

Presentation Outline and Talking Points, Brad Palach
Citizens Advisory Committee on Federal Areas: Federal Overreach Summit
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I'm Brad Palach with the Alaska Department of Fish and Game. I supervise the Departments ANILCA Program and the Access and Defense Program. We specialize in federal land management planning and related issues, including maintaining the use of federal lands by the public and the Department.

I'd like to thank the Commission for putting together this conference. It's a subject that I have been engaged in for a number of years now and I appreciate the chance to hear other perspectives, and share the concerns of the Department of Fish and Game.

In trying to decide what to discuss with you today I had a lot to think about. In hoping to be productive I decided to discuss some of the background of how fish and wildlife management was, I think, intended to operate following statehood, and then how it changed over the years with the advent of new federal law and policies, with some examples of how it isn't working.

I'll conclude with some possible solutions and thoughts for future consideration.

Some historical background

- Fish and wildlife management were big Issues for the Territory of Alaska, and helped drive the push for statehood.

One of the key issues in the drive for Statehood was concern for the management of Alaska's natural resources, particularly salmon. There was a strong desire to place the management of Alaska's resources in the hands of its residents and many cited concerns regarding management from Washington D.C. or Outside entities, generally by people who lacked necessary context and operated pursuant to goals and interests that ignored Alaska's complexity. Alaska's resources suffered greatly under that system as a Territory and they were in very poor condition at the time of Statehood.

- State of Alaska Constitution...manage for sustained yield for benefit of Alaskans

During the Alaska Constitutional Convention, management of the Alaska's natural resources was considered in depth. The US was concerned that as a "State" Alaska would become

dependent on the federal government, but Alaskans saw use of natural resources as its ticket to independence. It was determined, and recognized through Article 8, Natural Resources, that it would be the policy of the State to:

- Section 1.
...encourage the...development of its resources by making them available for maximum use consistent with the public interest
- Section 2
...provide for the utilization, development, and conservation of all natural resources...for the maximum benefit of its people
- Section 4
...fish, forests, wildlife ...and all replenishable resources ...shall be maintained on the sustained yield principle...

So, this means that, by law, the Department manages the fish and wildlife in the state, for all the people for their maximum benefit, on a sustainable basis consistent with the public interest.

Now, fast forward to the late 60s and 70s when concerns regarding natural resources were increasingly influenced by the growth of the Environmental movement. Through legislation and policies, the federal government became more active in the preservation of land, water, fish and wildlife. Some examples include the Wilderness Act, Clean Water Act, Clean Air Act, National Environmental Policy Act, Endangered Species Act, and Marine Mammal Protection Act. Throughout the 1970s, Congress heavily studied and debated how this influence would be applied to Alaska, culminating in the Alaska National Interest Lands Conservation Act, ANILCA, in 1980.

There was always a concern about how the authorities of the states would be respected and maintained considering the broad-based nature of increased federal action. To clarify the role of the states when it came to fish and wildlife management, many pieces of legislation included “savings clauses,” for instance:

Savings Clauses

- State and Federal Relationships 43 CFR Part 24

This policy is intended to reaffirm the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility, and to foster improved conservation of fish and wildlife.

[f]ederal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law.

- ANILCA...1314
...nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act....” (Title VIII deals with subsistence.)
- Refuge Improvement Act: Public Law 105-57
(m) Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.

In addition to savings clauses in this legislation, Congress often added provisions directing cooperation between the states and the federal land managers because it was recognized that there may be differences in both mandates and management objectives. For example,

43 CFR Part 24 State and Federal Relationships

- ...the effective stewardship of fish and wildlife requires the cooperation of the several States and the Federal Government.
- It is the intent of the Secretary to strengthen and support, to the maximum legal extent possible, the missions of the States and the Department of the Interior to conserve and manage effectively the nation's fish and wildlife. It is, therefore, important that a Department of the Interior Fish and Wildlife Policy be implemented to coordinate and facilitate the efforts of Federal and State agencies in the attainment of this objective.

Refuge Improvement Act

- ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the System are located;
- ensure timely and effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies during the course of acquiring and managing refuges;

MMOUs

In Alaska, following the passing of ANILCA, and under authorization of 43 CFR Part 24, the Department of Fish and Game entered into Master Memorandums of Understanding (MMOUs) with all of the federal land managers in Alaska. These agreements stressed resolution of management issues through cooperative efforts.

- The MMOUs between ADF&G and the USFWS and NPS both state the following:
The agencies agree to:
Coordinate planning for management of fish and wildlife resources on Service lands so that conflicts arising from differing legal mandates, objectives and policies do not arise or are mitigated

There were also understandings within these MMOUs that the Department was recognized as having the primary responsibility to manage fish and wildlife within Alaska, unless state regulations were found to be incompatible with federal goals, objectives or management plans.

So, in 1982, when most of these MMOUs were developed, there existed a fairly clear demarcation and understanding about each agency's responsibilities. Basically, on federal lands, the Department managed fish and wildlife and the federal agencies managed habitat and people and we cooperated in doing so, maximizing our expertise and efforts. That's pretty simplistic but that's the basics.

Things went along OK into the 1990's, not without hiccups, but workable and mostly cooperative. But the late 1990s witnessed a change in the way federal and state agencies worked together. It could have been the passage of time, rotation of management personnel and decisionmakers, but it also likely involved the development, application and interpretation of federal policies that altered the manner in which the management authorities of the states were categorized by the federal agencies. Authorizations and use of discretion were often applied liberally to accord maximum authority to the federal agencies. Policies that were intended to address national issues were applied to Alaska where there were no issues. Historical context and Alaskan specificity, the compromises of ANILCA, were lost.

I'll pick two examples and describe how interpretations of these policies changed the playing field and, ultimately, how coordination with our federal partners may have been undermined:

1. Unimak Caribou and the USFWS and 601 FW 3, the Biological Integrity, Diversity, and Environmental Health Policy.

I earlier referenced the Fish and Wildlife Service Refuge Improvement Act. That Act was developed to guide the Fish and Wildlife Service in its basic functions, including cooperating with the States. However, it also led to the development of several policies that brought about conflict when applied to Alaskan refuges. A policy that came out of Section 5 of the Act is a good example:

- Section 5 (a) (4) (B)...ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;

This section was later used as the basis for development of 601 FW 3, Biological Integrity, Diversity, and Environmental Health Policy. Part of this policy states that:

- FW 601 3.7(E) . We favor management that restores or mimics natural ecosystem processes or functions to achieve refuge purpose(s).

Essentially, this means managers should let nature take its course as a natural process, a non-interference practice. As fish and wildlife managers, this can create a number of problems, most importantly the fact that a “natural process” is not something readily defined or even identifiable. More specifically, nature does not have a default course to follow that automatically leads to sustainability. Ideological and theoretical issues like this materialized with impressive clarity when the policy was applied to Alaska.

Unimak Island is part of the Alaska Maritime National Wildlife Refuge and most of the island is designated Wilderness. In late 2009, the Department informed the USFWS that the Unimak Caribou Herd was experiencing a severe population decline and was in danger of being extirpated. Our observations were that all hunting, including subsistence, had been closed and that the habitat of the island appeared adequate to support caribou, but wolves were causing extremely low recruitment of calves through predation on the calving grounds. Department staff determined that a predator control program targeting those few wolves, probably fewer than 10, preying on caribou in the calving area would help the herd recover and we recommended that a predator control program be implemented in the spring of 2010. These programs provide an efficient and scientific means of restoring balance in predator-prey relationships and maintaining biodiversity and healthy populations of wildlife, as well as maintain sustainable populations used by the residents of the area for subsistence.

In a meeting with Service leadership to discuss the situation and steps we thought needed to be taken, we were told by the Service that such action was not consistent with their biological

integrity policy and that they could not permit us to carry out the proposed action. Specifically, because it appeared to be a natural ecosystem process, Service policy required that the herd be allowed to “blink out”.

You can see where the conflict occurs. The Department is charged with managing the fish and wildlife of the state for the maximum benefit of the people under the sustained yield process. Allowing the herd to “blink out” was in direct conflict with our constitutional mandate, as much as culling the wolf population was seen by the Service as being in direct conflict with their interpretation of its policies. The context that got lost through the evolution of Service policy, and applied interpretations, was how conflicts like this get resolved, which requires an understanding of state management authorities and how the Savings Clauses of ANILCA and the Refuge Improvement Act and other federal legislation was intended to play a role.

When the Department provided the Service with notice that we intended to act without them to take what we saw as necessary action to prevent the herd from blinking out we were threatened with legal action and were forced to stand down. Subsequently we entered into two separate planning processes to try to resolve the concerns of the Service but neither of those were able to surmount the Services internal opposition. In the meantime, the Unimak Caribou herd has declined by 50% (decreasing from around 400 to less than 200) over the past 4 years and shows no sign of bottoming out.

Hopefully the Unimak herd can stop being a cautionary tale and start being a leading example of how we, the Service and the Department, can cooperate. But for now, application of this policy regarding natural diversity tends to interfere with the exercise of our respective authorities and we need to figure out how we can address that interference as resource managers.

Example 2

- Skilak Loop Management Area - USFWS, the Refuge Improvement Act and the compatibility of hunting and wildlife viewing.

In 1997 the Congress approved an “Organic Act” for the Fish and Wildlife Service, the Refuge Improvement Act (Public Law 105-57). Part of the Improvement Act determined that there were six priority public uses of all refuges and two of these were hunting and wildlife viewing. The Service is to provide opportunities for these two uses and where there is conflict make the uses compatible with each other to the extent possible.

In the early 1980's the USFWS decided that they needed to develop wildlife viewing opportunities on the Kenai Refuge. To do so they took a look at the Skilak Loop area and determined that if they closed hunting and trapping in the area and developed infrastructure such as platforms, trails and enhanced habitat they would have a great viewing area. They approached the Board of Game and requested that the area be closed. The Board balked, as did the Department. To our staff the area seemed ill suited to viewing opportunities due to vegetation, terrain and little infrastructure. The Service pushed forward and indicated they would close the area by federal regulation if the state did not compromise. In the face of that threat, and with the assurance that the area would be developed to a degree that hunting should be limited but could still be conducted, the Board relented.

Following this agreement the Service did little to develop the infrastructure to enhance viewing opportunities due to funding and other priorities. In 2006 the Board reviewed the situation and based on a public proposal, lack of infrastructure developed by the Service since 1986 and the absence of potential user conflicts, authorized additional opportunities for hunting. The Service objected and again threatened to use federal regulations to close the area. A compromise was again reached where a limited youth hunt would be permitted and the Service would implement actions to enhance viewing opportunities. As happened in 1986, few, if any of the enhancement projects were implemented due to funding and other priorities.

That brings us to 2013. The Board again reviewed Skilak and determined that a limited hunt for wolves, coyotes and lynx was appropriate. They considered the potential for user conflicts and limited the hunt to the winter when the road is not maintained and closed hunting near developed areas to be consistent with Service closures. The Service again objected, and told the Board that they would use the federal regulatory process to unilaterally close the area if the Board opened it since they wanted the entire area set aside as a viewing area. They also believed the hunt was part of a predator control program.

Some side notes here: The Refuge has previously determined that hunting, a priority public use under the Refuge Improvement Act, is compatible on the Kenai Refuge, including Skilak Loop. There are no conservation concerns for wolves, coyotes or lynx that the Service has presented as a reason to close their take. And, under the Refuge Improvement Act, hunting and wildlife viewing are compatible uses with refuges as well as each other. Service policy says that the Service should work to make these uses compatible if there are conflicts, including the use of time, area and other management tools.

From the state side, the hunt was not part of a predator control program. It was simply allowing hunters an opportunity to take surplus animals under sustained yield principles.

Following the Board's decision to allow hunting for wolves, coyotes and lynx, the Service notified us that they were again going to seek federal regulations to close the area to hunting and trapping. The Service has embarked on that process and I can assure you that we are objecting based on the failure of the Service to show these uses are incompatible with the area and that no conservation issues exist.

So, in our perspective, we have the Service failing to follow their own policy (605 FW 1, Wildlife Dependent Recreation 1.7(C) regarding compatible uses. The Board considered the issues and worked to make the hunt compatible with other uses in the area through the use of time and space. We fail to see how these uses are incompatible and it seems that the only reason for the closure is due to a philosophical approach within the Service that precludes the hunting of predators.

Example- Good

- Etolin Elk –USFS, has been good to work with...

We have other issues with federal agencies that I don't have time to get into. The NPS Superintendents Compendium has been increasingly used to close state authorized hunts due to speculative impacts to undefined park values. Issues regarding access abound, with restrictions on where and how people can access areas acting as de facto hunting closures.

I do want to point out that we have good cooperation and coordination with the US Forest Service. When we approached them regarding accessing part of the Tongass Forest to conduct a collaring project on elk, we initially faced significant issues regarding wilderness. However, we were able to cooperatively identify the need for the project, discuss issues regarding wilderness and public use, reasonably mitigated them and are successfully conducting a multi-year monitoring project that allows us to better manage the elk herd. Cooperation and coordination can work and the Forest Service has been a good partner to work with.

So, where do we go from here...what are some resolution possibilities:

Resolution Possibilities

- We can seek judicial relief...sue 'em. Successful judicial relief in our favor is questionable (you don't know what judges will decide) and provides results that frequently lead to the deterioration of good faith and our ability to cooperate
- Budgetary action can be taken...Limit what federal funds can be spent on, such as when Rep. Young was able to limit the funds that the NPS could use to patrol the Yukon River

as a result of the Wilde incident. However, this is a short term fix of limited application and would probably be difficult to renew year after year.

- Congressional Action...The Big Fix. This involves Congress acting to specifically direct federal agencies, through law, recognize the states as the managers of fish and wildlife on all lands unless specifically preempted by Congress, such as through the MBTA, ESA, MMPA.
- Coordinate and cooperate as ANILCA and other federal legislation intended. Get along and respect authorities as was done for nearly 40 years. Part of this would require an ANILCA training requirement for new federal staff and all decision makers so they understand the unique aspects of Alaska.

What happens if we don't resolve this?

- The state could just give up and tell the federal agencies they can do what they want in federal areas and we will no longer waste our scarce resources trying to cooperate with them. This is not likely as it conflicts with State constitutional direction to manage the natural resources of the state wherever they may be. We would also be turning our back on the public that uses these areas and depends on the state to protect their interests, plus the simple fact that wildlife know no boundaries and must be managed in a consistent fashion where they are present, not by the artificial boundaries of Parks and Refuges
- The federal agencies are more and more abandoning scientific wildlife management principles and using an undefined non-intervention , "Surplus of Mother Nature" approach as a management strategy, which will likely result in decreased abundance of wildlife, the public will find fewer opportunities for hunting within federal areas and subsequent crowding on state land where wildlife is scientifically managed. We're already seeing this as hunters are displaced from the Kenai Peninsula and are going elsewhere to seek hunting opportunities. Where the public is allowed to hunt on federally managed lands, for subsistence or otherwise, I think they will find they may have opportunities for harvest but not realistic ones. This is sometimes described as the "empty bag" concept, where there are so few animals to harvest that people have little success. The Alaska Peninsula provides a good example. There has been virtually no hunting for caribou there except for a limited hunt on the SAP Caribou herd, which was managed out of precipitous decline by the Department using a selective predator control program on limited state land. Elsewhere on the Alaska Peninsula the state is prevented from taking action to manage because some of the intensive management

work that needs to be done is on federally managed lands where we are prevented by federal objections, based on non-management policies, from doing so. Fewer animals, less opportunity.

Questions?