

# PREEMPTION OF STATE WILDLIFE LAW IN ALASKA: WHERE, WHEN, AND WHY

JULIE LURMAN, J.D., M.E.S.\*

SANFORD P. RABINOWITCH, M.L.A.\*\*

*Preemption is the constitutional doctrine which holds that when federal law and state law conflict, federal law must be followed, and state law must yield. In Alaska, the wildlife law known as the Intensive Management statute is in conflict with federal laws governing national park lands and the management of wildlife on those lands. Preemption requires the State of Alaska to refrain from implementing the Intensive Management statute on national park lands because of the conflict with federal laws. This Article describes the relevant state and federal laws, the preemption doctrine, and the doctrine's application to wildlife management in Alaska. It concludes by stating that Alaska has every right to manage wildlife as it sees fit but must always yield in cases where its laws are preempted by the laws of the United States.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	146
II.	WILDLIFE MANAGEMENT AND THE NATIONAL PARK SERVICE.....	147
III.	STATE INTENSIVE MANAGEMENT OF WILDLIFE .....	154

---

Copyright © 2007 by Julie Lurman and Sanford P. Rabinowitch.

\* Assistant Professor of Natural Resources Law and Policy, University of Alaska Fairbanks, School of Natural Resources and Agricultural Sciences. J.D. 2003, Georgetown University Law Center; M.E.S. 1999, Yale School of Forestry and Environmental Studies; B.S. 1997, Cook College, Rutgers University. SNRAS Pub. No. 2007-003.

\*\* Subsistence Manager, Alaska Regional Office, National Park Service. Masters of Landscape Architecture, 1977, University of Oregon; B.S., Environmental Planning and Management, 1973, University of California, Davis. The views expressed here are my own and do not represent the views of the National Park Service or the United States Department of the Interior.

IV. PREEMPTION: WHAT IS IT? .....	158
V. PREEMPTION: WHY DOES IT APPLY? .....	162
VI. CONCLUSION.....	170

## I. INTRODUCTION

Since 1994, the State of Alaska has been managing wildlife in accordance with the state's Intensive Management principles laid out in the Alaska Code.<sup>1</sup> This statute—which will be referred to as the Intensive Management statute—directly conflicts with the wildlife management mandates laid out by Congress in the National Park Service Organic Act<sup>2</sup> and the Alaska National Interest Lands Conservation Act (ANILCA).<sup>3</sup> This direct conflict is currently preventing the National Park Service (NPS) from achieving the goals set out for it by Congress.<sup>4</sup> As the State's implementation of the Intensive Management statute becomes increasingly widespread, it is ever more important for the National Park Service to recognize that the State's current Intensive Management program is preempted on NPS lands based on a theory of direct conflict. The stark differences in the animating legislation of the State and the NPS have led to misunderstandings between both the hunting and conservation communities and the management agencies themselves. This Article seeks to explain why the NPS may not acquiesce to wildlife management practices

---

1. ALASKA STAT. § 16.05.255 (2006).

2. 16 U.S.C. § 1 (2000).

3. 16 U.S.C. §§ 3101–3233 (2000).

4. Currently, the Intensive Management statute only directly affects national preserve lands, since state hunting regulations have been superseded by ANILCA §§ 816(a) and 1314(c) since 1989. For many years the State has informed the public that the State's regulations do not apply to national parks and national monuments. See ALASKA DEPT. OF FISH & GAME, 2007–2008 ALASKA HUNTING REGULATIONS 80–88 (2007), available at [http://www.wildlife.alaska.gov/regulations/pdfs/regulations\\_complete.pdf](http://www.wildlife.alaska.gov/regulations/pdfs/regulations_complete.pdf) [hereinafter 2007–2008 ALASKA HUNTING REGULATIONS]; see also 36 C.F.R. § 2.1 (1983) (prohibiting hunting of wildlife or fishing except as otherwise provided in the chapter). This, however, could easily affect all NPS lands because the Federal Subsistence Board, which establishes the hunting regulations for parks and monuments, is pressured to adopt the State's hunting regulations, and because the State hopes to eventually reclaim control of all hunting in Alaska. See generally Master Memorandum of Understanding Between the Alaska Department of Fish and Game, Juneau, Alaska, and the U.S. National Park Service, Department of the Interior, Anchorage, Alaska (Oct. 14, 1982) [hereinafter Memorandum of Understanding] (on file with author); see also Letter from Governor Frank Murkowski to Secretary Gale Norton (Jan. 10, 2005) (on file with author) (pressuring the federal subsistence board to defer to State hunting regulations).

that conflict with its mandate and how the Intensive Management statute does, in fact, conflict with that mandate.

Part II of this article outlines the federal mandates for the management of wildlife on NPS lands in Alaska. Part III describes Alaska's Intensive Management statute and the regulations derived from it. Part IV defines the theory of preemption as a result of direct conflict, and Part V describes how the criteria for preemption of state law, based on a theory of direct conflict, are met by the facts in this situation.

## II. WILDLIFE MANAGEMENT AND THE NATIONAL PARK SERVICE

The NPS is guided in its efforts to manage wildlife on its lands by its enabling statute, the 1916 National Park Service Organic Act, and its most recent interpretation of this statute—which was most recently stated in the 2006 Management Policies. The agency is also guided by the legislation creating each park unit—which often carries more specific instructions regarding Congress's intentions for the different land areas.

The Organic Act tells the agency to “conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>5</sup> Over the years, courts have interpreted this somewhat vague statement to mean that the agency has broad discretion in making resource use decisions and in determining the proper balance between preservation and enjoyment.<sup>6</sup> With wildlife in particular, the agency initially applied this statutory language inconsistently, sometimes emphasizing preservation<sup>7</sup> and at other times highlighting use and enjoyment.<sup>8</sup>

---

5. 16 U.S.C. § 1.

6. See, e.g., *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1247 (E.D. Cal. 1999) (“[T]he Organic Act does not serve as basis for a cause of action when the issue is confined to the Agency’s exercise of discretion in attempting to balance valid, competing values.”); see also *National Wildlife Federation v. NPS*, 669 F. Supp. 384, 391 (D. Wyo. 1987) (“[T]he Park Service has broad discretion in determining which avenues best achieve the Organic Act’s mandate.”).

7. An early directive from the Secretary of the Interior to the first director of the National Park Service read: “[H]unting will not be permitted in any national park.” *Nat’l Rifle Assoc. v. Potter*, 628 F. Supp. 903, 905 (D.D.C. 1986).

8. In the early years of the Park Service, “the Service’s desire to maintain peaceful scenes led it to exterminate animals . . . . Predators such as cougars, wolves, coyotes, lynx, bobcats, foxes, badgers, mink, weasels, fishers, otters, and martens were unnatural impairments to the natural grandeur that the Service

In 1978, Congress amended the NPS's responsibilities with the Redwood National Park Expansion Act,<sup>9</sup> which states in part that:

Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by the first section of the Act of August 25, 1916, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.<sup>10</sup>

This statement reaffirms and strengthens Congress's earlier pronouncement on the NPS's duties, because it requires that the agency's actions be consistent with the conservation purpose of the parks.<sup>11</sup>

In the late 1960s, the NPS also began implementing less intrusive techniques for the management of wildlife. This policy—which has come to be called natural regulation—“relies on ecological processes to determine, or regulate, population conditions of native plants and animals to the extent practicable.”<sup>12</sup> Under a natural regulation regime, “[w]ildlife populations are allowed to fluctuate without direct human intervention.”<sup>13</sup> The agency's policy, by the 1980s, “had evolved to emphasize maintenance of natural ecological processes as a means of managing native wildlife. The tradition of nonintervention in wildlife dynamics in U.S. national parks is an outgrowth of this policy . . . .”<sup>14</sup> This approach was formalized in a series of Management Policies, with the latest being *Management Policies 2006*.<sup>15</sup> In this document, NPS managers are told to “adopt park

---

sought to ‘leave unimpaired.’” DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* 1063 (2002).

9. 92 Stat. 166 (1978) (codified at 16 U.S.C. § 1a-1 (2000)).

10. *Id.* (emphasis added).

11. *Potter*, 628 F. Supp. at 910 (finding that the Redwood National Park Expansion Act furthers the purpose of conservation in the Organic Act).

12. Michael Soukup, Mary K. Foley, Ronald Hiebert & Dan E. Huff, *Wildlife Management in U.S. National Parks: Natural Regulation Revisited*, 9 *ECOLOGICAL APPLICATIONS* 1 (1999).

13. Rolf O. Peterson, *Wolf-Moose Interaction on Isle Royale: The End of Natural Regulation?*, 9 *ECOLOGICAL APPLICATIONS* 10 (1999).

14. *Id.* at 10–11.

15. U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, *MANAGEMENT POLICIES 2006* (December 2000), available at

resource preservation, development, and use management strategies that are intended to *maintain the natural population fluctuations and processes* that influence the dynamics of individual plant and animal populations, groups of plants and animal populations, and migratory animal populations.”<sup>16</sup> Therefore, the NPS’s current policy is generally to avoid interfering with population dynamics.

Only under unusual circumstances is the natural regulation rule set aside for a more active management approach. For instance, the NPS may remove wildlife from parks where the agency determines that such removal is necessary for the protection of park resources.<sup>17</sup> In general, the Organic Act requires a finding of “detriment” before the NPS may destroy park wildlife: “The Secretary of the Interior . . . may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations.”<sup>18</sup> There is also an NPS policy that requires “an explicit finding of detriment by a park superintendent when a controlled harvest program is contemplated, i.e., a program designed to kill a percentage of a herd [or population] for no other reason than the desire to reduce the size of the herd [or population].”<sup>19</sup> So, while artificial manipulation of wildlife

---

<http://www.nps.gov/policy/MP2006.pdf> [hereinafter MANAGEMENT POLICIES 2006].

16. *Id.* at 62 (emphasis added).

17. *See Davis v. Latschar*, 202 F.3d 359 (D.C. Cir. 2000) (approving the Park Service’s authority to remove deer that the Service determined were harming a National Historic Site).

18. 16 U.S.C. § 3 (2000).

19. *Greater Yellowstone Coalition v. Babbitt*, 952 F. Supp. 1435, 1441 (D. Mont. 1996), *aff’d mem.*, 108 F.3d 1385 (9th Cir. 1997); *see also* 48 F.R. 30252 § 2.2 (1983) (“In units of the National Park System where hunting and trapping activities are not authorized by enabling legislation for a park area, resource management for purposes of wildlife use and control is accomplished only pursuant to the authority of 16 U.S.C. 3, which authorizes the reduction of animal populations determined to be ‘detrimental’ to the use of the area and its statutory values.”). *See also* MANAGEMENT POLICIES 2006, *supra* note 15, at 44 (“Whenever the Service removes plants or animals, manages plant or animal populations to reduce their sizes, or allows others to remove plants or animals for an authorized purpose, the Service will seek to ensure that such removals will not cause unacceptable impacts to [sic] native resources, natural processes, or other park resources. Whenever the Service identifies a possible need for reducing the size of a park plant or animal population, the Service will use scientifically valid resource information obtained through consultation with technical experts, literature review, inventory, monitoring, or research to evaluate the identified need for

populations is permissible, the circumstances under which the NPS can take such action are quite narrow, and the NPS must first make its case for choosing to do so.

The NPS has a long history of court-supported preemption of state wildlife laws where those laws conflict with the NPS's mission or regulations.<sup>20</sup> In *New Mexico State Game Commission v. Udall*, the Tenth Circuit Court of Appeals found that the NPS had the authority to remove deer from Carlsbad Caverns National Park for research purposes without seeking a permit from the state as required under New Mexico state law.<sup>21</sup> The court added that if the State felt that the law gave too much authority to the NPS, the remedy was not with the courts since the law is valid and there was no abuse of the discretion it created.<sup>22</sup> Similarly, in *United States v. Moore*, the West Virginia Southern District Court, citing *New Mexico State Game Commission*, stated that "the power of the United States to regulate and protect wildlife living on the federally controlled property cannot be questioned."<sup>23</sup> In that case, the court found that the NPS had the authority to prevent the state from spraying pesticides to eliminate black flies in the New River Gorge National River because the NPS's regulations prohibited the taking of wildlife—including black flies. A final example can be found in *United States v. Brown*, where the State of Minnesota wanted to assert the dominance of state hunting laws on waters adjacent to and surrounded by Voyageurs National Park.<sup>24</sup> Here, the court stated bluntly that "[w]here the State's laws conflict with the . . . regulations of the National Park Service . . . the local laws

---

population management [and] document it in the appropriate park management plan.").

20. "Because the NPS Organic Act does not defer to state wildlife law, the Park Service is not constrained by that law." ROBERT L. GLICKMAN & GEORGE CAMERON COGGINS, *MODERN PUBLIC LAND LAW* 260 (2001). See also R. Gerald Wright, *Wildlife Management in National Parks: Questions in Search of Answers*, 9 *ECOLOGICAL APPLICATIONS* 30, 32 (1999) ("From its beginning, the NPS has maintained exclusive jurisdiction over the management of wildlife in parks. And, although legally contested by individual state game departments, court decisions have uniformly supported the right of the NPS to own and manage wildlife on its lands.").

21. 410 F.2d 1197, 1199 (10th Cir. 1969).

22. *Id.* at 1202.

23. 640 F. Supp. 164, 166 (S.D. W. Va. 1986); see also *Organized Fishermen of Fla. v. Andrus*, 488 F. Supp. 1351, 1355 (S.D. Fla. 1980) ("[T]here is no question that the complete power Congress has over public lands under the Property Clause of the Constitution . . . necessarily includes the power to regulate and protect the wildlife living there.").

24. 431 F. Supp. 56, 59 (D. Minn. 1976).

must recede.”<sup>25</sup> It is clear that the NPS has the authority to regulate activities in park areas even where these regulations conflict with state regulations.

As stated above, the Organic Act provides important general guidelines for park management, but it is the specific park establishment acts that provide the details for management. Since the management of wildlife within a park depends on Congress’s statements at the time the land was set aside, it is important to examine the relevant establishment legislation. ANILCA created or expanded nearly every park in Alaska<sup>26</sup> and continues to be Congress’s most detailed statement as to the proper management of Alaska’s parks. That Act makes it lawful to take wildlife for subsistence purposes from most parks and all preserves in Alaska and for sport hunting purposes in preserves.<sup>27</sup> ANILCA also provides guidelines for situations in which wildlife population numbers falter. The statute makes it clear that in such cases, subsistence hunting is to be given priority over sport hunting where the two compete for wildlife resources; and where the elimination of sport hunting is inadequate, the Federal Subsistence Board<sup>28</sup> is to decrease even subsistence use of animal resources.<sup>29</sup> But, in all of these detailed instructions provided by Congress, there is no mention of any type of intensive management of wildlife resources as a solution to such a situation. This suggests that Congress deliberately excluded intensive management practices from the NPS’s arsenal under such circumstances. ANILCA never contemplates the use of intensive wildlife management techniques as a means of sustaining the hunting systems. Instead, the statute makes clear that hunting must give way where necessary.

ANILCA’s wildlife management mandate can be found in several sections of the statute and can be summed up as a requirement to conserve natural and healthy populations of wildlife. ANILCA states:

---

25. *Id.* at 63; *see also* *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976) (holding that the argument that Congress lacks power to administer public lands contrary to state law without state consent is “without merit”).

26. 16 U.S.C. §§ 3101–3233 (2000).

27. 16 U.S.C. §§ 3126(a), 3202(c)(1) (2000).

28. “Federal subsistence management falls under the authority of the federal subsistence board. The board [is comprised of] 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 (2002).

29. 16 U.S.C. §§ 3114, 3126(b) (2000).

It is hereby declared to be the policy of Congress that . . . consistent with sound management principles, and the *conservation of healthy populations* of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands . . . .<sup>30</sup>

ANILCA also provides that:

Nothing in this title shall be construed as . . . granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, *and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife.*<sup>31</sup>

This strong statement clearly indicates that hunting—even subsistence hunting—must never interfere with the maintenance of natural, healthy populations. Intensive management techniques that are designed to artificially inflate prey numbers by removing native predators, or by other intrusive and disruptive means, would not be consistent with the common understanding of the conservation of natural and healthy populations.

The legislative history of the statute indicates that Congress took this requirement very seriously. The Senate Report on ANILCA states: “The committee intends the phrase ‘the conservation of healthy populations of fish and wildlife’ 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* in relation to their ecosystems . . . .”<sup>32</sup> The report goes on to state that:

The Committee recognizes that the management policies and legal authorities of the National Park System and the National Wildlife Refuge System may require different interpretations and application of the ‘healthy population’ concept consistent with the management objectives of each system. Accordingly, the Committee recognizes that the policies and legal authorities of the managing agencies will determine the nature and degree of management programs affecting ecological relationships, population dynamics, and manipulation of the components of the ecosystem.<sup>33</sup>

---

30. *Id.* at § 3112(1) (emphasis added).

31. *Id.* at § 3125(1) (emphasis added).

32. S. REP. NO. 96-413, at 233 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 5070, 5177 (emphasis added).

33. *Id.*

The Senate Report clearly indicates that Congress not only intended the Bureau of Land Management, the Forest Service, the Fish and Wildlife Service, and the National Park Service to manage the wildlife on their lands for healthy populations, but that Congress also recognized the NPS's (and the Fish and Wildlife Service's) more rigorous existing wildlife management mandates as the appropriate source for the guidance of agency action. The Department of the Interior took this explanation to heart and incorporated it, nearly verbatim, into its regulations interpreting and implementing the "*conservation of healthy populations of fish and wildlife*" language of ANILCA for purposes of subsistence.<sup>34</sup>

Of course, both the Organic Act and ANILCA encourage the NPS to cooperate with state and local agencies,<sup>35</sup> but such cooperation does not authorize variance from statutory directives; ANILCA is explicit on this point. Section 802(3) of ANILCA states:

*[E]xcept as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.*<sup>36</sup>

Congress did not authorize the NPS to cooperate with state law to the point of sacrificing the mandates expressed in ANILCA itself.<sup>37</sup>

---

34. 50 C.F.R. § 100.4 (1992) ("*Conservation of healthy populations of fish and wildlife* means the maintenance of fish and wildlife resources and their habitats in a condition that assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystem . . . and recognizes that the policies and legal authorities of the managing agencies will determine the nature and degree of management programs affecting ecological relationships, population dynamics, and the manipulation of the components of the ecosystem.") (emphasis added).

35. See 16 U.S.C. § 1a-6(c) (2000) ("The Secretary of the Interior is hereby authorized to . . . cooperate, within the National Park System, with any State or political subdivision thereof in the enforcement of supervision of the laws or ordinances of that State or subdivision."). Here again, the Secretary is authorized, but not required, to cooperate; such cooperation would not justify a violation of the precepts of the statute itself. See also 16 U.S.C. § 3112(3).

36. 16 U.S.C. § 3112(3).

37. "The NPS and the states should work as harmoniously as possible, particularly in a park where Congress has authorized hunting under state law. However, the NPS need not feign that it possesses no authority or responsibility over the wild animals within park boundaries." Frank Buono, *Managing Wildlife in the Parks: The Legal Basis*, 14 THE GEORGE WRIGHT FORUM 18, 23 (1997).

Finally, ANILCA contains a savings clause preserving state authority over wildlife management: “Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in Title VIII of this Act*, or to amend the Alaska constitution.”<sup>38</sup> But while state authority in general is unchanged, the clause itself notes that Title VIII of the statute, which creates the federal subsistence priority and lays out the management mandate described above, takes precedence. Lending too much weight to the preservation of authority portion of this clause would nullify the management mandates provided elsewhere in the statute, as well as the rest of the language of the savings clause itself. It seems, therefore, that what the savings clause is actually preserving to the State is its pre-existing role—also preserved under the Organic Act—to generally manage wildlife. The Organic Act authorizes the NPS to manage park areas, and where that management conflicts with state law, state law must give way.

### III. STATE INTENSIVE MANAGEMENT OF WILDLIFE

In 1994, the Alaska State Legislature amended the existing statute directing the State Board of Game on wildlife management.<sup>39</sup> The amended statute calls for “intensive management” of wildlife populations in place of the earlier approach to wildlife management.<sup>40</sup> The explicit goal of the State’s Intensive Management statute is to maintain, restore, or increase the abundance of big game prey populations for human consumptive use.<sup>41</sup> Where current prey population levels are not

---

38. 16 U.S.C. § 3202 (2000) (emphasis added).

39. Act of Apr. 12, 1994, ch. 13, 1994 Alaska Sess. Laws § 2.

40. ALASKA STAT. § 16.05.255 (2006).

41. Section 16.05.255(e) reads as follows:

The Board of Game shall adopt regulations to provide for intensive management programs to restore the abundance or productivity of identified big game prey populations as necessary to achieve human consumptive use goals of the board in an area where the board has determined that

- (1) consumptive use of the big game prey population is a preferred use;
- (2) depletion of the big game prey population or reduction of the productivity of the big game prey population has occurred and may result in a significant reduction in the allowable human harvest of the population; and
- (3) enhancement of abundance or productivity of the big game prey population is feasibly achievable utilizing recognized and prudent active management techniques.

considered to be high enough to meet human consumptive needs, the State may not respond by curbing harvest levels or taking other conservation measures unless intensive management practices are simultaneously implemented.<sup>42</sup>

The statutory definition of “intensive management” is:

[M]anagement of an identified big game prey population consistent with sustained yield through active management measures to enhance, extend, and develop the population to maintain high levels or provide for higher levels of human harvest, including control of predation and prescribed or planned use of fire and other habitat improvement techniques.<sup>43</sup>

There can be no doubt that this definition, and the statutory goals in general, are likely to lead to high levels of human intervention in order to achieve a high level of consistent human consumptive use. After all, “intensive management” is intended to maintain a “sustained yield,” which the statute itself 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>44</sup>

Furthermore, under the regulations that implement this statute, the State uses the level of hunter demand for big game prey as one of the four criteria to be used when “identifying big game prey populations that are important for providing high levels of human consumptive use.”<sup>45</sup> In order to implement the Intensive Management statute, the State has crafted regulations that require the Board of Game to “utilize *active management* of habitat and predation as the major tools to reverse any significant reduction in

---

42. Section 16.05.255(f) reads as follows:

The Board of Game may not significantly reduce the taking of an identified big game prey population by adopting regulations relating to restrictions on harvest or access to the population, or to management of the population by customary adjustments in seasons, bag limits, open and closed areas, methods and means, or by other customary means authorized under (a) of this section, unless the board has adopted regulations, or has scheduled for adoption at the next regularly scheduled meeting of the board regulations, that provide for intensive management to increase the take of the population for human harvest consistent with (e) of this section.

This rule may not apply if the Board of Game determines that intensive management would be ineffective, inappropriate, or against the best interest of subsistence users. ALASKA STAT. § 16.05.255(f) (2006).

43. ALASKA STAT. § 16.05.255(j)(4) (2006).

44. ALASKA STAT. § 16.05.255(j)(5) (2006) (emphasis added).

45. ALASKA ADMIN. CODE tit. 5, § 92.106(1)(D) (1998).

the allowable human harvest of the population.”<sup>46</sup> The implementing regulations continue to underscore the human-centered, utilitarian goals of the statute and the high degree of manipulation of wildlife systems that is required in order to achieve those wildlife management goals.

If a hunting quota cannot be met in a game management area, then intensive management methods must be put into place.<sup>47</sup> Predator control is the most easily identified method of intensive management, though it is generally not permitted on NPS or U.S. Fish and Wildlife Service lands.<sup>48</sup> Practicing “intensive management” does not just consist of predator control, although this is the utmost manifestation of the principle. Intensive management in practice also includes actions such as: increasing 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 predators, thereby permitting the “incidental” taking of these animals; authorizing same day airborne hunting and trapping, which allow takings the same day one flies in an aircraft; allowing easier and greater use of motor vehicles while hunting, thus increasing 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>49</sup>

---

46. *Id.* at § 92.106(6) (emphasis added).

47. ALASKA STAT. § 16.05.255(e) (2006).

48. *See, e.g.*, ALASKA ADMIN. CODE tit. 5, §§ 92.110, 92.115, 92.125 (2006); *see also* MANAGEMENT POLICIES 2006, *supra* note 15, at 69 (“The Service does not engage in activities to reduce the numbers of native species for the purpose of increasing the numbers of harvested species (i.e., predator control), nor does the Service permit others to do so on lands managed by the National Park Service.”).

49. For example, Alaska Department of Fish and Game, Summary of Actions, Proposals No. 147, 148, and 223, passed February/March 2004, reauthorized the brown bear tag fee exemption in Units 19D, 20D, and 20E, because “moose are currently below their population or harvest objectives” and “tag fee exemptions will encourage harvesting opportunistically associated with other hunting practices.” ALASKA DEPT. OF FISH AND GAME, Summary of Actions 24, 38 (Feb. 26 – Mar. 10, 2004), *available at* [http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2003\\_2004/g031004.pdf](http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2003_2004/g031004.pdf). [hereinafter Summary of Actions Feb./Mar. 2004]. Proposal No. 230, passed February/March 2004, increased the wolf hunting season and bag limit in Unit 19 because this was “vital in reducing the predator population and helping to conserve the moose population.” *Id.* at 40. Proposal No. 34, passed November 2005, lengthened the brown bear season in Unit 22A because “bear predation . . . is contributing to a serious decline in moose population.” ALASKA DEPT. OF FISH AND GAME, Summary of Actions 9 (Nov. 11

Such yearly changes to hunting regulations apply to all hunters within the game management unit (or sometimes statewide) on all state, private, or (most) federal land, unless a specific exception is written into the regulations.<sup>50</sup> These regulatory changes are not considered predator control activities—which may only be executed by those specifically permitted to do predator control. Also, the Intensive Management statute does not just affect Alaska Board of Game decisions once populations are in decline; rather, it is the state’s wildlife management mandate in the same way that sections 802 and 815 of ANILCA<sup>51</sup> and section 1 of the Organic Act<sup>52</sup> form the management mandate for the NPS in Alaska. All state wildlife management activities carried out by the Board of Game must be driven by the goals and directives of the Intensive Management statute or the Board risks violating its legislatively prescribed responsibilities.

Furthermore, intensive management is really an umbrella term that describes several different types of management activities. Within this category are those management actions already

---

– 14, 2005), *available at* [http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2005\\_2006/summ112005.pdf](http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2005_2006/summ112005.pdf). [hereinafter Summary of Actions Nov. 2005]. Proposal No. 21, passed January 2006, allowed the trapping of black bear and the sale of hides and skulls. “Board members felt that allowing the sale of hides provides an opportunity to increase harvest in predator control areas.” ALASKA DEPT. OF FISH AND GAME, Summary of Actions 4 (Jan. 27 – 29, 2006), *available at* [http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2005\\_2006/jan06-bog-statewide.pdf](http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2005_2006/jan06-bog-statewide.pdf). [hereinafter Summary of Actions Jan. 2006]. Proposal No. 29, passed March 2006, eliminated brown bear tag fees in Unit 25C. “Adopting this proposal is consistent with the intensive management goals for the Fortymile caribou herd. Eliminating bear tag fees is another way of encouraging more brown bear harvest.” ALASKA DEPT. OF FISH AND GAME, Summary of Actions 5 (Mar. 10 – 21, 2006), *available at* [http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2005\\_2006/bog-march10sac.pdf](http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2005_2006/bog-march10sac.pdf). [hereinafter Summary of Actions Mar. 2006].

50. For instance, Proposal No. 6, passed November 2003, authorized the use of “snowmachines” to take wolves in Unit 18, but the “board noted that this regulation would not apply on federal [wildlife] refuge land.” ALASKA DEPT. OF FISH AND GAME, Summary of Actions 2 (Nov. 1 – 4, 2003), *available at* [http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2003\\_2004/g110403.pdf](http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2003_2004/g110403.pdf). [hereinafter Summary of Actions Nov. 2003]. State hunting rules do not necessarily apply to subsistence hunters on federal lands in Alaska, unless the federal subsistence board specifically adopts them because the federal government controls all subsistence hunting on federal lands in Alaska. *See generally* DAVID CASE and DAVID VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS*, ch. 8 (2002).

51. 16 U.S.C. §§ 3112, 3125 (2000).

52. 16 U.S.C. § 1 (2000).

described that are taken within official Intensive Management Areas under the Intensive Management statute. But there are identical types of actions taken on lands that are not officially designated as Intensive Management Areas or actions intended to promote prey species that are not officially recognized by the Intensive Management statute.<sup>53</sup> While these management practices are not a direct result of the Intensive Management statute, they are nonetheless an intensive type of wildlife management designed to increase selected prey populations for the benefit of human hunters and to the detriment of natural ecosystem dynamics.

#### IV. PREEMPTION: WHAT IS IT?

“When Congress exercises a granted power, concurrent conflicting state legislation may be challenged via the Preemption Doctrine.”<sup>54</sup> In other words, state law must yield where it conflicts with federal law. The concept of preemption is derived from the Supremacy Clause of the Constitution,<sup>55</sup> which requires that state

---

53. Proposal No. 51, passed March 2003, authorized an exemption for brown bear tag fees in Unit 11 (which is not an Intensive Management Area within the meaning of the Intensive Management statute). “The board recognized that the tag fee exemptions were instituted to stimulate harvest [of brown bear] in intensive management areas.” ALASKA DEPT. OF FISH AND GAME, Summary of Actions 8 (Mar. 7 – 15, 2003), available at [http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2002\\_2003/g031503.pdf](http://www.boards.adfg.state.ak.us/gameinfo/meetsum/2002_2003/g031503.pdf). [hereinafter Summary of Actions Mar. 2003]. Proposal No. 56, passed in March 2003, increased the bag limit and season length for red fox in certain units. “The board understood this limited increase could benefit those wanting to c[u]ll foxes . . .” *Id.* (species which foxes prey upon not targeted by the Intensive Management statute). Proposal No. 156, passed March 2003, increased the hunting season and bag limits for coyote in many units in part because the “board recognized the pressure on [Dall’s] sheep and small game populations” due to coyote predation. *Id.* at 22. (Dall’s sheep are not targeted by the Intensive Management statute). Proposal No. 20, passed November 2003, increased the bag limit on wolves in Unit 23 (which is not an Intensive Management Area within the meaning of the Intensive Management statute) to twenty wolves per season. “The board determined an increased bag limit would benefit moose populations . . .” Summary of Actions Nov. 2003, *supra* note 50, at 5.

54. JOHN E. NOWAK, RONALD D. ROTUNDA, & J. NELSON YOUNG, CONSTITUTIONAL LAW 267 (1978).

55. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

laws that “interfere with, or are contrary to,” federal law be invalidated.<sup>56</sup>

Laws such as the Organic Act and ANILCA are passed by Congress under the granted constitutional power of the Property Clause.<sup>57</sup> The landmark United States Supreme Court case describing the federal government’s powers under the Property Clause, specifically as they relate to wildlife, is *Kleppe v. New Mexico*.<sup>58</sup> The *Kleppe* Court stated that “we have repeatedly observed that the power over public land thus entrusted to Congress is without limitations.”<sup>59</sup> The Court ultimately found that “the complete power that Congress has over public lands necessarily includes the power to regulate and protect wildlife living there.”<sup>60</sup> Therefore, according to the Court, Congress retains the power to enact legislation respecting federal lands pursuant to the Property Clause, and when Congress does enact such legislation, it “necessarily overrides conflicting state laws under the Supremacy Clause.”<sup>61</sup>

Preemption has been clearly recognized by the United States Supreme Court:

If Congress evidences intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an

---

56. *Nat’l Audubon Soc’y v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002). *See also* *North Dakota v. United States*, 460 U.S. 300, 318 (1983) (stating that state statutes that are “plainly hostile to the interests of the United States” need not be applied); *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (holding that “to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in pursuance of the Constitution. . . . [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”). *See also* NOWAK, ROTUNDA & J. YOUNG, *supra* note 54, at 267 (“The supremacy clause mandates that federal law overrides, i.e., preempts any state regulation where there is an actual conflict between the two sets of legislation such that both cannot stand . . .”).

57. U.S. CONST. art. IV, § 3, cl. 2 (“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.”).

58. 426 U.S. 529 (1976).

59. *Id.* at 539 (internal quotations omitted) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

60. *Id.* at 540–41 (internal quotations omitted).

61. *Id.* at 543.

obstacle to the accomplishment of the full purposes and objectives of Congress.<sup>62</sup>

Thus, a state statute may be preempted either because congressional legislation completely occupies a given field so that there is no room for state action, or because, although Congress left room for the state to legislate, the state's legislation directly conflicts with the federal statute.

In the case of park wildlife management, Congress has not expressly preempted state law. There is no clause in ANILCA or the Organic Act that explicitly asserts that state law no longer applies in the area of wildlife management. In fact, to the contrary, these statutes are explicit that where there is no conflict, state law regarding wildlife management is to remain in effect or is at least to be given serious consideration.<sup>63</sup> For these reasons it can also be said that Congress did not intend for the statutes to completely occupy the field of wildlife management.<sup>64</sup> There is clearly room created by Congress under these statutes for the states to continue to legislate.

Here, Alaska state law and federal law directly conflict with each other; in this scenario, state law must yield to the federal law. "State action must give way to federal legislation where a valid act of Congress fairly interpreted is in actual conflict with the law of the state. Regulations duly promulgated by a federal agency, pursuant to Congressional delegation, have the same preemptive

---

62. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (internal citations and quotations omitted) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) (holding that state mining permit requirement was not preempted because the federal land use and state environmental regulations in question were distinguishable). *See also Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002) ("First, Congress may expressly preempt state law. Second, preemption may be inferred where Congress has occupied a given field with comprehensive regulation. Third, a state law is preempted to the extent that it actually conflicts with federal law."); *Totemoff v. State*, 905 P.2d 954, 958 (Alaska 1995) ("Federal law can preempt state law in three ways. First, Congress may expressly declare that state law is preempted. Second, state law is preempted if Congress intends the federal government to occupy a field exclusively. Third, federal law preempts state law if the two actually conflict.").

63. *See* 16 U.S.C. § 1a-6(c)(2) (2000); 16 U.S.C. § 539b(c) (2000); *see also* 36 C.F.R. § 13.40 (1983) (adopting non-conflicting state laws into National Park Service regulations).

64. *See Totemoff*, 905 P.2d at 959 ("Even though Title VIII [of ANILCA] has been fully implemented, it does not create a scheme of federal regulation so pervasive that there is no room for state regulation to supplement it.").

effect.”<sup>65</sup> Therefore, if a statute passed by Congress is based on legitimate constitutional authority, like the Property Clause, then the derivative agency regulations interpreting that statute may also preempt conflicting state law.<sup>66</sup>

Also, state and federal laws need not be contradictory on their face for federal law to supersede state law; on the contrary, actual conflict may be far more subtle.<sup>67</sup> Direct conflict can be found where, for instance, the result of a state law is to manifestly discourage the very conduct that federal law was meant to encourage or if the state law encourages conduct that is detrimental to the implementation of federal law.<sup>68</sup>

As shall be seen, it is physically impossible to meet the goals of both the federal and Alaska state statutes simultaneously;<sup>69</sup> furthermore, the state statute operates as an obstacle to the accomplishment of Congress’s objectives<sup>70</sup> as prescribed in ANILCA and other statutes. For these reasons, which the next Part will explain more fully, it is clear that the State’s Intensive Management statute, as well as other intensive management

---

65. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-26, at 482 (2d ed. 1988) (internal quotations omitted).

66. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 714 (1985) (stating that “state laws can be pre-empted by federal regulations as well as by federal statutes,” but holding that local ordinances were not preempted when there was no evidence that federal regulations explicitly or implicitly intended to preempt local regulations in the field of plasma donation).

67. TRIBE, *supra* note 65, at 482.

68. *See generally* TRIBE, *supra* note 65, at 482–86. *See also* *Nash v. Fla. Industrial Comm’n*, 389 U.S. 235, 239–40 (1967) (holding that state unemployment compensation laws were preempted because they tended to defeat the objectives of the NLRB); *Xerox Corp. v. County of Harris, Tex.*, 459 U.S. 145, 153–54 (1982) (striking down a state tax because it would penalize the acts a federal law meant to encourage); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973) (holding a city ordinance to be preempted because it mandated restrictions that interfered with the accomplishment of the objectives of the Federal Aeronautics Act).

69. *See Nat’l Audubon Soc’y v. Davis*, 307 F.3d 835, 851–52 (9th Cir. 2002) (“Such a conflict arises when compliance with both federal and state regulations is a physical impossibility.” (quoting *Hillsborough County*, 471 U.S. at 713) (internal quotations omitted)); *see also* *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987).

70. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (observing that state law is preempted where it would stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”); *see also* *Cal. Coastal*, 480 U.S. at 581; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

activities not specifically carried out under the Intensive Management statute, are preempted on NPS lands.

#### V. PREEMPTION - WHY DOES IT APPLY?

The State of Alaska is pursuing a course of action that directly interferes with the successful execution of congressional mandates for the management of wildlife on NPS lands. It is not surprising that conflict should arise between the State and the NPS over the State's game management activities. This is generally considered a likely point of contention.<sup>71</sup> NPS policy seeks to sustain and protect natural populations and processes while avoiding artificial manipulation that increases the numbers of certain species above natural levels.<sup>72</sup> The Alaska Board of Game, like most state game authorities,<sup>73</sup> is charged with maintaining high, continuously predictable numbers of prey populations,<sup>74</sup> rather than with maintaining the naturally fluctuating populations and processes that the NPS is charged with protecting. This significant difference in management goals was even recognized by the State of Alaska and preserved in the Master Memorandum of Understanding between the Alaska Department of Fish and Game and the NPS.<sup>75</sup> That document states that the Department of Fish and Game agrees, among other things:

1. To recognize the *Service's responsibility to conserve fish and wildlife* and their habitat and regulate the human use on Service lands in Alaska, in accordance with the National Park Service Organic Act, ANILCA, and other applicable laws.
2. To manage fish and resident wildlife populations *in their natural species diversity* on Service lands, recognizing that nonconsumptive use and appreciation by the visiting public is a primary factor.
- ...

---

71. See Buono, *supra* note 37, at 22 (1997); William F. Porter & H. Brian Underwood, *Of Elephants and Blind Men: Deer Management in the U.S. National Parks*, 9 ECOLOGICAL APPLICATIONS 3, 5 (1999); *supra* note 20, at 32.

72. See MANAGEMENT POLICIES 2006, *supra* note 15, at 62.

73. See generally Porter & Underwood, *supra* note 71, at 5 ("States are charged with managing population *size* rather than population *process*."); Wright, *supra* note 20, at 32 ("State wildlife agencies typically manage for population size and quality (e.g., large trophy males), whereas the NPS has no overt management emphasis other than assuring that populations are free of unwarranted unnatural disturbances.").

74. ALASKA STAT. § 16.05.255(e) (2006).

75. Memorandum of Understanding, *supra* note 4.

5. To recognize that National Park Service areas were established, in part, to “*assure continuation of the natural process of biological succession*” and “to maintain the environmental integrity of the natural features found in them.”<sup>76</sup>

Conserving natural and healthy populations is requisite to conserving wild species in their natural diversity to ensure natural biological succession.<sup>77</sup> There can be no doubt that this was Congress’s mandate for the NPS lands. However, this management approach directly conflicts with the State’s actions and so ought to preempt them.

Over time, the preemption cases “have continually narrowed the scope of judicial inquiry to a determination of whether, under the particular facts of the case, the existence of the state regulatory scheme is facilitative or detrimental to the purposes and objectives of the federal statute.”<sup>78</sup> In other words, there is no hard and fast rule as to whether a state statute must be preempted, but rather the decision will depend upon the facts of the individual case.

The Intensive Management statute on its face conflicts with federal laws that specifically promote conservation of natural processes and natural and healthy populations. ANILCA specifically provides permission for wildlife to be removed from NPS lands through subsistence and sport hunting.<sup>79</sup> While hunting is permitted in some parks, it has never been implied that hunting should trump the central purpose of the NPS, which is conservation in a natural state.<sup>80</sup> In fact, the opposite is true. ANILCA

76. *Id.* (emphasis added). Furthermore, both parties mutually agreed:

4. To recognize that the taking of fish and wildlife by hunting, trapping, or fishing on certain [Park] Service lands in Alaska is authorized in accordance with applicable State and Federal law *unless State regulations are found to be incompatible with documented Park or Preserve goals, objectives or management plans.*
5. To recognize for maintenance, rehabilitation, and enhancement purposes, that under extraordinary circumstances the manipulation of habitat or animal populations may be an important tool of fish and wildlife management to be used cooperatively on Service lands and waters in Alaska by the Service or the Department when *judged by the Service, on a case by case basis, to be consistent with applicable law and Park Service policy.*

*Id.* (emphasis added).

77. See generally M. BEGON, ET AL., *ECOLOGY: INDIVIDUALS, POPULATIONS AND COMMUNITIES* (1990).

78. NOWAK, ROTUNDA & J. YOUNG, *supra* note 54, at 269.

79. 16 U.S.C. §§ 3126(a), 3202(c)(1) (2000).

80. See 16 U.S.C. § 410hh (2000) (establishing that subsistence activities are “permitted” in certain park areas, but are not a purpose of those areas).

specifically includes a mechanism through which all hunting, including subsistence hunting, may be reduced or eliminated to protect wildlife populations,<sup>81</sup> but there is no corresponding mechanism to artificially inflate prey numbers in order to protect hunting, subsistence or otherwise. Subsistence hunting,<sup>82</sup> for rural Alaska residents in particular, must be accommodated,<sup>82</sup> but even that must give way where animal population numbers cannot support it. The only solution to such a situation found in the statute is to stop or reduce the hunt, not to intensively manage the wildlife.<sup>83</sup> Hunting, even subsistence hunting, may not be the driver for wildlife management within the park system. Neither the NPS nor a state has the authority to undermine the wildlife management mandate for the parks determined by Congress. NPS wildlife may only be managed for natural and healthy populations,<sup>84</sup> not to “achieve human consumptive use goals.”<sup>85</sup>

In addition to this facial conflict between the statutes, the state statute conflicts with the federal law as it is applied. As was pointed out in Part III of this Article, Alaska’s Intensive Management statute not only countenances but requires significant alterations to natural population dynamics, often by facilitating the elimination of large numbers of the predator species. The hunting regulations that make this possible are applied throughout the game management unit to which they are attached. For instance, Proposals No. 148 and 223, which were passed during the February/March 2004 Board of Game meeting, and which reauthorized the brown bear tag fee exemption in units 19D and 20E,<sup>86</sup> necessarily affected parts of Yukon-Charley Rivers National Preserve and Denali National Preserve, as well as other federal lands that happen to be in those units.<sup>87</sup> Similarly, Proposal No. 19, which was passed in November 2003, and which eliminated the

---

81. 16 U.S.C. §§ 3114, 3126(b) (2000).

82. *See* 16 U.S.C. § 3113 (2000).

83. *See* 16 U.S.C. §§ 3114, 3126 (2000); *see also* Nat’l Rifle Ass’n v. Potter, 628 F. Supp. 903 (D.D.C. 1986). In *National Rifle Ass’n v. Potter*, the court stated that “the primary management function with respect to Park wildlife is its preservation unless Congress has declared otherwise.” *Id.* at 912. In addition, Secretary Hubert Work emphasized that “the duty imposed upon the National Park Service in the organic act creating it to faithfully preserve the parks and monuments for posterity in essentially their *natural* state is paramount to every other activity.” *Id.* at 910 (emphasis added).

84. *See* 16 U.S.C. § 3125 (2000).

85. ALASKA STAT. § 16.05.255(e) (2006).

86. Summary of Actions Feb./Mar. 2004, *supra* note 49, at 24, 38.

87. 2007–2008 ALASKA HUNTING REGULATIONS, *supra* note 4, at 80–88.

resident tag fee for brown bear in unit 23,<sup>88</sup> affected Gates of the Arctic National Preserve and Noatak National Preserve.<sup>89</sup> Proposal No. 120, which was passed in March 2006, extended the wolf hunting season for units 12, 20, and 25, in order to “help increase moose numbers.”<sup>90</sup> This regulation affects Denali National Preserve, Yukon-Charley Rivers National Preserve, and Wrangell-St. Elias National Preserve.<sup>91</sup>

Wildlife managers cannot strive to maximize prey for human consumption while simultaneously conserving natural and healthy populations of *all* species. The two goals and the means by which they are achievable are mutually exclusive. The goals and methods of the Intensive Management statute have manifested themselves in a multitude of actions, described above, which attempt to manipulate wildlife, often at the expense of predator populations. It is clear that both federal and state entities recognize that outright predator control is inappropriate on NPS lands.<sup>92</sup> It should now be apparent as well that the many actions in addition to actual predator control under the Intensive Management statute inherently conflict with federal law and should be prohibited from being executed on NPS lands.<sup>93</sup>

There is a series of United States Supreme Court cases which hold that general statutory expressions of national policy are not necessarily sufficient to result in statutory conflict leading to preemption; rather, specific federal declarations are often required.<sup>94</sup> In *Commonwealth Edison v. Montana*, the Court stated

---

88. Summary of Actions Nov. 2003, *supra* note 50, at 5.

89. 2007–2008 ALASKA HUNTING REGULATIONS, *supra* note 4, at 96–98.

90. Summary of Actions Mar. 2006, *supra* note 49, at 18.

91. 2007–2008 ALASKA HUNTING REGULATIONS, *supra* note 4, at 61–62, 83–88, 102–04.

92. See Letter from Marcia Blaszak, Regional Director, National Park Service, to Mike Fleagle, Chairman, Alaska Board of Game (Oct. 15, 2004) (on file with author) (stating that, in the past, National Park Service lands have been specifically excluded by the Alaska Board of Game from predator control areas).

93. Letter from the Acting Assistant Secretary for Fish Wildlife and Parks, Department of the Interior, to Gerald Nicholia, Chair, Eastern Interior Alaska Subsistence Regional Advisory Council (Dec. 15, 2006) (on file with author) (stating that predator control in particular and manipulation of wildlife populations in general is “contrary to the National Park Service concept”).

94. See *Commonwealth Edison Co. v. Montana*, 435 U.S. 609, 634 (1981) (holding that Montana’s severance tax on coal did not violate the Supremacy Clause because general expressions by Congress that the use of coal is favored over other fossil fuels are not sufficient to preempt a state law that might burden that goal); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 220–23 (1983) (rejecting the claim that California’s

that “it is necessary to look beyond general expressions of ‘national policy’ to specific federal statutes with which the state law is claimed to conflict.”<sup>95</sup> In that case, utility companies sued the State of Montana, arguing that the State’s severance tax on coal is preempted by several federal statutes which encourage the use of coal over other fossil fuels.<sup>96</sup> The Court, however, noted that Congress specifically provided for the continuation of state severance taxes on coal in the savings clauses of the relevant statutes, and the legislative history demonstrates that Congress contemplated Montana’s severance tax specifically when writing those clauses.<sup>97</sup>

In Alaska, however, the facts surrounding the management of wildlife indicate that the exact opposite is true. The savings clauses in ANILCA explicitly recognize that section VIII of the statute changes federal and state roles regarding wildlife management.<sup>98</sup> Also, the legislative history emphasizes Congress’s desire to ensure that agencies manage wildlife strictly to maintain healthy and natural populations and, furthermore, notes the NPS’s pre-existing conservation mission and recognizes that the NPS, and the Fish and Wildlife Service in particular, may need to develop more stringent wildlife protection regulations.<sup>99</sup> In the statutes themselves, and in the legislative history, Congress never contemplates the use of alternative goals and methods for wildlife management on NPS lands, though Congress was likely aware that such alternatives were in place in many state systems.

The case of *Florida Lime & Avocado Growers v. Paul*<sup>100</sup> suggests, however, that differing statutory goals alone may not suffice to be the basis for preemption. In that case, Florida farmers sued the State of California over a California statute which limited the avocados that could be sold in California to those containing less than eight percent oil, even though a federal statute already created guidelines for the sale of avocados.<sup>101</sup> The Court found that preemption did not apply because the California statute did not

---

moratorium on new nuclear power plants frustrates the Atomic Energy Act’s purpose to encourage the commercial use of nuclear power).

95. 453 U.S. at 634.

96. *Id.* at 633.

97. *Id.* at 635.

98. 16 U.S.C. § 3202 (2000).

99. S. REP. NO. 96-413, at 233 (1979), as reprinted in 1980 U.S.C.C.A.N. 5070, 5177.

100. 373 U.S. 132 (1963).

101. *Id.* at 133–34.

directly conflict with the federal statute.<sup>102</sup> The state statute adopted oil percentage requirements and the federal statute adopted picking date, weight, and size restrictions; therefore the requirements of both regulatory schemes could be met simultaneously and preemption was not necessary.<sup>103</sup> Ultimately, the Court said that the “test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.”<sup>104</sup> As has already been pointed out, the objectives of the statutes in question in this Article are in fact “quite dissimilar”<sup>105</sup> and the perpetuation of the State’s regime must come at the expense of the federal goals. Here, the goals do not simply differ; rather, the State scheme interferes with NPS Management, since wildlife populations that are regularly manipulated are not natural.

Human manipulation of wildlife populations may very well lead to unnatural or unhealthy conditions for those populations. For instance, if predator populations are artificially suppressed to increase prey populations, those prey populations can become so overabundant that they destroy the very environment upon which they depend.<sup>106</sup> Of course, a superficial response to this problem is

---

102. *Id.* at 141.

103. *Id.* at 142–43.

104. *Id.* at 142.

105. *Id.*

106. See William J. Ripple et al., *Trophic Cascades Among Wolves, Elk and Aspen on Yellowstone National Park’s Northern Range*, 102 *BIOLOGICAL CONSERVATION* 227, 228 (2001) (describing how elk overbrowsing has contributed to a great decline in aspen regeneration in Yellowstone National Park and suggesting that it was the extirpation of wolves that led to changed elk patterns of movement through the park, which led to this situation). The authors also suggest that the reintroduction of wolves to the park may be reversing this process. *Id.* See also FREDERIC WAGNER ET AL., *WILDLIFE POLICIES IN THE U.S. NATIONAL PARKS* 46–47 (1995) (“Even the most superficial review of animal problems in the parks reveals that overpopulations [of ungulates] are at the root of many difficulties . . . . The more complex policy question to resolve once more turns on the matter of naturalness. The ecosystems in parks primarily established for their preservation . . . are clearly being altered by the browsing of elevated deer populations.”). Wagner and his co-authors cite “the following generalizations about the effects of high deer densities in eastern U.S. deciduous forests:”

[C]omposition of the forest overstory may be determined by browsing out the saplings of palatable tree species and leaving the unpalatable species to dominate the forest; the composition of the understory may be determined in the same way and, at the extreme, eliminated . . . .

simply to argue that hunters will replace predators in this new version of an ecosystem and prey numbers will be kept in check. However, while hunting may prevent the problems related to ungulate overabundance, it can still lead to unnatural conditions. Suppressed or absent predator populations, even if nominally replaced by humans who cull large ungulates, will still lead to altered cascading trophic effects (i.e., changes in what is present to eat and be eaten will be felt up and down the food chain).<sup>107</sup> An oversimplified example of such unnatural consequences may be that decreased wolf populations lead to increased coyote populations, which lead to decreased fox populations—each change causing many other changes in related prey populations (e.g., rodents, other small mammals, and birds).<sup>108</sup> It is impossible to manipulate one end of a trophic system (or ecosystem) without causing a chain reaction of other unnatural and often unpredictable results.

The intensive management situation is very similar to *First Iowa Hydroelectric Cooperative v. Federal Power Commission*,<sup>109</sup> where a utility cooperative's application for a license to build a dam was blocked by the State of Iowa for failure to comply with Iowa law, although the application met all the requirements of the Federal Power Act.<sup>110</sup> The Court stated that, “[c]ompliance with State requirements that are in conflict with federal requirements

---

Fundamental changes in vegetation alter the abundance and diversity of animal species that depend on it.

*Id.* (internal quotations omitted); Douglas W. Smith, Rolf Peterson & Douglas B. Houston, *Yellowstone After Wolves*, 53 *BIOSCIENCE* 330, 331 (2003) (finding that once grey wolves were extirpated from Yellowstone National Park in the early 1930s “some ungulate species, particularly elk, were considered to be ‘overabundant’ and ‘range deterioration’ became an issue”).

107. See GARY K. MEFFE ET AL., *PRINCIPLES OF CONSERVATION BIOLOGY* 392 (2d ed. 1997) (“Management of single species can lead to maximizing production of a few species without regard to the community/ecosystem in which they occur. Achieving high densities for one species may cause serious habitat degradation and reduce biodiversity.”).

108. See generally Smith, Peterson & Houston, *supra* note 106, at 335–38 (finding generally that wolf reintroduction to the park has resulted in a fifty percent decline in coyote density; because red fox compete closely with coyote their numbers may increase; wolverine populations may also increase because they rely on scavenging carcasses which are now more abundant due to wolf predation; willow and aspen, which had been rare prior to wolf reintroduction, are now increasing and are important for many bird and small mammal species, as well as beaver and moose).

109. 328 U.S. 152 (1946).

110. *Id.* at 156–64.

may well block the federal license.”<sup>111</sup> Ultimately, the Court found that the State’s laws were preempted and stated that:

The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.<sup>112</sup>

Similarly, the Organic Act and the ANILCA leave to the State of Alaska its traditional power to regulate wildlife as long as that power is not used in ways that conflict with the federal government’s superior right to regulate its lands. It is important to keep in mind that:

Where Congress has legislated in a field traditionally occupied by the states . . . there is a presumption against preemption, and a finding of preemption requires a ‘clear and manifest’ Congressional purpose . . . . [F]ederal courts can be expected to take a close look to determine whether preemption is consistent with what appears to be the Congressional purpose.<sup>113</sup>

It is true that wildlife management is an area of law typically left to state control, but it is also true that under the Property Clause of the Constitution the federal government has the right to legislate concerning its land and the wildlife thereon.<sup>114</sup> “State action incompatible with a legitimate exercise of federal power lacks validity, even when within an area where the states might otherwise act.”<sup>115</sup> Ultimately, if the Property Clause and the Supremacy Clause are to be given full effect, federal laws must trump state law even in the area of wildlife management. As the

---

111. *Id.* at 167.

112. *Id.* at 171–72.

113. WILLIAM W. SCHWARZER, AMERICAN LAW INSTITUTE – AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, FEDERAL PREEMPTION: A BRIEF ANALYSIS 7 (Aug. 26, 1999).

114. *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.”); *see also* *Fund for Animals v. Thomas*, 932 F. Supp. 368, 369–70 (D.D.C. 1996) (“The common law has always regarded the power to regulate the taking of animals *ferae naturae* to be vested in the states to the extent their exercise of that power may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.” (internal quotations omitted)).

115. NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 50 (2d ed. 1999).

Supreme Court said in *Hines v. Davidowitz*,<sup>116</sup> where the state's law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it must be preempted.<sup>117</sup>

This is the case at hand. The goal of the Intensive Management statute, to maintain an artificially high level of prey animals in order to meet the needs of all hunters in the state, is completely incongruous to the goals of the Organic Act and the ANILCA, which are to maintain natural and healthy populations and processes. Therefore, regulations enacted by the State which directly affect NPS lands, in order to meet or further the goals of the Intensive Management statute, are likely to discourage, complicate, or thwart the NPS's ability to meet the goals of the Organic Act and the ANILCA.

## VI. CONCLUSION

It has been clear for some time that NPS regulations may preempt state wildlife management laws that conflict with the NPS's own mandates at any time under the Organic Act. What is now also clear is that Alaska's Intensive Management statute meets the criteria for direct conflict with federal law, specifically the Organic Act and the ANILCA, as well as derivative regulations and policies, and must be preempted in favor of wildlife management goals and techniques that are in line with the mandates established by Congress.

While this article may appear to support an enormous shift in responsibility among federal and state managers, in fact the balance of power remains the same. Congress never suggested that it would tolerate the co-existence of state laws that thwarted its own legislative intent. This is necessarily a fact-specific analysis; different state wildlife management regimes might yield very different results.

We do not mean to imply that intensive management practices are normatively bad or wrong in some philosophical sense. The State has every right to manage wildlife for abundance of key species, and, by doing so, is meeting the needs and desires of many residents. Unfortunately, such management techniques and goals, while perfectly legitimate on state and private lands, are neither appropriate nor legal on NPS lands, which are required to be managed for purposes other than maximized human consumptive uses. Reconciling these two disparate systems is not a matter of

---

116. 312 U.S. 52 (1941).

117. *Id.* at 67 (emphasis added).

determining who is right and who is wrong.<sup>118</sup> Instead, it is a matter of determining on which lands these practices are allowed by law and on which lands they are not.

---

118. Porter & Underwood, *supra* note 71, at 5.