

Kevin M. Saxby (AK Bar No. 8611132)
Senior Assistant Attorney General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: 907-269-5100
Facsimile: 907-279-2834
Email: kevin.saxby@alaska.gov

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

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

CIVIL ACTION NO.:

**ALASKA’S MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

I. Introduction

The State of Alaska, through the Office of the Attorney General (“Alaska”), requests an order prohibiting defendants Ken Salazar, Rowan Gould, and the United States Fish and Wildlife Service (collectively “Service”) from preventing or interfering with Alaska’s plan to preserve the status quo until the merits of this lawsuit may be decided by taking up to seven

wolves from the caribou calving grounds on Unimak Island during the month of June, 2010. This order is requested for the purpose of preserving enough caribou calves so that the Unimak Caribou Herd and the Unimak wolf population may be maintained at approximately their current population levels while this lawsuit is pending. This order is necessary because the caribou herd that is the subject of this suit is in a precipitous decline such that, unless immediate action is taken to preserve the status quo, the option to relatively quickly restore it to a healthy and sustainable population level will be eliminated, and the herd itself may face extirpation, before a decision on the merits of this case may be rendered.

II. Legal Standards

The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits. *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F. 2d 701, 704 (9th Cir. 1988). Courts in this Circuit apply a recently corrected standard when reviewing temporary restraining order and preliminary injunction requests. Under that standard, Alaska must show that, 1) it is likely to succeed on the merits, 2) Alaska is likely to suffer irreparable harm in the absence of preliminary relief, 3) the balance of equities tips in Alaska's favor, and 4) an injunction is in the public interest. *American Trucking Association, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009), quoting *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

III. Factual Background

A. The Biology

The Unimak Caribou Herd is a unique herd occupying Unimak Island, the easternmost Aleutian Island. Affidavit of Bruce Dale, para. 2. It is the only naturally occurring insular caribou herd in the nation, and its range represents the southwestern edge of caribou

range in North America. *Id.* In 2002, this herd numbered approximately 1260 animals, which was a healthy and sustainable population level. *Id.* Almost all of Unimak Island is within the Alaska Maritime National Wildlife Refuge, administered by the Service. *Id.*

Beginning in 2005, Alaska Department of Fish and Game (“Department”) staff began noticing unfavorable population trends, and, by 2007, determined that the herd had begun to decline. Affidavit of Lem Butler, para. 3 and Affidavit of Bruce Dale, para. 3. That decline became precipitous in 2008, and a census conducted by the Service in January 2010 confirmed that only approximately 400 caribou remained on the island. *Id.*

The roughly 75% decline in population over only seven years was of great concern to Alaska’s wildlife biologists, but they have become even more concerned about the corresponding decline in bull:cow and cow:calf ratios. Affidavit of Bruce Dale, para. 4. The current bull:cow ratio, based on an October 2009 composition survey of 221 Unimak caribou conducted by Department staff, is 4.9 bulls per 100 cows, the lowest such ratio ever recorded in Alaska. *Id.* Of the 221 caribou examined, only *ten* were adult bulls. *Id.* Therefore, the Department estimates that only approximately twenty adult bulls remain in the entire herd. *Id.*

Also during the October 2009 composition survey, Department staff determined that almost no calves have been surviving to be recruited into the herd, and the current calf:cow ratio is 3.4 per 100. Affidavit of Bruce Dale, para. 5. Said another way, the Department estimates that only about twelve calves of the approximately 250 calves born in 2009 survived until the Fall. *Id.* This combination of low bull:cow and calf:cow ratios has produced a negative feedback loop that accelerates the ongoing decline as each year passes, absent interruption. *Id.*

This negative feedback loop works as follows: the effect of the low bull:cow ratio is that fewer cows are bred and pregnancy rates continue to decline, leading to poor calf

production. Affidavit of Bruce Dale, para. 7. Poor calf production, in turn, lowers recruitment, and the resulting low calf:cow ratio further depresses the adult bull component of the population. *Id.* To compound the issue, breeding is hardest on bulls which expend large amounts of energy while competing for receptive cows. *Id.* As more cows are bred per bull, more energy is expended and fat reserves are consumed even more quickly. *Id.* Thus, the low bull:cow ratio is physiologically damaging to bulls, making them increasingly ill-prepared to face the winter following the rut. *Id.* The Department's experts, therefore, believe that the Unimak Caribou Herd is now at a tipping point, where the number of bulls can quickly drop to zero unless prompt action is taken. *Id.* By this coming winter, so few bulls will remain in the herd that a single stochastic event, such as a heavy snow or rain on snow icing event following the rut, could eliminate all of the bulls in the herd. *Id.* Moreover, adult cows are aging and their survival rate will continue to decrease. *Id.* Because of all of these factors, it is the Department's opinion that the imminent calving season is the best chance, and perhaps the last chance, to prevent bulls from declining to zero, and is the most likely chance to achieve a reasonable calf crop that could initiate a relatively quick recovery for the Unimak Caribou Herd. *Id.*

It is also the Department's opinion that, if no action is taken to protect the caribou calves born this spring, past history and studies performed on similar caribou herds indicate that if calf protection efforts are subsequently initiated, it will, nevertheless, take a minimum of three to five years for the herd to even be restored to its current, seriously depleted, population level. Affidavit of Bruce Dale, para. 8. In other words, it will take at least three years of recovery efforts to make up for the decline of the population from a single year delay in calf protection. *Id.* Also, as illustrated above, the likelihood that the herd, and especially the bull component, may be

completely extirpated will be substantially increased. *Id.* As a result, hunting, including subsistence hunting, of this herd would be precluded for the foreseeable future. *Id.*

The Department has not yet determined what caused the initial decline, but does not believe that the historically low human harvest is at fault. Affidavit of Bruce Dale, para. 6. The Department has determined, however, that the current, ongoing decline is being driven by heavy predation on calves, which is mostly caused by wolves. *Id.* Accordingly, the Department believes that reducing or eliminating wolf predation on caribou calves, until those calves have moved off of the calving grounds and stand a better chance of surviving into the Fall (recruitment), is the key to halting and reversing the decline. Affidavit of Bruce Dale, para. 9, Affidavit of Denby Lloyd, para. 6.

B. The Department's Exhaustion of all Options to Obtain Permission to Protect Caribou Calves this Spring, Assuming Permission was Required

As stated above, Department staff began noticing a decline in the Unimak Caribou Herd in 2007, with that decline increasing precipitously during 2008 and 2009. Affidavit of Denby Lloyd, para. 2. This led the State to close all hunting in March 2009 and federal managers to close subsistence hunting in July 2009. *Id.*

After Alaska Department of Fish and Game personnel were able to locate only 221 caribou when conducting a composition survey, which also confirmed chronically low calf recruitment and declining bull:cow ratios, former Director of the Department's Division of Wildlife Conservation Doug Larsen sent a letter to Refuge Manager Nancy Hoffman outlining the Department's concerns and the emergent nature of the situation on December 22, 2009. *see* Exhibit A to Affidavit of Denby Lloyd.

Following former Director Larsen's letter, a series of meetings between Service and Department staff were held, during which various barriers to immediate action to address the emergency were identified by the Service. Affidavit of Denby Lloyd, para. 4. For example, the position taken by one Service supervisor at a January 13, 2010, meeting was that the herd could be allowed to "blink out," under the theory that doing so was consistent with "natural diversity," so that no emergency existed. *Id.*

Likewise, during that same January 13, 2010 meeting, Service staff stated that either an Environmental Impact Statement or an Environmental Assessment under the National Environmental Policy Act, 42 U.S.C. §4321 et seq., ("NEPA") would be necessary before any action to address the herd's decline could be taken, suggesting that the process could take 1-3 years. Affidavit of Denby Lloyd, para. 5. Department staff, with the assistance of Alaska's Department of Law, provided the Service with legal documentation for the proposition that no such process was required. *Id. see State of Alaska, et al. v Cecil D. Andrus, et al.*, 591 F.2d 537 (9th Cir. 1979) and *Defenders of Wildlife, et al. v. Cecil D. Andrus, et al.*, 627 F.2d 1238 (D.C. Cir. 1980). Nevertheless, the Service continued to assert that a lengthy NEPA process must be completed before calf protection by surgically removing wolves preying on calves may occur. Affidavit of Denby Lloyd, *supra*.

On February 3, 2010, the Department shared with the Service for its review prior to releasing, and then issued, a news release announcing that a management plan had been developed to address the continued decline and prevent the loss of Unimak caribou by selective removal of wolves on the calving grounds. Affidavit of Denby Lloyd, para. 6.

In January of 2010, the Service conducted a census that counted approximately 400 caribou remaining on the island. Affidavit of Denby Lloyd, para. 7. Given this sobering

information, and the Service's insistence that the NEPA process would have to be completed, Department Commissioner Lloyd directed his staff to prepare a document for submission to the Service and that could easily be converted to a NEPA-compliant Environmental Assessment. *Id.* The staff who prepared this document were trained and highly experienced in NEPA work, and their product was done to the highest standards. *Id.*

In a February 25, 2010 meeting between Department leadership, members of the Board of Game, and the Service, the Service recanted its initially irresponsible assertion by agreeing that they were not willing to let the caribou herd "blink out" because they have a responsibility to management for refuge purposes, including biodiversity, as well as a responsibility to provide for subsistence. Affidavit of Denby Lloyd, para. 9. Simultaneously, they reiterated the need for NEPA review and that they didn't think there was an emergency. *Id.*

Then, on April 1, 2010, the Service identified a new barrier to the department recovery effort: the need for a Minimum Requirements Analyses (MRA) under the Wilderness Act, 16 U.S.C. § 1131 *et seq.*, before the use of helicopters for the caribou radio collaring, calf survey, and wolf collaring aspects of the Department's overall recovery plan could be permitted, even though no such requirement had ever been imposed on similar work in the past. Affidavit of Denby Lloyd, para. 11. The Service also said that a separate MRA was necessary for the use of those same helicopters, during the same time periods, to spot and surgically remove wolves from the caribou calving grounds. *Id.* The Service estimated that nine months would be required for completion of these MRAs. *Id.* Accordingly, Commissioner Lloyd assigned Department staff to prepare these MRAs for submission to the Service. *Id.*

The MRA for the caribou and wolf collaring effort was completed and submitted to the Service in four days, as helicopter collaring operations had been scheduled to begin as

soon as the weather allowed in early April. Affidavit of Denby Lloyd, para. 12. However, the Service stated that the MRA could not be approved because the associated study plan lacked an Institutional Animal Care and Use Committee (IACUC) authorization under the Animal Welfare Act, 7 U.S.C. §2131, *et seq.* *Id.* Although the Department employees do, in fact, undergo training for IACUC certification, this requirement to provide copies of staff IACUC certificates was another new requirement that had never before been imposed by the Service on the Department's conduct of similar management activities. *Id.* Such activities have, in the past, always been covered by a Master Memorandum of Understanding between the Service and Department which states that Department employees have access to Service lands "at any time" to conduct these types of routine management activities. *Id.* And Exhibit B to Affidavit of Denby Lloyd.

The IACUC authorization was submitted by the Department in a single day, on April 8, 2010, along with a request for expedited approval and permit issuance as the weather had briefly cleared so that collaring could be done. Affidavit of Denby Lloyd, para. 13. However, the Special Use Permit was not issued and, on April 12, 2010, the weather deteriorated and the helicopter left for other work. *Id.* Thus, due to the Service's new requirements and delay, the Department's April caribou and wolf collaring effort was thwarted. *Id.*

In the face of these bureaucratic stumbling blocks, Commissioner Lloyd elected to also assign staff to draft the MRA for the upcoming calf protection/wolf removal and bull translocation aspects of the Department's recovery plan. Affidavit of Denby Lloyd, para. 14. Those documents were completed and submitted to the Service on April 28, 2010. *Id.* Eventually, on May 20, 2010, the Service issued a Special Use Permit that covers all of the collaring aspects of the program, but not the wolf removal portion. *Id.*

Meanwhile, the Department had completed the NEPA review, which was submitted to the Service on April 20, 2010. Affidavit of Denby Lloyd, para. 15. On May 6, 2010, the Service informed the Department that the review would not be accepted as an Environmental Assessment, and that, instead, the NEPA compliance process would be contracted out, requiring, at minimum, another six months before any decision on the outstanding Special Use Permit for wolf removal could be rendered. *Id.*

To finally get a yes or no answer as to whether the Department's calf protection/wolf removal plans for the 2010 calving season would be permitted, Commissioner Lloyd, on May 20, 2010, sent a letter to the Service's Acting Director Rowan Gould outlining Alaska's concerns and plans for addressing them. *See* Exhibit C to Affidavit of Denby Lloyd.

On May 24, 2010, the Department received the Service's response to Commissioner Lloyd's letter, threatening legal action, apparently including criminal prosecution, if State employees or agents proceeded with the plans to protect caribou calves by surgically removing wolves preying on caribou calves on the calving grounds during the imminent calving season. *See* Exhibit D to Affidavit of Denby Lloyd.

IV. Argument

A. Alaska is Likely to Prevail on the Merits

Alaska does not believe the Service will dispute that it has a statutory obligation to conserve wildlife populations in their natural diversity on, and ensure the biological integrity, diversity, and environmental health of, the Alaska Maritime National Wildlife Refuge by conserving, managing, and restoring the only naturally-occurring island caribou population within that Refuge, or anywhere else in the nation; to manage the Refuge to provide opportunities for continued subsistence uses of the herd by local residents and others and, indeed,

to manage in such a way as to cause the least adverse impact possible on those local residents' subsistence uses of the herd; as well as to ensure effective coordination and cooperate with the Department in fulfilling these obligations. ANILCA §303(1), Pub. L. 96-487, §303(1) (1980); ANILCA § 802, 16 U.S.C. §3112; and 16 U.S.C §668dd(a)(4). Indeed, the Service has already admitted to ADF&G Commissioner Denby Lloyd that it has a responsibility to manage for refuge purposes including biodiversity, and a responsibility to provide for subsistence uses of this herd. Affidavit of Denby Lloyd, para. 9. Even if the Service did dispute these obligations, the statutory language on point is clear and leaves no room for equivocation.

Likewise, there is little room for dispute that subsistence users have been severely impacted by the decline of the Unimak Caribou herd. Indeed, both the State and the Federal Subsistence Board, on which the Service holds a seat, have closed their hunting seasons. Affidavit of Denby Lloyd, para. 2. As of the date of this document, there is nowhere within a roughly 400-mile radius that the residents of False Pass and neighboring villages may hunt caribou, a primary source of subsistence red meat in this area. Affidavit of Lem Butler, para. 2. Instead of causing the least possible adverse impact on these local residents, and maintaining and providing for their continued subsistence uses of the herd, Refuge management, to date, has resulted in the worst possible adverse impact—a total loss of subsistence opportunity for the foreseeable future. *Id.* and Affidavit of Denby Lloyd, para. 22. Thus, the Service is in violation of, at least, ANILCA Sec.s 303(1) and 802.

Nor should there be any dispute that the Unimak Caribou Herd is in severe decline, having lost approximately 75% of its population since 2002. Affidavit of Bruce Dale, para. 4. Indeed, the Federal Subsistence Board closed all subsistence hunting of this herd precisely because of that decline. Affidavit of Denby Lloyd, para. 2. Service personnel have

helped to establish the magnitude of the decline through their censuses and other forms of data gathering. *Id.*, para. 7 and Affidavit of Bruce Dale, para. 3. Even more ominous is the fact that the best available data show that the number of adult bulls in the herd is around twenty and the bull:cow ratio is the lowest ever recorded in Alaska. *Id.*, paras 4-7. With so few bulls, and a continuing population decline, there is a very real risk that the adult bull component of the herd will be extirpated in the near future. *Id.* If that happens, no more calves will be born and the herd's extirpation will be inevitable, absent intervention. Loss of its only insular caribou herd, and even severe depletion of that herd, is, almost by definition, a loss to the natural diversity, biological integrity, and environmental health of the Alaska Maritime National Wildlife Refuge. These facts also establish violations of ANILCA Sec. 303(1), as well as 16 U.S.C. § 668dd(a)(4).

Moreover, the situation is not one in which events beyond the control of the Service have prevented it from fulfilling its statutory mandates. The inability to fulfill subsistence mandates has been obvious since at least July 2009, when the Federal Subsistence Board concluded that the herd has no harvestable surplus and all hunting must be closed. Affidavit of Denby Lloyd, para. 2. The emergent nature of the situation has been evident from the Service's own data since at least October 2009 and was officially brought to their attention by the Department in December 2009. Affidavit of Denby Lloyd, Exhibit A. In the ensuing months, the Service has taken no action to halt or reverse the decline. What is worse, when presented with a plan from the Department to do so, the Service has repeatedly stonewalled the efforts and, ultimately, threatened criminal prosecution of State employees and agents in order to unequivocally prohibit any remedial action. Affidavit of Denby Lloyd, paras 4-19 and Exhibits C and D. Given these facts, the Service has failed to ensure coordination and cooperation with the Alaska Department of Fish and Game in fulfilling its obligations, described in more detail above,

to manage the Refuge so as to preserve the herd and its subsistence uses, thereby violating 16 U.S.C. § 668dd(a)(4) and ANILCA Sec. 802.

The Service may plead that it is simply following established procedure and law, albeit slightly more slowly than desired by the State. For several reasons, this argument should not prevail. First, there are good reasons to conclude that the administrative hurdles cited by the Service do not apply to the State under the circumstances of this case. For example, the Service's ongoing assertion that the NEPA process must be fully completed before the State may act is directly contradicted by two published opinions that are directly on point. In *State of Alaska, et al. v Cecil D. Andrus, et al.*, 591 F.2d 537 (9th Cir. 1979), the Court of Appeals for this circuit held that, "the district court was correct in declaring that no environmental impact statement was necessary before the Secretary could stay his hand and allow the State of Alaska to manage its own wildlife." *State of Alaska*, at 541. Thereafter, in *Defenders of Wildlife, et al. v. Cecil D. Andrus, et al.*, 627 F.2d 1238 (D.C. Cir. 1980), the Court agreed with this reasoning, stating that the case raised "the question of whether, under the circumstances of this case, the National Environmental Policy Act obligates the Secretary to prepare and circulate an environmental impact statement when he does not act to prevent the State of Alaska from conducting, as part of a wildlife management program, a wolf hunt on certain federal land. Because the Secretary's conduct here does not constitute a "major Federal action" within the meaning of the Act, we hold that the Secretary is not so obligated, and we reverse." *Defenders of Wildlife*, at 1240. Given these precedents, the Service was simply wrong in asserting that the NEPA process had to be completed before the Department could take action to remove wolves to protect the caribou herd.

Likewise, the Service was wrong in asserting that the National Wildlife Refuge System Administration Act, as amended (16 U.S.C. §668dd), would be violated if the

Department conducted predator management without a special use permit. *See* Affidavit of Denby Lloyd, Exhibit D. Nowhere does this Act state any such requirement. To the contrary, it expressly recognizes that nothing therein is to be “construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.” It also expressly requires the Service to “ensure effective coordination, interaction, and cooperation with ...the fish and wildlife agency of the States in which the units of the System are located.” 16 U.S.C. §668dd(a)(4)(E). ANILCA carries similar statements, recognizing the State of Alaska’s authority to manage wildlife on federal lands and requiring the Service to cooperate with the State in administering Refuge lands. 16 U.S.C. §§3112(3) and 3202(a).

The Service interpreted the above, and similar, statutory mandates by entering into a Master Memorandum of Understanding with the Department in which it expressly agreed,

1. To recognize the Department as the agency with the primary responsibility to manage fish and resident wildlife within the State of Alaska.
2. To recognize the right of the Department to enter onto Service lands at any time to conduct routine management activities which do not involve construction, disturbance to the land, or alterations of ecosystems.
3. To cooperate with the Department in planning for enhancement or development activities on Service lands which require permits, environmental assessments, compatibility assessments, or similar regulatory documents by responding to the Department in a timely manner with requirements, time tables, and any other necessary input.

... [and]

4. To review present U.S. Fish and Wildlife Service policies and any future proposed changes in those policies in consultation with the Department to determine if modified or special policies are needed for Alaska.

Affidavit of Denby Lloyd, Exhibit B. Under this Agreement, since 1982, the Department has routinely conducted its game management activities on Service lands without any requirement for a special use permit.

The agreement set forth in the 1982 MOU has been subsequently reinforced in the Service's own published policies. For example, in explaining what compatible uses of refuges do not require special use permits, the Service has informed the States that,

we do not require compatibility determinations for State wildlife management activities on a national wildlife refuge pursuant to a cooperative agreement between the State and the Fish and Wildlife Service where the Refuge Manager has made a written determination that such activities support fulfilling the refuge purposes or the System mission.

65 Fed. Reg. 62488 (2000). Alaska has such a cooperative agreement in the above-described MOU.¹

The Service's new assertion that permits are required for game management activities such as those at issue here that do not involve construction, disturbance to the land, or alterations of ecosystems is directly contrary to item 2 in the MOU and its stated policies. Likewise, the Service's last-minute imposition of a new requirement about the need for such permits violates item 6 of the MOU such actions are arbitrary and capricious. In any event, there is good cause to hold that the Service's longstanding previous interpretation of its authorities, to

¹ The Service's policies also recognize that actions such as those at issue in this case may take place on an immediate, emergency basis, stating,

The Refuge Administration Act states that the Secretary may temporarily suspend, allow, or initiate any use in a refuge if the Secretary determines it is necessary to immediately act in order to protect the health and safety of the public or any fish or wildlife population.

65 Fed. Reg. 62488 (2000).

the effect that no special use permit was required for the types of activities at issue in this case, was the correct one.

Nevertheless, the Department acted in accordance with the Service's newly imposed requirements, and made every reasonable effort to comply with its demands. To that end, the Department prepared and submitted a document that the Service could accept as, and convert into, an Environmental Assessment that met NEPA requirements. Affidavit of Denby Lloyd, paras 8 and 16. This was no off-the-cuff product; it was prepared by professionals trained and experienced in NEPA compliance, and the Service did not identify any inadequacies in its content. *Id.* And, the Department applied for, and supplied all requested back-up documentation for, the various special use permits the Service asserted were needed. Affidavit of Denby Lloyd, paras 4-17. The Service knows that it may allow or initiate any use on an emergency and immediate basis if it determines that doing so is necessary to protect a wildlife population. 65 Fed. Reg. 62488 (2000). That is precisely the decision the Department has been requesting, to no avail. At this point, there is nothing further that the Department can do to obtain the Service's cooperation in taking the emergency wildlife management action needed to protect caribou calves born in the imminent calving season (June 2010). Affidavit of Denby Lloyd, para. 21.

Given the above circumstances, the Service's assertions that no action may be taken until NEPA compliance is completed and the last outstanding special use permit is issued, and especially its threat to seek criminal prosecution of State employees or agents who take action to manage wildlife, violate the provisions of ANILCA and the National Wildlife Refuge System Administration Act cited above, and are agency actions, findings or conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law within the scope of Section 706(2)(A) of the Administrative Procedures Act. 5 U.S.C. §706(2)(A).

To the extent that this Court concludes that NEPA compliance and a special use permit may be required, the Service's unexplained refusal to accept and act upon the Department's NEPA submission, and its refusal to either grant the last outstanding special use permit or exercise its emergency authority, violates the several coordination and cooperation requirements cited above, as well as breaches their MOU agreement to timely cooperate with the Department on NEPA and permitting issues, and constitutes "agency action unlawfully withheld or unreasonably delayed" within the scope of 5 U.S.C. §706(1). Under the circumstances, the Court should conclude that the State is likely to prevail on the merits of this suit.

B. Alaska is Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

As shown above, the Unimak Caribou Herd has declined by 75% since 2002 and it now has only about twenty adult bulls left. Affidavit of Bruce Dale, paras 2-4. The likelihood that most or all of those bulls will die, and few or no calves will survive to replace them, before the 2011 breeding season is significant. *Id.*, para. 7 and Affidavit of Lem Butler, para. 4. Even if the adult bull component of the herd is not completely lost, and protection efforts are brought next season, the failure to take action to protect caribou calves born this Spring will inevitably result in a further, and steeper, decline coupled with at least a three to five year delay before the herd grows back to the seriously depleted situation it is in as of the date of this document. Affidavit of Bruce Dale, para. 8 and Affidavit of Lem Butler, para. 4. That delay will, in turn, result in an even longer and indefinite time during which the biodiversity and ecological health of Unimak Island will suffer, and the local people will be unable to pursue one of their most important subsistence resources. *Id.* and Affidavit of Denby Lloyd, paras 9 and 22. The Alaska Maritime National Wildlife Refuge was set aside, among other purposes, to conserve this caribou herd and ensure its continued use for subsistence by local users. ANILCA Sec.s 303(1)

and 802, Pub. L. 96-487, §303(1) (1980) and 16 U.S.C. § 3112; also 16 U.S.C. §668dd(a)(4)(A) and (B). By definition, these losses constitute harm.

The State of Alaska is constitutionally obligated to manage its wildlife according to the sustained yield principle, subject to preferences among beneficial uses, and to provide for the maximum use and benefit of its natural resources for the Alaskan people. Constitution of Alaska, Art. VIII, Sec.s 1, 2 and 4. The Commissioner, as head of the Department, has been empowered and required by the Alaska Legislature to manage, protect maintain, improve and extend the game resources of the state in the interest of the economy and general well-being of the State. AS 16.05.020(2). Congress has recognized the State's interest in managing its wildlife, including resident wildlife on federal lands. 16 U.S.C. § 668dd(m) and 3202(a). The United States Fish and Wildlife Service has also previously recognized that the State of Alaska's Department of Fish and Game has "the primary responsibility to manage fish and resident wildlife within the State of Alaska" without equivocation as to land status or ownership. Affidavit of Denby Lloyd, Exhibit B. Given these principles, the State of Alaska will suffer from, and is entitled to assert the right to seek remedies for, the harms described above.

These harms Alaska is likely to incur are irreparable. There is no way to compensate the State of Alaska or its people for the ecological, economic, and subsistence losses that will occur if injunctive relief is denied. Subsistence, for example, is as important and necessary culturally, traditionally and physically to Alaskans as it is economically, and Congress has so found. 16 U.S.C. §3111(1). Money cannot compensate for the loss of culture and traditions, even if it could for the food loss. Likewise, losses to biological integrity and environmental health are beyond the reach of traditional forms of legal compensation. If injunctive relief is denied and the Unimak Caribou Herd is permitted to decline further and

approach or reach extirpation, Alaska will have suffered incalculable and uncompensable, that is to say “irreparable,” harm.

C. The Balance of Equities Tips in Alaska’s Favor

Alaska is not requesting an order allowing it to proceed, without federal participation or oversight, with its overall predation control implementation plan in the motion at bar. It is, instead seeking an order allowing it to conduct a very precise, tailored, and limited level of wolf removal from the caribou calving grounds that is sufficient only to preserve the status quo while this lawsuit is pending. In other words, Alaska is not asking the Court, at this time, to order that it may proceed to remove enough wolves on a repeated basis from the caribou calving grounds to allow the Unimak Caribou Herd to recover to its former numbers. Alaska, for purposes of this motion and for the sake of argument, is willing to wait for the Service to complete its NEPA analysis and, assuming that process reaches the same conclusions Alaska has, issue its special use permits before Alaska proceeds with its larger planned predator control effort. Instead, Alaska is asking for an order allowing it to take no more than seven wolves from the calving grounds this June, as that is the number our biologists have calculated will be minimally adequate to keep the herd from declining further by virtue of the negative feedback loop described above. Affidavit of Bruce Dale, para. 10. Removal of up to seven wolves also maintains a healthy wolf population on the Island, as managers estimate that between 15 and 30 wolves currently occupy it. *Id.* and 5 AAC 92.125(l)(2)(B)(iv). Wolves reproduce very quickly, and repopulate within a short time after control actions are taken. “Predator Management in Alaska” (Exhibit E hereto), pp. 15 and 16. In essence, Alaska is simply seeking to preserve the resources at issue at levels that are as close to their current states as possible, so that the parties continue to have a caribou resource that is capable of a relatively quick population turnaround,

should this Court eventually rule in Alaska's favor on the merits. The alternative is likely to lead to moot issues, as allowing the herd to continue its precipitous decline will lead to a herd that remains at extremely low levels for an extended time, or is extirpated, no matter what this Court orders.

Given Alaska's request to merely maintain the status quo, the equities tip in its favor. Moreover, the action the State of Alaska is asking permission to undertake will also accrue to the benefit of the Defendants, who have admitted that they have the duty to preserve the subject caribou herd and the opportunities to use it for subsistence purposes. Affidavit of Denby Lloyd, para. 10. Nor will Alaska's proposed action cause the Service any harm. Department personnel will be in the caribou calving area, and its environs, anyway, using helicopters to collar caribou and wolves pursuant to a special use permit granted by the Service for those purposes. Special Use Permit (Exhibit F hereto). Little, if any, additional disturbance will be caused if up to seven wolves are killed using those same helicopters during the same time period.

The fact that up to seven wolves could be killed under the State's requested order does not alter the balance of equities. The wolf population on the island is healthy and Alaska is not proposing to reduce it any more than is necessary to simply maintain the caribou herd in its current state. Even if seven wolves are removed, the remainder will still constitute a healthy population, capable of quickly reproducing and replenishing their number. Affidavit of Bruce Dale, para. 10 and Exhibit E, pp. 15-16. In any event, the temporary loss of up to seven wolves, when balanced against the likely long term loss or depleted status of the entire Unimak Caribou Herd, and the loss of uses and values associated with that herd, does not tip the scales against Alaska.

Overall, considering that Alaska's request is merely to preserve the status quo; that the Service will also benefit and will not suffer from Alaska's proposed action; and that the temporary loss of up to seven wolves does not outweigh the potential loss likely to occur through inaction; the balance of harms tips sharply in Alaska's favor.

D. The Proposed Injunction is in the Public Interest

Congress has articulated the public interest in this case: preservation of the caribou herd and managing the Refuge so as to maintain subsistence uses of that herd. ANILCA Sec.s 303(1) and 802, Pub. L. 96-487, §303(1) (1980) and 16 U.S.C. § 3112; also 16 U.S.C. §668dd(a)(4)(A) and (B). Likewise, Congress has mandated Refuge management that ensures the biological integrity, diversity, and environmental health of the National Wildlife Refuge System. 16 U.S.C. §668dd(a)(4)(B). None of these public interests would be served by allowing the Unimak Caribou Herd to further decline towards extirpation. All would be served by a carefully tailored order permitting calf protection through limited wolf removal this calving season.

E. Summary

The Service's administration of the Alaska Maritime National Wildlife Refuge has, to date, failed to meet several of its statutory mandates, including mandates to conserve the subject caribou population and maintain subsistence uses of it, and mandates to cooperate with the State of Alaska in doing so, and Alaska is likely to be able to establish this on the merits. That the caribou herd is in severe decline, is well known to the Service, and its projected further decline is likely to lead to irreparable harm to the State of Alaska and its people.

Rather than taking quick and effective action to reverse this situation and come back into compliance with its statutory mandates, the Service has spent its time erecting barriers

to Alaska's efforts on point, and there is good reason to conclude that these barriers are not necessary. Nevertheless, Alaska has done all it can do to surmount the barriers and proceed to take the now-emergency action that has become obviously necessary. When the Service outright prohibited the State of Alaska from doing so, and threatened prosecution, it overstepped its legal authorities and Alaska is also likely to be able to establish this on the merits.

Considering the equities and the public interest, there is essentially no downside to entry of an order permitting Alaska to take a limited action calculated to preserve the status quo in this situation, so that effective relief may actually be rendered at the end of this litigation if the Court rules in Alaska's favor. The State of Alaska has met its legal burden and established its entitlement to a temporary restraining order and preliminary injunction.²

V. Conclusion

For all of the above reasons, the State of Alaska's motion for a temporary restraining order and preliminary injunction should be granted.

DATED this 28th day of May , 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: s/Kevin M. Saxby
Kevin M. Saxby (AK Bar No. 8611132)
Senior Assistant Attorney General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: 907-269-5100
Facsimile: 907-279-2834
Email: kevin.saxby@alaska.gov

² As noted in Commissioner Lloyd's affidavit, in paragraph 20, the Alaska Board of Game recently extended the wolf hunting and trapping seasons in this area as a backup effort should no other allowance for predator removal be made. Neither the Board nor the Department believe these extensions are likely to succeed in stemming the herd's decline. *Id.* If this motion is granted, the Department will close the wolf hunting and trapping seasons by emergency order.

CERTIFICATE OF SERVICE

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

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

s/ Kevin M. Saxby
Kevin M. Saxby