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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT DILLINGHAM

NONDALTON TRIBAL COUNCIL, )  
KOLIGANEK VILLAGE COUNCIL, )  
NEW STUYAHOK TRADITIONAL )  
COUNCIL, EKWOK VILLAGE )  
COUNCIL, CURYUNG TRIBAL )  
COUNCIL, and LEVELOCK )  
VILLAGE COUNCIL, )

Plaintiffs, )

vs. )

STATE OF ALASKA, ALASKA )  
DEPARTMENT OF NATURAL )  
RESOURCES, and TOM IRWIN, )  
Commissioner of Natural Resources, )

Defendants. )

Case No. 3DI-09-46 CI

**AMENDED COMPLAINT FOR DECLARATORY JUDGMENT**

COME NOW Plaintiffs Nondalton Tribal Council, Koliganek Village Council, New Stuyahok Traditional Council, Ekwok Village Council, Curyung Tribal Council, and Levelock Village Council (hereinafter "Plaintiffs"), by and through counsel, seeking declaratory judgment against defendants State of Alaska,

Alaska Department of Natural Resources, and Tom Irwin, Commissioner of Natural Resources, regarding certain acts and omissions involving the current Bristol Bay Area Plan for State Lands, adopted by the Department in 2005 (“2005 BBAP” or “BBAP”), that Plaintiffs allege were and are unlawful. Plaintiffs request that the Court declare that the acts and omissions alleged in this Complaint are contrary to law, and grant Plaintiffs appropriate relief.

## **I. PARTIES.**

1. Plaintiff Nondalton Tribal Council is the federally recognized tribe for Nondalton, Alaska and sues on behalf of its members. They hunt and fish for subsistence on state lands in much of the Nushagak and Kvichak river drainages, to which the 2005 BBAP applies. Nondalton is located on Sixmile Lake in the Kvichak drainage, and is the community closest to certain mining claims (the “Pebble claims”) on state-owned land which are the subject of a potential and controversial large copper, gold and molybdenum mine. Tribal members hunt and fish in the area of the Pebble claims.

2. Plaintiff Koliganek Village Council is the federally recognized tribe for the Village of Koliganek, Alaska and sues on behalf of its members. The village is on the Nushagak River. Tribal members hunt and fish for subsistence on state-owned lands in much of the Nushagak River drainage, including in the vicinity of the Pebble claims.

3. Plaintiff New Stuyahok Traditional Council is the federally recognized tribe for the Village of New Stuyahok, Alaska and sues on behalf of its members. The village is on the Nushagak River. Tribal members hunt and fish on state lands for subsistence on much of the Nushagak and Kvichak river drainages, including in the area of the Pebble claims.

4. Plaintiff Ekwok Village Council is the federally recognized tribe for the Village of Ekwok, Alaska and sues on behalf of its members. Ekwok village is on the Nushagak River. Tribal members hunt and fish for subsistence on state

lands in much of the Nushagak River drainage, including in the vicinity of the Pebble claims.

5. Plaintiff Curyung Tribal Council is the federally recognized tribe for Dillingham, Alaska, has approximately 2400 members, is the largest tribe in the Bristol Bay Drainages, and sues on behalf of its members. Dillingham is on the Nushagak River. Tribal members hunt and fish for subsistence on state lands in much of the Nushagak and Kvichak river drainages, including in the vicinity of the Pebble claims, and on the Alaska Peninsula.

6. Plaintiff Levelock Village Council is the federally recognized tribe for the Village of Levelock, Alaska and sues on behalf of its members. The village is on the Kvichak River. Tribal members hunt and fish on state lands for subsistence on much of the Kvichak and Nushagak river drainages, including in the area of the Pebble claims, and on the Alaska Peninsula.

7. The plaintiffs bring this action as public interest litigants, although some members of each Tribe fish commercially in Bristol Bay.

8. Defendant State of Alaska is responsible for managing state lands, pursuant to Art. VIII of the Alaska Constitution, and Alaska Statutes and duly-adopted regulations.

9. Defendant Alaska Department of Natural Resources (“DNR”) is the state agency that manages most state lands, including lands subject to the BBAP. DNR implements state land use planning statutes contained in AS 38.04, and applicable regulations adopted by it at 11 AAC Chap. 55, under which authorities DNR has adopted and revised land use plans, including the BBAP, for state lands. DNR also implements state public land laws including those codified in Title 38 of the Alaska Statutes and mining laws in Title 27, and implements the Alaska Coastal Management Program (“ACMP”) at AS 46.40.

10. Defendant Tom Irwin (“Irwin”) is the Commissioner of Natural Resources and the chief official of DNR. He is responsible for developing,

adopting and implementing the BBAP, and for implementing the above-cited statutes and regulations. Irwin is sued in his official capacity.

## **II. JURISDICTION.**

11. The court has jurisdiction over this lawsuit pursuant to AS 22.10.020.

## **III. FACTUAL OVERVIEW.**

12. The 2005 BBAP is the state's principal land use plan for state lands in the Bristol Bay area. It applies to approximately twelve million acres of state-owned or state-selected uplands and shorelands (*i. e.*, lands between the ordinary high water marks of navigable waters), most of which lands and waters drain into Bristol Bay. The 2005 BBAP also applies to approximately seven million acres of adjacent tide and submerged lands. The geographic scope of the BBAP extends from the Bering Sea coast in the vicinity of Quinhagak, Alaska, east across the drainages of the Nushagak and Kvichak Rivers at the head of Bristol Bay, south to the end of the Alaska Peninsula and Unimak and Krenitzin Islands. Most of the state-owned uplands and shorelands in the BBAP are in the Nushagak and Kvichak drainages and on the Alaska Peninsula. These uplands and shorelands support the state's most valuable commercial sockeye salmon fisheries, subsistence fishing and hunting which supply residents of 31 villages and communities in the area with their food and their cultural identity, and recreational businesses and uses based on sport fishing, hunting and other outdoor recreational pursuits. The 2005 BBAP applies to state-owned land at the Pebble claims, where exploration is occurring under permits issued by DNR. The claims overlap the divide between the headwaters of the Kuktuli River in the Nushagak drainage and Upper Talarik Creek in the Kvichak drainage. The claims are a few miles north of the western portion of Iliamna Lake, which is one of the primary sockeye-salmon rearing lakes in Alaska, and into which Upper Talarik Creek directly flows from portions of the Pebble claims.

13. DNR must adopt and revise state land use plans under Alaska Statutes 38.04, 38.05.300, and regulations at 11 AAC Chap. 55. Pursuant to AS 38.04.065(a), land use plans, including the BBAP, are to “provide for the use and management of state-owned land.” To prepare and adopt state land use plans, DNR must maintain, keep current, and rely upon the available inventory of resources and uses in the area. AS 38.04.060, 38.04.065(b)(4). Upon information and belief, the inventory is to be essentially all relevant available information. Pursuant to AS 38.04, AS 38.05.300, and 11 AAC Chapter 55, a plan must designate primary surface uses of units of state land (*e.g.*, for habitat, public recreation, minerals, etc.). A land classification order then converts the designations to corresponding land classifications (see definition of “Area Plan,” 2005 BBAP, page A-2; and Tables 4.2(A) and (B), 2005 BBAP, pp. 4-5 – 4-6, summarizing conversion of designated uses to classifications). A unit may have up to three classifications (“co-classifications”). 11 AAC 55.040(d). Alaska Statute 38.04.015 lists the uses and purposes – *i.e.*, the “primary public interests” - - for which land must be retained in public ownership, including subsistence, energy development, aquaculture, forestry, grazing, sport hunting and fishing, mining and mineral leasing, and habitat. DNR has adopted regulations at 11 AAC 55.050 - .230 that establish and define a land classification category for every use in AS 38.04.015(1), except subsistence. Pursuant to AS 38.04.065(c)(2) and 38.04.015, classifications such as wildlife habitat land, public recreation land, mineral land and transportation corridor land require that the land so classified remain in public ownership. Other classifications, *e.g.*, settlement land and resource management land, do not carry this requirement.

14. In September 1984, the Alaska Departments of Natural Resources, Fish and Game (“ADF&G”), and Environmental Conservation (“DEC”) had jointly adopted an earlier Bristol Bay Area Plan for State Lands (“1984 BBAP”). It designated primary uses (*see* Exhibit 1, 1984 BBAP, Map, “Primary Land Uses on State Lands”) that, when converted to land classifications, resulted in

classifying nearly all of the twelve million acres of uplands and shorelands as wildlife habitat land, usually as co-classifications reflecting other primary uses, and most as a co-classification with recreation, and in some instances with minerals, oil and gas, or transportation. Pursuant to AS 38.04.015, these co-classifications, in which habitat was a classification, retained nearly all the land in state public ownership.

15. The 2005 BBAP completely revises and replaces the earlier 1984 BBAP. The 2005 BBAP designates primary uses (*see* Exhibit 14, 2005 BBAP, Map 0-5, "Land Uses Designations") that, when converted to land classifications, result in reclassifying nearly all of the twelve million acres of uplands and shorelands. This has resulted in reducing the amount of uplands and shorelands classified as habitat by approximately 90 percent, from approximately twelve million acres under the 1984 BBAP to approximately 768,000 acres under the 2005 BBAP. This causes a similar reduction in land classifications that, under AS 38.04.015, would result in retaining land in public ownership. Most of the land that remains classified as habitat is coastal tide and submerged lands. In these and other respects, the 2005 BBAP drastically changes, without factual justification or compliance with legal authority, the land-use designations, classifications, and acreages assigned to them by the 1984 BBAP.

16. The 2005 BBAP was not adopted jointly by DNR, ADF&G and DEC. It was prepared and adopted by officials at DNR.

17. Since 2001, at least five former managers or lobbyists active and directly associated with the hardrock mining industry in Alaska assumed responsible management positions in DNR that have been central to the preparation, adoption and implementation of the 2005 BBAP. Several are still central to its implementation.

18. Defendant Irwin is a former manager of the Fort Knox and True North gold mines, and is former vice president of operations of Fairbanks Gold Mining, Inc. Irwin served as Commissioner of Natural Resources from January 2003 to

October 2005, during the time the 2005 BBAP was prepared and adopted, and he is serving again in that capacity. On or about April 19, 2005, Irwin approved and signed: (1) the 2005 BBAP which replaced the earlier 1984 BBAP; (2) Land Classification Order No. SC-04-002 (*see* 2005 BBAP page B-1), that classified the lands pursuant to the 2005 BBAP; and (3) the 2005 Nushagak and Mulchatna Rivers Recreation Management Plan ("2005 Rivers Plan"), which is an element of the BBAP and replaced the 1990 Nushagak and Mulchatna Rivers Recreation Management Plan ("1990 Rivers Plan").

19. Upon information and belief, Rick Fredericksen of DNR ("Fredrickson") is a former manager for WGM, Inc., a minerals exploration firm, and former director of pre-development for the mining company Echo Bay Alaska, Inc. In about March 2003, DNR hired and assigned him to the Resource Assessment and Development Section of DNR's Division of Mining, Land and Water, to manage DNR's intended revisions of the 1984 BBAP and 1990 Rivers Plan. Fredrickson essentially completed that work when Irwin approved the 2005 BBAP and 2005 Rivers Plan. Fredericksen is now chief of the Mining Section of DNR's Division of Mining, Land and Water. He assists in implementing mining laws, regulations and the 2005 BBAP as they apply to mineral exploration and development in the Bristol Bay area, including at the Pebble claims.

20. Stan Foo was a registered lobbyist for the mining companies Cominco and Placer Dome US in 2001, when he became Chief of the Mining Section in DNR's Division of Mining, Land and Water. Cominco owned the Pebble claims until 2001, when it sold them to Northern Dynasty Mines, Inc. The 2005 BBAP identifies Foo (chief of the Mining Section) as "Division of Mining" staff assigned to the revision the Bristol Bay Area Plan. Foo performed in that capacity under Irwin's supervision of DNR until about March 2005, when Placer Dome hired Foo to manage its Donlin Creek hardrock mining project in Alaska.

21. Upon information and belief, Tom Crafford of DNR is a former vice president of North Pacific Mining Company, and is a mining consultant. DNR

hired Crafford in about 2005, initially as chief of its Mining Section, and he is presently a large-mine permitting coordinator in DNR's Office of Project Management and Permitting ("OPMP"). Under Irwin's supervision, OPMP is a part of the Office of the Commissioner, and was created not by statute or regulation, but by Irwin. OPMP has no permit-issuing authority, but instead purports to "coordinate" permits. Crafford coordinates the permitting activities of state agencies with respect to large mining projects in southwest Alaska, including activities related to the Pebble claims within the BBAP area.

22. Bill Jeffress worked with Irwin at the Fort Knox gold mine, and was an environmental manager and engineer in Alaska and Nevada with Barrick Gold Corp. (Donlin Creek mine), Kinross Gold Corp. (True North mine, Fort Knox mine) and Amax Gold Inc. (Fort Knox mine). Jeffress served as Director of OPMP from about February 2003 to about October 2005.

23. Irwin, Fredericksen and Crafford presently remain at DNR. Irwin uses Charlotte MacCay, who is not a DNR employee but is the current manager of permitting affairs for the Pebble Partnership formed to develop a Pebble mine, to prepare agency-approved minutes of meetings of from approximately five to ten state-federal interagency "Technical Working Groups" (TWGs). These TWG's are composed mostly of state and federal agency officials assigned, in an advisory capacity, to address scientific, engineering and other studies being undertaken by the Pebble Partnership for governmental and public environmental review and agency permitting of a future Pebble mine. MacCay, by preparing and distributing the minutes of TWG meetings for agency approval, creates written records that, after agency approval, are susceptible to being putatively part of a state or federal agency record, in the event of future judicial review on the record. Prior to her employment by the Pebble Partnership, MacCay was Teck Cominco Mining Company's senior administrator for environment and government affairs in Alaska, and a registered lobbyist for Teck Cominco.



24. Upon information and belief, Irwin, Crafford, Jeffress, Foo and MacCay have served as officers or directors of the Alaska Producers Council, a trade association of the hardrock mining industry in Alaska. State records prepared under the Executive Budget Act, state budgets, and DNR records demonstrate that, after these individuals assumed their staff positions and functions at DNR, the industry has substantially funded DNR's annual budgets for OPMP staff positions in Irwin's office, through "program receipts" arising from memoranda of understanding between DNR and mining companies. Under these memoranda of understanding, the companies, as applicants or prospective applicants for mining-related permits, reimburse hourly salaries and costs incurred by OPMP staff, and other state officials.

25. In discarding the 1984 BBAP and adopting the 2005 BBAP, DNR has committed numerous unlawful acts and omissions. The result is a new Bristol Bay Area Plan skewed away from the habitat protections of the 1984 BBAP, and now oriented very strongly toward encouraging, developing, and protecting mining on nearly all of the twelve million acres of state-owned uplands that discharge into some of the world's richest salmon-producing lands and waters.

#### **IV. FACTS RELATING TO PLAINTIFFS' SPECIFIC CLAIMS.**

26. For the most part, the 1984 BBAP and 2005 BBAP address the same area of approximately twelve million acres of state uplands and shorelands, plus tide and submerged lands in Bristol Bay. The 2005 BBAP adds tide and submerged land east of the Alaska Peninsula and a relatively small amount of uplands and shorelands in the Kuskokwim River drainage.

##### **A. The 1984 Bristol Bay Area Plan for State Lands.**

27. The 1984 BBAP, which remained in effect until Irwin adopted the 2005 BBAP, had 22 management units. Unit 1 was all the tidelands and submerged lands, and Units 2 through 22 were the uplands and shorelands. The 1984 BBAP resulted in DNR issuing Mineral Closing Order ("MCO") No. 393

(effective September 13, 1984). Pursuant to AS 38.05.185, MCO No. 393 closed to new mineral entry 64 streams and adjacent uplands for 100 feet each side of their high-water marks, based on "Findings of the [DNR] Commissioner" that "development of mining claims . . . creates an incompatible surface use conflict with salmon propagation and production, and jeopardizes the economy of the Bristol Bay region and the management of the commercial, sport and subsistence fisheries in the Bristol Bay area," and that "the best interest of the state and its residents" were served by the closure. This was supported by a similar, accompanying, more detailed "Justification for Stream Closures."

28. To meet requirements of AS 38.04.065(b), which requires area plans to rely on the available inventory of resources and uses prepared under AS 38.04.060(a), in 1984 DNR produced maps for purposes of minerals, oil and gas, and transportation corridors. ADF&G produced "Fish and Wildlife Distribution" maps and "Community Subsistence Use Areas" maps for DNR, which are in Appendix A to the 1984 BBAP, and are attached hereto as Exhibits 2 – 9. Exhibit 2 depicts anadromous and non-anadromous freshwater fish habitat and MCO No. 393. Exhibits 3 – 6 depict "essential" and "important" wildlife habitats by species, genus or otherwise. Exhibits 7 – 9 depict the respective subsistence use areas of the 31 villages and communities in the area.

29. The 1984 BBAP, page B-1, defined "essential habitat" in part as –  
habitat necessary to support essential life cycle functions of individual fish and wildlife species and provide for the existence and maintenance of local and/or regional fish and wildlife populations. Relative to other geographical areas or habitat designations, essential habitats are the highest valued fish and wildlife areas. Man-induced disturbance and land use changes in essential habitat areas would be expected to have the most severe and immediate impact on local and/or regional populations of fish and wildlife. Within the Bristol Bay study area, essential habitat, as depicted on the Fish and Wildlife Distribution Maps, includes: caribou calving areas, winter use areas, and migration corridors; brown bear spring use stream concentration areas; [and] moose winter use areas . . . .

30. The 1984 BBAP, page B-2, defined “important habitat” in part as – habitat used to support life cycle functions of individual fish and wildlife species and important in maintaining optimal levels of local and/or regional fish and wildlife populations. On a unit area basis, man-induced development and disturbances in important habitat areas would be expected to have less severe and longer range impacts on local and/or regional populations of fish and wildlife when compared to similar disturbances in essential habitat. Within the Bristol Bay study area, important habitat, as depicted on the Fish and Wildlife Distribution Maps, includes: caribou summer use areas; brown bear summer use areas, fall use areas, and denning areas; [and] moose spring, summer, and fall use areas . . . .

31. Based on the mapped inventories of resources and uses, the 1984 BBAP designated nearly all of the twelve million acres of uplands and shorelands as “essential” or “important” habitat. This resulted in classifying nearly all of such lands as wildlife habitat land under 11 AAC 55.230, usually as co-classifications of (1) wildlife habitat and public recreation land, (2) wildlife habitat, public recreation, and oil and gas land, (3) wildlife habitat and oil and gas land, (4) wildlife habitat, public recreation, and mineral land, and (5) wildlife habitat, mineral and oil and gas, and transportation corridor land. (See Exhibit 1, 1984 BBAP, Map, “Primary Land Uses on State Lands”) The 1984 BBAP designated remote settlement as a secondary use on about 60,000 acres, and limited disposal out of state ownership to about 13,000 of these acres, so long as the habitat and other goals were met on the remaining land in the respective units. Most settlement lands were in the Kvichak and Nushagak drainages, and little or none were sold. Pursuant to the 1984 BBAP, DNR co-classified the lands at and in the vicinity of what are now Pebble claims as wildlife habitat and public recreation land, or as wildlife habitat, public recreation, and mineral land.

**B. The 1990 Nushagak - Mulchatna Rivers Recreation Management Plan**

32. DNR adopted the 1990 Rivers Plan as a land management plan authorized under AS 38.04, and as an element of the 1984 BBAP. At about the same time, for purposes of the ACMP, the Bristol Bay Coastal Resources Service

Area Board adopted the 1990 Rivers Plan as a plan for an “Area Meriting Special Attention.” Areas Meriting Special Attention are defined at AS 46.40.210(1) as delineated areas that are “sensitive to change or alteration” and, for reasons such as those listed in that definition, have heightened conservation concerns.

33. The 1990 Rivers Plan did not classify land, but stated that it arose out of DNR’s recognition of the importance of subsistence and recreation and public concern about the growth of recreation in these drainages. It sought to protect and balance subsistence and recreational use and development on about 5.7 million acres of state land in the Nushagak-Mulchatna drainages, which were Units 6 and 7 and part of Unit 5 of the 1984 BBAP. The Rivers Plan further subdivided these units and created a more detailed inventory of subsistence and recreational use on these lands than on the remainder of lands in the 1984 BBAP.

**C. The 2005 Bristol Bay Area Plan for State Lands.**

34. The 2005 BBAP, for the most part, re-labels each upland unit of the 1984 BBAP (Units 2 – 22) as a “region,” and further subdivides regions into units. This practice yields 287 units in the 2005 BBAP, of which 227 are uplands and shorelands, and 60 are tide or submerged lands. With respect to the 5.7 million acres in the Rivers Plan, the 2005 BBAP generally uses the unit boundaries of the Rivers Plan, which had already subdivided Units 6, 7 and part of 5 of the 1984 BBAP into smaller units.

35. The 2005 BBAP leaves Mineral Closing Order No. 393 in effect. It continues to have legal force and effect, including on lands closed to mineral entry along Koktuli River and Upper Talarik Creek in the area of the Pebble claims.

**1. Inventory and Maps Prepared for the 2005 BBAP.**

36. For the 2005 BBAP and the inventory required by AS 38.04.060(a) and 38.04.065(b), DNR’s project manager Fredericksen collected, and in some instances mapped, selected information. The 2005 BBAP contains five maps titled (1) “Historical & Archeological Sites,” (2) “Mineral Closure Orders, Leasehold Location Orders, & Mineral Opening Orders,” (3) “Mineral Resources:

Deposits, Prospects, and Occurrences,” which depicts areas of mining claims at Pebble, Sleitat, Shotgun Hills, and Kemuk as hardrock deposits and prospects; (4) “Oil & Gas and Coal Basins,” and (5) “Transportation Corridors,” which depicts a road corridor from Williamsport Bay on Cook Inlet to the Pebble claims.

37. Fredericksen also produced, but DNR did not publish as a part of the 2005 BBAP, maps of non-anadromous marine fish distribution, critical caribou habitats, moose habitats, essential and important brown bear habitats, proposed roads and corridors, and other resources and uses. This Complaint refers to these unpublished maps as the “DNR Fredericksen maps,” and plaintiffs attach four as Exhibits 15 – 18. The DNR Fredericksen maps of caribou, moose and brown bear habitats (Exhibits 15, 16 and 17), for the most part, depict either the same, or similar, habitats as had ADF&G’s “Fish and Wildlife Distribution” maps of caribou, moose and brown bear habitats (Exhibits 3, 4, and 6) in the 1984 BBAP.

38. Upon information and belief, Fredericksen and DNR did not produce, or request ADF&G to produce, any new maps of the subsistence use areas relied on by the 31 villages and communities in the Bristol Bay area, to reflect any different information from that contained in the subsistence maps that ADF&G had produced for the 1984 BBAP.

## **2. DNR’s 2005 BBAP Departs from Legally Defined and Adopted Terms.**

39. The 2005 BBAP applies its own, *ad hoc* definitions of at least six terms that are significant for land designation, classification and management. These *ad hoc* definitions are at odds with DNR’s duly-adopted regulatory definitions or other law, and the 2005 BBAP uses them to designate and classify land in ways that are neither lawful nor factually supportable.

- a. **DNR's *ad hoc* definition of the "Ha' (Habitat)" designation and *ad hoc* list of "fish and wildlife categories" used to designate habitat in the 2005 BBAP.**

40. For purposes of classifying land, the 2005 BBAP at page 2-9 uses the following *ad hoc* definition of the "Ha' (Habitat)" designation and list of "fish and wildlife categories" to identify and designate land as habitat:

**B. Allowing Uses in Fish and Wildlife Habitats (Ha).** These habitats are defined as Areas [sic] that serve as a concentrated use area for fish and wildlife species during a sensitive life history stage where alteration of the habitat and/or human disturbance could result in a permanent loss of a population or sustained yield of the species. Fish and wildlife categories used to identify "Ha" (Habitat) designations in this plan include the following:

- Anadromous fish spawning and rearing areas in fresh water or brackish intertidal zones
- Estuaries important for rearing or schooling of anadromous fish
- Kelp beds covering large areas that are important marine nurseries
- Pacific herring spawning and rearing concentrations areas
- Eel grass beds that are important marine nurseries
- Waterfowl and/or shorebird concentration areas
- Seabird breeding habitat within each colony area of 500 birds and a two-mile radius around major breeding colonies (more than 20,000 birds)
- Bald eagle nest sites or nest site areas, and known concentrations
- Sea lion haulouts and rookeries
- Harbor seal haulouts and rookeries
- Walrus haulouts and rookeries
- Sea otter pupping areas
- Bear concentration areas (including concentrations by season)
- Important wildlife migration corridors, including nearshore migration routes.

The duly-adopted regulatory definition of "wildlife habitat land" is found at 11 AAC 55.230, and defines the term as follows:

Land classified wildlife habitat is land which is primarily valuable for (1) fish and wildlife resource production, whether existing or through habitat manipulation, to supply sufficient numbers or a diversity of species to support commercial, recreational, or traditional uses on an optimum sustained yield basis; or (2) a unique

or rare assemblage of a single or multiple species of regional, state, or national significance.

41. DNR's *ad hoc* "'Ha' (Habitat)" definition, quoted above, is limited to "a concentrated use area for fish and wildlife species during a sensitive life history stage where alteration of the habitat and/or human disturbance could result in a permanent loss of a population or sustained yield of the species." In contrast, 11 AAC 55.230 is in terms of "land which is primarily valuable for . . . fish and wildlife resource production . . . to supply sufficient numbers or a diversity of species to support commercial, recreational, or traditional uses on an optimum sustained yield basis."

42. DNR's *ad hoc* list of "fish and wildlife categories" fails to include moose or caribou. DNR's 2005 BBAP (page 2-13) asserts that moose and caribou calving and rutting areas change over time. This assertion is belied by the unpublished DNR Fredericksen maps. The DNR Fredericksen map titled "Moose Habitat" (Exhibit 16) depicts moose habitats as differing little, if at all, from moose habitats depicted on ADF&G's 1984 "Moose & Marine Mammal Distribution" map (Exhibit 4) in the 1984 BBAP. The DNR Fredericksen map titled "Caribou Herds and Critical Habitat" (Exhibit 15) depicts what is apparently the range of the Mulchatna and Kilbuk herds as having expanded somewhat since 1984, and depicts the same caribou calving areas identified as "essential" habitat on ADF&G's 1984 "Caribou Distribution" map (Exhibit 3). One such caribou calving area, that is depicted on the 1984 ADF&G caribou map and the DNR Fredericksen map of critical caribou habitat and identified in the 2005 BBAP, pages 3-111, 3-112, 3-175, is a calving area north of western Iliamna Lake that includes almost the entire drainages of Upper Talarik Creek and the North and South Forks of the Kokluli River, at and substantially surrounding the Pebble claims. DNR's assertion in the 2005 BBAP that moose and caribou change calving and rutting areas over time, and DNR's failure to include moose and caribou in its list of "fish and wildlife categories" used in the 2005 BBAP to

identify and designate habitat, have led to the failure of the 2005 BBAP to designate and classify lands, as wildlife habitat land, where moose or caribou concentrate seasonally on moose winter-use areas and caribou calving grounds.

b. **DNR's *ad hoc* definition of "anadromous waters" in the 2005 BBAP.**

43. DNR's 2005 BBAP, page A-1 (glossary) uses the following *ad hoc* definition of "anadromous waters":

**Anadromous Waters.** A river, lake or stream from its mouth to its uppermost reach including all sloughs and backwaters adjoining the listed water, and that portion of the streambed or lakebed covered by ordinary high water used by salmon to spawn. Anadromous waters are shown in "The Atlas to the Catalog of Waters Important for Spawning, Rearing, or Migration of Salmon" (referred to as the Anadromous Fish Stream Catalog) compiled by ADF&G.

44. For purposes of land management under the 2005 BBAP, DNR's *ad hoc* definition excludes the beds of anadromous waters wherever the water column is used for rearing, feeding and migration, but where the bed beneath the water is not used for salmon spawning.

45. The *Atlas*, correctly titled "*An Atlas to the Catalog of Waters Important for Spawning, Rearing, or Migration of Anadromous Fishes*," and its accompanying "*Catalog of Waters Important for Spawning, Rearing, or Migration of Anadromous Fishes*," including its definitions, implement the Anadromous Fish Act. In 2005, when DNR adopted the 2005 BBAP, that Act was codified as AS 41.14.870 *et. seq.* and implemented by DNR, even though ADF&G still compiled the *Atlas*. The Act is now codified as AS 16.05.871 *et. seq.*, and is implemented by ADF&G. The *Atlas*, the *Catalog*, and their definitions were duly-adopted by DNR into regulation by reference in 2005 under 11 AAC 195.010 and are now duly-adopted by ADF&G by reference under 5 AAC 95.011.



46. A number of these duly-adopted regulations under the Anadromous Fish Act are in conflict with DNR's *ad hoc* definition of "anadromous waters." The definitions in the *Catalog* (see attached regulations) provide in relevant part:

**"Anadromous Fish"** means a fish or fish species that spends portions of its life cycle in both fresh and salt waters, entering fresh water from the sea to spawn and includes the anadromous forms of pacific trout and salmon of the genus *Oncorhynchus* (rainbow and cutthroat trout and chinook, coho, sockeye, chum and pink salmon), Arctic char, Dolly Varden, sheefish, smelts, lamprey, whitefish, and sturgeon.

**"Bed"** means the substrate, bounded by the stream banks, over or through which the water column flows.

**"Fish"** means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle. . . ;

**"Fish Habitat"** means any area on which fish depend, directly or indirectly, during any stage of their life cycle, including but not limited to areas of spawning, rearing, food supply, overwintering, or migration.

**"Migration"** means the predictable, purposeful, or seasonal movement of fish, unrestricted by other than natural influences.

**"Portion of the bed(s) and banks, up to the ordinary high water mark (OHW)"** means (A) in the non-tidal portion of a river, lake, or stream: the portion of the bed(s) and banks up to which the presence and action of the non-tidal water is so common and usual, and so long continued in all ordinary years, as to leave a natural line or "mark" impressed on the bank or shore as indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics; (B) in a braided river, lake, or stream: the area delimited by the natural line or "mark," as defined in Part A above, impressed on the bank or shore of the outside margin of the most distant channels; or (C) in the tidally influenced portion of a river, lake, or stream: the portion of the bed(s) and banks below the (1) OHW as described in A or B above, or (2) mean high water elevation; whichever is higher at the project site.

**“Rearing”** means the developmental life phase of a fish from fertilization of eggs to adult.

**“Spawning”** means the deposition or fertilization of fish eggs, including preparation for deposition or fertilization.

**“Specified upper limit”** means the documented upstream limit of anadromous fish use as depicted in *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes* or listed in the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.

**“Specified Water Body”** means a river, stream, or lake, in its liquid or frozen state, its braided channels, distributaries, sloughs, backwaters, and estuaries, including the portion of the bed(s) and banks up to the ordinary high water mark, from its mouth to its specified upper limit as depicted in *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes* or listed in the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.

Under these Anadromous Fish Act regulations, the beds of anadromous waters are not limited, as they are in DNR’s *ad hoc* definition, to “that portion of the streambed or lakebed . . . used by salmon to spawn.” First, the duly-adopted definition of “specified water body” includes the waters and “the portion of the bed(s) and banks up to the ordinary high water mark, from its mouth to its specified upper limit as depicted in [the *Atlas*].” The duly-adopted definition of “specified upper limit” is the “documented upstream limit of anadromous fish use as depicted in [the *Atlas*].” Second, the duly-adopted definition of “anadromous fish” includes “the anadromous forms of pacific trout and salmon of the genus *Oncorhynchus* (rainbow and cutthroat trout and chinook, coho, sockeye, chum and pink salmon), Arctic char, Dolly Varden, sheefish, smelts, lamprey, whitefish, and sturgeon.” This definition is not limited to salmon, as DNR’s *ad hoc* definition would require. Third, with respect to areas fish use during their life cycles, the duly-adopted definitions of “fish” and “fish habitat” include “any area on which fish depend, directly or indirectly, during any stage of their life cycle, including

but not limited to areas of spawning, rearing, food supply, overwintering, or migration.” This duly-adopted definition is not limited to spawning areas, as DNR’s *ad hoc* definition would require.

**c. DNR’s *ad hoc* definition of “recreation” in the 2005 BBAP.**

47. DNR’s 2005 BBAP at page A-11 uses an *ad hoc* definition of “recreation” as follows:

**Recreation.** Any activity or structure intended for recreational purposes, including but not limited to hiking, camping, boating, fishing, and sightseeing. "Recreation" does not refer to subsistence or sport hunting and fishing. [Underscoring original]

The duly-adopted regulation 11 AAC 55.160 defines the “public recreation land” classification as:

Land classified public recreation is land that is suitable for recreation uses, waysides, parks, campsites, scenic overlooks, hunting, fishing or boating access sites, trail corridors, or greenbelts along bodies of water or roadways.

The adopted regulatory definition includes sport hunting and fishing, while DNR’s *ad hoc* definition does not.

**d. DNR’s *ad hoc* definition of “subsistence uses” in the 2005 BBAP.**

48. DNR’s 2005 BBAP at page A-13 defines “subsistence uses” in part as:

**Subsistence Uses.** The noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state . . . .

This *ad hoc* definition fails to conform to *McDowell v. State*, 785 P.2d 1 (Alaska 1989). *McDowell* holds that the Alaska Constitution, Article VIII, Section 3 (the Common Use Clause) bars the state from limiting subsistence to rural residents -- or, as the *ad hoc* definition states, “a resident domiciled in a rural area

of the state.” To the extent that the 2005 BBAP asserts that it manages land to protect subsistence uses (even in the absence of a subsistence land classification category), the 2005 BBAP does with respect to rural residents only, and thus is likely to protect too little land for all Alaskans’ subsistence uses.

e. **DNR’s *ad hoc* definition of the “Mi-Minerals” designation in the 2005 BBAP.**

49. For purposes of classifying land, DNR’s 2005 BBAP at page 3-4 uses an *ad hoc* definition to designate land as mineral. It states in part:

**Mi – Minerals.** Areas associated with significant resources, either measured or inferred, that may experience minerals exploration or development during the planning period are designated Minerals. This is a designation that includes surface uses in support of minerals exploration and development, including tailings deposition, waste rock disposal, mineral processing facilities, administrative facilities, and residential living quarters. \* \* \*

By contrast, the duly-adopted regulation 11 AAC 55.130 defines the “mineral land” classification as:

land where known mineral resources exist and where development is occurring or is reasonably likely to occur, or where there is reason to believe that commercial quantities of minerals exist.

DNR’s *ad hoc* “Mi-Minerals” definition includes land where “significant resources . . . may experience minerals exploration,” whereas the adopted 11 AAC 55.130 defines the “mineral land” classification category more narrowly. It does not include lands that may be subject to mere mineral exploration. DNR’s *ad hoc* definition allows tailings facilities, impoundments, associated dams, waste rock disposal (and other facilities related to mining) to be located on lands and waters closed to mineral entry by Mineral Closing Order No. 393 but designated “Mi-Minerals” in the 2005 Plan. This includes lands along the Koktuli River and Upper Talarik Creek that are closed to mineral entry by MCO No. 393, designated as “Mi-Minerals” by the 2005 BBAP on account of the Pebble claims, and reclassified as mineral land by Land Classification Order No. SC-04-002. In fact,

on or about February 8, 2005, Northern Dynasty sought assurances from DNR's Fredericksen that tailings facilities for a Pebble mine could be placed inside the land closed to mineral entry, so long as the tailings would be from ore mined outside the land closed to mineral entry. DNR's *ad hoc* definition of the "Mi-Minerals" designation, and DNR's land classification order that converts the "Mi-Minerals" designations to mineral land, accommodate Northern Dynasty's concern. In doing so, the *ad hoc* definition and land classification order circumvent the fishery conservation purposes of MCO No. 393, its best interest finding that mining is incompatible with fisheries, and its "Justification for Stream Closures," including their application to closed lands along the Koktuli River and Upper Talarik Creek.

**f. DNR's *ad hoc* definition of "classification" in the 2005 BBAP.**

50. The 2005 BBAP at page A-3 uses an *ad hoc* definition of "classification" as follows:

**Classification.** Land classification identifies the purposes for which state land will be managed. All classification categories are for multiple use, although a particular use may be considered primary. Land may be given a maximum of three classifications in combination.

The duly-adopted definition of "classification" at 11 AAC 55.280(1) states:

"classification" means the designation of land according to its primary use, and in a manner that will provide maximum benefit to the people of Alaska.

DNR's *ad hoc* definition (1) neglects the legal requirement of 11 AAC 55.280(1) that a "classification" is to "provide maximum benefit to the people of Alaska," a public interest element derived from Article VIII, Section 2 of the Alaska Constitution; and (2) asserts that a classification "identifies the purposes for which state land will be managed," whereas the duly adopted 11 AAC 55.280(1) defines "classification" in terms of a "designation of land according to its primary use."

### 3. Land Designation and Classification under the 2005 BBAP.

51. Although Chapter 4 of the 2005 BBAP (pp. 4-2, 4-3) mentions in passing the duly-adopted land classification categories of 11 AAC 55.050 - .230, the 2005 BBAP applies these definitions only for its later management of lands, and not for their earlier designation and classification. The “Resource Allocation Tables” in Chapter 3 designate the primary uses of each management unit, and Land Classification Order No. SC-04-002 converts these to classifications. DNR’s *ad hoc* definitions of critical land designation and classification terms were applied to these steps. The text of Chapter 3 departs from the duly adopted definition of “wildlife habitat land” at 11 AAC 55.230 by repeatedly referring to the “Ha-Habitat” designation as being for areas used by fish and wildlife “during a sensitive life-history stage where alteration of the habitat or human disturbance could result in the permanent loss of a population or sustained yield of a species.” This is based on DNR’s *ad hoc* definition of the “‘Ha’ (Habitat)” designation quoted in paragraph 40, above. Similarly, the allocation tables of Chapter 3 of the 2005 BBAP designate habitat predominantly where marine-related wildlife have “concentrated use areas,” such as at walrus, seal and sea lion haulouts, eel grass and kelp beds, herring spawning areas, and seabird colonies, all of which are on the list of “fish and wildlife categories” used to designate habitat. Similarly, the 2005 BBAP (pp. A-6, A-13) defines “haulout” and “tidal resource management zones,” respectively, in terms of “concentrations” and “high concentration” of wildlife. By applying DNR’s *ad hoc* definition of the habitat designation and the list of “fish and wildlife categories” that depart from 11 AAC 55.230, the 2005 BBAP and its land classification order reduce the amount of uplands and shorelands classified as wildlife habitat land (and therefore for retention in public ownership) by about 90 percent, from approximately 12,000,000 acres in the 1984 BBAP to approximately 768,000 acres in the 2005 BBAP. In contrast, the 2005 BBAP and land classification order classify as wildlife habitat land approximately

1.4 million acres of tide and submerged lands, nearly all of which are in or adjacent to existing, legislatively designated state or federal conservation areas.

52. The 2005 BBAP, page 2-9, concedes that it designates few uplands as habitat. The few so designated are, with minor exception, corridors of several rivers in the Nushagak drainage. Most shorelands designated habitat are where salmon spawn in navigable anadromous waters, but not included is the western half of Iliamna Lake, into which Upper Talarik Creek flows from the Pebble claims. Aside from the above-mentioned river corridors and shorelands, nearly 99 percent of all land classified as habitat is coastal tide and submerged land.

53. Many habitats of caribou, moose, bear, other upland wildlife, fish in non-navigable waters, rearing salmon and other fish in western Iliamna Lake, and non-anadromous fish are denied habitat designation by the 2005 BBAP due to its *ad hoc* habitat definition and its narrow, marine-related list of “fish and wildlife categories” used to identify, designate, classify and retain land as habitat.

54. The 2005 BBAP and classification order shift more than 9.4 million upland acres from co-classifications under the 1984 BBAP for habitat, recreation and other uses (which retain land in public ownership), to “resource management land,” which does not. The 2005 BBAP changes settlement from a secondary use to a primary use, and increases the acreage from approximately 60,000 acres as a secondary use to over 640,000 acres as a primary use and classification. Much of this increased acreage is in the area of the Pebble claims and the road corridor to them. Thus, the 2005 BBAP results in reclassifying over 10 million of the 12 million upland acres from land identified, delineated, retained, classified and required for retention in public ownership, to land that is not.

55. The millions of acres of state lands as to which the 2005 BBAP eliminates the prior habitat classifications of the 1984 BBAP include:

(a) The western half of Iliamna Lake and its bed (Region 10). Iliamna Lake is one of Alaska’s most important sockeye salmon rearing lakes and into which Upper Talarik Creek directly flows from that portion of the Pebble claims

in Region 10. The 1984 BBAP designated, and thereby classified, the entire Iliamna Lake and its bed as habitat. In DNR's 2005 BBAP, Table 3.1 (pp. 3-326 – 3-330) lists, designates primary uses of, and thereby classifies, most navigable anadromous water bodies and their beds as habitat. However, Table 3.1 (at page 3-328) fails to list the Region-10, western portion of Iliamna Lake in that portion of the table that lists the navigable anadromous water bodies of Region 10.

Omitting approximately the western half of Iliamna Lake results in its designation, classification and management being governed by the provisions in the 2005 BBAP that apply to omitted lands (*see* 2005 BBAP, pp. 4-8 – 4-9, “Applicability of Plan Designations/Classifications to State Lands not Identified in the Plan Text or Plan Maps”). This has resulted in cancellation of the 1984 habitat classification for approximately the western half of Iliamna Lake and its bed, and the designation of them as general use (*see* 2005 BBAP, p. 4-2, note 1), thereby classifying western Iliamna Lake and its bed as resource management land.

(b) Beds of anadromous waters not used for salmon spawning, but where the waters or beds are used by salmon and other anadromous fish for rearing, migration and other life stages.

(c) Most non-anadromous fish habitat outside of legislatively designated conservation areas.

(d) The vast majority of moose winter-use habitat within roughly 2.5 to 3 million acres of state land located north of Iliamna Lake and east of the Mulchatna River corridor units. These moose winter-use areas include the Upper Talarik Creek drainage at and near the Pebble claims, the area of Nikabuna Lakes north of the claims, the area southeast of Tutna Lake north of the claims, and areas along the road corridor to the claims. The 2005 BBAP also eliminates the prior habitat classification in the area of Kemuk Mountain, west of Koliganek. ADF&G's 1984 map of moose habitat identified all these lands as “essential” winter habitat, and DNR's Fredericksen map of moose habitat identifies them as winter habitat. The



2005 BBAP reclassifies most of these lands as mineral, settlement or resource management lands.

(e) The caribou calving areas at and surrounding the Pebble claims and in the upper Mulchatna drainage. ADF&G's 1984 map of caribou habitat identified these areas as "essential" habitat. DNR's Fredericksen map of caribou habitat identifies them as "critical" habitat. The 2005 BBAP reclassifies these lands as mineral or resource management lands.

(f) Spring-, summer-, and fall-use habitat for moose along the proposed road corridor to the Pebble claims. ADF&G's 1984 map of moose habitat identified these lands as "important" habitat. DNR's Fredericksen map of moose habitat identifies them as spring-, summer-, and fall-use areas. The 2005 BBAP reclassifies these lands as settlement or resource management lands.

(g) Brown bear concentration streams at Upper Talarik Creek and many streams along the road corridor. Both ADF&G's 1984 brown bear habitat map and DNR's Fredericksen map of such habitats identify these as "essential." The 2005 BBAP reclassifies these lands as mineral, resource management or settlement lands.

(h) Several million acres of caribou winter-use habitat in the Nushagak and Kvichak drainages outside major river corridors of the Nushagak system. ADF&G's 1984 map of caribou habitat identified these lands as "essential" habitat. The 2005 BBAP reclassifies the land as resource management land.

(i) Shotgun Hills and Sleitat Units. ADF&G'S 1984 map of caribou habitat identified the land in these units as lying within "essential" caribou winter-use habitat. The 1984 ADF&G brown bear habitat map identified the Shotgun Hills land as "important" habitat for denning. The DNR Fredericksen map of brown bear habitat identifies it as "important" habitat for denning. The 2005 BBAP reclassifies the land in these units as mineral land.

56. Of the over 640,000 acres classified for settlement and disposal, nearly half (approximately 284,000 acres) are in the Kvichak and Nushagak

drainages, and of this, approximately 207,000 acres are within approximately twenty-five miles of the Pebble claims, or are along the proposed road corridor. All would be accessed by proposed roads on the DNR Fredericksen map of proposed roads (Exhibit 18). The larger tracts include: (1) southeast of Tutna Lake, north of the Pebble claims, (2) at Nikabuna Lakes, north of the claims, (3) in the Chulitna River drainage, north of the claims, (4) on upper Chekok Creek near the access route, and (5) on Pile River near the access route. Nearly all of these tracts include lands identified as “essential” or “important” habitats – *i.e.*, as “essential” moose winter-use habitat in the 1984 BBAP and its map of moose habitats (Exhibit 4); as “essential” brown bear concentration streams in the 1984 BBAP and its map of brown bear distribution (Exhibit 6) and equally as “essential” concentration streams on the DNR Fredericksen map titled “Brown Bear Distribution” (Exhibit 17); or as “important” spring-, summer- and fall-use areas of moose in the 1984 BBAP and its map of moose habitats (Exhibit 4). The 2005 BBAP reclassifies the land from its co-classification as wildlife habitat, public recreation and mineral land under the 1984 BBAP, to solely settlement land. The 2005 BBAP fails to consider, as required by AS 38.04.065(b)(6), whether non-state land may be available for settlement.

#### **4. Pebble and Subsistence and Sport Hunting and Fishing.**

57. The 2005 BBAP, at pages 3-111, 3-112, states: “The general resource management intent for the Pebble Copper area is to accommodate mineral exploration and development . . . .” and “Mineral development . . . is expected to be authorized . . . .” However, the 2005 BBAP does not address whether the large number of workers (possibly thousands) necessary to build and operate the mine, plus secondary population growth in the area, are compatible under AS 38.04.065(b)(7) and 11 AAC 55.030(c)(6) with: (1) subsistence on state and federal lands in the area, where subsistence is managed under different state and federal subsistence laws; (2) recreational uses of fish and wildlife on state and federal lands, or existing recreational businesses; or (3) commercial salmon

fishing, particularly for Chinook salmon bound for the Nushagak River which would be accessed by road, according to the proposed transportation map in the 2005 BBAP and the DNR Fredericksen map of proposed roads.

58. Although Chapter 3 of the 2005 BBAP mentions subsistence generally in the region-wide discussions of many of the 22 regions, the allocation tables of Chapter 3, which designate primary uses that convert to corresponding land classifications and which contain the unit-specific statements of management intent and inventories, mention subsistence with respect to only five upland-shoreland units totaling about 373,000 acres, out of the 227 upland-shoreland units totaling about twelve million acres. This equates to about 3 percent of the total upland acreage, the vast majority of which is in the Nushagak and Kvichak drainages and on the Alaska Peninsula, and most of which is used by residents of 31 villages to harvest fish and game for food.

59. In contrast, the allocation tables in the 2005 BBAP mention subsistence with respect to eighteen tide and submerged land units totaling about 6,221,000 acres, out of the 60 tideland-submerged land units totaling about seven million acres. This equates to about 89 percent of the total tide and submerged land acreage. Thus, at the unit level, at which designation and classification occur, the 2005 BBAP treats subsistence as almost exclusively a tide and submerged land activity, as if moose and caribou have disappeared from subsistence hunting since 1984. Nothing in the 2005 BBAP or inventory supports a proposition that people shifted their upland subsistence uses to tide and submerged lands after the 1984 BBAP was adopted, particularly not those people represented by plaintiffs, who live far inland from coastal tidelands.

60. For the harvest of fish and game, the 2005 BBAP creates an *ad hoc* "Hv-Harvest" designation. As applied, it, too, treats subsistence as a tidelands activity. The "Hv-Harvest" designation is applicable to tidelands only, and it is converted to a habitat classification (2005 BBAP, Tables 4.2A and 4.2B, pp. 4-5, 4-6). The 2005 BBAP, page 3-3, defines this designation as:

**Hv-Harvest.** Fish and wildlife harvest areas are subsistence, recreational and/or community harvest areas of varied size where alteration of habitat could permanently limit sustained yield to traditional users; or are areas of intense harvest where the level of harvest has reached, or is projected to reach, the harvestable surplus for the resource. This land will remain in state ownership.

The 2005 BBAP designates ten of the 60 tide and submerged land units -- but none of the 227 upland and shoreland units -- as having co-designations of habitat and harvest. All units so designated are commercial fishing areas, and none of these tide and submerged land units is identified in the unit-specific inventories as an area for hunting moose and caribou, which usually occurs far inland. None are proximate to plaintiffs' villages and communities in the upper Nushagak and Kvichak drainages where subsistence activities constitute the primary use of state land. Most of these tide and submerged land "Harvest Areas" are within, adjacent to, or relate to existing legislatively-designated conservation areas. As tide and submerged lands, all are already protected by the Public Trust Doctrine.

**5. Mining as a co-designated use on all lands open to mineral entry.**

61. The 2005 BBAP abandons DNR's earlier practice in the 1984 BBAP of identifying secondary uses, and almost entirely abandons its practice of identifying prohibited uses.

62. The 2005 BBAP at page 3-5 treats mining as a "co-designated use" on all state land open to mineral entry. It employs an *ad hoc* definition of "designated use" at page A-3, part of which provides:

**Designated Use.** An allowed use of major importance in a particular management unit. Activities in the unit will be managed to encourage, develop, or protect this use. \* \* \*

63. Thus, the 2005 BBAP makes mining an important co-designated use to be encouraged, developed and protected on almost the entire twelve million upland acres, regardless of what any inventory may say about minerals being

present or not. When no secondary uses are identified and no co-classifications occur (as is the case on nearly all of the 9.4 million acres classified as “resource management land”), only one designated use remains. That is “mining,” as defined by the 2005 BBAP, page A-8. Other uses of the land, such as for subsistence, recreation and habitat are merely undesignated uses on these 9.4 million acres of state land. On these lands, the 2005 BBAP allows other uses only so long as they are compatible with mining and mineral exploration. This occurs because a designated use prohibits an undesignated use, if the undesignated use “conflicts with the management intent, designated primary or secondary uses, or management guideline” applicable to the land (2005 BBAP, page A-10, definition of “prohibited use;” *see also* 2005 BBAP, pp. 2-2 – 2-3, 3-2 and 11 AAC 55.040(c)). Thus, DNR’s 2005 BBAP transforms subsistence, recreation and habitat, including its production of salmon, moose, caribou, and other fish and wildlife, into “prohibited uses” whenever they conflict with mining or mineral exploration on these 9.4 million acres of the public’s state-owned land.

**D. The 2005 Nushagak-Mulchatna Rivers Recreation Management Plan.**

64. For purposes of managing recreation on 5.7 million acres of state-owned uplands and shorelands in the Nushagak and Mulchatna river drainages, the 2005 Rivers Plan uses nearly the same unit-specific, more detailed inventories of high, moderate and low subsistence and recreational use areas as did the 1990 Rivers Plan. Thus, the 2005 Rivers Plan relies on the available inventory, as AS 38.04.065(b)(4) requires. In contrast, for purposes of land classification in the Nushagak and Mulchatna river drainages, the 2005 BBAP mentions subsistence in the unit-specific inventory in only one unit (R06-48, “Iowithla River,” 46,449 acres), out of approximately 87 units comprising the same 5.7 million acres of state-owned uplands and shorelands in the Nushagak-Mulchatna drainages that are also the subject of the 2005 Rivers Plan. Furthermore, the 2005 Rivers Plan and 2005 BBAP use substantially the same unit boundaries in these drainages, and DNR and Fredericksen revised both plans contemporaneously. Yet, while the

2005 Rivers Plan does rely on the available inventory as AS 38.04.065(b)(4) requires, the 2005 BBAP fails to do so.

65. The 2005 Rivers Plan at page 1-3 purports to sever the “link” between the Rivers Plan and the Alaska Coastal Management Program. The 2005 Rivers Plan excludes from its application all land in the Nushagak and Mulchatna drainages classified under the 2005 BBAP as mineral or settlement land. The excluded land includes nearly 303,000 acres of mineral land in the immediate vicinity of the Pebble claims, and at Shotgun Hills, Sleitat, and Kemuk.

### **FIRST CAUSE OF ACTION**

**(The definition in the 2005 BBAP of the habitat designation is unlawfully inconsistent with the adopted definition of the “wildlife habitat land” classification at 11 AAC 55.230.)**

66. Plaintiffs reallege and incorporate herein the preceding paragraphs.

67. Instead of using the adopted regulatory definition of “wildlife habitat land” at 11 AAC 55.230 as the basis for designating land as habitat and classifying it as wildlife habitat land, the 2005 BBAP uses an *ad hoc* definition of the “Ha’ (Habitat)” designation and the list of “fish and wildlife categories,” as stated in paragraph 40, above. DNR’s *ad hoc* definition and list, as applied in the 2005 BBAP, differ in significant legal respects from 11 AAC 55.230.

68. First, 11 AAC 55.230 defines the “wildlife habitat land” classification category in terms of land “primarily valuable for . . . fish and wildlife resource production.” The 2005 BBAP’s *ad hoc* definition, by contrast, defines the habitat designation in terms of a “concentrated use area for fish and wildlife species during a sensitive life history stage.” This disparity between the adopted definition and DNR’s *ad hoc* definition results in retaining land for habitat only if a species exhibits the phenomenon of having a “concentrated use area,” and if such an area coincides with a “sensitive life history stage.” The regulatory definition is not so limiting, and covers habitat used at all stages of the animals’ life history.

69. Second, 11 AAC 55.230 defines the habitat classification in terms of land necessary to retain in public ownership “to support commercial, recreational, or traditional uses on an optimum sustained yield basis.” The 2005 BBAP’s *ad hoc* definition restricts the habitat designation to land necessary to retain in public ownership so as to avoid “a permanent loss of a population or sustained yield of the species.” This results in the 2005 BBAP and classification order classifying land as habitat only if it is necessary to prevent a “permanent loss” from which recovery cannot occur, rather than habitat necessary to produce a harvestable surplus, or an annual or periodic sustained yield, as required by the “sustained yield” clause of the Alaska Constitution, Art. VIII, Sec. 4, and AS 38.04.910(12).

70. Third, DNR’s *ad hoc* definition in the 2005 BBAP uses “sustained yield” instead of “optimum sustained yield” as in the adopted 11 AAC 55.230.

71. Fourth, DNR’s *ad hoc* list of “fish and wildlife categories,” which the 2005 BBAP uses to identify and designate habitat for classification as wildlife habitat land, encompasses mostly marine-related habitat, and does not mention moose, caribou or their habitats, which are important for subsistence and sport hunting. As stated in paragraph 42, above, the DNR Fredericksen map of moose habitat shows the same seasonal moose habitats as does the 1984 BBAP map of such habitats, and the DNR Fredericksen map of critical caribou habitats depicts virtually the same caribou calving areas as does the 1984 BBAP map of caribou habitats. Thus, these DNR Fredericksen maps, and the unit-specific inventories in the allocation tables of the 2005 BBAP, in referring to such habitats, entirely negate the assertion in the 2005 BBAP that moose calving and rutting areas have changed over time, and they undermine that assertion with respect to caribou.

72. Application of DNR’s *ad hoc* definition and list in the 2005 BBAP unlawfully emphasizes habitat designations and classifications of concentrated use areas on tide and submerged land (such as walrus, seal and sea lion haulouts, eel grass and kelp beds, herring spawning areas, and whale feeding and calving areas), to the exclusion of many essential, crucial, and important upland and shoreland

habitats such as the western half of Iliamna Lake, recognized moose winter-use areas, and the calving grounds of the Mulchatna caribou herd. DNR's actions have unlawfully reduced the acreage of uplands and shorelands classified and protected as habitat in the 2005 BBMP by about 90 percent from the 1984 BBAP, from approximately 12 million acres to approximately 768,000 acres.

73. The 2005 BBAP violates AS 38.04.065, 38.04.015, 38.05.300, and 11 AAC 55.230 by failing to apply the duly-adopted definition of wildlife habitat land at 11 AAC 55.230, and instead imposing DNR's *ad hoc* definition and list. Defendants have thereby violated applicable law and have caused injury to plaintiffs' interests in protecting habitat primarily valuable for fish and wildlife production that supports commercial, recreational, and traditional uses on an optimum sustained yield basis.

#### **SECOND CAUSE OF ACTION**

**(DNR's adoption of land classification categories at 11 AAC 55.050 - .230 for all uses listed in AS 38.04.015(1), except subsistence, violates AS 38.04.065, 38.04.015 and 38.05.300.)**

74. Plaintiffs reallege and incorporate herein the preceding paragraphs.

75. Alaska Statute 38.04.065(c) provides in part:

(c) The commissioner shall adopt regional land use plans for state land. Each regional land use plan must identify and delineate

(1) \* \* \*

(2) areas that must be retained in state ownership and planned and classified for various uses and purposes under AS 38.04.015.

76. Alaska Statute 38.04.015 (Public Interest in Retaining State Land in Public Ownership) provides in part:

The primary public interests in retaining areas of state land surface in public ownership are

(1) to make them available on a sustained-yield basis for a variety of beneficial uses including subsistence, energy development, aquaculture, forestry, grazing, sport hunting and fishing, hiking, snowmobiling, skiing, and other activities of a type which can generally be made available to more people and



conducted more successfully if the land is in public rather than private ownership;

\* \* \*

77. DNR's regulations at 11 AAC 55.050 – .230 establish and define land classification categories for each of these statutorily-listed "primary public interests," excepting subsistence.

78. DNR's failure to adopt a regulatory subsistence land classification category in 11 AAC Chapter 55: (1) directly violates requirements of AS 38.04.065(c) and 38.04.015(1), which expressly require that DNR's area plans (including the 2005 BBAP) must identify and delineate land to be retained, planned and classified for subsistence; (2) violates AS 38.05.300(a), which requires appropriate land classifications for various surface uses; (3) violates state policy at AS 38.04.005 that requires DNR "to plan and manage state-owned land to establish a balanced combination of land available for both public and private purposes;" (4) precludes unlawfully the ability of the public to seek, under public-involvement procedures of AS 38.04.065, a subsistence classification when no such classification category has been adopted in DNR's regulations; and (5) unlawfully precludes meaningful public and agency participation required by AS 38.04.065(b)(8). DNR's failure to adopt a "subsistence" land classification category under the procedures of the APA to authorize it and Alaskans to identify, delineate, retain, classify and protect land for subsistence needs of Alaskans, injures plaintiffs' interests.

### **THIRD CAUSE OF ACTION**

**(DNR has violated law by designating and classifying land in the 2005 BBAP without relying upon, or keeping current, its available inventories of resources and uses.)**

79. Plaintiffs reallege and incorporate herein the preceding paragraphs.

80. DNR has violated AS 38.04.065(b)(4), which requires DNR to rely, to the extent available, upon the inventory of resources and uses. DNR has done so

when its 2005 BBAP makes mining a primary or designated use to be “encouraged, developed, or protected” on all land open to mineral entry, without regard to legally required evidence of commercial mineralization in an inventory sufficient to support the mineral designation pursuant to the adopted definition of mineral land at 11 AAC 55.130. DNR’s unlawful action in effect has classified all land open to mineral entry as mineral land, without regard to demonstrated mineralization. DNR’s unlawful action, lacking support from any current inventory, also violates the “balanced” and “most judicious” multiple use classifications required by the definition of “multiple-use” contained in AS 38.04.910(5), wherever legally required evidence of commercial mineralization is lacking in the inventory.

81. DNR has violated AS 38.04.060(a), which requires DNR to maintain and keep current its inventory of resources and uses. DNR has done so by designating and classifying millions of acres of uplands, and by adopting statements of management intent and guidelines, in the 2005 BBAP without undertaking, since its adoption of the 1984 BBAP, any comprehensive inventory required by AS 38.04.060(a) to identify areas of subsistence use on uplands governed by the 2005 BBAP that are not also contained in the 2005 Rivers Plan, so as to ensure that mining and other uses are compatible with subsistence, as required by AS 38.04.065(b)(7) and 11 AAC 55.030(c)(6), including in the Upper Talarik Creek drainage used by plaintiffs’ members.

82. DNR has violated AS 38.04.065(b)(4) by designating and classifying millions of acres of uplands in the Nushagak and Mulchatna drainages, and adopting statements of management intent and guidelines, in the 2005 BBAP without relying on the inventory of high, moderate and low subsistence and recreational uses in those drainages, as required by AS 38.04.065(b)(4), and as DNR has done in the 2005 Rivers Plan. This disparate use of inventory information in these drainages results in the 2005 BBAP designating and

classifying lands that have high value for subsistence or recreational hunting in the Nushagak and Mulchatna drainages, as having no designated primary use.

83. DNR's violations of applicable laws injure plaintiffs' interests.

#### **FOURTH CAUSE OF ACTION**

**(Excluding sport hunting and fishing from recreation violates AS 38.04.065(b)(7), 11 AAC 55.160, and 11 AAC. 55.030(c)(6).)**

84. Plaintiffs reallege and incorporate herein the preceding paragraphs.

85. For purposes of land classification, 11 AAC 55.160 defines "public recreation land" as land suitable for sport hunting or fishing. For purposes of compatibility between uses of land, AS 38.04.065(b)(7) provides that area plans must "plan for compatible surface and mineral land use classifications," and 11 AAC 55.030(c)(6) requires that they include "management guidelines and stated management intent" for "ensuring compatibility among competing land uses."

86. DNR and its 2005 BBAP violate AS 38.04.065(b)(7), 11 AAC 55.160, and 11 AAC. 55.030(c)(6) by defining recreation to exclude sport hunting and fishing, and thereby injure plaintiffs' interests in retaining and conserving land for public purposes, including recreation, subsistence, and commercial uses of fish and game, and including habitat conservation, all of which benefit from conserving land in public ownership.

#### **FIFTH CAUSE OF ACTION**

**(DNR failed to consider and analyze the effects that increased population will have on competition to pursue, use and harvest fish and wildlife, and therefore violates AS 38.04.065(b)(2), (3), (5), (6), (7) and (8).)**

87. Plaintiffs reallege and incorporate herein the preceding paragraphs.

88. In preparing and adopting the 2005 BBAP, DNR has unlawfully failed to implement AS 38.04.065(b)(2), (3), (5), (6), (7) and (8), which require DNR to consider economic and social factors, involve other agencies and the public in an interdisciplinary approach, give priority to areas of critical environmental concern,

consider present and potential uses of the land, consider the potential use of land under other ownership in the area, plan for compatible surface and mineral land use classifications, and provide meaningful participation by other state and federal agencies and the public in land use planning.

89. DNR in the 2005 BBAP declares that it intends to accommodate a Pebble mine, and expects it to be authorized. Yet DNR in its 2005 BBAP unlawfully fails to implement the requirements of AS 38.04.065(b)(2), (3), (5), (6), (7) and (8) regarding the anticipated Pebble mine, by failing to address increased competition for uses of fish and wildlife that will result, directly and indirectly, from thousands of workers necessary to build and operate the mine and secondary developments caused by the mine, and the effect this increased competition will have on subsistence, sport and commercial opportunities to pursue and use fish and game on state and federal lands and waters in the area.

90. AS 38.04.065(b)(6) requires DNR to consider the potential use of land under other ownership in the area. DNR in its 2005 BBAP has failed to consider whether any non-state land (and in particular, municipal land and privately-owned land) would be potentially available to house mine workers and others who may live and work in the area on account of a future Pebble mine, and whether impacts arising from those lands might be different from impacts arising from disposal and settlement of state-owned settlement lands in the vicinity of the Pebble claims and the proposed road corridor to them. DNR's failures are in direct violation of AS 38.04.065(b)(6), and constitute arbitrary and capricious action by the agency, and an unlawful exercise of its discretion. DNR thereby injures plaintiffs' interests.

#### **SIXTH CAUSE OF ACTION**

**(DNR and the 2005 BBAP violate the compatibility requirements of AS 38.04.065(b)(7) and 11 AAC 55.030(c)(6), and violate Mineral Closing Order No. 393.)**

91. Plaintiffs reallege and incorporate herein the preceding paragraphs.

92. DNR in its 2005 BBAP abuses discretion and violates AS 38.04.065(b)(7), which provides that area plans must “plan for compatible surface and mineral land use classifications,” and violates 11 AAC 55.030(c)(6), which requires that area plans include “management guidelines and stated management intent” for “ensuring compatibility among competing land uses.”

93. DNR commits these violations of law and regulation by: (1) using an *ad hoc* definition of the “Ha’ (Habitat)” designation, that differs from duly adopted definition of wildlife habitat land at 11 AAC 55.230, and by using an *ad hoc* list of mostly marine-related “fish and wildlife categories” to identify and classify land as wildlife habitat land; (2) failing to adopt a “subsistence” land classification category in 11 AAC Chap. 55, as is required by AS 38.04.065(c) and AS 38.04.015(1); (3) eliminating prior definitions of “essential” and “important” habitat found in the 1984 BBAP and maps used to designate and classify land under AS 38.04 as wildlife habitat land, and used to adopt management intent and guidelines under AS 38.04.065(b)(7) and 11 AAC 55.030(c)(6) to ensure compatibility of other uses with habitat; (4) using an *ad hoc* definition of the “Mi-Mineral” designation that differs from the definition of mineral land at 11 AAC 55.130 by including mere exploration; and by including and allowing tailings facilities, impoundments, associated dams, waste rock disposal and other mining facilities within lands and waters closed to mineral entry, so as to deliberately circumvent Mineral Closing Order No. 393, as it applies, among other instances, to closed lands along the Kuktuli River and Upper Talarik Creek in the area of the Pebble claims; (5) designating “harvest areas” only on tidelands far distant from plaintiff’s villages; (6) abandoning DNR’s longstanding administrative practice of using co-classifications on most lands, in favor of sole classifications; (7) abandoning DNR’s longstanding administrative practice of designating settlement a secondary use, and instead elevating settlement to a primary use; (8) defining the term “classification” with a new, *ad hoc* definition so as to substitute the unilateral notion that a classification “identifies the purposes for which state land will be

managed,” for the adopted definition in 11 AAC 55.280(1) that a classification “means the designation of land according to its primary use, and in a manner that will provide maximum benefit to the people of Alaska;” (9) treating mining as a “co-designated use” to “encourage, develop or protect” on all land open to mineral entry regardless of the inventory, including the mapped inventory of “Mineral Resources: Deposits, Prospects, and Occurrences” and the legal requirements for inventory at AS 38.04.060(a) and 38.04.065(b)(4); (10) applying an *ad hoc* definition of “recreation” that “does not refer to . . . sport hunting and fishing” [underscoring original], contrary to the duly-adopted definition of “public recreation land” at 11 AAC 55.160; (11) severing the link between the 2005 Rivers Plan and the Alaska Coastal Management Program (ACMP); and (12) excluding from application of the 2005 Rivers Plan all land in the Nushagak and Mulchatna drainages classified by the 2005 BBAP as mineral or settlement land. The cumulative effect of DNR’s unlawful actions and violations of administrative discretion, as set out above, has been to adopt a 2005 BBAP that violates AS 38.04.065(b)(7), 11 AAC 55.030(c)(6), and Mineral Closing Order No. 393, and injures plaintiffs’ interests in proper planning for mining and settlement that is compatible with habitat and public uses of fish and wildlife.

**SEVENTH CAUSE OF ACTION**  
**(Violations of Alaska Administrative Procedure Act, AS 44.62, and**  
**noncompliance with existing regulations.)**

94. Plaintiffs reallege and incorporate herein the preceding paragraphs.

95. DNR has failed to comply with the requirements and procedures of the Alaska Administrative Procedure Act (“APA”), AS 44.62, *et. seq.*, in each of the following respects. DNR in the 2005 BBAP creates and applies: (1) an *ad hoc* definition of the “Ha’ (Habitat)” designation that is narrower than, and circumvents, the duly-adopted definition of the “wildlife habitat land” classification category at 11 AAC 55.230; (2) an *ad hoc* definition of the “Mi-

Mineral” designation that is broader than, and circumvents, the duly-adopted definition of the “mineral land” classification category at 11 AAC 55.130; (3) an *ad hoc* definition of “classification” that differs from the duly-adopted definition of this term in 11 AAC 55.280(1); (4) an *ad hoc* definition of “recreation” that excludes sport hunting and fishing, and thereby unlawfully narrows and circumvents the duly-adopted definition of the “public recreation land” classification category at 11 AAC 55.160 and the application of compatibility requirements under AS 38.04.065(b)(7) and 11 AAC 55.030(c)(6) that are intended to ensure mining is compatible with recreation, including sport hunting and fishing; and (5) an *ad hoc* definition of “anadromous waters” that limits the beds of anadromous waters to “that portion of the streambed or lakebed . . . used by salmon to spawn,” limits anadromous fish to “salmon,” limits the life-stages to spawning, and thereby unlawfully narrows and circumvents the Anadromous Fish Act, AS 16.05.871 *et. seq.*, and the definitions in the *Catalog of Waters Important for Spawning, Rearing, or Migration of Anadromous Fishes* which are duly-adopted into regulation by reference under 5 AAC 95.011 (formerly 11 AAC 195.010 at the time DNR adopted the 2005 BBAP). All of DNR’s *ad hoc* definitions ignore and violate existing, duly-adopted regulatory definitions or unlawfully circumvent statutes, including the Anadromous Fish Act. DNR’s failure to adopt its *ad hoc* definitions pursuant to the APA violates the APA. DNR’s unlawful acts and omissions injure plaintiffs’ interests in conservation and use of fish, wildlife, lands and waters covered by the 2005 BBAP.

#### **EIGHTH CAUSE OF ACTION**

**(DNR’s *ad hoc* definition of the Habitat designation in the 2005 BBAP does not apply, use and observe the principle of sustained yield.)**

96. Plaintiffs reallege and incorporate herein the preceding paragraphs.

97. Article VIII, Section 4, of the Alaska Constitution provides that fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the

State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

98. AS 38.04.065(b) requires DNR to “use and observe” the sustained yield principle when adopting or revising area plans. This principle is defined and described by AS 38.04.910(12) in terms of –

the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources of the state land consistent with multiple use.

AS 38.04.910(12) defines “sustained yield” for purposes of land use planning in a manner similar to other definitions of this principle found at AS 16.05.255(k)(5) with respect to game, AS 41.17.950(27) with respect to forest land, and 5 AAC 39.222(f)(26) (“optimum sustained yield”) with respect to salmon. DNR violates this principle in the 2005 BBAP by providing, in its *ad hoc* definition of the “Ha’ (Habitat)” designation, that the sustained yield principle is met under the 2005 BBAP if DNR merely avoids permanently losing a renewable resource or the sustained yield of a species.

99. DNR’s *ad hoc* definition of the habitat designation in the 2005 BBAP fails to ensure “the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources,” and its application by DNR results in applying habitat designations and classifications only to “concentrated use areas during a sensitive life history stage,” and to land necessary to retain in state ownership only to avoid “a permanent loss of a population or sustained yield of the species.” DNR has equally failed to implement in the 2005 BBAP the constitutional “sustained yield” mandate by confining habitat designations to a predominantly marine-related list of “fish and wildlife categories,” with the result that few uplands are classified as habitat, and nearly 99 percent of land classified as habitat (aside from shorelands and several river corridors in the Nushagak drainage) is coastal tide and submerged land.



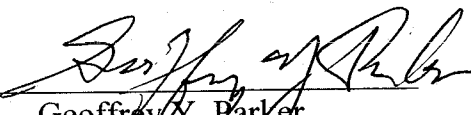
100. DNR's *ad hoc* definition of the habitat designation, DNR's constricted list of "fish and wildlife categories," and DNR's 2005 BBAP, taken as a whole, and for all of the reasons stated in this Complaint, do not "use and observe" the principle of sustained yield as required by the Alaska Constitution and implementing laws and regulations. DNR's 2005 BBAP therefore violates AS 38.04.065(b), AS 38.04.910(12), and Article VIII, Section 4, of the Alaska Constitution; and DNR's unlawful actions have thereby injured plaintiffs' interests in the protection of fish and wildlife habitat that produces and supports fish and wildlife for commercial, recreational, and traditional subsistence uses on an optimum sustained yield basis.

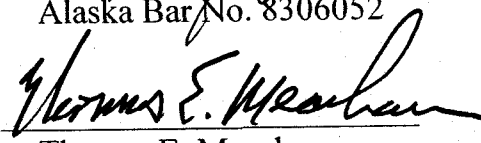
### PRAYER FOR RELIEF

Plaintiffs pray that this Court --

1. enter declaratory judgment for plaintiffs on each of their separate causes of action;
2. declare the 2005 BBAP unlawful, and of no continuing legal force and effect, due to DNR's multiple violations of applicable law as alleged in this Complaint;
3. award plaintiffs their costs and attorneys fees as public interest litigants; and
4. grant plaintiffs such other and further relief as may be appropriate.

Dated at Anchorage, Alaska on June 9, 2009.

By:   
Geoffrey Y. Parker  
Alaska Bar No. 8306052

By:   
Thomas E. Meacham  
Alaska Bar No. 7111032

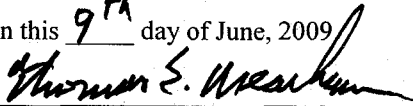
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was hand delivered to:

J. Anne Nelson, Assistant Attorney General  
John Baker, Senior Assistant Attorney General  
Department of Law  
1031 W. 4<sup>th</sup> Ave., Suite 200  
Anchorage, Alaska 99501

on this 9<sup>th</sup> day of June, 2009



Thomas E. Meacham  
Thomas E. Meacham

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT DILLINGHAM

NONDALTON TRIBAL COUNCIL, )  
KOLIGANEK VILLAGE COUNCIL, )  
NEW STUYAHOK TRADITIONAL )  
COUNCIL, EKWOK VILLAGE )  
COUNCIL, CURYUNG TRIBAL )  
COUNCIL, and LEVELOCK )  
VILLAGE COUNCIL, )

Plaintiffs, )

vs. )

STATE OF ALASKA, ALASKA )  
DEPARTMENT OF NATURAL )  
RESOURCES, and TOM IRWIN, )  
Commissioner of Natural Resources, )

Defendants. )

Case No. 3DI-09-46 CI

**ATTACHMENTS TO PLAINTIFFS' AMENDED COMPLAINT**

**Regulations Adopted by Reference in 2005 and 2009**

1. Definitions from the "*Catalog of Waters Important for Spawning, Rearing, or Migration of Anadromous Fishes*," Southwestern Region, Effective January 15, 2005 (Alaska Department of Fish and Game, Special Publication No. 04-07, with Alaska Department of Natural Resources) adopted into regulation by reference under 11 AAC 195.010.

2. Definitions from the "*Catalog of Waters Important for Spawning, Rearing, or Migration of Anadromous Fishes*," Southwestern Region, Effective June 1, 2009 (Alaska Department of Fish and Game, Special Publication No. 09-05) adopted into regulation by reference under 5 AAC 95.011.

Special Publication No. 04-07

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**Catalog of Waters Important for Spawning, Rearing,  
or Migration of Anadromous Fishes – Southwestern  
Region, Effective January 15, 2005**

by

**J. Johnson,**

**Ed Weiss,**

and

**Scott Maclean**


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November 2004

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Alaska Department of Fish and Game

Alaska Department of Natural Resources



*Attachment 1  
page 1 of 4*

## DEFINITIONS

1. "Anadromous Fish" means a fish or fish species that spends portions of its life cycle in both fresh and salt waters, entering fresh water from the sea to spawn and includes the anadromous forms of pacific trout and salmon of the genus *Oncorhynchus* (rainbow and cutthroat trout and chinook, coho, sockeye, chum and pink salmon), Arctic char, Dolly Varden, sheefish, smelts, lamprey, whitefish, and sturgeon.
2. "Atlas" means *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.
3. "Backwaters" means a portion of the water body formed by an eddy along channel margins downstream from obstructions such as bars, root wads, or boulders, or as the result of backflooding upstream from an obstruction sometimes separated from the channel by sand or gravel bars.
4. "Banks" means the portion of the stream channel cross section that restricts the lateral movement of water at normal bank-full levels often exhibiting a distinct break in slope from the stream bottom.
5. "Bed" means the substrate, bounded by the stream banks, over or through which the water column flows.
6. "Braided channels" means the intertwined branches or secondary channels of a river or stream and characterized by the separation and rejoining of two or more channels separated by bars or islands.
7. "Catalog" means the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.
8. "Distributary" means a stream that flows away from, and does not rejoin, the main channel, and which usually flows to a sea, lake, stream, or other body of water.
9. "Estuary" means a semi-enclosed coastal body of water with a free connection to the sea and in which seawater is measurably diluted with freshwater derived from land drainage.
10. "Fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;
11. "Lake" means an inland water body, permanent or seasonal, occupying a basin or hollow in the earth's surface, which may or may not have a current or single direction of flow.
12. "Mean high water" means a tidal datum used in referring to tidelands or the tidally affected portion of the stream, that is equal to the average of all high tides over a 19-year Metonic cycle, as established by the National Ocean Service of the National Oceanic and Atmospheric Administration.
13. "Mean lower low water" means a tidal datum used in referring to tidelands or the tidally affected portion of the stream, that is equal to the average of the lower of the two low tides of each day over a 19-year Metonic cycle, as established by the National Ocean Service of the National Oceanic and Atmospheric Administration.
14. "Migration" means the predictable, purposeful, or seasonal movement of fish, unrestricted by other than natural influences.

15. **"Mouth"** means a line drawn between the seaward extremities of the exposed tideland banks of any stream channel(s) at mean lower low water; a stream or river may have more than one mouth by virtue of having more than one channel that empties into a receiving body of water.
16. **"Permit"** means the written approval by the deputy commissioner of ADNR or the deputy commissioner's authorized representative, in the form of a Fish Habitat Permit issued through an area office of the ADNR, Office of Habitat Management & Permitting (OHMP), based on plans and specifications as required by either AS 41.14.840 or AS 41.14.870.
17. **"Pollute"** means altering the physical, chemical or biological properties of a stream, river, or lake to the extent that the water fails to meet the Alaska Water Quality Standards set forth in 18 AAC 70.010 - .110.
18. **"Polygon"** means a geographic area of numerous water bodies or wetland areas that cannot be accurately mapped at the 1:63,360 scale and which are important for the spawning rearing or migration of anadromous fish. These polygons are listed in the Catalog with single point identifiers and delineated on the Atlas maps by a dashed line boundary. All waters within these polygons are considered specified anadromous fish bearing water bodies.
19. **"portion of the bed(s) and banks, up to the ordinary high water mark (OHW)"** means (A) in the non-tidal portion of a river, lake, or stream: the portion of the bed(s) and banks up to which the presence and action of the non-tidal water is so common and usual, and so long continued in all ordinary years, as to leave a natural line or "mark" impressed on the bank or shore as indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics; (B) in a braided river, lake, or stream: the area delimited by the natural line or "mark," as defined in Part A above, impressed on the bank or shore of the outside margin of the most distant channels; or (C) in the tidally influenced portion of a river, lake, or stream: the portion of the bed(s) and banks below the (1) OHW as described in A or B above, or (2) mean high water elevation; whichever is higher at the project site.
20. **"Rearing"** means the developmental life phase of a fish from fertilization of eggs to adult.
21. **"Area Office"** means the local area office of the Alaska Department of Natural Resources, Office of Habitat Management & Permitting. (Refer to the Contacts section of the introduction for office locations)
22. **"River"** means a stream of fairly large size flowing in a definite course or channel, or a series of diverging and converging channels.
23. **"Slough"** means (A) a low, swampy ground or overflow channels where water flows sluggishly for considerable distances; (B) a side channel slough formed by channelization; (C) a sluggish channel of water, such as a side channel of a stream, in which water flows slowly through low, swampy ground, or a section of an abandoned stream channel containing water most or all of the year, but with flow only at high water, and occurring in a flood plain or delta; (D) a marsh tract lying in a shallow, undrained depression on a piece of dry ground; (E) term used for a creek or sluggish body of water in a bottomland.
24. **"Spawning"** means the deposition or fertilization of fish eggs, including preparation for deposition or fertilization.

25. "Specified upper limit" means the documented upstream limit of anadromous fish use as depicted in *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes* or listed in the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.
26. "Specified Water Body" means a river, stream, or lake, in its liquid or frozen state, its braided channels, distributaries, sloughs, backwaters, and estuaries, including the portion of the bed(s) and banks up to the ordinary high water mark, from its mouth to its specified upper limit as depicted in *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes* or listed in the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.
27. "Stream" means a natural or artificial watercourse containing flowing water at least part of the year including a river, creek or tributary.

**SPECIAL PUBLICATION NO. 09-05**

**CATALOG OF WATERS IMPORTANT FOR SPAWNING, REARING, OR  
MIGRATION OF ANADROMOUS FISHES - SOUTHWESTERN REGION,  
EFFECTIVE JUNE 1, 2009**

by

J. Johnson  
and  
Kimberly Klein

Alaska Department of Fish and Game  
Divisions of Sport Fish and Habitat  
333 Raspberry Road, Anchorage, Alaska, 99518-1599

March 2009

Attachment 2  
P 1 of 4



## DEFINITIONS

1. **"Area Office"** means the local area office of the Alaska Department of Fish and Game, Division of Habitat. (Refer to the Contacts section of the introduction for office locations)
2. **"Anadromous Fish"** means a fish or fish species that spends portions of its life cycle in both fresh and salt waters, entering fresh water from the sea to spawn and includes the anadromous forms of pacific trout and salmon of the genus *Oncorhynchus* (rainbow and eutthroat trout and chinook, coho, sockeye, chum and pink salmon), Arctic char, Dolly Varden, sheefish, smelts, lamprey, whitefish, and sturgeon.
3. **"Atlas"** means *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes.*
4. **"Backwaters"** means a portion of the water body formed by an eddy along channel margins downstream from obstructions such as bars, root wads, or boulders, or as the result of back-flooding upstream from an obstruction sometimes separated from the channel by sand or gravel bars.
5. **"Banks"** means the portion of the stream channel cross section that restricts the lateral movement of water at normal bank-full levels often exhibiting a distinct break in slope from the stream bottom.
6. **"Bed"** means the substrate, bounded by the stream banks, over or through which the water column flows.
7. **"Braided channels"** means the intertwined branches or secondary channels of a river or stream and characterized by the separation and rejoining of two or more channels separated by bars or islands.
8. **"Catalog"** means the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes.*
9. **"Distributary"** means a stream that flows away from, and does not rejoin, the main channel, and which usually flows to a sea, lake, stream, or other body of water.
10. **"Estuary"** means a semi-enclosed coastal body of water with a free connection to the sea and in which seawater is measurably diluted with freshwater derived from land drainage.
11. **"Fish"** means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;
12. **"Fish Habitat"** means any area on which fish depend, directly or indirectly, during any stage of their life cycle, including but not limited to areas of spawning, rearing, food supply, overwintering, or migration.
13. **"Lake"** means an inland water body, permanent or seasonal, occupying a basin or hollow in the earth's surface, which may or may not have a current or single direction of flow.
14. **"Mean high water"** means a tidal datum used in referring to tidelands or the tidally affected portion of the stream, that is equal to the average of all high tides over a 19-year Metonic cycle, as established by the National Ocean Service of the National Oceanic and Atmospheric Administration.

15. **"Mean lower low water"** means a tidal datum used in referring to tidelands or the tidally affected portion of the stream, that is equal to the average of the lower of the two low tides of each day over a 19-year Metonic cycle, as established by the National Ocean Service of the National Oceanic and Atmospheric Administration.
16. **"Migration"** means the predictable, purposeful, or seasonal movement of fish, unrestricted by other than natural influences.
17. **"Mitigation"** means measures which must be undertaken by an applicant to avoid, minimize, rectify, reduce, or compensate for potential adverse impacts to fish or fish habitat resulting from a proposed use or activity
18. **"Mouth"** means a line drawn between the seaward extremities of the exposed tideland banks of any stream channel(s) at mean lower low water; a stream or river may have more than one mouth by virtue of having more than one channel that empties into a receiving body of water.
19. **"Permit"** means the written approval by the commissioner of ADF&G or the commissioner's authorized representative, in the form of a Fish Habitat Permit issued through an area office of the ADF&G, Division of Habitat, based on plans and specifications as required by either AS 16.05.841 or AS 16.05.871.
20. **"Pollute"** means altering the physical, chemical or biological properties of a stream, river, or lake to the extent that the water fails to meet the Alaska Water Quality Standards for the "Growth and Propagation of Fish, Shellfish, Other Aquatic Life, and Wildlife" set forth in 18 AAC 70.010 - .990.
21. **"Polygon"** means a geographic area of numerous water bodies or wetland areas that cannot be accurately mapped at the 1:63,360-scale and which are important for the spawning rearing or migration of anadromous fish. These polygons are listed in the Catalog with single point identifiers and delineated on the Atlas maps by a dashed line boundary. All waters within these polygons are considered specified anadromous fish bearing water bodies.
22. **"Portion of the bed(s) and banks, up to the ordinary high water mark (OHW)"** means (A) in the non-tidal portion of a river, lake, or stream: the portion of the bed(s) and banks up to which the presence and action of the non-tidal water is so common and usual, and so long continued in all ordinary years, as to leave a natural line or "mark" impressed on the bank or shore as indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics; (B) in a braided river, lake, or stream: the area delimited by the natural line or "mark," as defined in Part A above, impressed on the bank or shore of the outside margin of the most distant channels; or (C) in the tidally influenced portion of a river, lake, or stream: the portion of the bed(s) and banks below the (1) OHW as described in A or B above, or (2) mean high water elevation; whichever is higher at the project site.
23. **"Rearing"** means the developmental life phase of a fish from fertilization of eggs to adult.
24. **"River"** means a stream of fairly large size flowing in a definite course or channel, or a series of diverging and converging channels.
25. **"Slough"** means (A) a low, swampy ground or overflow channels where water flows sluggishly for considerable distances; (B) a side channel slough formed by channelization; (C) a sluggish channel of water, such as a side channel of a stream, in which water flows slowly through low, swampy ground, or a section of an abandoned stream channel containing water most or all of the

year, but with flow only at high water, and occurring in a flood plain or delta; (D) a marsh tract lying in a shallow, undrained depression on a piece of dry ground; (E) term used for a creek or sluggish body of water in a bottomland.

26. **"Spawning"** means the deposition or fertilization of fish eggs, including preparation for deposition or fertilization.
27. **"Specified upper limit"** means the documented upstream limit of anadromous fish use as depicted in *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes* or listed in the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.
28. **"Specified Water Body"** means a river, stream, or lake, in its liquid or frozen state, its braided channels, distributaries, sloughs, backwaters, and estuaries, including the portion of the bed(s) and banks up to the ordinary high water mark, from its mouth to its specified upper limit as depicted in *An Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes* or listed in the *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*.
29. **"Stream"** means a natural or artificial watercourse containing flowing water at least part of the year including a river, creek or tributary.