

WP26–41/42 Executive Summary	
General Description	<p>Wildlife Proposal WP26-41 requests eliminating the unit-specific provision allowing the take of caribou from a boat moving under power in Unit 18. <i>Submitted by: Yukon Delta National Wildlife Refuge</i></p> <p>Wildlife Proposal WP26-42 requests eliminating the unit-specific provision allowing the take of moose from a boat moving under power in a portion of Unit 18. <i>Submitted by: Yukon Delta National Wildlife Refuge</i></p>
Proposed Regulation	<p>§ 51.26(n)(18)(iii)</p> <p><i>(C) You may take caribou from a boat moving under power in Unit 18.</i></p> <p><i>(D) You may take moose from a boat moving under power in that portion of Unit 18 west of a line running from the mouth of the Ishkowiik River to the closest point of Dall Lake, then to the east bank of the Johnson River at its entrance into Nunavakanukakslak Lake (N 60°59.41' Latitude; W 162°22.14' Longitude), continuing upriver along a line 1/2 mile south and east of, and paralleling a line along the southerly bank of the Johnson River to the confluence of the east bank of Crooked Creek, then continuing upriver to the outlet at Arhymot Lake, then following the south bank west to the Unit 18 border.</i></p>
OSM Conclusion	Support Proposals WP26-41 and WP26-42
Yukon-Kuskokwim Delta Subsistence Regional Advisory Council Recommendation	Oppose
Western Interior Alaska Subsistence Regional Advisory Council Recommendation	Support
Interagency Staff Committee Comments	The Interagency Staff Committee found the analysis to be a thorough and accurate evaluation of the proposal and that it provides sufficient basis for the Regional Advisory Council recommendation and the Federal Subsistence Board action on this proposal.
ADF&G Comments	Support

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Written Public Comments	None

Proponent Statement

The proponent states these regulations are not applicable due to many animals being harvested on navigable water ways, which fall under State jurisdiction. While not explicit in their submitted proposal, the proponent has also expressed concerns about the enforcement issues that have arisen due to conflicting Federal and State regulations regarding this issue.

Current Federal Regulations

§ 51.26 Subsistence taking of wildlife.

(b) Prohibited methods and means. Except for special provisions found at paragraphs (n)(1) through (26) of this section, the following methods and means of taking wildlife for subsistence uses are prohibited:

(4) Taking wildlife from a motorized land or air vehicle when that vehicle is in motion, or from a motor-driven boat when the boat's progress from the motor's power has not ceased.

§ 51.26(n)(18)(iii)

(C) You may take caribou from a boat moving under power in Unit 18.

(D) You may take moose from a boat moving under power in that portion of Unit 18 west of a line running from the mouth of the Ishkowik River to the closest point of Dall Lake, then to the east bank of the Johnson River at its entrance into Nunavakanukakslak Lake (N 60°59.41' Latitude; W 162°22.14' Longitude), continuing upriver along a line 1/2 mile south and east of, and paralleling a line along the southerly bank of the Johnson River to the confluence of the east bank of Crooked Creek, then continuing upriver to the outlet at Arhymot Lake, then following the south bank west to the Unit 18 border.

Proposed Federal Regulations

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§51.26(n)(18)(iii) Unit-specific regulations

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Current State Regulations

5 AAC 92.080. Unlawful methods of taking game; exceptions.

The following methods of taking game are prohibited:

(4) unless otherwise provided in this chapter, from a motor-driven boat or a motorized land vehicle, unless the motor has been completely shut off and the progress from the motor's power has ceased, except that a

(A) motor-driven boat may be used as follows:

(i) in Units 23 and 26 to take caribou;

Relevant Federal Regulations

§ 51.3 Applicability and scope.

(b) The regulations contained in this part apply on all public lands, including all inland waters, both navigable and non-navigable, within and adjacent to the exterior boundaries of the following areas, and on the marine waters as identified in the following areas:

(4) Yukon Delta National Wildlife Refuge, including Nunivak Island: the submerged land and water of Nunivak Island together with the adjacent waters of the Bering Sea extending, for Federal Subsistence Management purposes, 3 miles from the shoreline of Nunivak Island as described in Executive Order No. 5059, dated April 15, 1929.

§51.26(n)(4)(iii) Unit-specific regulations

(A) You may shoot ungulates from a boat. You may not shoot bear, wolves, or wolverine from a boat, unless you are certified as disabled.

§51.26(n)(23)(iv) Unit-specific regulations

(A) You may take caribou while hunting from a boat moving under power in Unit 23.

§51.26(n)(25)(iii) Unit-specific regulations

(B) You may take caribou and moose from a boat moving under power in Unit 25.

§51.26(n)(26)(iv) Unit-specific regulations

(A) You may take caribou from a boat moving under power in Unit 26.

Extent of Federal Public Lands

Unit 18 is comprised of approximately 68% Federal public lands that consist of 65% U.S. Fish and Wildlife Service (USFWS) managed lands and 3% Bureau of Land Management (BLM) managed lands.

Customary and Traditional Use Determination

Rural residents of Unit 18, Lower Kalskag, Manokotak, Stebbins, St. Michael, Togiak, Twin Hills, and Upper Kalskag have a customary and traditional use determination for caribou in Unit 18.

Rural residents of Unit 18, Upper Kalskag, Lower Kalskag, Aniak, and Chuathbaluk have a customary and traditional use determination for moose in Unit 18, that portion of the Yukon River drainage upstream of Russian Mission and that portion of the Kuskokwim River drainage upstream of, but not including, the Tuluksak River drainage.

Rural residents of Unit 18, Lower Kalskag, St. Michael, Stebbins, and Upper Kalskag have a customary and traditional use determination for moose in Unit 18, that portion north of a line from Cape Romanzof to Kusilvak Mountain to Mountain Village, and all drainages north of the Yukon River downstream from Marshall.

Rural residents of Unit 18, Lower Kalskag, and Upper Kalskag have a customary and traditional use determination for moose in Unit 18, remainder.

Regulatory History

In 1991, the provision allowing the take of caribou from a boat moving under power in Unit 23 was adopted into Federal regulations from State regulations when the Federal Subsistence Management Program began (72 FR 29314; June 26, 1991).

In 1993, the Federal Subsistence Board (Board) rejected Proposal P93-002 to allow the take of moose from a boat moving under power in Unit 21 because of the lack of Federal lands bordering the major rivers in the unit (OSM 2000).

In 1994, the Board adopted Proposal P94-82 allowing the harvest of caribou from a boat moving under power in Unit 26 as the amount of Federal lands along major rivers was adequate to support the request (59 FR 29035; June 3, 1994; OSM 2000). Also in 1994, the Board rejected Proposal P94-063A to allow the take of moose and caribou from boats moving under power in Unit 22 because of the lack of

Federal lands bordering the major rivers in the unit (OSM 2000). Additionally in 1994, the Board adopted Proposal P94-008 to allow the take of deer from boats in Unit 4 and subsequently rejected a request for reconsideration for Proposal 94-008 submitted by the Alaska Department of Fish and Game (ADF&G) over jurisdictional concerns (OSM 2000).

In 1995, the Board adopted Proposal WP95-52 allowing the harvest of caribou and moose from a boat moving under power in Unit 25 “to accommodate local customary and traditional use patterns” (60 FR 31545; June 15, 1995), as recommended by the Eastern Interior and Southcentral Alaska Subsistence Regional Advisory Councils (Councils) (FSB 1995: 444–447), and because the amount of Federal lands along major rivers was adequate to support the request (OSM 2000). The Eastern Interior Council’s recommendation stated that the proposal “supports subsistence needs and reflects current practices” (FWS 1995:343).

In 1996, the Board adopted Proposal P96-001 to modify the general prohibition on the use of motorized vehicles to read:

*When taking wildlife for subsistence purposes, you may not:
Take wildlife from a motorized vehicle when that vehicle is in motion, or from a motor driven boat when the boat’s progress from the motor’s power has not ceased, except caribou may be taken from a boat under power in Units 23, 25, and 26, and moose may be taken tom a boat under power in Unit 25.*

Previously, hunters were required to stop the engine of a motorized vehicle prior to shooting, which could be hazardous in river currents and was a reoccurring safety concern raised in earlier proposals (OSM 2000). This Federal regulation is still in effect statewide and conflicts with existing State regulations, which require the motor to be completely shut off.

In 2000, the Board adopted Proposal WP00-41 allowing the harvest of caribou from a boat moving under power in Unit 18 as part of the consensus agenda (65 FR 40760; June 30, 2000). In the proposal analysis, the Interagency Staff Committee commented that the Board had approved comparable requests in other units, and the proposal would benefit subsistence users given the high percentage of Unit 18 lands that are part of the Yukon Delta NWR. ADF&G commented that they had no recommendation, but did not anticipate any biological impacts on the caribou population in Unit 18 from adopting the proposal. Both the Yukon Delta and Seward Peninsula Councils supported the proposal.

In 2010, the Board adopted Proposal WP10-59 with modification to allow the harvest of moose, in addition to caribou, from a boat moving under power in a portion of Unit 18 (the Yukon River drainage below Mountain Village) (75 FR 37921; June 30, 2010). According to the proposal analysis, the modification removed the words “under low or idle power” from the proposal to eliminate potential confusion on the part of hunters and law enforcement concerning what exactly “under low or idle power” meant. Additionally, the proposal analysis noted that other existing regulations allowing take from a boat moving under power (in Units 18, 23, 25, and 26, mentioned above), did not contain the

words “under low or idle power” either (FWS 2010: 630). The modification to the proposal would therefore make the language in the regulation consistent with existing regulations.

The Yukon-Kuskokwim Delta Council also supported the modified proposal, stating, “There have been no reported accidents caused by hunting from moving boats. Resources in the area can sustain the additional harvest of moose. Some people do this as a practical activity while hunting. Keeping the boat under power while hunting in the area is important for safety (to avoid sweepers, rocks, etc.)” (FWS 2010: 631).

ADF&G opposed the proposal, stating its position that Federal subsistence hunting regulations only apply on Federal public lands, not on nonfederal lands and waters, and that the boat accessible waters of the Lower Yukon River are State-owned. ADF&G continued that the proposal would contribute to law enforcement issues (OSM 2010).

Board members commented on the modified proposal by saying that: 1) the moose population in the area was healthy; 2) the proposed hunting method was already in use by Federal subsistence users; and 3) the proposed method was allowed in other management units for caribou and moose and resulted in hunters being more successful and safer. The distinction between State and Federally-managed lands was considered one that Federal subsistence users were already making in order to hunt under Federal regulations, which differed from State regulations in the area (FSB 2011: 253, 261). Additional testimony from Council chairs during Board deliberations noted that privately-owned, State-managed lands in the area were primarily village corporation lands, owned by local residents who were aware of the boundaries (FSB 2011:260).

In 2011, the Alaska Board of Game (BOG) opposed Proposal 12 to allow the take of moose from a boat moving under power in the lower Yukon River drainage area of Unit 18 because of concerns over wounding loss and hunter safety (OSM 2012).

In 2012, the Board adopted Proposal WP12-50, with modification to expand the portion of Unit 18 in which you may take moose from a boat moving under power to also include the Unit 18 remainder hunt area (**Map 1**). The modification was to clarify the regulatory language. The Yukon-Kuskokwim Delta Council supported the proposal stating “This is a historic standard practice. No accidents have been reported using this practice while hunting. People are trying to efficiently put food on the table. People wish to abide by the law while hunting.” ADF&G opposed the proposal for the same reasons as Proposal WP10-59.

Discussion and Effects

If these proposals are adopted, the take of caribou and moose from a boat moving under power would be prohibited in Unit 18, reducing subsistence opportunity. No significant effects on wildlife populations are anticipated.

Adopting these proposals would decrease regulatory complexity for federally qualified subsistence users hunting moose or caribou from a motor-driven boat in a navigable waterway within Unit 18 as

they will not be subject to potential law enforcement action by State law enforcement officers enforcing the State's view that the Federal regulation is unenforceable. Under Federal subsistence regulations, federally qualified subsistence users will no longer be authorized to shoot at a moose or a caribou from a motor-driven boat when the boat's progress from the motor's power has not ceased. However, they may choose to hunt under applicable State regulations that authorize take of a moose or caribou from a motor-driven boat whose motor has been completely shut off and the progress from the motor's power has ceased. However, State and Federal regulations concerning the take of wildlife from a boat will remain misaligned statewide to some extent. State regulations require a boat's motor to be completely shut off, while Federal regulations only require progress from the boat's motor to have ceased, allowing motors to remain running.

In the past, the Board has generally adopted or rejected proposals allowing the take of wildlife from boats moving under power based on the percentage of Federal lands along major, navigable rivers in the unit. However, allowing the take of caribou and moose from a boat under power under Federal regulations creates confusion for users and subjects them to potential law enforcement actions by the State. Users complying with Federal regulations may violate State regulations that the State will enforce against them based on the current State position that the Federal government does not have the authority to regulate hunting from navigable waters that are owned by the State.

OSM CONCLUSION

Support Proposals WP26-41 and WP26-42

Justification

While adopting these proposals decreases subsistence opportunity, these existing provisions increase the risk of citations for federally qualified subsistence users and have a high risk of confusing federally qualified subsistence users who may not understand that compliance with the Federal regulation may nonetheless subject them to State law enforcement actions.

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SUBSISTENCE REGIONAL ADVISORY COUNCIL RECOMMENDATIONS

Yukon-Kuskokwim Delta Subsistence Regional Advisory Council

The Council voted to **oppose** WP26-41/42. They stated safety concerns as their primary reason for opposing, citing the highly variable and often dangerous water and weather conditions encountered when hunting and the importance of having full control of a boat during such conditions and with multiple people and loaded firearms on board. The Council expressed frustration with the on-going disputes over navigable waters and the impact this has on subsistence users. They agreed that the best course of action is to change the State regulations to match the Federal ones and intend to submit a proposal to the Alaska Board of Game during the upcoming meeting cycle to address this issue and better align regulations.

Western Interior Alaska Subsistence Regional Advisory Council

The Council voted to **support** WP26-41/42. The Council considered the proposal to be inconsequential, as it was not expected to substantially change moose harvest practices for rural users. Moose hunting from a boat on a river often occurs in dynamic conditions, which can make it challenging to assess regulatory details in real time as animals move quickly away from approaching boats. Overall, the Council concluded the proposal would not result in a meaningful change in harvest behavior.

INTERAGENCY STAFF COMMITTEE

The Interagency Staff Committee found the analysis to be a thorough and accurate evaluation of the proposal and that it provides sufficient basis for the Regional Advisory Council recommendation and the Federal Subsistence Board action on this proposal.

Alaska Department of Fish and Game Comments

Wildlife Proposal WP26-41-42

Wildlife Proposal WP26-41 and WP26-42 would eliminate the unit-specific provision allowing the take of caribou and moose from a boat moving under power in Game Management Unit (GMU) 18.

Position

The Alaska Department of Fish & Game (ADF&G) **SUPPORTS** these proposals as they would remove federal regulations that regulate activities that are technically within the State's jurisdiction. The State's authority to regulate state-owned submerged lands and navigable waters within federal conservation system units in Alaska is recognized in numerous provisions in ANILCA and further supported in judicial findings. Existing provisions allowing caribou and moose to be harvested from a boat moving under power is inconsistent with state hunting regulations.

Executive Order 15153, Sec. 3(b)(xxii) directs the Department of the Interior to conduct meaningful consultation with State fish and wildlife agencies prior to enacting land management plans or regulations affecting hunting and fishing opportunities on public lands. This directive was reinforced by Secretarial Order 3447, which calls for removing unnecessary barriers to hunting and fishing, expanding access where compatible, improving coordination with State agencies, and ensuring transparent review of any proposed restrictions.

Background

State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution as affirmed in *Utah v. United States*, 482 U.S. 193 (1987). Under the doctrine, all states under the Union on an equal footing with respect to sovereign rights and powers, title to the beds of navigable waters vested in the newly formed State of Alaska in 1959.

On December 2, 1980, the Alaska National Interest Lands Conservation Act (ANILCA) became law. This act created or added 150 million acres to various federal conservation system units (CSU). In ANILCA, Congress did not take away the state's power to regulate state-owned submerged lands within federal CSUs in Alaska. Numerous provisions in ANILCA recognize and respect the state's authority over state-owned land. Because these "withdrawals" occurred after the date of statehood, there is no disagreement between the state and federal governments that navigable waters within the various CSU's are owned by the state.

Sturgeon v. Frost (Sturgeon I), 577 U.S. 424 (2016), concerned the National Park Service's (NPS) attempt to prohibit the use of a hovercraft on the Nation River within the Yukon-Charley Rivers National Preserve. The Supreme Court unanimously found that the Ninth Circuit had misinterpreted ANILCA, emphasizing that Section 103(c) restricts federal regulatory authority within conservation system units only to federally owned public lands. The Court held that ANILCA is unique to Alaska and must be applied according to its explicit terms.

After remand, the Ninth Circuit again found in favor of NPS authority, and the case returned to the Supreme Court. In *Sturgeon v. Frost* (Sturgeon II), 587 U.S. 207 (2019), the Court again ruled

unanimously for Sturgeon. The Court held definitively that navigable waters within CSUs—where the State of Alaska owns the underlying submerged lands—are 'non-public' lands for the purposes of ANILCA.

These two landmark decisions affirm the State of Alaska's regulatory jurisdiction over navigable waters and clarify that ANILCA protects the State's authority from being displaced by federal land management regulations within CSUs.