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Governor Mike Dunleavy
STATE OF ALASKA

January 4, 2021

Mr. Chad Padgett, Alaska State Director
Bureau of Land Management
222 West Seventh Avenue, No. 13
Anchorage, AK 99501

Re: Bering Sea-Western Interior Resource Management Plan
Governor's Consistency Review

Dear Mr. Padgett:

The State of Alaska reviewed the proposed Bering Sea-Western Interior Resource Management Plan (BSWI RMP or proposed plan) and Final Environmental Impact Statement. The State is a cooperating agency and participated fully at every stage of the planning process, including providing the Bureau of Land Management (BLM) with comments at all internal cooperating agency review opportunities, as well as during public comment periods. While the State expected, and would have preferred, a more collaborative process that allowed for discussions with state staff on issues raised in both informal and formal reviews, it appears BLM's use of a contractor to assist in the preparation of this plan added time to the overall planning process, and in many instances, preempted providing meaningful opportunities for follow up discussions with the State. Unfortunately, as a result, while I recognize BLM's efforts to make the proposed plan more consistent with multiple-use management under the Federal Land Policy and Management Act, pursuant to 43 CFR 1610.302, the plan remains inconsistent with State plans, policies, and programs in specific areas, as described in the attached comments. Some of the inconsistencies may also be the result of unclear or conflicting language in the plan itself.

The balance provided in the Alaska National Interest Lands Conservation Act (ANILCA) Section 101(d) speaks directly to the reserved lands in conservation system units (CSUs) designated by ANILCA (e.g., wildlife refuges) and public lands necessary and appropriate for more intensive use and disposition (e.g., BLM managed multiple use lands).

> *This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people;* ***accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive***

> ***use and disposition****[emphasis added], and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby*(ANILCA Section 101(d)).

While the intent in the proposed plan is a step in the right direction for maintaining that balance by ensuring multiple-use management on BLM's non-CSU lands, many of the concepts in this plan, including the concept of connecting CSUs with connectivity corridor designations, do not comport with the decision Congress made to designate large CSUs that were purposely expansive to encompass full ecosystems; hence, the need for the use and access provisions that Congress included in ANILCA to ensure that the designation of 100 million acres of such expansive CSUs statewide would not interfere with the State's economic and social needs (e.g., Titles VIII and XI of ANILCA). This was coupled with other provisions in ANILCA, commonly referred to as ANILCA's "no more clauses," that prohibit the establishment of new CSUs, or administratively designated "de facto" CSUs, without approval by Congress.[1] I strongly urge BLM to abandon this approach to land management in this and future planning efforts. Also, when considering concerns raised by others during the plan's protest period, BLM must be mindful of the balance established by Congress in ANILCA and the unique context for land ownership and resource management authorities in Alaska, including those granted to the State under the State Constitution, the Alaska Statehood Act, the Submerged Lands Act, RS 2477 rights-of-way granted to the State under the Mining Law of 1866, and lands granted to Alaska Native corporations under the Alaska Native Claims Settlement Act. The legislative intent in all these Acts must be the driving factor in determining the appropriate management for BLM lands in Alaska, not BLM's national policies that lack recognition of the unique Alaska context.

Thank you for your consideration of the issues identified in the enclosed comments. I urge you to reconcile these inconsistencies in the plan and in the Record of Decision.

Sincerely,

Mike Dunleavy
Governor

Enclosure

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Don Young, United States House of Representatives
The Honorable Corri Feige, Commissioner, Alaska Department of Natural Resources
The Honorable Doug Vincent-Lang, Commissioner, Alaska Department of Fish and Game
Kip Knudson, Director of State and Federal Relations, Office of the Governor

[1] ANILCA Section 1326(a) requires congressional approval of any new withdrawals in Alaska greater than 5,000 acres and 1326(b) prohibits studies for the purpose of establishing new CSUs or for other similar purposes unless authorized by ANILCA or a subsequent Act of Congress.

State of Alaska
Governor's Consistency Review Finding
for the Bering Sea-Western Interior
Resource Management Plan and Final EIS

I. Support for Decisions in the Proposed Plan

1. **Recommendation to Lift ANCSA (d)(1) Withdrawals is Appropriate and Long Overdue**
In a 2006 Report to Congress, BLM recognized withdrawals put in place under the 1971 Alaska Native Claims Settlement Act (ANCSA) had served their intended purpose, which was to set aside lands for selection by Alaska Native corporations, the process for which is complete. BLM also recognized that Congress had also passed significant legislation that provides environmental protections that were not in place in the 1960's. This includes, but is not limited to, the passage of the National Environmental Policy Act of 1970 (NEPA), the Clean Water Act of 1972, the Federal Land Policy and Management Act of 1976 (FLPMA), and the Alaska National Interest Lands Conservation Act (ANILCA) of 1980, which designated over 100 million acres of conservation system units (CSUs), including designated wilderness, across Alaska. A full 30% of lands within the BSWI planning area currently are ANILCA CSUs managed by the U.S. Fish and Wildlife Service (BSWI, Page 1-5). BLM also acknowledged in its 2006 report that it now had rigorous regulations that protect the environment during the orderly development of its multiple-use lands.

> *In the early 1970s when the lands were withdrawn under Section 17(d)(1) and (d)(2) of the ANCSA, there were few regulations to oversee the development of the public lands and protect important natural resources. Since then, Congress has passed significant legislation for the orderly development of the public lands and to protect the environment from adverse impacts. The BLM has 1) developed extensive oil and gas lease stipulations, required operating procedures (ROPs), and surface management regulations for miners, which are now in place and sufficient to assess and protect the resources in most situations..."* (BLM, Sec. 207 Alaska Land Transfer Acceleration Act: A Review of D-1 Withdrawals, Report to Congress (June 2006), at 5, 6)

The State agrees with BLM's reasons for lifting all the ANCSA 17(d)(1) withdrawals in the BSWI planning area, as discussed in the response to comments in Appendix H (page 4), and strongly supports their recommended revocation. The lifting of the ANCSA (d)(1) withdrawals does not, in any way, jeopardize or negate protections afforded BLM lands and resources under existing federal and state laws and regulatory authorities.

2. **Lands with Wilderness Characteristics (LWC) and Wild and Scenic River (WSR) Decisions are Consistent with ANILCA**
The proposed plan manages 100 percent of LWC within the planning area to emphasize other resource values and multiple uses as a priority over protecting wilderness characteristics and does not recommend any rivers be designated as WSRs. We concur with both decisions, as they are consistent with congressional intent in ANILCA Sections 1320 and 1326(b). While ANILCA Section 1320 gives BLM discretionary authority to periodically conduct wilderness

reviews in Alaska, BLM has not conducted a wilderness review, and instead is implementing its national LWC Policy (i.e., BLM Manuals 6310 and 6320), which is inconsistent with ANILCA Section 1320's prohibition on presumptive management of land for its wilderness characteristics without Congressional action.[2] Therefore, protecting LWC administratively through a land use planning decision, with or without a recommendation for designation before Congress, circumvents this Congressional intent for Alaska. Congress' intent on this matter is reinforced by ANILCA Section 1326(b), which prohibits studies that consider recommending new CSUs *or other designations for related or similar purposes*, unless authorized by ANILCA or a future act of Congress.

While we reiterate our objection to BLM implementing national policy (BLM Manual 6400) that is inappropriate in Alaska and ignores Congressional direction in ANILCA Section 1326(b), which prohibits WSR studies not authorized by ANILCA or a subsequent Act of Congress, we concur with BLM's decision to not recommend any new WSRs. It is consistent with intent in the Wild and Scenic Rivers Act (WSRA) to work closely with affected States in the study of potential WSRs authorized by Congress.[3]

II. Revisions Needed for Consistency with State Area Plans, Programs and Policies

1. Implementing Travel Management "Interim" Decisions is Improper and Interferes with Access on and to State Lands and Waters.

- Issue
  - Numerous access restrictions are being imposed on the public as "interim" management without an inventory and resource and use data required for final decisions.
  - The proposed plan provides no commitment to initiate a travel management step-down plan within a specified timeframe, which would leave unjustified and onerous access restrictions in place indefinitely.
- Resolution
  - Remove intent to implement "interim" travel management decisions *prior to completion* of a step-down travel management plan.

The Travel and Transportation Management section of the proposed plan (Section 2.6.18, page 2-83) identifies general transportation management actions, ANILCA closure procedures that will be followed should BLM propose any restrictions on ANILCA protected methods of access, and criteria that will be followed when BLM initiates a travel and transportation management step-down plan. Table 2-17 (Travel and

[2] "...In the absence of congressional action relating to any such recommendation of the Secretary, the Bureau of Land Management shall manage all such areas which are within its jurisdiction in accordance with the applicable land use plans and applicable provisions of law." (ANILCA Section 1320)

[3] While BLM's study was not congressionally authorized by ANILCA or a subsequent Act of Congress as required in ANILCA (the WSRA preceded ANILCA), the WSRA includes intent for federal agencies is to work closely with affected states. "The study of any of said rivers [designated for study by Congress in Section 5(a) of the WSRA] shall be pursued in as close cooperation with appropriate agencies of the affected State and its political subdivisions as possible..." (Section 5(c) of the WSRA).

Transportation Management Actions by Alternative) lists numerous restrictions that apply to ANILCA designated CSUs, lands that are not designated ANILCA CSUs, and areas that BLM is administratively designating in the BSWI plan (e.g., Innoko Bottoms Priority Wildlife Habitat Area). This would be unobjectionable save for the fact that this section also states that the plan "[a]dditionally…provides *interim-guidance* [emphasis added] on types of limitations until the implementation level plans are complete… provided in the alternatives table below." The narrative suggests that BLM intends to implement the restrictions, even though they are "interim-guidance" and determined without the benefit of a current trail inventory and data to identify and evaluate actual impacts to users and resources, as required by NEPA and BLM's internal policies, among other authorities. As noted in the State's comments on the draft RMP/EIS, the Analysis of the Management Situation that was prepared for this planning process shows very little use or resource concerns on which to base any restrictions, let alone the access restrictions identified in the table as "interim-guidance." Furthermore, although these same restrictions are listed in Table ES-2 (Implementation Decisions) as not being subject to a "Protest," they are, however, appealable to the Interior Board of Land Appeals or the Office of Hearings and Appeals. This is a strong indicator that BLM intends to implement "interim-guidance" as codified and enforceable regulations. This would be highly inappropriate and legally questionable.

We. therefore, request the ROD clearly state that implementing the travel management restrictions listed in the plan (Table ES-2 and Table 2-17) would be pre-decisional and will not be implemented or enforceable until an appropriately informed and publicly vetted travel and transportation management plan is complete and any required implementing regulations (e.g., closure process in 43 CFR 36.11) are subsequently promulgated.

2. **BLM Does Not Manage State-owned Navigable Waters**
   - Issue
     - By applying access and use restrictions on state-owned navigable waterways that have not been declared non-navigable by a federal court, under the guise that they are "non-navigable," the plan places unlawful clouds on the State's title.

   - Resolution
     - Presume all waters are navigable until determined otherwise by a Court and remove all restrictions on waters that are navigable and are in fact owned by the State.

   The proposed plan applies restrictions on motorized use, including prohibitions on hovercrafts, airboats, and inboard motors to "non-navigable" rivers in the planning area (see Table 2-6, p. 2-32 and section 2.6.21, p. 2-100), even though the so called "non-navigable" rivers, or river segments, have not been identified by BLM or declared non-navigable by the federal Courts.

The State of Alaska, estimating very conservatively, has approximately 800,000 miles of navigable-in-fact rivers and 30,000,000 acres of navigable-in-fact lakes. Alaska owns all the associated submerged lands, and the Alaska Department of Natural Resources (ADNR)--as the public trustee and steward--holds title to the same for the overall public good. The Equal Footing Doctrine of the United States Constitution, U.S. Const. art. IV, § 3, cl. 1, the Federal Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, and the Alaska Statehood Act of 1958, Pub. Law 85-508, 72 Stat. 339, expressly provide that the State of Alaska owns the submerged lands beneath each and every navigable-in-fact river or other waterway and beneath each and every navigable-in-fact lake or other waterbody located within its borders. State ownership of these submerged lands is only defeated by valid pre-statehood federal withdrawals specifically intending to defeat state title;[4] the vast majority of lands held by the federal government in Alaska represent post-statehood withdrawals pursuant to ANILCA, 16 U.S.C § 3101 *et seq.*, and do not defeat state title to the submerged lands that fully vested in 1959.

BLM is tasked with determining navigability status of waters in Alaska within federal boundaries. After 60 years of statehood, many waters have not yet been adjudicated, including those BLM lands within the boundaries of the BSWI planning area. To fully implement the direction of the Supreme Court in Sturgeon v. Frost, 587 U.S.___, 139 S. Ct. 1066 (2019), all waters must be presumed navigable unless determined otherwise through established processes. Absent this determination, all navigable waters are "State waters" and the submerged lands under them are State lands and therefore, not "public lands" under ANILCA 102(3). The same holds true for navigable waters located outside of CSUs. These waters are managed under applicable state statutes, regulations, and policies; federal regulations can only be enforced in Alaska on lands to which the US government holds title. Exceptions to this presumption would occur only where a navigability determination has found the water to be non-navigable through a federal court; where the waterbodies involved are ancillary waters or receive little to no public use; or where the waterbodies cannot be traversed successfully in a flat bottom boat carrying a 1000-pound load.

As an example, the Unalakleet River is both a navigable river and a wild and scenic river designated by ANILCA. The restrictions applied to the Unalakleet are also illegally applied under ANILCA, which excludes state lands (including state submerged lands) from the boundaries of wild and scenic rivers.[5] As recognized by the Supreme Court in the Sturgeon decision, "a State's title to lands beneath navigable waters brings with it regulatory authority over 'navigation, fishing and other public uses' of those waters" *Id.* at 1074.

The restrictions imposed in the proposed plan on the Unalakleet River and other navigable waters under the guise that waterbodies are "non-navigable (e.g., within the Innoko Bottoms Priority Habitat Area) constitute clouds on State title to affected navigable waterways. It is only permissible for BLM to restrict activities on waters that

[4] Alaska v. United States, 545 U.S. 75 (2005)

[5] ANILCA Section 606 (a)(1) states that "[s]uch boundaries shall not include any lands owned by the State or a political subdivision of the State…"

have been declared non-navigable by the federal courts, and more overreaching restrictions are impermissible by law. Use restrictions of State waters based on a presumption of non-navigability by BLM that have not been declared non-navigable by a federal court frustrates state interests. See Alaska v. United States, 201 F.3d 1154 (9th Cir. 1959). This applied presumption of non-navigability further creates undue confusion and uncertainty for the public and for law-abiding citizens who wish to use state lands; land management professionals have a hard enough time trying to discern the complexities of concurrent state and federal jurisdiction, the average person is in an even worse predicament. This fact has been underscored twice by a unanimous United States Supreme Court in *Sturgeon*. This situation puts public users of navigable-in-fact waters and state submerged lands in civil and even criminal jeopardy when their legal use of the waters crosses an administrative "line" on a waterbody.

To ensure consistency with state-management of all navigable waters within the planning area, we request BLM presume all waterbodies are state-navigable waters (with exceptions as noted above) and remove all access and use restrictions in the proposed plan that apply to waters, including those that are currently identified as being applicable to "non-navigable" waterbodies.

3. **BLM Does Not Manage State RS 2477s**
    - Issue
        - Numerous RS 2477 routes throughout planning area are restricted, including Iditarod National Historic Trail (INHT). BLM is claiming RS 2477 rights are determined through a process entirely independent of the BLM's land use planning process. BLM is functionally negating State property interests; invalidating State RS 2477 ROWs; and placing unlawful clouds on State title.

    - Resolutions:
        - Recognize valid existing state ROW RS 2477 routes and remove restrictive measures on RS 2477 routes, to be consistent with State Generally Allowed Uses (GAUs).
        - Confirm in the ROD that the management corridor for the INHT does not apply to the Unakaleet River, nor does it affect the validity of State asserted RS2477s.

The State of Alaska owns numerous rights-of-way across federal land under RS 2477, including rights-of-way identified in AS 19.303.400. There are numerous valid RS 2477 rights-of-way owned by the State of Alaska that fall within the boundaries of the BSWI planning area, including the Iditarod National Historic Trail (INHT), which is comprised of numerous segments. Most, if not all, of these valid state-owned easements are not included in the proposed plan, even though the State has asked BLM to recognize them continuously throughout the planning process. The failure to delineate these property interests owned by the State of Alaska is arbitrary and capricious; creates needless confusion and misunderstanding; represents an unconstitutional taking; and clouds clear state title to these lawful state property interests. See 28 U.S.C. § 2904a; *Sturgeon v.*

Frost, No 17-949, 587 U.S. ___ (Mar. 26, 2019); Mark Patrick Heath 181 IBLA 114 (2011). The State's June 12, 2019 comments on the draft plan and EIS included a complete explanation of how Revised Statute 2477, located in Section 8 of the Mining Law of 1866, granted numerous State ROWs across federal land in Alaska. These comments are incorporated herein by reference.

In designating the INHT, the National Trails System Act (P.L. 90-543, as amended) specifically states:

> *SEC. 5 (a) (7) The Iditarod National Historic Trail, a route of approximately two thousand miles extending from Seward, Alaska, to Nome, Alaska, following the routes as depicted on maps identified as 'Seward-Nome Trail', in the Department of the Interior's study report entitled 'The Iditarod Trail (Seward-Nome Route) and other Alaskan Gold Rush Trails' dated September 1977. The map shall be on file and available for public inspection in the office of the Director, National Park Service, Washington, D.C. The trail shall be administered by the Secretary of the Interior.* ***No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land.*** *[emphasis added] The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than 1/4 mile on either side of the trail.*

Pursuant to P.L 90-543, as amended, the State of Alaska entered into a Memorandum of Agreement with BLM concerning the INHT. The agreement clearly delineates that the "State of Alaska manages portions of the primary and connecting trails and historic sites identified in the CMP [INHT Comprehensive Management Plan] as components of the Trail" (AK-974-MU8-INHT-03). Additionally, the agreement states:

> *Nothing in this agreement affects the validity of state Revised Statute 2477 rights-of-way claims to all or parts of the Trail* (AK-974-MU8-INHT-03, Section F. Administration).

Given the initial establishment of the trail during the Iditarod Gold Rush of the 1910's, it would be reasonable for the CMP to anticipate the State would assert the INHT and its many components as RS 2477 ROWs. As explained in the CMP's Introduction "The intent of this plan is for the Federal Government to initiate cooperative management of the Iditarod NHT, so that eventually the State of Alaska and a coalition of volunteer organizations may assume the major portion of the management responsibility for the Trail system." (1986 INHT CMP, Introduction, page x)

Crucially, it must be noted that the INHT Comprehensive Management Plan (CMP) places the management of an RS 2477 with the State at *assertion*:

> *However, until an RS 22477 is asserted, the Federal government will continue to manage the historic resources and ensure public travel on segments currently under Federal administration* (Page 78, Section d.).

A segment of the INHT also runs along the Unalakleet WSR, a State-owned navigable river, which is excluded from the wild and scenic river boundary pursuant to ANILCA Section 606 (see issue #2 above). Therefore, the segment of the trail that overlays state-owned navigable waters (i.e., the Unalakleet River) is not managed by BLM pursuant to both ANILCA and the National Trails System Act. Additionally, the 1986 INHT CMP states "On trail segments which follow public waterways, no trail corridor will be established." (Page 78, Section g.). The BSWI RMP establishes management for the INHT that also conflicts with the INHT CMP. It appears BLM is attempting to amend the cooperatively developed and legislatively mandated CMP through the BSWI RMP without the required consultation with partner agencies and associated public process.[6]

The response to comments in the proposed plan states:

> *RS 2477 claims are not considered or evaluated in the BLM's land use planning process. RS 2477 rights are determined through a process entirely independent of the BLM's land use planning process. RMPs do not recognize or reject RS 2477 assertions. The BSWI RMP is not intended to provide any evidence bearing on or addressing the validity of any RS 2477 assertions and does not adjudicate, analyze, or otherwise determine the validity of claimed ROWs. Nothing in this RMP extinguishes any valid ROW or alters in any way the legal rights the State and boroughs have to assert RS 2477 claims* (Appendix H, page 27).

Notwithstanding the foregoing claims, by imposing access restrictions on State-owned RS 2477 ROWs within the planning area, BLM is doing the very thing that it claims it is not doing – adjudicating the validity of State-owned routes and exerting ownership and control over the same. By applying regulation and management decisions to the State's ROWs, BLM is functionally negating State property interests; invalidating State RS 2477 ROWs; and placing unlawful clouds on State title.

Under the guise of not adjudicating the validity of RS 2477 routes within the planning area, BLM is dictating – in a manner contrary to State law – what can and cannot occur on the most iconic route within the State. Also, by refusing to acknowledge or identify the INHT as an RS 2477 in the proposed plan, BLM is creating unnecessary conflicts over the management of the INHT as a CSU under ANILCA. BLM does not manage segments of the INHT located on state lands and ANILCA Section 1109 specifically

[6] "This Comprehensive Management Plan, as mandated by Congress, represents the cooperative efforts of the Bureau of Lands Management, the Forest Service, the Fish and Wildlife Service, the National Park Service, the State of Alaska, the Iditarod National Historic Trail Advisory Council, various local governments, Native corporations, and interest groups, as well as hundreds of individuals. Together, these agencies, groups, and individuals have proposed a cooperative management philosophy." (1986 CMP, Introduction, page x)

states that "[n]othing in this title shall be construed to adversely affect any valid existing rights of access."

We request BLM recognize all State RS 2477 ROWs in the planning area (both in the proposed plan and subsequent travel management step down plan) and remove all restrictions, including those within the State's 100-foot ROW corridor for the INHT, that conflict with the State's GAUs (see section 11 AAC 96.020). Additionally, we request the ROD clarify that the management corridor for the INHT does not apply to sections of the INHT that overlay the Unalakleet WSR or affect the validity of State asserted RS 2477s, consistent with the CMP and the State's MOU with BLM regarding the INHT.

4. **Proposed Innoko Bottoms Priority Wildlife Habitat Area (IBPWHA) and Community Focus Zones**
    - Issues:
        - The IBPWHA is unnecessarily duplicative with the State Paradise Controlled Use Area (PCUA);
        - Designation of the IBPWHA and Community Focus Zones (CFZs) and the associated travel and user restrictions are not supported by evidenced-based adaptive management in the Plan;
        - Both management designations circumvent established processes for coordinating with the State Board of Game and Board of Fish to resolve user conflict;
        - Both designations fail to recognize that wildlife abundance and population structure should be addressed in conjunction with user conflicts to reach fair and equitable solutions; and
        - Neither designation supports the intent of Secretarial Order (SO) 3356 to increase public access to hunting or SO 3362 to work with the state wildlife agency (as noted in the Plan for the IBPWHA), and both fail to recognize EO 13443 and SO 3347.
    - Resolutions: In the ROD, commit to—
        - Removing the designation of the IBPWHA and CFZs;
        - Conforming BLM lands within the State's PCUA to PCUA management;
        - Working with the State Boards of Game and Fish by bringing evidenced-based management concerns and requests to the Boards through the proposal process for consideration when the need arises, e.g., providing the Boards with Regional Advisory Council and documented community data of user conflicts and proposals for resolution and seek out regional-based objectives, which could include requests for the State to take action by emergency order should a conservation concern arise and development of a multi-agency guide use allocation program when known conflicts exist.

The area that BLM is proposing to designate as the 236,556-acre IBPWHA is already within the State's PCUA. Designation of the IBPWHA and its proposed management rather than conformity with the State's PCUA is inconsistent with the State controlled use

area. Conforming BLM lands within the State's PCUA to PCUA management would maintain continuity for the public and support State resource management objectives to the extent possible while simultaneously supporting BLM management objectives. A review of the literature indicates BLM is not implementing an adaptive management strategy through the designation of the IBPWHA, rather it is an assumptive strategy. The Plan fails to acknowledge the "environmental variation, partial observability, partial controllability, and structural uncertainty [that] all limit a decision maker's ability to make informed management decisions."[7] The Plan lacks the evidenced-based modeling data to indicate a demonstrable need for the CFZs or management that differs from the State PCUA for the proposed IBPWHA. ANILCA Title VIII already provides a subsistence priority on public lands. Rather, the Plan employs pre-emptive restrictive management strategies in both cases based on hypotheses which assume the need for more restrictive management when existing management strategies through federal-state management board processes have not been employed.

The Plan states the IBPWHA will support the intent of SO 3356 without evidence of an applied strategy to increase public access to hunting in the field. Additionally, there is no evidence that the proposed IBPWHA supports SO 3362 to improve collaboration with the states as indicated in the Plan's justification in the response to comments (Appendix H); the Alaska Department of Fish and Game (ADF&G) is unaware of any consultation by BLM on the designation of the IBPWHA or collaborative discussion of need. While we were afforded cooperating review opportunities during the planning process, no outreach to the State occurred in response to our concerns with the IBPWHA. This is also counter to the instruction of SO 3362 to work with state wildlife agencies and should be paramount given the proposed IBPWHA overlaps with the State's Paradise Controlled Use Area established by the State Board of Game public process.

The Plan indicates the designations of the IBPWHA and CFZs result from the Bureau's authority for management of habitat and recreation, respectively. However, the Plan fails to recognize the interplay between federal and state management authorities and the nexus between the management of habitat and people to support fish & game and the management of the fish & game itself. The application of the Plan's habitat and recreation management decisions extend de facto negative impacts to the state's authority for wildlife management through BLM's associated management of user activity in the IBPWHA and CFZs related to wildlife use. The Plan thereby fails to incorporate the State's "broad trustee and police powers as stewards of the Nation's fish and wildlife species on public lands and waters under the jurisdiction of the Department [of Interior]..." as recognized in the September 10, 2018 Secretarial Memorandum issued to the Bureau from the Secretary of Interior. It also fails to advance DOI's priorities for increasing recreational access on Bureau lands and waters, improve collaboration with partners, and better align Federal and State regulations as noted by Executive Order (EO) 13443 ("Coordination with State, Tribes, and Territories") and SO 3347 ("Conservation, Stewardship and Outdoor Recreation").

[7] Williams, B. K., R. C. Szaro, and C. D. Shapiro. 2009. Adaptive Management: The U.S. Department of the Interior Technical Guide. Adaptive Management Working Group, U.S. Department of the Interior, Washington, DC.

The solution to these issues is to recognize the need and actively work cooperatively with the State as cooperative resource managers to holistically manage the areas the public uses as a whole using all available data—including state and federal data, and sources from both western science and traditional knowledge. The public does not separate resources from their habitat nor from their use of the resource across land status boundaries. Users subsist and recreate across the landscape as a whole.

DOI explicitly recognizes the State's authority for managing wildlife across all lands and jurisdictional boundaries and as it relates to public use; this plan needs to do the same:

> *The States' fundamental responsibility for fish and wildlife management includes responsibility for appropriate regulation of public use and enjoyment of fish and wildlife species. The Department recognizes States as the first-line authorities for fish and wildlife management and hereby expresses its commitment to defer to the States in this regard except as otherwise required by Federal law* (Department of Interior directive memorandum: State Fish and Wildlife Management Authority on Department of the Interior Lands and Waters, September 10, 2018).

The practical outcome must be that the ROD recognizes this complexity, demands implementation of practical cooperative working relationships of BLM with its partners to improve on-the-ground management as well as uphold existing intent of the joint 1983 Memorandum of Understanding (MOU) between BLM and the ADF&G, work within established procedures using all available data to manage user conflict and resource allocation, and conform management for the IBPWHA to that of the State's PCUA which was created by the Board of Game to accomplish support of the wildlife as desired by the plan and do so without added unnecessary complexity.

5. **Trapping and Hunting Precluded by Other Management Decisions in the Plan**
   - Issues:
     - Trappers' ability to locate cabins on waterways is precluded by management prescriptions applied to HVWs and cabins.
     - The proposed plan impedes the use of public shelter cabins (including the Rohn Cabin) as hunting bases by limiting the stay at the cabins to 3 days.

   - Resolutions:
     - Clarify in the ROD that trapping cabins are allowed within the 100-year floodplain areas of all streams; conform distance limits between cabins and waterways with those in the State Kuskokwim Area Plan (KUAP).
     - Increase public shelter cabin limits from 3 days to 10 days, in accordance with State GAUs for camping.

<u>Trapping Cabins</u>

The proposed plan generally addresses trapping as a common and supported activity in the planning area and revisions clarify that cutting or disturbing trees will be allowed for

trapping activities. In Appendix H, BLM also states in the responses to comments that "The Proposed RMP/Final EIS clarifies any proposed management actions related to trapping" (Appendix H, p. 38). However, despite the intent to support trapping and clarify management actions within the plan, management actions such as prohibiting permanent structures in the 100-year floodplain, impede the opportunity for trappers to locate trapping cabins along waterways within the planning area—an action critical to many trap lines. This management action puts trapping cabins a minimum of 100 feet from the ordinary high-water mark of a stream; on other waterways (6^{th}, 7^{th}, 8^{th}, and 9^{th} orders streams) the buffer prohibits trapping cabins within a quarter of a mile. The on-the-ground application of setting riparian buffer distances according to stream orders will be extremely difficult for users to determine permissible activities. This is another example of proposed management creating undue confusion and uncertainty for the public and for law-abiding citizens who wish to use the lands when even land management professionals have a hard enough time trying to discern the complexities of concurrent state and federal jurisdiction. The average person is in an even worse predicament.

Conforming trapping cabin use on BLM lands to State planning, as determined in the KUAP, provides for the allowance of trapping cabins along waterways while still protecting area resources and maintaining management continuity for the public users of the area. Specifically, conformity with the KUAP would allow trappers to have cabins within the 100-year floodplain but not within 50 feet of the ordinary high-water mark of a lake, stream, or wetland and would allow for greater buffer distances in specific identified circumstances. It should be noted that ANILCA 1303 (b)(1) even allows for trapping cabins in CSUs as Congress recognized trapping was a traditional and customary use to be provided for in areas of high resource value.

As noted herein, DOI has issued directives instructing its agencies to collaborate with its State partners and to align their planning with State plans and regulations. Doing so results in a net benefit to local users allowing for the simultaneous protection of resources and the facilitation of ease of use. Such consistency also engages the intent of the 1983 MOU between BLM and the ADF&G which recognizes ADF&G as the primary agency responsible for policy development and management directly relating to uses of fish and wildlife resources on State and BLM managed lands. As noted above, there is a nexus between federal land management and state fish and game management which needs to be addressed cooperatively, holistically, and as consistently across jurisdictional boundaries as possible to benefit the users of public lands and resources. We therefore request BLM clarify in the ROD that trapping cabins are allowed within the 100-year floodplain areas of all streams and conform distance limits between cabins and waterways with those in the State KUAP.

Public Shelter Cabins

As we noted in our comments on the draft plan, a 3-consectutive day and 6-day per calendar year limit on cabin stays in a planning area as remote as this makes stays both uneconomical and impractical, particularly during hunting season. No response to the State's comments or justification is provided in the plan for the reduced stay limits.

The proposed plan states management of the Rohn Recreation Management Zone is for the primary purpose of hunting among other activities (see Appendix G: Goals and Objectives, Section 2.17.2 Objectives, #6). It also states that the shelter cabin and airstrip are frequently used as a base camp in late summer for sheep hunters (see Appendix P, Rohn Management Zone Objective Statement, p. 8). By limiting stays to a maximum of 3-consectutive days and 6-days per calendar year for non-permitted uses, BLM has effectively restricted the Rohn site from meeting the stated needs and objectives in the plan as well as impede feasible hunting trip lengths throughout the year. Comparatively, State GAUs provide camping limits of 10-day stay limits and the opportunity for longer stays available on a case-by-case basis. In addition, the Plan limits are inconsistent with various DOI regulations, Orders, and guidance put in place to increase recreational hunting opportunities and align itself with State plans and regulations. Again, without data to provide evidence of need for the restricted use, conformity with State planning in the vicinity maintains resource protections while implementing BLM's multiple use mandate and simplifies management regimes for users. We therefore request BLM conform management for the planning area with State GAUs for camping and increase public shelter cabin limits from three days to ten days.

6. **Sheefish Spawning Areas Warrant Protective Management on Discrete BLM Uplands**
    - Issue: Four discreet sheefish spawning areas in Kuskokwim drainage, with adjacent BLM uplands, do not have adequate protections to maintain the Sheefish as a priority fish species in the planning area.
    - Resolution: Ensure a buffer on BLM lands adjacent to documented spawning areas to protect sheefish spawning areas from surface disturbing activities.

The State's comments on the draft plan outlined support for the protection of 15.5 river miles of discreet sheefish spawning habitat; the four spawning areas represent the only spawning areas within the entire drainage. The BLM acknowledges in its response to comments in Appendix H that important sheefish spawning habitat exists in the planning area but indicates that the spawning habitat is all on State of Alaska lands. We recognize the plan provides some protections for the sheefish spawning locations via the HVW designation, however, we are concerned that the riparian buffer distances that apply to adjacent BLM uplands currently will be insufficient on the smaller waterbodies where the spawning areas are relatively low gradient. Based on existing sheefish data, ADF&G recommends 1,500-foot buffers on BLM uplands adjacent to the spawning areas to ensure adequate protection for sheefish spawning in State waters. The Plan's riparian buffer distances for the smaller order tributaries do not ensure that sufficient protections are in place for the Sheefish spawning areas. The solution to these issues is to actively work with the State as cooperative resource managers to holistically manage the public use areas and rely on all available data to inform joint management decisions.

Sheefish are highly specific in their choice of spawning habitat requiring an exact mix of water chemistry, hydrology and positioning within a drainage for distribution of rearing juveniles. The limited occurrence of spawning areas concentrated in only four small discrete areas within the entire Kuskokwim drainage for the population provides evidence that the spawning reaches and adjacent lands need to be protected on BLM lands, consistent with the protections applied on State lands and waters. As we expressed throughout the planning

process, the need for protection is scientifically supported and justified for limited discreet areas appropriately sized to the river corridors and the lands alongside those corridors necessary for special management to conserve the sheefish spawning habitat. We request BLM apply management to discreet areas specific to the sheefish spawning areas to ensure effective protection of the valuable habitat.

III. Revisions Needed to Reconcile Plan Inconsistencies

1. **FLPMA Right-of-Way (ROW) Avoidance Areas Blanket the Entire Planning Area**
    - Issues:
        - 100% of BLM lands in the planning area are designated a ROW Avoidance Area because of the uncalculated acreages brought in by the inclusion of the following areas: BLM sensitive plants, highly erodible soils, tundra mats, riparian and permafrost. This blanket designation sends a mixed message and provides conflicting management direction on multiple use lands that are open to development.
        - ROW avoidance areas on BLM lands may result in inadvertently pushing projects onto adjacent lands of higher ecological value.

    - Resolutions:
        - Limit ROW avoidance areas to mapped areas (map 2-1) and instead process ROW applications on a case-by-case basis under BLM's existing permitting authority, NEPA, and ANILCA.
        - Add ROW avoidance criterion that states the ecological value of adjacent lands will also be taken into consideration and that adjacent landowners will be consulted during permitting.

    The proposed plan designates 509,798 acres of ROW avoidance areas and 413,179 acres of ROW avoidance for linear realty actions (see Map 2-48). An additional uncalculated acreage that is not identified on the ROW map but is identified in the proposed plan as ROW avoidance areas include BLM sensitive plants, highly erodible soils, tundra mats, riparian areas, and permafrost areas (see Table 2-15 on page 2-75 and Appendix H, page 22). While the map indicates a significant reduction from the public review draft RMP, which recommended 4.9 million acres of ROW avoidance areas in High-Value Watersheds (HVW(s)) and an additional 1.4 million acres of ROW exclusion areas, the uncalculated and unmapped areas conceivably result in virtually all BLM-managed lands within the planning area being designated ROW avoidance areas.

    While the avoidance designation allows for ROWs under certain conditions (e.g., when applicant documents that there is no feasible alternative), the conflicting management direction in the plan will challenge both the public and adjudicators during plan implementation. Additionally, the message conveyed to prospective project proponents is that BLM multiple-use lands are managed more restrictively and will be more costly to develop. This will have a direct impact on state lands that are open to development but due to their proximity to and possible need for associated development on BLM lands, development will be discouraged or prove too costly. Western Alaska has limited infrastructure and the

availability of BLM multiple use lands within the planning area are crucial to meeting various communities' needs. There is also concern that when blanket restrictions like this are applied to all BLM lands, the ecological value of adjacent lands will not be taken into consideration, resulting in potentially greater resource impacts.

To resolve these inconsistencies and ensure opportunities for development on State lands are not negatively impacted by the perception that BLM multiple use lands are not available for resource development due to the blanket and pervasive ROW Avoidance Area designations on all BLM-managed lands in the planning area, we request only the mapped ROW Avoidance Area designations, as shown on Map 2-1, be designated in the final plan. In addition, to ensure projects are evaluated with a broader perspective and not simply forced onto adjacent lands on the basis that it is merely "feasible," we request the consideration of the ecological value of adjacent lands and a commitment to consult with adjacent landowners be added to the ROW Avoidance Area designation criteria.

2. **Management of High-Value Watersheds is Unclear**
    - Issues:
        - Insufficient scale of HVWs maps, vague caveats lacking clear management direction, and undefined activities make it difficult to evaluate where the restrictions apply and what they would apply to.
        - Lack of clarity, particularly regarding HVW applicability to tundra mat, riparian, and permafrost areas, will challenge adjudicators during plan implementation.

    - Resolution:
        - Improve maps and clarify internal Plan inconsistencies, e.g., undefined activities and caveats

    According to the plan, the planning area contains 4.9 million acres and 13,070 rivers miles of HVWs. HVWs are identified as "open" to ROWs even though, as noted under issue one above, ROW Avoidance Area designations additionally apply to all tundra mat, riparian, and permafrost areas. It is highly unlikely that these areas do not overlap each other, creating HVWs ROW Avoidance areas by default. Salable mineral development, No Surface Occupancy (NSO) leasable entry, and locatable mineral entry are also allowed within the 100-year floodplain with the caveat that locatable entry may be affected by restrictions that apply to other resources. The "other" resources that could restrict or preclude locatable entry are not identified; therefore, the State and the public are expected to sift through the plan and assortment of maps to determine where mining is encumbered by other restrictions. With an explicit exception for the mineral decisions that are allowed in the 100-year floodplain (except where other restrictions restrict or preclude locatable entry), the plan includes a prohibition on surface-disturbing activities and permanent structures within the 100-year floodplain but it does not specifically identify by example or otherwise, what surface-disturbing activities and permanent structures are banned from areas where salable mineral development, NOS leasable and locatable entry is (or could be) allowed. It is also unclear if the prohibition includes activities associated with allowed development.

We request BLM resolve these issues to ensure proper adjudication of proposals on BLM lands in accordance with the proposed plan's intent under Alternative E to "protect the long-term sustainability of resources *while providing for multiple resource uses*. Given the patchwork of land ownership both on BLM lands where state navigable waters and RS 2477 ROWs are located, and throughout the planning area, this will also ensure opportunities for resource development on state lands and waters are not negatively impacted.