

THE KENAI RULE IN FOUR ACTS: BEAR BAITING, FIREARMS, AND HUNTING: COMMENT & ANALYSIS OF *ALASKA V. BERNHARDT*

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ABSTRACT

The Kenai Rule, enacted by the U.S. Fish and Wildlife Service in 2016, prohibits (a) the hunting of brown bears with bait in the Kenai National Wildlife Refuge, (b) most hunting in the Skilak Wildlife Recreation Area, and (c) the discharge of firearms along the Kenai and Russian Rivers. The Kenai Rule was challenged by the State of Alaska and Safari Club International in Alaska v. Bernhardt. This Comment provides an overview of the case as it was heard in the District Court of Alaska. This discussion includes arguments and counterarguments surrounding the application of four legislative acts: the Administrative Procedure Act, the National Wildlife Refuge System Improvement Act, the Alaska National Interest Lands Conservation Act, and the National Environmental Policy Act. Additionally, this Comment examines the holding and subsequent public response to the Ninth Circuit's decision in Safari Club International v. Haaland, the public's opinion on bear baiting, the culling of predators to increase moose and caribou populations for hunters, and the future impact this decision will have on the federalist arrangement of Alaska's natural resources.

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I. INTRODUCTION

Environmental sustainability is at the forefront of numerous public domains, including politics, popular culture, and for many Alaskans, everyday life. A variety of environmental issues have made headlines in the forty-ninth state, as demonstrated by the dwindling snow crab population,¹ coastline erosion,² and melting permafrost.³ As a result, wildlife management—in the context of both conservation and human sustenance—is at the forefront of the public discourse in Alaska. For purposes of this comment, wildlife management is defined as purposeful action by stakeholders that influences interactions between humans, animals (or wildlife), and wildlife habitats.⁴ However, opinions on how to implement wildlife management greatly diverge. Some Alaskans advocate for wildlife protections in the form of land preservation.⁵ Others argue for wildlife maintenance through permissive hunting, trapping, and fishing regulation.⁶ Still others argue for restrictive hunting regulations.⁷ The Kenai Rule,⁸ which consists of multiple provisions enacted in 2016 by the U.S. Fish and Wildlife Service (hereinafter “FWS”) for Alaska’s Kenai National Wildlife Refuge,⁹ proves a valuable case study into this complex conflict.

1. Rachel Ramirez, *Billions of Snow Crabs Have Disappeared from the Waters Around Alaska. Scientists Say Overfishing Is Not the Cause*, CNN (Oct. 16, 2022, 10:06 PM), <https://www.cnn.com/2022/10/16/us/alaska-snow-crab-harvest-canceled-climate>.

2. Paul Laustsen & Ann Gibbs, *Northern Alaska Coastal Erosion Threatens Habitat and Infrastructure*, SOUND WAVES NEWSL. (U.S. Geological Surv., Reston, Va.) Sept. 1, 2015, <https://www.usgs.gov/centers/pcmsc/news/northern-alaska-coastal-erosion-threatens-habitat-and-infrastructure>.

3. See generally Sasha Kahn, Note, *It Takes a Village: Repurposing Takings Doctrine to Address Melting Permafrost in Alaska Native Towns*, 39 ALASKA L. REV. 105, 108–09 (2022) (discussing the consequences of melting permafrost on Alaska Native communities).

4. Shawn J. Riley et al., *The Essence of Wildlife Management*, 30 WILDLIFE SOC’Y BULL. 585, 593 (2002).

5. See, e.g., Press Release, The Conservation Fund, *Creamer’s Field Wildlife Refuge Gains Important Land and Trails* (Oct. 20, 2020), <https://www.conservationfund.org/impact/press-releases/2297-alaska-wildlife-refuge-gains-important-land-and-trails> (discussing a recent decision to expand a wildlife refuge near Fairbanks to protect bird habitats).

6. See, e.g., Avery Lill, *More Shrubs Means Way More Moose in Western Alaska*, ANCHORAGE DAILY NEWS (Sept. 5, 2022), <https://www.adn.com/alaska-news/wildlife/2022/09/05/more-shrubs-means-way-more-moose-in-western-alaska/> (“In western parts of the state, biologists hope that hunting pressure will help protect the health of booming populations.”).

7. See, e.g., *id.*

8. The Kenai Rule, 81 Fed. Reg. 27,030 (May 5, 2016) (to be codified at 50 C.F.R. pt. 36).

9. *Alaska v. Bernhardt*, 500 F. Supp. 3d 889, 900–01 (D. Alaska 2020).

The Kenai National Wildlife Refuge, a 1.9 million acre refuge in Alaska's Kenai Peninsula,¹⁰ serves as a popular hunting and fishing destination for both Alaska residents and nonresidents.¹¹ The Skilak Wildlife Recreation Area, located within the Kenai National Wildlife Refuge, provides 44,000 acres of wildlife viewing and environmental education opportunities.¹² Federal actors, supporting the land preservation and restrictive hunting approach to wildlife management, drafted the Kenai Rule to accomplish three major goals. First, it banned hunting brown bears using bait in the Kenai National Wildlife Refuge.¹³ Second, it emphasized wildlife viewing and environmental education in the Skilak Wildlife Recreation Area.¹⁴ And third, it extended a firearms buffer in the Kenai River and Russian River corridors.¹⁵

Alaska, subscribing to the permissive hunting regulation approach to wildlife management, had approved bear baiting in the Kenai Peninsula¹⁶ and opened the Skilak Wildlife Recreation Area to the hunting of wolves, coyote, and lynx in 2013.¹⁷ In 2020, after the enactment of the Kenai Rule, the State of Alaska and Safari Club International challenged FWS, the Alaska Wildlife Alliance, and other environmental organizations¹⁸ to invalidate those restrictions.¹⁹

This comment provides an overview of this federalist conflict, focusing mainly upon the arguments and counterarguments in *Alaska v. Bernhardt* as a way to predict the case's impact on federal interests in Alaskan land. Part II of this comment provides the legal background

10. Kenai National Wildlife Refuge Cabins, RECREATION.GOV (2022), <https://www.recreation.gov/camping/campgrounds/233317?tab=info> (last visited May 12, 2022).

11. Sterling D. Miller et al., *Trends in Brown Bear Reduction Efforts in Alaska, 1980–2017*, 28 *URSUS* 135, 137 (2017).

12. The Kenai Rule, 81 Fed. Reg. at 27,038.

13. *Id.* at 27,031.

14. *Id.*

15. *Id.*

16. Lisa Demer, *Protections for Kenai Brown Bears at Center of Classic Alaska Battle*, ANCHORAGE DAILY NEWS, <https://www.adn.com/alaska-news/article/protections-kenai-brown-bears-center-classic-alaska-battle/2013/12/03/> (Sept. 28, 2016).

17. See The Kenai Rule, 81 Fed. Reg. at 27,038 (stating that Alaska adopted hunting regulations).

18. *Alaska v. Bernhardt*, 500 F. Supp. 3d 889, 902 (D. Alaska 2020). Intervenor-Defendants were Alaska Wildlife Alliance, Alaskans for Wildlife, Friends of Alaska Wildlife Refuges, Denali Citizens Council, Copper County Alliance, Kachemak Bay Conservation Society, Defenders of Wildlife, National Parks Conservation Association, National Wildlife Refuge Association, Northern Alaska Environmental Association, The Wilderness Society, Wilderness Watch, Sierra Club, Center for Biological Diversity, and the Humane Society of the United States. *Id.* at 902 n.90.

19. *Id.* at 902.

underlying the federalist conflict present in the Kenai Rule debate. Part III discusses this debate in the context of arguments presented in *Alaska v. Bernhardt* and outlines the Federal District Court for Alaska’s rationale in upholding the Kenai Rule’s restriction on the baiting of brown bears in the Kenai National Wildlife Refuge and hunting in the Skilak Wildlife Recreation Area, while revoking the prohibition on discharging firearms along the Kenai and Russian Rivers.²⁰ Part IV discusses the U.S. Court of Appeals for the Ninth Circuit’s decision in *Safari Club International v. Haaland* to affirm the district court’s decision to grant summary judgment in favor of the defendants.²¹ Part IV also analyzes public response to this decision, specifically the State of Alaska petition to the Supreme Court for review on October 27, 2022.²² Finally, Part V discusses the present and future implications of this federalist conflict.

II. BACKGROUND

To contextualize the legal landscape underlying *Alaska v. Bernhardt*, this Part begins by outlining the establishment of the Kenai National Wildlife Refuge and the division of power between federal actors and the state of Alaska over this area. Next, this Part provides a brief overview of the hunting technique that spurred this federalist conflict—bear baiting. Finally, this background overview outlines the state and federal actions that led to the legal confrontation in *Alaska v. Bernhardt*.

1. Establishment & Division of Power of the Kenai National Wildlife Refuge

The Kenai National Wildlife Refuge, originally called the Kenai National Moose Range, was created in 1941 by President Franklin D. Roosevelt.²³ The purpose of the refuge was to protect the breeding and feeding range of moose on the Kenai Peninsula.²⁴ In 1980, by passing the Alaska National Interest Lands Conservation Act (“ANILCA”),²⁵ Congress expanded the refuge “to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, moose, bears, mountain goats, Dall sheep, wolves and other fur-bearers,

20. *Id.* at 927.

21. *Safari Club Int’l v. Haaland*, 31 F.4th 1157, 1179 (9th Cir. 2022).

22. *Safari Club Int’l v. Haaland*, 31 F.4th 1157 (9th Cir. 2022), *petition for cert. filed*, (U.S. Oct. 27, 2022) (No. 22-401).

23. *See* Exec. Order No. 8979, 6 Fed. Reg. 6471 (Dec. 16, 1941) (establishing the Kenai National Moose Range).

24. *Id.*

25. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101-3233).

salmonoids and other fish, waterfowl and other nonmigratory birds.”²⁶

To determine who would maintain and control the refuge, FWS entered into a Master Memorandum of Understanding with Alaska in 1982.²⁷ The agreement gave FWS the power “to conserve fish and wildlife and their habitats and regulate human use.”²⁸ Conserve in this context means that FWS oversees fish and wildlife through the lens of species preservation and ecological balance.²⁹ In other words, FWS regulates how many animals can be caught by the public to ensure a natural balance. FWS does this through environmental surveys and population estimates of various species.³⁰ Human use here refers to how and what a person can do in terms of hunting and fishing. Here, certain animals require a tag or a license to be hunted and harvested.³¹ For fishing, there are limits on what a person can keep, meaning that certain species of fish cannot be caught and kept but must be thrown back, the fish itself has to meet certain specifications to be kept (minimum and/or maximum weight, length, if the fish looks pregnant or has been tagged as pregnant, etc.), and the length of the fishing season.³² This balancing act in wildlife stewardship, based upon the North American Model of Wildlife Conservation, means that the FWS will use science “to develop wildlife policy, only killing wildlife for legitimate purposes such as food, and upholding the ideal of hunting as inexpensive and accessible to all – preventing the U.S. from becoming like England where only a privileged class had the opportunity to hunt.”³³ In sum, FWS has the power to dictate both which animals may be hunted, fished, and harvested and the methods by which such hunting, fishing, and harvesting may be done.

Meanwhile, federal *and* state law regulates “the *taking* of fish and wildlife . . . on [FWS] lands in Alaska.”³⁴ Therefore, Alaska was given the power to regulate the ability to “pursue, hunt, shoot, trap, net capture,

26. *Id.* at § 303(4)(B)(i), 94 Stat. at 2391.

27. *Alaska v. Bernhardt*, 500 F. Supp. 3d 889, 895 (D. Alaska 2020).

28. *Id.*

29. *Mission and Vision*, U.S. FISH AND WILDLIFE SERV., <https://www.fws.gov/about/mission-and-vision> (last visited Nov. 29, 2022).

30. *See, e.g.*, U.S. FISH & WILDLIFE SERV., WATERFOWL: POPULATION STATUS, 2022 2–4 (2022), <https://www.fws.gov/sites/default/files/documents/waterfowl-population-status-report-2022.pdf> (discussing some FWS surveying and population estimation techniques).

31. ALASKA DEP’T OF FISH & GAME, *Hunting/Trapping Licenses and Permits*, <https://www.adfg.alaska.gov/index.cfm?adfg=huntlicense.main> (last visited Dec. 16, 2022).

32. *Id.*

33. U.S. DEP’T OF THE INTERIOR, *Everything You Need to Know About Hunting on Public Lands* (Sept. 1, 2017), <https://www.doi.gov/blog/everything-you-need-know-about-hunting-public-lands>.

34. *Bernhardt*, 500 F. Supp. 3d at 895–96 (emphasis added).

collect, kill, harm, or attempt to engage in any such conduct” within the refuge.³⁵ This state power has an important limitation, the state regulations must be compatible with “documented Refuge goals, objectives, or management plans.”³⁶ The purpose for National Wildlife Refuges in Alaska, as regulated by the FWS, is to conserve wildlife populations in their natural diversity, which includes maintaining predator and prey relationships.³⁷ While hunting and trapping activities are not to be given priority over non-consumptive activities like wildlife watching and hiking, the protection of wildlife and natural resources within National Wildlife Refuges by FWS is given the highest priority.³⁸

In accordance with this distribution of authority, FWS developed a 1985 Comprehensive Conservation Plan which permitted hunting and trapping in the Kenai National Wildlife Refuge except in areas where public safety was a concern.³⁹ The plan also designated the Skilak Wildlife Recreation Area as an area to remain available for wildlife viewing.⁴⁰

2. Baiting: An Introduction to the Controversial Practice

Hunters use bait to lure animals into a particular area.⁴¹ In some instances, hunters will put bait in a particular spot over a long period of time to train the animal to come back to that area while simultaneously adding layers of fat to the animal.⁴² Baiting the animal makes them less elusive, more predictable, and potentially easier to shoot.⁴³ On the day of a bait-hunt, the hunter will typically set up a perch in a tree or use an elevated platform.⁴⁴ The hunter will then set out bait and wait in the perch

35. 16 U.S.C. § 3102(18).

36. *Bernhardt*, 500 F. Supp. 3d at 895-96.

37. Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52,247, 52,252 (Aug. 8, 2016) (codified at 50 C.F.R. pt. 32, 36).

38. *Id.* at 52,257.

39. *Bernhardt*, 500 F. Supp. 3d at 896 (quoting the U.S. Fish and Wildlife Service’s administrative record).

40. *Id.*

41. Vivien Bullen, *How Deer Baiting Works*, HOWSTUFFWORKS, <https://adventure.howstuffworks.com/outdoor-activities/hunting/alternative-methods/deer-baiting.htm> (last visited Nov. 10, 2022).

42. See Patrick Durkin, *Baiting: Do the Consequences Outweigh the Benefits?*, MEATEATER (Feb. 5, 2019), <https://www.themeateater.com/conservation/policy-and-legislation/baiting-do-the-consequences-outweigh-the-benefits> (describing how bears in states where baiting is less regulated develop a “long-lasting, high-sugar diet” from long-term baiting and become more “fat and fertile” than bears in other states).

43. See *id.* (implying that the purpose of long-term use of high-fat bait foods is to increase bear size for better hunting).

44. See Will Brantley, *Baiting Big Game*, REALTREE (May 18, 2017), <https://www.realtree.com/big-game-hunting/articles/baiting-big-game>

to get a clean shot of the animal.⁴⁵

In the United States, using bait for hunting appears to be an unpopular practice. One study found that fifty-five percent of Americans from distinct geographic regions disapprove of bait hunting—with fourteen percent *strongly* disapproving.⁴⁶ Only thirty-two percent approved of the practice.⁴⁷

For bears, baiting usually includes high-calorie, high sugar foods, such as candy, corn, and donuts, stacked into a large pile.⁴⁸ Bear baiting in and of itself is dangerous to human life because bears can climb on the elevated stands,⁴⁹ and the bait used can attract other creatures, such as racoons and skunks, leading to the spread of diseases like rabies.⁵⁰ The practice is also dangerous for the bear population as it can leave a cub without its mother.⁵¹ A poll of Alaskans in 2018 found that just thirty-four percent approved of hunters and trappers baiting brown and black bears.⁵²

(describing how ideal baiting positions are often elevated).

45. *Id.*

46. RESPONSIVE MGMT. & AM. SPORTFISHING ASS'N, AMERICANS' ATTITUDES TOWARD HUNTING, FISHING, SPORT SHOOTING, AND TRAPPING 35 (2019), https://www.fishwildlife.org/application/files/7715/5733/7920/NSSF_2019_Attitudes_Survey_Report.pdf.

47. *Id.*

48. Durkin, *supra* note 42.

49. See Clay Newcomb, *Treestand or Ground Blind for Bear?*, BEAR HUNTING MAG. (2019), <http://www.bear-hunting.com/2019/8/treestand-or-ground-blind-for-bear> (arguing that bait bear hunting from a perch can be especially dangerous because bears are capable of climbing ladders); see also *Online Bear Baiting Clinic: Location and Bait Choice*, ALASKA DEP'T OF FISH & GAME, <https://www.adfg.alaska.gov/index.cfm?adfg=bearbaiting.baitlocation> (last visited Nov. 11, 2022) (describing brown bears as “dangerous to you and others using the site”).

50. Ellen M. Candler et al., *Who Takes the Bait? Nontarget Species Use of Bear Hunter Bait Sites*, 13 HUM.-WILDLIFE INTERACTIONS 98, 106 (2019), <https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1533&context=hw>.

51. See *Online Bear Baiting Clinic: Choosing Which Bear to Take*, ALASKA DEP'T OF FISH & GAME, <https://www.adfg.alaska.gov/index.cfm?adfg=bearbaiting.bearchoice> (last visited Nov. 11, 2022) (discussing how female bears will “stash” their cubs in nearby trees before checking the bait site, implying that if hunters kill bear mothers, their cubs will be orphaned).

52. Press Release, The Humane Soc'y of the U.S., *The Humane Society of the United States Releases a New Poll Revealing that Alaskan Voters Strongly Oppose Cruel Methods of Killing Iconic Wildlife on National Preserves in Alaska* (June 27, 2018), <https://web.archive.org/web/20220609202516/https://www.humanesociety.org/news/humane-society-united-states-releases-new-poll-revealing-alaskan-voters-strongly-oppose-cruel>.

3. The Federalist Clash Over Bear Baiting and Hunting in the Refuge

In 1993, FWS limited hunting methods in the refuge by prohibiting the “*unauthorized* distribution of bait and the hunting over bait.”⁵³ This limitation continued to permit baiting in the refuge as long as it was authorized in accordance with state regulations.⁵⁴ Alaska, to increase the number of moose and caribou available to hunters, permits the use of bait stations to capture predators of both moose and caribou, namely, bears and wolves.⁵⁵ The Alaska Board of Game approved bear baiting in the Kenai Peninsula in 2013.⁵⁶ The Board of Game implemented this change to not only increase the moose and caribou population, but also to ensure public safety.⁵⁷ Because brown bears are losing substantial portions of their natural habitat for reasons such as climate change, they have begun to move to more human-recreational spaces in and around the Kenai refuge, posing a significant threat to tourists, campers, and recreational users in the peninsula.⁵⁸ For the same public safety reasons, the Alaska Board of Game also opened the Skilak Wildlife Recreation Area to the hunting of wolves, coyotes, and lynxes.⁵⁹

However, brown bears have been a “threatened” species in the conterminous United States since 1975.⁶⁰ As mentioned previously, FWS, as a part of their charge, is responsible for ensuring a natural balance and protecting species from becoming extinct due to human intervention. Therefore, in response to the Alaska Board of Game’s actions, FWS, through the Kenai Rule, blocked the baiting of brown bears,⁶¹ closed the Skilak Wildlife Recreation Area to the hunting of coyotes, wolves, and lynxes,⁶² and limited the use of firearms along the Kenai and Russian rivers.⁶³ The State of Alaska’s legal mandate, which encourages a sustained yield of wildlife for hunting, deviated from the FWS’s

53. 50 C.F.R. § 32.2(h) (emphasis added).

54. *Id.*

55. Miller et al., *supra* note 11, at 136.

56. Lisa Demer, *Protections for Kenai Brown Bears at Center of Classic Alaska Battle*, ANCHORAGE DAILY NEWS, <https://www.adn.com/alaska-news/article/protections-kenai-brown-bears-center-classic-alaska-battle/2013/12/03/> (Sept. 28, 2016).

57. *See id.* (discussing increasing bear populations, especially in residential areas, threatening hunters and residents alike).

58. *Id.*

59. *See* The Kenai Rule, 81 Fed. Reg. 27,030, 27,038 (May 5, 2016) (to be codified at 50 C.F.R. pt. 36) (stating that Alaska adopted hunting regulations).

60. Miller et al., *supra* note 11, at 135.

61. The Kenai Rule, 81 Fed. Reg. at 27,036.

62. Notice of Hunting and Trapping Restrictions Within the Skilak Wildlife Recreation Area (Skilak Loop Management Area) of Kenai National Wildlife Refuge, Alaska, 78 Fed. Reg. 66,061, 66,061–62 (Nov. 4, 2013).

63. The Kenai Rule, 81 Fed. Reg. at 27,031.

requirements and led to federal action in the form of the Kenai Rule.⁶⁴

III. ALASKA V. BERNHARDT

Due to conflicting opinions between Alaskan and federal lawmakers, the State of Alaska and the Safari Club International challenged aspects of the Kenai Rule in *Alaska v. Bernhardt*.⁶⁵ Alaska and the Safari Club sought to invalidate the three major goals of the Kenai Rule: the ban on brown bear baiting in the Kenai National Wildlife Refuge, the restrictions on hunting in the Skilak Wildlife Recreation Area, and the ban on firearms in the Kenai River and Russian River corridors.⁶⁶ To do this, the state argued that these provisions violated four legislative acts: the Administrative Procedure Act, the National Wildlife Refuge System Improvement Act, ANILCA, and the National Environmental Policy Act.⁶⁷

This Part begins by summarizing the arguments presented by the plaintiffs and defendants in *Alaska v. Bernhardt*. To accomplish this, this Part first addresses the alleged violation of ANILCA, which applies equally to all three goals of the Kenai Rule. Then this Part analyzes the remaining alleged violations and discusses the fate of hunting in the Kenai National Wildlife Refuge as determined by the District Court of Alaska.

A. The Alaska National Interest Lands Conservation Act (ANILCA): Overview of Arguments and Ruling

As applied to all three goals of the Kenai Rule, the state argued that the Kenai Rule violated ANILCA, which grants Alaska authority over the “management of fish and wildlife, including methods and means of hunting.”⁶⁸ The state accused FWS of usurping “the State’s role in managing wildlife on public lands in Alaska” in violation of ANILCA.⁶⁹ However, FWS rebutted this charge by arguing that “ANILCA maintains the balance of authority whereby [FWS] only permits State management of wildlife to the extent it does not conflict with federal [wildlife] management priorities.”⁷⁰ These priorities tie back to the mission and vision of FWS, which states in part that it must “conserve, protect and enhance fish,

64. Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52,248, 52,251 (Aug. 5, 2016).

65. *Alaska v. Bernhardt*, 500 F. Supp. 3d 889, 895–96 (D. Alaska 2020).

66. *Id.*

67. *Id.* at 900, 902, 910.

68. *Id.* at 910–11.

69. *Id.*

70. *Id.* at 911.

wildlife, plants, and their habitats for the continuing benefit of the American people.⁷¹ Further, FWS's priorities also include protecting and recovering threatened and endangered species, supporting the replenishment of depleted wildlife stocks, and conducting programs of enforcement to meet these needs.⁷² Thus, the priorities of the federal government, by way of FWS, can be surmised as protecting threatened and endangered species by enforcing programs to ensure long-term ecological success.

Faced with the task of determining whether Congress intended ANILCA to preempt Alaska's wildlife management over federal lands,⁷³ the District Court of Alaska found that the plaintiffs "d[id] not point to any provision in ANILCA that explicitly states that federal regulations governing [national wildlife refuges] must conform to state law."⁷⁴ In other words, ANILCA supersedes Alaska legislation over federal lands. Additionally, the court found "[t]he prohibition on brown bear baiting and the restrictions on hunting in the Skilak [Wildlife Recreation Area] and along the Kenai and Russian rivers [to be] valid exercises of [FWS's] authority under ANILCA to specify different uses for different areas within the Kenai [National Wildlife Refuge]."⁷⁵ As a result, the court found the aspects of the Kenai Rule that were challenged did not violate ANILCA.⁷⁶

B. Bear Baiting: Overview of Arguments and Ruling

1. *The Administrative Procedure Act*

The State of Alaska argued that the Kenai Rule's restriction on bear baiting conflicts with the state and FWS's Master Memorandum of Understanding, which authorized bear baiting in Alaska's national wildlife refuges in accordance with state regulations.⁷⁷ However, the defendants clarified, and the district court agreed, that Alaska's refuges are "'opened to hunting, fishing and trapping' under ANILCA and governed by 'specific refuge regulations.'"⁷⁸ Therefore, the court accepted FWS's interpretation of the regulation, determining that it was not plainly

71. Mission and Vision, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/about/mission-and-vision> (last visited Nov. 29, 2022).

72. *Id.*

73. *Bernhardt*, 500 F. Supp. 3d at 912.

74. *Id.* at 914. *But cf.* Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 101(d), 94 Stat. 2371, 2375 (1980) (codified as amended at 16 U.S.C. § 3101(d)) (expressing Congress's desire that there be no need for future federal legislation following ANILCA).

75. *Bernhardt*, 500 F. Supp. 3d at 915.

76. *Id.*

77. *Id.* at 923. *See supra* text accompanying notes 27-32.

78. *Bernhardt*, 500 F. Supp. 3d at 924 (quoting Refuge-Specific Hunting and Fishing Regulations, 58 Fed. Reg. 5,065, 5,069 (Jan. 19, 1993) (to be codified at 50 C.F.R. pts. 32, 33)).

erroneous or inconsistent with the prohibition of hunting with bait in wildlife refuge areas.⁷⁹ In other words, FWS and the district court interpreted ANILCA to allow additional prohibitions on hunting with bait.

Additionally, the state argued that the Kenai Rule was arbitrary and capricious because FWS did not explain its change of position on the baiting of bears.⁸⁰ In 2007, FWS issued a compatibility determination specific to the Kenai National Wildlife Refuge, in which it stated that a combination of both federal law and state regulations allowed for hunters to practice black bear baiting in Kenai.⁸¹ The state maintained that FWS lacked a rational basis for limiting the harvesting of brown bears since “the number of brown bears harvested during a hunting season is established by the State.”⁸² The defendants argued that they had reached a different conclusion about the compatibility determination because the 2007 decision now threatened the brown bear population significantly in Kenai, even though it only addressed black bear baiting.⁸³ The court agreed, finding that FWS did not change its position on bear baiting in the Kenai Rule, and instead, FWS adequately explained its position and referenced studies on the decrease in brown bear populations due to hunting.⁸⁴

2. *The National Wildlife Refuge System Improvement Act*

The plaintiffs alleged that FWS misconstrued the Alaska Board of Game’s regulations involving brown bear baiting, erroneously concluding that the state’s regulations were inconsistent with the Kenai National Wildlife Refuge Comprehensive Conservation Plan.⁸⁵ However, the defendants maintained that this was irrelevant because “the Kenai Rule does not rely on notions of ‘intensive management’ or ‘predator control.’”⁸⁶ In other words, the defendants argued that the Kenai Rule was neither in place to micromanage the population of various wildlife in Kenai nor to keep predator populations at safe levels. Instead, the defendants argued that the court only needed to “consider whether the ‘agency’s stated reasons for’ the Kenai Rule are sufficient.”⁸⁷ In response, the court cited a Ninth Circuit ruling holding that the National Wildlife Refuge System Improvement Act

79. *Id.* at 926–27.

80. *Id.* at 923.

81. *Id.* at 897.

82. *Id.* at 923–24.

83. *Id.* at 924. *See also id.* at 924 n.294 (noting Intervenor-Defendants’ argument that FWS “did not change its position because it has never permitted *brown bear* baiting in the Kenai [National Wildlife Refuge,]” only *black bear* baiting) (emphasis added).

84. *Id.* at 925.

85. *Id.* at 916. *See supra* text accompanying notes 39–40.

86. *Bernhardt*, 500 F. Supp. 3d at 917.

87. *Id.*

preempts state regulations and is not bound by conflicting state law.⁸⁸

3. *The National Environmental Policy Act*

The plaintiffs argued that the National Environmental Policy Act, which requires federal agencies to assess the environmental effects of proposed actions prior to deciding to pursue them,⁸⁹ applied to the Kenai Rule.⁹⁰ The plaintiff argued that the Rule “reduces the effectiveness of State wildlife management by preempting [Alaska Board of Game]-authorized harvest opportunities and methods of take.”⁹¹ This preemption of Alaska’s wildlife management would impact the physical environment, making the National Environmental Policy Act applicable.⁹²

However, the defendants maintained that the National Environmental Policy Act does not apply to restrictions on baiting brown bears.⁹³ According to the defendants, the provisions in the Kenai Rule “simply maintain the environmental status quo on the Kenai refuge that has been in place for three decades.”⁹⁴ The court agreed, ruling that the National Environmental Policy Act did not apply to limits on brown bear baiting in the Kenai Rule.⁹⁵ According to the court, the plaintiffs failed to identify any cases that required “an [environmental assessment] or an [environmental impact statement] based solely on a change in who is enforcing the rules when the environmental status quo remains unchanged.”⁹⁶

88. *Id.* at 918 (citing Nat’l Audubon Soc’y, Inc. v. Davis, 307 F.3d 835, 854 (9th Cir. 2002)).

89. 42 U.S.C. § 4332(C).

90. *Bernhardt*, 500 F. Supp. 3d at 904.

91. *Id.*

92. Under the National Environmental Policy Act, “[w]hen an agency decides to proceed with an action in the absence of an [environmental assessment] or [environmental impact statement], the agency must adequately explain its decision.” *Id.* (quoting *Alaska Ctr. for the Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999)). The agency “cannot avoid its statutory responsibility under [the National Environmental Policy Act] merely by asserting than [sic] an activity it wishes to pursue will have an insignificant effect on the environment.” *Id.* (quoting *Alaska Ctr. for Env’t*, 189 F.3d at 859). Instead, the agency “must supply a convincing statement of reasons why potential effects are insignificant.” *Id.* (quoting *Alaska Ctr. for Env’t*, 189 F.3d at 859).

93. *Bernhardt*, 500 F. Supp. 3d at 904.

94. *Id.*

95. *Id.* at 906.

96. *Id.* at 913.

C. Hunting in the Skilak Wildlife Recreation Area: Overview of Arguments and Ruling

1. *The Administrative Procedure Act*

According to the plaintiffs, limiting late-season predator hunts in the Skilak Wildlife Recreation Area would not negatively impact wildlife viewing and photography, as assumed by FWS.⁹⁷ The defendants maintained that the plaintiffs could “identify no available science or data that [FWS] overlooked.”⁹⁸ Further, FWS contended that keeping the Skilak Wildlife Recreation Area closed to predator hunting would alleviate safety concerns between hunters and recreation users.⁹⁹ FWS explained that due to the Skilak Wildlife Recreation Area’s “small size, its accessibility by road, proximity to population centers, and likely hunting (or trapping) pressure,” its conclusion to restrict access was reasonable.¹⁰⁰

The Federal District Court of Alaska found that FWS made decisions involving the Skilak Wildlife Recreation Area based on its expertise and that the plaintiffs supplied no evidence that was apparently ignored by FWS.¹⁰¹ According to the court, the decision to close the Skilak Wildlife Recreation Area to late-season predator hunting was neither arbitrary nor capricious.¹⁰²

2. *The National Wildlife Refuge System Improvement Act*

According to the plaintiffs, the Kenai Rule violated the National Wildlife Refuge System Improvement Act because it “elevate[d] one compatible priority use (viewing) over another (hunting)” in the Skilak Wildlife Recreation Area and “unnecessarily creat[ed] a conflict with State law.”¹⁰³ The plaintiffs stated that the Kenai Rule was “not consistent with State wildlife laws” and “illegally deprive[d] the State of its authority.”¹⁰⁴ The plaintiffs also alleged that FWS misconstrued the Alaska Board of Game’s regulations involving predator hunts in the Skilak Wildlife Recreation Area, erroneously concluding that the state’s regulations were inconsistent with the Kenai National Wildlife Refuge Comprehensive Conservation Plan.¹⁰⁵

The defendants asserted that rather than elevating one purpose over another, FWS “specified different areas of the refuge for different purposes

97. *Id.* at 918–19.

98. *Id.*

99. *Id.*

100. *Id.* (quoting *The Kenai Rule*, 81 Fed. Reg. 27,030, 27,038 (May 5, 2016) (to be codified at 50 C.F.R. pt. 36)).

101. *Id.* at 921.

102. *Id.*

103. *Id.* at 916.

104. *Id.*

105. *Id.*

that can be incompatible,” as authorized in ANILCA.¹⁰⁶ The defendants stated that “any conflict between the National Wildlife Refuge System Improvement Act and ANILCA is resolved in favor of ANILCA,”¹⁰⁷ as described in the National Wildlife Refuge System Improvement Act.¹⁰⁸

The court found that the plaintiff’s claim regarding the elevation of recreation over hunting in the Skilak Wildlife Recreation Area was without merit because ANILCA instructs FWS to set aside different areas for different uses.¹⁰⁹ When the National Wildlife Refuge System Improvement Act and ANILCA conflict, ANILCA prevails.¹¹⁰ The court ruled that the defendants’ arguments regarding restrictions on hunting in the Skilak Wildlife Recreation Area sufficiently met the standard of the National Wildlife Refuge System Improvement Act, which prohibits uses that are “inconsistent with public safety.”¹¹¹

3. *The National Environmental Policy Act*

Presenting the same argument as used to invalidate the bear baiting ban, the state argued FWS violated the National Environmental Policy Act by restricting hunting in the Skilak Wildlife Recreation Area without assessing the environmental impact before acting.¹¹² However, the defendants again maintained that the National Environmental Policy Act does not apply to these restrictions because they are “simply maintain[ing] the environmental status quo on the Kenai refuge that has been in place for three decades.”¹¹³ The court agreed, ruling that the National Environmental Policy Act did not apply to limits on hunting in the Skilak Wildlife Recreation Area in the Kenai Rule.¹¹⁴ The court found that the plaintiffs did not comply with the National Environmental Policy Act’s complaint process because they did not first alert an agency (here, the FWS) of the issue and allow the agency significant time to address it.¹¹⁵

106. *Id.*

107. *Id.*

108. 16 U.S.C. § 668dd note (Statutory Construction with Respect to Alaska).

109. *Bernhardt*, 500 F. Supp. 3d at 917.

110. 16 U.S.C. § 668dd note (Statutory Construction with Respect to Alaska).

111. *Bernhardt*, 500 F. Supp. 3d at 917-18.

112. *Id.* at 904.

113. *Id.*

114. *Id.* at 906.

115. *Id.*

D. Firearm Restrictions on the Kenai and Russian Rivers: Overview of Arguments and Ruling

1. *The Administrative Procedure Act*

The state asserted that FWS did not examine the impact, real or perceived, that a restriction on firearms would have on hunters along the Kenai River.¹¹⁶ Because other firearms have been used in the area to hunt small game and waterfowl, the state argued that the use of firearms to hunt bears does not enhance the risk to humans of an accidental shooting.¹¹⁷ The plaintiffs also maintained that the Kenai Rule was overly broad because it extended the hunting restrictions year-round.¹¹⁸ The defendants argued that the use of firearms to hunt big game is more lethal than firearms used for hunting small game and waterfowl, and therefore enhances the risk to humans.¹¹⁹ FWS also maintained that increasing firearm activity, in terms of both more armed hunters and repeated shots fired from one or several hunters, near or in a river, heightens the risk of an incident, even if an incident has yet to occur.¹²⁰

The District Court of Alaska found that FWS had reason to be concerned about firearm discharges along the rivers, that FWS considered the implications of its year-round ban, and that the limitation would have a limited impact on hunting opportunities and harvest levels of bears and moose.¹²¹ As a result, the District Court of Alaska found the restriction on firearm discharges along the Kenai and Russian rivers to be neither arbitrary nor capricious.¹²²

2. *The National Wildlife Refuge System Improvement Act*

Presenting the same argument as used to invalidate the hunting restrictions in the Skilak Wildlife Recreation Area, the state asserted that the Kenai Rule violates the National Wildlife Refuge System Improvement Act because it “elevat[ed] one compatible priority use (viewing) over another (hunting)” in the Kenai and Russian rivers and “unnecessarily creat[ed] a conflict with State law.”¹²³ FWS cited public safety concerns due to recreational use along the rivers and also indicated that the restrictions are justified under the National Wildlife Refuge System Improvement Act.¹²⁴ As with the restriction on hunting in the Skilak Wildlife

116. *Id.* at 921.

117. *Id.*

118. *Id.* at 922.

119. *Id.*

120. *Id.*

121. *Id.* at 922–23.

122. *Id.* at 923.

123. *Bernhardt*, 500 F. Supp. 3d at 916.

124. *Id.* at 916–17.

Recreation Area, the court found that the plaintiffs' claim regarding the Kenai and Russian rivers was without merit because ANILCA instructs FWS to set aside different areas for different uses.¹²⁵

3. *The National Environmental Policy Act*

The plaintiffs maintained that FWS relied on categorical exclusions found in the National Environmental Policy Act.¹²⁶ Agencies must "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," which in turn triggers the need for the agency to provide an environmental assessment or environmental impact statement.¹²⁷ Further, the defendants asserted that any error made by not completing an environmental assessment or impact statement was harmless because no public controversy existed.¹²⁸

The Federal District Court of Alaska found that rather than explain how FWS came to its decision to ban firearms discharges along the Kenai and Russian Rivers, FWS had just restated its firearms exclusions in the Kenai Rule without providing sufficient reasons for its decision.¹²⁹ An agency that does not complete an environmental assessment or environmental impact statement must adequately explain the rationale for its decision and action.¹³⁰ Due to non-compliance with the National Environmental Policy Act, the court remanded the issue of firearms along the Kenai and Russian Rivers back to FWS for further documentation.¹³¹

In this potentially landmark decision, the District Court of Alaska ruled in favor of the federal government's interests over Alaska's interests. By banning the hunting of brown bears with bait in the Kenai National Wildlife Refuge and most hunting in the Skilak Wildlife Recreation Area, the court found that FWS upheld its legal obligation to maintain wildlife populations in their natural diversity.¹³² The plaintiffs appealed this decision.¹³³

125. *Id.* at 917.

126. *Id.* at 906.

127. *California v. Norton*, 311 F.3d 1162, 1168 (9th Cir. 2002) (quoting 40 C.F.R. § 1508.4 (2001)).

128. *Bernhardt*, 500 F. Supp. 3d at 910.

129. *Id.* at 909.

130. *Id.* at 904 (quoting *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999)); *see supra* note 92.

131. *Bernhardt*, 500 F. Supp. 3d at 910.

132. *Id.* at 927.

133. *See Safari Club Int'l v. Haaland*, 31 F.4th 1157 (9th Cir. 2022).

IV. SAFARI CLUB INTERNATIONAL V. HAALAND

The U.S. Court of Appeals for the Ninth Circuit reviewed the District Court of Alaska’s summary judgment ruling in favor of FWS.¹³⁴ In April 2022, the Ninth Circuit in *Safari Club International v. Haaland* found that “the district court properly entered summary judgment for FWS on all claims.”¹³⁵ This Part provides an outline of the Ninth’s Circuit’s rationale for affirming the district court’s decision. Then this Part explores the public’s response to the appellate holding, specifically the writ for certiorari filed by the state.

A. The Administrative Procedure Act

In its evaluation of the Kenai Rule and the Administrative Procedure Act, the Ninth Circuit emphasized that FWS was required to consider visitor safety, wildlife viewing, and photography in the Kenai National Wildlife Refuge.¹³⁶ According to the court, FWS has a “statutory duty to manage the Kenai Refuge in line with the purpose of that refuge and its management plans.”¹³⁷

B. The National Wildlife Refuge System Improvement Act

The U.S. Court of Appeals for the Ninth Circuit found that the District Court of Alaska ruled correctly regarding the National Wildlife Refuge System Improvement Act, stating that the act “does not require FWS to allow all State-sanctioned hunting throughout the Kenai Refuge.”¹³⁸ The court added that “when ANICLA and the Improvement Act are in tension, the former prevails.”¹³⁹

C. The National Environmental Policy Act

Regarding the National Environmental Policy Act and the Kenai Rule, the U.S. Court of Appeals for the Ninth Circuit found that “FWS sensibly decided that the Kenai Rule fits a [categorical exclusion].”¹⁴⁰ The court also rejected plaintiffs’ argument that “‘extraordinary circumstances’ required an [environmental assessment] or [environment impact statement] for the Kenai Rule,” finding that there was no basis for

134. *See id.* at 1166–67 (summarizing the procedural history of the matter).

135. *Id.* at 1179.

136. *Id.* at 1178.

137. *Id.*

138. *Id.* at 1170.

139. *Id.*

140. *Id.* at 1179.

reversal.¹⁴¹

D. The Alaska National Interest Lands Conservation Act (ANILCA)

In their appeal, the State of Alaska claimed that the Alaska Statehood Act and ANILCA remove FWS's ability to restrict state-approved hunting on Alaska's federal lands.¹⁴² ANILCA states that "[n]othing 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."¹⁴³ The U.S. Court of Appeals for the Ninth Circuit described this approach as "wrong" because ANILCA applied to federal lands like the Kenai refuge.¹⁴⁴

The state also contended that the Kenai Rule violates the 2017 congressional joint resolution that significantly amended ANILCA and expanded brown bear hunting to wildlife refuges in Alaska.¹⁴⁵ The Ninth Circuit reiterated that while "[i]t is true that the Alaska Statehood Act transferred administration of wildlife from Congress to the State . . . this 'transfer [did] not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife' like the Kenai Refuge, which remain under federal control."¹⁴⁶

E. Public Response

Alaska Wildlife Alliance, which represented the defendants, was happy with the decision, according to executive director Nicole Schmitt.¹⁴⁷ "For people who live in the Kenai area and who enjoy the refuge, enjoy seeing the bears and recreating in this high-use area, I think it is a decision that strengthens that those opportunities are still going to be available and protects Kenai brown bears to the extent that they need to be protected as a genetically distinct population," Schmitt said.¹⁴⁸

Counsel for the plaintiffs, Regina Lennox, felt the Ninth Circuit was

141. *Id.*

142. *Id.* at 1167.

143. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 1314, 94 Stat. 2484 (1980) (codified at 16 U.S.C. § 3202(a)).

144. *Safari Club Int'l*, 31 F.4th at 1168.

145. *See id.* at 1169-70 (describing how the 2017 joint resolution cancelled the Refuges Rule, a rule that had prohibited brown bear baiting in all wildlife refuges).

146. *Id.* (quoting Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 341 (1958)) (alteration in original).

147. Sabine Poux, *Court Upholds Hunting and Bear Baiting Restrictions for Kenai National Wildlife Refuge*, ALASKA PUB. MEDIA (Apr. 20, 2022), <https://www.alaskapublic.org/2022/04/20/court-upholds-hunting-and-bear-baiting-restrictions-for-kenai-national-wildlife-refuge/>.

148. *Id.*

too deferential to FWS.¹⁴⁹ “Safari Club is considering further appellate options, particularly in view of the Supreme Court’s recent track record of reversing Ninth Circuit rulings on [the Alaska National Interest Lands Conservation Act],” Lennox said in April 2022.¹⁵⁰

F. Petition to the U.S. Supreme Court to Hear *State of Alaska v. Haaland*

On October 27, 2022, the State of Alaska petitioned the Supreme Court to review the decision by the U.S. Court of Appeals for the Ninth Circuit in *Safari Club International v. Haaland*.¹⁵¹ The State of Alaska’s request for the Supreme Court to hear the case largely references ANILCA.¹⁵² In the writ of certiorari, the state argued that reconsideration of FWS’s Kenai Rule “is especially significant to Alaska because it concerns ANILCA, which, as this Court is aware, was Congress’s attempt to resolve years of conflict between the federal government and Alaskans.”¹⁵³

V. ANALYSIS

With this decision, the Ninth Circuit has redefined the federalist arrangement of Alaska’s natural resources. By deferring to federal agencies over state laws, the courts have effectively declared the federal government supreme in the clash between state interests in hunting and federal interests in wildlife protection and recreation management.

But this fight is far from over. The petition to the Supreme Court will likely go unanswered, but where this case ends, the next will begin. Alaska Governor Mike Dunleavy, who will likely be sworn in for his second term in 2023,¹⁵⁴ has long supported the state’s environmental self-determination, declaring after the state petitioned the U.S. Supreme Court that “Congress did not intend for federal agencies to have unlimited authority over how we access our wildlife.”¹⁵⁵ By challenging the Kenai

149. *Id.*

150. *Id.*

151. *Safari Club Int’l v. Haaland*, 31 F.4th 1157 (9th Cir. 2022), petition for cert. filed, (U.S. Oct. 27, 2022), <https://law.alaska.gov/pdf/press/221027-Petition.pdf>.

152. *Id.*

153. *Id.* at 20.

154. Kavitha George & Jeremy Hsieh, *Dunleavy Poised to Win Alaska Governor’s Race*, ALASKA PUB. MEDIA (Nov. 9, 2022), <https://alaskapublic.org/2022/11/09/early-results-show-dunleavy-leading-in-alaska-governors-race/>.

155. Press Release, Alaska Dep’t of L., Alaska Asks Supreme Court to Review Secretary of the Interior’s Authority to Override State Hunting Laws (Oct. 27, 2022), <https://law.alaska.gov/press/releases/2022/102722-HuntingLaws.html>.

Rule, the Dunleavy administration and the State of Alaska continued its practice of encouraging the development or exploitation—depending upon one’s perspective—of Alaska’s natural resources. This pattern has included several notable incidents in 2022 alone. Alaska auctioned 140,000 acres for farming in the state’s interior, despite the protests of Alaska Natives who cited their concerns of the impact on wildlife habitat in Alaska’s boreal forest.¹⁵⁶ Governor Dunleavy also asked the Environmental Protection Agency to not stop the Pebble Mine project that critics say threatens the sockeye salmon population.¹⁵⁷ Earlier in the year, the governor’s administration hired a law firm to fight the Biden administration’s freeze on oil and gas development in Alaska’s Arctic National Wildlife Refuge¹⁵⁸ and backed a proposal that would utilize a 250-mile stretch of public highway for 24-hour heavy truck traffic between a mine and a mill.¹⁵⁹

These issues have an outsized impact in the Last Frontier. Around ninety percent of Alaska is publicly owned, significantly more than any other state.¹⁶⁰ Of that, roughly two-thirds is held by the federal government¹⁶¹ and one-third is state owned.¹⁶² The *Bernhardt* decision has the potential to embolden federal agencies to further regulate human activity in protected areas without credence to state law. In response, the state could pass additional laws permitting other types of hunting or recreation activity at odds with these federal directives. It is possible the Alaska state government and federal agencies will continue to fight in the courts over similar protections in the coming years.

156. Alex DeMarban, *Tribe Protests Effort to Develop Agricultural Project in Wilderness West of Nenana*, ANCHORAGE DAILY NEWS (Nov. 3, 2022), <https://www.adn.com/alaska-news/2022/11/03/tribe-protests-effort-to-develop-agricultural-project-in-wilderness-west-of-nenana/>.

157. Alex DeMarban, *Alaska Gov. Dunleavy Urges EPA to Stop Veto of Pebble Mine*, ANCHORAGE DAILY NEWS (Oct. 25, 2022), <https://www.adn.com/politics/2022/10/25/alaska-gov-dunleavy-urges-epa-to-stop-veto-of-pebble-mine/>.

158. Nathaniel Herz, *Alaska Hires 2nd Outside Law Firm to Fight Biden Administration over Arctic National Wildlife Refuge Leases*, ANCHORAGE DAILY NEWS (Jan. 1, 2022), <https://www.adn.com/politics/2022/01/26/alaska-hires-second-outside-law-firm-to-fight-biden-administration-over-arctic-refuge-leases/>.

159. Dermot Cole, *Kinross Plan to Add 24-Hour Heavy Truck Traffic Across Interior Alaska Would Be a Public Safety Nightmare*, REPORTING FROM ALASKA, (Jan. 1, 2022), <https://www.dermotcole.com/reportingfromalaska/2022/1/12/kinross-plan-to-add-heavy-truck-traffic-across-interior-alaska-could-be-a-public-safety-nightmare>.

160. *Public Land Ownership by State*, NAT. RES. COUNCIL OF ME. (2000), <https://www.nrcm.org/documents/publiclandownership.pdf>.

161. *See id.* (219,000,000 acres owned federally divided by 325,700,000 acres owned publicly).

162. *See id.* (105,800,000 acres owned by the state divided by 325,700,000 acres owned publicly).

However, if the state does not see viable success in challenging federal agencies' restrictions in court, the Alaska public's perceptions about federal interests in Alaska could shift. In the past, such shifts in other states have caused notable and dangerous clashes.¹⁶³ On the other hand, successful wilderness rehabilitation efforts,¹⁶⁴ especially with charismatic megafauna, could swell public support, or at least maintain it.¹⁶⁵ For one example, in November 2022, Washington's Fish and Wildlife Commission voted to ban recreational black bear hunting in the spring in order to protect the bear population.¹⁶⁶

The *Haaland* holding was a victory for federal interests, but its long-term effects remain largely uncertain. Federal agencies can continue to preserve wildlife in accordance with this ruling but should be cautious about acting in a manner that could jeopardize their relationships with Alaska's state leaders and the public at large.

In broad strokes, *Haaland* increased the power of the U.S. Fish and Wildlife service to enforce federal policies on its lands. With the future of various forms of fishing across the state becoming more restricted, if allowed at all, further cases pertaining to the perceived overreach of the federal government are bound to become issues before the state and federal courts in Alaska. While *Haaland* and *Bernhardt* dealt with brown bear baiting in Kenai, the application of the cases can easily extend to

163. See, e.g., Marshall Swearingen et al., *Timeline: A Brief History of the Sagebrush Rebellion*, HIGH COUNTRY NEWS (Jan. 17, 2018), <https://www.hcn.org/articles/a-history-of-the-sagebrush-rebellion> (describing the slow rise in tensions between private individuals and the federal government over protected land that eventually led to decades of violence).

164. It is worth noting that success may not be straightforward. A recent study calls into question the State of Alaska's mandate to improve moose and caribou populations by culling predators. The study found that the killing of over 1,000 wolves and 3,500 brown and black bears in an Alaskan game unit from 2008–20 had no correlation with subsequent moose harvests. Zaz Hollander, *Killing wolves and bears over nearly 4 decades did not improve moose hunting, study says*, ANCHORAGE DAILY NEWS (Nov. 23, 2022), <https://www.adn.com/alaska-news/wildlife/2022/11/23/killing-wolves-and-bears-over-nearly-four-decades-did-not-improve-moose-hunting-study-says/>. According to biologist Rick Steiner, the study is “the kind of slam dunk that shows this mythology of predator control is just that: a myth.” *Id.*

165. See, e.g., Christopher K. Williams et al., *A Quantitative Summary of Attitudes Toward Wolves and Their Reintroduction (1972-2000)*, 30 WILDLIFE SOC'Y BULL. 575, 580 (2002) (describing how public-wide attitudes toward wolf reintroduction largely stayed the same, even though reintroductions have grown more common in recent decades).

166. Nicholas Turner, *WA Bans Spring Black Bear Hunting*, SEATTLE TIMES (Nov. 22, 2022), <https://www.seattletimes.com/seattle-news/wa-bans-spring-black-bear-hunting/#:~:text=The%20state%20had%20contended%20recreation,split%20vote%20in%20November%202021.>

fishing in federally protected areas as both are under the purview of U.S. Fish and Wildlife. Many of the areas surrounding Bristol Bay, for example, may become case talking points referencing *Haaland*, as the fishing industry continues to be devastated by the decimation of various crab populations.

Haaland may also serve as precedent in future cases related to brown bear baiting. As observed in this case, part of the plaintiff's argument was misaligned as protections for black bear baiters were not extended to brown bear baiters, creating confusion.¹⁶⁷ A mass application of badly understood opinions could lead to serious injuries to bear baiting hunters. Further, this confusion may lead to the baiting of animals that are more endangered than brown bears, like polar bears in Alaska. This could prove devastating to a bear population on the verge of extinction. With *Bernhardt* and *Haaland* decided, it is up to officials at federally protected refuges to make their users aware of the current laws in digestible terms to protect both hunters and wildlife.

More bear baiting generally results in fewer bears. This is particularly harmful for Alaska Native tribes who rely on the land. By keeping federal protections in Kenai and Skilak in place, brown bear populations may continue to be available to Alaska Natives in areas surrounding the federal land.

But this ruling affects far more than brown bears. It has the potential to extend to protections for large swaths of Alaska's wildlife. Overfishing and overhunting both have a negative impact on all other portions of an ecosystem, which have spillover effects into society. Without brown bears, other dangerous predators may move into areas that are not natural to them, thus creating an entirely new issue for tribes and ecosystems to adjust to. These protections were not just put in place for hunters to enjoy a recreational activity, but also to ensure the longevity of the wilderness in all its facets.

VI. CONCLUSION

This Comment overviewed the *Bernhardt* case, offering a broader adaptation of the court's ruling to various aspects of legal and everyday life. While the federal government asserted greater ability to enforce its legislation on federal lands, fights surrounding federal protections are on the horizon in Alaska. While bear hunting is an activity relatively contained within Alaska, the effects of *Bernhardt* and *Haaland* could be massive because wildlife and fishing policy in the forty-ninth state have an outsized impact on the entire world.

167. *Alaska v. Bernhardt*, 500 F. Supp. 3d 889, 923–24 (D. Alaska 2020).