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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ALASKA**
12

14 **Ninilchik Traditional Council,**
15 **Plaintiff,**
16 **vs.**
17 **Tim Towarak, *et al.*,**
18 **Defendants.**
19

3:15-cv-00205 JWS
ORDER AND OPINION
[Re: Motion at Docket 10]

20 **I. MOTION PRESENTED**

21 At docket 10 defendants Tim Towarak, Sally Jewell, and Tom Vilsack
22 (“Defendants”) move to dismiss the complaint of plaintiff Ninilchik Traditional Council
23 (“NTC”) pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). NTC opposes at
24 docket 21; Defendants reply at docket 32.

25 At docket 20 the court granted Defendants’ motion for judicial notice of the nine
26 exhibits they attached to their motion to dismiss (Exhibits A-I); at docket 37 the court
27 granted NTC’s motion for judicial notice of Exhibits 1-7 and 9 to NTC’s opposition but
28 declined to take judicial notice of Exhibit 8; and at docket 35 the court granted NTC
leave to file a surresponse, which NTC filed at docket 36.

1 Oral argument was heard on April 14, 2016.

2 **II. BACKGROUND**

3 In 1980 Congress passed Title VIII of the Alaska National Interest Lands
4 Conservation Act (“ANILCA”)¹ “to protect the subsistence way of life in the face of
5 Alaska’s growing population and the resultant pressure on fish and wildlife
6 populations.”² “Congress’ aim in passing ANILCA was to ensure a way of life ‘essential
7 to Native physical, economic, traditional, and cultural existence and to non-Native
8 physical, economic, traditional, and social existence.’”³ Among other things,
9 Section 804 of ANILCA provides that on public lands the taking of fish for “nonwasteful
10 subsistence uses shall be accorded priority” over the taking of fish for other purposes.⁴

11 To advance ANILCA’s directives, Congress authorized the Secretary of the
12 Interior and the Secretary of Agriculture to promulgate regulations.⁵ One of these
13 regulations established a Federal Subsistence Board (“Board”),⁶ which is charged with
14 administering “the federal subsistence program at the heart of Title VIII.”⁷ The Board’s
15 powers include the power to issue “regulations for the management of subsistence
16 taking and uses of fish and wildlife on public lands”⁸ and to take emergency action to
17 close public lands for the taking of fish or to modify the requirements for subsistence
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19 ¹16 U.S.C. §§ 3111–26.

20 ²*Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1091 (9th Cir. 2008) (citing 16 U.S.C.
21 § 3111(3)).

22 ³*Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1189 (9th Cir. 2000)
23 (quoting 16 U.S.C. § 3111(1)).

24 ⁴16 U.S.C. § 3114.

25 ⁵*Fed. Subsistence Bd.*, 544 F.3d at 1092 (citing 16 U.S.C. § 3124)).

26 ⁶50 C.F.R. § 100.10.

27 ⁷*Fed. Subsistence Bd.*, 544 F.3d at 1091.

28 ⁸50 C.F.R. § 100.10(d)(4)(I).

1 and/or non-subsistence take.⁹ In 2002 the Board delegated its authority over in-season
2 management of the federal subsistence fishery in the Kenai National Wildlife Refuge to
3 the U.S. Fish and Wildlife Service, Kenai Fishery Resources Office.¹⁰

4 The three defendants in this action are the Secretary of Interior, the Secretary of
5 Agriculture, and the Board's Chairman. The plaintiff is NTC, the governing body of
6 Ninilchik Village,¹¹ a federally-recognized Indian tribe¹² whose members have a
7 customary and traditional use of all fish in the Kasilof and Kenai River drainages.¹³
8 Although Ninilchik Village members share "in an annual subsistence allocation of
9 salmon from three federal fisheries on the Kenai River,"¹⁴ they allege that they have
10 "been unable to harvest this subsistence salmon allocation" due to "restrictive federal
11 subsistence regulations limiting methods and means of harvest, and restrictive and
12 arbitrary federal in-season subsistence management actions."¹⁵

13 In March 2014 NTC submitted two proposed regulations that would authorize
14 residents of Ninilchik to operate two community subsistence gillnets: one in the Kenai
15 River and the other in the Kasilof River.¹⁶ The Southcentral Regional Advisory Council,
16 which is a regional advisory council established under Section 805 of ANILCA to
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20 ⁹50 C.F.R. § 110.19(a).

21 ¹⁰Doc. 1 at 9 ¶ 25; Doc. 14-1 at 2-7.

22 ¹¹Doc. 1 at 2.

23 ¹²Indian Entities Recognized and Eligible To Receive Services From the United States
24 Bureau of Indian Affairs, 81 Fed. Reg. 5019-02 (Jan. 29, 2016).

25 ¹³Doc. 1 at 3 ¶ 10; Doc. 21 at 4.

26 ¹⁴Doc. 21 at 4. See 50 C.F.R. § 100.27(e)(10)(iv)(D)(3).

27 ¹⁵Doc. 1 at 4 ¶ 11.

28 ¹⁶*Id.* at 6 ¶ 18. NTC's Kenai River gillnet proposal is at Doc. 10-1.

1 provide opinions and recommendations to the Board on subsistence matters,¹⁷
2 considered NTC's two gillnet fishery proposals and recommended that the Board adopt
3 both.¹⁸ The Board voted to adopt NTC's proposals¹⁹ and, after a five-month notice and
4 comment period, promulgated final regulations authorizing the two gillnet fisheries.²⁰

5 Under these regulations a Kasilof River gillnet would be allowed between July 1
6 and 31 and a Kenai River gillnet would be allowed between June 15 and August 15 for
7 the harvest of Sockeye, Chinook, Coho, and Pink salmon, unless fishing is closed by
8 "Federal Special Action."²¹ One permit for each net would be awarded by the federal in-
9 season fishery manager based on the submission of a written operational plan.²²
10 During all relevant times, that in-season fishery manager was Jeffry Anderson
11 ("Anderson").²³

12 On May 27, 2015, NTC submitted to Anderson an operational plan for the Kenai
13 and Kasilof gillnet fisheries.²⁴ Before deciding either submission, Anderson issued an
14 emergency special action closing the federal subsistence fishery from June 18 until
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16 ¹⁷16 U.S.C. § 3115. "The Secretary may choose not to follow any recommendation [of a
17 regional advisory council] which he determines is not supported by substantial evidence,
18 violates recognized principles of fish and wildlife conservation, or would be detrimental to the
satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he
shall set forth the factual basis and the reasons for his decision." *Id.* § 3115(c).

19 ¹⁸Doc. 1 at 6-8 ¶¶ 19, 21.

20 ¹⁹*Id.* at 8-9 ¶ 23.

21 ²⁰*Id.* at 9 ¶ 24. See Subsistence Management Regulations for Public Lands in
22 Alaska—2015-16 and 2016-17 Subsistence Taking of Fish Regulations, 80 Fed. Reg. 28187-01
23 (May 18, 2015) (The regulations regarding the Kasilof River fishery are codified at 36 C.F.R. §
24 242.27(e)(10)(iv)(I); 50 C.F.R. § 100.27(e)(10)(iv)(I). The regulations regarding the Kenai River
fishery are codified at 36 C.F.R. § 242.27(e)(10)(iv)(J); 50 C.F.R. § 100.27(e)(10)(iv)(J)).

25 ²¹80 Fed. Reg. at 28192-93.

26 ²²*Id.*

27 ²³Doc. 1 at 9 ¶ 25.

28 ²⁴*Id.* ¶ 26.

1 August 15 for early-run Chinook salmon in all federal public waters in the Kenai River
2 downstream of Skilak Lake.²⁵

3 On July 13, “less than a month before the closure of the 2015 federal
4 subsistence fishing season,” Anderson approved NTC’s operational plan for the Kasilof
5 River gillnet and issued a permit to NTC.²⁶ But Anderson still did not act on NTC’s
6 request for a Kenai River gillnet permit.²⁷ In a July 16 letter Anderson explained that he
7 did not anticipate approving a Kenai River permit for the 2015 fishing season “because
8 of the urgent need to protect early-run Chinook [s]almon.”²⁸

9 In late July NTC wrote two letters to the Board seeking relief from Anderson’s
10 emergency closure and failure to issue the Kenai permit.²⁹ Specifically, NTC asked the
11 Board to (1) overturn Anderson’s emergency closure;³⁰ (2) negate his refusal to
12 authorize an operational plan for a Kenai gillnet fishery for the 2015 fishing season;³¹
13 (3) rescind his authority over Cook Inlet Area subsistence fishing;³² and (4) remove
14 language in the Kenai River regulation that empowers Anderson to block the issuance
15 of a gillnet permit.³³ The Board convened on July 28 and considered NTC’s requests.³⁴

18 ²⁵*Id.* at 10 ¶ 27. The Special Action notice is at Doc. 10-4.

19 ²⁶*Id.* at 11 ¶ 31.

20 ²⁷*Id.* at 12 ¶ 34.

21 ²⁸Doc. 21-4 at 5.

22 ²⁹Doc. 1 at 12 ¶ 36. These two letters are at Doc. 21-4 at 1-29, Doc. 21-5 at 1-5.

23 ³⁰Doc. 21-4 at 3.

24 ³¹*Id.*; Doc. 21-5 at 3.

25 ³²Doc. 21-5 at 3-4.

26 ³³*Id.*

27 ³⁴Doc. 1 at 13 ¶ 37.

1 After hearing testimony from Anderson in support of his actions³⁵ and from NTC in
2 opposition,³⁶ the Board voted not to grant NTC any of the relief it had requested.³⁷

3 NTC's two-count complaint, filed in October 2015, alleges that Defendants'
4 actions violate Section 804 of ANILCA and the Administrative Procedure Act ("APA")³⁸
5 in relation to three events: (1) the Board's 2002 delegation of authority to the in-season
6 manager; (2) Anderson's 2015 subsistence fishery closure; and (3) Defendants'
7 implementation of the Kenai river gillnet fishery regulation.

8 **A. NTC's Seven ANILCA Claims**

9 With regard to the 2002 delegation, NTC alleges that Defendants violated
10 ANILCA by delegating in-season management authority without any substantive
11 standards (claim one)³⁹ and then "failed to exercise any independent oversight" over the
12 in-season manager's actions (claim two).⁴⁰

13 With regard to the 2015 closure, NTC alleges that Defendants violated ANILCA
14 by allowing Anderson to close the subsistence fishery and keep it closed for the entire
15 fishing season (claim three).⁴¹

16 With regard to the Kenai gillnet fishery, NTC alleges that Defendants violated
17 ANILCA when the Board delegated authority to Anderson to "develop an operational
18 plan" for the Kenai gillnet fishery without "any standards or oversight" (claim four),⁴²

20 ³⁵Doc. 10-3 at 11-15.

21 ³⁶*Id.* at 16-28.

22 ³⁷Doc. 1 at 14 ¶ 41. *See also* doc. 10-3 at 29-33.

23 ³⁸5 U.S.C. § 706.

24 ³⁹Doc. 1 at 15 ¶ 47.

25 ⁴⁰*Id.*

26 ⁴¹*Id.* at 16 ¶ 48.

27 ⁴²*Id.* ¶ 49.

1 when Anderson failed to decide NTC's gillnet permit application (claim five),⁴³ and when
2 the Board then refused to revoke Anderson's authority over the Kenai gillnet fishery
3 (claim six).⁴⁴

4 Finally, NTC alleges generally that the Board violated ANILCA by failing to "take
5 corrective action" to prevent Anderson's "continued arbitrary and capricious action[s]"
6 and to "ensure implementation" of the Kenai gillnet fishery (claim seven).⁴⁵

7 **B. NTC's Four APA Claims**

8 NTC's APA claims allege that: (1) "Defendants' actions and failure to act
9 regarding [Anderson's 2015] closure of the Kenai River federal subsistence fishery" was
10 "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with 5
11 U.S.C. § 706(2)(A);"⁴⁶ (2) Anderson's "failure to develop an operation plan and issue a
12 permit for" the Kenai gillnet was "arbitrary, capricious, an abuse of discretion, and
13 otherwise not in accordance with 5 U.S.C. § 706(2)(A);"⁴⁷ (3) the Board "illegally and
14 arbitrarily ignored its own record and acted in such a way as to prevent implantation of
15 its own regulation;"⁴⁸ and (4) the Board failed to "prescribe standards and a process for
16 the in-season fishery management actions that are consistent with the requirements of
17 the APA."⁴⁹

21 ⁴³*Id.*

22 ⁴⁴*Id.* at 17 ¶ 50.

23 ⁴⁵*Id.* ¶ 51.

24 ⁴⁶*Id.* at 17-18 ¶ 53.

25 ⁴⁷*Id.*

26 ⁴⁸*Id.* at 18 ¶ 54.

27 ⁴⁹*Id.* ¶ 55.

III. STANDARDS OF REVIEW

A. Rule 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a party may seek dismissal of an action for lack of subject matter jurisdiction. In order to survive a defendant's motion to dismiss, the plaintiff has the burden of proving jurisdiction.⁵⁰

"Rule 12(b)(1) jurisdictional attacks can be either facial or factual."⁵¹ Where the defendant brings a facial attack on the subject matter of the district court, the court assumes the factual allegations in the plaintiff's complaint are true and draws all reasonable inferences in the plaintiff's favor.⁵² The court does not, however, accept the truth of legal conclusions cast in the form of factual allegations.⁵³

"With a factual Rule 12(b)(1) attack, however, a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiffs' allegations."⁵⁴

B. Rule 12(b)(6)

Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such a motion, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."⁵⁵ To be assumed true, the allegations, "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the

⁵⁰*Tosco v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2000).

⁵¹*White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

⁵²*Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

⁵³*Id.*

⁵⁴*White*, 227 F.3d at 1242 (9th Cir. 2000) (citations omitted).

⁵⁵*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

1 opposing party to defend itself effectively.”⁵⁶ Dismissal for failure to state a claim can
2 be based on either “the lack of a cognizable legal theory or the absence of sufficient
3 facts alleged under a cognizable legal theory.”⁵⁷ “Conclusory allegations of law . . . are
4 insufficient to defeat a motion to dismiss.”⁵⁸

5 To avoid dismissal, a plaintiff must plead facts sufficient to “‘state a claim to relief
6 that is plausible on its face.’”⁵⁹ “A claim has facial plausibility when the plaintiff pleads
7 factual content that allows the court to draw the reasonable inference that the
8 defendant is liable for the misconduct alleged.”⁶⁰ “The plausibility standard is not akin
9 to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
10 defendant has acted unlawfully.”⁶¹ “Where a complaint pleads facts that are ‘merely
11 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
12 plausibility of entitlement to relief.’”⁶² “In sum, for a complaint to survive a motion to
13 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that
14 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”⁶³

15 Ordinarily, if matters outside the pleadings are “presented to and not excluded by
16 the court,” a Rule 12(b)(6) motion “must be treated as one for summary judgment under
17 Rule 56” and the parties “must be given a reasonable opportunity to present all the
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19 ⁵⁶*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

20 ⁵⁷*Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

21 ⁵⁸*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

22 ⁵⁹*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*,
23 550 U.S. 544, 570 (2007)).

24 ⁶⁰*Id.*

25 ⁶¹*Id.* (citing *Twombly*, 550 U.S. at 556).

26 ⁶²*Id.* (quoting *Twombly*, 550 U.S. at 557).

27 ⁶³*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Starr*, 652 F.3d
28 at 1216.

1 material that is pertinent to the motion.”⁶⁴ There are two exceptions to this rule,
2 however. “First, a court may consider material which is properly submitted as part of
3 the complaint on a motion to dismiss without converting the motion to dismiss into a
4 motion for summary judgment.”⁶⁵ Second, “a court may take judicial notice of ‘matters
5 of public record.’”⁶⁶

6 **IV. DISCUSSION**

7 **A. Defendants’ Jurisdictional Attacks**

8 NTC’s complaint alleges that this court has subject matter jurisdiction over its
9 ANILCA claims under 28 U.S.C. § 1331,⁶⁷ 28 U.S.C. § 1362,⁶⁸ and Section 807 of
10 ANILCA,⁶⁹ which states in pertinent part that an organization aggrieved by a failure of
11 the federal government “to provide for the priority for subsistence uses” set out in
12 Section 804 “may, upon exhaustion of any State or Federal (as appropriate)
13 administrative remedies which may be available, file a civil action in the United States
14 District Court for the District of Alaska to require such actions to be taken as are
15 necessary to provide for the priority.”⁷⁰ NTC alleges that this court has subject matter
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19 ⁶⁴Fed. R. Civ. P. 12(d).

20 ⁶⁵*Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotation
21 omitted).

22 ⁶⁶*Id.* at 688-89 (quoting Fed. R. Evid. 201).

23 ⁶⁷“The district courts shall have original jurisdiction of all civil actions arising under the
24 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

25 ⁶⁸“The district courts shall have original jurisdiction of all civil actions, brought by any
26 Indian tribe or band with a governing body duly recognized by the Secretary of the Interior,
wherein the matter in controversy arises under the Constitution, laws, or treaties of the United
States.” 28 U.S.C. § 1362.

27 ⁶⁹Doc. 1 at 2 ¶ 2.

28 ⁷⁰16 U.S.C. § 3117.

jurisdiction over its APA claims under 28 U.S.C. § 1331, 28 U.S.C. § 1362, and 5 U.S.C. § 706.⁷¹

Defendants assert that this court lacks jurisdiction over: (1) all of NTC's claims that relate to the Kenai gillnet fishery⁷² because they are not ripe until all third parties exhaust their administrative challenges to the regulation that authorizes that fishery; (2) NTC's challenges to the Board's 2002 delegation of authority to the U.S. Fish and Wildlife Service because that was not a final agency action; (3) NTC's challenges to the Board's 2002 delegation of authority because those challenges are untimely; (4) NTC's challenges to the Board's decision not to rescind Anderson's authority because that decision is committed to the Board's discretion by law; (5) NTC's challenge to the emergency closure order because NTC lacks standing; and (6) NTC's various challenges that seek orders compelling the Board to act in ways that it is not legally required to act.

1. NTC's gillnet-fishery-related claims are ripe

Ripeness is "peculiarly a question of timing,"⁷³ designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract

⁷¹Doc. 1 at 2 ¶ 2. 5 U.S.C. § 706 pertains to the scope of judicial review of agency actions under the APA; it does not give the federal courts jurisdiction. See *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986) ("The Administrative Procedure Act does *not* provide an independent basis of jurisdiction to review agency actions.") (emphasis in original) (citing *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). See also *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) ("[T]he APA prescribes standards for judicial review of an agency action, once jurisdiction is otherwise established.").

⁷²Defendants specifically identify NTC's ANILCA claims (or portions of them) at paragraphs 46-51 of their complaint and its APA claims at paragraphs 52 through 53. Doc. 10 at 14.

⁷³*Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974).

disagreements.”⁷⁴ “Because ripeness goes to the exercise of subject matter jurisdiction, a ripeness challenge is properly raised under Rule 12(b)(1).”⁷⁵

“Ripeness has both constitutional and prudential components.”⁷⁶ “The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with” the “injury in fact” analysis for Article III standing.⁷⁷ “Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are ‘definite and concrete, not hypothetical or abstract.’”⁷⁸ Defendants do not overtly argue that the constitutional ripeness test is not met here.⁷⁹ Instead, they focus their arguments on ripeness’ prudential component.

Analysis of ripeness’ prudential component “is guided by two overarching considerations: ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’”⁸⁰ “A claim is fit for decision if the issues

⁷⁴*Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

⁷⁵*Auerbach v. Board of Educ. of the Harborfields Cent. School Dist. of Greenlawn*, 136 F.3d 104, 108-109 (2d Cir. 1998).

⁷⁶*Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir.1993).

⁷⁷*Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). For purposes of Article III standing an “injury in fact” is “an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted).

⁷⁸*Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting *Thomas*, 220 F.3d at 1139)).

⁷⁹Doc. 10 at 15-17.

⁸⁰*Thomas*, 220 F.3d at 1141 (quoting *Abbott Laboratories*, 387 U.S. at 149).

1 raised are primarily legal, do not require further factual development, and the
2 challenged action is final.”⁸¹

3 In accordance with 50 C.F.R. § 100.18(a)(5),⁸² the Board issued the Kenai gillnet
4 regulation as a “final rule.”⁸³ Defendants nonetheless argue that the regulation is not
5 final because “multiple parties have filed requests for reconsideration, and that
6 reconsideration process is still underway.”⁸⁴ They argue that the regulation’s lack of
7 finality also renders speculative any hardship that NTC would face if the court withholds
8 consideration of their claims.⁸⁵ According to Defendants, no party may obtain judicial
9 review of a Board regulation so long as some other party has sought administrative
10 reconsideration of that regulation.

11 Defendants rely primarily on *I.C.C. v. Bhd. of Locomotive Engineers*,⁸⁶ *Acura of*
12 *Bellevue v. Reich*,⁸⁷ and *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt*,⁸⁸
13 cases that hold that a party renders an administrative decision nonfinal for purposes of
14 judicial review by seeking administrative relief from that decision. These cases are not
15 on all fours, however, because none addresses the question presented by Defendants:

17 ⁸¹*Winter v. California Medical Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir.1989) (internal
18 quotation marks and citation omitted).

19 ⁸²“Following consideration of the proposals the Board shall publish final regulations
20 pertaining to subparts C and D of this part in the Federal Register.” 50 C.F.R. § 100.18(a)(5).

21 ⁸³Doc. 21-2 at 1 (“ACTION: Final rule.”).

22 ⁸⁴Doc. 10 at 15.

23 ⁸⁵*Id.* at 15-16.

24 ⁸⁶482 U.S. 270, 284 (1987) (holding that labor organization’s “timely petition for
25 administrative reconsideration stayed the running of the Hobbs Act’s limitation period until the
petition had been acted upon by the Commission.”).

26 ⁸⁷90 F.3d 1403, 1408 (9th Cir. 1996) (“The Administrator’s decision was an interim
27 determination that the dealers’ employment of minor lot attendants violated child labor laws.
The dealers’ exceptions will be heard by an ALJ, who has de novo review.”).

28 ⁸⁸606 F.3d 1058, 1064 (9th Cir. 2010) (same).

1 whether one party's administrative appeal of an agency's action renders that action
2 nonfinal as to all third parties.

3 In *Public Citizen v. Mineta*,⁸⁹ the Ninth Circuit answered that question in the
4 negative. The plaintiffs there challenged a final rule of the National Highway Traffic
5 Safety Administration ("NHTSA"). The relevant statute required such challenges to be
6 brought within 59 days⁹⁰ and, as in *Locomotive Engineers*, the court held that the
7 statute of limitations was tolled for the parties who petitioned for reconsideration. The
8 NHTSA argued that under its regulation, 49 C.F.R. § 553.39, tolling did not apply to
9 parties who did not petition for reconsideration. Those non-petitioning parties
10 challenged NHTSA's regulation, arguing that its drafter misinterpreted the case law.⁹¹

11 The Ninth Circuit affirmed NHTSA's interpretation of the case law, holding that
12 "finality with respect to agency action is a party-based concept."⁹² "Although a petition
13 for reconsideration renders an agency order non-final as to the party seeking
14 reconsideration, it does not affect the right to seek judicial review by those persons who
15 did not try to obtain reconsideration"⁹³ The Ninth Circuit's holding in *Mineta* is in
16 line with case law from other circuits, including the D.C. Circuit,⁹⁴ the Eighth Circuit,⁹⁵

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19 ⁸⁹343 F.3d 1159 (9th Cir. 2003).

20 ⁹⁰49 U.S.C. § 30161.

21 ⁹¹343 F.3d at 1168 (the non-petitioners argued that NHTSA "mistakenly interpreted the
22 case law that guided its understanding in drafting section 553.39").

23 ⁹²*Pub. Citizen Inc. v. Mineta*, 343 F.3d 1159, 1170 (9th Cir. 2003) (quoting *Bellsouth
Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994)).

24 ⁹³*Mineta*, 343 F.3d at 1170.

25 ⁹⁴*See, e.g., Bellsouth*, 17 F.3d at 1489-90.

26 ⁹⁵*Winter v. I.C.C.*, 851 F.2d 1056, 1062 (8th Cir. 1988) ("Winter correctly notes that in
27 multi-party proceedings one party may seek judicial review of an agency decision while another
28 party seeks administrative reconsideration, resulting in both tribunals having jurisdiction. An
agency decision may thus be final for one purpose yet nonfinal for another purpose.").

1 and the Third Circuit.⁹⁶ In *West Penn*, the Third Circuit explained that interpreting
2 finality as a party-based concept “serves the interests of fairness by allowing parties
3 seeking judicial review to get it, rather than making them dependent on the whims of
4 other parties.”⁹⁷

5 Defendants argue that the Board’s regulation is different from the regulation at
6 issue in *Mineta* because it states that the agency’s decision is final only “if the request
7 for reconsideration is denied,”⁹⁸ which Defendants interpret to mean all requests for
8 reconsideration, even those filed by third parties. It contends that this interpretation “is
9 entitled to strong deference and may not be overturned unless plainly erroneous or
10 inconsistent with the language of the regulation.”⁹⁹

11 Defendants’ interpretation of 50 C.F.R. § 100.20(g) fails even under this highly
12 deferential standard because it is inconsistent with the language of that regulation. 50
13 C.F.R. § 100.20(g) does not state that a Board action is not final until all third-party
14 requests for reconsideration are resolved; it states that if a party requests
15 reconsideration and the Board denies that request, the Board’s denial “represents the
16 final administrative action”¹⁰⁰ on that specific request.

17 **2. The Board’s delegation of in-season management authority to the**
18 **U.S. Fish and Wildlife Service was a final agency action**

19 Defendants cite language from several sections of NTC’s complaint and assert
20 that NTC “seems to challenge” the Board’s delegation of authority to the in-season
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23 ⁹⁶*W. Penn Power Co. v. U.S. E.P.A.*, 860 F.2d 581, 586 (3d Cir. 1988) (“[F]inality with
24 respect to agency action is a party-based concept.”).

25 ⁹⁷*Id.*

26 ⁹⁸Doc. 32 at 9 (citing 50 C.F.R. § 100.20(g)) (emphasis in original).

27 ⁹⁹*Id.* at 10 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

28 ¹⁰⁰50 C.F.R. § 100.20(g).

1 manager to issue emergency closure orders¹⁰¹ or to approve an operational plan for the
2 Kenai gillnet fishery.¹⁰² Defendants argue that this court lacks subject matter jurisdiction
3 over such challenges because these delegations were not final agency actions, and
4 therefore they are unreviewable under § 704 of the APA.¹⁰³

5 NTC disputes Defendants' description of its complaint,¹⁰⁴ stating that it is not
6 challenging the Board's general ability to delegate its authority, but rather the Board's
7 specific failure to rescind Anderson's authority over "the 2015 Kenai gillnet operation
8 plan" and "the subsistence fishery in 2015."¹⁰⁵ In addition, NTC states that its complaint
9 challenges the Board's "implementation of its delegation of authority through the 2002
10 letter."¹⁰⁶ In reply, Defendants do not contend that the first two agency actions that NTC
11 identifies—the Board's decisions not to rescind Anderson's authority over the Kenai
12 gillnet permit or over emergency in-season closures—are not final agency actions. But
13 Defendants maintain that the Board's 2002 delegation of authority to the U.S. Fish and
14 Wildlife Service was not a final agency action.¹⁰⁷

15 Under the APA, 5 U.S.C. § 704, "agency action is subject to judicial review only
16 when it is either: (1) made reviewable by statute; or (2) a 'final' action 'for which there is
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19 ¹⁰¹Doc. 10 at 17 (citing Doc. 1 at 9 ¶¶ 25; 16 ¶¶ 48).

20 ¹⁰²*Id.* (Defendants cite no part of NTC's complaint in support of this assertion).

21 ¹⁰³*Id.* at 18 (citing the APA, 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177 (1997)
22 (discussing when an agency action is final for purposes of the APA)). Because the APA is not
23 jurisdictional, the court considers this challenge to fall under Rule 12(b)(6), not Rule 12(b)(1).
See *Califano v. Sanders*, 430 U.S. 99, 107 (1977).

24 ¹⁰⁴Doc. 21 at 14-15.

25 ¹⁰⁵*Id.* at 15 (emphasis added) (citing NTC's ANILCA cause of action, Doc. 1 at 16-17
26 ¶¶ 48, 50-51).

27 ¹⁰⁶Doc. 21 at 15 (citing Doc. 1 at 14, 15-16 ¶¶ 42, 47-48).

28 ¹⁰⁷Doc. 32 at 17.

1 no other adequate remedy in a court.”¹⁰⁸ NTC does not contend that ANILCA or any
2 other statute makes reviewable the Board’s decision to delegate its authority to the in-
3 season manager. Instead, it argues that this delegation was a final agency action
4 under § 704 of the APA.¹⁰⁹

5 To determine when an agency action is final, courts look to whether (1) the
6 action marks “the consummation of the agency’s decisionmaking process—it must not
7 be of a merely tentative or interlocutory nature” and (2) it is an action “by which rights or
8 obligations have been determined, or from which legal consequences will flow.”¹¹⁰

9 Defendants argue that neither prong of this test is satisfied here because delegations of
10 authority to individuals do not mark the consummation of an agency’s decisionmaking
11 process, nor do they “have any legal consequences for parties outside the agency.”¹¹¹

12 Defendants’ argument lacks merit. The 2002 delegation of authority meets both
13 prongs of the *Bennett* test. First, the delegation was not tentative or interlocutory in
14 nature. It conclusively and immediately provides the U.S. Fish and Wildlife Service with
15 delegated authority to issue special actions affecting federal fisheries.¹¹² Second, legal
16 consequences flow from the 2002 delegation letter—namely, the delegatee obtained
17 the legal right to issue special actions. Defendants’ argument that this delegation was
18 not final because it did not affect NTC’s rights confuses finality with the separate
19 question whether NTC’s harm is fairly traceable to that action.¹¹³

22 ¹⁰⁸*Cabaccang v. U.S. Citizenship & Immigration Servs.*, 627 F.3d 1313, 1315 (9th Cir.
23 2010) (quoting 5 U.S.C. § 704).

24 ¹⁰⁹Doc. 21 at 16.

25 ¹¹⁰*Bennett*, 520 U.S. at 177–78 (internal quotation marks and citation omitted).

26 ¹¹¹Doc. 10 at 18-20; Doc. 32 at 17.

27 ¹¹²Doc. 14-1 at 3.

28 ¹¹³*See Bennett*, 520 U.S. at 177.

1 **3. The court cannot yet decide whether NTC's challenges to the**
2 **Board's 2002 delegation of authority are timely**

3 NTC's complaint alleges that the Board violated ANILCA in 2002 when it
4 delegated in-season fishery management authority to the U.S. Fish and Wildlife Service
5 without "any substantive standards to ensure that in-season management actions were
6 consistent with providing for subsistence uses and were supported by recognized
7 principles of fish management and facts."¹¹⁴ It also alleges that this standardless
8 delegation violates the APA.¹¹⁵ Defendants argue that this court lacks jurisdiction over
9 these claims because they are untimely under 28 U.S.C. § 2401(a).¹¹⁶ NTC correctly
10 notes that the Ninth Circuit has held that "§ 2401(a)'s six-year statute of limitations is
11 not jurisdictional."¹¹⁷ Thus, the court will consider Defendants' argument in the context
12 of Rule 12(b)(6).

13 NTC argues that its challenges to the 2002 delegation are timely under the
14 discovery rule, which provides that an action accrues "when the plaintiff discovers, or in
15 the exercise of reasonable diligence should have discovered, the injury and its
16 cause."¹¹⁸ It asserts that it did not discover the injury it suffered in 2002 until "June or
17 July of 2015," when the in-season manager acted without the guidance of substantive
18 standards in closing the subsistence fishery.¹¹⁹ Defendants respond by arguing that the
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21 ¹¹⁴Doc. 1 at 15 ¶ 47. See also Doc. 21 at 15 (citing Doc. 1 at 14 ¶ 42; *id.* at 15-16 ¶¶ 47-
22 48).

23 ¹¹⁵Doc. 1 at 18 ¶ 55.

24 ¹¹⁶Doc. 10 at 20.

25 ¹¹⁷*Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997).

26 ¹¹⁸*Bartleson v. United States*, 96 F.3d 1270, 1277 (9th Cir. 1996) (quoting *Landreth v.*
27 *United States*, 850 F.2d 532, 533 (9th Cir.1988)).

28 ¹¹⁹Doc. 1 at 16 ¶ 48.

1 discovery rule is of no avail to NTC because it does not allege that it was injured by the
2 2002 delegation, but rather by actions taken pursuant to that delegation.¹²⁰

3 The Ninth Circuit's decision in *Wind River Mining Corp. v. United States*,¹²¹
4 controls the court's analysis. The plaintiff there filed a complaint in 1989 challenging a
5 decision of the United States Bureau of Land Management ("BLM") ten years earlier
6 that classified certain lands as "Wilderness Study Areas."¹²² The Ninth Circuit ruled that
7 the challenge was not time barred under § 2401(a)'s six-year statute of limitations,
8 holding that "a substantive challenge to an agency decision alleging lack of agency
9 authority may be brought within six years of the agency's application of that decision to
10 the specific challenger."¹²³ "The government should not be permitted to avoid all
11 challenges to its actions, even if ultra vires, simply because the agency took the action
12 long before anyone discovered the true state of affairs."¹²⁴

13 NTC's complaint alleges injuries caused in part by the Board's lack of authority to
14 delegate its authority in 2002 without substantive standards.¹²⁵ At this juncture, the
15 court cannot determine when the statute of limitations began to run on this claim
16 because the record does not reveal the first time that this allegedly ultra vires delegated
17 authority was applied to NTC.¹²⁶ The court reserves this issue for a later stage of the
18 proceedings after the parties have had the opportunity to conduct discovery.

19
20 ¹²⁰Doc. 32 at 18.

21 ¹²¹946 F.2d 710 (9th Cir.1991).

22 ¹²²*Id.* at 711.

23 ¹²³*Id.* at 716.

24 ¹²⁴*Id.* at 715.

25 ¹²⁵See, e.g., Doc. 1 at 16 ¶¶ 47-48.

26 ¹²⁶See *N. Cty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009) ("The
27 Alliance could have had no idea in 1993 that the NIGC's approval of the Nooksacks' Ordinance
28 would affect them in 2006 by leading to construction of a casino thirty-three miles from the
Nooksack reservation.").

1 **4. Even though the Board’s refusal to rescind Anderson’s authority is**
2 **committed to agency discretion by law, the court has jurisdiction to**
3 **review NTC’s ANILCA claim**

4 The APA, “which generally provides the standards of review for agency action,
5 also withdraws jurisdiction to review agency decisions that are ‘committed to agency
6 discretion by law.’”¹²⁷ Defendants argue that the court lacks jurisdiction over NTC’s
7 challenges to the Board’s refusal to rescind Anderson’s authority because that decision
8 is committed to the Board’s discretion by law.¹²⁸ According to Defendants, “[n]either the
9 APA nor ANILCA provides guidance or restrictions on the Board’s ability to delegate its
10 authority.”¹²⁹

11 Defendants rely heavily on *Drakes Bay Oyster Co. v. Jewell*.¹³⁰ In *Drakes Bay*,
12 the plaintiff requested an extension of a permit pursuant to a Congressional enactment,
13 “Section 124,” that provided in relevant part that ““notwithstanding any other provision of
14 law, the Secretary of the Interior is authorized to issue a special use permit with the
15 same terms and conditions as the existing authorization.””¹³¹ The plaintiff challenged
16 the denial of its requested permit, arguing that the Secretary violated various federal
17 laws, including Section 124 and the National Environmental Policy Act (“NEPA”). The
18 Ninth Circuit held that it lacked jurisdiction to hear the plaintiff’s Section 124 challenge
19 because that law did not provide any restrictions on the Secretary’s discretion to act.¹³²

20 ¹²⁷*Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (quoting
21 5 U.S.C. § 701(a)(2)).

22 ¹²⁸Doc. 10 at 20-22; Doc. 32 at 15-17.

23 ¹²⁹Doc. 10 at 21.

24 ¹³⁰747 F.3d 1073 (9th Cir. 2013).

25 ¹³¹*Id.* at 1077-78 (citing Department of the Interior Appropriations Act, Pub.L. No.
26 111–88, § 124, 123 Stat. 2904, 2932 (2009) (“Section 124”)).

27 ¹³²*Id.* at 1085 (“Had Congress wanted to express a view on whether the Secretary
28 should consider the Department’s policies on wilderness or other criteria, it would have said so.
It did not, but rather gave the Secretary the discretion to decide.”).

1 The court did not hold, however, that it lacked jurisdiction to consider whether the
2 Secretary's action ran afoul of other laws, such as NEPA. To the contrary, the Ninth
3 Circuit held that "even where the substance or result of a decision is committed fully to
4 an agency's discretion, 'a federal court has jurisdiction to review agency action for
5 abuse of discretion when the alleged abuse of discretion involves violation by the
6 agency of constitutional, statutory, regulatory or other legal mandates or restrictions.'"¹³³
7 Under such circumstances, the only challenge over which courts lack jurisdiction is one
8 that seeks review of "an alleged abuse of discretion regarding the making of an
9 informed judgment by the agency."¹³⁴

10 "When a court is asked to review agency action in instances where considerable
11 discretion is committed by statute to an official, the court lacks jurisdiction due to the
12 provisions of § 701(a)(2) only when the agency action of which plaintiff complains fails
13 to raise a legal issue which can be reviewed by the court by reference to statutory
14 standards and legislative intent."¹³⁵ NTC is correct that Section 804's subsistence
15 priority is a statutory standard under which the court can review NTC's claim that the
16 Board abused its discretion in denying NTC's request to revoke Anderson's authority.
17 5 U.S.C. § 701(a)(2) does not deprive the court of jurisdiction to consider that claim.

18 **5. NTC lacks standing to challenge the 2015 closure order**

19 Defendants next argue that NTC lacks standing to challenge the emergency
20 closure order because that order expired before this action was filed.¹³⁶ The "irreducible
21 constitutional minimum of standing:" contains the following three elements: (1) the
22 plaintiff must have suffered an "injury in fact;" (2) "there must be a causal connection
23

24 ¹³³*Id.* at 1082 (quoting *Ness Inv. Corp. v. U.S. Dep't of Agr., Forest Serv.*, 512 F.2d 706,
25 715 (9th Cir.1975)).

26 ¹³⁴*Id.* (citation and internal quotation marks omitted).

27 ¹³⁵*Strickland v. Morton*, 519 F.2d 467, 470 (9th Cir. 1975).

28 ¹³⁶Doc. 32 at 13.

1 between the injury and the conduct complained of;” and (3) “it must be likely, as
2 opposed to merely speculative, that the injury will be redressed by a favorable
3 decision.”¹³⁷ Defendants’ argument focuses on the first element, stating that “at the
4 time this action was commenced, [NTC] suffered no injury as a result of” the closure
5 order.¹³⁸

6 NTC responds by asserting that its complaint alleges the following injuries that
7 flow from the emergency order: its members were prevented “from realizing an
8 important subsistence opportunity,” they were prevented from harvesting enough
9 salmon to meet their subsistence needs, and their subsistence way of life was
10 compromised.¹³⁹ NTC argues that the harm to its members’ subsistence way of life
11 caused by the lost fishing opportunity is an ongoing injury.¹⁴⁰

12 Assuming without deciding that NTC and its members are suffering an ongoing
13 injury caused by the 2015 closure order, the court is not convinced that the third
14 element of standing is present here: that NTC’s injury will likely be redressed by a
15 favorable decision. NTC is seeking a declaratory judgment stating that the Board’s
16 failure to overturn Anderson’s emergency closure in 2015 violated ANILCA and the
17 APA.¹⁴¹ Even if NTC obtains this remedy it would not turn back the clock to allow NTC’s
18 members to harvest sufficient salmon to meet their subsistence needs for the 2015
19 fishing season.

23
24 ¹³⁷*Lujan*, 504 U.S. at 560-61 (citations and internal quotation marks omitted).

25 ¹³⁸Doc. 32 at 13.

26 ¹³⁹Doc. 36 at 2.

27 ¹⁴⁰*Id.*

28 ¹⁴¹Doc. 1 at 18 ¶ 2; 19 ¶ 7.

1 NTC argues that its requested declaratory relief “will prevent the same unlawful
2 conduct in 2016,”¹⁴² but the court is not so sure. Emergency closure orders are issued
3 for any number of particularized reasons, based on a finding that closing the fishery is
4 “necessary to ensure the continued viability of a fish or wildlife population” or to
5 “continue subsistence uses of fish or wildlife, or for public safety reasons.”¹⁴³ NTC does
6 not allege facts that indicate the Board will likely repeat its 2015 action in 2016. As
7 such, NTC has not alleged facts that show that a declaration that the 2015 closure
8 order was unlawful will remedy any of its current or future injuries. Because this court
9 may not render advisory opinions,¹⁴⁴ it lacks jurisdiction to consider NTC’s challenge to
10 the 2015 closure order.

11 **6. Whether NTC’s § 706(1) claims seek to compel discrete actions that**
12 **the agency is required to take**

13 Defendants’ final jurisdictional challenge argues that NTC lacks standing under
14 5 U.S.C. § 706(1) to compel the Board to act in various ways.¹⁴⁵ Section 706(1)
15 governs challenges to agency inaction and allows aggrieved parties to compel “agency
16 action unlawfully withheld or unreasonably delayed.”¹⁴⁶ Challenges to agency actions,
17 in contrast, are governed by § 706(2).¹⁴⁷

18 ¹⁴²Doc. 36 at 4.

19 ¹⁴³50 C.F.R. § 100.19(a).

20 ¹⁴⁴See *Coalition for a Healthy Cal. v. F.C.C.*, 87 F.3d 383, 386 (9th Cir.1996)
21 (recognizing that “federal courts have never been empowered to render advisory opinions”).

22 ¹⁴⁵Doc. 10 at 22 (citing several of NTC’s ANILCA claims, Doc. 1 at 15-16 ¶¶ 46-48, and
23 APA claims, Doc. 1 at 17-18 ¶ 53). See *Ctr. for Biological Diversity v. Veneman*, 394 F.3d
24 1108, 1113 (9th Cir. 2005) (holding that a plaintiff’s failure to sufficiently plead a § 706(1) claim
deprives it of standing).

25 ¹⁴⁶5 U.S.C. § 706(1). See *Norton v. S. Utah Wilderness All.* (“SUWA”), 542 U.S. 55, 62
26 (2004) (“The APA provides relief for a failure to act in § 706(1).”). “A ‘failure to act’ is not the
27 same thing as a ‘denial.’ The latter is the agency’s act of saying no to a request; the former is
simply the omission of an action without formally rejecting a request—for example, the failure to
promulgate a rule or take some decision by a statutory deadline.” *Id.* at 63.

28 ¹⁴⁷5 U.S.C. § 706(2).

1 In *Norton v. S. Utah Wilderness All.* (“SUWA”),¹⁴⁸ the Supreme Court considered
2 whether the BLM could be compelled to act in conformance with its statutory obligation
3 under the Federal Land Policy and Management Act of 1976 (“FLPMA”) to manage
4 certain areas “in a manner so as not to impair the suitability of such areas for
5 preservation as wilderness.”¹⁴⁹ Among other things, the plaintiffs alleged that BLM’s
6 failure to ban the use of off-road vehicles violated this nonimpairment obligation.¹⁵⁰
7 Their suit challenged this failure to act pursuant to 5 U.S.C. § 706(1).¹⁵¹

8 The Supreme Court rejected the plaintiffs’ challenge, holding that § 706(1) may
9 only be used to compel “a *discrete* agency action that [the agency] is *required to*
10 *take*.”¹⁵² Section 706(1) does not provide a cause of action for suits that allege
11 “[g]eneral deficiencies in compliance”¹⁵³ or seek “wholesale improvement of [a
12 government] program by court decree;”¹⁵⁴ it empowers “a court only to compel an
13 agency ‘to perform a ministerial or non-discretionary act,’ or ‘to take action upon a
14 matter, without directing *how* it shall act.”¹⁵⁵ The Court ruled that, under this standard,
15 the plaintiffs’ claim failed because the FLPMA was only “mandatory as to the object to
16 be achieved. . . . It assuredly does not mandate, with the clarity necessary to support
17 judicial action under § 706(1), the total exclusion of [off-road vehicle] use.”¹⁵⁶

18 ¹⁴⁸542 U.S. 55 (2004).

19 ¹⁴⁹43 U.S.C. § 1782(c).

20 ¹⁵⁰*SUWA*, 542 U.S. at 60.

21 ¹⁵¹*Id.* at 61.

22 ¹⁵²*Id.* at 64 (emphasis in original).

23 ¹⁵³*Id.* at 66.

24 ¹⁵⁴*Id.* at 64 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990)).

25 ¹⁵⁵*Id.* (quoting Attorney General’s Manual on the Administrative Procedure Act 108
26 (1947)) (emphasis in original).

27 ¹⁵⁶*Id.* at 66.

1 In *Ctr. for Biological Diversity v. Veneman*,¹⁵⁷ the plaintiffs filed a § 706(1) action
2 to compel the U.S. Forest Service to take certain rivers and streams into account while
3 planning for the use and development of federal land, as required by the Wild and
4 Scenic Rivers Act (“WSRA”).¹⁵⁸ The Ninth Circuit affirmed the district court’s dismissal
5 of this claim for lack of jurisdiction, holding that the plaintiffs lacked standing under
6 § 706(1) because their claim was “indistinguishable from the one rejected by the Court
7 in *SUWA*.”¹⁵⁹

8 In accordance with this line of authority, Defendants argue that NTC lacks
9 standing under § 706(1) to seek orders compelling Defendants to take the actions
10 discussed below.

11 **a. Paragraph 46 of the complaint does not assert a specific claim**
12 **for relief**

13 Defendants’ first challenge targets paragraph 46 of the complaint; they argue
14 that this paragraph seeks a broad order compelling the Board to “provide a priority
15 under ANILCA,” generally.¹⁶⁰ According to Defendants, this claim fails because
16 ANILCA does not specify how the Board must act in order to prioritize subsistence
17 uses.¹⁶¹

18 This argument misses the mark because paragraph 46 contains background
19 information and does not assert a specific cause of action. Paragraph 46 merely states
20 that Defendants violated ANILCA “in the following ways:” and then paragraphs 47
21 through 51 specify the alleged violations. Defendants’ argument that paragraph 46
22

23 ¹⁵⁷394 F.3d 1108 (9th Cir. 2005).

24 ¹⁵⁸16 U.S.C. § 1276(d)(1).

25 ¹⁵⁹394 F.3d at 1113.

26 ¹⁶⁰Doc. 10 at 22.

27 ¹⁶¹*Id.* at 23-24.

1 seeks a broad order compelling Defendants to generally comply with ANILCA's
2 subsistence priority provisions is unsupported by the complaint.¹⁶²

3 **b. NTC has standing to seek an order compelling the Board to**
4 **establish “frameworks” for its delegatee**

5 Defendants next target paragraph 47 of the complaint, which seeks an order
6 compelling Defendants to promulgate substantive standards to guide the in-season
7 manager's exercise of his delegated authority.¹⁶³ NTC alleges that Defendants' failure
8 to promulgate such standards violates Section 804 of ANILCA. But as Defendants
9 point out, ANILCA contains no such requirement. NTC effectively concedes this point
10 in its opposition by not relying on ANILCA, but rather a regulation, 50 C.F.R.
11 § 100.10(d)(6).

12 Despite this pleading deficiency, it is clear that NTC's complaint gives
13 Defendants fair notice¹⁶⁴ that it is asserting a claim based on 50 C.F.R. § 100.10(d)(6)
14 because Defendants' motion to dismiss addresses the merits of a claim under that
15 regulation.¹⁶⁵ Therefore, in the interest of justice, the court will construe NTC's
16 complaint as asserting a claim that Defendants' failure to promulgate substantive
17 standards to guide the in-season manager's decisions violates 50 C.F.R.
18 § 100.10(d)(6).¹⁶⁶

19 50 C.F.R. § 100.10(d)(6) states that the Board may “delegate to agency field
20 officials the authority to set harvest and possession limits, define harvest areas, specify

21 ¹⁶²This relief is also not requested in the “Relief Sought” section of NTC's complaint.
22 Doc. 1 at 18-19 ¶¶ 1-10.

23 ¹⁶³Doc. 1 at 15-16 ¶ 47. See also *id.* at 18 ¶ 1, 19 ¶ 5.

24 ¹⁶⁴*Twombly*, 550 U.S. at 555 (“Federal Rule of Civil Procedure 8(a)(2) requires only a
25 short and plain statement of the claim showing that the pleader is entitled to relief, in order to
26 give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”)
(citation and internal quotation marks omitted).

27 ¹⁶⁵Doc. 10 at 24.

28 ¹⁶⁶Fed. R. Civ. P. 8(e) (“Pleadings must be construed so as to do justice.”).

1 methods or means of harvest, specify permit requirements, and open or close specific
2 fish or wildlife harvest seasons *within frameworks established by the Board*.¹⁶⁷
3 Defendants argue that this language does not require the Board to establish any
4 “frameworks;” it merely requires the delegatee to “comply with any frameworks that the
5 Board establishes” should the Board, in its discretion, establish such frameworks.¹⁶⁸
6 NTC reads the regulation differently, arguing that it establishes that the “Board *may*
7 delegate authority, but if it chooses to do so, the delegation must be established within
8 frameworks set by the Board.”¹⁶⁹

9 If 50 C.F.R. § 100.10(d)(6) were ambiguous, the Board’s interpretation of its own
10 regulation would be given deference.¹⁷⁰ It is not; it plainly requires the Board to create
11 “frameworks” to guide its delegatee’s actions.¹⁷¹ Section 100.10(d)(6) provides
12 permissive authority to the Board to delegate certain authority to field officials within
13 “frameworks established by the Board.” The delegation power is permissive, but the
14 frameworks are mandatory if the Board exercises that power. Because this is a
15 discrete agency action demanded by law, NTC has standing to seek an order
16 compelling the Board to issue § 100.10(d)(6) “frameworks.”¹⁷²

17 NTC’s complaint goes too far, however, in seeking an order directing the Board
18 to promulgate regulations.¹⁷³ NTC has not established that the frameworks required by
19

20 ¹⁶⁷50 C.F.R. § 100.10(d)(6) (emphasis added).

21 ¹⁶⁸Doc. 10 at 24; Doc. 32 at 21.

22 ¹⁶⁹Doc. 21 at 20 (emphasis in original).

23 ¹⁷⁰*Auer*, 519 U.S. at 461.

24 ¹⁷¹*Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (“*Auer* deference is warranted
25 only when the language of the regulation is ambiguous.”).

26 ¹⁷²*SUWA*, 542 U.S. at 65 (“[W]hen an agency is compelled by law to act within a certain
27 time period, but the manner of its action is left to the agency’s discretion, a court can compel
the agency to act, but has no power to specify what the action must be.”).

28 ¹⁷³Doc. 1 at 19 ¶ 5.

§ 100.10(d)(6) must come in the form of regulations. The court lacks jurisdiction over that request.

c. NTC lacks standing to seek an order compelling the Board to “oversee” its delegatee’s actions

Defendants next challenge NTC’s claim that the Board is violating ANILCA by not overseeing the in-season manager’s actions.¹⁷⁴ Paragraph 47 of the complaint alleges that the Board violated ANILCA by failing “to exercise any independent oversight on actions taken by the in-season manager.”¹⁷⁵ Paragraph 49¹⁷⁶ contains a similar allegation. Defendants argue that “[n]o statute or regulation compels the Board to exercise oversight, as [NTC] has requested that the court do.”¹⁷⁷ NTC effectively concedes this point by not responding to Defendants’ argument.

Because NTC does not identify any legal authority that imposes a mandatory requirement on the Board to “oversee” its delegatee, NTC lacks standing to seek an order compelling the Board to so act.

d. NTC lacks standing to seek an order compelling Defendants to develop an operational plan

Paragraph 53 of the complaint alleges that Anderson’s “failure to develop an operation plan . . . for a subsistence gillnet fishery in the Kenai River” was “arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with 5 U.S.C. § 706(2)(A).”¹⁷⁸ Because NTC is challenging a failure to act, this cause of action is

¹⁷⁴Doc. 10 at 25-26.

¹⁷⁵Doc. 1 at 15 ¶ 47.

¹⁷⁶*Id.* at 16 ¶ 49 (“The [Board] delegated authority to Mr. Anderson, the in-season manager of the Kenai National Wildlife Refuge, to develop an operational plan for a community subsistence gillnet on the Kenai River. The [Board] failed to provide any . . . oversight to the in-season manager in carrying out this delegation of authority.”). See also *id.* at 18 ¶ 1; 19 ¶ 4.

¹⁷⁷*Id.* at 26.

¹⁷⁸*Id.* at 17-18 ¶ 53.

1 governed by § 706(1), not § 706(2)(A).¹⁷⁹ Defendants argue that NTC lacks standing to
2 compel the Board to develop an operational plan because 50 C.F.R.
3 § 100.27(e)(10)(iv)(J) requires NTC to develop the operational plan, not the in-season
4 manager.¹⁸⁰ NTC does not respond to this argument, effectively conceding that
5 Defendants are correct.

6 **e. NTC has standing to seek an order compelling the in-season**
7 **manager to decide its Kenai gillnet permit application, but not**
8 **one compelling him to grant it**

9 Paragraphs 49 and 53 of the complaint allege that Anderson's failure to issue a
10 permit for a subsistence gillnet fishery in the Kenai River violates ANILCA and the
11 APA.¹⁸¹ Defendants argue that NTC lacks standing to seek an order compelling the
12 Board to issue a permit to NTC for the 2016 fishing season,¹⁸² as it requests.¹⁸³
13 Defendants are correct.

14 As an initial matter, the court notes that NTC's complaint is again deficient.
15 NTC's complaint merely alleges that the actions Anderson took with regard to the Kenai
16 gillnet permit violate section 804 of ANILCA¹⁸⁴ and the APA, 5 U.S.C. § 706(2)(A).¹⁸⁵ In
17 opposition to Defendants' motion to dismiss, NTC relies on neither of these statutes; it
18 relies on the Kenai gillnet fishery regulation, 50 C.F.R. § 100.27(e)(10)(iv)(J).¹⁸⁶ Despite
19 this pleading deficiency, it is again clear that NTC's complaint gives Defendants fair

20 ¹⁷⁹See *SUWA*, 542 U.S. at 62.

21 ¹⁸⁰Doc. 10 at 26.

22 ¹⁸¹Doc. 1 at 16 ¶ 49; 17-18 ¶ 53.

23 ¹⁸²Doc. 10 at 26-27.

24 ¹⁸³Doc. 1 at 19 ¶ 6.

25 ¹⁸⁴*Id.* at 17 ¶ 49.

26 ¹⁸⁵*Id.* at 18 ¶ 53.

27 ¹⁸⁶Doc. 21 at 21.

1 notice that it is asserting a claim based on that regulation because Defendants' motion
2 addresses the merits of such a claim.¹⁸⁷ In the interest of justice, the court will construe
3 NTC's complaint as asserting a claim that Defendants have violated 50 C.F.R.
4 § 100.27(e)(10)(iv)(J).

5 The court lacks jurisdiction over NTC's request for an order compelling
6 Defendants to issue the Kenai gillnet permit because nothing in 50 C.F.R.
7 § 100.27(e)(10)(iv)(J) requires the in-season manager to issue that permit. Instead, the
8 regulation gives the in-season manager discretion to determine whether an operational
9 plan is meritorious. NTC does not allege, as it must to have standing to compel the
10 issuance of its permit, that Anderson has determined that its operational plan is
11 meritorious.

12 That is not the end of the story, however, because NTC also alleges that
13 Anderson abused his authority by not issuing a decision on NTC's application based on
14 the merits of its operational plan.¹⁸⁸ NTC argues that "[a]t the very least" the regulation
15 requires Anderson to issue a decision on a gillnet permit application. The in-season
16 manager has two options: (1) if he finds the operational plan meritorious, he must
17 award the permit; or (2) if he finds the operational plan unmeritorious, he must deny the
18 permit.¹⁸⁹ Defendants disagree, arguing that the regulation provides merely that the
19 "in-season manager *should* award" a permit based on the merits of the operational
20 plan, an interpretation that allows the in-season manager discretion to sit on an
21 application indefinitely or deny a permit without regard to the merits of the operational
22 plan.

23 Defendants' interpretation is inconsistent with the language of the regulation, and
24 therefore is entitled to no deference. The regulation contains mandatory language. It

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26 ¹⁸⁷Doc. 10 at 26.

27 ¹⁸⁸Doc. 1 at 16-17 ¶ 49.

28 ¹⁸⁹Doc. 21 at 21.

1 states that one Kenai gillnet permit “*will be awarded* by the [f]ederal in-season fishery
2 manager . . . based on the merits of the operational plan”¹⁹⁰ and, once the permit is
3 issued, “[f]ishing will be allowed from June 15 through August 15 on the Kenai River
4 unless closed or otherwise restricted by [f]ederal special action.”¹⁹¹ Under this
5 framework, the in-season manager lacks discretion to withhold a ruling on a permit
6 application indefinitely or to base his permit decision on a consideration other than “the
7 merits of the operational plan.”

8 Finally, Defendants argue that NTC’s claim is moot because the Board, at its
9 July 28 meeting, granted NTC the precise relief it is seeking in this case.¹⁹² To the
10 contrary, the Board merely ordered Anderson to “work on an operational plan” with NTC
11 for a Kenai River gillnet.¹⁹³ More than eight months have passed since this order was
12 issued and Anderson still has not decided NTC’s application. To put this in context,
13 Anderson approved NTC’s Kasilof permit in “about six weeks.”¹⁹⁴ The Board’s July 28
14 order did not moot NTC’s claim.

15 **B. Defendants’ Rule 12(b)(6) Attacks**

16 **1. NTC’s APA cause of action fails to state a claim**

17 “There is no right to sue for a violation of the APA in the absence of a ‘relevant
18 statute’ whose violation ‘forms the legal basis for [the] complaint.’”¹⁹⁵ “The APA is
19 merely a procedural vehicle for review of agency action; it does not confer a substantive
20

21
22 ¹⁹⁰50 C.F.R. § 100.27(e)(10)(iv)(J)(2) (emphasis added).

23 ¹⁹¹50 C.F.R. § 100.27(e)(10)(iv)(J)(4).

24 ¹⁹²Doc. 32 at 22.

25 ¹⁹³Doc. 23-4 at 11.

26 ¹⁹⁴Doc. 23-4 at 8.

27 ¹⁹⁵*El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 959 F.2d
28 742, 753 (9th Cir. 1991) (quoting *Lujan*, 497 U.S. at 883).

1 right to be free from arbitrary agency action.”¹⁹⁶ Under this standard, each of NTC’s
2 four APA claims fail because none identifies a statute, other than the APA itself, that
3 forms the legal basis of the claim.

4 **2. NTC’s remaining Section 804 claim**

5 The only remaining Section 804 claim is NTC’s claim that the Board violated
6 ANILCA when it voted not to revoke Anderson’s authority.¹⁹⁷ In order to state such a
7 claim, NTC must plausibly allege that revoking Anderson’s authority was “necessary to
8 provide for the priority” for subsistence uses set forth in Section 804.¹⁹⁸

9 Defendants suggest that NTC is required to allege that nonsubsistence users
10 have been “granted a conflicting right on federal waters of the Kenai.”¹⁹⁹ This is
11 certainly one type of claim that may be brought under ANILCA,²⁰⁰ but not the exclusive
12 one. For example, the Ninth Circuit has recognized that Section 804 claims also lie
13 where subsistence uses are restricted without that being necessary “to protect the
14 continued viability of fish and wildlife populations,”²⁰¹ where subsistence use restrictions
15
16
17

18
19 ¹⁹⁶*Furlong v. Shalala*, 156 F.3d 384, 394 (2d Cir. 1998).

20 ¹⁹⁷Doc. 1 at 17 ¶¶ 50-51.

21 ¹⁹⁸16 U.S.C. § 3117(a).

22 ¹⁹⁹Doc. 10 at 30.

23 ²⁰⁰*See Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 318 (9th Cir. 1988) (“This
24 is a case involving a clash of lifestyles and a dispute over who gets to fish. Congress, using
25 clear language, has resolved this dispute in favor of the Kenaitze who choose to pursue the
26 traditional subsistence way of life by giving them priority in federal waters. The state has
27 attempted to take away what Congress has given, adopting a creative redefinition of the word
28 rural, a redefinition whose transparent purpose is to protect commercial and sport fishing
interests.”).

²⁰¹*Ninilchik Traditional Council*, 227 F.3d at 1193 (citing *United States v. Alexander*, 938
F.2d 942, 945 (9th Cir. 1991)).

1 are implemented without the application of the three criteria set out in Section 804,²⁰² or
2 where subsistence users are denied “a meaningful use preference.”²⁰³

3 NTC’s complaint alleges that Anderson has made several decisions that violate
4 Section 804, in particular his decision to “close the fishing season for Chinook salmon
5 on the Kenai River before it began, and keep it closed throughout the season”²⁰⁴ and
6 his decision not to issue a Kenai gillnet permit.²⁰⁵ But nothing in NTC’s complaint
7 plausibly asserts that Anderson’s authority over such decisions must be revoked in
8 order for Defendants to honor their obligations under Section 804—because, for
9 example, Anderson intentionally violated Section 804 and will continue to intentionally
10 violate Section 804. NTC’s claim that Section 804 requires the Board to rescind
11 Anderson’s authority lacks merit.

12 **V. CONCLUSION**

13 Based on the preceding discussion, Defendants’ motion to dismiss is **GRANTED**
14 **IN PART AND DENIED IN PART** as follows: Defendants’ motion to dismiss NTC’s
15 claim that the Board violated 50 C.F.R. § 100.10(d)(6) by not establishing “frameworks”
16 to guide the delegation of its authority is **DENIED**; Defendants’ motion to dismiss NTC’s
17 claim that the in-season manager’s failure to decide its Kenai gillnet permit application
18 based on the merits of the operational plan violates 50 C.F.R. § 100.27(e)(10)(iv)(J) is
19 **DENIED**; in all other respects, Defendants’ motion is **GRANTED**.

20 DATED this 17th day of April 2016.

21
22 /s/ JOHN W. SEDWICK
23 SENIOR UNITED STATES DISTRICT JUDGE
24

25 ²⁰²*Id.* (citing *Alexander*, 938 F.2d at 946 n.7).

26 ²⁰³*Id.*

27 ²⁰⁴Doc. 1 at 16 ¶ 48.

28 ²⁰⁵*Id.* ¶ 49.