

# NATIONAL WILDLIFE REFUGES AND INTENSIVE MANAGEMENT IN ALASKA: ANOTHER CASE FOR PREEMPTION

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## ABSTRACT

*In this Article, the Author explores the attempts made by the State of Alaska to implement various regulations on National Wildlife Refuge System (NWRS) lands in the state, examining the conflict between the State's Intensive Management System and the mission of the NWRS, which is managed by the U.S. Fish and Wildlife Service, a federal agency. The Author discusses the concept of preemption generally and concludes that actions undertaken by Alaska's Intensive Management System are in direct conflict with the federal mandates of the NWRS, and thus the State's actions should be preempted.*

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## INTRODUCTION

The 2007 article, “Preemption of State Wildlife Law in Alaska: Where, When, and Why,”<sup>1</sup> made the argument that attempts by the State of Alaska to implement its intensive management law or other regulations that amounted to an intensive type of wildlife management (such as managing for desirable prey species abundance at the cost of natural processes and population dynamics) on National Park Service lands were in direct conflict with the Park Service’s mandates as laid out by Congress, and should therefore be preempted on Park Service lands.<sup>2</sup> This conclusion left open the question of whether a similar problem exists with regard to other federal lands in Alaska. This follow-up Article examines the same issue from the perspective of the U.S. Fish and Wildlife Service (FWS) and the National Wildlife Refuge System (NWRS).

Part I of this Article briefly describes state intensive management law and practices and their relevance to the NWRS. Part II provides an analysis of the relevant federal legislation guiding the FWS in its management of the NWRS, as well as the courts’ and FWS’s interpretations of that legislation. Part III presents the concept of preemption and its application in this context, followed by a discussion of the legality of intensive management on NWRS lands.

### I. STATE INTENSIVE MANAGEMENT

The federal government sets the rules and regulations for subsistence hunting on federal lands in Alaska, as required under the Alaska National Interest Lands Conservation Act (ANILCA).<sup>3</sup> In general, however, it is the State of Alaska that sets the terms for non-subsistence hunting in Alaska, on both federal and non-federal lands. Non-

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1. Julie Lurman & Sanford P. Rabinowitch, *Preemption of State Wildlife Law in Alaska: Where, When, and Why*, 24 ALASKA L. REV. 145 (2007).

2. *Id.* at 146.

3. Pub. L. No. 96-487, §§ 801-816, 94 Stat. 2371 (1980) [hereinafter ANILCA] (codified at 16 U.S.C. 410hh-3233 (2006), 43 U.S.C. §§ 1602-1784 (2006)). Federal subsistence management falls under the authority of the federal subsistence board. The board comprises the Alaska regional directors of the Fish and Wildlife Service, the National Park Service, the Forest Service, the Bureau of Land Management, and the Bureau of Indian Affairs, as well as the chair appointed by the Secretary of the Interior. DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 302 (2d ed. 2002).

subsistence hunting is allowed on nearly all refuge lands in Alaska. As a result, the State's actions and policies can have a significant impact on refuge lands. Additionally, there is constant pressure from the State to harmonize federal subsistence hunting regulations with the State's hunting regulations.<sup>4</sup>

Alaska's fish and wildlife management program, like most state wildlife programs, is geared toward providing hunting opportunities.<sup>5</sup> This tendency is exemplified by the State's intensive management program. Intensive management in Alaska has two distinct faces: the first is the official Intensive Management program formalized through Section 16.05.255 of the Alaska Statutes, and the second is the regular use of an intensive type of wildlife management.<sup>6</sup>

The goal of the State's Intensive Management statute is to maintain, restore, or increase the abundance of certain game populations (specifically moose, caribou, and deer) for human consumption.<sup>7</sup> The intention of the program is to maintain a "sustained yield," which the statute defines as "the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game, subject to preferences among beneficial uses, on an annual or periodic basis."<sup>8</sup> The regulations implementing this statute require the Board of Game to "utilize active management of habitat and predation as the major tools to reverse any significant reduction in the allowable human harvest of the population."<sup>9</sup> If prey population levels set by the State are not being met in a particular game management unit, then the State must officially designate the unit as an Intensive Management area and implement intensive management practices.<sup>10</sup>

Implementing intensive management may take the form of lethal predator control, but may also take various other forms, such as:

[I]ncreasing bag limits and liberalizing hunting seasons for predators to increase their harvest; eliminating the need for hunters to obtain or purchase hunting tags or permits for

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4. See, e.g., Letter from Governor Frank Murkowski, State of Alaska, to Secretary Gale Norton, United States Department of the Interior (Jan. 10, 2005) (on file with author) (pressuring the federal subsistence board to defer to state hunting regulations).

5. Robert Fischman, *From Words to Action: The Impact and Legal Status of the 200 National Wildlife Refuge System Management Policies*, 26 STAN. ENVTL. L.J. 77, 95 (2007).

6. For a more complete discussion of this issue, see generally Lurman & Rabinowitch, *supra* note 1.

7. ALASKA STAT. § 16.05.255 (2008).

8. *Id.* (emphasis added).

9. ALASKA ADMIN. CODE tit. 5, § 92.106(6) (2001).

10. ALASKA STAT. § 16.05.255 (2008).

predators, thereby permitting the “incidental” taking of these animals; same day airborne hunting and trapping which allow taking the same day one flies in an aircraft; allowing easier and greater use of motor vehicles while hunting to increase the hunter’s advantage; expanding the allowable means and methods of hunting for predators, like baiting or feeding, thereby creating additional opportunities for taking; allowing the sale of raw hides and skulls thereby creating economic incentives for taking; and many others.<sup>11</sup>

These less controversial, though more ubiquitous, regulatory changes typically apply to all hunters within the relevant game management unit. They even apply regardless of whether that unit encompasses federal lands or not, unless an exception is written into the regulation itself. Thirteen out of the sixteen federal wildlife refuges in Alaska overlap with officially designated Intensive Management areas.<sup>12</sup> Of those thirteen, twelve are entirely or largely within Intensive Management areas.<sup>13</sup> While lethal predator control for prey enhancement is not currently permitted on any refuge in Alaska,<sup>14</sup> the other types of Intensive Management activities mentioned above are permitted. This problem, therefore, is extremely pervasive. Over eighty percent of the refuges in Alaska are affected by Intensive Management, and for over ninety percent of those refuges affected, all or nearly all of the refuge’s land base is affected.

The Intensive Management policy and the types of actions it engenders are technically limited to areas officially designated as “Intensive Management” areas and to species officially recognized by the Intensive Management statute.<sup>15</sup> However, the philosophy behind the Intensive Management approach spills over to the regulation of other species and to areas outside those marked Intensive Management

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11. Lurman & Rabinowitch, *supra* note 1, at 156.

12. See ALASKA ADMIN. CODE tit. 5, § 92.108 (where the game management units described as “positive” are Intensive Management Areas).

13. ALASKA ADMIN. CODE tit. 5, § 92.108.

14. United States Fish and Wildlife Service, United States Department of the Interior, Alaska Maritime National Wildlife Refuge, Biological Projects, Invasive Species Management, <http://alaskamaritime.fws.gov/whatwedo/bioprojects/restorebiodiversity/restoremain.htm> (last visited Apr. 10, 2010). There are some examples of predator control on refuges in Alaska for other purposes, such as removal of invasive species or protection of threatened or endangered species. *Id.* For example, in the Alaska Maritime National Wildlife Refuge, non-native, invasive foxes and rats have been removed to protect endangered, native bird species. *Id.* Intensive management techniques are also utilized by the FWS on some refuges in other states for similar reasons or where the maintenance of natural processes is no longer possible due to disturbance. *Id.*

15. ALASKA STAT. § 16.05.255 (2008).

where the State is still primarily interested in providing game species for hunting. As such, many hunting regulations outside official Intensive Management areas are established with an eye toward limiting predator species in order to increase the abundance of game species for human hunting purposes.<sup>16</sup> This broader concept of intensive wildlife management is also problematic for the FWS.

## II. FISH AND WILDLIFE SERVICE MANAGEMENT MANDATES

The FWS must meet obligations under many statutes in its management of the NWRs. Three statutes in particular provide the greatest source of authority and responsibility for the agency in its management capacity: (1) the 1997 National Wildlife Refuge System Improvement Act<sup>17</sup> (which amended the National Wildlife Refuge System Administration Act of 1966<sup>18</sup>); (2) the 1980 Alaska National Interest Lands Conservation Act;<sup>19</sup> and (3) the Wilderness Act of 1964.<sup>20</sup>

### A. National Wildlife Refuge System Improvement Act

The National Wildlife Refuge System Improvement Act (“Improvement Act”) states that refuges must be managed to fulfill the overall mission of the refuge system and the purposes of the individual refuge.<sup>21</sup> The Improvement Act states that the mission of the system is to “administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plants resources and their habitats within the United States for the benefit of present and future generations of Americans.”<sup>22</sup> The statute defines “conservation” and “management” as synonymous, both meaning “to sustain and, where appropriate, restore and enhance, *healthy populations* of fish, wildlife, and plants utilizing . . . methods and

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16. For example, Proposal No. 156, passed in March 2003, increased the hunting season and bag limits for coyote in many units, in part because the “board recognized the pressure on [Dall Sheep] and small game populations” due to coyote predation (Dall Sheep are not targeted by the Intensive Management Statute). See Alaska Department of Fish and Game, Summary of Actions, <http://www.boards.adfg.state.ak.us/fishinfo/meetsum/meetsum.php> (last visited Apr. 10, 2010).

17. Pub. L. No. 105-57, 111 Stat. 1252-1260 (1997).

18. Pub. L. No. 89-669, 80 Stat. 927 (1966) (codified at 16 U.S.C. §§ 668dd-668ee (2006)).

19. 16 U.S.C. §§ 3101-3233 (2006).

20. 16 U.S.C. §§ 1131-1136 (2006).

21. 16 U.S.C. § 668dd(a)(3)-(4) (2006). Where system mission and refuge purposes conflict, individual refuge purposes take precedence. 16 U.S.C. § 668dd(a)(4)(D) (2006).

22. 16 U.S.C. § 668dd(a)(2) (2006).

procedures associated with modern scientific resource programs.”<sup>23</sup> This restates the system mission without providing much additional guidance,<sup>24</sup> though it makes clear that maintenance of “healthy populations” is part of the statute’s goal.

Professor Robert Fischman suggests two possible interpretations of the phrase “healthy populations:” (1) healthy is “only a quantitative threshold where population levels are sustainable;” or (2) healthy “would include both quantitative characteristics (e.g., the number of individuals in a population) and qualitative attributes (e.g., the condition of health).”<sup>25</sup> Neither interpretation is necessarily incompatible with the idea of suppressing some populations in an effort to establish an abundance of other populations; this is what the State of Alaska professes it will do, while still maintaining sustainable levels of all populations.<sup>26</sup>

A third possible interpretation is that “healthy populations” should be understood in light of ANILCA, which was passed seventeen years before the Improvement Act and also employs “healthy populations” as a management standard.<sup>27</sup> There are several reasons why it seems likely that Congress had at least one eye on ANILCA when drafting the Improvement Act. First, ANILCA represents a first attempt by Congress to create management goals for wildlife refuges that transcend a single refuge—something the Improvement Act accomplishes on a larger scale. Second, as stated above, the two statutes employ remarkably similar “healthy populations” language in fleshing out the agency’s management goal.<sup>28</sup> Third, the Improvement Act specifically mentions ANILCA and states that where the two conflict, ANILCA supersedes the Improvement Act.<sup>29</sup> It makes sense, then, that the “healthy populations” language in both statutes was intended to mean the same thing. Otherwise, Congress would have established a deliberate conflict between the management of refuges in Alaska and the management of refuges in the rest of the country. This outcome seems extremely unlikely given that one of the purposes behind the Improvement Act

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23. 16 U.S.C. § 668ee(4) (2006) (emphasis added).

24. ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 81 (2003).

25. *Id.* at 81–82.

26. See Alaska Department of Fish and Game, Wildlife Conservation, <http://www.wildlife.alaska.gov/index.cfm?adfg=control.main> (last visited Apr. 10, 2010) (describing the goals of intensive management to raise levels of huntable prey species while “maintaining healthy populations of all . . . resources, including moose, caribou, wolves, and bears”).

27. See ANILCA, *supra* note 3, § 802.

28. The ANILCA language will be examined in detail, *infra* Part II.B.

29. 16 U.S.C. § 668dd(e)(1)(a) (2006).

was to create greater coordination within the refuge system.<sup>30</sup> Fourth, ANILCA was a testing ground for other management concepts that have since become major components of the Improvement Act, most notably the requirement to perform refuge-level planning.<sup>31</sup> Lastly, Representative Don Young of Alaska was Chair of the House Resources Committee at the time the Improvement Act was being drafted and debated.<sup>32</sup> It is likely he was intimately familiar with the language and requirements of ANILCA since that statute has had such an important impact on the State of Alaska.

By understanding the “healthy populations” language of the Improvement Act in terms of the “healthy populations” language of ANILCA, it is clear that this management criterion truly does conflict with state goals of artificially increasing prey numbers by removing or greatly limiting the number of predators from the system.<sup>33</sup>

In meeting its system mission, the FWS must “ensure that . . . biological integrity, diversity, and environmental health are maintained . . .”<sup>34</sup> The statute does not provide a definition for this language, but the agency provides an interpretation in its manual.<sup>35</sup> “Biological integrity” is defined as “biotic composition, structure, and functioning at genetic, organism, and community levels comparable with historic conditions, including the *natural biological processes* that shape genomes, organisms, and communities.”<sup>36</sup> “Biological diversity” is defined as “the variety of life and its processes, including the variety of living organisms . . . and the communities and ecosystems in which they occur.”<sup>37</sup> “Environmental health” refers to the composition structure and functioning of abiotic features and processes (i.e., non-living chemical

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30. National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 5, 111 Stat. 1252 (1997).

31. *Id.* § 7.

32. CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, LIST OF STANDING COMMITTEES AND SELECT COMMITTEES AND THEIR SUBCOMMITTEES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES TOGETHER WITH JOINT COMMITTEES OF THE CONGRESS WITH AN ALPHABETICAL LIST OF THE MEMBERS AND THEIR COMMITTEE ASSIGNMENTS, ONE HUNDRED FIFTH CONGRESS 22 (1997), available at <http://clerk.house.gov/105/scsfinal105.pdf>.

33. It is also worth noting that the Improvement Act defines “fish and wildlife” to mean “any wild member of the animal kingdom,” and therefore the protections afforded by the statute apply not only to commercially or recreationally valuable species, but to all species. 16 U.S.C. § 668ee(7) (2006).

34. 16 U.S.C. § 668dd(a)(4)(B) (2006).

35. See U.S. FISH AND WILDLIFE SERVICE MANUAL: LAND USE AND MANAGEMENT SERIES: BIOLOGICAL INTEGRITY, DIVERSITY, AND ENVIRONMENTAL HEALTH, 601 FW 3.6(A)–(E) (2001).

36. *Id.* at 3.6(B) (emphasis added).

37. *Id.* at 3.6(A).

and physical environmental factors).<sup>38</sup> Lastly, “historic conditions” are defined as the “composition, structure, and functioning of ecosystems resulting from *natural processes* that we believe, based on sound professional judgment, were present prior to substantial human related changes to the landscape.”<sup>39</sup> Further, in explaining the agency’s position, the manual states that the agency favors “management that restores or mimics natural ecosystem processes or functions. . . .”<sup>40</sup> On the specific issue of population management, the manual states that the agency “formulate[s] refuge goals and objectives for population management by considering *natural densities*, social structures, and *population dynamics* at the refuge level. . . . [The agency] manages populations for *natural densities and levels of variation*.”<sup>41</sup> This language indicates that, for the agency to meet the system mission of wildlife conservation, the FWS must maintain *natural densities*, population dynamics, and levels of population variation that reflect historic conditions.<sup>42</sup> This suggests that any State attempts to manipulate population densities, dynamics, or levels of variation to achieve unnatural results are directly in conflict with FWS requirements.<sup>43</sup>

## B. Alaska National Interest Lands Conservation Act

ANILCA<sup>44</sup> is the establishment legislation for most refuges in Alaska, and it expanded the area of all pre-existing refuges. ANILCA, therefore, provides nearly all of the refuge purposes for each of the

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38. *Id.* at 3.6(C).

39. *Id.* at 3.6(D) (emphasis added).

40. *Id.* at 3.7(E).

41. *Id.* at 3.14(B)–(C) (emphasis added).

42. The manual even goes so far as to say that if “events occurring off refuge lands or waters may injure or destroy biological integrity, diversity, and environmental health of a refuge,” the agency’s responsibility to the public resources in its care requires that “refuge managers . . . address these problems.” *Id.* at 601 FW 3.20.

43. The Fish and Wildlife Service developed a policy on biological integrity of having the species’ composition, abundance and interrelationships with each other and with their habitat comparable to historical conditions. Under the policy, predators and prey would be managed for natural densities and levels of variation using historical conditions as the frame of reference. See Greg Bos, former FWS Alaska Subsistence Coordinator, Remarks at an Eastern Interior Federal Subsistence Regional Advisory Council Meeting 164–65 (Oct. 18, 2006) (transcript on file with author). Similarly, Freyfogle and Goble argue that this language “calls for the conservation of basic ecological processes *with little human alteration*, including the natural biological processes that shape genomes, organisms, and communities.” ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 212 (2009) (emphasis added).

44. 16 U.S.C. §§ 3101–3233 (2006).



refuges in Alaska.<sup>45</sup> Meeting refuge purposes is the second part of the central management mandate for the FWS and supersedes the system mission where a conflict exists. The purposes for each refuge in Alaska are listed separately in Sections 302 and 303 of ANILCA.<sup>46</sup> Each set of purposes are somewhat customized for each particular refuge, yet they all contain the same basic language.<sup>47</sup> The general purposes for the Alaskan refuges are to “conserve fish and wildlife populations and habitats *in their natural diversity* . . . to fulfill international treaty obligations with respect to fish and wildlife and their habitats . . . and to ensure water quality and quantity within refuges in a manner consistent with wildlife conservation.”<sup>48</sup>

Neither ANILCA nor the FWS has formally defined the phrase “natural diversity,”<sup>49</sup> and the courts have not had an opportunity to interpret this language. By looking at the legislative history, however, we can get an idea of what the phrase was intended to mean. The Senate Report on ANILCA states that the refuges set aside by the statute represent “the opportunity to manage these areas on a planned ecosystem-wide basis with all of their *pristine ecological processes intact*.”<sup>50</sup> The conservation of “natural diversity,” therefore, was not intended to mean only the number of species present on the landscape, but also the conservation of the natural interactions, dynamics, cycles, and processes within and between species in these areas. Essentially, “natural diversity” should be seen as simply an earlier iteration of the “biological integrity, diversity, and environmental health” criteria which surfaced later in the Improvement Act.

In addition to providing refuge purposes, ANILCA also provides another layer of management requirements for Alaska refuges. ANILCA requires that federal agencies manage wildlife in a manner that is consistent with “the conservation of *healthy populations* of fish and wildlife.”<sup>51</sup> The legislative history specifically defines this phrase to mean the “maintenance of fish and wildlife resources and their habitats in a condition which assures stable and continuing *natural populations and species mix* of plants and animals.”<sup>52</sup> This indicates that the intention

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45. The refuges that pre-date ANILCA also have additional refuge purposes derived from their various establishment documents.

46. ANILCA, *supra* note 3, §§ 302–303.

47. *Id.*

48. *Id.* (emphasis added).

49. U.S. FISH & WILDLIFE SERVICE & U.S. GEOLOGICAL SURVEY, CLIMATE CHANGE FORUM FOR ALASKA 14 (2007), available at [http://alaska.fws.gov/climate/pdf/executive\\_summary.pdf](http://alaska.fws.gov/climate/pdf/executive_summary.pdf).

50. S. REP. NO. 69-413, at 174 (1979).

51. 16 U.S.C. §§ 3112(1), 3125(1) (2006) (emphasis added).

52. S. REP. NO. 96-413, at 233.

of the “healthy populations” language was more than simply a reference to a sustainable quantitative threshold or a condition of health, but rather a broader reference to preservation of the natural population dynamics and interspecies cycles that existed on the landscape before European contact. This understanding is supported by additional statements made in the Senate Report:

[T]hese units will assure to the greatest extent possible the protection of the ecological units and processes that support entire habitats for Alaska’s diverse fish and wildlife resources. . . . For each unit the key wildlife species are listed. However, the committee feels that while it is important to focus attention on the major species of each refuge, it is equally important that the Fish and Wildlife Service manage these units to conserve the entire spectrum of plant and animal life found on the refuge. Alaska is unique in this country in that it is the last place where man has not adversely affected the balance of nature. . . . For example, the Arctic National Wildlife Refuge should be managed to conserve the diversity of fish and wildlife populations of the refuge and not merely the Porcupine caribou herd. Therefore, focusing purely on prey abundance is clearly not what the drafters had in mind.<sup>53</sup>

The FWS manual has adopted the Senate Report’s definition of “healthy populations” in its interpretation of ANILCA.<sup>54</sup> The agency should also formally adopt this understanding of “healthy populations” in its interpretation of the Improvement Act.

The legislative history further states that the management techniques employed must “minimize the likelihood of irreversible or long term adverse effects upon such populations and species. . . . The greater the ignorance of the resource parameters, particularly of the ability and capacity of a population or species to respond to changes in its ecosystem, the greater the safety factor must be.”<sup>55</sup> This congressional warning is becoming increasingly relevant as Alaska and Alaskan wildlife continue to feel the impacts and uncertainties of climate change.

All Alaskan refuges, except for the Kenai National Wildlife Refuge, are also mandated to provide the opportunity for continued subsistence use by local rural residents, but only if this use does not interfere with

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53. *Id.*

54. Guidance as to the meaning of “healthy populations” is found in the Alaska Lands Act legislative history. *See* Alaska National Wildlife Refuges, Interim Management Regulations, 46 Fed. Reg. 31,818 (June 17, 1981) (codified at 50 C.F.R. pt. 36).

55. S. REP. NO. 96-413, at 233.

the wildlife conservation and treaty obligation mandates.<sup>56</sup> Section 3114 of ANILCA restricts subsistence uses “in order to protect the continued viability” of fish and wildlife populations. Section 3125(1) of ANILCA states that the law does not permit subsistence uses where they are “inconsistent with the conservation of healthy populations.” The FWS interprets the two limitations in a single standard that requires that “fish and wildlife resources and their habitats [remain] in a condition which assures stable and continuing *natural populations* and species mix of plants and animals *in relation to their ecosystem . . .*,”<sup>57</sup> rather than in relation to state or human needs and wants. This interpretation is clearly derived from the legislative history.<sup>58</sup>

Subsistence hunting, therefore, is to be supported on refuges in Alaska as long as it does not interfere with the two purposes that have been given higher priority by ANILCA: conservation of species and meeting treaty obligations. Furthermore, the statute is specific about what must happen if wildlife population numbers decrease for any reason. First, non-subsistence hunting must be decreased or stopped. If that is insufficient to protect the affected wildlife populations, then subsistence hunting must be stopped as well.<sup>59</sup> The statute does not contemplate intensive types of wildlife management to maintain “hunnable” levels of game.

### C. Wilderness Act

Of the sixteen National Wildlife Refuges in Alaska, ten contain “wilderness areas” designated by ANILCA.<sup>60</sup> These wilderness designations essentially establish an additional refuge purpose that the agency must meet in its administration of the refuge.<sup>61</sup> The FWS has stated that “[w]ilderness purposes are ‘within and supplemental’ to refuge establishing purposes.”<sup>62</sup> To meet this additional purpose, the agency must meet the requirements of the Wilderness Act,<sup>63</sup> which establishes the federal government’s responsibilities in managing

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56. ANILCA, *supra* note 3, §§ 302–303; *see also* MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 300 (3d ed. 1997).

57. S. REP. NO. 96-413, at 233 (1979); 46 Fed. Reg. 31,818 (June 17, 1981) (to be codified at 50 C.F.R. pt. 36) (emphasis added).

58. *See* S. REP. NO. 96-413, at 233.

59. 16 U.S.C. §§ 3114, 3126(b) (2006). *See also* Lurman & Rabinowitch, *supra* note 1, at 151.

60. ANILCA, *supra* note 3, §§ 701–704.

61. U.S. FISH & WILDLIFE SERVICE MANUAL: LAND USE & MANAGEMENT: GENERAL OVERVIEW OF WILDERNESS STEWARDSHIP POLICY, 610 FW 1.14(A), 1.17 (2008).

62. *Id.* at 1.12(B).

63. 16 U.S.C. §§ 1131–1136 (2006).

wilderness areas. The Act states that “[a] wilderness . . . is hereby recognized as an area where the earth and its community of life are untrammelled by man . . . an area of undeveloped federal land retaining its primeval character and influence . . . which is protected and managed so as to preserve its natural conditions. . . .”<sup>64</sup> The FWS interprets the term “untrammelled” to mean “the freedom of a landscape from the human intent to permanently intervene, alter, control, or manipulate natural conditions or processes.”<sup>65</sup> The Wilderness Act requires agencies to manage wilderness areas in a manner that preserves the “wilderness character” of the area.<sup>66</sup> To this end, the FWS has stated that:

Maintaining wilderness character requires an attitude of humility and restraint. In wilderness, we do not adjust nature to suit people, but adjust human use and influences so as not to alter natural processes. We strengthen wilderness character with every decision to forego actions that have physical impact or would detract from the idea of wilderness as a place set apart, a place where human uses, convenience, and expediency do not dominate. We preserve wilderness character by our compliance with wilderness legislation and regulation, but also by imposing limits on ourselves.<sup>67</sup>

Furthermore, the agency’s manual states that the FWS will not interfere with major ecosystem processes (in which the FWS explicitly includes “predator/prey fluctuations”) “unless *necessary* to accomplish refuge purposes.”<sup>68</sup> To be considered “necessary,” the agency states that the action “to modify ecosystems, species populations levels, or natural processes must be: required to respond to a human emergency or the minimum requirement for administering the area as wilderness. . . .”<sup>69</sup> The statutory language and the agency’s interpretations of that language both suggest that to preserve the wilderness character of untrammelled lands effectively, natural processes and conditions must be protected. Such processes and conditions must necessarily include natural predator/prey relationships and cycles.<sup>70</sup>

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64. 16 U.S.C. § 1131(c) (2006).

65. U.S. FISH & WILDLIFE SERVICE MANUAL, *supra* note 61, at 1.5(DD).

66. 16 U.S.C. § 1133(b) (2006).

67. U.S. FISH & WILDLIFE SERVICE MANUAL, *supra* note 61, at 1.13(D).

68. *Id.* at 2.16(B)(1) (emphasis added).

69. *Id.* at 2.16(B)(3).

70. As Roger Kaye, Wilderness Specialist for the Arctic National Wildlife Refuge, wrote, “wilderness has always been inseparable from wildlife.” ROGER KAYE, LAST GREAT WILDERNESS: THE CAMPAIGN TO ESTABLISH THE ARCTIC NATIONAL WILDLIFE REFUGE 215 (2006).

The courts have had several opportunities to assess the FWS's responsibilities under the Wilderness Act. In *Sierra Club v. Lyng*,<sup>71</sup> an environmental group challenged a Forest Service program that combated insect infestation by cutting trees and spraying chemicals.<sup>72</sup> The purpose of the program was to protect commercial timber interests and private property outside the wilderness area, "not to further wilderness interests or to further national wilderness policy."<sup>73</sup> Ultimately, the court "imposed an affirmative burden on the Secretary of Agriculture to justify the eradication program in light of wilderness values."<sup>74</sup>

In *Wilderness Society v. U.S. Fish & Wildlife Services*, the Wilderness Society claimed that the FWS violated the Wilderness Act by permitting a salmon enhancement project (which introduced approximately six million hatchery-raised salmon fry into a wilderness lake) because the project was hostile to the mandate to preserve "natural conditions" that are part of "wilderness character."<sup>75</sup> The court declined to reach the issue of whether the project actually violated natural conditions,<sup>76</sup> yet it struck down the permit. It held that the primary purpose of the project was to aid commercial fishermen and that the Wilderness Act forbids wilderness areas from being used for commercial enterprises.<sup>77</sup> The court stated that, "Whatever else may be said about the positive aims of the Enhancement Project, it was not designed to advance the purpose of the Wilderness Act."<sup>78</sup>

Actions in wilderness areas therefore must be justified in terms of whether they further the goals and values of the Wilderness Act.<sup>79</sup> The sole purpose of intensively managing prey species in Alaska is to increase harvestable prey numbers beyond naturally occurring levels to meet a human desire for increased hunting opportunity.<sup>80</sup> This purpose

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71. 662 F. Supp. 40 (D.D.C. 1987).

72. *Id.* at 41.

73. *Id.* at 42.

74. No. 01-35266, 2003 U.S. App. LEXIS 27248, \*28 (9th Cir. Dec. 30, 2003), amended by *Wilderness Society v. U.S. Fish & Wildlife Serv.*, 360 F.3d 1374 (9th Cir. 2004) (en banc) (citing *Lyng*, 662 F. Supp. at 42-43).

75. *Id.* at \*2.

76. *Id.* at \*46 n.18.

77. *Id.* at \*33-34.

78. *Id.* at \*23.

79. *Id.* at \*44; see also *High Sierra Hikers Ass'n v. U.S. Forest Serv.*, 436 F. Supp. 2d 1117, 1133-34 (E.D. Cal. 2006) ("Because it is not possible to infer [from the language of the Wilderness Act] that establishment (much less enhancement) of opportunities for a particular form of human recreation is the purpose of the Wilderness Act, it is not possible to conclude that enhancement of fisheries is an activity that is 'necessary to meet minimum requirements for the administration of the area for the purposes of this chapter.'").

80. ALASKA STAT. § 16.05.255(e) (2008).

does not further wilderness interests or national wilderness policy, and is therefore also inappropriate on refuge wilderness areas.

#### D. Are the Fish and Wildlife Service Manuals Binding on the Agency?

The FWS's interpretations of both the Improvement Act and ANILCA were made through policy statements in the *Fish and Wildlife Service Manual* and not through regulations in the Code of Federal Regulations (C.F.R.). These interpretations, however, have often been subjected to notice and comment procedures. Furthermore, they are published in draft and final form in the Federal Register, along with a complete discussion of the comments received throughout the comment period.<sup>81</sup> The question of whether courts will bind agencies to legal interpretations made through manual provisions rather than the C.F.R. is very complicated. In *McGrail & Rowley v. Babbitt*,<sup>82</sup> the court found that the FWS manual was not binding on the agency.<sup>83</sup> The manual provisions reviewed in that case, however, had not been promulgated using notice and comment procedures,<sup>84</sup> while many of the manual provisions cited in this Article have been subject to notice and comment.

In *Wilderness Society*, the court analyzed whether the FWS's administrative interpretations of statutory mandates required deference.<sup>85</sup> Ultimately, the court determined that deference was not required, primarily because the specific case "involve[d] only an agency's application of law in a particular permitting context, and not an interpretation of a statute that will have the force of law generally for others in similar circumstances."<sup>86</sup> The statements made in the manuals relied upon in this Article, however, are general interpretations. Thus, even though they are intended to guide agency behavior rather than the public's behavior, they might be regarded as having the force of law.

In *Wilderness Society v. Norton*,<sup>87</sup> the D.C. Circuit noted that courts should examine two issues when determining whether or not to bind agencies to their non-regulatory interpretations: the effects of the agency

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81. See, e.g., Policy on Maintaining the Biological Integrity, Diversity, and Environmental Health of the National Wildlife Refuge System, 66 Fed. Reg. 3818 (Jan. 16, 2001); 46 Fed. Reg. 31,818 (Jun. 17, 1981); FISCHMAN, *supra* note 24, at 110.

82. 986 F. Supp. 1386 (S.D. Fla. 1997).

83. *Id.* at 1394.

84. *Id.*

85. *Wilderness Society v. U.S. Fish & Wildlife Serv.*, No. 01-35266, 2003 U.S. App. LEXIS 27248, \*40 (9th Cir. Dec. 30, 2003).

86. *Id.*

87. 434 F.3d 584 (D.C. Cir. 2006).

action and the expressed intention of the agency.<sup>88</sup> FWS has manifested its intent to be bound, at least in part, by its decision to employ notice and comment procedures and issue publication through the *Federal Register*.<sup>89</sup> On the other hand, the state of the law in this area is not completely settled, and since the FWS's manual contains some mixed messages about the agency's intent to be bound,<sup>90</sup> it is possible that a court would not find the manual provisions binding.<sup>91</sup>

### III. PREEMPTION

"When a portion of a refuge is open to hunting or fishing, state law governing those activities generally applies unless it conflicts with some federal law or a specific refuge regulation."<sup>92</sup> Where there is a conflict, the solution is for the federal agency to preempt state law. The courts have found that actual conflict is necessary before the FWS can preempt the state under the Improvement Act.<sup>93</sup> In *Wyoming v. United States*, Wyoming sued the FWS and the Department of the Interior for refusing to allow the state to vaccinate wild elk on the National Elk Range, a part of the NWRs.<sup>94</sup> The complaint alleged that the FWS interfered "with the State's sovereign right to manage wildlife within its borders."<sup>95</sup> The court recognized that "[h]istorically, States have possessed 'broad trustee and police powers over . . . wildlife within their borders, including . . . wildlife found on Federal lands within a State.'"<sup>96</sup> The

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88. *Id.* at 595; see also *Davis v. Latchar*, 83 F. Supp. 2d 1, 7 (D.D.C. 1998) (*aff'd* in *Davis v. Latchar*, 202 F.3d 359, 361 (D.C. Cir. 2000) (finding that since the Park Service expressed its intention to be bound by its Management Policies, those Management Policies were binding on the agency).

89. *Norton*, 434 F.3d at 595–96. For a complete discussion of this issue, see generally Fischman, *supra* note 5. "In return for its investment in the notice-and-comment procedure, the Service should receive from courts greater deference to its interpretations of the refuge organic law. But this comes at the price of binding the agency to its published determinations." *Id.* at 121. *Contra* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990).

90. The manual provisions are "intended to improve the internal management of the Service, and [the manual] is not intended to, and does not, create [a judicially enforceable] right or benefit." Policy on National Wildlife Refuge System Improvement Act of 1997 Mission and Goals and Refuge Purposes and Uses, 71 Fed. Reg. 36,404 (June 26, 2006). "The tension between the actual manual provision and the disclaimer . . . leaves some room for debate over their binding status." Fischman, *supra* note 5, at 127.

91. Fischman, *supra* note 5, at 126–27.

92. FISCHMAN, *supra* note 24, at 184.

93. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002).

94. *Wyoming*, 279 F.3d at 1218.

95. *Id.* at 1222 (internal quotation marks omitted).

96. *Id.* at 1226 (quoting 43 C.F.R. § 24.3).

court, however, also recognized the Supreme Court's decision in *Kleppe v. New Mexico*<sup>97</sup> and stated that the Property Clause of the Constitution<sup>98</sup> "empowers Congress to exercise jurisdiction over federal land within a State if Congress so chooses."<sup>99</sup> The court also noted that "if Congress so chooses, federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives under the Constitution's Supremacy Clause."<sup>100</sup> The question then, according to the Tenth Circuit, was whether the Improvement Act actually conflicted with the state's vaccination program.<sup>101</sup> Ultimately, the court held that the FWS could not fulfill its mission as set forth in the Improvement Act unless refuges are "consistently directed and managed as a national system. . . . Congress undoubtedly intended a preeminent federal role for the FWS in the care and management of the NWRS."<sup>102</sup> "Congress intended ordinary principles of conflict preemption to apply,"<sup>103</sup> and as such, the FWS had the authority to preempt state law and deny permission to the state to vaccinate the elk.<sup>104</sup>

In *National Audubon Society v. Davis*,<sup>105</sup> the Audubon Society sued California state officials for implementing a ballot proposition that banned the use of certain traps and poisons to capture or kill wildlife.<sup>106</sup> The Audubon Society was concerned that this proposition would restrict the federal government's ability to eliminate invasive species and limit the ability to protect endangered birds from predators on National Wildlife Refuges.<sup>107</sup> The group claimed that the Improvement Act, among other federal laws, preempted the proposition.<sup>108</sup> The court agreed that the Improvement Act did preempt the proposition "to the extent that actual conflict persists between state and federal policies."<sup>109</sup> The court defined conflict preemption by quoting the Supreme Court's

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97. 426 U.S. 529 (1976).

98. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

99. *Wyoming*, 279 F.3d at 1227.

100. *Id.*

101. *Id.* at 1234.

102. *Id.* at 1233-34.

103. *Id.* at 1234.

104. *Id.* at 1235.

105. 307 F.3d 835 (9th Cir. 2002).

106. *Id.* at 842-43.

107. *Id.* at 844.

108. *Id.* at 842.

109. *Id.* at 854.



opinion in *Florida Lime & Avocado Growers v. Paul*,<sup>110</sup> which stated that actual conflict arises when “compliance with both federal and state regulations is a physical impossibility.”<sup>111</sup> The *Audubon Society* court, following the Tenth Circuit’s decision in *Wyoming*, found that “Congress invoked federal power under the Property Clause when it enacted the [Improvement Act], and that the [Improvement Act] ‘plainly vests the FWS with authority to administer the Act and manage the [National Wildlife Refuges].’”<sup>112</sup> The *Audubon Society* court held that since National Wildlife Refuges are federal government land, Congress has the authority under the Property Clause to preempt state action with respect to National Wildlife Refuge management and has done so through the Improvement Act.<sup>113</sup> Additionally, according to the court, the Improvement Act preempts the state proposition “because the ban on [certain types of] traps conflicts with FWS’s statutory management authority on those federal reserves.”<sup>114</sup>

Similarly, with regard to intensive wildlife management in Alaska, there is direct conflict between the goals and methods of the State’s program and the mandates set by Congress for the management of the NWRS. The Improvement Act, ANILCA, and the Wilderness Act all require the FWS to preserve natural conditions and processes,<sup>115</sup> yet the state would like to interfere in these processes to increase harvestable prey at the expense of predator abundance.<sup>116</sup> These two goals and the methodology used to achieve them are mutually exclusive. As such, the FWS must preempt those attempts the State makes to eliminate predators in order to intensively manage prey species.

The Savings and Cooperation Clauses found in the Improvement Act and ANILCA are also relevant. The Improvement Act contains several clauses requiring “effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies during the course of acquiring and managing refuges.”<sup>117</sup> This requirement for conformity, however, is tempered by language that only requires cooperation “to the extent practicable.”<sup>118</sup> Similarly, the Savings Clause in the Improvement Act, stating that “[n]othing in this Act shall be construed as affecting the

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110. 373 U.S. 132 (1963).

111. *Audubon Soc’y*, 307 F.3d at 851–52 (quoting *Florida Lime*, 373 U.S. at 142–43)).

112. *Id.* at 854 (quoting *Wyoming v. United States*, 279 F.3d 1214, 1228 (10th Cir. 2002)).

113. *Id.*

114. *Id.*

115. *See supra* Part II.

116. *See supra* Part I.

117. *See, e.g.*, 16 U.S.C. § 668dd(a)(4)(M) (2006).

118. *See, e.g.*, 16 U.S.C. § 668dd(e)(1)(A)(iii) (2006).

authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System,” is tempered by a second sentence stating that “[r]egulations permitting hunting or fishing of fish and resident wildlife within the System shall be, *to the extent practicable*, consistent with State fish and wildlife laws, regulations, and management plans.”<sup>119</sup> In *Wyoming*, the Tenth Circuit wrote, interpreting the Savings and Cooperation Clauses: “We find highly unlikely the proposition that Congress would carefully craft the substantive provisions of the [Improvement Act] to grant authority to the FWS to manage the [refuges] and promulgate regulations thereunder, and then essentially nullify those provisions and regulations with a single sentence.”<sup>120</sup>

The Savings Clause is not meaningless; it simply indicates that ordinary principles of conflict preemption apply where necessary.<sup>121</sup> Neither is the Cooperation Clause a meaningless provision,<sup>122</sup> as a failure on the part of the FWS to work cooperatively with state agencies is reviewable by the courts.<sup>123</sup> Further, the FWS must be able to explain why the State’s program would “stand as an obstacle to the accomplishment and execution” of federal goals.<sup>124</sup> Thus, the Cooperation and Savings Clauses of the Improvement Act:

[D]o not ultimately limit the ability of refuge managers to carry out their missions. Nor do they empower states to resist a lawful federal action since a state law cannot interfere with the accomplishment of a federal objective. States can insist on being consulted, but it is up to federal managers to decide when and whether it is “practicable” for state law to remain in force. In the case of conflict with a federal action or policy, state law must give way.<sup>125</sup>

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119. 16 U.S.C. § 668dd(m) (2006) (emphasis added).

120. *Wyoming v. United States*, 279 F.3d 1214, 1234–35 (internal citations omitted).

121. *Id.* at 1234. Similarly, the Supreme Court has stated, “Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? . . . In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871–72 (2000).

122. *See Wyoming*, 279 F.3d at 1236.

123. *See id.* at 1236–37.

124. *Id.* at 1240 (quoting *Geier*, 529 U.S. at 883) (internal quotation marks omitted).

125. FREYFOGLE & GOBLE, *supra* note 43, at 215; *see also* Fischman, *supra* note 23, at 88 (“[T]he act itself requires coordination with states in the administration of the [s]ystem . . . . This partnership with states is, of course, limited by federal

ANILCA also contains clauses encouraging cooperation<sup>126</sup> and reserving authority to the state,<sup>127</sup> but like the Improvement Act, these clauses are tempered by language that preserves federal authority in cases of conflict.<sup>128</sup>

Finally, the Master Memorandum of Understanding (MMOU) existing between the FWS and the Alaska State Department of Fish and Game must be considered.<sup>129</sup> The MMOU was originally written and signed in 1982 and then recommitted (though not amended) in 2006.<sup>130</sup> One could argue that the MMOU relieves the FWS of the need to go through the compatibility determination process when the state wishes to take wildlife management action on NWRS lands, or alternatively, that the MMOU requires the FWS to defer to the State regarding most wildlife management matters. Neither of these interpretations, however, agrees with the actual language of the MMOU or the language of the statutes under which the NWRS must be managed. Among other commitments, the agencies agree in the MMOU that: (1) wildlife populations on NWRS lands must be managed “in their natural diversity”; (2) the state has the right to enter NWRS lands “at any time to conduct routine management activities which do not involve construction, disturbance to the land, or alteration of ecosystems”; and (3) the taking of fish and wildlife on NWRS lands is “authorized in accordance with State and Federal law unless State regulations are found to be incompatible with documented Refuge goals, objectives, or management plans.”<sup>131</sup>

In 2000, the FWS interpreted its responsibility to make compatibility determinations for all refuge uses as excluding “refuge

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preemption of state law that conflicts with FWS management control on refuges. For instance, a state may not impose its own hunting/trapping regulations or property law restrictions on the Refuge System under circumstances where they would frustrate decisions made by the Service or Congress.”).

126. 16 U.S.C. § 3112(3) (2006).

127. See 16 U.S.C. §§ 3112(3), 3202 (2006).

128. See *id.* For a full discussion of ANILCA cooperation and savings clauses, see Lurman & Rabinowitch, *supra* note 1, at 153–54.

129. Master Memorandum of Understanding Between the Alaska Dep’t of Fish & Game and the U.S. Fish & Wildlife Serv., Dep’t of the Interior (Mar. 13, 1982) (on file with author).

130. Recommitment to the Master Memorandum of Understanding, Letter from Reg’l FWS Director, Region 7 and Commissioner, Alaska Department of Fish & Game, to All Employees of Region 7, U.S. Fish & Wildlife Serv., and the Alaska Dep’t of Fish & Game (Nov. 14, 2006) (on file with author).

131. Master Memorandum of Understanding, *supra* note 129 (emphasis added).

management activities.”<sup>132</sup> State wildlife management activities are considered “refuge management activities” when they are taken “pursuant to a cooperative agreement between the State and the FWS where the Refuge Manager has made a *written determination* that such activities support *fulfilling the refuge purposes or the System mission*.”<sup>133</sup> No such written determination was made either at the time the MMOU was originally written or when the agencies recommitted to it. The MMOU also does not refer to specific management activities that would allow a refuge manager to even make such a determination. Even if the vague statements made in the MMOU could be said to incorporate such specific activities as intensive management and predator control, it would be impossible to consider these actions as “fulfilling the refuge purposes or the System mission.” If the actions considered did fulfill the refuge purposes or the System mission, they would be per se compatible anyway, regardless of the exception.

The alternative claim, that the MMOU requires the FWS to defer to the state on wildlife management matters, is also without merit. This claim seems to be based on the following statement in the MMOU: “The Fish and Wildlife Service agrees to recognize the Department [of Fish and Game] as the agency with the primary responsibility to manage fish and resident wildlife within the State of Alaska.”<sup>134</sup> There is no doubt that this statement is an accurate reflection of reality. Primary authority over wildlife is generally vested in the several states when there is no conflicting federal law.<sup>135</sup> The U.S. Department of the Interior has recognized the truth of this statement several times, but has also recognized the government’s power to preempt state law regarding wildlife management where necessary.<sup>136</sup> The Improvement Act, passed

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132. U.S. FISH & WILDLIFE SERVICE MANUAL, *supra* note 61, § 2.10(A); Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,484, 62,488 (Oct. 18, 2000).

133. Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,484, 62,488 (Oct. 18, 2000) (emphasis added).

134. Master Memorandum of Understanding, *supra* note 129.

135. *See, e.g.,* Kleppe v. New Mexico, 426 U.S. 529, 545 (1976) (“Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions.”).

136. 43 C.F.R. § 24.3(a) (2009) states:

In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State. Under the Property Clause of the Constitution, Congress is given the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” In the exercise of power under the Property Clause, Congress may choose to preempt State management of fish and wildlife on Federal lands and, in circumstances where the exercise of power

in 1997, unequivocally places the responsibility for management of wildlife on NWRs lands in the hands of the FWS.<sup>137</sup> This responsibility cannot be abandoned by the FWS simply by signing an MMOU that is neither approved by Congress nor open to public notice and comment. This MMOU and others like it are certainly significant: they facilitate the cooperation required by the Improvement Act, ANILCA, and other statutes and policies. Such cooperation, however, is only required “where practical” – in other words, where it does not conflict with existing federal mandates or the ability of the FWS to meet its congressionally assigned mission.<sup>138</sup> There would be a constitutional separation of powers problem if executive agencies could simply avoid the implementation of congressional mandates by signing MMOUs with the states. In the end, the truth of this position was even recognized by the parties who signed the letter of recommitment to the MMOU. While that document does not directly recognize the passage of the Improvement Act, it does state: “Please read and become familiar with the MMOU and practice its cooperative principles *to the extent possible*.”<sup>139</sup> While the MMOU is an important component of state/federal relations regarding wildlife management on Alaskan refuges, it does not change the state of the law, which requires the FWS to manage its land and the wildlife found there in accordance with the relevant congressional mandates.

## CONCLUSION

The State of Alaska’s attempts to decrease predator numbers through straightforward predator control and other indirect regulations stand as an obstacle to accomplishing the mission of the refuge system,

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under the Commerce Clause is available, Congress may choose to establish restrictions on the taking of fish and wildlife whether or not the activity occurs on Federal lands, as well as to establish restrictions on possessing, transporting, importing, or exporting fish and wildlife. Finally, a third source of Federal constitutional authority for the management of fish and wildlife is the treaty making power.

137. *Wyoming v. United States*, 279 F.3d 1214, 1233–34 (10th Cir. 2002) (“[The refuges] cannot fulfill the mission set forth in [the Improvement Act] unless they are consistently directed and managed as a national system. . . . Congress undoubtedly intended a preeminent federal role for the FWS in the care and management of the [refuges].”) (internal quotation marks and citations omitted). The court noted that it could not “accept the State of Wyoming’s broad and absolute challenge . . . to the FWS’s authority to manage wildlife on [refuge lands] in a manner with which the state disagrees.” *Id.* at 1234.

138. This qualification is recognized in the language of the original MMOU itself. See Master Memorandum of Understanding, *supra* note 129.

139. Recombitment to the Master Memorandum of Understanding, *supra* note 130 (emphasis added).

the purposes of the various refuges in Alaska, the healthy population mandate of the Improvement Act and ANILCA, and the preservation requirements of the Wilderness Act. While the courts require the agency to make the case for preemption explicit, the courts have not relieved—and cannot relieve—the agency of its obligation to preempt state law in order to meet its congressional mandates.

The FWS must take a more proactive role in ensuring that its mandates are being met on refuge lands. The state has no interest in guaranteeing those mandates on the FWS's behalf and every reason (based on meeting its own mandates and the desire of many of its constituents) to expand the sphere of influence of its programs as broadly as possible. It is up to the FWS to ensure that Congress's intent is fulfilled. The Improvement Act, ANILCA, and the Wilderness Act each contain progressively stronger language indicating that programs like intensive wildlife management are generally not appropriate on NWRS lands in Alaska.