

Dual Management of Wildlife in Alaska: Making Federal Practice Align with Federal Mandates

Kyle Joly, Sanford P. Rabinowitch, and Julie Lurman Joly

THE YEAR 2014 MARKED THE 25TH ANNIVERSARY of the 1989 landmark decision by the Alaska Supreme Court, *McDowell v. State of Alaska*, and provides a milestone at which to reflect upon its impact. In short, the court ruling stated that Article VIII of the Alaska state constitution grants equal access to wildlife resources to all of its residents (both urban and rural) and that a rural preference or priority was impermissible. However, in 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which required a rural preference for use of subsistence resources on federal lands in Alaska (see ANILCA §804). Thus the *McDowell* decision exposed a conflict between state and federal law that led to dual management of wildlife (excluding migratory birds and marine mammals) in Alaska, so that there is now federal management of subsistence hunting on federal lands and state of Alaska management elsewhere (see Norris 2002 for a detailed accounting).

For many years, there were repeated efforts to bridge the gap and unify management, but these efforts fell short and currently we see little chance of the dual management paradigm disappearing in the foreseeable future. It was with the early hope for reconciliation that the secretaries of the interior and agriculture created the Federal Subsistence Board (FSB; 50 CFR 100), which mirrors the function of the state's Board of Game. Federal subsistence hunting regulations were first promulgated as temporary regulations in 1990 and made permanent in 1992 (Norris 2002). Given the commonly held belief that a quick reversal back to single management was expected, federal regulations were, initially, virtually a copy of the existing state hunting regulations (Norris 2002). The FSB was never envisioned by the ANILCA (i.e., it is not explicitly mentioned or even alluded to in the law nor mentioned in its legislative history) and its regulations do not always adhere to corresponding land management agency regulations (see specific examples below). Indeed, the FSB regulations state that they do not supersede agency-specific regulations (50 CFR 100.3)

Here, we argue that the stop-gap measures to “temporarily” assume control over wildlife management on federal lands, which are now 25 years old, do not fully address the legal

The George Wright Forum, vol. 32, no. 1, pp. 18–24 (2015).

© 2015 The George Wright Society. All rights reserved.

(No copyright is claimed for previously published material reprinted herein.)

ISSN 0732-4715. Please direct all permissions requests to info@georgewright.org.

mandates of the land management agencies that comprise the FSB (the Department of the Interior's Bureau of Land Management, National Park Service, US Fish and Wildlife Service, and Bureau of Indian Affairs, and the Department of Agriculture's US Forest Service). Below, we provide recommendations to alter the FSB and its regulations so that it is compatible with its constituent agencies' mandates for the next 25 years.

Recommendations

(1) Assess every extant federal subsistence wildlife hunting regulation (as well as those covering trapping and fishing) to determine their compatibility with the existing legal framework of the respective land management agencies and whether they reflect differences between traditional subsistence hunting and the sport hunting ethos. This lens should also be used to assess all new proposed regulations the FSB receives.

There are conflicts between existing FSB regulations and agency law and regulations, as well as between subsistence and sport hunting norms. For example, trophy hunting is an acceptable practice in the sport hunting, but not the subsistence, community. Trophy hunting has the potential to alter the behavior, genetics, age structure, body size, sex ratios, timing of mating, and antler and horn sizes of wildlife (Coltman et al. 2003; Milner et al. 2007; Allendorf et al. 2008; Allendorf and Hard 2009; Darimont et al. 2009; Mysterud and Bischof 2010; Schmidt and Gorn 2013; Monteith et al. 2013). By selectively harvesting the largest, and possibly the strongest, males, antler and horn sizes and body sizes have decreased in ungulates in some areas (Coltman et al. 2003; Milner et al. 2007; Darimont et al. 2009; Monteith et al. 2013). Further, the largest and strongest individuals will obviously no longer be able to reproduce and pass along these traits, which can impact the genetics of a population (Milner et al. 2007; Allendorf et al. 2008; Allendorf and Hard 2009; Darimont et al. 2009; Monteith et al. 2013). It can also alter the behavior of groups. For example, the largest male muskox (*Ovibos moschatus*) in a herd control and defend small bands. Not only do they defend against other muskox males but also against predators such as grizzly bears (*Ursus arctos*). By removing the largest male who facilitates group cohesion and defense, the entire band of muskox may become more prone to run from predators, rather than form their iconic defensive circle, and thereby actually increase the vulnerability of the entire band to predation (Schmidt and Gorn 2013). By having harvests that focus on or are completely limited to males, male-to-female sex ratios can be dramatically skewed, which can result in altered timing of mating, younger/smaller males reproducing, and lower pregnancy rates (see Milner et al. 2007; Darimont et al. 2009; Mysterud and Bischof 2010). Therefore the more dramatic impacts of trophy, or selective, hunting can affect the health of wildlife populations, as well as their natural condition. The recovery time of over-harvested populations severely impacted by selective harvest may be longer than those not impacted by it (Allendorf and Hard 2009).

“Healthy” and/or “natural” are management criteria mandated by Title VIII of the ANILCA for federal agencies in Alaska while providing the federal subsistence priority. The evolutionary pressures brought on by trophy and selective harvest has been termed “unnatural selection” (Allendorf and Hard 2009) and likely violate these mandates. As outlined by Hilderbrand and others (2013), the ANILCA is just one law relating to land and wildlife stew-

ardship that must be adhered to, but there are numerous other laws, regulations, and policies that must also be followed, including the National Park Service Organic of 1916, National Park Service Management Policies 2006, Federal Land Policy and Management Act (FLPMA) of 1976, National Wildlife Refuge System Administration Act of 1966, and National Wildlife Refuge System Improvement Act of 1997, among others. Like the ANILCA, some of these other laws also discourage or curtail selective harvest. Therefore, we recommend that federal subsistence regulations that promote trophy hunting be replaced with regulations that allow for a greater range of open seasons, sizes, and ages, as well as the hunting of female ungulates. This change, if properly implemented, could offset the impacts of limited trophy hunting (Myserud and Bischof 2010). Trophy hunting may not be sustainable without “evolutionarily enlightened” management (Allendorf and Hard 2009; Myserud and Bischof 2010). “Minimizing the impact of sport hunting on the evolution of hunted species should be a major preoccupation of wildlife managers” (Festa-Bianchet 2003).

Similar arguments can be made with regard to harvest (bag) limits, seasons, and methods and means: the three components that support wildlife harvest management. “Harvest limits” are the number of individuals of a particular species that a hunter may kill over a specified period. “Seasons” are the time and duration that a hunt occurs during the year. “Methods and means” are the acceptable practices that are allowed in order to harvest wildlife. All three of these components were retained when the state hunting regulations were copied over into federal subsistence regulations in 1992. Twenty-five years ago, harvest limits for many predatory species, such as coyotes (*Canis latrans*), wolverine (*Gulo gulo*), grizzly bears, black bears (*Ursus americanus*) but especially wolves (*Canis lupus*), still largely reflected the misguided concept that they are pests: inherently evil or at least not critical to natural ecosystem function. Exaggerated harvest limits, such as in Alaska’s Game Management Unit (GMU) 22 where there is no limit on the numbers of wolves that can be taken by any individual subsistence hunter, or in GMU 19D, where the limit is 10 wolves/day (Office of Subsistence Management 2012), are easily construed as being designed to reduce predator numbers because predators are still viewed negatively or could reduce the amount of available ungulate harvest for humans. Setting high harvest limits for predators, such as 10 wolves per day per hunter, that are intentionally designed to or unintentionally could manipulate naturally functioning ecosystems is, in the parlance of the state of Alaska, considered “Intensive Management.” Intensive Management is the purposeful manipulation of the ecosystem, by humankind, with the express intent of inducing larger populations of ungulate species using techniques such as predator control. This is the explicit goal for Alaska state wildlife management, and Intensive Management is the preferred tool to reach that goal (see Alaska Statute 16.05.255 e–g and k 1–5). Predator control, as an Intensive Management tool, is prohibited on many federal lands in Alaska (e.g., national parks, monuments, and preserves, and national wildlife refuges) and must undergo an ANILCA Section 810 analysis on other lands, such as those managed by BLM (Lurman 2006; Lurman and Rabinowitch 2007; Joly 2010). However, other Intensive Management actions, such as excessively high harvest limits, have occurred on federal lands and should be corrected to a reduced level. Harvest limits of predators should not exceed what is reasonably likely to be utilized by subsistence users for the legislated purposes of

consumption for things such as food, shelter, fuel, clothing, tools, transportation and for the making and selling of handicrafts. Furthermore, such harvests should not disrupt natural or healthy ecosystem function. Moreover, there is no universal quota system, so even under reduced limits enough hunters could be harvesting so as to impact predatory species. While difficult to implement, eventually a quota system should be developed and deployed and periodically adjusted on a regional basis.

Sport hunting seasons for some predatory species are too long in many places, running through the end of May or even June in some areas (State of Alaska 2013). There is pressure to align sport and subsistence hunting regulations, to reduce complexity for hunters. Hunting seasons for those predatory species, which are furbearers, should be in alignment with trapping seasons so that they are limited to when their pelts have high value (typically fall through spring).

One large disparity between subsistence and sport hunting is in means and methods. The most obvious difference is that “fair chase” is a tenet central to the sport hunting ethos, but not in the world of subsistence hunting. The regulations do acknowledge some of these differences, such as allowing subsistence hunters to harvest caribou while swimming in some areas (Office of Subsistence Management 2012) but more could be done to codify these cultural differences.

(2) Provide veto authority to the land management agencies (i.e., Bureau of Land Management, National Park Service, US Fish and Wildlife Service, Bureau of Indian Affairs, and US Forest Service) that comprise the FSB over any new proposed regulation that may impact the lands and wildlife that they manage.

A carefully crafted veto authority with high standards for federal land management agencies would efficiently and effectively streamline and clarify the regulatory process. Proposals that an agency can demonstrate to be antithetical to the pertinent laws governing their lands could be vetoed, for their lands, before they became regulation. As it now stands, the possibility exists that an agency could get overruled in the FSB process and have proposals become regulation that are not legally implementable on the lands that they manage. While FSB regulations state that agency-specific regulations are not superseded by FSB regulations, implementation of this detail is difficult and not transparent to the public. Our experience has shown that an agency finding itself in this position must repeatedly bring up this detail to ensure the public is not misinformed. An initial veto authority would be more streamlined, intelligible, timely, and transparent.

The veto authority would likely be only rarely employed if our first recommendation, to assess the compatibility of new proposed regulations with the existing regulatory paradigm, is adopted.¹

(3) Re-write regulations as to who can serve on FSB’s 10 Regional Advisory Councils (RACs) and the FSB itself.

The purpose of RACs is to advise the FSB on subsistence taking and uses of wildlife and fish resources on federal lands. Subsistence hunting under federal regulations is limited to qualified rural residents; currently, non-rural residents can and do serve on RACs. We recommend that a super-majority of each council be made up of rural residents to ensure that

the voices of rural subsistence users, who are most impacted by these regulations, are heard. This is consistent with the ANILCA's §801 (5), which states that "rural residents who have personal knowledge of local conditions and requirements" should "have a meaningful role in the management of fish and wildlife and of subsistence use on the public lands in Alaska."

The FSB and its processes underwent an official review relatively recently (2010) during the term of Secretary of the Interior Ken Salazar. The review was long in coming and its few significant recommendations have been implemented rather slowly. One recommendation that was implemented was the creation of two additional seats on the FSB that were filled by "public members." While they provided a welcome broadening of perspective and improved the resulting discussions, the makeup of the new board has the potential to substantively alter the dynamics of the FSB process. Each individual land management agency now has less influence over the outcome of proposed subsistence regulations affecting the lands and wildlife that they manage. This diminished influence over FSB regulations makes a discussion about the need for a veto authority by individual agencies, as described in our second recommendation above, all the more urgent.

Finally, these "public members", including the chair of the FSB, need not be residents of Alaska. We recommend that this be changed and that only residents of Alaska, and preferably federally qualified rural residents, be appointed to the FSB.

Conclusion

The 25-year-old stop-gap regulations to ensure that the federal subsistence priority is provided were written with the expectation that they would be temporary and used only until the state of Alaska came into compliance. After 25 years, it is obvious a solution resolving the issue of dual management is not at hand and the time to discuss recommendations suggested in this paper, as well as other ideas, is now. Federal subsistence regulations need to be revised to account for agency mandates, differences between traditional subsistence and sport hunting, and the reality that they are likely to be around for another 25 years. Additional changes need to be made to increase the efficiency of the regulatory process so that land management agencies and the FSB work more compatibly for the next 25 years. We believe that it will be up to the individual land management agencies, through FSB processes, to move our recommendations forward.

Given that subsistence hunting regulations were copied from sport hunting regulations (Norris 2002), the nexus between the two types of hunting is obvious. Our arguments about trophy hunting, excessive harvest limits, and long seasons have implications for federal land management agencies that have sport hunting regulations that affect them (e.g., national park preserves, national forests, national wildlife refuges, and BLM-managed lands) as well. Initial attempts to rectify these regulations should be run through the sport hunting regulatory process (i.e., the state of Alaska's Board of Game). If these attempts prove futile, federal land managers have the legal tools, authority, and responsibility to preempt the state regulations so that the regulations comply with their mandates.

Acknowledgments

We thank Jeff Rasic, Grant Hilderbrand, and Deb Cooper for reviewing previous drafts of this manuscript. This work was supported in part by the US Department of Agriculture National Institute of Food and Agriculture, Hatch project ALK-10-05. The contents are solely the responsibility of the authors and do not necessarily represent the views of the US Department of Agriculture, National Institute of Food and Agriculture, National Park Service, US Department of the Interior, any of the Federal Subsistence Board agencies, or the University of Alaska–Fairbanks.

Endnote

1. While this article was under review, the FSB reviewed and accepted a new regulation allowing for the hunting of brown bear over bait within GMU 25D, which includes US Fish and Wildlife Service-administered national wildlife refuge lands. This allowance marks the first time hunting of brown bears over bait was permitted by the federal system, following a similarly first-of-its-kind 2012 allowance by the state of Alaska. The new FSB regulation occurred despite the US Fish and Wildlife Service speaking out strongly and voting against the proposal.

References

- Alaska Constitution, Article VII.
- Alaska National Interest Lands Conservation Act, Public Law No. 96-487, December 2, 1980, 94 Stat. 2422, 16 U.S.C. §3111 at seq.
- Alaska Statue § 16.05.255.
- Allendorf, F.W., et al. 2008. Genetic effects of harvest on wild animal populations. *Trends in Ecology and Evolution* 23: 327–336.
- Allendorf, F.W., and J.J. Hard. 2009. Human-induced evolution caused by unnatural selection through harvest of wild animals. *Proceedings of the National Academy of Sciences* 106: 9987–9994.
- Coltman, D.W., et al. 2003. Undesirable evolutionary consequences of trophy hunting. *Nature* 426: 655–658.
- Darimont, C.T., et al. 2009. Human predators outpace other agents of traits change in the wild. *Proceedings of the National Academy of Sciences* 106: 952–954.
- Festa-Bianchet, M. 2003. Exploitative wildlife management as a selective pressure for life-history evolution of large mammals. In *Animal Behavior and Animal Conservation*, M. Festa-Bianchet and M. Apollonio, eds. Washington, DC: Island Press, 191–207.
- Hilderbrand, G.V., K. Joly, S.P. Rabinowitch and B. Shults. 2013. *Wildlife Stewardship in National Park Service Areas in Alaska: A Report to the Alaska Leadership Council Subgroup on Wildlife Harvest on Parklands*. Natural Resource Report NPS/AKSO/NRR—2013/663. Fort Collins, CO: National Park Service.
- Joly, J.L. 2010. National wildlife refuges and Intensive Management in Alaska: Another case for preemption. *Alaska Law Review* 27: 27–48.

- Lurman, J. 2006. Subsistence at risk: failure to act and NEPA compliance in post-ANILCA Alaska. *Environmental Law* 36: 289–299.
- Lurman, J., and S.P. Rabinowitch. 2007. Preemption of state wildlife law in Alaska: Where, when, and why. *Alaska Law Review* 24: 145–172.
- McDowell v. State of Alaska*, 785 P.2d 1 (Alaska 1989).
- Milner, J.M., et al. 2007. Demographic side effects of selective hunting in ungulates and carnivores. *Conservation Biology* 21: 36–47.
- Monteith, K.L., et al. 2013. Effects of harvest, culture, and climate on trends in size of horn-like structures in trophy ungulates. *Wildlife Monographs* 183: 1–26.
- Mysterud, A. and R. Bischof. 2010. Can compensatory culling offset undesirable evolutionary consequences of trophy hunting? *Journal of Animal Ecology* 79: 148–160.
- Norris, F. 2002. *Alaska Subsistence: A National Park Service Management History*. Anchorage, AK: US Department of the Interior.
- Office of Subsistence Management. 2012. Subsistence management regulations for the harvest of wildlife on federal public lands in Alaska, July 1, 2012–June 30, 2014. Anchorage, AK: US Department of the Interior. Online at <http://www.doi.gov/subsistence/regulation/wildlife/index.cfm>.
- Schimdt, J.H., and T.S. Gorn. 2013. Possible secondary population-level effects of selective harvest of adult male muskoxen. *PLOS ONE* 8(6): e67493; doi:10.1371/journal.pone.0067493.
- State of Alaska. 2013. 2013–2014 *Alaska Hunting Regulations*. Juneau: State of Alaska.
- Kyle Joly**, Gates of the Arctic National Park and Preserve, 4175 Geist Road, Fairbanks, AK, 99709; kyle_joly@nps.gov
- Sanford P. Rabinowitch**, Alaska Regional Office, National Park Service (retired)
- Julie Lurman Joly**, School of Natural Resources and Agricultural Sciences, 364 O’Neill Building, University of Alaska–Fairbanks, Fairbanks, AK 99775; julie.joly@alaska.edu