ESSAY

SUBSISTENCE AT RISK: FAILURE TO ACT AND NEPA COMPLIANCE IN POST-ANILCA ALASKA

BY

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The State of Alaska is currently conducting predator control activities on federal lands. Under the National Environmental Policy Act (NEPA), when a federal agency does not make an "overt act," no NEPA requirement to prepare an Environmental Impact Statement (EIS) attaches. However, if some other agency action were mandated under a separate statute in relation to that activity but the action was not taken, NEPA does attach. The Alaska National Interest Lands Conservation Act (ANILCA) presents an independent requirement to formally evaluate the effect of all land uses on subsistence activities on federal lands in Alaska. The Bureau of Land Management (BLM) has failed to take this mandatory action in connection with the State's predator control activities. This "failure to act" does not relieve the BLM of its duties under either ANILCA or NEPA.

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I. INTRODUCTION

The State of Alaska has been carrying out intensive[1] wolf control programs[2] over large areas of the state.[3] These areas are made up primarily of state and private lands (including Native-owned lands), but also include portions of federal land units.[4] Therefore, the predator control activities, like aerial wolf hunting and brown bear baiting stations, may occur on these federal lands. While the current areas subject to the predator control program contain only relatively small federally-owned parcels, in reality, the state's program is likely to grow,[5] occurring on more and more federal land as it grows. The United States National Park Service and the United States Fish and Wildlife Service (FWS) have notified the State that predator control will not be allowed on their land units.[6] But the United States Bureau of Land Management (BLM) has made no such statement, implicitly allowing the state to carry out the predator control program on BLM lands. BLM failed to provide formal public notice or perform a publicly available internal evaluation of the program's potential effects on the lands and resources in BLM's care. In impliedly assenting to Alaska's predator control program,

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[1] According to Ryan Scott, a Fish and Wildlife Technician with the Alaska Department of Fish and Game, 273 wolves had been shot as of May 3, 2005 in the 2004–2005 regulatory year. E-mail from Ryan Scott, Fish and Wildlife Technician, Alaska Dep. of Fish and Game, to Julie Lurman, Assistant Professor of Natural Res. Law and Policy, Univ. of Alaska Fairbanks, School of Natural Res. and Agric. Scis. (May 3, 2005 10:14 A.M. AST) (on file with author).

[2] Control of Predation by Wolves, ALASKA ADMIN. CODE tit. 5, § 92.110 (2005); Predation Control Implementation Plan, ALASKA ADMIN. CODE tit. 5, § 92.125 (2005).

[3] *See* Alaska Department of Fish and Game, Wolf Control in Alaska, http://www.wildlife.alaska.gov/index.cfm?adfg=wolf.control (last visited Apr. 23, 2006) (map depicting land management units in which predator control is currently taking place).

[4] *See* U.S. FED. OFFICE OF SUBSISTENCE MGMT., MANAGEMENT REGULATIONS FOR THE HARVEST OF WILDLIFE ON FEDERAL PUBLIC LANDS IN ALASKA: EFFECTIVE JULY 1, 2004–JUNE 30, 2005, at 53, 56, 67, 78, 82 (2004) [*hereinafter* MANAGEMENT REGULATIONS] (maps depicting federal land units within the larger state land management units).

[5] The original version of the current program comprised only 1,728 square miles in unit 19D. This area was then expanded in March 2004 to 3,588 square miles. Press Release, Alaska Department of Fish and Game, McGrath Wolf Control Boundary Expanded (Mar. 1, 2004), *available at* http://www.adfg.state.ak.us/news/2004/3-1-04nr_mcgrath.php. Later that month, the state expanded the predator control program to include Game Management Units 19A, 19B, and 16B. Press Release, Alaska Dep. of Fish and Game, Board of Game Authorizes Predator Control, Reconsiders Denali Buffer (Mar. 9, 2004), *available at* http://www.adfg.state.ak.us/news/2004/3-9-04nr.php. The program was expanded again for the 2004–2005 season to include Units 13A, B, and E. Press Release, Alaska Dep. of Fish and Game, Predator Control Permit Applications Available (Aug. 24, 2004), *available at* http://www.adfg.state.ak.us/news/2004/8-24-04_nr.php.

[6] Alaska Dep. of Fish and Game, Agenda Change Request: Wolf Predation Control Implementation Plan-USFWS, http://www.boards.adfg.state.ak.us/gameinfo/meetinfo/2004-2005/acr%201.pdf (last visited Apr. 23, 2006); Alaska Dep. of Fish and Game, Agenda Change Request: Control of Predation of Wolves-USFWS, http://www.boards.adfg.state.ak.us/gameinfo/meetinfo/2004-2005/acr%202.pdf (last visited Apr. 23, 2006); Alaska Dep. of Fish and Game, Agenda Change Request: Wolf Predation Control Implementation Plan-NPS, http://www.boards.adfg.state.ak.us/gameinfo/meetinfo/2004-2005/acr%203.pdf (last visited Apr. 23, 2006); Alaska Dep. of Fish and Game, Agenda Change Request: Control of Predation by Wolves-NPS, http://www.boards.adfg.state.ak.us/gameinfo/meetinfo/2004-2005/acr%204.pdf (last visited Apr. 23, 2006).

BLM violated both its trust responsibility to protect subsistence resources under the Alaska National Interest Land Conservation Lands Act (ANILCA)[7] and the procedural mandates of the National Environmental Policy Act (NEPA).[8]

II. ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

The federal government has the responsibility under ANILCA to ensure that subsistence[9] resources are not negatively affected by uses (like wolf control) on federal lands. Section 810(a) states:

> 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 or his designee *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.[10]

This section imposes significant procedural requirements on federal land management agencies. Before permitting any use on federal lands the agency managing the lands must evaluate the effect of such use on subsistence, and must examine any alternatives available to reduce or eliminate the need for the use. If the use would "significantly restrict subsistence uses" then it cannot be allowed until the agency: 1) notifies the state, affected local committees, and regional councils; 2) gives public notice and holds a hearing in the vicinity of the use; and 3) determines that the restriction on subsistence is necessary, that the least possible amount of land will be affected, and that the agency will take steps to alleviate any negative effects on subsistence.[11] BLM's implicit assent to Alaska's predator control activities falls within the rubric of section 810. BLM may not simply cast aside section 810's undoubtedly affirmative duty.

The goal of predator control, the land use in question, is dramatic reduction of wolf populations, thereby affecting subsistence harvest. Wolves are important subsistence resource in Alaska; many rural subsistence harvesters use wolf fur for ruffs, wind guards, and linings.[12] According to the

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7 16 U.S.C. §§ 3101–3233 (2000).

8 42 U.S.C. §§ 4321 –4370e (2000).

9 Several factors, including rural residents' distance from other food sources, chronic regional unemployment, and rural residents' consequent "weak position in the cash economy" have resulted in rural Alaskans' dependence on wild, renewable sources of foods, particularly protein in the form of fish and game. Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 250 (1995).

10 16 U.S.C. § 3120 (2000) (emphasis added).

11 *Id.*; *see also* DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 306 (2d ed. 2002); Dan Cheyette, Comment*, Breaking the Trail of Broken Promises: "Necessary" in Section 810 of ANILCA Carries Substantive Obligations*, 27 ENVTL. L. 611, 611 (1997) (listing obligations the Forest Service must meet under section 810 of ANILCA to conduct timber sales).

12 ROBERT J. WOLFE, ALASKA DEP'T OF FISH & GAME, TRAPPING IN ALASKA COMMUNITIES WITH

Federal Office of Subsistence Management, the government does not have precise records detailing how many wolves are taken for subsistence purposes on federal lands.[13] The lack of such data suggests that neither the state nor the BLM could know to what extent Alaska's program will negatively affect the subsistence use of wolves.

The state is interested in predator control as a mechanism to increase valuable prey populations such as moose and caribou.[14] Eliminating too many predators, however, has the potential to allow moose and caribou to reproduce past the carrying capacity of their habitat. "Management of single species can lead to maximizing production of a few species without regard to the community/ecosystem in which they occur. Achieving high densities for one species may cause serious habitat degradation and reduce biodiversity."[15] By removing wolves as an important natural limiting factor for the moose and caribou populations it is possible that unintended negative consequences could result. This is true "particularly in non-coastal systems with moose and caribou, [where] wolves serve an important role in maintaining game populations below levels at which their food supply would be damaged."[16]

According to BLM's own procedural guidance on section 810, a formal evaluation and finding under that section is required whenever there is sufficient discretion on BLM's part to "substantially affect the outcome."[17] The Federal District Court of Alaska has already determined that BLM may close its lands to state wildlife-management programs.[18] Therefore, BLM does have the discretion and authority to affect the outcome. The BLM

MIXED SUBSISTENCE-CASH ECONOMIES 17 (1991), *available at* http://www.subsistence.adfg.state.ak.us/TechPap/tp217.pdf.

13 Telephone interview with Chuck Ardizzone, Wildlife Biologist, U.S. Fish and Wildlife Serv., Office of Subsistence Mgmt. (June 2, 2005).

14 Some subsistence users also approve of predator control and on several occasions have requested that such actions be taken in order to increase prey populations. *See*, *e.g.*, E. Interior Subsistence Reg. Advisory Council, Winter Public Meeting Minutes, Feb. 27, 2004, http://Alaska.fws.gov/asm/pdf/ractrans/Region%209%20Transcripts%2027%20Feb%2004.pdf (last visited Apr. 22, 2006); W. Interior Reg. Subsistence Advisory Council, Meeting Minutes, March 9, 2005, http://Alaska.fws.gov/asm/pdf/ractrans/Region%206%20Transcripts%2009%20Mar%2005.pdf (last visited Apr. 22, 2006).

15 GARY K. MEFFE ET AL., PRINCIPLES OF CONSERVATION BIOLOGY 392 (2d ed. 1997).

16 Alaska Dep. of Fish and Game, Management, http://www.adfg.state.ak.us/pubs/notebook/furbear/wolf.php (last visited Apr. 23, 2006). Additionally, the effectiveness of wolf control as a method to increase ungulate numbers is in question. Similar wolf control programs have failed to increase ungulate populations in the past. In studies conducted by Valkenburg et al. from 1995–1997, decreasing wolf populations by 60–62% did not have a significant effect on the target Delta caribou herd in Alaska. The authors theorize that factors other than resident predator populations play a larger role in ungulate numbers and abundance than scientists have heretofore realized. Patrick Valkenburg et al., *Calf Mortality and Population Growth in the Delta Caribou Herd After Wolf Control*, 32 WILDLIFE SOC'Y BULL. 746, 746–56 (2004).

17 U.S. Bureau of Land Mgmt., Instruction Memorandum No. AK 86-350, part II. A (Aug. 26, 1986) [hereinafter Instruction Memorandum] (on file with author).

18 Alaska v. Andrus, 429 F. Supp. 958, 961 (D. Alaska 1977). In *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002), the state of Wyoming challenged FWS's refusal to permit state officials to vaccinate elk on the National Elk Refuge against brucellosis. *Id.* at 1222. The court held in part that the Tenth Amendment does not reserve to states the absolute right to manage wildlife on federal lands. *Id.* at 1226.

section 810 Instruction Memorandum preemptively excludes certain activities from the section 810 process: 1) non-discretionary activities (primarily state and native land conveyances), 2) actions "that do not withdraw, reserve, lease or otherwise permit," and 3) actions approved as categorical exclusions by the BLM State Director.[19] Presently, the State Director has approved no categorical exclusions.[20]

The Instruction Memorandum interprets the section 810 phrase "otherwise permit" in two alternate ways. In Appendix 2 of that document, the agency addresses whether fire planning falls within the category of actions that "withdraw, reserve, lease or otherwise permit use." First, the agency states that no permits are issued for fire planning.[21] Next the agency states that a "natural fire is not, of itself, a use of the land but is an act of nature."[22] Both statements are undoubtedly correct assessments of the fire planning situation and express the notion that the agency considers the phrase "permits the use" to refer both to those situations in which an actual permit must be issued, and to those situations in which no formal permit need be issued, but the agency retains considerable authority to affect the timing, form, or other aspects of the use. This is certainly a correct interpretation of the plain language of ANILCA. It is the second understanding of the phrase "permits the use" that is relevant to this discussion. Since BLM has "sufficient authority to substantially affect the outcome" within that agency's interpretation of section 810, a section 810 evaluation is required for the state's predator control activities on BLM's lands.

Even though BLM may not have committed an overt act here, it impliedly consented to operation of Alaska's predator control program on its lands by allowing the program to continue unimpeded. By consenting without performing an evaluation under section 810, BLM violated the requirements of ANILCA.

III. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act compels all federal agencies to complete an Environmental Impact Statement (EIS) each time there is a proposal for "major federal action significantly affecting the quality of the human environment."[23] Given the context and planned intensity of Alaska's predator control program, decreasing predator populations on federal lands is an action that would significantly affect the quality of the human environment within NEPA's definition of those terms.[24] Furthermore, since

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19 Instruction Memorandum, *supra* note 17, at pt. II. B.

20 *Id.* at app. 4.

21 *Id.* at app. 2.

22 *Id.*

23 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (2000).

24 *See* 40 C.F.R. § 1508.27 (2005) (defining "significantly"); 40 C.F.R. § 1508.3 (2005) (defining "affecting"); 40 C.F.R. § 1508.14 (2005) (defining "human environment"). Actions that may have serious consequences for wildlife populations routinely require EIS documentation. For example, for the translocation of sea otters, see the Notice of Intent to Prepare a Supplement to a Final Environmental Impact Statement Pertaining to the Translocation of

"major" is dependently tied to "significantly," if a finding of significance were found, it is more than likely the action would be described as "major" as well.[25] The controversy here lies in the question of whether or not this is a "federal action." In general, inaction, or failure to act, is not considered to be within the scope of the NEPA requirement,[26] and here, as was specifically noted above, the BLM has not taken any action.

The terms "inaction" and "failure to act" are often used interchangeably when describing the exception to "federal action." However, for the purposes of this essay each term will be given a precise and distinct meaning. For our purposes, "inaction" will refer to those situations in which an agency does nothing, and "failure to act" will refer to those situations in which an agency was required to take some action or make some decision (under a statute other than NEPA) but failed to do so. According to the Council on Environmental Quality (CEQ), the former is an exception to the NEPA requirement, but the latter is not. "Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedures Act or other applicable law as agency action."[27] As a rule, CEQ's regulations are given "substantial deference" by the courts.[28] Whether or not an EIS is mandated here will depend on which of these two categories describes the BLM's behavior.

In order to answer this question we must turn to *Defenders of Wildlife v. Andrus*[29] and its associated case law.[30] In *Defenders of Wildlife* we find a fact pattern nearly identical to the present situation. In 1979, the Alaska Board of Fish and Game authorized a program of wolf control that would be implemented on state, private, and federal lands.[31] Since state governments

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Southern Sea Otters, 65 Fed. Reg. 46, 172 (July 27, 2000), *available at* http://ventura.fws.gov/i&e/fedreg/pdf/2000-07-27_seaottter_noi.pdf. Alternatively, see the final EIS for the relocation of terns in the Columbia River. U.S. FISH & WILDLIFE SERV., CASPIAN TERN MANAGEMENT TO REDUCE PREDATION OF JUVENILE SALMONIDS IN THE COLUMBIA RIVER ESTUARY, FINAL ENVIRONMENTAL IMPACT STATEMENT, PORTLAND, OR. (2002), *available at* http://migratorybirds.pacific.fws.gov/CATE_FEIS_and%20_DEIS_and_News_QA.htm.

[25] 40 C.F.R. § 1508.18 (2005) ("Major reinforces but does not have a meaning independent of significantly . . . ."); *see also* RONALD BASS ET AL., THE NEPA BOOK 30 (2d ed. 2001) ("[T]he term 'major' has no independent meaning . . . .").

[26] Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1246 (D.C. Cir. 1980) (stating that "no agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so").

[27] 40 C.F.R. § 1508.18 (2005).

[28] *See Defenders of Wildlife*, 627 F.2d at 1238 (quoting Andrus v. Sierra Club, 442 U.S. 347 (1979)); *see also* Sierra Club v. Penfold, 857 F.2d 1307, 1312 n.9 (9th Cir. 1988) (finding that CEQ "regulations are binding on all federal agencies and provide guidance to the courts for interpreting NEPA requirements").

[29] *Defenders of Wildlife*, 627 F.2d 1238 (D.C. Cir. 1980).

[30] Defenders of Wildlife v. Andrus, 77 F.R.D. 448 (D.D.C. 1978); Alaska v. Andrus, 429 F. Supp. 958 (D. Alaska 1977); Defenders of Wildlife v. Andrus, 77 F.R.D. 448, (D.D.C. 1978); Alaska v. Andrus, 591 F.2d 537 (9th Cir. 1979); Defenders of Wildlife v. Andrus, 593 F.2d 1371 (D.C. Cir. 1979).

[31] *See* Alaska Dep't of Fish & Game, Div. of Wildlife Conservation, Wolf Management in Alaska with an Historic Perspective (Mar. 2002), http://www.wildlife.alaska.gov/index.cfm?adfg=wolf.wolf_mgt (last visited Apr. 22, 2006) (detailing the controversy leading up to the

"have broad trustee and police powers over wild animals within their jurisdictions,"[32] the state did not need to ask BLM for permission to carry out this program on BLM's lands.[33] BLM, for its part, did not interfere with the state's plans or act in any way on the matter. Defenders of Wildlife, an environmental advocacy group, sued the BLM claiming that the BLM's implied acquiescence to the program required an EIS.[34] The court, however, disagreed and determined that the absence of any overt act on the part of BLM relieved the agency of any duty under NEPA.[35]

Additionally, the court explained that the Federal Land Policy and Management Act of 1976 (FLPMA)[36] did not present any independent duty for the agency to act in this situation. FLPMA only gives the BLM permission to supersede a state's wildlife management practices, but does not require such action, so the statute cannot serve as an independent avenue to requiring EIS documentation.[37]

The *Defenders of Wildlife* court also referred to a predecessor case, *Alaska v. Andrus*,[38] which examined the facts to decide if the Alaska Native Claims Settlement Act (ANCSA)[39] presented a separate independent duty for BLM to take action regarding the state's program.[40] The *Alaska v. Andrus* court found that ANCSA also did not present any such independent duty for BLM to act on the matter.[41] As with FLPMA, the court found that while intervening action by BLM was permitted, such action was not mandated, and since no action was taken and none required there was no NEPA trigger.[42]

It is therefore evident that under NEPA alone, when an agency makes no "overt act," NEPA does not attach—this is inaction. However, if action were *mandated* (under a separate statute) but that action was not taken, NEPA does attach—this is failure to act. It is also clear that FLPMA and ANCSA do not present independent sources of mandatory action. However, this case law predates the passage of ANILCA[43] and so this fact pattern was not tested against the presence of the independent requirement to act found in ANILCA. As stated in Part I of this essay, ANILCA presents an independent requirement upon which BLM has failed to act.

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implementation of a program of wolf control); *see also Defenders of Wildlife*, 627 F.2d at 1239 (stating that most wolves in this program were to be killed on federal lands).

[32] Kleppe v. New Mexico, 426 U.S. 529, 545 (1976).

[33] Alaska v. Andrus, 429 F. Supp. at 963 ("[T]he State is generally allowed to act unless the Secretary takes some affirmative action to halt the activity."); *see also Defenders of Wildlife*, 627 F.2d at 1248 ("Despite its ability to take control into its own hands, Congress has traditionally allotted the authority to manage wildlife to the states.").

[34] *Defenders of Wildlife*, 627 F.2d at 1239.

[35] *Id.* at 1245.

[36] Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2000).

[37] *Defenders of Wildlife*, 627 F.2d at 1250.

[38] 429 F. Supp. 958 (D. Alaska 1977).

[39] Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629h (2000).

[40] *Defenders of Wildlife*, 627 F.2d at 1241–42.

[41] Alaska v. Andrus, 429 F.Supp. at 963.

[42] *Id.*

[43] The final case in this matter, *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), was decided February 5, 1980. ANILCA was not enacted until December 2, 1980.

BLM's failure to act is a violation of ANILCA. Under ANILCA the agency is compelled to evaluate the use of federal lands to ensure that there will be no resulting adverse affect on subsistence resources. That evaluation would activate the requirement for some level of NEPA review. Just because BLM failed to act as required under ANILCA does not relieve the agency of its resulting responsibilities under NEPA.[44]

Additionally, these earlier cases took place at a time when the State of Alaska was still managing all hunting—both subsistence and sport—on all federal and state lands in Alaska. In *Alaska v. Andrus*, the court states: "This court finds it a strained chain of logic which turns totally non-federal action into federal action just because the Secretary has the power to regulate the activity. Such a holding would appear to require an EIS for every State hunting season on federal lands."[45] This holding might have seemed ludicrous at a time when the state was managing hunting resources on all lands in Alaska. Circumstances today, however, are markedly different than in 1977 when these cases were decided. In 1990, the federal government reasserted control of the subsistence harvest on federal lands[46] because the state government was no longer in compliance with the strictures established under ANILCA.[47] Today, a requirement for NEPA review each time the state undertakes actions which could significantly impact subsistence resources on federal lands seems less absurd, since the state has been explicitly excluded from its primary management role of subsistence resources on federal lands.

There has also been judicial support for the idea that where an independent statutory requirement is mandatory, as opposed to permissive, a duty to satisfy NEPA's requirements exists as well. For instance, in the 1980s, Utah's Garfield County decided to widen Burr Trail, a road that winds through federal lands including two Wilderness Study Areas. In *Sierra Club v. Hodel*,[48] the Sierra Club sued the Department of the Interior for failing to meet NEPA requirements by allowing this widening to proceed. Under the

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[44] 40 C.F.R. § 1508.18 (2005) ("Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts . . . ."); *see also* RONALD BASS ET AL., *supra* note 25, at 31 ("A federal agency's inaction, if reviewable by law, may be considered a federal action under NEPA.").

[45] Alaska v. Andrus, 429 F. Supp. at 963.

[46] "In response to the *McDowell* ruling and Alaska's inability to comply with the requirements of Title VIII of ANILCA, the cognizant federal agencies took over management of subsistence uses on federal lands in 1990." DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 296 (2002).

[47] ANILCA mandates that only rural residents of Alaska be given the right to subsistence hunt on federal lands in Alaska. *See* 16 U.S.C. §§ 3113–3114 (2000). The state regulation that implemented that restriction, ALASKA ADMIN. CODE tit. 05, § 99.010 (1982), was struck down by the Alaska Supreme Court because it conflicted with the State's constitution. Alaska v. McDowell, 785 P.2d 1 (Alaska 1989). Alaska's constitution contains three clauses referred to as the "equal access clauses" mandating that access to the state's natural resources, including fish and wildlife, be made available to all citizens of the State. *See* ALASKA CONST. art. VIII, §§ 3, 15, 17. Once the State was no longer in compliance with the requirements of ANILCA, the federal government was forced to take over subsistence management on federal lands. *See* 16 U.S.C. § 3115(d).

[48] 848 F.2d 1068 (10th Cir. 1988).

terms of the road ownership, the county did not need to apply to the BLM, the relevant land management agency, for a permit to widen the road.[49] The Sierra Club, however, maintained that the action was still a federal action due to BLM's "responsibilities under FLPMA,"[50] which

> expressly requires the Secretary to protect [Wilderness Study Areas or WSAs] during the review process, by creating two distinct duties of conservation: (1) a "nonimpairment" duty—to manage the WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness . . . ;" and (2) a "nondegradation" duty—to "take any action required to prevent unnecessary or undue degradation of the [WSAs] and their resources . . . ."[51]

The court found that BLM's responsibilities to protect WSAs under FLPMA "injects an element of federal control for required action that elevates this situation to one of major federal action."[52] In making this decision, the court examined the earlier precedent of *Defenders of Wildlife v. Andrus* and *State of Alaska v. Andrus*. The *Sierra Club* court distinguished these earlier cases by highlighting that the earlier cases found FLPMA did not create a duty independent of NEPA since the language found in the relevant part of FLPMA was permissive. In *Defenders of Wildlife*, the FLPMA provision hinged on the word "may,"[53] while in *Sierra Club* the relevant FLPMA language was mandatory: "the Secretary *shall* by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources . . . ."[54] As the court points out in *Sierra Club v. Hodel*, when the statutory duty is mandatory, the action will be considered a federal action.[55] In the current situation, the duty described above under ANILCA is likewise mandatory and not permissive.[56] Therefore, the BLM must evaluate all uses of federal lands in order to determine if there will be any significant adverse affects on the subsistence resource. So we see that where an independent statutory requirement has been mandatory, and not permissive, courts have held that a duty under NEPA attaches.[57]

While a subsequent Supreme Court decision, *Norton v. Southern Utah Wilderness Alliance*,[58] has overruled the idea that failure to act under section

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[49] The road was an R.S. 2477 right-of-way granted by the 1866 Mining Act. Act of July 26, 1866, 14 Stat. 253. The use of such roads is defined by state law, which in Utah states that reasonable improvement is allowed as needed, so that permission from BLM for the road widening project was not required. *See Sierra Club*, 848 F.2d at 1080–83.

[50] *Sierra Club*, 848 F.2d at 1074.

[51] *Id.* at 1085 (citing Federal Land Policy Management Act of 1976 § 603(c), 43 U.S.C. § 1782(c)).

[52] *Id.* at 1090.

[53] *Defenders of Wildlife*, 627 F.2d 1238, 1250 (D.C. Cir. 1980).

[54] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (2000) (emphasis added).

[55] *Sierra Club*, 848 F.2d at 1091.

[56] 16 U.S.C. § 3120 ("Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use . . . ."); *see also supra* Part I.

[57] *See* Minnesota Public Interest Research Group v. Butz, 358 F. Supp. 584, 628 (D. Minn. 1973) ("NEPA cannot be construed in isolation but must instead be construed in conjunction with other statutes and regulations . . . .").

[58] 542 U.S. 55 (2004).

1782(c) of FLPMA is justiciable, the Court did reemphasize the fact that "legally required" agency action can be compelled,[59] supporting the central idea above. Furthermore, the Court in *Norton* determined that failure to act under section 1782(c) of FLPMA is not justiciable because while section 1782(c) is "mandatory as to the object to be achieved" (protection of wilderness study areas), it allows the BLM "a great deal of discretion in deciding how to achieve it."[60] The Court states that in order for a failure to act to be justiciable, the required action must be "discrete,"[61] as well as mandatory, so as to "avoid judicial entanglement in abstract policy disagreements."[62] In contrast to the FLPMA provision in *Norton*, section 810's requirement is discrete. The BLM is required to make a specific type of assessment and follow pre-determined procedures. It is these discrete, legally mandated actions which BLM has failed to take and which a court could certainly compel without getting entangled in policy issues.

Finally, it is possible that the facts described here do not rise to the level of mandating an EIS,[63] either because this action is not "major" or "significant," or for some other reason. However, this does not eliminate BLM's burden under NEPA. "NEPA's reach is not limited to 'major federal actions' within the meaning of [NEPA]; only the requirement to prepare an EIS is."[64] The agency must make this decision definitively, and publicly, in an Environmental Assessment (EA) and sign a Finding of No Significant Impact (FONSI), as is required under NEPA and CEQ regulations.[65]

IV. CONCLUSION

Current predator control efforts on federal land cannot avoid the dictates of NEPA solely based on the decision in *Defenders of Wildlife v. Andrus*. Since the passage of ANILCA, and the reversion of subsistence management on federal lands back to the federal government, the BLM's

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[59] *Id.* at 63.

[60] *Id.* at 66.

[61] *Id.* at 62.

[62] *Id.* at 66.

[63] *See* Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988) ("The Ninth Circuit, however, has not been receptive to arguments that impact statements must accompany inaction, or actions that are marginally federal."). It is worth mentioning, however, that CEQ considers the presence of scientific controversy (such as how ungulate and wolf populations will actually be affected by a program) to be a factor that weighs heavily on the side of completing an EIS rather than an EA and a FONSI. *See* 40 C.F.R. §1508.27 (1978) (listing "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" as one of the factors that must be considered when determining whether an action is significant).

[64] Rhode Island Comm. on Energy v. Gen. Servs. Admin., 397 F. Supp. 41, 58 (D.R.I. 1975).

[65] "In 1978, the [CEQ] promulgated regulations implementing NEPA's procedural commands. Under these regulations, if the agency decides not to prepare a full-fledged EIS, it is nevertheless obliged to prepare a less comprehensive Environmental Assessment (EA) to support a Finding of No Significant Impact (FONSI). In addition, the regulations require the agency to prepare a Record of Decision (ROD) identifying all of the alternatives that it considered in reaching its decision and specifying the environmentally preferable alternative." Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 ENVTL. L. 569, 570–71 (1990); *see also* 40 C.F.R. §§ 1500–1508 (1989).

failure to act becomes separately reviewable and a requirement to perform a NEPA review attaches.

This does not mean that all uses of federal land will require EISs—not all uses will be major, significant, or affect the human environment within the meaning of NEPA. Moreover, not all uses on federal lands in Alaska will implicate subsistence resources, thereby triggering ANILCA. Additionally, the imposition of NEPA review does not restrict the state's inherent right to control wildlife. BLM always had the power to approve or reject state proposals regarding wildlife on BLM lands—it is just clearer now that all such proposals which potentially impact subsistence resources require a formal section 810 evaluation and that such evaluations constitute "federal action." Even if it is determined that a project for which a section 810 evaluation is done is neither major nor significant, an EA and a FONSI are still necessary and appropriate in order for the agency to meet its obligations under NEPA.