

Alaska Prof. Hunters Assoc., SCI, Sportsmen's Alliance meeting with OIRA

Withdrawal Rule: RIN 1024-AE38, "Alaska: Hunting and Trapping on National Preserves," 83 Fed.Reg. 2361 (May 22, 2018)

Repealing Federal Overreach in the 2015 Alaska National Preserves Rule

This paper is submitted by the Alaska Professional Hunters Association (APHA), Safari Club International (SCI) and Sportsmen's Alliance (SA) in advance of our meeting with OIRA scheduled for 2:30 pm EST on October 1, 2019 regarding the pending Withdrawal Rule referenced above.

Key Points:

As the Supreme Court recently affirmed in the case of *Sturgeon v. Frost* (No. 17-949), Alaska is very different than other U.S. States, including with respect to the National Park Service (NPS) authority in Alaska. One major difference involves hunting on National Park units. As part of the Alaska National Interest Lands Conservation Act (ANILCA), Congress directed that the NPS must allow hunting on National Preserves in Alaska.

The State of Alaska has primary authority to regulate wildlife within its boundaries, including on National Preserves and other federal land units.

In 2015, the NPS adopted regulations for all National Preserves in Alaska that restricted multiple forms of hunting authorized by the State and added a wide-ranging general preemption clause (2015 Regulations). Those regulations directly conflicted with State rules regarding hunting.

The illegal 2015 Regulations purportedly were designed to restrict the practices of non-subsistence hunters. In actuality, the 2015 Regulations deprived Alaska Natives, who had moved from their local villages to more urban areas of Alaska, of their ability to continue to engage in traditional, subsistence-based hunting when returning to their home villages.

The 2015 Regulations directly conflict with the State's ability to manage wildlife consistent with the State Constitution's directive to provide the hunters of Alaska with "sustained yield."

The NPS has now taken steps to correct its errors. The regulation currently under OIRA review restores the State's authority to manage hunting to where it was before 2015.

The NPS's efforts to withdraw the 2015 Regulations follow Congress' lead. In 2017, Congress, under authority of the Congressional Review Act, directed the U.S. Fish and Wildlife Service to withdraw a very similar rule from 2016 (and thus eligible for Congressional Review Act review) that restricted hunting on all National Wildlife Refuges in Alaska and that also conflicted with State hunting regulations.

The regulation under OIRA review is intended to restore the proper relationship between State and federal management of wildlife and public lands in Alaska.

OIRA should release the rule, and allow the NPS to complete its withdrawal of the unwarranted 2015 Regulations that were adopted in contravention of ANILCA.

Introduction

We support the Withdrawal Rule under review by OIRA. See 83 Fed.Reg. 23621 (May 22, 2018); It would repeal several unwarranted provisions in an existing rule adopted by the NPS in October 2015 (2015 Regulations). The 2015 Regulations unlawfully preempted State of Alaska regulations governing authorized practices of hunting in the State. See 80 Fed.Reg. 64235 (Oct. 23, 2015). This paper explains the illegalities and unwarranted policies underlying the 2015 Regulations and why it is appropriate to repeal them.

Who We Are

APHA is the State's hunting guide association. Members of APHA guide recreational hunters, referred to in the governing statutes as "sport" hunters, in authorized hunting activities in the State. SCI and SA are recreational hunting associations whose members hunt in the State of Alaska, including in National Preserves. Our organizations respect and follow the principles of fair chase hunting and participate in and support hunting as a means of managing and conserving Alaska's wildlife. Like all hunters who respect nature, we make productive use of the animals we harvest as food and for other uses, and we avoid any waste of the harvested animals.

As recreational hunters and their guides, we respect the traditional subsistence hunting practices engaged in by rural residents of Alaska, primarily the Alaska Native community. Many members of SCI and SA are also subsistence hunters, as they often rely on the meat from the animals they hunt to feed their families.

In addition, we respect the State's authority to manage wildlife, including the establishment of hunting seasons, quotas, and methods of take.

Recreational hunting (particularly guided hunting) is an important economic activity in Alaska, and generates a substantial cash economy in rural Alaska. For a study commissioned by APHA, see http://www.alaskaprohunter.org/Economic_Impacts_of_Guided_Hunting_Final.pdf.

Governing Law

The State of Alaska regulates hunting pursuant to a clause in the Alaska Constitution that requires management of wildlife "on a sustained yield principle." Art. VIII, § 4. In other words, the Alaska Constitution obligates the Alaska's Board of Game (BOG) and Department of Fish and Game to make sure Alaska's hunters have the ability to harvest resources in accordance with their needs. By statute, "sustained yield" is defined as "the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game," for both predator and prey species. AS § 16.05.255(k)(5). The State maintains a staff of biologists and other scientists who evaluate species populations to determine the levels of beneficial harvest that achieve "sustained yield." Congress in the Alaska Statehood Act "accepted, ratified, and confirmed" the Alaska Constitution, including this "sustained yield" clause. P.L. 85-508 § 1 (1958).

Hunting on National Preserve in Alaska is not only legal, it is mandated by federal law. ANILCA requires that NPS allow "sport" hunting (recreational hunting) as well as subsistence hunting on Alaska's National Preserves. 16 U.S.C. § 3201. ANILCA provides for State regulation of the taking of wildlife, and only reserves to NPS the authority to close hunting in "designated zones" and for "designated periods" for "reasons of public safety, administration, floral and faunal

protection, or public use and enjoyment.” 16 U.S.C. § 3201. Except for this limited authority, the statute entrusts hunting management to the State. ANILCA does not authorize NPS to determine hunting seasons or methods and means of take, as these decisions lie within the authority of the State. *Id.* § 3202(a) and (b) (“management of the fish and wildlife on public lands” is assigned to the State and management of the “public lands” themselves is assigned to the Federal unit managers). No provisions of ANILCA refer to federal regulation of hunting seasons or methods or means, with an exception carved for subsistence hunting. *Id.* § 3202(a). The 2015 Regulations apply to non-subsistence hunting.

In ANILCA, Congress specifically directed that recreational hunting on National Preserves is subject to State regulation, which Congress knew was based on the “sustained yield” clause in the Alaska Constitution. 16 U.S.C. § 3202(a). Congress clarified in ANILCA that it was not in any way amending the Alaska Constitution or diminishing (or increasing) State authority to regulate hunting on National Preserves. *Id.*

The 2015 Regulations

The 2015 Regulations contain two different parts, a general preemption clause, and a list of specific preemptions of particular hunting methods and means. See 80 Fed.Reg. at 64343 (adding a general preemption clause in new 36 C.F.R. § 13.42(f) and a list of specific preemptions of particular State authorized hunting practices in 36 C.F.R. § 13.42(g)).

The general preemption clause invalidates any present or future State hunting regulations that could impact the balance between predator species (bears, wolves, coyotes) and prey species (moose, deer, caribou, and others). The general preemption clause rejects State rules that “are related to predator reduction efforts,” and then broadly defines “predator reduction efforts” as rules “**with the intent or potential to alter or manipulate natural predator-prey dynamics** and associated natural ecological processes in order to increase harvest of ungulates by humans.” 36 C.F.R. § 13.42(f) (emphasis added). In adopting this clause, the NPS incorrectly and illegally acted on the premise that the “sustained yield” clause in the Alaska Constitution, despite its foundation of scientific management of wildlife for sustainable use, was contrary to NPS policy.

In addition, the 2015 Regulations federally prohibit certain specific hunting practices that either are legal under state law or that NPS wanted to federally ban even though already illegal under state law. See 36 C.F.R. 13.42(g) (table). Because some of the practices (e.g. use of poison) were already illegal under state law, the 2015 Regulations created the misimpression that some of these practices would be “legal” without federal preemption. One has to read the list carefully to identify practices that the State would allow, often in limited circumstances.

Although NPS justified the 2015 Regulations as necessary to protect predator species, the 2015 Regulations do not rely on any finding that populations of bear, wolves, coyotes or other species are in jeopardy such that the NPS needs to step in and exercise its authority to close sport hunting on National Preserves in “designated zones” for “designated periods” under 16 U.S.C. § 3201. To the contrary, the 2015 Regulations reflect only a preference that wildlife on NPS units should not be managed by any regulatory actions that “reduce or increase wildlife populations for harvest.” 80 Fed.Reg. at 64326 (citing “NPS Management Policies 2006”). In adopting the 2015 Regulations, NPS codified a “hands off” management regime for NPS lands. i.e., a view that managers should let “natural systems” take their course. *Id.* In adopting the 2015 Regulations, the NPS substituted its management policies and practices for those of the State’s

and in doing so, illegally usurped the State of Alaska's primary authority over the management of Alaska's wildlife.

At present, the 2015 Regulations remain in effect. Congress has demonstrated that it does not agree with the Department of the Interior's continued interference with Alaska's management of wildlife and hunting on federal lands. This was demonstrated by the fact that, in early 2017, Congress, under authority of the Congressional Review Act (CRA), legislatively repealed a similar rule promulgated by the U.S. Fish and Wildlife Service (FWS) in 2016. 81 Fed.Reg, 52248 (Aug. 5, 2016); Pub. Law No. 115-20. Because the 2015 Regulations predated the FWS rule, Congress did not have sufficient time to direct the withdrawal of the 2015 Regulations under the CRA.

APHA, SCI, and SAF have litigation pending for judicial review of the 2015 Regulations, but have stayed the filing of opening briefs, in anticipation that the matter can be resolved without further litigation when NPS withdraws the illegal regulations by issuing a final version of the Withdrawal Rule. Case Nos. 3:17-cv-00013, 14, and 26 (D. Alaska).

Repeal of the 2015 Regulations through the Withdrawal Rule

The Withdrawal Rule would repeal the general preemption clause. See 83 Fed.Reg. at 23624 (proposing to remove 36 C.F.R. § 13.42(f)). This change will restore the status quo in effect before 2015 and reinstate the proper balance between State and federal management of wildlife and public lands.¹

The Withdrawal Rule would also repeal the 2015 Regulations' specific preemption of particular hunting practices authorized by the State. 83 Fed.Reg. at 23625 (proposing to remove § 13.42(g)). This change is necessary to permit the BOG to manage wildlife in accordance with the principle of sustained yield, as required by the State Constitution.

Several of the particular hunting practices now prohibited on National Preserves (except for subsistence hunters) by the 2015 Regulations are not engaged in by recreational hunters or their guides, and are only engaged in by subsistence hunters. Specific practices prohibited by the 2015 Regulations (but allowed by the State) that would be restored as a result of the Withdrawal Rule, are largely restricted to a small, remote section of Alaska. The practices of bear denning and hunting of swimming caribou (prohibited by the 2015 Regulations) are carried out only by Alaskan Native communities as they conduct subsistence hunts in extremely remote areas north of the Arctic Circle where hunted food is essential for nutritional survival. The 2015 Regulations already exempt subsistence hunters from the prohibitions. 36 C.F.R. § 13.42(g). As a result, the only practical effect of the 2015 Regulations' prohibitions is to forbid Alaska Native subsistence hunters from including visiting relatives from outside their villages when they conduct these subsistence hunts. Please see our separate paper also being uploaded for this

¹ Please note that repeal of the general preemption clauses in the 2015 Regulations would not authorize the State to engage in "intensive management" on federal lands. "Intensive management" refers to "active management measures to enhance, extend, and develop the population [of ungulates] ... includ[ing] control of predation" through aggressive measures not associated with recreational or subsistence hunting, such as hunting by State-paid agents. See AS § 16.05.255(f). "Intensive management" is very different from ordinary management decisions such as setting season lengths and defining which customary methods and means of hunting may be used. Since a series of federal court decisions in the 1970s, the State has not engaged in intensive management on Federal lands without the consent of the Federal land agency. The State cannot engage in "intensive management" on Federal lands, and that is not at issue here.

meeting on bear denning misconceptions. Consequently, repealing the 2015 Regulations' prohibitions of these practices would allow Alaska Native subsistence hunters to bring visiting relatives who live in urban areas (and so are not eligible for subsistence hunting) along with them on their subsistence hunts. Bringing along visiting family who return from cities to their villages helps maintain important Alaska Native cultural traditions that would otherwise rapidly erode.

Some of the other hunting practices which the 2015 Regulations specifically preempt on National Preserves in Alaska are carried out by recreational hunters, where allowed by the State BOG. See 36 C.F.R. § 13.42(g) (table). We will address two such practices: (1) summer hunting of wolves and coyotes, and (2) the use of bait to hunt bears in areas of dense underbrush and forestation. These practices have been determined by the State BOG to be sustainable for all species affected by the hunting. The Withdrawal Rule will reverse the 2015 Regulations' prohibition of these practices, but will not jeopardize Alaska's wildlife, as it will continue to be managed by experts—the biologists of Alaska's Department of Fish and Game.

Summer Hunting of Wolf and Coyotes. Given the cold climate of Alaska, summer hunting seasons are important to provide a meaningful hunting opportunity. The State BOG has, after reviewing population estimates and other data and recommendations from State biologists, made the judgment that wolf and coyote numbers are very healthy and, pursuant to the principle of sustained yield, wolf and coyote populations should therefore be open to a sustainable summer hunting season. This is exactly the type of scientific judgment that should be made by the State. In its 2015 Regulations, the NPS conceded that its decision to preempt on National Preserves State regulations allowing the summer hunting of wolves and coyotes was not based on any evidence that wolves and coyote population levels had somehow fallen. 80 Fed.Reg. at 64334 (“this rule is not based on particular wildlife population levels” and is instead based on “NPS responsibility to manage national preserves for natural processes ...”). The 2015 Regulations' ban of summer wolf and coyote hunting is a specific application of the overbroad general preemption rule. State management of wildlife is the default in Alaska. The NPS's authority is limited to closing hunting seasons in the zones encompassing the National Preserves only when it is necessary to “protect” a species. Because these species are healthy, the NPS has no authority to close zones to these State-authorized hunting seasons. The Withdrawal Rule will correct a preemption decision, illegally based only on a management philosophy (i.e., the “hands off” approach that NPS claimed to prefer in the 2015 Regulations).

Use of Bait to Hunt Bear in Dense Underbrush and Forest. The State has authorized the use of bait to hunt bears in areas with dense underbrush and forest, provided that precautions are taken to stay well away from places inhabited by people. A summary of the State's regulations, including requirements for distance from inhabited places, is available at: <https://www.adfg.alaska.gov/static/applications/web/nocache/regulations/wildliferegulations/pdfs/bear.pdf7D13E5A85BBFADF3E339F227A73F59F/bear.pdf>

The use of bait has considerable conservation value because it allows the hunter to obtain a much better view of the bear and thus harvest the older, male bears preferred under State regulation. The use of bait allows the hunter to avoid the harvest of younger bears or sows. The use of bait also reduces the risk that a bear who has been shot will make its way through dense underbrush to an area where it cannot be recovered and productively utilized. Hunting bears with of bait is commonly allowed in the 48 contiguous States, including in Idaho, Maine, Michigan, Minnesota, New Hampshire, New Jersey, Wisconsin, and Wyoming, and on the types

of federal lands that in those States are commonly open to hunting. The BOG permits this method of take, and NPS's prohibition lacks any scientific basis. The Withdrawal Rule will withdraw this unwarranted prohibition.

Conclusion

The 2015 Regulations represent an illegal attempt by the NPS to substitute its preferred method of managing public lands and wildlife for the State's federally mandated management of wildlife on National Preserves in Alaska. The 2015 Regulations represent an overreach of the NPS's legal authority and restrict Alaska Native practices of cultural and nutritional importance in remote areas of the State north of the Arctic Circle. Further, the 2015 Regulations' restrictions on the predator hunting season or on certain practices employed by recreational hunters lack any scientific basis and exceed the parameters of the NPS's authority to close zones to hunting on National Preserves. The Withdrawal Rule represents the NPS's effort to correct its own error and illegal actions. The Withdrawal Rule will reinstate the NPS's adherence to the State primary authority to manage wildlife consistent with the State Constitution and federal law. For these reasons, APHA, SCI, and SA request that OIRA release the Withdrawal Rule as soon as possible.

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