of authority contained in the Proposed Rule that seek to preempt state management have no legal basis:

- The proposed Rule would authorize individual refuge managers, who may have no experience in wildlife management, to unilaterally close and restrict harvests and seasons on a refuge, i.e., supersede state regulations that are adopted through an extensive public process involving 84 local advisory committees and the Board of Game with oversight by the Alaska Department of Fish and Game.
- Based on personal opinion with no criteria, public process, or consultation, the Proposed Rule authorizes refuge managers to prohibit state-authorized methods and means of harvests that are “particularly efficient.” While this is a huge leap in unfettered authority by itself, there appears to be no limit to expanding this authority to restrict other methods and means, such as use and types of firearms, fishing nets, traps, barbed hooks, fish wheels, or others that a refuge manager personally dislikes.
- The Proposed Rule “would prohibit predator control on refuges in Alaska,” except as authorized by a refuge manager, even though the FWS routinely conducts predator control under State permits on refuges in order to maintain sustainable populations of migratory birds and other species. Throughout the promulgation of the Proposed Rule, the FWS mischaracterizes state-authorized seasons and methods and means as “predator control” to serve as a red herring waved without facts, despite repeated corrections provided by the State. In fact, the Service cites Congressman Udall’s statements entered into the legislative record after ANILCA became law that inaccurately portrays “predator control”, whereas the only valid legislative history entered by Senator Stevens prior to passage of ANILCA clarifies that the purpose to “*conserve fish and wildlife populations and habitats in their natural diversity*” on Alaska refuges the “*importance of maintaining the flora and fauna within each refuge in a healthy condition . . . The term is not intended to preclude predator control on refuge lands in appropriate instances.*”

*Unacceptable diminishment of public participation in future closures:* The role of Alaskans is significantly reduced as the federal regulatory process for Alaska refuges under the Proposed Rule would no longer require public notice and hearing in the affected area but would add the internet as a source for comments. Internet is no substitute for genuine consultation and is not a reliable forum for communication in rural Alaska. This change acts to expand comments by people outside of Alaska. The requirements for the FWS to consult with local residents that are most affected is negated because the required public notice and hearing prior to future rulemaking will be optional and closures may be extended indefinitely without reevaluation rather than the limits in current rules. Such reductions in the public’s role in decisionmaking is clearly contrary to the requirements and spirit of ANILCA.

*Mischaracterized Rule as only affecting “nonsubsistence”:* Numerous Alaskans commented that the impact of the Proposed Rule is broader than appears on first reading because the regulations fail to acknowledge that Alaskans hunt and trap for subsistence as well as nonsubsistence purposes under state regulations, whereas the proposed rule only recognizes federal subsistence regulations by federally qualified rural residents. As a result, it appears that the FWS is invoking a de facto closure of all 76 million acres in Alaska to Alaskans hunting and trapping for subsistence purposes under state regulations. Such a closure also appears to close refuge lands to the myriad of state subsistence fisheries authorized statewide. Further,



this refusal to recognize that state regulations provide harvests for subsistence purposes will likely result in future closures to other public activities related to subsistence and traditional uses otherwise protected by ANILCA.

The effect of the Proposed Rule is to authorize individual refuge manager's to sit in judgement of state wildlife management plans, goals, and objectives currently implemented with an extensive public process consistent with recognized scientific principles and consistent with the constitutional mandate to sustainably manage all populations. This contradicts one of ANILCA's key provisions, in which Congress confirmed state management of fish and wildlife as transferred to the State under conditions established in the Alaska Statehood Act. These regulations preempt state management even though Congress has not given the FWS authority to overrule state management except under specific criteria in law (not in administrative policy or reinterpretations of law). These regulations are based on a policy that FWS proposes to supersede all other directions Congress did establish in law.

The FWS claims that the National Wildlife Refuge System Improvement Act requires a refuge manager to close an area or restrict activities based on his opinion of what is "*conservation of natural and biological diversity, biological integrity, and environmental health of the refuge*" without criteria or public process. This is not criteria authorized by the National Wildlife Refuge System Improvement Act to trump state wildlife management. In fact, the National Wildlife Refuge System Improvement Act states that if there is any conflict between that law and ANILCA, then ANILCA prevails. The FWS is proposing to move their Biological Integrity, Diversity, and Environmental Health policy into regulation with immediate impact on the ability of the states to manage fish and wildlife on the refuges. While the current regulation is specific to Alaska and targets the state's management of wildlife, there is nothing then to limit the FWS's use of the rule as precedent to expand this authority to all refuges and all species of fish and wildlife.

I urge you to withdraw the rulemaking immediately and implement measures to assure staff reverse this trend to preempt state management of wildlife and take steps to improve relationships that restore the public's confidence in management of our national system of refuges and, in particular, the National Wildlife Refuges in Alaska.

Sincerely,

A handwritten signature in blue ink that reads "Dan Sullivan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Dan Sullivan, Chairman  
Senate Environment and Public Works Committee  
Subcommittee on Fisheries, Water, and Wildlife