

Executive Director's Report

June Meeting

This is just a reminder that the June meeting at the Portland Red Lion (310 S.W. Lincoln) is the week of June 10th. The AP and SSC will start on Monday, and the Council will start on Tuesday afternoon, meeting jointly with IPHC commissioners. The Council agenda starts Wednesday morning and is sure to run through the weekend. We need to be out by Sunday afternoon as sleeping rooms are not available Sunday night because of the Rose Festival.

Here is a partial listing of final decisions we will face in June:

- Higher ownership caps for halibut IFQs in the Bering Sea
- Approve longlining for pot gear for sablefish in the Bering Sea
- BSAI Pacific cod allocations
- BSAI crab bycatch measures
- Revisions to overfishing definitions

We'll also have major reports on the social and economic impacts of IFQs, IBQ development, grid sorting, and the observer program, as well as initial review of improved retention and utilization in the groundfish fisheries. Next September we go to Sitka, the week of September 16.

Bering Sea Ecosystems Study

I sent you a copy of the executive summary and a news article on the National Academy of Sciences study on the Bering Sea ecosystem in the February 23rd Council mailing. I would like to invite Bob Francis, who chaired the panel, to come speak to the Council, SSC and AP. I believe the best time to schedule this is at our September meeting. My reasoning is that in August, we could submit it to the groundfish plan team for their review, and perhaps to an ecosystems committee that we still need to appoint. These groups could report their views also in September, and then the materials would be fresh in our minds as we head into stock assessment decisions in September and December. September also has many fewer agenda items than June. If you think this is a reasonable approach, I'll work with Bob Francis on arranging his presentation.

Advanced Notice of Proposed Rulemaking on Subsistence

Two years ago at our April 1994 meeting, we were briefed by Gavin Frost of the Office of the Solicitor, U.S. Department of Interior, Alaska Region, and Cheri Jacobus, then from the State's Attorney General's Office on the Holland decision in Alaska v. Babbitt (the Katie John Case). U.S. District Court Judge Holland rendered his decision on March 30, 1994, finding that priority must be given to subsistence fishermen on all navigable waters in the State of Alaska under the 1980 Alaska National Interest Lands Conservation Act, or ANILCA. Though the State gave subsistence priority during the 1980s, the Alaska Supreme Court overturned the state law as unconstitutional because it gave special rights to rural residents. This placed the State directly at odds with ANILCA, and with the Holland decision, the federal government is empowered to restrict commercial and sport fisheries if they jeopardize subsistence fisheries harvests.

On April 4, 1996, the Federal Subsistence Board within the U.S. Departments of Interior and Agriculture published an advanced notice of proposed rulemaking (item B-1(a)). Under this proposed rule, the Federal Subsistence Board's jurisdiction would be extended to include, not just all non-navigable waters located on public lands, but also all inland navigable waters within and adjacent to the boundaries of specified Federal land units regardless of ownership of submerged lands. These lands would include National Parks, Forests, Refuges, and other specified Federal land units in Alaska. A long list of these units is provided in the advanced notice on pages 12 and 13. Under the proposed rule, the Secretaries of Interior and Agriculture would delegate authority to the Board to take action if hunting, fishing, or trapping activities that take place in Alaska off public lands result in a failure to provide subsistence priority on public lands. Of more importance to the North Pacific Council is that we might be required by the Federal Subsistence Board to take additional actions to control bycatch of salmon if that were determined to be affecting subsistence fisheries on inland navigable waterways in Federal units throughout Alaska. The comment period on the notice will close on June 14, 1996. The notice is a direct result of the Katie John decision. There also will be public hearings, still to be announced.



Federal Subsistence Board

1011 East Tudor Road
Anchorage, Alaska 99503



FISH and WILDLIFE SERVICE
BUREAU of LAND MANAGEMENT
NATIONAL PARK SERVICE
BUREAU of INDIAN AFFAIRS

For immediate release: Bruce Batten (907)786-3487
April 4, 1996

FOREST SERVICE

Federal Rule Will Clarify Fishing Jurisdiction for Alaska Subsistence

An Advance Notice of Proposed Rulemaking which proposes a modification of the scope and applicability of federal subsistence management in Alaska was published in the Federal Register on Thursday, April 4, 1996. The Advance Notice, prepared by the Department of the Interior and the Department of Agriculture, responds to the Ninth Circuit Court's recent decision in Alaska v. Babbitt (the Katie John Case). In that case, the Court held that public lands subject to the subsistence priority include navigable waters in which the United States has a reserved water right. Those waters, which are identified in the Advanced Notice, include navigable waterways within and adjacent to the boundaries of National Parks, Forests, Refuges, and other specified Federal land units in Alaska.

The Advance Notice also addresses two other issues that are the subject of rulemaking petitions and related litigation. The three primary parts of the Advanced Notice are these:

1. In accordance with the Katie John decision, the Advance Notice proposes to modify the interpretation that the Federal Subsistence Board had operated under since 1990, when the Federal program for subsistence management in Alaska went into effect. Under this previous interpretation, the Board's management authority did not extend to navigable waters in most parts of Alaska and therefore did not affect subsistence fishing for most of the inland waters of Alaska. Under the contemplated new rule, the Board's jurisdiction would include management of subsistence fishing in specified navigable waters.

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2. The Advance Notice also proposes to delegate the authority of the Secretaries of Interior and Agriculture to take action if hunting, fishing, or trapping activities taking place in Alaska off public lands result in a failure to provide subsistence priority on public lands. The Board is directed to exercise this authority only sparingly and after full consultation with the State of Alaska.

3. The Advance Notice further proposes that the Board maintain jurisdiction over public lands in conservation system units which have been selected by, but have not yet been conveyed to, the State of Alaska or Alaska Native corporations. Because of over selection, many of these lands may never be conveyed and will ultimately remain under Federal management.

"The rule making process gives all Alaskans ample opportunity to comment on this proposed rule," said Mitch Demientieff, chairman of the Federal Subsistence Board. "We hope that citizens will participate in this public process by giving us their ideas on how to meet the court's mandates."

"Given the Katie John decision, we had to move ahead with this notice," said Deborah L. Williams, Special Assistant to the Secretary for Alaska. "But we hope, first and foremost, that the State of Alaska will craft a solution to subsistence that would allow the Federal government to return management of all subsistence hunting and fishing management to the State."

The Federal Register also announces that there will be hearings to take public comment on the Advance Notice proposals. Exact times and locations will be announced locally.

To obtain copies, to inquire about, or to make comments on the Advance Notice, call or write: Mitch Demientieff, Chairman, Federal Subsistence Board, c/o Thomas H. Boyd, Office of Subsistence Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503, or call (907) 786-3888.

The comment period on the Advanced Notice will close on June 14, 1996.

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[Federal Register: April 4, 1996 (Volume 61, Number 66)]
[Proposed Rules]
[Page 15014-15018]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

RIN 1018-AD68

Subsistence Management Regulations for Public Lands in Alaska, Identification of Waters Subject to Subsistence Priority Regulation and Expansion of the Federal Subsistence Program and the Federal Subsistence Board's Authority

AGENCY: Forest Service, USDA; Fish and Wildlife Service, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Departments of Agriculture and the Interior give notice of their intention to amend the scope and applicability of the Federal subsistence program in Alaska to include subsistence activities occurring on inland navigable waters in which the United States has a reserved water right and to identify specific Federal land units where reserved water rights exist. The amendments being considered also would extend the Federal Subsistence Board's management to all Federal lands selected under the Alaska Native Claims Settlement Act or the Alaska Statehood Act and situated within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, or any new national forest or forest addition, until conveyed to the State of Alaska or an Alaska Native Corporation, as required by ANILCA. In addition, the rule amendments being considered would unambiguously delegate to the Federal Subsistence Board the authority to determine when hunting, fishing or trapping activities taking

place in Alaska off the public lands interfere with the subsistence priority on the public lands to such an extent as to result in a failure to provide the subsistence priority and to take action to restrict or eliminate the interference. The Departments also are considering whether to provide the Federal Subsistence Board with authority to investigate and make recommendations to the Secretaries regarding the possible existence of additional Federal reservations, Federal reserved water rights or other Federal interests, including those which attach to lands in which the United States has less than fee ownership. The regulatory amendments being considered would conform the Federal subsistence management regulations to the court decree issued in *State of Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). This advance notice of proposed rulemaking also is in response to the Petitions for Rulemaking submitted by the Northwest Arctic Regional Council et al. on April 12, 1994, and the Mentasta Village Council, et al. on July 15, 1993.

DATES: Written public comment is invited and will be considered in the development of a proposed rule. Comments on this advance notice of proposed rulemaking and proposals for changes to the preliminary regulatory text must be received no later than June 14, 1996 to be considered.

ADDRESSES: Any comments concerning this notice, including sections regarding conformance with statutory and regulatory authorities and the preliminary regulatory text included with it may be sent to Mitch Demientieff, Chairman, Federal Subsistence Board, c/o Thomas H. Boyd, Office of Subsistence Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska, 99503.

FOR FURTHER INFORMATION CONTACT:

Thomas H. Boyd, Office of Subsistence Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska, 99503; telephone (907) 786-3888. For questions specific to National Forest System lands, contact Ken Thompson, Assistant Director, Subsistence, Forest Service, Alaska Region, P.O. Box 21638, Juneau, Alaska 99802-1628; telephone (907) 586-7921.

SUPPLEMENTARY INFORMATION:

Background

The Federal Subsistence Board assumed subsistence management responsibility for public lands in Alaska in 1990, after the Alaska Supreme Court ruled in *McDowell v. State of Alaska*, 785 P.2d 1 (Alaska 1989), reh'g. denied (Alaska 1990), that the rural preference contained in the State's subsistence statute violated the Alaska Constitution. This ruling put the State's subsistence program out of compliance with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) and resulted in the Secretaries assuming subsistence management on the public lands in Alaska. The "Temporary Subsistence Management Regulations for Public Lands in Alaska, Final Temporary Rule" was published in the Federal Register (55 FR 27114-27170) on June 29, 1990. The "Subsistence Management Regulations for Public Lands in Alaska, Final Rule" was published in the Federal Register (57 FR 22940-22964) on May 29, 1992.

In both cases, the rule "generally excludes navigable waters" from Federal subsistence management. 55 FR 27114, 27115 (1990); 57 FR 22940, 22942 (1992). In a lawsuit consolidated with *Alaska v. Babbitt*, plaintiff Katie John challenged these rules, arguing that navigable waters are properly included within the definition of "public lands" set out in ANILCA. At oral argument before the United States District Court for Alaska, the United States took the position that Federal reserved water rights which encompass the subsistence purpose are public lands for purposes of ANILCA. The United States Court of Appeals for the Ninth Circuit subsequently held: "[T]he definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Alaska versus Babbitt*, 72 F.3d at 703-704. In the course of its decision, the Ninth Circuit also directed: "[T]he federal agencies that administer the subsistence priority are responsible for identifying those waters." *Id.* at 704.

The amendments being considered in this advance notice of proposed rulemaking would conform the Federal subsistence management regulations to the Ninth Circuit's ruling in *Circuit's ruling in Alaska v. Babbitt*. As the Ninth Circuit directed, this document identifies Federal land units in which reserved water rights exist. These are "public lands" under the Ninth Circuit's decision in *Alaska v. Babbitt* and thus are subject to the Federal subsistence priority in Title VIII of ANILCA. The preliminary regulatory text being considered here also provides the Federal Subsistence Board with clear authority to administer the subsistence priority in these waters.

On July 15, 1993, the Mentasta Village Council, Native Village of Quinhagak, Native Village of Goodnews Bay, Alaska Federation of Natives, Alaska Inter-tribal Council, RURAL CAP, Katie John, Doris Charles, Louie Smith and Annie Cleveland filed a "Petition for Rule-Making by the Secretaries of Interior and Agriculture that Navigable Waters and Federal Reserved Waters are 'Public Lands' Subject to Title VIII of ANILCA's Subsistence Priority."

On April 12, 1994, the Northwest Arctic Regional Council, Stevens Village Council, Kawerak, Inc., Copper River Native Assoc., Alaska Federation of Natives, Alaska Inter-tribal Council, RURAL CAP and Dinyee Corporation filed a "Petition for Rule-Making by the Secretaries of Interior and Agriculture that Selected But Not Conveyed Lands Are To Be Treated as Public Lands for the Purposes of the Subsistence Priority in Title VIII of ANILCA and that Uses on Non-Public Lands in Alaska May Be Restricted to Protect Subsistence Uses on Public Lands in Alaska." A Request for Comments on this Petition was published at 60 FR 6466 (1995). This advance notice of proposed rulemaking rule also responds to both these petitions for rulemaking.

Public Review and Comment

Comments on this advance notice of proposed rulemaking and proposed changes to the preliminary regulatory text included with this notice may be submitted in writing to the address identified at the beginning of this rulemaking by June 14, 1996. Comments received by that date will be considered in the development of the proposed rule. In addition, the Departments will hold several public hearings in various locations in Alaska. The specific dates, times, and locations of the hearings will be announced subsequently.

Federal Subsistence Regional Advisory Councils

Alaska has been divided into ten subsistence resource regions, each of which is represented by a Federal Subsistence Regional Advisory Council. The Regional Councils provide a forum for rural residents with personal knowledge of local conditions to have a meaningful role in the subsistence management of fish and wildlife on Alaska public lands. The Councils will have a substantial role in reviewing the proposed rule to be published subsequently and in making recommendations on the final rule.

Summary of Changes

This advance notice of proposed rulemaking includes preliminary regulatory text on the proposed rule amendments being considered. This level of detail is provided to assist the reviewer in commenting on the proposals under consideration; the Secretaries may propose these or other amendments to the subsistence regulations in the proposed rule to follow this action.

Sec. ____3 Applicability and scope.

The amendments being considered in this advance notice of proposed rulemaking would expand the scope of the Federal subsistence program to include, in addition to the waters already included, all inland navigable waters within the exterior boundaries of the listed National Parks, Preserves, Wildlife Refuges, and other specified Federal land units managed by the Department of the Interior in Alaska. Within the exterior boundaries of the two national forests in Alaska, the subsistence program would apply to all inland navigable waters bordered by lands owned by the United States.

The Department of the Interior agencies, to assure the effective stewardship of fish and wildlife, adequately protect subsistence uses, and prevent interference with the effective management of the Federal subsistence priority, have determined a need to apply the subsistence program to waters throughout the Federal land units listed in Sec. ____3(b)(1) of the preliminary regulatory text which are managed by the Department, whether or not the United States is the littoral or riparian owner of any given reach. Land ownership patterns within these units are complex, most of the land has not been surveyed, and ownership is still changing as land selections are conveyed to the State of Alaska and Alaska Native Corporations. The Interior agencies believe that the substantial complications inherent in "checkerboard" subsistence management based upon land ownership bordering specific portions of water bodies within the exterior boundaries of the listed Federal land units necessarily would be detrimental to the resources for which the Department of the Interior is responsible.

Within the exterior boundaries of the two national forests situated in Alaska which are listed in Sec. ____3(b)(2) of the preliminary regulatory text, the Federal subsistence program will be extended only to those inland waters bordered by lands owned by the United States. The Secretary of Agriculture has not identified reserved water rights, necessary for the purposes for which the two national forests were established, in reaches of water that are not bordered by federally owned national forest lands. Accordingly, extending the Federal subsistence program to these nonadjacent waters is not considered necessary to assure effective stewardship of fish and wildlife, adequately protect subsistence uses, prevent interference with the Federal subsistence

management program, or avoid detriment otherwise to national forest resources. The majority of inland waters located within the exterior boundaries of the two forests and which are not bordered by national forest lands are contained within relatively large and easily identified tracts of land owned by Alaska Native Corporations or the State of Alaska or its municipalities. In addition, the Federal Subsistence Board would have authority under Sec. ____10 of the preliminary regulatory text to restrict where necessary serious interference with the subsistence priority from hunting, fishing, or trapping activities that take place in these nonadjacent waters.

The existing regulations for the Federal subsistence management program specify that the program applies to all non-navigable waters located on the public lands and to waters specifically listed in Sec. ____3(b) (1)-(11), which consist of certain pre-statehood reserves. In these areas the program extends to public lands and to waters over land owned by the United States. This includes certain marine waters within the boundaries of pre-Statehood reserves. This advance notice of proposed rulemaking would amend Sec. ____3(b) to add to the Federal subsistence management program all inland navigable waters, as specified in Sec. ____3(b) (1) and (2), within and adjacent to the boundaries of the specified Federal land units regardless of ownership of submerged lands. Pre-statehood reservation of marine waters listed in the present regulations at Sec. ____3(b) (1)-(11) would continue to be included in the subsistence management program.

Sec. ____4 Definitions

The regulatory amendments being considered would change the definition of "Federal lands" to include navigable and non-navigable inland waters in which the United States has a reserved water right. This amendment would conform the Federal subsistence management program with the Ninth Circuit's ruling in *Alaska v. Babbitt*.

This advance notice of proposed rulemaking also would amend the definition of "Public Lands or public land" to treat as public land certain Federal lands described in ANILCA Sec. 906(o)(2) which have been selected by the State of Alaska or an Alaska Native Corporation but not yet conveyed. This change would be proposed in response to the April 12, 1994, "Petition for Rule-Making by the Secretaries of Interior and Agriculture that Selected But Not Conveyed Lands are To Be Treated as Public Lands for the Purposes of the Subsistence Priority in Title VIII of ANILCA and that Uses on Non-Public Lands in Alaska May be Restricted to Protect Subsistence Uses on Public Lands in Alaska," which was filed by the Northwest Arctic Regional Council, et al. After reviewing the matter, the Secretaries have concluded as a matter of law that certain selected but not conveyed lands are governed by the terms of ANILCA Sec. 906(o)(2), 43 U.S.C. Sec. 1616(o)(2), which provides that: "Until conveyed, all Federal lands within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be administered in accordance with the laws applicable to such unit." Accordingly, the Secretaries have determined that all Federal lands within the units specified in ANILCA Sec. 906(o)(2) will be administered as part of the unit to which they belong and will be subject to the administrative jurisdiction of the Federal Subsistence Board until conveyed from Federal ownership. The contemplated change relating to the definition of public lands contained in the preliminary regulatory text reflects the Secretaries' conclusions in this regard.

This advance notice of proposed rulemaking also would add new definitions of "reserved water rights" and "inland waters" for clarity. The "reserved water rights" definition follows Supreme Court precedent, specifically *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The "inland waters" definition establishes two standards to determine whether a given water is inland or marine. A water that satisfies either (or both) of the two standards for inland waters would be considered inland for purposes of the Federal subsistence program under the preliminary regulatory text included here. If a water is located landward of the mean high tide line, the water is inland. Similarly, any water is inland if it is located upstream of the line drawn across the mouth of waters entering the sea. The definition also contains a nonexclusive list of the kinds of waters which are commonly found inland.

Sec. ____ .10 Federal Subsistence Board

This advance notice of proposed rulemaking would unambiguously delegate to the Federal Subsistence Board the authority to regulate hunting, fishing and trapping activities on non-public lands in Alaska which interfere with subsistence activities on the public lands to such an extent as to result in a failure to provide the subsistence priority. The Secretaries expect that the Board would exercise this authority sparingly. Prior to taking action in any such case, it is expected that the Board would consult with, and make a significant effort to resolve the conflict through cooperative action with, the State of Alaska, the appropriate Regional Council, and the National Marine Fisheries Service where appropriate. The Board's regulatory authority under this provision would be limited to the territorial limits of the State of Alaska and would not extend to offshore fisheries beyond the territorial waters of Alaska. All international treaty obligations of the United States with respect to fish and wildlife and their habitats also must be adhered to.

This advance notice of proposed rulemaking would provide, in addition, the Federal Subsistence Board with authority to investigate whether in appropriate instances there exist additional Federal reservations of public lands, Federal reserved water rights or other Federal interests, including those in which the United States has a less than fee ownership interest, which should be included in the Federal subsistence management program, and to make recommendations to the Secretaries for the inclusion of those interests within the Federal subsistence management program. Such interests might include Federal lands not listed in Sec. ____ .3(b) of the preliminary regulatory text, including military reserves and some or all of hundreds of remote parcels in Alaska.

Conformance With Statutory and Regulatory Authorities

National Environmental Policy Act Compliance

A Draft Environmental Impact Statement that described four alternatives for developing a Federal Subsistence Management Program was distributed for public comment on October 7, 1991. That document described the major issues associated with Federal subsistence management of fish and wildlife; draft administrative regulations also were included as an appendix. A Final Environmental Impact Statement for the Federal Subsistence Management Program was published on February 28, 1992. In accordance with that Impact Statement, the Subsistence Management

Regulations for Public Lands in Alaska: Final Rule (57 FR-22940-22964), was published on May 29, 1992. This advance notice of proposed rulemaking considers amendments to the rule that was adopted as a result of that process.

The scope of the existing Federal subsistence regulations already includes substantial areas of both navigable and non-navigable waters in Alaska; accordingly, the Federal Subsistence Board has adopted a comprehensive set of annual subsistence fishing regulations in Subpart D. This advance notice of proposed rulemaking identifies additional waters to which the Subpart D annual subsistence fishing regulations will apply, as required by the Ninth Circuit Court of Appeals in *Alaska v. Babbitt*, but would not amend those existing Subpart D regulations. In addition, in response to a Petition for Rulemaking, this advance notice of proposed rulemaking would expand the authority of the Federal Subsistence Board by unambiguously delegating to the Board the authority to exercise the power of the Secretaries to regulate hunting, fishing and trapping activities which occur on nonpublic lands and waters in Alaska when such activities interfere with the Federal subsistence priority to such an extent as to result in a failure to provide the subsistence priority. It would also apply the program to certain selected but not conveyed lands within specified Federal land units as required by Sec. 906(o)(2) of ANILCA.

All or portions of this advance notice of proposed rulemaking may be appropriate for issuance as a final interpretive rule or be subject to a categorical exclusion from the National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4332(2)(C). Appropriate compliance with NEPA will be completed before a final rule is issued.

It has been determined that this advance notice of proposed rulemaking has no environmental justice implications under Executive Order 12898. In the event it is determined that preparation of an environmental impact statement is necessary before a final rule can issue on part or all of this proposal, an assessment under Executive Order 12898 will be included in that statement.

Compliance With Section 810 of ANILCA

The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless a restriction is necessary to conserve healthy fish and wildlife populations. A Section 810 analysis was completed as part of the Final Environmental Impact Statement on the Federal Subsistence Management Program in 1992. It has been determined that this advance notice of proposed rulemaking will not significantly restrict subsistence uses on the public lands. In the event it is determined that it is necessary to prepare an environmental impact statement in connection with the proposed rule, an analysis of effects on subsistence as set forth in section 810 of ANILCA will be included in that statement.

Paperwork Reduction Act

The Department of the Interior has already received clearance under the Paperwork Reduction Act for its existing regulations governing annual subsistence take. The information collection requirements of those rules have been approved by the Office of Management and Budget under

44 U.S.C. Sec. 3501 and have been assigned clearance number 1018-0075. Should any additional clearances be required as a result of the expansion of the Federal Subsistence Board's jurisdiction described in this advance notice of proposed rulemaking, the Secretaries will obtain them before the rule imposing the information collection requirements become effective.

Executive Order 12866

This advance notice of proposed rulemaking has been reviewed by the Office of Management and Budget under Executive Order 12866.

Economic Effects

The Departments have determined that this advance notice of proposed rulemaking would not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq. This advance notice of proposed rulemaking simply would identify waters which the Ninth Circuit Court of Appeals has determined are subject to Federal subsistence management, provide the Federal Subsistence Board with the authority to manage those waters, and consolidate in the Board other existing regulatory authority of the Secretaries. In the event that future regulations affect small entities, the Board would be required to conduct a Regulatory Flexibility Act analysis at that time. This Notice will impose no direct, indirect, non-quantifiable or enforcement costs on small entities; no changes in the demography of populations are anticipated; there will be no significant effect upon existing information collection and recordkeeping requirements; and no aggregate effects on small entities are anticipated. The aggregate effect would be an insignificant economic effect on a number of small entities. The number of small entities affected is unknown but the fact that the effects, if any, will be negligible indicates that they will not be significant within the meaning of the Regulatory Flexibility Act.

Federalism Assessment

This advance notice of proposed rulemaking does not meet the threshold of "Federalism Effects" as set forth in Executive Order 12612 and is consistent with the existing parameters of established Federal authority as set forth by the Federal courts.

Taking Assessment

In accordance with Executive Order 12630, it has been determined that this advance notice of proposed rulemaking has no takings of private property implications.

Unfunded Mandates

The Secretaries have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 et seq., that this advance notice of proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities.

Drafting Information.--The preliminary regulatory text included with this Notice was drafted by the Office of the Regional Solicitor, 4230 University Drive, Suite 300, Anchorage, AK, 99508-4626, with assistance from the Office of the Solicitor, 1849 C Street, N.W., Washington, D.C., 20240.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National Forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, Public lands, Reporting and recordkeeping requirements, Wildlife.

The following preliminary regulatory text is provided to assist the reviewer in commenting on the changes under consideration; the Secretaries may propose these or other amendments to the subsistence regulations in the proposed rule to follow this action.

PART _____--SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA

1. Subpart A of 36 CFR Part 242 and 50 CFR 100, Sec. _____.3 is proposed to be amended by replacing the existing Sec. _____.3(b) with the following language and deleting Sec. _____.3(c).

Sec. _____.3 Applicability and Scope.

(b) The regulations contained in Subpart D apply:

(1)(i) On all public lands including all waters located on these lands, on all navigable and nonnavigable waters within the exterior boundaries of the following units, and on inland waters adjacent to the exterior boundaries of the following units:

- (A) Alaska Maritime National Wildlife Refuge;
- (B) Alaska Peninsula National Wildlife Refuge;
- (C) Aniakchak National Monument and Preserve;
- (D) Arctic National Wildlife Refuge;
- (E) Becharof National Wildlife Refuge;
- (F) Bering Land Bridge National Preserve;
- (G) Cape Krusenstern National Monument;
- (H) Denali National Preserve and the 1980 additions to Denali National Park;
- (I) Gates of the Arctic National Park and Preserve;
- (J) Glacier Bay National Preserve;
- (K) Innoko National Wildlife Refuge;
- (L) Izembek National Wildlife Refuge;

(M) Katmai National Preserve;
(N) Kanuti National Wildlife Refuge;
(O) Kenai National Wildlife Refuge;
(P) Kobuk Valley National Park;
(Q) Kodiak National Wildlife Refuge;
(R) Koyukuk National Wildlife Refuge;
(S) Lake Clark National Park and Preserve;
(T) National Petroleum Reserve in Alaska;
(U) Noatak National Preserve;
(V) Nowitna National Wildlife Refuge;
(W) Selawik National Wildlife Refuge;
(X) Steese National Conservation Area;
(Y) Tetlin National Wildlife Refuge;
(Z) Togiak National Wildlife Refuge;
(AA) White Mountain National Recreation Area;
(BB) Wrangell-St. Elias National Park and Preserve;
(CC) Yukon-Charley Rivers National Preserve;
(DD) Yukon Delta National Wildlife Refuge;
(EE) Yukon Flats National Wildlife Refuge;
(FF) all components of the Wild and Scenic River System located outside of the boundaries of National Parks, National Preserves or National Wildlife Refuges, including segments of the Alagnak River, Beaver Creek, Birch Creek, Delta River, Fortymile River, Gulkana River and Unalakleet River.

(ii) [Reserved]

(2) The regulations contained in Subpart D apply on all public lands including all inland waters, located on or bordered by other public lands, within or adjacent to the exterior boundaries of the following reservations:

- (i) Chugach National Forest
- (ii) Tongass National Forest, including Admiralty Island National Monument and Misty Fjords National Monument.

2. In Subpart A of 36 CFR part 242 and 50 CFR 100, Sec. __-4, the Definitions of "Federal lands" and "Public lands or public land" are proposed to be revised to read as follows:

Federal lands means lands and waters and interests therein the title to which is in the United States, including navigable and non-navigable waters in which the United States has reserved water rights.

Public lands or public land means:

- (a) Lands situated in Alaska which are Federal lands, except—
 - (1) Land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(2) Land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(3) Lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

(b) Notwithstanding the exceptions in paragraphs (a)(1), (2) and (3), of this section until conveyed, all Federal lands within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, new national forest or forest addition shall be treated as public lands for purposes of the regulations in this part pursuant to Sec. 906(o)(2) of ANILCA.

3. In Subpart A of 36 CFR part 242 and 50 CFR 100, Sec. _____.4, new definitions of "inland waters" and "reserved water rights" are proposed to be added in alphabetical order as set forth below:

Inland waters means, for purposes of the regulations in this part, those waters located landward of the mean high tide line or waters located upstream of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea. Inland waters include, but are not limited to, lakes, reservoirs, ponds, creeks, streams and rivers.

Reserved water right(s) means the Federal right to use the unappropriated appurtenant water necessary to accomplish the purposes for which a Federal reservation was established. Reserved water rights include nonconsumptive and consumptive uses.

4. Subpart B of 36 CFR part 242 and 50 CFR 100, Sec. _____.10 is proposed to be amended by adding the following Secs. _____.10(d)(4)(xviii) and _____.10(d)(4)(xix):

Sec. _____.10 Federal Subsistence Board

(d)(4)(xviii) Determine when hunting, fishing or trapping activities which occur on lands or waters in Alaska other than public lands interfere with subsistence hunting, fishing or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority, and after appropriate consultation with the State of Alaska, the regional councils, and other Federal agencies, to restrict or eliminate said activities;

(d)(4)(xix) Identify, in appropriate specific instances, whether there exist additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches and make appropriate recommendations to the Secretaries for inclusion of those interests within the Federal subsistence management program.

Dated: March 29, 1996.

Phil Janik, Regional Forester, USDA Forest Service.

Dated: March 29, 1996.

Bruce Babbitt, Secretary of the Interior.

[FR Doc. 96-8188 Filed 4-3-96; 8:45 am]

BILLING CODE 3410-11-M