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# Alaska: Extraordinary Parks, Extraordinarily Complicated

Julie Lurman Joly

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## **ALASKA: EXTRAORDINARY PARKS, EXTRAORDINARILY COMPLICATED**

*Julie Lurman Joly\**

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In many ways, national parks in Alaska face the same difficulties as other parks nationwide: pockets of strong anti-federal sentiment, increasingly high usage rates (at least in a couple of Alaska parks) leading to resource degradation, decreasing funding, and increasing maintenance costs. On the other hand, Alaska parks are completely unique in their circumstances. Many parks in Alaska receive few to no visitors each year. The Alaska parks contain vast tracts of land and resources but are managed by the barest minimum number of employees. National park lands in Alaska comprise some fifty-four million acres, which is over sixty percent of the total land managed by the National Park Service (NPS) nationally.<sup>1</sup> Despite comprising a majority of the total land which is managed by the NPS, only twenty-

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1. *Alaska... and Beyond*, NAT’L PARK SERV., ALASKA REG’L OFFICE, <https://www.nps.gov/akso/parks/Index.cfm> (last visited Sep. 23, 2016).

eight biologists,<sup>2</sup> out of a total of 409 biologists employed by the agency nationwide,<sup>3</sup> manage, track, and study this land and its resources. Quite simply, Alaska does not have the human capital that is available to other parks around the country.

Furthermore, while the National Park Service Organic Act (Organic Act) directs all parks,<sup>4</sup> parks in Alaska must also contend with the additional legislative responsibility of the Alaska National Interest Lands Conservation Act (ANILCA) of 1980<sup>5</sup> This federal statute creates a new category of park land, subsistence use preferences for most park lands (thereby establishing a system of dual management of fish and wildlife), and novel issues of access across park lands. ANILCA also contributes to the doubt related to the NPS's authority over internal and adjacent waterways. Altogether, ANILCA adds a great deal of additional responsibility and complexity to park management in Alaska, and it does so without providing any corresponding additional support, either institutional or political, to help the NPS meet those responsibilities. Few of these complications can be resolved without significant, and unlikely, legislative action. Where feasible, this article suggests potential solutions that could ameliorate some of these complications and, in light of the improbability of immediate legislative change, this article provides further insight to Alaska park managers in an effort to help them understand, anticipate, and plan for sources of friction resulting from divergent state and federal regulations.

Section I of this article discusses the extent to which sport hunting is permitted in Alaska parks, the interplay of differing federal and state regulation of sport hunting, and the difficulties sport hunters in Alaska encounter in determining what body of regulations govern the park lands on which they are hunting. Section II addresses issues relating to subsistence hunting in Alaska parks, such as state-federal and intra-federal conflicts in regulating subsistence hunting uses in Alaska parks. Further, where available, Section II presents solutions to problems that inhere in managing subsistence hunting in Alaska parks. Section III highlights the difficulties present in allowing user access to Alaska National Park lands through the use of snowmachines. Finally, Section

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2. *Employee List May 2015*, NAT'L PARK SERV., ALASKA REG'L OFFICE, <https://www.nps.gov/akso/connect/AKR-phonelist-employees.pdf> (last visited Sep. 23, 2016).

3. *Employee List August 2014*, NAT'L PARK SERV., [www.nps.gov/features/foia/NPS\\_Employee\\_List\\_August2014\\_FORWEB.xls](http://www.nps.gov/features/foia/NPS_Employee_List_August2014_FORWEB.xls) (last visited Sep. 28, 2016). Compare the number of ecologists (245) employed by the National Park Service nationwide with the number employed by the agency in Alaska (18).

4. 16 U.S.C. § 1 (2012) (repealed 2014).

5. 16 U.S.C. §§ 3101–3233 (2012).

IV details recent conflicts over the exact scope of the NPS's authority to regulate waterways within or adjacent to Alaska parks. In doing so, Section IV focuses on a recent decision of the United States Supreme Court, which bears on the issue of the lawful scope of the NPS's regulation of Alaska park waterways.

### I. NATIONAL PRESERVES AND SPORT HUNTING

ANILCA establishes a new land category called National Park Preserves that is intended to create areas where sport hunting is explicitly permitted.<sup>6</sup> Ten out of the fifteen park units in Alaska contain preserve lands.<sup>7</sup> There are, of course, other park areas outside of Alaska where limited hunting is permissible under the establishment legislation.<sup>8</sup> However, in Alaska, sport hunting is widely permissible over a great deal of park lands (approximately 20 million acres),<sup>9</sup> rather than being relegated to a very few widely dispersed locations.

The State of Alaska regulates sport hunting statewide, including on federal lands. However, the State's hunting regulations are an expression of the state's wildlife laws and goals. These hunting regulations are often in conflict with federal land management goals as described by federal statutes—particularly with regard to National Parks. For instance, the State of Alaska is required to intensively manage wildlife populations in order to maximize a sustained yield of prey species (e.g. moose, caribou, and deer).<sup>10</sup> This intensive management requirement often leads to regulations designed to decrease predator populations.<sup>11</sup> The NPS, on the other hand, is required to maintain “natural and healthy populations”<sup>12</sup> of wildlife and “to conserve the scenery, natural and historic objects, and the wild life” found on park lands.<sup>13</sup> The NPS policies implementing the National Park Service Organic Act require the agency to “protect natural

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6. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 203, 16 U.S.C. § 3198(b) (2012).

7. *Id.* §§ 201-202.

8. *See, e.g.*, Amistad National Recreation Area (36 C.F.R. § 7.79 (2016)), Cape Cod National Seashore (36 C.F.R. § 7.67 (2016)), Lake Roosevelt National Recreation Area (36 C.F.R. § 7.55 (2016)), and Grand Teton National Park (36 C.F.R. § 7.22(f) (2016)).

9. *Regulations*, NAT'L PARK SERV., ALASKA REG'L OFFICE., <https://www.nps.gov/akso/management/regulations.cfm> (last visited Sep. 23, 2016).

10. ALASKA STAT. § 16.05.255 (2015).

11. Alaska: Hunting and Trapping in National Preserves, 80 Fed. Reg. 64,325, 64,326 (Nov. 23, 2015) (codified at 36 C.F.R. pt. 13).

12. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 815(1), 16 U.S.C. § 3125(1) (2012).

13. 16 U.S.C. § 1 (2012) (repealed 2014).

ecosystems and processes, including the natural abundances, diversities, distributions, densities, age-class distributions, populations, habitats, genetics, and behaviors of wildlife.”<sup>14</sup> These state and federal goals are mutually exclusive.<sup>15</sup> As a result, there has been a long history of conflict between state hunting regulations and the NPS’s laws and policies.

This conflict recently culminated in the NPS’s explicit preemption of state sport hunting regulations where they conflict with established federal requirements. In 2015, the NPS’s Alaska regional office promulgated new regulations restricting the application of the State’s sport hunting laws within parks so that they do not conflict with the NPS’s legal obligations under the Organic Act and ANILCA.<sup>16</sup> Under the new regulations, state wildlife regulations that conflict with the NPS’s regulations or laws are explicitly made inapplicable on NPS lands.<sup>17</sup> The NPS Regional Director in Alaska must now publish an annual list of all state-permitted activities that are prohibited on NPS lands.<sup>18</sup>

There has been a great deal of criticism of these regulation changes by the State and other interests,<sup>19</sup> and the NPS’s effort has been characterized as statutory overreach and a violation of the public trust doctrine.<sup>20</sup> However, as the NPS states, “the State’s responsibility [to manage fish and wildlife] is not exclusive and it does not preclude federal regulation of wildlife on federal public lands, as is well-established in the courts and specifically stated in ANILCA.”<sup>21</sup> Unfortunately, continued conflicts over the NPS’s authority and responsibility exacerbate an already complicated management situation.

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14. *Management Policies 2006: The Guide to Managing the National Park System*, NAT’L PARK SERV., §§4.1, 4.4.1, 4.4.1.2, 4.4.2, <https://www.nps.gov/policy/mp/policies.html> (last visited Nov. 3, 2016); *see also* Alaska: Hunting and Trapping in National Preserves, 80 Fed. Reg. at 64,325, 64,326.

15. Julie Lurman Joly & Sanford P. Rabinowitch, *Preemption of State Wildlife Law in Alaska: Where, When, and Why*, 24 ALASKA L. REV. 145, 165 (2007).

16. Alaska: Hunting and Trapping in National Preserves, 80 Fed. Reg. at 64,325.

17. *Id.*; *see also* 36 C.F.R. § 13.42(a), (f) (2016).

18. Alaska: Hunting and Trapping in National Preserves, 80 Fed. Reg. at 64,325; 36 C.F.R. § 13.42(f) (1) (2016).

19. *National Park Service’s Final Rule Overrides State Wildlife Management Role, Draws Concerns*, ALASKA DEP’T OF FISH AND GAME (Oct. 23, 2015), <http://www.adfg.alaska.gov/index.cfm?adfg=pressreleases.pr10232015> (last visited Oct. 28, 2016).

20. Doug Vincent Lang, *Alaska must reject feds’ claim to control hunting in preserves and refuges*, ALASKA DISPATCH NEWS (January 10, 2016), <https://www.adn.com/commentary/article/feds-out-line/2016/01/10/> (last visited Nov. 3, 2016). Lang is the former director of Wildlife Conservation at the Alaska Department of Fish and Game.

21. Alaska: Hunting and Trapping in National Preserves, 80 Fed. Reg. at 64,325, 64,331.

## II. SUBSISTENCE USE OF ALASKA'S PARKS

Alaska occupies a unique position in the country's national park system because of the mandate to protect subsistence use in those parks. However, the management of subsistence hunting in Alaska parks has presented numerous points of friction, both between State and federal entities and between different federal agencies with sometimes incompatible statutory mandates. Although the current regime is complex, the situation is not wholly intractable. This Section introduces suggestions which have the potential to resolve some of the problems identified.

In addition to permitting some sport hunting, ANILCA also establishes subsistence hunting as a use that must be protected on most NPS lands in Alaska.<sup>22</sup> Subsistence is “the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption . . . .”<sup>23</sup> Subsistence hunting is limited to rural residents (i.e. fulltime residents of certain communities)<sup>24</sup> and is given priority over sport hunting when wildlife populations decline.<sup>25</sup> Congress protected subsistence use because it found that it was “essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence” and furthermore because “in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses.”<sup>26</sup>

While most Alaska NPS lands have a subsistence use priority, there are some exceptions. The portion of Denali National Park that pre-dates the passage of ANILCA, known colloquially as the “hard park,” is not subject to the subsistence requirements.<sup>27</sup> Glacier Bay, Kenai Fjords, and Katmai National Parks are also exempt from subsistence, though any attendant preserves are subject to the subsistence requirement.<sup>28</sup> Finally, because Klondike Gold Rush National Historic Park and Sitka National Historic Park both pre-date ANILCA and were not expanded by

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22. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 203, 16 U.S.C. § 3198(b) (2012).

23. *Id.* § 803.

24. 36 C.F.R. § 242.23 (2016); 50 C.F.R. § 100.23 (2016).

25. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 804, 16 U.S.C. § 3114 (2012).

26. *Id.* § 801(1)-(2).

27. *Id.* §§ 202- 203. “Hard parks” include the pre-ANILCA portions of Denali National Park and Preserve, Glacier Bay National Park and Preserve, and Katmai National Park and Preserve.

28. *See* 36 C.F.R. § 13.410 (2016); 50 C.F.R. § 100.3 (2016).

ANILCA, they are not subject to the requirements of that statute at all.<sup>29</sup>

When ANILCA was first passed, the assumption made by Congress was that the State of Alaska would manage the subsistence harvest in accordance with the requirements laid out in ANILCA.<sup>30</sup> Accordingly, in 1982, the State amended its subsistence hunting rules to mirror the requirements found in ANILCA so that the State could implement those rules on federal lands.<sup>31</sup> In May 1982, the Department of the Interior certified that the State's program complied with ANILCA's provisions, thereby allowing the State to retain its role as manager of all fish and wildlife in the State.<sup>32</sup>

This state of affairs lasted only seven years, however. In 1989, the State of Alaska was sued over its ANILCA-compliant hunting regulations. In *McDowell v. Alaska*, the Alaska Supreme Court held that the State's ANILCA-compliant subsistence rules violated the Alaska Constitution.<sup>33</sup> In particular, the state rule implementing the ANILCA requirement that the subsistence preference be exclusive to rural residents was found by the court to violate article VIII of the Alaska Constitution which essentially guarantees equal access for all state residents to fish and game resources.<sup>34</sup> Consequently, the State had to amend its rules and abandon any residency-based requirements. Since the new state regulations could not implement the rural residency requirement as laid out in ANILCA, the State could no longer administer the federal subsistence program.<sup>35</sup>

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29. Sitka was established in 1972, and Klondike Gold Rush was established in 1976. *See* An Act to Authorize Certain Additions to the Sitka National Monument in the State of Alaska, and for Other Purposes, Pub. L. No. 92-501, 86 Stat. 904 (1972) & Klondike Gold Rush National Historical Park, Alaska-Wash. Establishment, Pub. L. No. 94-323, 90 Stat. 717 (1976) (codified as amended at 16 U.S.C. § 410bb (2012)).

30. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 805(d), 16 U.S.C. § 3115(d) (2012).

31. *See* FRANK NORRIS, ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE MANAGEMENT HISTORY 100 (2002); *see also* Boards of Fisheries and Game Subsistence Procedures, ALASKA ADMIN. CODE tit. 5, §§ 99.005-99.030 (1982) (repealed).

32. NORRIS, *supra* note 31, at 101.

33. 785 P.2d 1 (Alaska 1989).

34. *Id.* at 25; *see also* AK CONST. art. VIII, §§3 (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use”), 15 (“No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State”), and 17 (“Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.”).

35. DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 295 (2d ed.

There were several attempts at the state level to remedy the situation in such a way that wildlife management would remain in State hands. First, the State attempted to craft new rules that would comply with both ANILCA and the state's constitution.<sup>36</sup> When that approach failed, several attempts were made to alter the state constitution so that the State could continue to implement ANILCA subsistence harvests, but this approach was also unsuccessful.<sup>37</sup> In 1990, the federal government established the Federal Subsistence Board to take over subsistence harvest management responsibilities.<sup>38</sup> Today, the Board is composed of representatives from the four federal land management agencies, as well as a representative from the Bureau of Indian Affairs and two rural community representatives.<sup>39</sup>

Therefore, in Alaska today there is a dual system of wildlife management: one system of partial state control and one system of partial federal control. This has led to two distinct difficulties for the NPS. First, there are conflicts related to dual management between the State and the various federal agencies over which entity possesses what authority in the realm of wildlife management. Second, there are conflicts between the NPS and the Federal Subsistence Board over the propriety of rules established by the Board impacting wildlife management on NPS lands.

#### *A. Federal-State Conflicts Related to Dual Management*

The State of Alaska manages subsistence and non-subsistence uses of fish and wildlife on state, private, and Native-owned lands in Alaska. The State also manages sport hunting on federal lands (though there are limitations on their authority, discussed above). Simultaneously, the federal government, through the Federal Subsistence Board, manages all subsistence uses of fish and wildlife on federal lands. Therefore, a dual system of management for subsistence uses exists in Alaska—one for

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1984) (explaining that the state's new subsistence policy provides that "all Alaskans were eligible to engage in subsistence harvests anywhere in Alaska").

36. NORRIS, *supra* note 31, at 163.

37. *Id.* at 163-64. The legislature could not amass enough votes to pass the constitutional amendments on to the public for the necessary vote.

38. *Id.* at 165; *see also* Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990) (codified at 36 C.F.R. pt. 242; 50 C.F.R. pt. 100).

39. NORRIS, *supra* note 31, at 166-67. The regulations controlling Board membership were updated in 2012 to include the rural community representatives. *See History of Subsistence Management in Alaska*, U.S. DEP'T OF INTERIOR, FED. SUBSISTENCE MGMT. PROGRAM, <https://edit.doi.gov/subsistence/library/history> (last visited Sep. 27, 2016).

federal lands and another for state and private lands.<sup>40</sup> This dual system creates complexities both for the public as well as the management entities, including the NPS.<sup>41</sup> As the Alaska Department of Fish and Game acknowledges, “under dual management . . . the complexity of regulations can be intimidating.”<sup>42</sup> The existing regime can make it difficult for subsistence users to understand and abide by the various rules—rules which differ depending on where the use takes place. Enforcement is therefore complicated by the fact that users are easily confused about which rules apply where. While ignorance is not a defense against enforcement,<sup>43</sup> it can create a public relations dilemma for the agency.

Having two different entities manage the same populations of wildlife can also exacerbate existing complexities. As the NPS states, “[c]ollaboration [between the state and federal governments] is paramount since individuals and populations commonly span NPS boundaries and harvest on adjacent lands may affect wildlife in park areas.”<sup>44</sup> However, where contentious resources and favored management methods are at stake, collaboration can often break down, thus making joint scientific studies, management operations, or even data sharing difficult or impossible. This, in turn, makes it more difficult for each agency to accurately assess population trends or user needs.

### *B. Federal Agency Conflicts Created by Federal Subsistence Board Regulations*

The structure of the Federal Subsistence Board (FSB) mirrors

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40. CASE & VOLUCK, *supra* note 35, at 302.

41. *Subsistence Q and A, What Is Dual Management?* SUBSISTENCE MGMT. INFO., <http://subsistmginfo.org/qa.htm#8> (“Most state and federal resource managers agree that divided management is not the ideal model for governing subsistence uses of fish and wildlife”) (last visited Sep. 28, 2016).

42. *Kuskokwim Drainage Management Area, Fishing Management*, ALASKA DEP’T OF FISH AND GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=ByAreaInteriorKuskokwim.management> (last visited Nov. 4, 2016).

43. *Management Regulations for the Subsistence Harvest of Wildlife on Federal Public Lands in Alaska 2014-2016*, FED. SUBSISTENCE MGMT. PROGRAM, 22 <https://www.doi.gov/sites/doi.gov/files/migrated/subsistence/regulation/wildlife/upload/2014-2016-Wildlife-Regulations-Complete-Book-11-2-MB.pdf> (last visited Nov. 4, 2016).

44. Grant Hilderbrand, Kyle Joly, Sandford P. Rabinowitch, & Brad Shults, *Wildlife Stewardship in National Park Service Areas in Alaska: A Report to the Alaska Leadership Council Sub-group on Wildlife Harvest on Parklands*, NAT’L PARK SERV., 6 (May 2013), <http://www.nps.gov/glba/learn/management/upload/Wildlife-Stewardship-in-NPS-Alaska.pdf> (last visited on Nov. 4, 2016).

Alaska's Board of Game process.<sup>45</sup> The FSB publishes proposed rule changes. The proposed rules are then reviewed by staff, Regional Advisory Councils<sup>46</sup> (representing rural and urban users), Subsistence Resource Commissions (representing resident zone communities),<sup>47</sup> tribes, and the general public. The FSB then meets to review recommendations and hear public testimony. Ultimately, the FSB decides whether to pass the final rule, which may or may not take the comments of others into account.<sup>48</sup> The FSB is made up of eight voting members: a chairperson, two members representing rural communities, the Regional or State Director of the Bureau of Land Management, and one representative each from the Fish and Wildlife Service, Bureau of Indian Affairs, NPS, and U.S. Forest Service.<sup>49</sup> Yet, if the representative of any single federal agency, or even several federal agencies, argues that a proposed rule would violate that agency's statutory mandates, the argument can be easily overruled.<sup>50</sup> Even if the proposed rule would violate an agency's statutory mandates, no single member of the FSB has veto authority over a proposed rule which would apply across all subsistence units. Therefore, the FSB's regulations "do not always adhere to corresponding land management agency regulations."<sup>51</sup> For instance, the FSB countenances selective harvest regimes (i.e. harvest management that focuses on certain size or sex classes and can thereby alter the size and gender ratios of the larger population),<sup>52</sup> though such regimes could be argued to violate ANILCA's requirement that wildlife on NPS lands be managed for "natural and healthy populations."<sup>53</sup> There

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45. Kyle Joly, Sanford P. Rabinowitch, & Julie Lurman Joly, *Dual Management of Wildlife in Alaska: Making Federal Practice Align with Federal Mandates*, 32 GEORGE WRIGHT FORUM 1, 18 (2015).

46. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 805, 16 U.S.C. § 3115 (2012).

47. *See id.* § 808 (explaining that resident zone communities are communities adjacent to NPS lands).

48. *Regulatory Process*, U.S. DEP'T OF INTERIOR, FED. SUBSISTENCE MGMT. PROGRAM, <https://www.doi.gov/subsistence/process> (last visited Sep. 25, 2016).

49. *Board Members*, U.S. DEP'T OF INTERIOR, FED. SUBSISTENCE MGMT. PROGRAM, <https://edit.doi.gov/subsistence/members> (last visited Sep. 25, 2016).

50. One example is the recent decision by the FSB to close non-subsistence caribou hunting in unit 23. The FWS, BLM, and NPS representatives all disagreed with this outcome, but since the Chair, BIA representative, two rural representatives, and USFS representative were in favor, it passed over the objections of the other agencies, even though those agencies objected on the grounds that the new rule violated ANILCA §815(3). *See Public Regulatory Meeting Minutes Volume II, April 13, 2016*, FED. SUBSISTENCE BD., 171-209 [https://edit.doi.gov/sites/doi.gov/files/uploads/fsb\\_mtg\\_13\\_apr\\_16.pdf](https://edit.doi.gov/sites/doi.gov/files/uploads/fsb_mtg_13_apr_16.pdf) (last visited Sep. 28, 2016).

51. Joly et al., *supra* note 45, at 18.

52. Joly et al., *supra* note 45, at 19.

53. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 815(1), 16 U.S.C.

is a great deal of political pressure on the FSB to adopt state harvest rules for purposes of symmetry, which can lead to the FSB adopting these types of harvest regimes, even if they may be in conflict with federal laws.<sup>54</sup>

While the FSB regulations state that they do not supersede agency-specific regulations,<sup>55</sup> the relevant federal agency has to challenge each particular rule, and the NPS often lacks the political will to do so.<sup>56</sup> With the 2012 addition of two public members representing rural subsistence users,<sup>57</sup> the composition of the FSB has changed in a manner that is likely to result in the increased probability that the objections of a single agency representative will be overlooked.<sup>58</sup> Currently, an agency could get overruled in the FSB process, resulting in regulations that are not legally implementable on the lands they manage. The fact that FSB rules do not supersede agency-specific rules is difficult to implement and not publicly transparent, thus leading to misinformation and confusion.<sup>59</sup>

There are three possible solutions to this dilemma. The first would be to require the FSB to assess the legal compatibility of all proposed rules against the mandates of the various represented federal agencies.<sup>60</sup> This would prevent the serious consideration of regulations that would conflict with agencies' legal mandates. A second possibility would be to provide veto authority to each land management agency representative on the FSB. Proposals that an agency finds to be in opposition to laws governing their lands could be vetoed before becoming regulations.<sup>61</sup> A third alternative would be to automatically exclude the lands of any protesting agency from the implementation of proposed regulations. In this way, the regulations could still go forward everywhere except on the lands on which their implementation would conflict with other

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§ 3125(1) (2012).

54. Joly et al., *supra* note 45, at 21.

55. 50 C.F.R. § 100.3(a) (2016).

56. The FSB rule allowing the hunting of sheep with one full curl or larger in Wrangell St. Elias is an example of selective harvest management in place in a park. See *Management Regulations for the Subsistence Harvest of Wildlife on Federal Public Lands in Alaska*, OFFICE OF SUBSISTENCE MGMT., 61 <https://www.doi.gov/sites/doi.gov/files/migrated/subsistence/regulation/wildlife/upload/Book.pdf> (last visited Oct. 28, 2016).

57. *History of Subsistence Management in Alaska*, U.S. DEP'T OF INTERIOR, FED. SUBSISTENCE MGMT. PROGRAM, <https://edit.doi.gov/subsistence/library/history> (last visited Sep. 26, 2016).

58. See, e.g., *supra* footnote 48.

59. Joly et al., *supra* note 45, at 21.

60. Joly et al., *supra* note 45, at 19.

61. Joly et al., *supra* note 45, at 21.

mandates. The FSB could put into operation any of these solutions through regulatory and policy change. Now that the FSB membership has expanded, it might be time for the NPS and other agencies to advocate for some or all of these changes.

### III. ACCESS TO ALASKA'S NPS LANDS

While ANILCA was responsible for altering the regime governing Alaska park management, some of the ways in which Alaska parks are used, due to their centrality to the lives of many Alaskans, were only minimally limited, or left completely undisturbed, by ANILCA. One of these uses is access to park lands, particularly via snowmachines. Although permitting snowmachine use in many sensitive park areas has allowed many park users to use park land in ways that would be otherwise impossible without snowmachines, permitting such access has not been without drawbacks. This Section suggests that the NPS should plan for and limit snowmachine access in various Alaska parks in a way that meets the needs of users as contemplated by ANILCA, while still comporting with the NPS's guiding principles.

ANILCA is the establishment legislation for most federal public lands in Alaska, and it expanded many pre-existing National Park Service units.<sup>62</sup> As such, the statute is responsible for restricting the use of many federal lands that had previously been available for a wider range of uses, such as access, by putting some of those lands under the NPS's authority. The statute attempts to soften that outcome by grandfathering in certain kinds of access, such as access to subsistence resources on NPS units and village-to-village travel across NPS units.

Because ANILCA ensures that rural residents have "reasonable access to subsistence resources on the public lands" including via "snowmobiles, motorboats, and other means of surface transportation," parks must allow such access for subsistence users.<sup>63</sup> Additionally, ANILCA provides that, subject to reasonable limitations, "snowmachines. . . motorboats, airplanes, and nonmotorized surface transportation" are also statutorily permitted on all federal conservation units "for travel to and from villages and homesites."<sup>64</sup> Therefore, various methods of motorized transportation are statutorily permitted

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62. Alaska National Interest Land Conservation Act (ANILCA) of 1980 §§ 201, 202, 302, 303, 401, 403, 501, 701, 702, 703, 704.

63. *Id.* § 811.

64. Alaska National Interest Land Conservation Act (ANILCA) of 1980 § 1110(a), 16 U.S.C. § 3170(a) (2012). In the continental U.S., snowmachines are typically referred to as snowmobiles.

into and across NPS lands. This limits park managers' ability to restrict these uses and ensures that motorized travel through parks is a relatively common occurrence.

National parks in Alaska are certainly not unique in permitting snowmachine access. However, the use of snowmachines in parks outside of Alaska is heavily regulated, which stands in marked contrast to most national parks in Alaska. As an example, snowmachine use is permitted in Crater Lake National Park, Yellowstone National Park, Grand Teton National Park, Mount Rainier National Park, and many others in the continental United States. However, in those examples, the use of snowmachines is limited to specified, marked routes.<sup>65</sup> In Alaska, on the other hand, with the exception of Denali National Park,<sup>66</sup> there are no limitations on where snowmachines may be used in park areas. Federal regulations set forth in 36 C.F.R. § 13.460 regulate the use of snowmachines by subsistence harvesters, and 43 C.F.R. § 36.11 regulates the use of snowmachines by all other rural users. Both provisions state that areas may be closed to snowmachine use by the Park Superintendent. However, no park (with the exception of Denali) has taken advantage of that authority.<sup>67</sup> Therefore, snowmachine users are free to use their machines over the entire park areas. Because the use of snowmachines in these areas is intended to facilitate subsistence use and native community cohesiveness in areas that lack roads or other developed transportation corridors, the lack of designated snowmachine routes makes sense. However, this still complicates park management in areas where snowmachines may be used anywhere. Waiting until problems develop before restricting access or methods of access does not constitute the conservation of park resources that is supposed to be the overarching guiding principle of NPS management.<sup>68</sup> National Parks in

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65. See, e.g., Crater Lake (36 C.F.R. § 7.2(c) (2016)), Grand Teton (36 C.F.R. § 7.22(g)(7) (2016)), Rocky Mountain (36 C.F.R. § 7.7(e)(1) (2016)), and Yellowstone (36 C.F.R. § 7.13(l)(7) (2016)). Maps of authorized snowmobile routes in Yellowstone are available at <https://www.nps.gov/yell/learn/management/upload/FAQsyearthwo.pdf>.

66. Denali National Park is the only park area in Alaska that has developed regulations restricting snowmachine use. See 36 C.F.R. §§ 13.950-13.962 (2016).

67. See 36 C.F.R. § 13 (2016).

68. See *Management Policies*, *supra* note 14, at § 1.4.3:

The fundamental purpose of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values.

Alaska must begin evaluating snowmachine use and its impact and consider limiting such use to certain park areas or corridors in order to minimize negative impacts.

#### IV. NPS AUTHORITY OVER WATERWAYS

While the NPS's power to regulate certain bodies of water is, in large part, well-settled and uncontested, a recent decision of the United States Supreme Court has introduced a degree of uncertainty to the management of Alaska park waterways. After several decades of managing internal and adjacent water bodies,<sup>69</sup> as is done by other parks nationwide, the NPS's authority over such waterbodies has recently been brought into question. Section 103(c) of ANILCA states that:

[o]nly those lands within the boundaries of any conservation system unit which are public lands. . . shall be deemed to be included as a portion of such unit. No lands conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.

It is this provision, which defines public lands to exclude land that is owned by other entities, that forms the basis of an ongoing dispute.

In 2007, a moose hunter on the Nation River inside Yukon-Charley Rivers National Preserve was found to be violating the NPS's national rule against hovercraft use on NPS managed waterways.<sup>70</sup> Citing ANILCA §103(c), the hunter, John Sturgeon, challenged the NPS's authority to enforce such a rule on a State-owned waterway in Alaska.<sup>71</sup> The federal district court and the Ninth Circuit both found for the NPS, determining that ANILCA did not prevent the application of the NPS rule to the management of the river since, as the NPS argued, §103(c) applies only to rules designed specifically for the particular unit and does not apply to general nationwide rules like the hovercraft ban.<sup>72</sup>

In 2016, the case went before the United States Supreme Court.<sup>73</sup> Before the Supreme Court, the federal government also argued that

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Additionally, many parks in the continental U.S. regulate the type of snowmachine that may be used within parks, especially with regard to air and noise emissions (see, for example, 36 C.F.R. §§ 7.13(l)(5), 7.22(g)(5) (2016)). Although 36 C.F.R. § 2.18 (2016) prohibits the use of excessively noisy snowmachines in all parks nationwide, more sweeping controls are, again, absent from specific Alaska park regulations.

69. See, e.g. 50 C.F.R. § 100.3 (2016).

70. Sturgeon v. Masica, 768 F.3d 1066, 1070 (9th Cir. 2014); see 36 C.F.R. § 2.17(e) (2016).

71. Sturgeon, 768 F.3d at 1069.

72. *Id.* at 1070, 1076-77.

73. Sturgeon v. Frost, 136 S. Ct. 1061 (2016).

because navigable waters are routinely subject to federal jurisdiction, they are de facto “public lands” within the meaning of ANILCA.<sup>74</sup> In the Supreme Court’s March 2016 opinion, the Court found that, contrary to the lower courts’ opinions, ANILCA “carves out numerous Alaska-specific exceptions to the NPS’s general authority over federally managed preservation areas.”<sup>75</sup> The Supreme Court rejected the lower courts’ reasoning that while Alaska-specific rules could not apply to non-federal lands in Alaska, nationwide rules could.<sup>76</sup> However, the Supreme Court refused to decide whether the Nation River qualifies as “public land” within the meaning of ANILCA or whether the NPS has the authority to regulate activities on the River even if it is not “public lands.”<sup>77</sup> Instead, the case was remanded back to the lower courts to make those determinations. As a consequence, the uncertainty as to whether the NPS has authority over adjacent and internal water bodies in Alaska remains, at least for now. This result has thrown a great deal of settled NPS policy into question and opens the door to more challenges to the agency’s authority.

## V. CONCLUSION

Alaska’s national parks operate in a more complex legal environment than most other national parks. That complexity, however, is not accompanied by greater institutional support. Alaska parks need stronger support in order to fully flex the authority given them by Congress and to meet all of their obligations and mandates. More robust support should take the form of greater access to increased human resources so that the vast natural resources under the NPS’s protection in Alaska can be better understood and managed and enhanced political capital so that the NPS in Alaska is encouraged to defend the natural resources and enforce the legal responsibilities entrusted to them by Congress. National parks often occupy the uncomfortable position of being in the vanguard of resource preservation. They must often implement and enforce laws that are politically unpopular in Alaska. Yet, the lack of popular appeal for these laws among some local

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74. Brief for Respondents, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (No. 14-1209), 2015 WL 9181059, at \*\*42-44.

75. *Sturgeon*, 136 S. Ct. at 1070.

76. *Id.* at 1071. The Supreme Court criticized the lower court’s ruling as being “topsy-turvy” since, under the lower court’s reasoning, non-public lands could only be regulated in an “Alaska-specific way” through rules applicable outside of Alaska, while public lands would be regulated by “Alaska-specific” regulations.

77. *Id.* at 1072.

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populations does not free the NPS from its obligation to execute them fully. These are national lands, the goals assigned to them have been derived from the national population, and the additional assistance and motivation needed to meet those goals may need to come from outside of the state as well.