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of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Fish and Game

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Sue Masica
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Dear Ms. Masica:

The Alaska Department of Fish and Game (Department) recognizes that Congress granted carefully defined authorities to the National Park Service (Service) through the National Park Service Organic Act (Organic Act), the General Authorities Act, as amended, and the Alaska National Interest Lands Conservation Act (ANILCA) to manage park units in Alaska, as well as conserve park resources on these lands under applicable federal law and regulation. We are also aware the Service has the authority to interpret and implement federal laws and regulations within the context of the enabling legislation and the Congressional record leading to the legislation. At the request of Senator Lisa Murkowski, the Service provided the Department with a compilation of these authorities and supporting information. This document was subsequently referenced and expanded upon in Service correspondence dated December 14, 2012.

While the Service is required under both statute and regulation to consult with the Department regarding wildlife related issues, we nonetheless appreciate the additional opportunity afforded the State of Alaska through the process developed by the Alaska Region to issue park compendiums. Despite the inability of our agencies to find common ground on specific wildlife related entries, we value the opportunity to discuss issues prior to public review.

Although the current and proposed restrictions under 36 CFR § 13.40(e), overall, affect a limited number of users, the Department is concerned by the influence the Service is exerting over state hunting regulations. To date, this influence has preempted the customary and traditional take of black bears at den sites with the aid of artificial light and additional wolf harvest opportunities based on increased levels of harvestable surplus. In neither of these cases were their sustained yield issues present. This year, the Service proposes to renew the above restrictions and additionally preempt the regulated take of brown bears over black bear baiting stations and wolf and coyote harvest opportunities that are based on increased levels of harvestable surplus. Again, there are no identified sustained yield concerns associated with these proposals.

The Service has not provided a reasoned analysis, supported by scientific data and analysis, which details a specific cause and effect relationship between these state regulations and a corresponding likelihood that impairment would exist for any park resource or value. Rather, the Service bases the preemption of state law on the vague assertion that these regulations might negatively affect park values or have the potential to impact some unspecified and undefined component(s) within a broad spectrum of individual, population, and ecological attributes of a species.

We do not intend to be reactionary, but without a reasoned analysis of the effect to competing park values or a rational link to the impairment of park resources, we cannot ascertain a consistent threshold behind these closures. To be clear, we are not simply frustrated with the results of a process, rather, we are frustrated with the process itself. Therefore, we must be cautious and proactively shield our sovereign responsibilities regarding wildlife from a seemingly annual effort by the Service to exert federal influence over wildlife management in Alaska. Over the past several years, we have been unsuccessful in expressing these concerns verbally, and therefore, have been compelled to repeatedly reiterate our concerns in writing.

The background information above, along with the corresponding determination of need for specific proposals, is the basis of the enclosed comments. Besides providing comment on specific proposals, we ask questions regarding the process, as well as the applicable legal framework.

Thank you for your consideration of these comments. We look forward to reviewing your detailed, written responses to our questions and concerns.

Sincerely,



Douglas Vincent-Lang
Acting Director

Enclosure

cc: Cora Campbell, Commissioner, Alaska Department of Fish and Game
Craig Fleener, Deputy Commissioner, Alaska Department of Fish and Game
Susan Magee, Statewide ANILCA Program Coordinator, State of Alaska
Stan Leaphart, Executive Director, Citizens Advisory Commission on Federal Areas
Lance Nelson, Senior Assistant Attorney General, Alaska Department of Law
Ted Spraker, Chair, Alaska Board of Game
Member States, Western Association of Fish and Wildlife Agencies

ALASKA DEPARTMENT OF FISH AND GAME

COMMENTS REGARDING THE NATIONAL PARK SERVICE 2013 PROPOSED COMPENDIUM

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NOTE TO READER: The following comments address restrictions proposed under 36 CFR § 13.40(e) regarding state authorized hunting seasons, bag limits, and/or methods and means of harvest including: 1) regulated take of brown bears over black bear baiting stations (Denali, Gates of the Arctic, and Wrangell-St. Elias National Preserves); 2) take of wolves and coyotes (Aniakchak, Denali, Gates of the Arctic, Katmai, Lake Clark, Wrangell-St. Elias, and Yukon-Charley Rivers National Preserves); and 3) customary and traditional take of black bears (cub bear or a female bear accompanied by a cub bear) with the aid of artificial light at den sites (Denali and Gates of the Arctic National Preserves) and are referenced interchangeably throughout the document as “compendium entries,” “compendium proposals,” “proposals,” “proposals at 36 CFR § 13.40(e),” “proposed restrictions,” and “proposed restrictions at 36 CFR § 13.40(e)” unless otherwise noted.

THE STATE-FEDERAL WILDLIFE MANAGEMENT RELATIONSHIP

The Alaska Department of Fish and Game (Department) recognizes that consumptive use opportunities provided under the Alaska National Interest Lands Conservation Act (ANILCA) are “*not an authorization without limit*,”¹ and that under § 1313 of the Act, “*the Secretary may designate zones where and periods when no hunting... may be permitted for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment*.” We understand the National Park Service (Service) Alaska Region (Region) interprets § 1313 as follows:

*. . . while sport hunting is authorized in Preserves under non-conflicting state law, if those activities cause impacts or impairment or are otherwise contrary to the NPS legal, regulatory, or policy framework, NPS may act pursuant to [36 CFR § 13.40(e)].*²

The ability of the Secretary to limit state hunts, however, is not an authorization without limit. Had Congress desired to substitute state wildlife management with exclusive federal management on national parks and preserves, it could have. However, Congress specifically intended that “*nothing in [ANILCA was] 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*...”³

Thus, Congress, through ANILCA, provides the Service with negative powers, i.e., restrictive regulatory powers,⁴ which generally limit Service authorities regarding wildlife to restricting state or ANILCA title VIII harvest under specific circumstances. Conversely, ANILCA provides the State of Alaska with positive powers, and “*reaffirmed the basic responsibility and authority of the State . . . to manage fish and resident wildlife on Federal lands*.”⁵ ANILCA provided that the State would continue to manage fish and wildlife populations across Alaska, e.g., determine harvestable surplus; allocate harvestable surplus; and set methods and means of harvest, as well as seasons and bag limits. These State powers were intended to be broad, so much so that Congress directed the State to implement the federal subsistence priority opportunity to harvest

¹ National Park Service, Alaska Region. (2012). *Compilation of closure background material*., page 1.

² *Ibid.*, at page 2.

³ ANILCA § 1314.

⁴ See generally 43 CFR Part 24.

⁵ 43 CFR §24.3(b).

wildlife on federal public lands. While the State was legally unable to continue implementing this priority opportunity based on the Alaska Constitution, it is nonetheless a strong indication that Congress intended the State to play a primary role in wildlife management on federal lands. 43 CFR § 24.1(a) concisely summarizes this state-federal relationship, “[f]ederal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of **specific, overriding Federal law.**” (Emphasis added.)

Significantly, Department of Interior regulations at 43 CFR Part 24, which guide state-federal wildlife interaction, emphasize the “*intent of the Secretary [of the Interior] to strengthen and support, to the maximum legal extent possible, the missions of the States and the Department of the Interior to conserve and manage effectively the nation’s fish and wildlife.*”⁶ (Emphasis added; footnote omitted.) Given our agencies’ respective roles and responsibilities regarding wildlife, preventing the State from exercising its authorities is an action of considerable significance. Service action implies a formal finding (but without corroborating evidence) that state management fails to ensure the conservation of species and sustained yield management principles. And given the State’s responsibility to provide for the sustainability of all wildlife within its borders – regardless of land ownership or designation – and its authority, jurisdiction, and responsibility to manage, control, and regulate wildlife populations, including for subsistence purposes, unless specifically preempted by federal law, we are disappointed in the recent approach the Service has taken to preempt state harvest regulations.

While the Service has made broad, cursory statements that unacceptable “impacts” could occur, the majority of the discussion in the determination and need appears speculative. The Service has yet to provide a reasoned analysis, which details a specific cause and effect relationship between these state authorizations and the possible impairment to any park resource or value. The determination and need is silent on current and expected visitor use; current and expected wildlife population numbers; and current and expected harvest based on state and/or federal analysis. While we recognize such an analysis is the responsibility of the Service, it is a necessary component for meaningful consultation with the State, as required by Service regulations that address the process for restricting the take of wildlife in Alaska at 36 CFR § 13.40(e).

GENERAL COMMENTS REGARDING PROPOSALS AT 13.40(e)

“Natural” landscapes

The emphasis on “natural” ecosystems erroneously implies there is, or was, no human presence within park units across the country. Specifically in Alaska, these statements fail to take into account that Alaska Natives have influenced wildlife and the environment for over 10,000 years.

Predator control and management in Alaska probably began when humans first crossed over the Bering land bridge from Asia into North America. [. . .] The quantitative effects

⁶ 43 CFR § 24.1(c).

*of those control efforts on predator populations are impossible to assess, but it is conventional to assert that reductions in average predator populations were substantial.*⁷

Over the past 300 years, others have significantly influenced the landscape, for better or worse. For example, in the early-1800s the Russian-American Fur Company, under the leadership of Alexander Baranov “never tried to conserve or manage sea otters, but exploited every population he found and then moved to another area.”⁸ During the mid- to late-1800s the fur trade and gold rush increased settlement.

*The pressure on large mammals for food for people and their dogs, which were then the primary mode of winter transportation, and the comparable pressure on wolves, bears, and other furbearers to supply the fur market were widespread and intense. Poison was widely used by trappers to take wolves and other furbearers. ¶ The dispersal of mining activities throughout much of Alaska was followed by major changes in wildlife habitat. Forests were cut to provide wood for construction of buildings, for mine timbers, and for fuel for cabins, houses, and power generation. The extent of wildland fire from accidental causes greatly increased, and fires were deliberately started to remove the forest or shrub cover to facilitate prospecting.*⁹ (Citations omitted.)

Human influence continued during territorial days.

*In the early 1900s the [Bureau of Biological Survey (BBS), within the United States Department of Agriculture,] wildlife management emphasis was law enforcement and removal of predators. They spent little money or time conducting surveys to determine population size or productivity. The Game Commission and the Territorial Legislature worked closely together on predator control, primarily through a bounty system and in later years through direct control efforts by BBS agents. Bounties were paid on wolves, coyotes, and wolverines in an attempt to benefit ungulate populations; the emphasis was always on wolves. [. . .] These agents and others used poisons and shooting to take thousands of wolves over the next decades.*¹⁰

National Park Service lands were not immune from predator control activities. Wolf control was conducted in Mt. McKinley National Park to benefit Dall sheep populations and associated viewing opportunities during this time period.¹¹

Following statehood, the Department began managing wildlife populations, regardless of land ownership, on a sustained yield basis per the Alaska Constitution.¹² This included lands that

⁷ National Research Council. (1997). *Wolves, Bears, and Their Prey in Alaska: Biological and Social Challenges in Wildlife Management*. The National Academies Press, Washington, DC., page 27.

⁸ Wayne Reglin. (2012). *Fish Politics and Wolf Wars*. Arctic Loon Press, Juneau, AK., page 7.

⁹ *Id.*, National Research Council., page 28.

¹⁰ *Id.*, Reglin., page 118, 119.

¹¹ Timothy Rawson. (2003) *Changing Tracks: Predators and Politics in Mt. McKinley National Park*. University of Alaska Press, Fairbanks, AK. See also *Id.*, Reglin., page 120, 121.

¹² See Alaska Constitution, Article VIII, § 4 (“[F]ish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle.” See

would eventually be designated by Congress as park lands under ANILCA. Department management activities are short-term actions intended to influence reproduction and survival of wild populations to achieve management objectives on abundance and sustainable harvest, but not fundamentally alter or permanently change natural dynamics.

This brief discussion demonstrates the Service's use of "natural," i.e., apparently meaning no human influence whatsoever, is not realistic. The level of human influence on habitat or ecological processes in park units ranges along a gradient from relatively uninfluenced by humans to habitats significantly controlled by humans (e.g., front country developed areas, Sitka National Historic Park). The mere fact human activity exists does not necessarily translate into a demonstrated effect, although a detrimental effect is often implied by the Service. Precisely defining the desired condition of "natural," in cooperation with agency partners, would greatly reduce confusion regarding unstated values for landscapes by applying objective scientific criteria.

While we recognize use of "natural" stems from Service policy, we question the unstated assumption that human effects on natural systems are somehow detrimental to the productivity or diversity of a "natural" system. This implies that active management techniques always lead to ecological outcomes outside the range of natural disturbances. This perspective lacks a scientific demonstration that management by definition produces an outcome or ecosystem condition that is functionally or permanently different than "natural" conditions. For example, why would a prescribed burn (set under prescribed conditions to produce some outcomes or avoid others) be functionally different than a wildfire in its effect on habitat for a variety of species? How would reducing predator abundance for a period of time be functionally different than a widespread outbreak of rabies in wolves? The Service appears concerned with what they *perceive* to be naturally functioning ecosystems and is essentially making a judgment of whether an intervention has occurred (bad) or not (good).

This inconsistency is further demonstrated in the allowance for species to become functionally extirpated from a park or preserve ecosystem, while assuring that designated distinct population segments of species under the Endangered Species Act (ESA) are not allowed to become extirpated. In the latter case the Service is mandated under the ESA to take all necessary actions to prevent a species from becoming functionally extirpated and to recover the population, including the use of predator control. As such, the Service is required to "manage" species and their ecosystems outside of the context of naturally functioning ecosystems.

Throughout the proposed restrictions at 36 CFR § 13.40(e), the Service does not describe a "natural" population composition, abundance, or dynamic on the species or landscape scale in any meaningful or measurable way. Until "natural" is described with metrics in an objective fashion, and an associated analysis addresses specific cause and effect impacts to a wildlife species, the assertion that "*naturally dynamic wildlife populations*"¹³ could be affected has no scientific merit.

also, *West v. Bd. of Game*, 248 P.3d 689, 695 (Alaska 2010). "*The sustained yield principle applies to all wildlife . . . including wolves and bears.*"

¹³ National Park Service, Alaska Region. (January 15, 2013). *Alaska's National Parks invite public comment on each park's compendium through February 15, 2013.*

Methods and means

It appears these proposed restrictions at 36 CFR § 13.40(e) have less to do with “natural” populations of wildlife, and more to do with state seasons, bag limits, and/or methods and means of harvest. For example, the Service asserts (without scientific data or analysis) that the authorization to take brown bears over black bear bait stations “*has the potential to create harvest pressures on the local natural abundance, behavior, distribution, and ecological integrity*”¹⁴ of brown bear populations. However, the current state regulation requires that hunters must comply with existing seasons and bag limits for brown bears and salvage all edible meat. The only difference is that a new “method” of harvest is authorized. Therefore, the Service appears to contend that these state seasons and bag limits have the potential to impair “natural” (undefined) populations of brown bears. If true, the consequence of this assertion is significant and would negatively affect the Department’s ability to manage wildlife populations. **Would the Service assert that changes to methods and means of harvest for other species have the potential to create these same pressures without a clear rationale supported by scientific data and analysis?**

Additionally, the Service points out that “*brown bear baiting is not currently allowed by any other state, province, or country.*”¹⁵ If accurate, this statement is interesting but functionally irrelevant to this discussion. Brown bear populations and densities found in the contiguous states and Canadian provinces, as well as throughout the world, are different than those found in Alaska. Considering “*Alaska has over 98 percent of the United States population of brown bears, and more than 70 percent of the North American population . . .*”¹⁶ making comparisons regarding brown bear hunting regulations is misleading.

Lastly, all management techniques, such as harvest, are intended to provide for the conservation of the species and be consistent with principles of sustained yield. Considering the Service does not provide a rational link (with associated scientific data or analysis) between these state regulations and the proposed restrictions, determining which management techniques interfere with a natural (undefined) abundance is difficult. **Therefore, what process does the Service utilize to determine if a state management action, such as state methods and means restrictions or allowances, alter the “*natural abundance, behavior, distribution, and ecological integrity*” of wildlife populations considering consumptive uses are a congressionally authorized use on preserve lands and effects on “natural” conditions are acceptable?**

Potential use

On numerous occasions, the Service has stated verbally that because a harvest opportunity is available to all Alaska residents, high harvest “potential” exists – essentially that because 600,000 individuals live in Alaska, 600,000 individuals might participate. According to the Service, this potential (for all Alaskans to participate) must be treated as an unacceptable impact because it constitutes an uncertain outcome. This would be analogous to the Service planning on

¹⁴ National Park Service, Alaska Region. (January 15, 2013). *Denali National Park and Preserve 2013 Proposed Compendium.*, page 5.

¹⁵ *Ibid.*

¹⁶ See Alaska Department of Fish and Game species descriptions available at <http://www.adfg.alaska.gov/index.cfm?adfg=brownbear.management> retrieved January 24, 2013.

the entire Alaskan population to visit each of the Alaska park units annually. While such a potential exists, this simply will not occur due to factors such as remoteness and inaccessibility. It is probably the reason why the Service itself does not plan for this potential. Similarly, for potential wildlife use, this is not a reasonable or supported conclusion. Further, in so stating, the Service implies that state seasons, bag limits, and/or methods and means of harvest are inconsistent with the conservation of species and sustained yield management principles and ignores the State's authority to immediately close a hunt should a conservation concern develop.

When the state Board sets seasons, bag limits, and/or methods and means it considers actual prior harvest, actual use trends, and actual hunter success rates compared to wildlife population trends. This information ensures the adopted regulations concerning seasons, bag limits, and/or methods and means will result in a harvest consistent with the conservation of species and sustained yield management principles. The State is constitutionally and statutorily bound to manage wildlife on the sustained yield principle.¹⁷ The State has the tools and authorities to discern and avoid conservation concerns and specifically accounts for potential impacts when establishing the terms and availability of any harvest opportunity. In the unlikely event that the established seasons, bag limits, and/or methods and means are insufficient to ensure the conservation of species and sustained yield management principles, the Department has the authority to immediately close all take by emergency order.¹⁸

Is an ANILCA § 810 evaluation required?

As the Service is aware, both state and federal hunting regulations apply to national preserves. While general hunters are required to hunt under state regulation, federally qualified subsistence users are not bound to hunt under federal regulation on federal land when state regulation provides harvest opportunity. These users have a choice. Therefore, it appears the proposed restrictions under 36 CFR § 13.40(e) will affect federally qualified subsistence users' ability to harvest wildlife on preserves.

ANILCA § 810 requires:

In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands... shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

It is our understanding the Service has not conducted § 810 evaluations regarding these restrictions in the past; however, considering federal management of the public lands in Alaska is to have the least adverse impact possible on rural Alaska residents who depend on subsistence uses, such an evaluation appears necessary. We note the Service discussed these proposals with

¹⁷ See Alaska Constitution, Article VIII, § 4; See also Alaska Statute 16.05.258(b) (Requiring the Board of Game to determine whether a portion of a game population customarily and traditionally taken for subsistence can be harvested consistent with sustained yield prior to adopting regulations allowing harvest.).

¹⁸ See Alaska Statute 16.05.060.

the Denali Subsistence Resource Commission and the Eastern Interior, Western Interior, and South Central Regional Advisory Councils. These advisory groups deal with subsistence issues on park lands, which implies an effect, whether positive or negative, to subsistence users.

Therefore, we request the Service conduct an ANILCA § 810 evaluation for all proposed restrictions under 36 CFR § 13.40(e) or provide adequate documentation as to why such an analysis is not required.

Ecosystem context

The Service has not discussed the potential effect these proposals may have on the greater ecosystem. This approach appears to ignore Service Policy.

*Science has demonstrated that few if any park units can fully realize or maintain their physical and biological integrity if managed as biogeographic islands. **Instead, park units must be managed in the context of their larger ecosystems.** The ecosystem context for some species and processes may be relatively small, while for others this context is vast. In any case, **superintendents face the challenge of placing each of the resources they protect in their appropriate ecosystem context and then working with all involved and affected parties to advance their shared conservation goals and avoid adverse impacts on these resources.**¹⁹ (Emphasis added.)*

How did the Service consider and incorporate this section of Service Policy when developing the proposed restrictions at 36 CFR § 13.40(e)?

COMMENTS REGARDING SPECIFIC PROPOSALS AT 13.40(e)

Regulated take of brown bears over black bear baiting stations

The Alaska Board of Game (state Board) adopted regulations at the March 2012 meeting that relate to bear baiting and brown bears. These regulations were not promulgated for predator control, nor are they likely to have that effect. Rather, they were in response to surplus yield and public requests to utilize this yield. What the regulation provides for is the sustained taking of brown bears at black bear baiting stations in Game Management Units (GMU) 12, 20C, 20E & 21D during open black bear baiting season and with a bear baiting permit. In adopting these regulations the state Board fully explored and considered the impact that adoption of this take would have on sustained yield and determined it would not affect the conservation of brown bears in these areas. The same restrictions that apply to black bear baiting apply. Hunters who take brown bears over bait in these areas are required to salvage the edible meat in addition to the hide and skull. Hunters must still comply with seasons and bag limits for brown bears. Currently the regulations state that in GMU 20C one brown bear may be taken per regulatory year; and in GMU 19D two brown bears may be taken per regulatory year.

Food-conditioned bears

The Service provides, in part, the following rationale to support these proposed restrictions:

The public safety concerns posed by food conditioned bears are universally recognized by natural resource agencies throughout the range of the species. Food conditioned

¹⁹ National Park Service. (2006). *Management Policies.*, page 36.

bears are more likely to be a danger to humans than those that are not food conditioned. Further, food conditioning of bears tends to increase the likelihood of a bear being killed in defense of life or property. Baiting is incongruent with best management practices and standard public educational messaging on the issue of food and bears. . . . [T]here is little current or historic data available to predict effects of this practice.²⁰

The Department does not dispute that food-conditioned bears could pose greater safety concerns than non-conditioned bears when in close proximity to humans. Further, we do not dispute that food-conditioned bears are more likely to be killed in defense of life or property circumstances than non-conditioned bears when in close proximity to humans. We also recognize that leaving human food accessible to bears is inconsistent with standard public safety messaging and state regulation. However, we question whether these state regulations will necessarily result in an increased number of food-conditioned bears.

The Department registers thousands of black bear bait stations yearly and has done so for many years. To date, we have not detected problems that can be directly attributed to the practice of bear baiting. In fact, areas with relatively high levels of bear baiting such as near Fairbanks and the Mat-Su Valley have comparatively fewer nuisance bear issues than other urban areas such as Anchorage or Juneau. This may be because bears are harvested or experience strong negative reinforcement. However, this is only inference and there are currently no data to evaluate cause and effect. Considering the wide-spread use of this hunting practice; state regulations that take reasonable steps to keep bears that may visit a bait station away from the public, such as regulating baiting as to time, place, type of bait, clean-up, and removal of bait and placement of bait sites away from roads, trails, homes, and developed campgrounds; and the noteworthy lack of identifiable problems, bear baiting should continue to be – as it has been legal in Alaska continuously since 1989 – compatible on the comparatively remote, unpopulated, and difficult to access preserve lands.

Lastly, taken out of context it may appear that bear baiting is “incongruent” with standard public safety messaging on the issue of food and bears. However, this is not the case. Safety messaging, while designed for everyone, applies to non-hunting scenarios in which humans want to avoid human-bear interactions including brown bears drawn to food without negative reinforcement. It does not logically follow that hunters would adhere to these principles at all times while on a regulated hunt. For example, most hunters do not make noise or travel in large groups when hunting brown bears or other game in Alaska.

Denali National Preserve

The Department has no biological concerns regarding the harvest of brown bears over black bear bait stations in GMU 20C. Considering no black bear bait sites were placed within Denali Preserve in the last five years, this regulation will likely have no biological effect on the brown bear population in the preserve. This trend should continue since black bear habitat is more easily accessible near the Tanana River (where most black bear bait stations are placed). Additionally, brown bear harvest in and near the preserve is extremely low. On average, six brown bears are harvested annually in GMU 20C, none of which were harvested within UCUs (Uniform Coding Units; roughly equivalent to drainages) that include a portion of preserve land.

²⁰ *Id.*, Denali National Park and Preserve 2013 Proposed Compendium., page 5.

Higher harvest levels would be sustainable and consistent with the conservation of brown bears and sustained yield management principles. The Department monitors brown bear harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation allowing harvest of brown bears over black bear bait stations in GMU 20C has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Wrangell-St. Elias National Preserve

The Department has no biological concerns regarding the harvest of brown bears over black bear bait stations in GMU 12 and this regulation will likely have no biological effect on the brown bear population in the preserve. The brown bear population in GMU 12 numbers 350–425 bears. Brown bear harvest in and near the preserve is low. On average, 20 brown bears are harvested annually in GMU 12, of which an average of 10 are harvested within UCUs that include a portion of preserve land. A harvest level of up to 28 bears is currently considered sustainable and consistent with the conservation of brown bears and sustained yield management principles. The Department monitors brown bear harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation allowing harvest of brown bears over black bear bait stations in GMU 12 has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Yukon-Charley Rivers National Preserve

The Department has no biological concerns regarding the harvest of brown bears over black bear bait stations in GMU 20E, including Yukon-Charley Rivers Preserve. This regulation will likely have no biological effect on the brown bear population in the preserve. The brown bear population in GMU 20E numbers 320–394 brown bears and average annual harvest is low (16 brown bears during regulatory years 2007–2008 through 2011–2012). This harvest had no biological effect on the population trend as it was distributed throughout GMU 20E and did not exceed 5% of the total estimated population. On average, four bears per year were harvested within UCUs that include a portion of preserve land. Higher harvest levels would be sustainable and consistent with the conservation of brown bears and sustained yield management principles.

The Department’s lack of biological concern is also based, in part, on state regulations in place during April 2005 through June 2009 in a relatively easily accessible portion of GMU 20E that specifically allowed brown bear baiting by permitted members of the public for brown bear control. This program was discontinued because a total of only 13 brown bears were taken (2.6 per year average), which had no discernible impact on brown bear predation on moose.

The Department monitors brown bear harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation allowing harvest of brown bears over black bear bait stations in GMU 20E has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Season extensions – wolf and coyote

The Service misconstrues the actions of the state Board. We do not deny the Intensive Management law is specifically designed to increase numbers of moose, caribou, and deer populations. However, the increased wolf and coyote seasons (and brown bear seasons discussed above) approved by the state Board in the referenced areas provide additional harvest opportunity where an increased level of harvestable surplus exists. These regulations were not promulgated principally for predator control as construed by the Service, i.e., to increase population numbers of, or favor, ungulates. In fact, by closing this harvest opportunity, the Service is favoring these predator populations over prey species and other predators, e.g., inter-specific competition with predator populations. These areas are characterized by vast areas of remote landscapes where little or no harvest takes place due to the difficulty of access. These state regulations are largely recognized as a way to provide additional harvest opportunity to the rural residents of the area.

Long hunting seasons provide hunters with the legal ability to take wolves and coyotes should the need or opportunity arise. Year-round hunting seasons currently occur in parts of the state for beaver, Arctic fox, bull caribou, black bear, squirrel, marmot, and hare and are consistent with the conservation of these species and sustained yield management principles. Additionally, the preemption of state law would result in multiple seasons across GMUs, adding unnecessary confusion for the general public, and increasing the potential for low compliance.

Aniakchak National Preserve

Wolves are common and stable in GMU 9E (13-18 wolves/1000 miles² in GMU 9). The current hunting seasons have not increased harvest significantly. Wolf hunting season dates in GMU 9 are August 10 through June 30. Average annual take in GMUs 9B, 9C, and 9E are sustainable (average of 74 wolves per year since 2000). Seven wolves, on average, have been taken annually in May after the hunting season was extended to May 25 in regulatory year 2005-2006. No wolves have been taken in June since the hunting season was extended to June 30 in regulatory year 2010-2011. Only two wolves have been taken during the month of May within the portions of GMU 9E which contain UCUs that include preserve land since regulatory year 2005-2006 and zero wolves were taken during the month of June within the portions of GMU 9E which contain UCUs that include preserve land.

Coyotes recently colonized the area but are uncommon and seldom harvested. The Department has no indication that take of coyotes during hunting season dates (August 10 – May 25) has had any biological effect on coyote populations in these areas.

Therefore, current hunting seasons are not likely to increase harvest beyond sustainable levels and will not disrupt behaviors, or affect wolf, coyote, or prey densities. The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that expands wolf and coyote hunting seasons in GMU 9E has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Denali National Preserve

Wolf hunting season dates are August 1 through May 31 in GMU 19D and August 10 through May 31 in GMU 20C. Harvest in these GMUs has been low, with an average of three wolves harvested per year during regulatory years 2007–2008 through 2011–2012 within UCUs that include a portion of preserve land.

Wolf densities in Units 19D and 20C are within the range reported in the literature for wolves in Interior Alaska where ungulate densities are low (7–25 wolves/1000mi²).²¹ In GMU 19D, the pre-wolf control density was estimated at 17 wolves/1000 mi² in 2001. After six years of wolf control (2004–2009), the population density within the control focus area was 7.2–7.8 wolves/1000 mi² in 2009 and has remained stable. In the control area, the Department manages the control program to ensure that the wolf population is maintained at a sustainable level.²² The wolf population outside the wolf control focus area was not affected by wolf control, and the GMU 19D east density (which includes Denali Preserve) was 14 wolves/1000 mi². Harvest, including wolf control take, averaged 25 wolves per year in GMU 19D.

Service researchers documented a sharp decline in the wolf population in southern GMU 20C during 1991–1994 (from 137 to 72 wolves),²³ likely due to the decline of the Denali caribou herd.²⁴ The wolf population then fluctuated at that comparatively lower level of between 75 and 112 wolves (15–20 wolves/1,000 mi²) during 1995–2006. Results of the northeastern GMU 20C wolf census in 2012 also reflect comparably low wolf numbers (10.7 wolves/1,000 mi²). GMU 20C harvest averages 28 wolves per year, a 22% harvest rate, which is considered sustainable.

Coyotes are uncommon and seldom harvested. The Department has no indication that take of coyotes during May through September has had any biological effect on coyote populations in these areas. These seasons provide hunters with the legal ability to take coyotes and wolves should the need or opportunity arise.

²¹ T.J. Meier. (2011). *Annual Report on Vital Signs Monitoring of Wolf (canis lupus) Distributions and Abundance in Denali National Park and Preserve, Central Alaska Network*. Natural Resource Technical Report NPS/CAKN/NRTR-2011/204.

²² 5 AAC 92.123.

²³ *Id.*, Meier.

²⁴ L. A. Adams. United State Geological Service Biological Resources Division. (2003). Personal communication to Don Young, Department biologist.

Therefore, current hunting seasons are not likely to increase harvest beyond sustainable levels and will not disrupt behaviors, or affect wolf, coyote, or prey densities. The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that expands wolf and coyote hunting seasons in GMU 19D and 20C has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Gates of the Arctic National Preserve

Wolves are common, stable, and lightly harvested in GMUs 24 and 26B. The wolf hunting season in GMU 26B is within the proposed restriction. Wolf hunting season dates in GMU 24 are August 10 through May 31. GMU 24 harvest has been low, with an average of seven wolves harvested per year during regulatory years 2007–2008 through 2011–2012 within UCUs that include a portion of preserve land.

The estimated fall population for the entire GMU 24 was 374–541 (14–21 wolves/1,000 mi²) in 58–66 packs during regulatory years 2008–2009 through 2010–2011, with probably little change since regulatory years 1996–1997 through 1997–1998. Wolf numbers were highest (23–28 wolves/1,000 mi²) and probably stable in southern GMU 24 (GMU 24D). Wolf populations were moderate in northern Unit 24 (Brooks Range portion of Units 24A and 24B; 15–21 wolves/1,000 mi²). Wolf populations were lowest in central Unit 24 (GMU remainder; 10–16 wolves/1,000 mi²).

Wolf control programs are planned in GMU 24B to begin in spring 2013, which could result in the removal of an additional 45–55 wolves. However, wolf control will not occur on park lands. The predator control area is 1,360 mi², and approximately 10% of the area of GMU 24B. If 55 wolves are harvested during predator control activities, it will constitute approximately 12% of the GMU 24 wolf population.

Trapper questionnaire reports and biologists’ sightings indicate that coyotes are uncommon and seldom harvested. The occasional sightings of coyotes and rare coyote harvest in GMU 24 likely represent dispersing individuals from the south, rather than a resident coyote population. The Department has no indication that take of coyotes during May through September has had any biological effect on coyote populations in these areas. These seasons provide hunters with the legal ability to take coyotes and wolves should the need or opportunity arise.

Therefore, current hunting seasons are not likely to increase harvest beyond sustainable levels and will not disrupt behaviors, or affect wolf, coyote, or prey densities. The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that expands wolf and coyote hunting seasons in GMU 24 has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Katmai National Preserve including Alagnak Wild River

Wolves are common and stable in GMUs 9C (13-18 wolves/1000 miles² in GMU 9). The current hunting seasons have not increased harvest significantly. Wolf hunting season dates in GMU 9 are August 10 through June 30. Average annual take in GMUs 9B, 9C, and 9E are sustainable (average of 74 wolves per year since 2000). Seven wolves, on average, have been taken annually in May after the hunting season was extended to May 25 in regulatory year 2005-2006. No wolves have been taken in June since the hunting season was extended to June 30 in regulatory year 2010-2011. Zero wolves were taken during the month of May within the portions of GMU 9C which contain UCUs that include preserve land since regulatory year 2005-2006, and zero wolves were taken during the month of June within the portions of GMU 9C which contain UCUs that include preserve land.

Coyotes recently colonized the area but are uncommon and seldom harvested. The Department has no indication that take of coyotes during hunting season dates (August 10 – May 25) has had any biological effect on coyote populations in these areas. These seasons provide hunters with the legal ability to take coyotes and wolves should the need or opportunity arise.

Therefore, current hunting seasons are not likely to increase harvest beyond sustainable levels and will not disrupt behaviors, or affect wolf, coyote, or prey densities. The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that expands wolf and coyote hunting seasons in GMU 9C has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Lake Clark National Preserve

Wolves are common and stable in GMUs 9B (13-18 wolves/1000 miles² in GMU 9). The current hunting seasons have not increased harvest significantly. Wolf hunting season dates in GMU 9 are August 10 through June 30. Average annual take in GMUs 9B, 9C, and 9E are sustainable (average of 74 wolves per year since 2000). Seven wolves, on average, have been taken annually in May after the hunting season was extended to May 25 in regulatory year 2005-2006. No wolves have been taken in June since the hunting season was extended to June 30 in regulatory year 2010-2011. Zero wolves were taken during the month of May within the portions of GMU 9B which contain UCUs that include preserve land since regulatory year 2005-2006, and zero wolves were taken during the month of June within the portions of GMU 9 which contain UCUs that include preserve land.

Coyotes recently colonized the area but are uncommon and seldom harvested. The Department has no indication that take of coyotes during hunting season dates (August 10 – May 25) has had

any biological effect on coyote populations in these areas. These seasons provide hunters with the legal ability to take coyotes and wolves should the need or opportunity arise.

Wolves are common and stable in GMU 19B (14 – 21 wolves/1000 mi²). Wolf hunting season dates in GMU 19B are August 1 through May 31. Average annual take has been low, with one wolf harvested per regulatory year during 2007–2008 through 2011–2012 within the portions of GMU 19B which contain UCUs that include preserve land. Throughout all of GMU 19B one wolf per year, on average, was harvested during May or August.

Coyotes recently colonized the area and trapper questionnaire reports and biologists' sightings indicate they are uncommon and seldom harvested. The Department has no indication that take of coyotes during May through September has had any biological effect on coyote populations in these areas. These seasons provide hunters with the legal ability to take coyotes and wolves should the need or opportunity arise.

Therefore, current hunting seasons are not likely to increase harvest beyond sustainable levels and will not disrupt behaviors, or affect wolf, coyote, or prey densities. The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that expands wolf and coyote hunting seasons in GMU 9B and 19B has the potential to affect "natural" (undefined) populations or impair park resources is unsubstantiated.

Wrangell-St. Elias National Preserve

Wolves are common (179–192 wolves) and lightly harvested in GMU 12. Wolf hunting seasons in GMU 12 are August 10 through May 31. An average annual take of 18 wolves per year remained stable during regulatory years 2007–2008 through 2011–2012 within UCUs that included preserve land. Throughout GMU 12, two wolves per year, on average, were taken during May or August.

Trapper questionnaire reports and biologists' sightings indicate that coyotes are less common than wolves and lightly harvested, and the population appears to be increasing. The Department has no indication that take of coyotes during May through September has had any discernible biological effect on coyote populations in these areas. These seasons provide hunters with the legal ability to take coyotes and wolves should the need or opportunity arise.

Therefore, current hunting seasons are not likely to increase harvest beyond sustainable levels and will not disrupt behaviors, or affect wolf, coyote, or prey densities. The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that expands wolf and coyote hunting seasons in GMU 12 has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Yukon-Charley Rivers National Preserve

Wolf control is being conducted under separate regulations in GMUs surrounding the Preserve, but not within it. In the control area, the Department manages the control program to ensure that the wolf population is maintained at a sustainable level.²⁵ Wolf populations within the Preserve and in adjacent GMUs 20B, 20D, 20E, 25B, and 25C are outside of the control area and the existing level of harvest is sustainable. For all of GMUs 20B, 20D, 20E, 25B, and 25C in regulatory years 2007-2008 through 2011-2012 the five-year average hunter-trapper harvest for UCUs that contain a portion of preserve lands was 15 and the five-year average hunter-trapper harvest for UCUs that *do not* contain a portion of preserve land was 138. The 5-year average hunter-trapper cumulative harvest for these GMUs was 153 over 39,680 miles². The five-year average hunter-trapper harvest during May and August for GMUs 20B, 20D, 20E, 25B, and 25C that contain a portion of preserve lands over the same time period was seven per year.

Current wolf hunting seasons (August 10 through May 31) are not likely to increase harvest and hunter and trapper harvest remains low in these GMUs. Throughout GMU 20E, which contains the majority of Preserve lands, an average of one wolf per year was taken during May or August. Service analysis of wolf harvest indicated that on average three wolves per year were harvested inside the Preserve during regulatory years 2007–2008 through 2009–2011. The Service also documented that four wolves from a radio-collared pack have been taken by wolf control outside the Preserve (an average of less than one wolf per year) during regulatory years 2004–2005 through 2009–2010.²⁶

The Department estimated the spring 2012 population within the 15,965 miles² wolf control area (portions of GMUs 12, 20B, 20D, 20E, and 25C outside Yukon-Charley Rivers Preserve) is at sustainable levels and contains 170–197 wolves. Since the wolf control program began in January 2005, the wolf population surrounding the Preserve has remained above 60 percent of the pre-control wolf population of 350–410 wolves. The wolf population in Unit 25B is lightly harvested and no wolf control is being conducted.

Trapper questionnaire reports and biologists’ sightings indicate that coyotes are less abundant than wolves, lightly harvested, and the population appears to be increasing. The Department has no indication that take of coyotes during May through September has had any biological effect on coyote populations in these areas. Longer hunting seasons provide hunters with the legal ability to take wolves and coyotes should the need or opportunity arise.

Therefore, current hunting seasons are not likely to increase harvest beyond sustainable levels and will not disrupt behaviors, or affect wolf, coyote, or prey densities. The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the

²⁵ 5 AAC 92.113.

²⁶ J. Burch. (2011). *Annual Report on Vital Signs Monitoring of Wolf (canis lupus) Distributions and Abundance in Yukon-Charley Rivers National Preserve, Central Alaska Network*. Natural Resource Technical Report NPS/CAKN/NRTR-2011/485.

Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that expands wolf and coyote hunting seasons in GMU 20E has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

Service action inappropriately extends the federal subsistence priority

The Service argues that state regulations extending wolf or coyote seasons have “*the potential to disrupt the subsistence opportunity for taking that wolf or coyote later in the year when their coats are prime in order to sell the pelt for cash.*”²⁷ This assertion ignores the intent of ANILCA § 815(3).

*Nothing in this title shall be construed as—authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national park or park monuments) **unless necessary for the conservation of healthy populations of fish and wildlife**, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law. (Emphasis added.)*

This proposed restriction is not necessary to conserve healthy populations of wildlife or the continuation of subsistence uses.

ANILCA recognizes that the State of Alaska retains primary management authority for all wildlife within the state through the regulatory powers of the state Board, and the Department is responsible to manage those resources under the sustained yield principle. While additional subsistence harvest opportunities are provided through ANILCA, it is exceedingly clear that this is the responsibility of the Federal Subsistence Board (federal Board), subject to consultation with state managers, and is to be provided through an open and active public process. As a result, the Service’s rationale circumvents state and federal statutes and supersedes the legitimate authority of both boards. The appropriate venue for the Service to address this type of concern is through the federal and the state Board processes.

Customary and traditional take of black bears at den sites

The state Board heard public testimony during its March 2008 meeting from users requesting recognition of customary and traditional means to harvest black bears. While the Service refers to these practices as “historically illegal,” in this instance, in November 2008, the state Board legally recognized long-standing cultural practices by resident hunters to harvest black bears in dens (including cubs and females with cubs) and, for safety reasons, to use artificial light as part of this practice. These methods are part of a pattern of customary and traditional use by local residents in GMUs 19A and 19D, upstream of the Selatna and Black River drainages, and GMUs 21B, 21C, 21D, and 24, and are documented in the customary and traditional use worksheet found in the Alaska Department of Fish and Game, Division of Subsistence Special Publication No. BOG 2008-07. Additionally, the Federal Western Interior Regional Advisory Council (RAC) endorsed the traditional and customary taking of sows with cubs and cubs in dens,

²⁷ *Id.*, Denali National Park and Preserve 2013 Proposed Compendium., page 8.

including the use of artificial light, for Federal lands in all of GMUs 19, 21, and 24. The Eastern Interior RAC also endorsed these customary and traditional practices for Federal lands in GMUs 21 and 24, emphasizing the need for artificial light as a safety measure.

The Service provides no detailed analysis regarding a specific cause and effect relationship between this state regulation and the possible impairment to any park resource and/or value but nonetheless asserts the following unacceptable impacts may occur:

The State provisions create efficient methods of take for black bears, including sows with vulnerable cubs, which have the potential to create harvest pressures on local populations and denning behavior of this species.²⁸

The practical effect of these allowances, open to all Alaska residents, is increased opportunity and efficiency for taking predator species – in particular, vulnerable denning family groups.²⁹

At its November 2008 meeting, the state Board clarified it was recognizing “denning,” including the take of cubs and females with cubs, as a customary and traditional practice (i.e., not implementing predator control type activities) as follows:

Just because predator control is going on out there doesn't mean [denning] isn't practiced, that the Native people who live out there practiced this for thousands of years. And feel like wherever we can we ought to recognize those practices....

There are customary and traditional practices of denning bears in the area historically. And again it's an opportunity for local people to take meat and to practice these customary and traditional methods.

...this is an attempt to move towards this goal of recognizing some of the customary and traditional practices that go on out in the Bush. A way people get food.

One of things I want to make very clear, at least as I see it in my mind, this is in no way part of any predator management program this isn't linked to one of them or one of the tools we are going to use. Again it's an opportunity for local residents to practice their customary and traditional heritage.

The state Board was clear this regulation was enacted to specifically legalize a long-standing customary and traditional means to obtain black bear meat during winter by residents of these GMUs; therefore, harvest is not expected to change. Because historic harvest levels have not caused a population sustainability concern, it is reasonable to assume the same level of harvest under the regulations legally recognizing this historic use will not cause a sustainability issue in the future. This practice does not have the same practical effect as predator control activities designed to manipulate wildlife populations for increased human consumption. The fact that

²⁸ *Id.*, Denali National Park and Preserve 2013 Proposed Compendium, page 3.

²⁹ *Ibid.*

black bears are common regionally indicates this customary and traditional practice does not have a significant impact on black bear populations.

Black bears are common and lightly harvested in GMU 19D (Denali National Preserve). The Department estimates 3,000–6,000 black bears in Unit 19D (24–48 black bears/100 mi²) and stable harvest of about 10 black bears per regulatory year. Since the denning regulations went into effect in 2008, the annual harvest remains stable at pre-2008 levels (<10/year) and is consistent with the conservation of black bears and sustained yield management principles. These remote, difficult to access lands are far from more readily accessible black bear habitat in the GMU. Therefore, the likelihood is negligible that this customary and traditional method of take would result in significant additional harvest or have a biological impact. Moreover, a Department mark–recapture study in May 2010 indicated that the black bear population in the Bear Control Area surrounding McGrath now exceeds the pre-control population level in 2003. While habitat differs, this nonetheless indicates black bear populations are resilient.³⁰

Black bears are common and are lightly harvested in GMU 24 (Gates of the Arctic National Preserve). Similarities in habitat and black bear sightings indicate the population is likely similar to GMU 19D (24–48 black bears/100 mi²) and the Eastern Yukon Flats in GMU 25D (>40 black bears/100 mi²). Since the denning regulations went into effect in 2008, annual harvest remains stable at pre-2008 levels and is consistent with the conservation of black bears and sustained yield management principles. Eighty-seven square miles of the preserve would be open to the taking of black bears under this authorization. These remote, difficult to access lands are far from more accessible black bear habitat in the GMU. Therefore, the likelihood is negligible that this customary and traditional method of take would result in significant additional harvest or have a biological impact.

The Department monitors harvest; in the unlikely event harvest increased beyond sustainable levels, the Department would close the season by emergency order if immediate action was necessary, and/or by recommending more conservative seasons, bag limits, and/or methods to the state Board for future hunting seasons.

Based on the above and without scientific data or analysis to the contrary, the assertion that the state regulation that allows customary and traditional harvest of black bears at den sites with the aid of artificial light has the potential to affect “natural” (undefined) populations or impair park resources is unsubstantiated.

PUBLIC INVOLVEMENT

36 CFR § 13.50(d)(1) requires that temporary closures “*shall not be effective prior to notice and hearing in the vicinity of the area(s) directly affected.*” The proposed restrictions cover approximately 10,000,000 million acres (15,625 miles²)³¹ and have the potential to affect hunters

³⁰ M. A. Keech. (2012). *Response of moose and their predators to wolf reduction and short-term bear removal in a portion of Unit 19D*. Alaska Department of Fish and Game, Federal Aid in Wildlife Restoration, Final Wildlife Research Report ADF&G/DWC/WRR-2012-#, Grants W-33-4 through W-33-10, Project 1.62, Juneau, Alaska.

³¹ Based on listed acreages in ANILCA §§ 201 and 202 for Aniakchak (376,000 acres), Denali (1,330,000 acres), Gates of the Arctic (900,000 acres), Katmai (308,000 acres), Lake Clark (1,214,000 acres), Wrangell-St-Elias (4,171,000 acres), and Yukon-Charley Rivers (1,713,000 acres) National Preserves.

in 49 resident zone communities,³² and nearby population centers that are not resident zone communities, such as Central, Circle, Eagle, Homer, and King Salmon, as well as the urban centers of Anchorage, Fairbanks, Palmer, and Wasilla. Despite the potential to affect a diverse population dispersed over a large area, the Service conducted only seven formal public hearings.

Additionally, six of the seven public meetings occurred prior to the release of the proposed restrictions thereby preventing public testimony based on specific proposals and associated data and analysis. We assume the Service provided the same justification regarding the proposed restrictions as provided to the Fairbanks News Miner, "*The state regulations we feel are not appropriate for the mandates we have for protecting natural and healthy wildlife populations in the preserve.*"³³ At a minimum, the public should have been provided with a specific proposal on which to base and provide testimony, especially considering the Service justifies the proposals using broad law and policy statements.

While we recognize it is the responsibility of the Service to plan and conduct these public hearings, **we request an explanation as to how meeting locations are chosen and why locations meet the requirement to hold hearings in the vicinity of the areas directly affected. More specifically, we request an explanation as to why seven public hearings met the requirement to hold hearings in the vicinity of the areas directly affected in 2013 and why specific proposals were not available for public review at those meetings. Furthermore, we request discussion as to why hearings were not scheduled for the major urban centers of Anchorage, Fairbanks, and the Mat-Su Valley considering the Service found the time, staff, and money to present the proposals at the "pay-to-attend" Alaska Forum on the Environment in Anchorage and conduct a multi-day Facebook event.**

IS RULEMAKING IN THE FEDERAL REGISTER REQUIRED?

To determine what it means to be consistent with the requirements of 36 CFR Parts 1 and 13, as well as Executive direction, we request a written response addressing the comments in the following sub-sections.

Approach appears inconsistent with 36 CFR Part 13

The Service has previously argued that 36 CFR § 13.50(d)(3) does not preclude the recurrence of the current and proposed "temporary" restrictions at 36 CFR §13.40(e) if a review of the circumstances indicates that the closure or restriction is again warranted for protection of public safety, wildlife, or other resources. By this reasoning, the same use could be "temporarily" closed in perpetuity so long as all procedural steps included in the regulation are complied with at every reoccurrence.

36 CFR § 13.50(d)(3) states that "[t]emporary closures or restrictions shall not extend for a period exceeding 12 months and may not be extended." The 1983 preamble to the Part 13

³² We recognize that per 36 CFR § 13.430 resident zone communities are generally "*areas near a national park or monument which contain significant concentrations of rural residents who, without using aircraft as a means of access for purposes of taking fish or wildlife for subsistence uses..., have customarily and traditionally engaged in subsistence uses within a national park or monument.*" However, due to their proximity, these communities utilize national preserve lands and have the opportunity to harvest wildlife under state hunting regulations on these lands.

³³ Available at http://www.newsminer.com/article_a20deafd-ba40-5776-b404-914d9d944abb.html retrieved February 11, 2013.

regulations states, “[t]his **rulemaking establishes time limits for emergency closures (30 days) and temporary closures (12 months) which cannot be extended.**” (Emphasis added.) 36 CFR § 13.50(e) provides that “[p]ermanent closures or restrictions shall be published as rulemaking in the Federal Register . . .” and § 13.50(g) provides a mechanism for lifting closures.

Reading the regulation as a whole, along with the Congressional Record and preamble, temporary closures or restrictions under 36 CFR § 13.40(e) appear to be those needed for 12 months or less, and those needed for more than 12 months would be considered permanent and published as rulemaking in the Federal Register. These regulations could then be subsequently rescinded when no longer necessary. The fact that the Service argues multiple, back-to-back temporary closures under § 13.40(e) of the same exact nature are *possible* under the regulations, even when the effect is a closure that exceeds 12 months and/or addresses a concern that would extend beyond 12 months, does not necessarily make that interpretation reasonable or appropriate.

For example, despite the Service’s intent to move the reoccurring temporary restrictions under 36 CFR § 13.40(e) for Denali and Gates of the Arctic National Preserves to rulemaking at some undetermined point, the closures are not based on any meaningful data or need to identify a conservation concern or any on-the-ground impacts. These closures are predicated solely on a generalized interpretation of Service Policy. As such, notwithstanding a change in Service Policy, this justification will not change and in fact has not changed between 2010 and 2013. While labeled “temporary” the clearly stated intent is that these closures are permanent and should, therefore, be promulgated as rulemaking under 36 CFR § 13.50(e).

Therefore, we request a full explanation of Service authorities under 36 CFR §§ 13.50 (d) and (e), with particular focus on the interpretation that § 13.50(d) authorizes use of re-occurring temporary closures or restrictions.

Approach appears inconsistent with Executive direction

Prohibiting the application of state regulations to public lands infringes upon state management authority and invokes fundamental principles of federalism. Executive Order 13132 directs the Service to carefully consider, and to the greatest extent possible, avoid preemption of state law. This direction makes it clear that “States possess unique authorities, qualities, and abilities to meet the needs of the people”³⁴ and should be deferred to “where possible”³⁵ to “experiment with a variety of approaches to public issues.”³⁶ Agencies are directed to “carefully assess the necessity”³⁷ for “any action that would limit the policymaking discretion of the States”³⁸ and to “act with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.”³⁹ The preemption of state law without scientific justification and the annual renewal of these

³⁴ Executive Order 13132 (1999), at (2)(e).

³⁵ *Ibid.*, (3)(d)(2).

³⁶ *Ibid.*, (2)(f).

³⁷ *Ibid.*, (3)(a).

³⁸ *Ibid.*

³⁹ *Ibid.*, (2)(i).

“temporary” closures without process, explanation, or justification is wholly inconsistent with these federalism principles.

As discussed above, in ANILCA Congress expressly recognized the State’s primary responsibility and authority for wildlife management on the public lands except as may be provided in title VIII of the Act. Executive Order 13132 further directs that conflicting interpretations of how Congress intended wildlife resources to be managed on Service lands in Alaska presents a manifest uncertainty requiring “the greatest caution.” Any caution or careful assessment by the Service in preempting state law through the superintendent’s discretionary authority has not been demonstrated and, as a result, interferes with the State’s capacity to “function as a laborator[y] of democracy.”⁴⁰

In addition to regulatory requirements for consultation under multiple provisions in 36 CFR Part 13, before state law is preempted, consultation is required. Where action may be inappropriate, such as where the existence of a “*problem of national significance*”⁴¹ is questionable, consultation is required “*to determine whether Federal objectives can be attained by other means.*”⁴² Even when there is “*the possibility of a conflict between State law and Federally protected interests,*”⁴³ consultation is required “*to avoid such a conflict.*”⁴⁴ The Service has provided no scientific justification for any one of the proposed restrictions which might enable meaningful consultation with the State. At its most basic level, consultation means an exchange of views with a subject-matter expert and stakeholder, which, in this circumstance, is impossible without an exchange of scientific data and analysis. Notification of a course of action is not consultation.

Approach appears inconsistent with 36 CFR Part 1

President Obama’s “Preemption” memorandum noted that preemption “*should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis.*”⁴⁵ President Clinton’s Executive Order 13132 deemed such preemption “*appropriate [only] in light of the presence of a problem of national significance*”⁴⁶ since “*issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.*”⁴⁷ Preemption of state law is a course of reasoned and unavoidable necessity, rife with significance and national import, and in this instance inconsistent with the fundamental principles of federalism and a highly controversial action. Furthermore, it appears a substantial dispute exists between the Department and the Service that these state regulations will necessarily affect “natural” (undefined) population compositions, abundance, or dynamics on the species or landscape level, or cause impairment to wildlife populations.

Under Service regulations, highly controversial closures must go through formal rulemaking. National Park Service regulations found at 36 CFR Parts 1 through 6 apply to all park lands,

⁴⁰ *Ibid.*, (2)(e).

⁴¹ *Ibid.*, (3)(b).

⁴² *Ibid.*

⁴³ *Ibid.*, (4)(d).

⁴⁴ *Ibid.*

⁴⁵ Presidential Memorandum of May 20, 2009.

⁴⁶ *Id.*, EO 13132(3)(b).

⁴⁷ *Ibid.*, (2)(a).

whereas Part 13 contains Alaska-specific regulations. These Alaska-specific regulations “*may amend, modify, relax or make more stringent*”⁴⁸ the more general regulations, meaning the Part 1 regulations remain in effect except to the extent Part 13 regulations provide otherwise. The Park Service made this clear in its 1981 rulemaking, stating:

*These regulations supplement the regulations of Parts 1 through 9 of Title 36 of the Code of Federal Regulations. **These Part 1-9 regulations remain applicable except as they are modified herein.***⁴⁹ (Emphasis added.)

The Park Service added in 1983:

*In general, the rules found in 36 CFR Part 13 apply to Alaska park areas and supersede the general regulations found in 36 CFR Parts 1-6 **in those specific instances where the provisions of the general regulations are in conflict** . . . Closures in park areas in Alaska will be established in accordance with the requirements of the Alaska National Interest Lands Conservation Act 16 U.S.C. 3101 et. seq., and its implementing regulations in 36 CFR 13.30.*⁵⁰ (Emphasis added.)

In Part 1, 36 CFR § 1.5 (entitled “closures and public use limits”) contains procedural requirements that must be followed prior to implementing or terminating a restriction, condition, public use limit, or closure of a park unit or area. In particular 36 CFR § 1.5(b) requires that a closure of a “highly controversial nature” shall be implemented through the Federal Register rulemaking process:

*(b) Except in emergency situations, **a closure, designation, use or activity restriction or condition, or the termination or relaxation of such, which is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area, adversely affect the park’s natural, aesthetic, scenic or cultural values, require a long-term or significant modification in the resource management objectives of the unit, or is of a highly controversial nature, shall be published as rulemaking in the FEDERAL REGISTER.*** (Emphasis added.)

Part 13 contains provisions for closures and restrictions in Alaska, but these provisions do not amend, modify, or conflict with the general requirement for Federal Register rulemaking for highly controversial closures. In particular 36 CFR § 13.50(c)-(e) provides:⁵¹

*(c) Emergency Closures. (1) Emergency closures or restrictions relating to the taking of fish and wildlife shall be accomplished by notice and hearing.
(2) Other emergency closures shall become effective upon notice as prescribed in paragraph (f) of this section; and*

⁴⁸ 36 CFR § 1.2(c).

⁴⁹ 46 FR 31843 (June 17, 1981; Final Rule).

⁵⁰ 48 FR 30253-54 (June 30, 1983; Final Rule revising 36 CFR Parts 1-7, and 12). Following reorganization of Part 13, § 13.30 is now § 13.50.

⁵¹ See also 36 CFR § 13.40(e) which states, in part, “*The Superintendent may prohibit or restrict the non-subsistence taking of fish or wildlife in accordance with the provisions of § 13.50 of this chapter.*”.

(3) No emergency closure or restriction shall extend for a period exceeding 30 days, nor may it be extended.

(d) Temporary closures or restrictions. (1) Temporary closures or restrictions relating to the taking of fish and wildlife, shall not be effective prior to notice and hearing in the vicinity of the area(s) directly affected by such closures or restrictions, and other locations as appropriate;

(2) Temporary closures shall be effective upon notice as prescribed in paragraph (f) of this section; and

(3) Temporary closures or restrictions shall not extend for a period exceeding 12 months and may not be extended.

(e) Permanent closures or restrictions. Permanent closures or restrictions shall be published as rulemaking in the FEDERAL REGISTER with a minimum public comment period of 60 days and shall be accompanied by public hearings in the area affected and other locations as appropriate.

Certain subsections of 36 CFR § 1.5 are superseded by 36 CFR § 13.50; however, § 1.5(b) remains applicable as it is not separately addressed by provisions in § 13.50. While we recognize that Service wildlife closures in Alaska are implemented through § 13.50, certain nationwide direction found at § 1.5 still applies. Therefore, in addition to the procedural requirements in §§ 13.40, 13.50 and consistent with § 1.5(b), it appears the Service must go through the rulemaking process for closures and restrictions of a highly controversial nature.

REOCCURRING CLOSURES UTILIZE FAULTY PROCESS

Consistent with our concerns regarding rulemaking for reoccurring temporary closures, the Service has not utilized an appropriate process when renewing “temporary” restrictions regarding the take of a cub bear or a female bear accompanied by a cub bear at a den site or the use of artificial light under 36 CFR § 13.40(e). It is our understanding the Service neither conducted the appropriate public hearings nor reanalyzed the circumstances surrounding the closure in a meaningful way.

In recent years, the Service has published a proposed compendium for each of the Alaska park units. These proposals highlight any proposed changes and the justification for those changes. After reviewing public comment, the compendium is finalized and a final compendium is published. The preamble to the final compendium highlights any public meetings associated with a proposed restriction or closure.

For example, the 2010 preamble for Denali National Park and Preserve states:

*The proposed compendium was available for comment from January 1 – February 15. **Public hearings were also held in Nikolai on March 25 and Denali National Park on March 29** regarding proposed restrictions on using artificial light to take black bear sows and cubs at den sites which was recently authorized under the State general hunting regulations. (Emphasis added.)*

Additionally, the proposal included, along with a justification, the following:

13.40(e) Temporary closures or restrictions to the taking of fish and wildlife

- *From October 15 through April 30, artificial light may not be used to take a black bear at a den site except to retrieve a dead bear or dispatch a wounded bear as authorized by state law.*
- *From October 15 through April 30, a person may not take a cub bear or a female bear accompanied by a cub bear at a den site.*

Both in 2011 and 2012, “*after review and consideration of the need for annual updates*”⁵² the proposal for Denali did not include the temporary closure referenced above. In other words, the Service did not inform the public of the extended closure but rather treated the entry as a permanent part of the compendium. No new analysis as to why the closure was to be extended was included. Additionally, to the best of our knowledge, the Service did not hold public hearings in the vicinity of the affected area.⁵³ While the Service held such meetings this year, these meetings were scheduled only after this issue was raised in a November 27, 2012, meeting with state representatives regarding the compendium process.

QUESTIONS PERTAINING TO THE NATIONAL PARK SERVICE LEGAL FRAMEWORK

As part of the requested written response regarding 36 CFR Part 13 and Executive direction, we ask that an evaluation of the following questions also be included.

ANILCA and the National Park Service Organic Act

The November 30, 2012, Denali National Park and Preserve news release regarding “*proposed changes to sport hunting regulations*”⁵⁴ cites a concern (without associated scientific data or analysis) that the referenced state regulations may impact “*the natural abundance, behavior, distribution, and ecological integrity of brown bear populations*”⁵⁵ and, therefore, exceed Congressional authorization.

Consistent with our concerns regarding “natural landscapes,” we recognize this position is based on Service Policy, which requires the maintenance of plants and animals:

*by preserving and restoring the **natural** abundances, diversities, dynamics, distributions, habitats, and behaviors of native plant and animal populations and the communities and ecosystems in which they occur.*⁵⁶ (Emphasis added.)

We question the basis of these assertions and note:

⁵² National Park Service. Alaska Region. (2012). *Executive Summary of Changes to the Superintendent’s Compendium for Denali National Park and Preserve.*, page 1.

⁵³ See the *Preamble to the Superintendent’s Compendium 2011 and 2012* for Denali National Park and Preserve, which state, “*The proposed compendium was available for comment from January 15 – February 15. The following preamble addresses comments received by the park on the proposed compendium.*”

⁵⁴ National Park Service, Alaska Region. (November 30, 2012) *Hearing Set on Proposed Hunting Restrictions in Denali National Preserve.* Available at <http://www.nps.gov/dena/parknews/compendiumchanges2013.htm>.

⁵⁵ *Ibid.*

⁵⁶ *Id.*, Management Policies., page 42.

*Pursuant to [the General Authorities Act, as amended], the Park Service concluded that Congress conceived of the park system as an integrated whole, wherein hunting, trapping, and any other **activities in derogation of park values could be allowed only if authorized by a park area’s enabling legislation or other applicable federal law.***⁵⁷ (Emphasis added.)

Also:

*Notwithstanding that the goals of user enjoyment and natural preservation may sometimes conflict, the NPS may rationally conclude, in light of the [National Park Service] Organic Act and its amendments, that its primary management function with respect to wildlife is preservation **unless Congress has declared otherwise.***⁵⁸ (Emphasis added.)

This reasoning is also reflected in current Service Policy:

*The additional legislative requirements of ANILCA, although not cited, must also be considered in the interpretation and application of [the 2006 Management Policies], as must all other applicable legislative requirements. **It is especially important that superintendents and other park staff review their park’s enabling legislation to determine whether it contains explicit guidance that would prevail over Service-wide policy.***⁵⁹ (Emphasis added.)

Generally, “[ANILCA] is a broad-ranging act which established new National Park System units in Alaska and provided special management direction for Federal park areas in Alaska.”⁶⁰ Congress expressly considered and recognized the Organic Act and the General Authorities Act, as amended, when deliberating and eventually passing ANILCA. Specifically, ANILCA § 203 states that park units in Alaska are to be managed pursuant to provisions of the National Park Service Organic Act (Organic Act), as amended and supplemented, *and* applicable provisions of ANILCA. Congress specifically authorized the continuation of consumptive uses of wildlife on Alaska National Preserves through ANILCA in §§ 203, 1313, and generally in title VIII. This explicit direction, in itself, supersedes direction in the Organic Act.

ANILCA § 101(b) states, “[i]t is the intent of Congress... **to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation.**” (Emphasis added). More specifically, ANILCA §§ 201(1)-(4), 201(6), 201(7a), 201(8a), 201(9)-(10), 202(2), 202(3a), state that these park areas “. . . shall be managed... **to protect habitat for, and populations of, fish and wildlife...**” Significantly, Congress specifically excluded the term “natural” in these sections of the Act. In contrast, ANILCA § 201(5), requires that Kenai Fjords National Park, where Congress *did not* provide for continued hunting opportunities, be managed “*to protect seals, sea lions, other marine mammals,*

⁵⁷ *Michigan United Conservation Clubs v. Lujan*, 949 F. 2d 202, 205 (6th Cir. 1991).

⁵⁸ *Ibid.*, at 207.

⁵⁹ *Id.*, Management Policies.. page 4.

⁶⁰ 46 FR 31836. (June 17, 1981; Final Rule).

*and marine and other birds and to maintain their hauling and breeding areas **in their natural state, free of human activity which is disruptive to their natural processes.*** (Emphasis added).

Additionally, and not to be confused with park-specific management direction in titles II or XIII of the Act, ANILCA § 815 further clarifies that the maintenance of “natural” populations are not a requisite for continued subsistence use opportunities on national preserves.

*Nothing [in title VIII] shall be construed as... permitting the level of subsistence uses of fish and wildlife within a **conservation system unit [which includes national preserves] 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.*** (Emphasis added.)

Based on the exclusion of the term “natural” in the statutory language of title II and the consistent direction that maintenance of “natural” populations is not a requisite under title VIII, it appears Congress directed that wildlife populations need not be “natural,” however “natural” is defined, on Alaska National Preserves. Further, “sound” populations, as provided by ANILCA § 101, are not necessarily “natural” populations.

Does the Service consider the statutory direction in ANILCA § 101(b) and title II “explicit guidance that would prevail over Service-wide policy”⁶¹ on Alaska National Preserves? Additionally, does the Service consider “sustainable” populations of wildlife “sound” populations? If so, and considering the Service “does not assert nor mean to imply that Alaska Department of Fish and Game or Board of Game actions have threatened the sustainability of wildlife populations,”⁶² how do these state regulations conflict with Congressional direction to provide for sound populations of wildlife, especially considering the corresponding allowance to provide for continued consumptive uses? Lastly, how do consumptive uses, managed on the sustained yield principle, jeopardize wildlife resources?

Park purposes and values

We understand the purposes and values for individual park units to be of great importance. The Organic Act, as amended, states:

“... the protection, management, and administration of these [areas of the National Park System]... 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.”⁶³ (Emphasis added.)

In a general summary of the Organic Act, the Department of Justice states:

While the Organic Act unified park management into a national system, national parks also have individual legislation and management systems. Each park is created by an

⁶¹ *Id.*, Management Policies.. page 4.

⁶² See December 14, 2012, letter from Deputy Director Joel Hard (NPS) to Acting Director Doug Vincent-Lang (ADFG)., page 2.

⁶³ 16 U.S.C. § 1a-1.

*individual legislative act of Congress. In this way, **Congress can address specific goals and needs with respect to a particular park. This results in a management system under which park officials must manage each park in accordance with the overarching national system as well as the park's own legislation and policies.** In addition to these congressional acts dealing specifically with the national park system, many other statutes impose requirements that may affect management decisions made by the National Park Service.*⁶⁴ (Emphasis added.)

By establishing Alaska park units, ANILCA thereby further defined their purposes and values,⁶⁵ which includes the consumptive use of wildlife on preserves. This is clearly evident in ANILCA §§ 101, 203, 1313, as well as the legislative record. Subsistence is also a value in these areas, as well as a majority of Alaskan National Parks. ANILCA and its significant body of legislative history provide that:

*It is the intent of Congress... to preserve... recreational opportunities including... sport hunting....*⁶⁶

*. . . the Secretary shall administer the lands, waters, and interests therein added to existing areas or established by [§§ 201, 202] as new areas of the National Park System...[p]rovided, however, [t]hat **hunting shall be permitted in areas designated as national preserves** under the provisions of this Act.*⁶⁷ (Emphasis added.)

*A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in [ANILCA] and **except that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed in a national preserve** under applicable State and Federal law and regulation.*⁶⁸ (Emphasis added.)

***The consumptive use of wildlife resources for subsistence, recreational, and other purposes is a recognized and permitted use of such resources within National Park Preserves.** Section 203 clarifies that **such use of wildlife resources within areas designated by sections 201 and 202 as National Park Preserves shall continue** subject to reasonable regulation, including the provisions of title VIII.*⁶⁹ (Emphasis added.)

*. . . the Committee amendment directs that a preserve be managed as a national park **except that all forms of hunting be permitted to continue.** This includes sport, subsistence, and guided hunting.*⁷⁰ (Emphasis added.)

⁶⁴ See <http://www.justice.gov/enrd/3195.htm> retrieved December 17, 2012.

⁶⁵ See Management Policies at page 11, 12. “The ‘**park resources and values**’ that are subject to the no-impairment standard **include**... appropriate opportunities to experience enjoyment of [native animals, and]... **any additional attributes encompassed by the specific values and purposes for which the park was established.**” (Emphasis added.)

⁶⁶ ANILCA § 101.

⁶⁷ *Id.*, § 203.

⁶⁸ *Id.*, § 1313.

⁶⁹ Senate Report 96-413., page 168.

⁷⁰ *Ibid.*, at page 307.

*Congress has found, in some instances, that **the taking of wildlife under appropriate regulation is consistent with the maintenance of the natural values** of lands which we otherwise would unhesitatingly designate as National Parks.⁷¹ (Emphasis added.)*

The Organic Act, as amended, requires that the management of park areas must not derogate the purposes and values for which a unit is established. However, it appears Congress intended to protect the “*high public value and integrity of the National Park System*”⁷² while simultaneously providing opportunities for the continued consumptive use of wildlife.

*This Act **provides sufficient protection for the national interest** in the scenic, natural, cultural and environmental values on the public lands in Alaska, **and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people**....⁷³ (Emphasis added.)*

When a use conflicts with the park resources and values, Service Policy states, “*the protection of resources and values must be predominant*”;⁷⁴ however, as discussed above, uses can also be values. At times, the Service appears to place less importance on purposes, values, and uses authorized by ANILCA (e.g., consumptive uses of wildlife) than on unenumerated national interest values (e.g., subjective perceptions of a naturally functioning ecosystem without any human influence). It appears an unaddressed (and therefore unresolved) conflict exists regarding the alternative uses of resources on park lands.

How does the Service reconcile competing park values given the statement that park values “must be predominant”?

Management flexibility

The Service “*has broad discretion in determining which avenues best achieve the [National Park Service] Organic Act’s mandate.*”⁷⁵ While we recognize that, through the Redwood Amendment, Congress “*directed that all units of the national parks [be] treated consistently, with resource protection the primary goal, while retaining the flexibility for individual park units . . . consistent with their specific enabling legislation,*”⁷⁶ the amendment did not require a uniform impairment standard across the park system.

*It is unclear from [the Organic Act] what constitutes impairment, and how both the duration and severity of the impairment are to be evaluated or weighed against the other value of public use of the park.*⁷⁷

To prevent impairment to park resources and values, Service Policy requires that unacceptable impacts be avoided and park superintendents “*must evaluate existing or proposed uses and*

⁷¹ Congressional Record House of Representatives 10549 (November 12, 1980).

⁷² 16 U.S.C. § 1a-1.

⁷³ ANILCA § 101(d).

⁷⁴ *Id.*, Management Policies., page 13.

⁷⁵ *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996).

⁷⁶ *Ibid.*, at 1449-50.

⁷⁷ *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000).

determine whether the associated impacts on park resources and values are acceptable.”⁷⁸

Broad policy statements lacking a reasoned, activity-specific analysis regarding how the Service balances competing values, or a rational link (with associated scientific data or analysis) to potential impairment of park resources and/or values, make this difficult to determine and consider.

We request clarification regarding the process used to determine if an unacceptable impact exists, and how the Service accounts for Congressional direction through ANILCA and the unique physical and visitor characteristics (e.g., vast size and limited visitor use) of Alaska park units. Additionally, under what Congressional authority did the “no-impairment standard” morph into the “unacceptable impacts standard”?

Importance of ANILCA

“[T]he Park Service administers 79.7 million acres of federal land in 49 states, **with two-thirds of the lands** (52.6 million acres, 66% of the NPS total) **in Alaska.**”⁷⁹ (Emphasis added.) The Region is therefore responsible for perpetuating the ANILCA-defined purposes, values, and Congressionally authorized uses on two-thirds of the park system. Based on this and the sections above, we question the assertion that the “*most important statutory directive for the National Park Service is provided by interrelated provisions of the Service Organic Act of 1916 and the Service General Authorities Act of 1970, including [the Redwood Amendment].*”⁸⁰

We request further clarification regarding this statement and the importance of ANILCA regarding park management in Alaska.

“Sport” hunting

The Service argues that, through ANILCA, “*sport hunting would be maintained as a heritage activity on some NPS lands in Alaska*”⁸¹ and that providing harvest opportunities beyond what is congressionally authorized cannot be allowed on preserve lands.

To begin, we do not question that hunting is a “heritage activity” in the general sense. State statute recognizes the need to preserve “*the heritage of hunting and trapping in the state*”;⁸² however, this has no bearing on state seasons, bag limits, and/or methods and means of harvest. As used by the Service, it appears the phrase “heritage activity” is justification to limit consumptive uses to those seasons, bag limits, and/or methods and means of harvest historically authorized. ANILCA neither refers to hunting as a heritage activity nor restricts consumptive use authorizations to those which have historically occurred. Rather, Congress expressly authorized consumptive uses. **What bearing, if any, does use of the phrase “heritage activity” have on Service management decisions?**

⁷⁸ *Id.*, Management Policies., page 12.

⁷⁹ Congressional Research Service. (2012). *Federal Land Ownership: Overview and Data.*, page 9. Available at <http://www.fas.org/sgp/crs/misc/R42346.pdf> retrieved January 22, 2013.

⁸⁰ *Id.*, Alaska Region. Compilation of closure background material., page 1.

⁸¹ *Ibid.*, at page 1.

⁸² Alaska Statute 16.05.255(a)(13)

The Service contends that because Congress used the phrase “*for sport purposes*” in ANILCA § 1313, methods of take that do not fall within the Service’s arbitrary (undefined) definition of “sport” hunting violate Congressional intent. This limited reading of the Act appears to be semantic exclusion.

*. . . the NPS cannot allow take – no matter how limited – of wildlife except as authorized by Congress. The State authorizations at issue exceed Congress's authorization for "sport" hunting and subsistence uses for "rural residents" as provided for in Title VIII. **Consequently, the authorizations for this State hunt exceed the statutory authorizations in ANILCA and are inconsistent with Federal regulations.** As such, allowing these activities to take place in NPS Preserves could result in an unacceptable impact to park resources.*⁸³ (Emphasis added.)

The allowance for hunting on national preserves in ANILCA occurs twice; §§ 203, 1313 state, respectively:

*. . . the Secretary shall administer the lands, waters, and interests therein added to existing areas or established by [§§ 201, 202 of ANILCA] as new areas of the National Park System...Provided, however, That **hunting shall be permitted in areas designated as national preserves** under the provisions of this Act.* (Emphasis added.)

*A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in [ANILCA] and **except that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed in a national preserve** under applicable State and Federal law and regulation.* (Emphasis added.)

ANILCA § 1313 utilizes the phrase “*the taking of... wildlife for sport purposes and subsistence uses... shall be allowed . . .*” (Emphasis added.) “*The term ‘take’ or ‘taking’ as used [in ANILCA] with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.*”⁸⁴ Therefore, substituting the definition of “take,” § 1313 reads that “**hunting of... wildlife for sport purposes and subsistence uses... shall be allowed . . .**” (Emphasis added.) Based on this, it appears Congress intended that hunting be allowed and the terms “sport” and “subsistence” are used to differentiate between subsistence and non-subsistence uses. The legislative history supports this reading:

*. . . both versions establish several national preserves to be administered by the National Park Service. Like the House-passed bill, **the Committee amendment directs that a preserve be managed as a national park except that all forms of hunting be permitted to continue.** This includes sport, subsistence, and guided hunting.*⁸⁵ (Emphasis added.)

⁸³ National Park Service, Alaska Region. (2010) *Gates of the Arctic National Park and Preserve compendium response to comments.*, page 5.

⁸⁴ ANILCA § 102(18).

⁸⁵ *Id.*, 96-413., page 307.

The phrase “*except that all forms of hunting be permitted*” implies that regulated take shall be allowed on national preserves, subject to reasonable regulation, and is to be distinguished into three categories: sport, subsistence, and guided. It appears that sport, subsistence, and guided are the only forms of hunting the committee considered, hence the use of “all.”

Guidance regarding ANILCA § 203 reinforces this interpretation (i.e., that Congress intended for the continuation of all forms of regulated take). First, § 203 clearly states that “*hunting shall be permitted.*” Second, the legislative history again indicates that hunting shall be permitted for all purposes and use of the term “recreational” simply distinguishes between subsistence and non-subsistence uses:

*The consumptive use of wildlife resources for subsistence, recreational, and other purposes is a recognized and permitted use of such resources within National Park Preserves. Section 203 clarifies that such use of wildlife resources within areas designated by sections 201 and 202 as National Park Preserves shall continue subject to reasonable regulation, including the provisions of title VIII.*⁸⁶ (Emphasis added.)

This interpretation is also consistent with legislative history from November 12, 1980:

*This section states that hunting and trapping shall be allowed in the Preserves, under applicable Federal and State law and regulation. Except for this, the National Preserves are to be managed exactly as are the National Parks.*⁸⁷ (Emphasis added.)

Again, this language encompasses all forms of regulated take, including take authorized under state regulation addressed by these compendium proposals.

Furthermore, the Service, to the best of our knowledge, has not defined “sport hunting” and, when it is not necessary to distinguish between subsistence uses has, from time to time, utilized “hunting.”

*Hunting is only allowed in the preserve area of Katmai. For current regulations and hunting dates in the preserve, check with the Alaska Department of Fish and Game.*⁸⁸ (Emphasis added.)

Curiously in the above example, the Service does not refer visitors to the park compendium, despite state protested closures in place at §13.40(e) restricting the take of wolves.

The use of the term “sport” to distinguish between subsistence and non-subsistence uses is consistent with state law. While Alaska Statute (AS) defines hunting as “*the taking of game under AS 16.05 – AS 16.40 and the regulations adopted under those chapters,*”⁸⁹ under AS 16.05.255(10), the state Board may regulate “*sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game.*”

⁸⁶ *Ibid.*, at page 168.

⁸⁷ *Id.*, HR 10549.

⁸⁸ See <http://www.nps.gov/katm/planyourvisit/things2do.htm> accessed January 22, 2013.

⁸⁹ *Id.*, AS 16.05.940(21).

Therefore, reading ANILCA as a whole and considering the legislative history, we request further clarification as to why these proposed restrictions at 36 CFR § 13.40(e) are necessary based solely on the undefined distinction between “hunting” and “sport hunting.”

“Conservation” vs. “Preservation”

It appears many compendium entries focus management actions on “preservation” rather than “conservation.” While similar, “preservation” should not be confused with “conservation.”⁹⁰ General common usage advises that “preservation” emphasizes “*keeping something that is valuable exactly as it is, without change and, in some cases, even without using it at all.*”⁹¹ “Conservation,” however, is about “*the wise use of a valuable item that one already has, with the suggestion that it will be difficult to replace once it has been used up.*”⁹²

The Organic Act specifically requires the Service to “*conserve*” wildlife and “*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.*”⁹³ According to Service policy:

*The Service manages the [animals in] parks to maintain them in an unimpaired condition for present and future generations in accordance with [Service]-specific statutes....*⁹⁴ (Emphasis added.)

*[The no impairment standard] ensures that park resources and values will continue to exist in a condition that will allow the American people to have present and future opportunities for enjoyment of them.*⁹⁵ (Emphasis added.)

ANILCA generally requires the protection of sound populations of wildlife and provides for consumptive uses of wildlife on most national parks and all preserves in Alaska. Both statutes appear to respect the fact that conservation, consumptive uses, and non-impairment are *not* mutually exclusive management objectives.

Per the Alaska Constitution, the Department is required to provide for the sustainability of all wildlife within Alaska.⁹⁶ The Service acknowledges the Department and the state Board maintain sustainable wildlife populations.

⁹⁰ See National Park Service, *NPS Overview*, which, under the heading “preservation” lists, “*the world’s largest carnivore, the Alaskan Brown Bear,*” available at <http://www.nps.gov/news/upload/NPS-Overview-updated-Oct-11-2012.pdf> accessed January 22, 2013.

⁹¹ S. I. Hayakawa. (1978). *Using the Right Word*. The Reader’s Digest Association, Inc., Pleasantville, NY., page 119.

⁹² *Ibid.*

⁹³ 16 USC § 1.

⁹⁴ *Id.*, Management Policies., page 36.

⁹⁵ *Ibid.*, at page 11.

⁹⁶ See *Id.*, footnote 12.

*[The Service does] not assert nor mean to imply that Alaska Department of Fish and Game or Board of Game actions have threatened the sustainability of wildlife populations. We understand State law prevents such an outcome....*⁹⁷

Therefore, we request an explanation as to how state management of wildlife resources frustrates the non-impairment standard, considering Congressional direction in the Organic Act to conserve wildlife for their use and enjoyment and under ANILCA to provide for continued consumptive uses of wildlife, coupled with ANILCA's recognition of the state's primary responsibility prerogative for management of wildlife resources on federal public lands in Alaska.

Selected legislative history

The Service cites Senate Report 96-413 and the Congressional Record, respectively, to support the position that these state authorized hunts interfere with park values.

*It is contrary to the National Park Service concept to manipulate habitat or populations to achieve maximum utilization of natural resources.*⁹⁸

*[T]he standard to be met in regulating the taking of fish and wildlife and trapping is that the preeminent natural values of the park system shall be protected in perpetuity and shall not be jeopardized by human uses. These are very special lands and this standard must be set very high[.]*⁹⁹ (Emphasis added.)

Taken in context, this part of Senate Report 96-413 discusses the continuation of subsistence uses, and does not refer, specifically, to other forms of take authorized by Congress on national preserves. In the same paragraph, the Senate committee considered human uses to be a natural part of the ecosystem. “[S]ubsistence uses by local rural residents have been, and are now, a natural part of the ecosystem serving as a primary consumer in the natural food chain.”¹⁰⁰ The manipulation of populations, as discussed in this section, specifically refers to the Service engaging in “habitat manipulation or control of other species,”¹⁰¹ but does not discuss increased seasons or bag limits based on higher levels of harvestable surplus. As stated previously, these state regulations were not promulgated for predator control, nor are they likely to have that effect (i.e., increase population numbers of, or favor, ungulates) but provide additional harvest opportunity where an increased level of harvestable surplus exists.

The second quotation above is inappropriately truncated, significantly altering its original meaning.

[T]he standard to be met in regulating the taking of fish and wildlife and trapping is that the preeminent natural values of the park system shall be protected in perpetuity and shall not be jeopardized by human uses. These are very special lands and this standard

⁹⁷ *Id.*, Deputy Director Hard (NPS) to Acting Director Vincent-Lang (ADFG), page 2.

⁹⁸ *Id.*, Denali National Park and Preserve 2013 Proposed Compendium., page 3.

⁹⁹ *Ibid.*, at pages 7-8.

¹⁰⁰ *Id.*, 96-413., page 171.

¹⁰¹ *Ibid.*

must be set very high: the objective for Park System lands must always be to maintain the health of the ecosystem, and the yield of fish and wildlife for hunting and trapping must be consistent with this requirement.¹⁰² (Emphasis added.)

This statement appears consistent with ANILCA § 815, discussed earlier, which does not require “natural” populations be maintained on national preserves for the continuation of subsistence uses – only that “healthy” populations are maintained. Accordingly, it appears that in order to protect “*the preeminent natural values of the park system,*” state regulations must only “*maintain the health of the ecosystem.*” The Service has not provided any scientific data or analysis to demonstrate the State has not satisfied this standard.

CONCLUSION

The Service has not provided a reasoned analysis, supported by scientific data and analysis, which details a specific cause and effect relationship between these state regulations and a corresponding likelihood that impairment would exist for any park resource or value. The determination and need is silent on current and expected visitor use; current and expected wildlife population numbers; and current and expected harvest based on state and/or federal analysis. Rather, the Service bases the preemption of state law on the vague assertion that the state regulations have the potential to impact some unspecified and undefined component(s) within a broad spectrum of individual, population, and ecological attributes of a species. This interference with the State’s ability to manage and allocate wildlife populations violates the principles of federalism. Without a reasoned analysis reconciling competing park values or supporting the likelihood of a conservation concern, it is difficult to prove a current, or future, impairment to park resources or values exists, and the Service is not convincing in its argument that federal action is necessary.

¹⁰² *Id.*, HR 10549.