

Geoffrey Y. Parker, Attorney at Law  
Law Office of Geoffrey Y. Parker  
634 K Street  
Anchorage, Alaska 99501  
Ph: 907-222-6859; Fax: 907-277-2242

Thomas E. Meacham, Attorney at Law  
9500 Prospect Drive  
Anchorage, Alaska 99507-5924  
Ph: 907-346-1077; Fax: 907-346-1028

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

NONDALTON TRIBAL COUNCIL, New )  
Koliganek Village Council, New Stuyahok )  
Traditional Council, Ekwok Village Council, )  
Curyung Tribal Council, Levelock Village )  
Council, AIFMA Cooperative, d/b/a/ The )  
Alaska Independent Fishermen's Marketing )  
Association, and Trout Unlimited, Inc., )

Plaintiffs, )

vs. )

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

Defendants, and )

PEBBLE LIMITED PARTNERSHIP, )  
Acting through it's General Partner, )  
PEBBLE MINES CORP., )

Intervenor. )

Case No. 3DI-09-46 CI

**THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT**

COME NOW Plaintiffs Nondalton Tribal Council, New Koliganek Village  
Council, New Stuyahok Traditional Council, Ekwok Village Council, Curyung Tribal

THIRD AMENDED COMPLAINT

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*Nondalton Tribal Council, et al. v. State of Alaska, DNR, et al.*, Case No. 3DI-09-46 CI

Council, Levelock Village Council, AIFMA Cooperative, and Trout Unlimited, Inc. (hereinafter "Plaintiffs"), by and through counsel, seeking declaratory judgment against defendants, the State of Alaska, Department of Natural Resources, and the Commissioner of Natural Resources, that Land Classification Order No. SC 04-002 ("Classification Order" or "Order"), which the Commissioner signed under AS 38.04.065 and AS 38.05.300 on April 19, 2005 and which implements DNR's 2005 Bristol Bay Area Plan for State Lands ("2005 BBAP"), and certain other acts and omissions as alleged in this Third Amended Complaint, are contrary to law, are arbitrary and capricious, constitute abuses of discretion, and Plaintiffs request that the Court grant appropriate relief.

## I. PARTIES.

1. Plaintiff Nondalton Tribal Council is the federally recognized tribal entity for Nondalton, Alaska and sues on behalf of its tribal members. Nondalton is located on Sixmile Lake in the Kvichak River drainage. Nondalton is the community closest to a so-called Pebble deposit and certain mining claims, first staked on state-owned lands at the deposit in about 1986, and which are the site of a potential and controversial large copper, gold and molybdenum mine known as "Pebble mine." Tribal members hunt and fish for subsistence on state lands which the Classification Order classifies in the Nushagak and Kvichak river drainages, including in the area of the Pebble mining claims.

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

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

4. Plaintiff Ekwok Village Council is the federally recognized tribe for the Village of Ekwok, Alaska and sues on behalf of its tribal members. Ekwok village is on the Nushagak River. Tribal members hunt and fish for subsistence on state owned lands classified by the Classification Order in much of the Nushagak River drainage, including in the vicinity of the Pebble claims.

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

6. Plaintiff Levelock Village Council is the federally recognized tribal entity for the Village of Levelock, Alaska and sues on behalf of its tribal members. The village is on the Kvichak River. Tribal members hunt and fish for subsistence on state-owned lands classified by the Classification Order in the Nushagak and Kvichak river drainages, and on the Alaska Peninsula. Tribal members hunt and fish for subsistence on state owned lands classified by the Classification Order in the Kvichak and Nushagak river drainages, including in the area of the Pebble claims, and on the Alaska Peninsula.

7. AIFMA Cooperative, d/b/a the Alaska Independent Fishermen's Marketing Association was founded in 1966. AIFMA is incorporated in the State of Alaska, is in good standing, and is a member-based association of commercial fishers in Bristol Bay. AIFMA is committed to protect the interests of those who fish Bristol Bay, and the salmon resources upon which they depend. One of AIFMA's goals is protection of the habitat in the Bristol Bay drainages where the land is classified by the Classification Order

8. Trout Unlimited, Inc. was incorporated in the State of Michigan in 1959, and is presently a non-profit corporation in good standing in that state. TU is the nation's largest coldwater fisheries conservation organization. It has approximately 145,000 members worldwide, of which approximately 1,300 are in Alaska. Its members, from

within and outside of Alaska, fish, hunt and recreate on state lands in the Bristol Bay drainages to which the Classification Order applies.

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

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

11. Defendant Alaska Department of Natural Resources (DNR) is the state agency that manages most state public domain lands, including the lands which DNR classified by the Classification Order to implement the 2005 BBAP pursuant to land use planning statutes contained in AS 38.04, the land classification statute, AS 38.05.300, and applicable regulations at 11 AAC Chap. 55.

12. Defendant Commissioner of Natural Resources, the chief official of DNR, was Tom Irwin (“Irwin”) when plaintiffs commenced this lawsuit. He approved and signed the 2005 BBAP and the Land Classification Order No. SC-04-002. He and his successor Commissioner are sued in their official capacity.

## **II. JURISDICTION.**

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

## **III. STATUTORY AND REGULATORY SCHEME OF STATE LAND USE PLANNING AND CLASSIFICATION.**

14. DNR is charged, by Alaska Constitution Art. VIII, § 4, with managing the replenishable state resources under its jurisdiction in accordance with “the sustained yield principle, subject to preferences among beneficial uses.” The Alaska Land Policy Act, at AS 38.04, translates the constitutional policies of Article VIII of the Alaska Constitution into specific land management goals to guide DNR’s land management decisions. The Act guides DNR by establishing, at AS 38.04.010, the purposes and goals of making land available for private use, and at AS 38.04.015, purposes and goals for retaining state land in public ownership. Alaska Statute 38.04.005 prescribes that disposal and retention decisions be “determined through the inventory, planning and classification processes set

out in AS 38.04.060-38.04.070.” Alaska Statute 38.04.060(a) prescribes that the inventory of state land and water resources must emphasize “areas of potential settlement, economic development, and critical environmental concern.” In the adoption and revision of land use plans, DNR must comply with AS 38.04.065(b), which requires DNR to “use and observe” the principles of sustained yield, “give priority to planning and classification in areas of potential settlement, renewable and nonrenewable resource development, and critical environmental concern,” rely on the inventory of state land, its resources and other values, and “plan for compatible surface and mineral land use classifications.” Alaska Statute 38.04.065(c) provides that each regional plan must identify and delineate:

- (1) areas of settlement and settlement impact, where land must be classified for various private uses, renewable and nonrenewable resource development, and for public recreation, open space, and other public uses desirable in and around settlement; and
- (2) areas that must be retained in state ownership and planned and classified for various uses and purposes under AS 38.04.015.

Alaska Statute 38.04.015 provides that the primary public interests in retaining areas of state land surface in public ownership include “to make them available on a sustained-yield basis for a variety of beneficial uses including subsistence, [and] sport hunting and fishing, . . . and other activities of a type which can generally be made available to more people and conducted more successfully if the land is in public rather than private ownership;” and “to protect critical wildlife habitat and areas of special scenic, recreational, scientific, or other environmental concern.” Alaska Statute 38.04.910(12) defines “sustained yield” as:

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

15. The state land use planning process also must result in the classification of land for surface use, as provided by AS 38.04.065(e) and 38.05.300. DNR implements land use plans pursuant to the statutory policy, at AS 38.04.005(a), “to establish a balanced combination of land available for public and private purposes.” To implement

the 2005 BBAP on state lands, DNR must “classify” state lands to reflect the intent of “land use designations” made by the 2005 BBAP, which the Commissioner did through his signing and issuance of Land Classification Order No. SC 04-002 on April 19, 2005. The 2005 BBAP was thereby implemented, and it thereafter affects the public through subsequent administrative actions such as Land Classification Order No. SC 04-002.

16. DNR has adopted regulations at 11 AAC 55 to implement the Alaska Land Policy Act, AS 38.04. The regulations provide, at 11 AAC 55.020(a), that land classification is based on a land use plan prepared under AS 38.04.065 and 11 AAC 55.030, and at 11 AAC 55.030 that an area plan is a regional plan. “Classification” means “designation of land according to its primary use and in a manner that will provide maximum benefit to the people of Alaska,” 11 AAC 55.280(1); “identifies the primary use for which the land will be managed, subject to valid existing rights and multiple use,” 11 AAC 55.040(c); and “reflects surface impacts of surface or subsurface uses, or both,” 11 AAC 55.040(a). Pursuant to 11 AAC 55.272, a classification takes effect when the commissioner signs a land classification order, which converts the land use designations in a plan to corresponding land classifications. Pursuant to 11 AAC 55.040(d), when a particular use is not dominant, a parcel may have up to three classifications. Pursuant to AS 38.04.065(c)(2) and 38.04.015, classifications such as Wildlife Habitat Land, Public Recreation Land, Mineral Land and Water Resources Land require that the land so classified must remain in public ownership. Other classifications, *e.g.*, Settlement Land and Resource Management Land, do not carry this requirement.

#### IV. FACTUAL OVERVIEW.

17. The Classification Order (2005 BBAP, App. B) implements the 2005 BBAP by classifying state-owned and state-selected land “based on the written justification” contained in the 2005 BBAP. The 2005 BBAP is the state’s principal land use plan for state lands in the Bristol Bay area and has approximately a 20-year life (2005 BBAP, p. A-10). The Order “supersedes and replaces all previous classifications and classification orders” affecting the area except three “Special Use Areas” ( 2005 BBAP, pp. 4-6 – 4-7).

18. Above the line of mean high tide, the Classification Order and 2005 BBAP apply to approximately eleven million eight hundred seventy-six thousand acres of state-owned or state-selected “uplands” (*i.e.*, 11,876,045 acres based on 2005 BBAP, p. 4-4 (Table 4.1(A)) and related text) and to “shorelands” above the high tide line. “Uplands” are those lands above ordinary high water (2005 BBAP, p. 1-2 (Fig. 1.1) and include non-navigable waters therein. “Shoreland” means “land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to ordinary high water mark as modified by accretion, erosion, or reliction” (*see id.*; AS 38.05.965(20)). Most of the uplands, shorelands, and navigable and non-navigable fresh waters involved here drain into Bristol Bay. Below the high tide line, the Classification Order and 2005 BBAP also apply to several million acres of adjacent tidal and offshore submerged lands in the marine environment (*see* 2005 BBAP, p. 4-2 (Table 4.1(B))).

19. The geographic scope of the Order and 2005 BBAP extends from the Bering Sea coast near Quinhagak, Alaska, east across the Nushagak and Kvichak river drainages, south to the end of the Alaska Peninsula and Unimak and Krenitzin Islands. Most state-owned uplands and shorelands are in the Nushagak and Kvichak drainages or on the Alaska Peninsula. The uplands and shorelands support the state’s most valuable commercial sockeye salmon fisheries, subsistence fishing and hunting which supply residents of 31 villages and communities with food and cultural identity, and recreational businesses and uses based primarily on sport fishing and hunting.

20. The Order and Plan apply to state-owned land where mineral exploration is occurring under permits issued by DNR. This land includes the Pebble mining claims, which are located at and near the divide between Upper Talarik Creek in the Kvichak drainage and the North and South Forks of the Kuktuli River in the Nushagak drainage. These claims are a few miles north of the western portion of Iliamna Lake, which is one of the primary sockeye-salmon rearing lakes in Alaska, and into which Upper Talarik Creek directly flows from portions of the Pebble claims.

21. The 2005 BBAP and its Classification Order replace and supersede the prior 1984 BBAP (“1984 BBAP,” Exhibit 19) and 1984 classification order. Upon information

and belief, this 1984 Classification Order was Land Classification Order No. SC 84-008.

22. In September 1984, the Alaska Departments of Natural Resources, Fish and Game (“ADF&G”), and Environmental Conservation had jointly adopted the earlier 1984 BBAP. Excepting that the 2005 BBAP, p. 3-133, adds about 343,586 acres in the Kuskokwim drainage which previously had been part of the Kuskokwim Area Plan, the 2005 BBAP for the most part applies to the same state owned or state-selected uplands and shorelands as did the 1984 BBAP, which did not treat or calculate separately the acreage of uplands from adjacent shorelands, as the 2005 BBAP does. Thus, aside from relatively minor amounts of change in land title between 1984 and 2005, deducting the aforesaid 343,586 upland acres in the Kuskokwim drainage means that the 1984 BBAP applied to approximately eleven million five hundred thirty-two thousand acres of state-owned or selected uplands (*i.e.*, approximately 11,532,450 upland acres), plus the shorelands, and certain tide and submerged lands. For simplicity, the Plaintiffs will refer to these total upland acres in the 1984 BBAP as “approximately 11.5 million upland acres” herein.

23. To prepare the 1984 BBAP, and to meet requirements of AS 38.04.065(b) that area plans rely on the available inventory of resources and uses prepared under AS 38.04.060(a), ADF&G produced “Fish and Wildlife Distribution” maps and “Community Subsistence Use Areas” maps for DNR, which are in Appendix A to the 1984 BBAP, and are attached hereto as Exhibits 2 – 9. Exhibit 2 depicts anadromous and non-anadromous freshwater fish habitat and Mineral Closing Order (MCO) No. 393, discussed below. Exhibits 3 – 6 depict “essential” and “important” wildlife habitats. Exhibits 7 – 9 depict the respective subsistence use areas of the 31 villages and communities in the area.

24. The 1984 BBAP, page B-1, defined “essential habitat” in part as –  
habitat necessary to support essential life cycle functions of individual fish and wildlife species and provide for the existence and maintenance of local and/or regional fish and wildlife populations. Relative to other geographical areas or habitat designations, essential habitats are the highest valued fish and wildlife areas. Man-induced disturbance and land use changes in essential habitat areas would be expected to have the most severe and immediate impact on local and/or regional populations of fish and wildlife.

Within the Bristol Bay study area, essential habitat, as depicted on the Fish and Wildlife Distribution Maps, includes: caribou calving areas, winter use areas, and migration corridors; brown bear spring use stream concentration areas; [and] moose winter use areas . . . .

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

26. Based on the mapped inventories of resources and uses, the 1984 BBAP identified nearly all of the approximately 11.5 million upland acres, plus the shorelands, as “essential” or “important” habitat. Subject to the designation of remote settlement as a secondary use on about 60,000 acres, and the limitation that not more than 13,000 acres would be disposed of, the 1984 BBAP co-designated the primary uses of all uplands and shorelands as either (1) habitat and public recreation land, (2) habitat, public recreation, and oil and gas land, (3) habitat and oil and gas land, (4) wildlife habitat, public recreation, and mineral land, and (5) wildlife habitat, mineral and oil and gas, and transportation corridor land. (*See Exhibit 1, 1984 BBAP, Map, “Primary Land Uses on State Lands,” and 1984 BBAP, pp. 2-31 – 2-33*). The 1984 classification order classified all lands accordingly. Most settlement land was in the Kvichak and Nushagak drainages, and little or none was subsequently sold.

27. The 1984 BBAP, p. B-3, defined “recreation” as including “hunting and fishing” and “developed public recreational facilities.” The 1984 BBAP, at pp. 2-30, recognized that “[t]he Bristol Bay region has long been known by sportsmen for its trophy fishing and big game hunting opportunities.” Accordingly, the 1984 BBAP co-designated, and the 1984 classification order co-classified, the vast majority of the uplands and shorelands for public recreation (*i.e.*, approximately 11,095,450 upland

acres), plus the shorelands either as (1) habitat and public recreation land, (2) habitat, public recreation, and oil and gas land, or (3) habitat, public recreation, and mineral land (*see* Exhibit 1). Pursuant to AS 38.04.015, these co-classifications (most often as habitat and public recreation) retained nearly all the affected land in state public ownership. This accommodated, *de facto*, subsistence use of state land, despite the lack of a “subsistence land use” classification category in 11 AAC 55 comparable to the “public recreation land” category at 11 AAC 55.160, which includes land used for sport hunting and fishing.

28. The 1984 BBAP designated, and the 1984 classification order co-classified, the lands at or in the vicinity of what are now the Pebble claims as wildlife habitat and public recreation land, or as wildlife habitat, public recreation, and mineral land.

29. Contemporaneous with adoption of the 1984 BBAP and 1984 classification order, the DNR Commissioner, Esther Wunnicke, issued Mineral Closing Order (“MCO”) No. 393 under AS 38.05.185. MCO No. 393 closed 213,697 acres to new mineral entry including and 100 feet each side of 64 anadromous streams. MCO No. 393 did so based on “Findings of the [DNR] Commissioner” that “development of mining claims ... creates an incompatible surface use conflict with salmon propagation and production, and jeopardizes the economy of the Bristol Bay region and the management of the commercial, sport and subsistence fisheries in the Bristol Bay area,” and that “the best interest of the state and its residents” were served by the closure. This was supported by a similar, accompanying, more detailed “Justification for Stream Closures.” These 64 streams and adjacent uplands include Upper Talarik Creek, the mainstem of the Kuktuli River and portions of the North and South Forks of Kuktuli River.

30. Upon information and belief, the first Pebble mining claims were staked in about 1986. Hundreds, or thousands, of claims have been staked thereafter in the vicinity.

31. In 1990, DNR adopted a Nushagak and Mulchatna Rivers Recreation Management Plan, as an element of the 1984 BBAP. The Rivers Plan applied to about 5.7 million acres of state land in the Nushagak and Mulchatna drainages in Units 6 and 7, and in part of Unit 5 of the 1984 BBAP. The Rivers Plan further subdivided these units and

created a more detailed inventory of subsistence and recreational uses on these lands than on the remainder of lands in the 1984 BBAP.

32. In about March 2003, DNR began a project to revise and replace the 1984 BBAP, including the 1990 Rivers Plan. Rick Fredericksen (“Fredericksen”) of DNR’s Resource Assessment and Development Section of the Division of Mining, Land and Water, was the project manager. The 2005 BBAP, for the most part, re-labels each unit of the 1984 BBAP as a “region,” and further subdivides these into units. This yields about 285 units in the 2005 BBAP, of which about 225 are uplands and shorelands, and about 60 are tide or submerged lands. With respect to the 5.7 million acres in the Rivers Plan, the 2005 BBAP generally uses the unit boundaries of the Rivers Plan, which had already subdivided Units 6, 7 and part of 5 of the 1984 BBAP into smaller units.

33. On or about April 19, 2005, Irwin approved and signed (1) the 2005 BBAP, replaces the 1984 BBAP; (2) the 2005 Nushagak and Mulchatna Rivers Recreation Management Plan (“2005 Rivers Plan”), which remains an element of the 2005 BBAP and replaces the 1990 Rivers Plan; and (3) Land Classification Order SC 04-002.

34. The 2005 BBAP leaves MCO No. 393 in effect entirely, including along Kuktuli River and Upper Talarik Creek in the area of the Pebble claims.

35. For the 2005 BBAP and the inventory required by AS 38.04.060(a) and 38.04.065(b), Fredericksen collected, and in some instances mapped, selected information. The 2005 BBAP contains five maps titled (1) “Historical & Archeological Sites,” (2) “Mineral Closure Orders, Leasehold Location Orders, & Mineral Opening Orders,” (3) “Mineral Resources: Deposits, Prospects, and Occurrences,” which depicts areas of mining claims at Pebble, Sleitat, Shotgun Hills, and Kemuk as hardrock deposits and prospects; (4) “Oil & Gas and Coal Basins,” and (5) “Transportation Corridors,” which depicts a road corridor from Williamsport Bay on Cook Inlet to the Pebble claims.

36. Fredericksen also produced, but DNR did not publish as a part of the 2005 BBAP, maps of non-anadromous marine fish distribution, critical caribou habitats, moose habitats, essential and important brown bear habitats, proposed roads and corridors, and other resources and uses. This Third Amended Complaint refers to these unpublished

maps as “DNR Fredericksen maps.” Plaintiffs attach four as Exhibits 15 – 18. The DNR Fredericksen maps of caribou, moose and brown bear habitats (Exhibits 15, 16 and 17), for the most part, depict either the same, or similar, habitats as had ADF&G’s “Fish and Wildlife Distribution” maps of caribou, moose and brown bear habitats (Exhibits 3, 4, and 6) in the 1984 BBAP. The DNR Fredericksen map of moose habitat (Exhibit 16), like ADF&G’s corresponding 1984 map (Exhibit 4), shows that the Nushagak and Kvichak river drainages contain most of the moose habitat that is on state lands classified by the Classification Order. Upon information and belief, Fredericksen and DNR did not produce, or request ADF&G to produce, any new maps of subsistence use areas relied on by the 31 villages and communities in the area, to reflect any different information than that earlier portrayed on the subsistence maps that ADF&G had produced for the 1984 BBAP, and which are Exhibits 7-9 to this Third Amended Complaint.

37. The 2005 BBAP, Chapter 3, divides the area into regions, and for each region, an allocation table states the “land use designations” of each planning unit within each region. Also in Chapter 3, a final section on “Navigable Rivers and Lakes” does the same for the shorelands of each listed river or lake that is navigable. With respect to uplands, most designations are depicted, in general, on the 2005 BBAP’s Map 0-5, “Land Uses Designations” (Exhibit 14). However, land use designations of shorelands are not identified on this map or any map in the 2005 BBAP. Instead, land use designations of shorelands are identified either on Table 3.1 (2005 BBAP, pp. 3-326 – 3-330) or pursuant to the text of the Plan.

38. Land Classification Order No. SC 04-002 implements the 2005 BBAP by converting designations into classifications, in accordance with “conversion tables” in the 2005 BBAP, pp. 4-5 – 4-6; *i.e.*, Tables 4.2(A) and 4.2(B). This results in reclassifying nearly all uplands and shorelands, and drastically changes, without adequate factual justification or compliance with legal authority, the land use classifications and acreages previously assigned to them by the 1984 BBAP and classification order. Doing so has the following results, which correspond to the First through Eighth Causes of Action in this Third Amended Complaint:

- (a) Of the approximately 11.5 million upland acres classified as “habitat” under the 1984 BBAP and its classification order, the 2005 Classification Order eliminates approximately 93 percent of the prior upland “habitat” classifications – *i.e.*, the 2005 Order eliminates the “habitat” classifications on about ten million seven hundred thousand upland acres (10.7 million acres). This occurs because the 2005 Order is based on the 2005 BBAP which uses an arbitrary, *ad hoc* definition of habitat, and an arbitrary, *ad hoc* list of primarily marine-related “fish and wildlife criteria” to identify inland upland habitat far from the marine environment. For purposes of this Third Amended Complaint, the Plaintiffs will refer to these total upland acres that lost their prior habitat classification as “approximately 10.7 million upland acres.”
- (b) The Order eliminates approximately 87 percent of prior upland “public recreation land” classifications – *i.e.*, it eliminates the “public recreation land” classifications on approximately nine million six hundred thousand upland acres (9.6 million acres) of approximately eleven million one hundred thousand upland acres (11.1 million acres.) classified as “public recreation land” under the 1984 BBAP and its classification order. This occurs because the Order is based on the 2005 BBAP which uses an arbitrary, *ad hoc* definition of “recreation” that excludes both subsistence and sport hunting and fishing. Nearly all lands which lost their prior public recreation classifications are within these same approximately 10.7 million upland acres that lost their prior habitat classifications as well.
- (c) Within the approximately 10.7 million upland acres that lost their prior habitat classifications, the Order further eliminates the prior habitat classifications of the beds of nearly all non-navigable anadromous waters, including Upper Talarik Creek and the upper reaches of the North and South Forks of Kuktuli River. This occurs because the Order is based on the 2005 BBAP which arbitrarily limits habitat classifications of anadromous waters to those that are navigable for purposes of legal title, which has nothing to do with whether the waters and beds are salmon habitat.
- (d) The Classification Order also eliminates the prior habitat and public recreation land classifications of the western half of Iliamna Lake and its shorelands. Upper Talarik

Creek flows from the Pebble mining claims into western Iliamna Lake. This elimination of the prior habitat classification of the western half of Iliamna Lake, including its shorelands, occurs because the Order is based on the 2005 BBAP, in which Table 3.1 (2005 BBAP, at p. 3-328) designates the eastern half in Region 9 as habitat and omits the western half in Region 10; and the 2005 BBAP provides that omitted lands are classified as Resource Management Land.

- (e) The Order further eliminates prior habitat and recreation classifications on the 213,697 acres closed to mineral entry by MCO No. 393 within and adjacent to 64 anadromous streams, including Upper Talarik Creek and the North and South Forks of Koktuli River, except those portions of the 64 streams that are navigable for title purposes, and except the aforesaid river corridors in the Nushagak drainage. This occurs within these same approximately 10.7 million upland acres of prior habitat classifications. This occurs because the Order is based on the 2005 BBAP, which (1) uses an expansive, *ad hoc* definition of the “Mi-Mineral” designation that includes mere exploration, and that allows tailings facilities, associated dams, waste rock disposal, and other mining facilities to be located on land closed to mineral entry but classified as Mineral Land; and (2) shifts approximately 9.1 million acres (*i.e.*, approximately 9,065,823 acres based on the 2005 BBAP, p. 4-4 (Table 4.1(A) and related text) from habitat to “Gu-General Use” designations, including lands subject to MCO No. 393 and previously co-classified as habitat and public recreation land under the 1984 BBAP and its classification order.
- (f) The Order eliminates prior habitat classifications of those portions of anadromous waters used for fish migration and food supply. This occurs because the Order is based on the 2005 BBAP which specifically designates only “those portions of navigable, anadromous streams where spawning and rearing occur” as habitat, and disregards navigable and non-navigable waters where fish migration and food supply occur, including lands and waters specified as important under the Anadromous Fish Act, 16.05.871 *et seq.*

- (g) The Order eliminates the prior habitat classification of about 3000 acres of state uplands lands within the Lower Talarik Creek Special Use Area. This occurs because the Order is based on the 2005 BBAP which fails to consider that a cooperative agreement between DNR, ADF&G and The Nature Conservancy, by which the State acquired certain land from The Nature Conservancy, provides that the all the land in the Special Use Area shall be managed to protect habitat, public recreation including sport fishing, and subsistence. This occurs within the same approximately 10.7 million upland acres that lost their prior habitat classifications.
- (h) The Order eliminates approximately 87 percent of prior classifications of uplands that resulted in retaining land in public ownership – *i.e.*, the 2005 Order eliminates the classifications that result in retention on about ten million upland acres (10.0 million ac.) of the approximately 11.5 million upland acres that had classifications which had resulted in retention under the 1984 BBAP and its classification order. This occurs for the foregoing reasons, and reasons specific to DNR’s acts and omissions concerning subsistence use of state lands and the 2005 BBAP as stated herein.

39. As set forth below, all these effects individually and cumulatively injure plaintiffs’ interests. A Ninth Cause of Action herein challenges DNR’s land use classification categories, at 11 AAC 55.050 -- .230, for lack of a subsistence land use classification category that would include land used for subsistence hunting and fishing, similar to how the Public Recreation Land classification category, at 11 AAC 55.160, is defined to include land used for sport hunting and fishing.

#### **FIRST CAUSE OF ACTION**

**All classifications of uplands which lost their prior habitat classification are based on DNR’s use of (1) an arbitrarily narrow definition of “habitat” that departs from regulation, and (2) an arbitrary list of primarily marine-related “fish and wildlife categories” to identify inland upland habitat far from the marine environment. These classifications include the Pebble planning units and violate sustained yield, AS 38.05.300 and 38.04, and are arbitrary, capricious and abuse discretion.**

40. Plaintiffs reallege and incorporate herein the preceding paragraphs.

41. The Order eliminates approximately 10.7 million upland acres, or about 93 percent, of prior habitat classifications. It reduces such classifications from about 11.5 million upland acres under the 1984 BBAP and its classification order, to about 768,000 acres under the 2005 BBAP and the Order. The 2005 BBAP, p. 2-9, concedes that it designates few uplands as habitat. Hence, the Order classifies few uplands as habitat. The limited upland acreage so designated and classified is, with minor exception, in river corridors of the Nushagak drainage, as depicted by Exhibit 14 (2005 BBAP, Map 0-5).

42. The lands which lost prior habitat classification are readily identified: (1) in general, by comparing Exhibit 1 from the 1984 BBAP to Exhibit 14 from the 2005 BBAP, and (2) by specific planning unit, by using Maps 0-1, 0-2, 0-3, Map 0-4 of the 2005 BBAP. All these exhibits and maps depict the designations under the 1984 or 2005 BBAP, and these designations convert to classifications.

43. The Classification Order classifies inland uplands, rivers, streams and lakes as Wildlife Habitat Land based on the 2005 BBAP which, at p. 2-9, uses the following *ad hoc* definition of the “‘Ha’ (Habitat)” designation and *ad hoc* list of primarily marine-related “fish and wildlife categories” to identify and designate inlands and uplands, far from the marine environment, as habitat:

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

- Anadromous fish spawning and rearing areas in fresh water or brackish intertidal zones
- Estuaries important for rearing or schooling of anadromous fish
- Kelp beds covering large areas that are important marine nurseries
- Pacific herring spawning and rearing concentrations areas
- Eel grass beds that are important marine nurseries
- Waterfowl and/or shorebird concentration areas
- Seabird breeding habitat within each colony area of 500 birds and a two-mile radius around major breeding colonies (more than 20,000 birds)
- Bald eagle nest sites or nest site areas, and known concentrations

- Sea lion haulouts and rookeries
- Harbor seal haulouts and rookeries
- Walrus haulouts and rookeries
- Sea otter pupping areas
- Bear concentration areas (including concentrations by season)
- Important wildlife migration corridors, including nearshore migration routes.

By contrast, the existing, applicable regulatory definition of the “Wildlife Habitat Land” land classification category, at 11 AAC 55.230, defines the term more broadly as:

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

44. DNR’s *ad hoc*, crabbed definition is limited solely to land where a species has a “concentrated use area” that coincides with a “sensitive life history stage where alteration of the habitat and/or human disturbance could result in a permanent loss of a population or sustained yield of the species.” A “permanent loss” is one from which recovery cannot occur. Hence, Chapter 3 of the 2005 BBAP repeatedly refers to the “Habitat” designation as being for areas used by fish and wildlife “during a sensitive life-history stage where alteration of the habitat or human disturbance could result in the permanent loss of a population or sustained yield of a species.” Similarly, except for river certain corridor in the Nushagak drainage, the allocation tables for each region in Chapter 3 designate habitat almost exclusively where marine-related wildlife have “concentrated use areas,” such as walrus, seal and sea lion haulouts, eel grass and kelp beds, herring spawning areas, and seabird colonies, all of which are on the list of “fish and wildlife categories” used to identify habitat. Consistently, the 2005 BBAP (pp. A-6, A-13) defines “haulout” and “tidal resource management zones” in terms of “concentrations” and “high concentration” of wildlife. All of this is at odds with that habitat which is necessary to produce a harvestable surplus, or an annual or periodic

sustained yield, as required by the “sustained yield” clause of the Alaska Constitution, Art. VIII, Sec. 4, and AS 38.04.065(b)(1) and 38.04.910(12).

45. By contrast, 11 AAC 55.230 applies to habitat used at each and every stage of an animal’s life history; *i.e.*, “land which is primarily valuable for . . . fish and wildlife resource production . . . to supply sufficient numbers or a diversity of species to support commercial, recreational, or traditional uses on an optimum sustained yield basis.”

46. DNR’s *ad hoc* list of “fish and wildlife categories” (*i.e.*, “habitats”) fails to include moose or caribou habitats, including those identified as “essential” in the 1984 BBAP, *i.e.*, moose winter use habitat, and caribou winter use and calving habitat depicted on the 1984 BBAP maps (Exhibits 3 and 4). Regardless of which seasonal habitat types are essential or important for moose or caribou, the 2005 BBAP, p. 2-13, asserts that moose and caribou calving and rutting areas change over time, but fails to designate *any* calving and rutting areas as habitat, except to the limited extent that such habitats exist within the aforesaid approximately 768,000 acres designated as habitat which is mostly within the river corridors of the Nushagak drainage, as depicted on Exhibits 3, 4, 14, 15 and 16. Moreover, DNR’s assertion is belied by the unpublished DNR Fredericksen maps. The DNR Fredericksen map titled “Moose Habitat” (Exhibit 16) depicts seasonal moose habitats that differ little, if at all, from the seasonal moose habitats depicted on ADF&G’s 1984 “Moose & Marine Mammal Distribution” map (Exhibit 4) in the 1984 BBAP. The DNR Fredericksen map titled “Caribou Herds and Critical Habitat” (Exhibit 15) depicts what is apparently the range of the Mulchatna and Kilbuk herds as having expanded somewhat since 1984, omits any identification of winter use habitat, and depicts the same caribou calving areas that were identified as “essential” on ADF&G’s 1984 “Caribou Distribution” map (Exhibit 3). Thus, these DNR Fredericksen maps, and the unit-specific inventories in the allocation tables of the 2005 BBAP in referring to such habitats, entirely negate the assertion in the 2005 BBAP that moose calving and rutting areas “have changed over time,” and they undermine the same assertion with respect to caribou. DNR’s failure to include moose and caribou in its “fish and wildlife categories,” and DNR’s assertion that moose and caribou change their calving and rutting areas over

time, have led to the failure of the 2005 BBAP to designate, and the Order to classify as required by AS 38.04.065, 38.05.300 and the “sustained yield” clause, those lands as necessary and proper as Wildlife Habitat Land, where moose concentrate seasonally on moose winter-use areas and caribou concentrate on winter use and calving areas or migration routes. One such caribou winter use and calving area, depicted on the 1984 ADF&G caribou map and the DNR Fredericksen map of critical caribou habitat and identified in the 2005 BBAP at pp. 3-111, 3-112, 3-175, but which lost its prior habitat classification due to the 2005 BBAP and its Order, is a winter use and calving area north of western Iliamna Lake. This area includes almost the entire drainages of Upper Talarik Creek and the North and South Forks of the Kokluli River, including land that is subject to the Pebble claims and other surrounding mining claims.

47. With respect to how the foregoing list of “fish and wildlife categories” is applied, the 2005 BBAP, at pp. 3-323 – 3-330, arbitrarily applies the first – *i.e.*, “[a]nadromous fish spawning and rearing areas in fresh water or brackish intertidal zones” – only to lands beneath waters that are navigable for purposes of legal title and goes no further to lands beneath non-navigable anadromous waters. Therefore, the Classification Order does the same. Then, the 2005 BBAP never applies the last category – *i.e.*, “important wildlife migration corridors,” such as caribou migration routes – to any land contained in the 2005 BBAP. Therefore, the Classification Order does the same.

48. Thus, the lands for which the 2005 Order has eliminated prior habitat classifications on the approximately 10.7 million upland acres, plus shorelands, include:

- (a) Almost every non-navigable, anadromous water body, such as Upper Talarik Creek and upper reaches of the North and South Fork of the Koktuli River, outside the above-mentioned river corridors in the Nushagak drainage;
- (b) Navigable, anadromous water bodies not listed in Table 3.1, such as the western half of Iliamna Lake and lake-bed (shoreland) in Region 10, and waters and beds (shorelands) that are used for the migration and food supply of anadromous fish, but not for spawning and rearing;
- (c) Non-anadromous fish habitat outside legislatively designated conservation areas;

- (d) The vast majority of moose winter-use habitat within roughly 2.5 to 3 million acres of state land north of Iliamna Lake and east of the Mulchatna River corridor units. These winter-use areas include the Upper Talarik Creek drainage at and near the Pebble claims, the area of Nikabuna Lakes north of the Pebble claims, the area southeast of Tutna Lake north of the Pebble claims, and areas along the road corridor to the claims. The Order also eliminates the prior habitat classification in the area of Kemuk Mountain, west of Koliganek. ADF&G's 1984 map of moose habitat had identified all of these lands as "essential" winter habitat (Exhibit 4) and DNR's Fredericksen map of moose habitat identifies them as winter habitat (Exhibit 16). Yet the Order reclassifies most of these land as mineral, settlement or resource management lands;
- (e) The caribou calving areas at and surrounding the Pebble claims and in the upper Mulchatna drainage. ADF&G's 1984 map of caribou habitat (Exhibit 3) identified these areas as "essential" habitat. DNR's Fredericksen map of caribou habitat (Exhibit 15) identifies them as "critical" habitat. Yet the Order reclassifies these lands as mineral or resource management lands;
- (f) Spring-, summer-, and fall-use habitat for moose along the proposed road corridor to the Pebble claims. ADF&G's 1984 map of moose habitat identified these lands as "important" habitat (Exhibit 4). DNR's Fredericksen map of moose habitat identifies them as spring-, summer-, and fall-use areas (Exhibit 16). Yet the Order reclassifies these lands as settlement or resource management lands;
- (g) Brown bear concentration streams at Upper Talarik Creek and many streams along the road corridor. Both ADF&G's 1984 brown bear habitat map (Exhibit 5) and DNR's Fredericksen brown bear map (Exhibit 17) identified these areas as "essential." Yet the Order reclassifies the areas as mineral, resource management or settlement lands;
- (h) Several million acres of caribou winter-use habitat in the Nushagak and Kvichak drainages outside major river corridors of the Nushagak system. ADF&G's 1984 map of caribou habitat (Exhibit 3) identified these lands as "essential" habitat. Yet the Order reclassifies these lands as resource management land;

(i) Shotgun Hills and Sleitat Units. ADF&G'S 1984 map of caribou habitat (Exhibit 3) identified these lands as lying within "essential" caribou winter-use habitat. The 1984 ADF&G brown bear habitat map (Exhibit 5) identified the Shotgun Hills land as "important" habitat for denning. The DNR Fredericksen map of brown bear habitat (Exhibit 17) identified these lands as "important" habitat for denning. Yet the Order reclassifies the land in these units as mineral land.

49. The 10.7 million upland acres which lost their prior habitat classifications designated under the 1984 BBAP also include all Pebble planning units and other units classified solely as Mineral Land under the 2005 BBAP and Classification Order, *i.e.*, Units R06-23 ("Pebble", 48,526 acres, 2005 BBAP, p. 3-111), R06-24 ("Pebble Streams," 36,508 acres, *id.* at p. 3-112) and R10-02 ("Pebble2," 25,046 acres, *id.* at p. 3-175), R06-03 ("Shotgun," 35,409 acres, *id.* at p. 3-102), R06-18 ("Sleitat," 73,099 acres, *id.* at page 3-109) and R06-36 ("Kemuk," 108,390 acres, *id.* at page 3-118).

50. Based on this 10.7-million-acre, 93-percent reduction in habitat classifications, the Order classifies vast acreages solely as Settlement Land, Mineral Land, or Resource Management Land. The lands so classified include (a) essential caribou habitats such as calving areas, (b) essential moose habitats such as wintering areas, (c) important caribou habitats such as summer use areas, (d) important moose habitats such as spring, summer and fall use areas, (e) important brown bear habitats such as summer use areas, fall use areas, and denning areas, and (g) countless non-navigable anadromous fish streams, many of which are specified and listed by ADF&G as important under the Anadromous Fish Act, AS 16.05.871, *et seq.*, and 5 AAC 95.011.

51. The Classification Order shifts approximately 9.1 million upland acres from co-classifications as habitat and recreation land, both of which require the land to be retained in public ownership (under the earlier 1984 BBAP and classification order), to "Resource Management Land," which carries no such requirement.

52. The 2005 BBAP changes settlement from a secondary use (in the 1984 BBAP) to a primary use, and increases the acreage from approximately 60,000 acres (as a secondary use) to over 640,000 acres as a primary use. The Order classifies such land

accordingly, as Settlement Land. Of the over 640,000 acres classified for settlement: (1) nearly half (approximately 284,000 acres) is in the Kvichak and Nushagak drainages, and (2) approximately 207,000 acres are within approximately twenty-five miles of the Pebble claims, or are along the proposed road corridor to the claims (depicted on Exhibit 14). These 207,000 acres would be accessed by proposed roads on the DNR Fredericksen map of proposed roads (Exhibit 18). The larger tracts include: (1) southeast of Tutna Lake, north of the Pebble claims, (2) at Nikabuna Lakes, north of the claims, (3) in the Chulitna River drainage, north of the claims, (4) on upper Chekok Creek near the access route, and (5) on Pile River near the access route. Nearly all of these tracts include lands earlier identified by the 1984 BBAP as “essential” or “important” habitats – *i.e.*, as “essential” moose winter-use habitat in the 1984 BBAP and its map of moose habitats (Exhibit 4); as “essential” brown bear concentration streams in the 1984 BBAP and its map of brown bear distribution (Exhibit 6), and equally as “essential” concentration streams on the DNR Fredericksen map titled “Brown Bear Distribution” (Exhibit 17); or as “important” spring-, summer- and fall-use areas of moose in the 1984 BBAP and its map of moose habitats (Exhibit 4). Unlike lands classified in the habitat, public recreation and mineral land classifications, the settlement land classification carries no requirement that land so classified be retained in public ownership.

53. Thus, the Classification Order reclassified approximately 10 million upland acres (of the approximately 11.5 million upland acres in the 1984 BBAP) from land identified, delineated, classified and required to be retained in public ownership pursuant to the 1984 BBAP, to either Resource Management Land or Settlement Land, neither of which is required to be retained. These actions constitute a total reduction of approximately 87 percent of the upland acreage earlier required under the 1984 BBAP and classification order to be retained in public ownership in the planning area.

54. Because the Land Classification Order is based on (1) DNR’s *ad hoc* definition of habitat, (2) DNR’s *ad hoc* list of primarily marine-related “fish and wildlife categories” which excludes moose and caribou, and (3) its crabbed, arbitrary application of these categories to exclude non-navigable, anadromous waters and wildlife migration

corridors, the Order protects few uplands as habitat (the 2005 BBAP, at 2-9 so acknowledges) and instead protects habitat mostly on “tideland, shoreland, and submerged land areas” (*id.*) where maritime-related wildlife concentrates, such as walrus, seal and sea lion haulouts, eel grass and kelp beds, herring spawning areas, and whale feeding and calving areas. Further, the Order also extinguishes prior habitat classifications on tide and submerged land except for approximately 1.4 million acres of such lands, nearly all of which are in or adjacent to existing, legislatively designated state or federal conservation areas. Thus, aside from the above-mentioned river corridors in the Nushagak drainage (and the eastern half of Iliamna Lake discussed below), nearly all land classified as habitat is coastal tide and submerged land, and is not uplands.

55. With respect to all lands that lost their prior habitat classifications, the Order No. SC 04-002: (1) violates DNR’s duty to apply the constitutional and statutory principles of sustained yield; (2) violates DNR’s statutory duty under AS 38.05.300 to undertake necessary and proper classifications, because it is based (a) on DNR’s arbitrary *ad hoc* definition of habitat, and arbitrary *ad hoc* list of primarily marine-related “fish and wildlife categories,” (b) on DNR’s failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on inventories of lands, resources and values; and (c) on DNR’s failures, under AS 38.04.065(c), to identify and delineate areas that must be retained in state ownership and planned and classified for the various uses and purposes under AS 38.04.015; and (3) abuses discretion.

56. Defendants have thereby injured plaintiffs’ interests in protecting and retaining habitat primarily valuable for fish and wildlife production that supports commercial, recreational, and traditional uses on an optimum sustained yield basis.

## SECOND CAUSE OF ACTION

**All classifications of upland units which lost their prior public recreation classifications are based on DNR's use of an arbitrarily definition of "recreation" that excludes sport hunting and fishing. These classifications include the Pebble planning units and other land classified as Mineral Land, Resource Management Land, and Settlement Land. These classifications violate sustained yield, AS 38.05.300 and 38.04, and are arbitrary, capricious and abuse discretion.**

57. Plaintiffs reallege and incorporate herein the preceding paragraphs.

58. Within the foregoing approximately 10.7 million upland acres that lost prior habitat classifications, the Classification Order eliminates approximately 9.6 million upland acres, *i.e.*, about 87 percent, of the prior public recreation land classifications. This reduces such classifications from about 11.1 million upland acres under the 1984 BBAP and its classification order, to about 1,482,000 upland acres (including the 768,000 acres co-designated and co-classified as habitat) under the 2005 BBAP and its Classification Order.

59. The Classification Order does so based on the 2005 BBAP and its *ad hoc* definition of "recreation" that excludes both subsistence and sport hunting and fishing:

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

By contrast, the existing, duly-adopted and applicable regulation 11 AAC 55.160 defines the "public recreation land" classification category as:

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

Thus, the adopted regulatory definition, like the definition of "recreation" in the 1984 BBAP, includes land that is suitable for sport hunting and fishing, while DNR's *ad hoc* definition in the 2005 BBAP emphatically "does not."

60. All upland planning units which lost their prior classifications as Public Recreation Land are readily identified in general by comparing Exhibit 1 from the 1984

BBAP to Exhibit 14 from the 2005 BBAP (while keeping in mind that Exhibit 14 depicts river corridors in the Nushagak drainage designated as habitat, when they are in fact co-designated as Ha-Habitat and either Rd-Recreation and Tourism-Dispersed or Rp-Public Recreation and Tourism-Public Use Site; and therefore that the Classification Order co-classifies them as Wildlife Habitat Land and Public Recreation Land).

61. The Classification Order reflects the arbitrary exclusion of hunting from recreation. The Kvichak and Nushagak drainages are locally, nationally and internationally significant destinations for sport hunting and fishing, and provide important subsistence resources. With respect to the Nushagak drainage, the 2005 Nushagak-Mulchana Rivers Recreation Management Plan (2005 Rivers Plan) identifies the levels of subsistence and sport hunting and fishing on particular units of 5.7 million acres of state lands within the greater 2005 BBAP. The 2005 River Plan does so with respect to the following units, which under the 2005 BBAP, have lost their prior classification as Public Recreation Land.

- (a) The 2005 BBAP, at p. 3-111, designates Unit R06-23 (“Pebble,” 48,526 acres) as “Mi-Minerals,” so the Classification Order classifies this land as Mineral Land. Yet, the same land is in Unit 19 (“Lower Mulchatna Uplands”) of the 2005 Rivers Plan. The Rivers Plan states, at p. 3-46, that subsistence hunting is high use and sport hunting is high use in this area.
- (b) The 2005 BBAP, at p. 3-112, designates Unit R06-24 (“Pebble Streams,” 36,508 acres) as “Mi-Minerals,” and therefore the Classification Order classifies this land as Mineral Land. Yet this same land is contained in Unit 17 (“Koktuli River Corridor”) of the 2005 Rivers Plan. It states, at p. 3-41, that these lands have high subsistence hunting use, and moderate to high and increasing sport hunting use.
- (c) The 2005 BBAP, at p. 3-102, designates Unit R06-03 (“Shotgun,” 35,409 acres) as “Mi-Minerals,” so the Order classifies this land as Mineral Land. This same land is in Unit 14 (“Nushagak Hills”) of the 2005 Rivers Plan. It states, at 3-34, that brown bear density is high throughout the unit, and that sport hunting for brown bear is high, is primarily by guided non-residents, and is at maximum sustainable levels.

- (d) The 2005 BBAP, at p. 3-109, designates Unit R06-18 (“Sleitat,” 73,099 acres) as “Mi-Minerals,” so the Order classifies it as Mineral Land. Yet this same land is in Unit 11 (“Middle Nushagak Uplands”) of the 2005 Rivers Plan. It states, at p. 3-27, that the unit is an important brown bear hunting area, that pressure is moderate to high, and that most brown bear hunting is by residents and guided non-residents.
- (e) The 2005 BBAP, at p. 3-118, designates Unit R06-36 (“Kemuk,” 108,390 acres) as “Mi-Minerals,” so the Order classifies it as Mineral Land. Yet this same land is in Unit 6 (“Lower Nushagak Uplands”) and in Unit 11 (“Middle Nushagak Uplands”) of the 2005 Rivers Plan. With respect to Unit 6, the 2005 Rivers Plan, at p. 3-17, states that subsistence caribou hunting is high. With respect to Unit 11, it states, at p. 3-27, that the unit is an important brown bear hunting area, that pressure is moderate to high, and that most brown bear hunting is by residents and guided non-residents.
- (f) The 2005 BBAP, at p. 3-101, designates Unit R06-01 (“RRMP 14,” 754,027 acres) as “Gu-General Use,” so the Order classifies it as Resource Management Land. Yet this same land is in Unit 14 (“Nushagak Hills”) of the 2005 Rivers Plan. It states, at p. 3-34, that brown bear density is high throughout the unit, and that sport hunting for brown bear is high, is primarily by guided non-residents, and is at maximum sustainable levels.
- (g) The 2005 BBAP, p. 3-103, designates Unit R06-05 (“RRMP 19,” 1,196,780 acres) as “Gu-General Use,” so the Order classifies it as Resource Management Land. Yet this same land is in Unit 19 (“Lower Mulchatna Uplands”) of the 2005 Rivers Plan. It states, at 3-46, that subsistence hunting is high and sport hunting is high.
- (h) The 2005 BBAP, at p. 3-108, designates Unit R06-13 (“RRMP 11,” 587,500 acres) as “Gu-General Use,” so the Order classifies it as Resource Management Land. Yet this same land is in Unit 11 (“Middle Nushagak Uplands”) of the 2005 Rivers Plan. It states, at p. 3-27, that the unit is an important brown bear hunting area, that pressure is moderate to high, and that most brown bear hunting is by residents and guided non-residents.

- (i) The 2005 BBAP, at p. 3-120, designates Unit R06-42 (“RRMP 6,” 577,023 acres) as “Gu-General Use,” so the Order classifies it as Resource Management Land. Yet this same land is in Unit 6 (“Lower Nushagak Uplands”) of the 2005 Rivers Plan. It states, at p. 3-17, that subsistence caribou hunting is high.
- (j) The 2005 BBAP, at p. 3-133, designates Unit R07-02 (“RRMP 25,” 565,591 acres) as “Gu-General Use,” so the Order classifies it as Resource Management Land. Yet this same land is in Unit 25 (“Upper Mulchatna Uplands”) of the 2005 Rivers Plan. It states, at p. 3-61, that sport hunting use is very high.
- (k) The 2005 BBAP, at p. 3-139, designates Unit R07-16 (“RRMP 19,” 40,343 acres) as “Gu-General Use,” so the Order classifies it as Resource Management Land. Yet this same land is in Unit 19 (“Lower Mulchatna Uplands”) of the 2005 Rivers Plan. It states, at p. 3-46, that subsistence hunting is high and sport hunting is high.
- (l) The 2005 BBAP, at p. 3-81, designates Unit R05-24 (“Portage Creek,” 42,561 acres) as “Gu-General Use,” so the Order classifies it as Resource Management Land. Yet this same land is in Unit 6 (“Lower Nushagak Uplands”) of the 2005 Rivers Plan. It states, at p. 3-17, that subsistence caribou hunting is high.
- (m) The 2005 BBAP, at p. 3-79, designates Unit R05-21 (“Scandinavian Slough,” 59,979 acres) as “Se-Settlement,” so the Order classifies it as Settlement Land. Yet this same land is in Unit 6 (“Lower Nushagak Uplands”) of the 2005 Rivers Plan. It states, at p. 3-17, that subsistence caribou hunting is high.

62. The lands identified in the foregoing paragraph comprise about 4.1 million acres of the 5.7 million acres of state-owned or selected land that is subject to the 2005 Rivers Plan within the greater 2005 BBAP. Nearly all of these 4.1 million upland acres, which comprise about 42 percent of the aforesaid 9.6 million acres that have lost their prior Public Recreation Land classification, are uplands. They demonstrate that (1) the classification of these planning units is based on DNR’s *ad hoc* definition of “recreation” which excludes sport hunting (as well as subsistence hunting and fishing and sport fishing) from recreation, and (2) the 2005 BBAP does not rely upon the inventory of such uses in the Rivers Plan, and therefore, neither does the Classification Order.

63. Upon information and belief, the 2005 Order classifies other lands important for subsistence and sport hunting and fishing as other than as Public Recreation Land.

64. With respect to all of the approximately 9.6 million acres that have lost their prior Public Recreation Land classification, the Classification Order: (1) violates DNR's duty to apply the constitutional and statutory principles of sustained yield for purposes of subsistence and sport hunting and fishing; (2) violates DNR's statutory duty under AS 38.05.300 to undertake necessary and proper classifications, by being based (a) on DNR's arbitrary, capricious definition of "recreation" that excludes both subsistence and sport hunting and fishing, and which has significant practical effects on classification as other than Public Recreation Land; (b) on DNR's failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on the inventory of lands, resources and values; and (c) on DNR's failures, under AS 38.04.065(c), to identify and delineate areas that must be retained in state ownership, and planned and classified, for the various uses and purposes under AS 38.04.015 "to make then available on a sustained yield basis" for subsistence and sport hunting and fishing and other such public uses; and (3) abuses discretion.

65. The Classification Order thereby further injures plaintiffs' interests in retaining and classifying land for public purposes, including recreation, subsistence, and commercial uses of fish and game, and including habitat conservation, all of which benefit from classifying land as public recreation land to retain it in public ownership.

### **THIRD CAUSE OF ACTION**

**All classifications of beds of non-navigable anadromous waters which lost their prior habitat classification are also based on the arbitrary criterion of whether the water is navigable for purposes of legal title to land. This excludes nearly all non-navigable anadromous waters from habitat classification, particularly in the Kvichak and Nushagak drainages, including the Pebble units. This violates sustained yield, AS 38.05.300 and 38.04, and is arbitrary, capricious and abuses discretion.**

66. Plaintiffs reallege and incorporate herein the preceding paragraphs.

67. Within the foregoing, approximately 10.7 million upland acres (which lost their prior, 1984 habitat classification due to DNR's application of its *ad hoc* definition of habitat and its *ad hoc* list of primarily marine-related “fish and wildlife categories”), nearly all beds of non-navigable anadromous waters also have lost such classification for an additional reason that has exacerbated the harm to plaintiffs. The 2005 BBAP, pp. 3-323 – 3-330, creates an arbitrary distinction between the habitat value of (1) *navigable* anadromous waters, and (2) *non-navigable*, anadromous waters. Then, the 2005 BBAP, pp. 3-323 – 3-330, arbitrarily applies the first “fish and wildlife category” – *i.e.*, anadromous fish spawning and rearing areas – only to the shorelands of *navigable*, anadromous water bodies, and not to the shorelands of *non-navigable* anadromous water bodies. The Anadromous Fish Act makes no such distinction. The Act treats all waters and beds of water bodies specified under the Act as important regardless of navigability for purposes of determining land title.

68. The 2005 BBAP, at 3-323, defines the term “shorelands” as follows:

The term ‘shorelands’ is defined as land belonging to the State, which is covered by non-tidal water that is navigable under the laws of the United States up to the ordinary high water mark as modified by accretion, erosion or reliction (AS 38.05.965).

Under federal law, *i.e.*, the constitutional Equal Footing Doctrine and the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.*, legal title to lands beneath navigable waters (*i.e.*, shorelands) vests in the State at statehood. The legal test for navigability in Alaska for such purposes, as established by *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1403-04 (9th Cir. 1989), is that the water must be susceptible to commerce at statehood by a boat used by a guide to guide customers.

69. By contrast, the statutory definition of “public water,” as contained in AS 38.05.965(18), means:

navigable water and all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest.

70. Within the approximately 10.7 million upland acres of land (identified by comparing Exhibits 1 and 14), the beds of non-navigable, anadromous streams which also have lost their prior habitat classifications due to DNR's arbitrary navigable/non-navigable distinction are readily identified by comparing corresponding maps of: (1) navigable waters, available at <http://dnr.alaska.gov/mlw/nav/>, and prepared for purposes of AS 38.04.062, with (2) *An Atlas of Waters Important for the Spawning, Rearing and Migration of Anadromous Fishes* ("Atlas"), and listed as such in the associated *Catalog of Waters Important for the Spawning, Rearing and Migration of Anadromous Fishes*, ("Catalog"), both of which are prepared for purposes of the Anadromous Fish Act, AS 16.05.871 *et seq.* and available at <http://www.adfg.alaska.gov/sf/SARR/AWC/> (sites last visited March 12, 2012). Both the *Atlas* and *Catalog* are adopted into regulation at 5 AAC 95.011.

71. Thus, the Classification Order is based on DNR's arbitrary use of title navigability to determine arbitrarily whether land should be classified as habitat based on navigability-for-title determinations. The Order is based on Table 3.1 (2005 BBAP, pp. 3-326 – 3-330). It designates the primary use of certain listed "shorelands" beneath navigable waters, including anadromous navigable waters. However, Table 3.1 does not have the same result for non-navigable waters, none of which are listed Table 3.1 because they are non-navigable, including those that are anadromous fish waters. Instead, the designated use of lands beneath non-navigable waters is the same as the unit in which they are located. This result is arbitrary, because it fails to consider whether these waters are specified, depicted and listed as important under the Anadromous Fish Act in the *Atlas* and *Catalog*.

72. Navigability for land title is irrelevant to (1) whether or not a water body is important anadromous fish habitat, and (2) the life cycle of salmon and other anadromous fish. This is particularly true where, as here, the State owns the adjacent uplands, and therefore owns the beds of non-navigable waters in any event.

73. Yet under the Classification Order, nearly all non-navigable, anadromous streams which are specified as important under the Anadromous Fish Act have lost their

prior habitat classifications due to DNR's arbitrary distinction based on title navigability, which has excluded streams that are not navigable for purpose of title, from qualifying as habitat. Every unit classified as Mineral Land contains such non-navigable, anadromous streams, *e.g.* – (1) Upper Talarik Creek in Pebble planning unit R10-02 (“Pebble2,” 2005 BBAP, at p. 3-175), (2) the upper reaches of the North and South Forks of the Koktuli River (and tributaries) in the Pebble planning units R06-24 (“Pebble Streams,” *id* at p. 3-112) and R06-23 (“Pebble,” *id* at p. 3-111), (3) Napoli Creek in R06-36 (“Kemuk,” *id* at p. 3-118), (4) unnamed streams in R06-18 (“Sleitat,” *id* at p. 3-109), and (5) unnamed streams in R06-03 (“Shotgun,” *id* at p. 3-102). Similarly, most units classified as Resource Management Land contain non-navigable anadromous streams which have lost their prior habitat classifications due to this arbitrary distinction, *e.g.* – (1) Upper Talarik Creek within Unit R10-01 (“Upper Talarik Creek,” *id* at p. 3-175) and Unit R10-03 (“Iliamna Lake NW,” *id* at p. 3-176), (2) Lower Talarik Creek which is proximate to the Pebble deposit and in units R10-03 (“Iliamna Lake NW,” *id* p. 3-176), R10-04 (“Lower Talarik Creek,” *id* at p. 3-176) and R10-05 (“Lower Talarik Creek SUA,” *id* at p. 3-177). Such non-navigable, anadromous streams, whether classified as Mineral Land or Resource Management Land, are readily identifiable by comparing corresponding maps from the aforesaid websites for anadromous waters and navigable waters.

74. Of all drainages to which the Classification Order applies, the effect of classifying the beds of anadromous waters based on DNR's arbitrary “navigability” distinction, which concerns title navigability only, falls most heavily on the Kvichak and Nushagak drainages. These drainages have the most non-navigable, anadromous reaches of river systems traversing state land within the planning area.

75. DNR's arbitrary exclusion of land beneath non-navigable, anadromous waters from habitat protection makes the land available for classifications that do not require retention in state ownership. Consistently, the 2005 BBAP, at p. 4-10, states “those portions of anadromous, non-navigable streams . . . are considered appropriate for conveyance to municipalities” unless they are identified for retention or designated as “Habitat, Minerals, Water Resources, or Public Facilities-Retain.”

76. Regarding the beds of all non-navigable, anadromous waters that have lost their prior habitat classification but are specified by ADF&G as important under the Anadromous Fish Act, the Classification Order No. SC 04-002: (1) violates DNR's duty to apply the constitutional and statutory principles of sustained yield; (2) violates DNR's statutory duty under AS 38.05.300 to undertake necessary and proper classifications, by being based (a) on DNR's arbitrary, capricious and meaningless legal distinction between navigable and non-navigable anadromous waters, which distinction has significant practical effects on habitat classification, (b) on DNR's failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on the inventory of lands, resources and values, and (c) on DNR's failures, under AS 38.04.065(c), to identify and delineate areas that must be retained in state ownership and planned and classified for the various uses and purposes under AS 38.04.015; and (3) abuses discretion.

77. The Classification Order thereby further injures plaintiffs' interests in the sustained yield of the salmon and other fish and wildlife that inhabit non-navigable anadromous waters.

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

**The classification of the western half of Iliamna Lake as Resource Management Land is based on the 2005 BBAP's failure to designate explicitly a primary designated use of that portion of the lake. This has extinguished the prior habitat and recreation co-classification and violates sustained yield, AS 38.05.300 and 38.04, and is arbitrary, capricious and abuses discretion.**

78. Plaintiffs reallege and incorporate herein the preceding paragraphs.

79. Both the 1984 BBAP and the 2005 BBAP divide Iliamna Lake into an eastern half and a western half, as depicted on Exhibits 1 and 14. The eastern half is in Region 9 of the 2005 BBAP. The western half is in Region 10.

80. Iliamna Lake is a principal rearing, spawning and migration area for sockeye salmon in the Kvichak River system of the Bristol Bay drainages. The lake is specified by ADF&G as an important anadromous water body under the Anadromous Fish Act, and is

listed as such in its aforesaid *Catalog*. Upon information and belief, salmon and trout which spawn in rivers tributary to the lake also utilize the lake during their life cycles.

81. DNR's 1984 BBAP, p. 3-35, addressed Iliamna Lake in the context of what was then the corresponding Unit 10 ("Western Iliamna Lake, Kvichak River") as follows:

The Kvichak River system, including Iliamna Lake and the Alagnak (Branch) River, is the single most important source of salmon in the [Bristol Bay] region. This resource provides for commercial, subsistence and sport users.

Consequently, the 1984 BBAP designated, and upon information and belief the 1984 classification order co-classified, the entire lake and its bed (eastern and western halves) as habitat and public recreation land.

82. DNR's 2005 BBAP, p. 3-167, similarly addresses Iliamna Lake in the context of what is now Region 10 ("Western Iliamna Lake, Kvichak River"):

The Kvichak River system, including the Alagnak (Branch) River and Iliamna Lake, is the single most important source of salmon in the Bristol Bay area. This resource provides for commercial, subsistence and sport users.

Yet the 2005 BBAP and its Classification Order fail to protect Iliamna Lake consistent with this statement of fact.

83. Iliamna Lake is "navigable" for purposes of legal title to the shorelands beneath its waters. Hence, Table 3.1 in the 2005 BBAP, at p. 3-328, designates the eastern half, lying within Region 9, as habitat. However, Table 3.1 entirely omits the western half of the lake, lying within Region 10, from any designated primary use. This occurs even though Region 10 is titled "Western Iliamna Lake, Kvichak River."

84. Upper Talarik Creek flows directly into western Iliamna Lake from that portion of the Pebble mining claims in planning Unit R10-02 ("Pebble2"), in Region 10.

85. Table 3.1 lists approximately seventy-two navigable lakes. Upon information and belief, and based on DNR's aforementioned navigability website, the omission of western Iliamna Lake from Table 3.1 is the only omission of a navigable lake into which

a stream flows from the Pebble planning units or from any other land classified as Mineral Land, under the 2005 BBAP and its Classification Order.

86. DNR's omission of the western half of Iliamna Lake from Table 3.1 results in its designation as General Use. The 2005 BBAP, p. 3-326, states:

Navigable rivers and lakes that are not within State Parks or State Game Refuges, and are not within state-owned, or state selected upland management units, and are not otherwise designated in [Table 3.1] are designated "General Use.

The western half of Iliamna Lake falls within this description. Consistently, the 2005 BBAP, p. 4-2 note 1, states that lands "not otherwise classified on the plan maps are classified General Use" (this is a slight misstatement that confuses a designation of "Gu-General Use" with its corresponding classification as "Resource Management Land," per the conversion tables, *i.e.*, Tables 4.2(A) and 4.2(B) in the 2005 BBAP, at pp. 4-5 – 4-6). The plan maps include Map 0-2 and Map 0-5. Map 0-2 does not identify designations for either the eastern half or the western half of Iliamna Lake. Neither does Map 0-5. Hence, the omission of the western half from Table 3.1, when coupled with the omission of the entire lake from Maps 0-2 and 0-5, is an arbitrary action by DNR.

85. The Classification Order co-classifies only the *eastern* half of the lake, per Table 3.1, as Wildlife Habitat Land and Public Recreation Land. However, because Table 3.1 omits the western half of Iliamna Lake, the Order arbitrary extinguishes the prior habitat and recreation co-classification of *western* half of Iliamna Lake, into which Upper Talarik Creek flows from the Pebble mining claims. The Order therefore classifies the western half as Resource Management Land, per the "conversion table" that applies to shoreland designations; *i.e.*, Table 4.2(B) in the 2005 BBAP, p. 4-6, which states that a "Gu-General Use" designation converts to a Resource Management Land classification.

87. "Resource management land" is defined at 11 AAC 55.200 as either  
(1) land for which a specific resource allocation decision is not possible because of a lack of adequate resource, economic, or other relevant information, or is not necessary because the land is presently inaccessible and remote and development is not likely to occur within the next 10 years;  
or

- (2) land that contains one or more resource values, none of which is of sufficiently high value to merit designation as a primary use.

Iliamna Lake does not fit this definition. As part of the “the single most important source of salmon in the Bristol Bay area,” a primary use of the lake is as habitat for spawning, rearing, migration, and food supply of both fish and humans, as well other fish and wildlife which inhabit the lake and that provide beneficial use to humans.

88. With respect to the western half of Iliamna Lake, the Classification Order: (1) abrogates and violates DNR’s duty to apply the constitutional and statutory principles of sustained yield; (2) violates DNR’s statutory duty under AS 38.05.300 to undertake necessary and proper classifications, by being based (a) on DNR’s arbitrary, capricious failure to include western Iliamna Lake in Table 3.1, which results in designating it as Gu-General Use and classifying it as Resource Management Land, (b) on DNR’s failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on the inventory of lands, resources and values, and (c) on DNR’s failure, under AS 38.04.065(c), to identify and delineate the western half of the Lake as an area that must be retained in state ownership and planned and classified for the various uses and purposes under AS 38.04.015; and (3) abuses discretion.

89. With respect to the western half of Iliamna Lake, the Classification Order thereby further injures plaintiffs’ interests in sustained yield of salmon and other fish and wildlife that inhabit Iliamna Lake, including salmon and trout that utilize the lake and the rivers and streams that feed into it.

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

**The classification of lands closed to mineral entry by MCO No. 393 as Mineral Land or as Resource Management Land, including as Mineral Land in the Pebble units, violates sustained yield, AS 38.05.300 and 38.04, and is arbitrary, capricious and abuses discretion.**

90. Plaintiffs reallege and incorporate herein the preceding paragraphs.

91. MCO No. 393 is depicted on Exhibit 2. MCO No. 393 was issued in September 1984, and it closed to mineral entry the state lands within and 100 feet of each

side of the anadromous portions of 64 identified streams. MCO No. 393 does so regardless of any claimed distinction of "navigability" for title purposes. These closed streams include those portions of Upper Talarik Creek and the North and South Forks of Koktuli River, which are listed in the *Catalog of Waters Important for the Spawning, Rearing and Migration of Anadromous Fishes*, and are depicted in its associated *Atlas*. MCO No. 393 closed these streams and adjacent lands based on a finding and justification that mining would be incompatible with sustained yield of salmon and resident fish important to the commercial, subsistence, and sport fisheries.

92. MCO No. 393 thereby restricts this mining-related aspect of multiple use, but allows other, non-mining-related multiple uses on these lands.

93. The 2005 BBAP designates most of these lands as either "Gu-General Use" or "Mi-Minerals," and the Classification Order accordingly classifies lands so designated as, respectively, Resource Management Land or as Mineral Land. DNR's 2005 actions have extinguished the prior co-classification of these lands as Wildlife Habitat Land and Public Recreation Land.

94. The upper reaches of these lands that are closed to mineral entry along Upper Talarik Creek and the North and South Forks of Koktuli River are within the planning units which contain the Pebble mining claims; *i.e.*, Units R06-24 ("Pebble Streams") and R10-02 ("Pebble2") (2005 BBAP at pp. 3-112, 3-175). Based on the 2005 BBAP, the Classification Order classifies these lands solely as Mineral Land, even though they are closed to mineral entry and are listed as important under the Anadromous Fish Act.

95. The Classification Order implements the 2005 BBAP based on the following *ad hoc* definition of the Mi-Minerals designation (*see e.g.*, 2005 BBAP, at p. 3-4):

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

By contrast, the existing, duly-adopted and applicable regulation 11 AAC 55.130 defines the “Mineral Land” classification category as:

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

96. DNR’s *ad hoc* “Mi-Minerals” definition thus arbitrarily includes land where “significant resources . . . may experience minerals exploration,” whereas the existing, adopted 11 AAC 55.130 definition of the “Mineral Land” classification category is more narrow, and does not include land that may be subject to mere mineral exploration. DNR’s *ad hoc* definition also abuses discretion by arbitrarily allowing tailings facilities, impoundments, associated dams, waste rock disposal, and other facilities related directly to mining, to be located on lands designated (and therefore classified) for minerals even where closed to mineral entry – as MCO No. 393 did. MCO No. 393 was based on the above-stated finding and justification that mining would be incompatible with sustained yield of salmon and resident fish important to the commercial, subsistence, and sport fisheries. DNR’s *ad hoc* definition of Mi-Minerals has unlawfully narrowed the land protection afforded by MCO No. 393.

97. With respect to the lands closed by MCO No. 393, the Classification Order: (1) violates DNR’s duty to apply the constitutional and statutory principles of sustained yield; (2) violates DNR’s statutory duty under AS 38.05.300 to undertake necessary and proper classifications, by being based (a) on DNR’s arbitrary, capricious definition of the “Mi-Minerals” designation that includes mere exploration, and that allows tailings facilities, impoundments, associated dams, waste rock disposal (and other facilities related to mining) to be located on lands designated for minerals even when closed to mineral entry by MCO No. 393, (b) on DNR’s failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on the inventory of lands, resources and values, as reflected in part by MCO No. 393 and its finding and justification, and (c) on DNR’s failures, under AS 38.04.065(c), to identify and delineate areas that must be retained in

state ownership and planned and classified for the various uses and purposes under AS 38.04.015; and (3) abuses discretion.

98. With respect to lands closed to mineral entry by MCO No. 393, the Classification Order further injures plaintiffs' interests in sustained yield and in retaining and conserving land for public purposes, including recreation, subsistence, and commercial uses of fish and game, and habitat conservation.

#### SIXTH CAUSE OF ACTION

**All classifications of navigable, anadromous waters which are migration and food supply areas, but not spawning or rearing areas, and which have lost prior habitat classifications, are based on arbitrary provisions in the 2005 BBAP that limit habitat designations of such waters to those portions that are spawning and rearing areas. This extinguishes prior habitat classifications of migration and food supply areas. This violates sustained yield, AS 38.05.300 and 38.04, and is arbitrary, capricious and abuses discretion.**

99. Plaintiffs reallege and incorporate herein the preceding paragraphs.

100. The *Catalog of Waters Important for the Spawning, Rearing and Migration of Anadromous Fishes* defines terms for purposes of the Anadromous Fish Act, and these definitions were adopted into regulation in 2005 at 11 AAC 195.010 (2005) and since 2009 have been adopted into regulation at 5 AAC 95.011 (see "Attachments to Plaintiffs' [First] Amended Complaint," and under "Reference" at <http://www.adfg.alaska.gov/sf/SARR/AWC/>). The duly-adopted definition of "fish habitat" is "any area on which fish depend, directly or indirectly, during any stage of their life cycle, including but not limited to areas of spawning, rearing, food supply, overwintering, or migration." The duly adopted definition of "specified water body" is "a river, stream, or lake . . . including the portion of the bed(s) and banks up to the ordinary high water mark, from its mouth to its specified upper limit as depicted in the [Atlas]."

101. However, the 2005 BBAP at p. 3-325 states that the land use designation of "navigable" water bodies not located within federal conservation units, State Parks, or State Game Refuges is the same designation as the adjacent upland tract –

except for those streams that are specifically designated Public Recreation and Tourism-Dispersed and those portions of navigable, anadromous streams where spawning and rearing occur, which are designated Habitat..

This distinction limits habitat designations to “those portions of navigable, anadromous streams where spawning and rearing occur.” Similarly, in the *ad hoc* “fish and wildlife categories” used to identify habitat, the first criterion – *i.e.*, “Anadromous fish spawning and rearing areas in fresh water or brackish intertidal zones” – refers only the “spawning and rearing areas.” Similarly, with respect to state-owned navigable streams in federal conservation units, the 2005 BBAP, p. 3-325 n. 29, directs: “Consult the ADF&G anadromous stream catalog to determine if a stream is anadromous and with ADF&G to determine if a specific portion of a stream is considered by that agency to be either a spawning or rearing area.”

102. Thus, wherever navigable, anadromous fish habitat is specified as important under the Anadromous Fish Act and is used for only migration or food supply -- but not for spawning and rearing -- the Classification Order has arbitrarily classified the shoreland (*i.e.*, the submerged bed between ordinary high water marks) as having the same as the classification as the adjacent upland tract, even though the ADF&G specifies it as important under the Anadromous Fish Act.

103. Upon information and belief, salmon generally migrate upstream to spawn and downstream to the ocean through the lower reaches of many navigable, anadromous streams such as the Kvichak and Nushagak Rivers; and these lower reaches are often migration areas, but are not “spawning and rearing areas.” These migration areas concurrently provide the essential upstream and downstream, migratory life cycle function and pathway for salmon, even when the fish use the areas solely for migration upstream from the ocean to freshwater spawning and rearing areas, and downstream from such areas to marine rearing areas.

104. With respect to navigable, anadromous waters and shorelands used by such fish only for migration or food supply, the Classification Order: (1) violates DNR’s duty to apply the constitutional and statutory principles of sustained yield; (2) violates DNR’s

statutory duty under AS 38.05.300 to undertake necessary and proper classifications, by being based (a) on DNR's arbitrary, capricious exclusion of anadromous waters that are specified as important under the Anadromous Fish Act but which are not spawning and rearing areas, (b) on DNR's failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on the inventory of lands, resources and values, including as reflected in MCO No. 393 and its finding and justification with respect to anadromous waters used for migration or food supply, and (c) on DNR's failures, under AS 38.04.065(c), to identify and delineate areas that must be retained in state ownership and planned and classified for the various uses and purposes under AS 38.04.015; and (3) abuses discretion.

105. The Classification Order thereby further injures plaintiffs' interests in the sustained yield of salmon and other fish.

#### SEVENTH CAUSE OF ACTION

**The classification of the Lower Talarik Creek Special Use Area as Public Recreation Land has extinguished its former co-classification as Wildlife Habitat Land. This former classification was required to implement the agreement with the Nature Conservancy by which the State acquired some of the land. This violates sustained yield, AS 38.05.300 and 38.04, and is arbitrary, capricious and abuses discretion.**

106. Plaintiffs reallege and incorporate herein the preceding paragraphs.

107. The 1984, BBAP and its classification order respectively designated and classified the state land in the Lower Talarik Creek watershed as habitat and public recreation land, and MCO No. 393 closed Lower Talarik Creek and lands 100 feet each side to new mining claims.

108. In December 1996, ADF&G, DNR and The Nature Conservancy entered into a Cooperative Agreement (*see* Exhibit 20). It states that all three parties were "concerned about the long-term health of ecologically significant lands associated with the Lower Talarik Creek Watershed ('LTC'), and are willing to accomplish specific tasks in cooperation with each other in order to achieve overall LTC protection." It states that DNR and ADF&G were willing to accept certain private lands, *i.e.*, "the Property,"

described as 155 acres in fee simple and a conservation easement on five additional acres, “subject to the terms and conditions” of the Agreement. Upon information and belief, this total of 160 acres involved a Native allotment which the Conservancy intended to acquire to conserve on Lower Talarik Creek.

109. In Paragraph I.B of this Agreement, ADF&G agreed to manage the Property as part of a larger Special Use Area under “use restrictions associated with the Special Use Area, and the terms of [the Agreement].” In Paragraph V.A, the Conservancy agreed to donate the Property to DNR on behalf of ADF&G, upon either of two alternative pre-conditions being satisfied: (1) passage of ten years from the effective date of the Agreement, or (2) notification from ADF&G that an area sufficient to protect the biological values of the Lower Talarik Creek watershed had been legislatively designated as a critical habitat area. In Paragraph V.A.2, DNR and ADF&G agreed “to take actions necessary to accept conveyance of the Property.”

110. In May 1999, DNR took action necessary to accept conveyance of the Property by establishing the Lower Talarik Creek Special Use Area (*see* Exhibit 20) referred to in the Agreement. The special use area consists of approximately 2915 acres. DNR did so “to protect high value fish and wildlife habitat” in the watershed. In doing so, DNR stated its management intent as follows:

The Bristol Bay Area Plan, 1984, recognizes the habitat and recreation values of the proposed Lower Talarik Creek Special Use Area. The State now has a better knowledge of the rainbow trout fishery and public use, as well as brown bear activity in the area. Therefore the special use area will continue to be managed: (i) for fish and wildlife with emphasis on protecting the rainbow trout fishery and bear population; (ii) to provide for traditional subsistence harvest activities and (iii) to accommodate public recreation. [*see* Exhibit 20]

111. By January 2003, neither of the two pre-conditions to conveyance of the Property by the Conservancy had been satisfied. So, the parties amended their Agreement to provide that the Conservancy would donate the Property irrespective of the pre-conditions (*see* Exhibit 20). In this Amendment, the parties agreed:

ADF&G agrees to manage the Property consistent with applicable statutes and regulations, the intent of Paragraph I. of the COOPERATIVE AGREEMENT, and the management guidelines of the Bristol Bay Area Plan (1984) and the Lower Talarik Creek Special Use Area as adopted May 19, 1999.

In the Amendment, the parties agreed that all other provisions of the 1999 Agreement remained in full force and effect, which include management as part of the Lower Talarik Creek Special Use Area, which had by then been established to “to protect high value fish and wildlife habitat.” The Conservancy then conveyed and DNR accepted the Property. (*See Exhibit 20*)

112. Although the 2005 BBAP, pp. 4-6 – 4-7, asserts generally that the Classification Order does not supersede or replace previous classification orders affecting three special use areas, including the Lower Talarik Creek Special Use Area, in fact, the 2005 BBAP, pp. 3-176 – 3-177, specifically designates the lands in unit R10-04 (“Lower Talarik Creek,” 3,120 acres) and R10-05 (“Lower Talarik Creek SUA,” 160 acres) as solely “Public Recreation and Tourism-Public Use Site.” Moreover, the 2005 BBAP, pp. 3-176 – 3-177, acknowledges that unit R10-04 (3,120 acres) “coincides the Lower Talarik Creek Special Use Area,” and that unit R10-05 (160 acres) is “within the Lower Talarik Creek Special Use Area.” Hence, the Classification Order classifies these units as solely Public Recreation Land. This Order extinguishes the prior 1984 habitat classification with respect to the land which the State owned prior to the 1996 Agreement and, in an agency action necessary to effectuate the Agreement and obtain the 160-acre Property, had designated in 1999 as the approximately 3000-acre Lower Talarik Creek Special Use Area to protect “high value fish and wildlife habitat” in the watershed.

113. With respect to the Lower Talarik Creek Special Use Area, including the Property which The Nature Conservancy conveyed to the State, the Classification Order, (1) violates DNR’s duty to apply the constitutional and statutory principles of sustained yield; (2) violates DNR’s statutory duty under AS 38.05.300 to undertake necessary and proper classifications, by being based (a) on DNR’s arbitrary, capricious failure to comply with the foregoing agreements with The Nature Conservancy, (b) on DNR’s

failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on the inventory of lands, resources and values, as reflected in these agreements, the Special Use Area designation and MCO No. 393 and its associated finding and justification, and (c) on DNR's failures, under AS 38.04.065(c), to identify and delineate areas that must be retained in state ownership and planned and classified for the various uses and purposes under AS 38.04.015, including as habitat necessary to protect the subsistence uses addressed in the Agreement, and (3) abuses discretion.

114. The Order further injures plaintiffs' interests in the sustained yield of salmon, trout and other fish.

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

**All earlier-classified lands that have lost their prior status as retained lands are based on (1) vastly reduced habitat and recreation classifications, and (2) an unconstitutional definition of "subsistence uses." These classifications violate DNR's constitutional and statutory duties of sustained yield, constitutional duties under Art. I, Sec. 1, and Art. VIII, including Sections 3, 15, and 17, of the Alaska Constitution, AS 38.05.300 and 38.04, and are arbitrary, capricious and abuse discretion.**

115. Plaintiffs reallege and incorporate herein the preceding paragraphs.

116. Alaska Statute 38.04.015 lists the "primary public interests in retaining areas of state land surface in public ownership." These include:

- (1) to make them available on a sustained yield basis for a variety of beneficial uses including subsistence, . . . sport hunting and fishing, . . . and other activities of a type which can generally be made available to more people and conducted more successfully if the land is in public rather than private ownership;
- (2) to facilitate mining and mineral leasing by managing appropriate public land for surface uses which are compatible with subsurface uses;
- (3) to protect critical wildlife habitat and areas of special scenic, recreational, scientific, or other environmental concern.

117. With respect to the requirement at AS 38.04.065(c)(2) that area plans must identify and delineate "areas that must be retained in state ownership and planned and classified for various uses and purposes under AS 38.04.015," the Classification Order

implements the 2005 BBAP, AS 38.05.300 and 38.04.065(c)(2), by classifying some state land to categories which retain state ownership, but it does so in an arbitrary manner, as follows. First, as said, the 2005 BBAP uses a crabbed, arbitrary and unlawful *ad hoc* definition of the “Ha-Habitat” designation to define habitat more narrowly than Wildlife Habitat Land is defined at 11 AAC 55.230. The 2005 BBAP then uses a crabbed, arbitrary, and unlawful *ad hoc* list of “fish and wildlife categories” to identify and designate inland uplands as habitat, when the list (1) is primarily marine-related; (2) excludes moose and caribou; and (3) is applied by DNR, with respect to anadromous habitat, only to waters that are “navigable” for title purposes, and then only to “spawning and rearing areas,” and not to those areas, navigable or non-navigable, where fish migrate and are harvested for subsistence in lower reaches of streams, such as at Levelock on the Kvichak River. The Classification Order has arbitrarily eliminated approximately 10.7 million upland acres, or 93 percent, of previous upland habitat classifications existing under the 1984 BBAP and its classification order and eliminated such classifications on navigable waters and shorelands that not used for spawning and rearing but are used for migration or food supply.

118. Second, the 2005 BBAP uses a crabbed, arbitrary, and unlawful *ad hoc* definition of “recreation” to exclude both subsistence and sport hunting from the definition and classification of recreation. Thus, the Order has arbitrarily eliminated approximately 9.6 million upland acres, *i.e.*, about 87 percent, of these prior recreation classifications under the 1984 BBAP and its classification order – such that relatively few uplands are classified as Public Recreation Land for sport or subsistence hunting, and most lands so classified are limited to a few river corridors in the Nushagak drainage. And of these, some are made available for conveyance out of state ownership to satisfy municipal land selection claims.

119. Third, although DNR asserts that it has employed habitat classifications to protect and retain land for subsistence so as to comply with the requirement of AS 38.04.065(c)(2) that area plans must retain land for purposes listed in AS 38.04.015, including subsistence, this assertion with respect to subsistence is erroneous and false. It

is belied by many aspects of the 2005 BBAP, as follows: (1) DNR's *ad hoc* definition of habitat does not mention subsistence or traditional and cultural uses of fish and game; (2) DNR's *ad hoc* list of “fish and wildlife categories” does not mention these uses either; (3) DNR has failed to rely on the inventory in the 2005 Rivers Plan of areas of very high, high, or moderate, subsistence or sport hunting uses; (4) in preparing the 2005 BBAP, DNR failed to prepare or maintain on a continuing basis, as required by AS 38.04.060, an inventory of subsistence use areas comparable to that prepared for the 1984 BBAP regarding the 31 villages and communities in the area; (5) DNR did not rely on the existing 1984 subsistence inventory, and (6) DNR has failed to give priority in inventorying resources and uses, to areas of potential settlement, economic development, and critical environmental concern, as required by AS 38.04.060.

120. The 2005 BBAP, at p. A-13, defines “subsistence uses” as:

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

This *ad hoc* definition is unlawful, because it fails to conform to *McDowell v. State*, 785 P.2d 1 (Alaska 1989)(holding that the Alaska Constitution, Article VIII, Sections 3, 15 and 17, bar the state from limiting subsistence to rural residents – or, as the *ad hoc* definition unlawfully states, “a resident domiciled in a rural area of the state”). Thus, to the extent that the 2005 Classification Order – which is based on DNR's *ad hoc* definition of habitat, DNR's *ad hoc* marine-related list of “fish and wildlife categories” which excludes moose and caribou, and all that has been above about DNR's ignorance of subsistence – has retained land as “habitat” for subsistence, it does so predominantly on coastal tide and submerged land. DNR has arbitrarily designated and retained little inland uplands for inland subsistence hunting, such as for moose and caribou. DNR's actions have arbitrarily assumed that inland upland subsistence, such as by members of the Plaintiff tribes, occurs primarily within coastal areas where marine fish and marine mammals concentrate. Moreover, DNR's actions have assumed unlawfully that its

constitutional and statutory duties to manage state land for sustained yield of subsistence uses, such as subsistence hunting for moose and caribou, is limited to “rural” residents.

121. Fourth, land classifications as Mineral Land, Public Recreation Land, Water Resources Land, and Wildlife Habitat Land result in land retained in state ownership. The definitions of each category have been previously stated herein. Water Resources Land is defined at 11 AAC 55.222 as:

Land classified water resources is land encompassing watersheds or portions of watersheds and is suitable for such uses as water supply, watershed protection, or hydropower sites.

Although designation of land for watershed protection might help to protect land used for subsistence and other public uses in the Kvichak and Nushagak drainages, the 2005 BBAP does not designate any land for watershed protection, or for any other purposes under 11 AAC 55.222, meaning that the Classification Order has classified no land as Water Resources Land.

122. Thus, the Classification Order has eliminated the retained-land status of nearly 10 million acres of state land that under the 1984 BBAP and its classification order carried a habitat or public recreation classification, and therefore were retained *de facto* for subsistence, too. Most of these lands that lost their retained land status are: (1) the aforesaid approximately 9.1 million acres which the 2005 BBAP has designated as Gu-General Use, which the Classification Order classifies to the non-retained status of Resource Management Land; and (2) the aforesaid additional approximately 575,000 acres which the 2005 BBAP designates as Se-Settlement, and which the Classification Order classifies as Settlement Land. Yet the 2005 Rivers Plan shows that many of these lands have high subsistence and sport hunting use. In addition, the 2005 BBAP, Appendix C, at pp. C-1 – C-4, recommends that various municipal selections of Public Recreation Land be approved. Therefore, approved selections may increase the forgoing total acreage that has lost its retained-land status that is required by AS 38.04.065(c)(2).

123. By contrast, with respect to the requirement at AS 38.04.065(c)(1) that area plans must identify and delineate areas of settlement and nonrenewable resource

development, the Classification Order implements the 2005 BBAP, AS 38.05.300 and 38.04.065(c)(1), intentionally to facilitate mining: (1) by classifying state land as Mineral Land in planning units that encompass the Pebble, Kemuk, Sleitat, and Shotgun deposits; (2) by classifying lands proximate to the Pebble units and the access corridor to them as Settlement Land, and (3) by classifying land as Resource Management Land in most areas. The Order does so, based on the following aspects of the 2005 BBAP. First, as asserted earlier, it uses an *ad hoc*, impermissibly-expansive definition of the “Mi-Mineral” designation that includes mere mineral exploration, and includes mining-related tailings facilities, associated dams, waste rock disposal, and other mining facilities, in order to designate lands for minerals, and to therefore classify the lands as Mineral Land, contrary to MCO No. 393. Second, the 2005 BBAP changes settlement from a secondary use to a primary use, then expands by six-fold the acreage designated for settlement (from approximately 60,000 acres as a secondary use, to more than 640,000 acres as a primary use). Thus, the Order classifies over 640,000 acres as Settlement Land, of which nearly half is proximate to the Pebble mining claims or the access corridor to them. Third, the 2005 BBAP shifts about 9.1 million acres from habitat and recreation designations to Gu-General Use, which the Order converts to Resources Management Land classifications, which have no designated primary use and are not required to be retained in state ownership

124. The Classification Order: (1) violates DNR’s duty to apply the constitutional and statutory principles of sustained yield; (2) violates the Alaska Constitution, Article I, Section 1, and Article VIII, including Sections 3, 15, and 17, (3) violates DNR’s statutory duty under AS 38.05.300 to undertake necessary and proper classifications, by being based (a) on the arbitrary acts and omissions stated above; (b) on DNR’s failures, under AS 38.04.065(b), to give priority to planning and classification in areas of renewable resource development and critical environment concern, and to rely on the inventory of lands, resources and values, and (c) on DNR’s failures, under AS 38.04.065(c), to identify and delineate areas that must be retained in state ownership and planned and

classified for the various uses and purposes under AS 38.04.015; and (4) abuses discretion.

125. The Classification Order thereby further injures plaintiffs' interests in retaining land in state ownership to make them available for uses of fish and wildlife on a sustained-yield basis.

#### **NINTH CAUSE OF ACTION**

**DNR violates sustained yield, AS 38.05.300, and abuses discretion by adopting a set of land classification categories at 11 AAC 55.050 - .230 that does not include an express subsistence land use classification category.**

126. Plaintiffs reallege and incorporate herein the preceding paragraphs.

127. Alaska Statute 38.04.900(a) requires DNR to adopt regulations necessary to carry out the purposes of AS 38.04. Alaska Statute 38.04.015 (Public Interest in Retaining State Land in Public Ownership) provides that "subsistence" is one of the "primary public interests in retaining areas of state land surface in public ownership" in order "to make them available on a sustained-yield basis." Alaska Statute 38.04.065(c) provides that regional land use plans (which include area plans) must "identify and delineate" "areas that must be retained in state ownership and planned and classified for various uses and purposes under AS 38.04.015."

128. The 2005 Rivers Plan identifies those lands in the Nushagak-Mulchatna drainage that have "moderate" and "high" subsistence hunting use. The 1984 BBAP identified subsistence use areas for 31 villages and communities in the area. Upon information and belief, other state lands in the Bristol Bay planning area, which DNR has not classified as habitat, qualify as having significant subsistence use.

129. DNR's arbitrary absence of a subsistence land classification category in 11 AAC 55.050 -- .230 unreasonably inhibits plaintiffs, the public, other tribes and governmental entities from using the statutory and regulatory land use planning process, including its public- and agency-involvement procedures required by AS 38.04.065 and 11 AAC 55, to identify, delineate, retain, plan, classify and protect state land for subsistence needs of all Alaskans.

130. DNR has violated its constitutional duties of sustained yield, and abuses discretion, by adopting and implementing a set of land classification categories at 11 AAC 55.050 - .230 that fails to include a subsistence land use classification category. DNR's lack of a subsistence land use classification category abuses discretion.

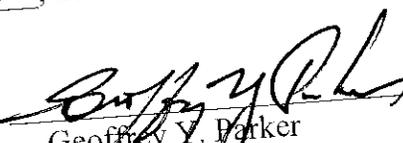
131. DNR's lack of a subsistence land use classification category injures plaintiffs' interests in protecting subsistence and in retaining land in public ownership for subsistence and other public uses.

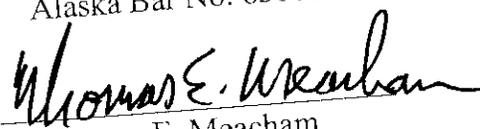
### PRAYER FOR RELIEF

Plaintiffs pray that this Court --

1. Enter declaratory judgment for plaintiffs on each of their separate causes of action;
2. Declare the Land Classification Order No. SC 04-002 is unlawful, and of no continuing legal force and effect, due to DNR's multiple violations of applicable law as alleged in this Third Amended Complaint;
3. Award plaintiffs their costs and attorneys fees as public interest litigants; and
4. Grant plaintiffs such other and further relief as may be appropriate.

Dated at Anchorage, Alaska on April 2, 2012.

By:   
Geoffrey V. Parker  
Alaska Bar No. 8306052

By:   
Thomas E. Meacham  
Alaska Bar No. 7111032

Attorneys for Plaintiffs