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Alaska v. Arnariak: Should Alaskan Land Use Regulations Protecting A Wildlife Sanctuary Be Preempted By The Marine Mammal Protection Act?

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ALASKA v. ARNARIAK: SHOULD ALASKAN LAND USE REGULATIONS PROTECTING A WILDLIFE SANCTUARY BE PREEMPTED BY THE MARINE MAMMAL PROTECTION ACT?

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I. INTRODUCTION

In 1972, Congress enacted the Marine Mammal Protection Act (MMPA),[1] establishing a national program to protect and conserve marine mammals and their habitats. Promulgation of the MMPA was spurred by a recognition that "man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide."[2] In essence, the MMPA was designed to prohibit the "harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States,"[3] including those mammals which are "physiologically adapted to the oceans."[4] The MMPA is based on the premise that marine mammals are of "great international significance, esthetic and recreational as well as economic."[5]

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1. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421(h) (1994).

2. H.R. REP. NO. 92-707, at 2 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144..

3. *Id.* Congress stated in full that "[t]he purpose of this legislation is to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States, unless taken under the authority of a permit issued by an agency of the Executive Branch." *Id.*

4. *Id.* at 27.

5. *Id.* at 26. The House Report declared in the section-by-section analysis that:

> (5) This subsection states that Congress has a legitimate interest in acting in this area since the animals are highly significant to interstate commerce. (6) This subsection states that marine mammals are resources of great significance and that it is congressional policy that they should be protected and encouraged to develop consistent with the sound policies of resource management. The primary objective of this management must be to maintain the health and stability of the marine ecosystem; this in turn indicates that the animals must be managed for their benefit and not for the benefit of commercial exploitation.

Enforcement responsibilities are allocated to the U.S. Department of Commerce and U.S. Department of Interior.[6]

Although the MMPA has been amended several times, it has consistently provided a blueprint for marine mammal conservation and habitat awareness.[7] Recently, a number of decisions have raised issues of federalism, specifically the purposes and goals of a Federal Act versus recognized states' rights to enact conservation measures.[8] State conservation methods concerning marine mammals protected under the MMPA are prohibited by an explicit preemption clause in the enabling legislation. This preemption arguably precludes a local interest in the protection of marine mammals.[9]

In *State of Alaska v. Arnariak*,[10] the Supreme Court of Alaska confronted the issue of whether or not the MMPA preempted state regulations prohibiting entry without a permit and the discharge of firearms on state lands.[11] The court held that the legislative history and purpose of the MMPA, combined with the canon that statutes should be interpreted to avoid unconstitutional results, indicated that the "MMPA's preemption clause is not so broad as to prevent the state from limiting access to, or the discharge of firearms on, state wildlife refuges."[12]

This Casenote suggests that two problems result from this decision. The first lies in the court's inherent disregard of the overarching history, purposes, and goals of the MMPA. The second, a correlation of the first,

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6. *See* 16 U.S.C § 1362 (12)(A)(i) & (ii). The Secretary of Commerce is responsible for for marine mammals of the order of Cetacea and Pinnipedia, except for the walrus; the Secretary of Interior is responsible for all other marine mammals. *Id.*

7. *See* Nina M. Young & Suzanne Iudicello, *Blueprint For Whale Conservation: Implementing the Marine Mammal Protection Act*, 3 OCEAN & COASTAL L.J. 149, 151 (1997) (citing Natasha Atkins, Summary of National Laws and International Agreements Affecting River Dolphins, in BIOLOGY AND CONSERVATION OF THE RIVER DOLPHINS; 3 Occasional Papers of the IUCN Species Survival Commission (SSC) 168, 173 (1987)).

8. *See* Intertanko v. Locke, 148 F.3d 1053, 1066 (9th Cir.1998), *cert. granted*, 120 S. Ct. 33 (1999) (certain regulations concerning the prevention of oil spills are preempted by federal legislation because such regulations qualify as "design and construction requirements"); Vietnamese Fisheries Ass'n v. California Dep't of Fish & Game, 816 F. Supp. 1468 (N.D. Cal. 1993) (holding that enforcement of a California ban on gillnetting for rockfish was preempted by federal groundfish regulations allowing gillnetting in those waters).

9. *See* 16 U.S.C. § 1379(a). The MMPA states in pertinent part:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species . . . to the State under subsection (b) (1) of this section.

10. 941 P.2d 154 (Alaska 1997).

11. *See id.* at 157.

12. *Id.* at 158.

arises in recognition that although local legitimate interests may provide valuable insights into issues of marine mammal conservation and habitat protection when associated with the goals and purposes of the MMPA, the issues must be evaluated under the MMPA "umbrella." In embracing state rights over federal preemption, the court failed to find a "middle road" where the interests of the State in protecting its Fifth Amendment right could coexist with the general purposes of the MMPA.

II. LEGAL BACKGROUND OF THE CASE

A. Marine Mammal Protection Act

The Marine Mammal Protection Act embodies a concerted legislative effort to curtail "commercial exploitation" of marine mammals and their habitats.[13] The need for such legislation stemmed from "man's impact upon marine mammals," and the desire to protect "resources of great international significance."[14] Specifically, the MMPA forbids any person subject to U.S. jurisdiction from taking, harassing, or killing marine mammals.[15] The species protected by the MMPA include "mammals which are physiologically adapted to the oceans," such as manatees, whales, dolphins, seals, and walruses.[16] The Secretary of Commerce is responsible for all cetaceans and pinnipeds, while the Secretary of Interior is responsible for all other marine mammals, including the walrus.[17]

In protecting these species, the MMPA sets out two specific goals. First, Congress determined that marine mammals "should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management."[18] Second, and perhaps more encompassing, Congress desired to "maintain the health and stability of the marine ecosystem."[19]

Further, Congress also found a legitimate interest in acting in this area because the animals are highly significant to interstate commerce.[20] Thus,

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13. H.R. REP. NO. 92-707, at 25 (1971), *reprinted in* U.S.C.C.A.N. 4144, 4154.
14. *Id.* at 2, 3.
15. Marine Mammal Protection Act, 16 U.S.C. § 1371 (1994).
16. *Id.* § 1362(6).
17. *See id.* § 1362(A)(i) & (ii).
18. *Id.* § 1361(6).
19. *Id.*
20. *See id. See also id.* § 1361(5)(A) & (B). This section states:
(5) marine mammals and marine mammal products either — (A) move interstate commerce, or (B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

it expressly preempted "takings" of marine mammals, by stating that "no State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any . . . species of marine mammal within the State. . . ."[21] Only with the proper transference of authority from the Secretary to the state may state laws be enacted and maintained.[22] The MMPA exempts Alaskan natives from these particular provisions, but only if "takings" are performed under certain conditions.[23]

B. Alaska State Laws and Regulations

In 1960, Alaska established the Walrus Islands State Game Sanctuary to preserve the "sole remaining place in the state where walruses annually haul out on land."[24] Round Island, part of the Walrus Islands State Game Sanctuary, is subject to several regulations of the Alaska Administrative Code.[25] Specifically, only those who hold a state-issued permit may enter

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and that the protection and conservation of marine mammals and their habitats in therefore necessary to insure the continuing availability of those products which move in interstate commerce.

21. *See* 16 U.S.C. § 1379(a).

22. *See id.*

23. *Id.* § 1371(b). These conditions for Alaskan natives include:
Except as provided in section 109 [16 U.S.C. § 1379], the provisions of this Chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean of the Arctic Ocean if such a taking — (1) is for subsistence purposes; or (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing . . . ; and (3) in each case, is not accomplished in a wasteful manner.

24. ALASKA STAT. § 16.20.092 (Michie 1998). The legislative findings and purposes of the Walrus Island State Game Sanctuary are as follows:
(a) The legislature recognizes that (1) the Walrus Islands are the sole remaining place in the state where walruses annually haul out on land and all similar "hauling grounds" in the state which were formerly utilized have been abandoned by walruses due to excessive molestation and slaughter; (2) the Walrus Islands are uninhabited, and the walruses frequenting them are not required by the state for subsistence utilization; (3) the Walrus Islands have great importance as a retreat for the Pacific walrus from the standpoints of conservation, scientific value, and tourist interest; (4) the Department of Natural Resources has taken appropriate action to achieve transfer of title in the Walrus Islands to the state. (b) The purpose of AS 16.20.090 — 16.20.098 is to protect the walruses and other game on the Walrus Islands.

25. *See* ALASKA ADMIN. CODE tit. 5, § 92.066 (1998). The Code states in pertinent part:
(2)(A) camping is allowed only in the designated camping area; (B) visitors shall remove all personal gear and garbage upon departure from the sanctuary; (C) pets are prohibited on Round Island; (D) discharge of firearms, disturbance or harassment of wildlife, removal of wildlife or parts of wildlife, swimming, and recreational diving are all prohibited on Round Island and in adjacent waters within three miles of Round

the island. Permit holders must abide by several rules, including the prohibition of the "discharge of firearms, disturbance or harassment of wildlife, removal of wildlife or parts of wildlife . . ." on Round Island.[26] These state regulations do not contain an exemption for Alaskan natives to take marine mammals.

C. Associated Law

At issue in *Arnariak* was the preemption of state law and regulations by the MMPA. Preemption analysis involves a comparison of the plain language of the statute with the preemption clause, and a review of its legislative history.[27] Three kinds of preemption exist: field, conflict, and express.[28] This case involves express preemption.[29] Specifically, the United States Supreme Court has interpreted the clause "relating to" in the MMPA as expressing broad preemptive purpose.[30] The Supreme Court, however, recognizes a limit to the reach of such clauses.[31]

Under the Fifth Amendment to the United States Constitution, no taking of private property can occur without just compensation.[32] State property is

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Island; (E) unless authorized in writing by sanctuary staff, access to all beaches and adjacent waters is prohibited except during arrival and departure at Boat Cove; authorization for beach and water access may be granted for scientific or educational activities and that access requires the presence of sanctuary staff.

26. ALASKA ADMIN. CODE tit. 5, § 92.066(2)(D) (1998).

27. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229–30 (1947) ("The question in each case is what the purpose of Congress was."); Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685 (1965).

28. *See* Cipollone v. Liggett, 505 U.S. at 516.

29. *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) (explaining that if a federal statute contains an express preemption clause, the task of statutory construction will first focus on the plain wording of the clause); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990) ("Where ... Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute . . . [the] task of discerning congressional intent is considerably simplified."); FMC Corp. v. Holliday, 498 U.S. 52, 56–57 (1990) (Federal preemption of state laws "may be either express or implied, and ... is explicitly stated in the statute's language or implicitly contained in its structure and purpose.").

30. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987); *see also* American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).

31. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) ("Notwithstanding its breadth, we have recognized limits to ERISA's preemption clause.")

32. *See* U.S. CONST. amend. V. "[N]or shall private property be taken for public use without just compensation."

included in the Fifth Amendment protections.[33] Therefore, a governmental attempt to require public access to private property by implementation of the Federal Act over state laws and regulations is as unconstitutional as a "permanent physical occupation"[34] or a violation of the "universal right to exclude."[35]

III. STATE OF ALASKA V. ARNARIAK

A. Background

Adam and Marie Arnariak, Alaskan natives, entered Round Island on June 21, 1993.[36] They did not have the required permits to enter the island.[37] Adam fired a rifle at a walrus violating an Alaskan Administrative Code regulation forbidding the discharge of firearms on the island.[38]

The portion of the MMPA that prohibits the taking of marine mammals instructs that "[n]o state may enforce, or attempt to enforce, any state law or regulation relating to the taking of any species . . . of marine mammal(s) within the state. . . ."[39] However, the MMPA exempts Alaskan natives who take marine mammals under certain conditions.[40]

The State filed a complaint against the Arnariaks; both were charged with entering the island without a permit, and Adam was charged with discharging a firearm on the island.[41] The Arnariaks moved to dismiss, arguing that the state regulations were preempted by the federal MMPA.[42] The district court granted the motion to dismiss, and the court of appeals

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33. *See* United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

34. Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987) (A permanent physical occupation will be deemed to have occurred "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.").

35. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) ("In this case, we hold the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

36. *See* Alaska v. Arnariak, 893 P.2d 1273, 1274 (Alaska Ct. App. 1995).

37. *See id. See also* ALASKA ADMIN. CODE tit. 5, § 92.066 (1999).

38. *See* ALASKA ADMIN. CODE tit. 5, § 92.066 (2)(D) (1992).

39. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1379(a) (1994).

40. *See id.* § 1371(b).

41. *See* Alaska v. Arnariak, 893 P.2d at 1274.

42. *See* Alaska v. Arnariak, 941 P.2d. 156 (Alaska 1997).

affirmed.[43] The State then petitioned the Alaska Supreme Court for a hearing. The appeal was granted.[44]

On appeal, the state argued that the MMPA's prohibition against the enforcement of the "'State law(s) on regulations relating to the taking of any species . . . of marine mammal within the State does not preclude the state from enforcing [its Administrative Code Regulations] because that provision is not a hunting regulation, but a 'land use regulation.'"[45] The State further argued that interpreting the MMPA to preempt state regulation, which protects other game as well as walruses, would render the MMPA unconstitutional under the Fifth and Tenth Amendments of the United States Constitution, and that the state regulations were intended to protect other game, as well as walruses.[46]

The Arnariaks argued that native hunting does not interfere with species preservation, and that the federal regulations meet the State's objectives.[47] Further, the Arnariaks argued that the state regulations were preempted by the MMPA[48] because the MMPA exempts certain Alaskan natives from state prohibitions when they harvest marine mammals for certain purposes.[49]

B. The Court's Opinion

In holding that Alaska's regulations were not preempted by the MMPA, the Alaska Supreme Court, following *Nollan v. California Coastal Commission*,[50] stated that a "governmental attempt to require public access to private property is unconstitutional and invalid unless the government first follows the condemnation process and pays just compensation."[51] Citing a line of "takings" cases, the court found that the application of section 1379(a) of the MMPA would be unconstitutional if it "were interpreted to require the State to permit access to and discharge of firearms on Walrus Island."[52]

Furthermore, the court determined that the legislative history and purpose of the MMPA did not support the assertion of any federal preemp-

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43. *See id.*
44. *See id.*
45. Alaska v. Arnariak, 893 P.2d. at 1275.
46. *See id.* at 1276, 1277.
47. *See* Alaska v. Arnariak, 941 P.2d at 160 (Robinowitz, J., concurring).
48. *See id.* at 156.
49. *See* Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(b) (1994).
50. 483 U.S. 825 (1987).
51. Alaska v. Arnariak, 941 P.2d at 156.
52. *Id.* at 156, 157.

tion concerning a protected state sanctuary,[53] and that the report of the Committee on Merchant Marine and Fisheries of the House of Representatives concerning the MMPA makes "clear that the act was not intended to interfere with state sanctuaries which protect marine mammals."[54] The court cited the "expressions of purpose" of the MMPA as sufficient to preclude federal preemption in maintaining the walrus sanctuary.[55] Given this construction, the court reasoned that the phrase "relating to," although suggesting a broad scale preemption, does not require application of the preemption clause.[56] The court held that no federal preemption exists as such a preemption would prevent the state from "limiting access to, or the discharge of firearms on, state wildlife refuges," which would be equated to a taking without just compensation.[57]

IV. DISCUSSION

Essentially, the court held that the MMPA did not preempt certain state regulations involving walruses, and in particular, a walrus sanctuary, because such a preemption is an unconstitutional taking without just compensation.[58] *Arnariak* therefore supports state circumvention of important federal directives in favor of local land use regulations. In reaching this conclusion, the court determined the MMPA, despite an express preemption clause, did not apply to state land use regulations.[59] Two difficulties arise with this decision. First, by finding that the MMPA did not extend to state regulation of a state walrus sanctuary, the court arguably undermined the goals and purposes of the MMPA, and opened the door to future denial of federal preemption under the guise of state land use regulations. Second, the decision provides a vivid example of how federalism conflicts are not easily solved when federal and state laws clash.

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53. *See id.*

54. *Id.* ("It is not the intention of this Committee to foreclose effective state programs and *protective measures such as sanctuaries*. . . . ") (citing H.R. REP. NO. 92-707, at 28 (1971).

55. Alaska v. Arnariak, 941 P.2d *reprinted in* 1972 U.S.C.A.A.N. 4144, 4161:

> In view of these expressions of purpose, it is difficult to believe that Congress also intended a meaning which would preclude the State from continuing to maintain a walrus sanctuary on state-owned islands which had previously been recognized as 'the sole remaining place in the state where walruses annually haul out on land.'

56. *Id.* at 158.

57. *Id.*

58. *See id.*

59. *See id.*

The MMPA and state regulations were enacted to protect certain marine species and their habitats. Federal preemption of state regulations enables the Arnariaks to "take" a marine mammal (in this case a walrus) for certain defined purposes. The Round Island regulations, however, forbid such a taking. Thus, any sort of analysis of this conflict involves consideration of federal and local legislation. Because federal preemption of a state law is at issue, analysis of this conflict involves a review of the Constitution, federal and state legislation, federal preemption guidelines, and the specific intent of Congress in enacting the MMPA.

The Constitution provides that the laws of the United States reign supreme.[60] Certain issues may be considered more of a national rather than local character, and federal law may preempt state law.[61] The Supreme Court has identified three types of preemption: field preemption, conflict preemption, and express preemption.[62] Field preemption exists when federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it."[63] In the instant case, it was noted that the regulation governing the taking of marine mammals was in a "field [in] which the [MMPA] is intended to occupy."[64] Conflict preemption exists when state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress."[65] This type of preemption is not at issue here, as Congress explicitly stated its intent to displace state law in the statute's language, thus expressly preempting state law.[66]

Section 1379(a) of the MMPA states that "[n]o state may enforce, or attempt to enforce, any State law or regulation relating to the taking of any

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60. *See* U.S. CONST. art. VI., cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

61. *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663 (1993) ("Where a state [law] conflicts with, or frustrates, federal law, the former must give way.").

62. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

63. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

64. Alaska v. Arnariak, 941 P.2d at 159 (Robowitz, J., concurring).

65. California v. ARC America Corp., 490 U.S. 93, 100–01 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

66. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992):

> For purposes of the present case, the key phrase, obviously, is 'relating to.' The ordinary meaning of these words is a broad one — 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' Black's Law Dictionary 1158 (5th ed. 1979) — and the words thus express a broad pre-emptive purpose."

species . . . of marine mammal[s] within the State. . . ."[67] The Alaska statute and regulations concern "walrus hauling grounds,"[68] and include prohibiting entry without a permit and the discharge of firearms.[69] The court construed the phrase "relating to" in section 1379(a) of the MMPA as meaning not "so broad as to prevent the State from limiting access to, or the discharge of firearms on, state wildlife refuges."[70] The court therefore found that section 1379(a) did not "preclude the state from restricting access to or from prohibiting the discharge of firearms on the state land."[71] This interpretation, though, is not supported by the legislative history or the purpose of the MMPA.[72]

It has been noted that Congressional purpose is the ultimate touchstone of preemption analysis.[73] Congress enacted the MMPA for several reasons, not the least of which was to "prohibit the harassing, catching and killing of marine animals."[74] Congress further clarified its purpose by stating that marine mammals should be "protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem."[75] In an attempt to balance local interests with the protection of marine mammals, Congress included a limited exception to the takings moratorium for Alaskan natives.[76]

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67. Marine Mammal Protection Act of 1972,16 U.S.C § 1379(a) (1994).

68. *See* ALASKA STAT. § 16.20.090 (Michie 1998).

69. *See* ALASKA ADMIN. CODE tit. 5, §§ 92.066, 92.510(a)(13) (1999).

70. Alaska v. Arnariak, 941 P.2d 154, 158 (Alaska, 1997):

Here the legislative history, the purpose of the MMPA, and the rule that statutes should be construed to avoid an unconstitutional result persuasively indicate that MMPA's preemption is not so broad as to prevent the State from limiting access to, or the discharge of firearms on, state wildlife refuges.

71. *See id.* at 158.

72. *See* H.R. REP. NO. 92-707, at 2 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144. ("The purpose of this legislation is to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States, unless taken under the authority of a permit issued by an agency of the Executive Branch."); *see also id.* at 5:

H.R. 10420 takes the strong position that marine mammals and the marine ecosystems upon which they depend for survival require additional protection from man's activities. There can be no question of the constitutional power of the Congress to regulate traffic in these animals and their products, deeply involved as they are in interstate and foreign commerce.

73. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229–30 (1947).

74. H.R. REP. NO. 92-707, at 2 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144.

75. Marine Mammal Protection Act of 1972,16 U.S.C § 1361(6) (1994).

76. *See* H..R. REP. NO. 92-707, at 39 (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4168. Clarifying the exception for indigenous persons:

Sec. 107 (a) This section allows the taking by Indians, Aleuts, or Eskimos dwelling on

The Supreme Court recognizes that the inquiry into Congressional intent may be simplified when Congress has included a broadly worded preemption provision.[77] The Supreme Court further recognizs that the phrase "relating to" suggests a "broad scale preemption."[78] Therefore, section 1379(a) of the MMPA may be reasonably interpreted as encompassing any law or regulation involving walruses.

The legislative history of the MMPA supports this interpretation. Clarification of section 109 of the Senate version reveals that, although a proper transfer of authority to the state is possible, the "Secretary would not in any case, however, thereby waive all subsequent Federal jurisdiction over any such marine mammals. He must continue to monitor state programs to make sure the purposes and policies of the Act continue to be fulfilled."[79] The Alaska Supreme Court, however, did not apply this interpretation, but rather focused on the report of the Committee on Merchant Marine and Fisheries of the House of Representatives concerning the MMPA to conclude that Congress did not intend to foreclose state involvement in maintaining sanctuaries.[80] The difficulty in this interpretation is that further exploration of the report clearly reveals Congressional intention to develop

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the coast of the North Pacific Ocean or the Arctic Ocean, under certain circumstances. These natives may not take marine mammals from endangered species, but they may take marine mammals without permits if the taking is for subsistence purposes in accordance with traditional customs, is not done wastefully, and is not done for purposes of direct or indirect commercial sale. If a native kills a walrus for subsistence purposes, the bill does not prohibit the use of ivory from that walrus' tusks so long as his primary purpose for taking was that of subsistence. If, on the other hand, an Eskimo wishes to take a number of walruses primarily for the purpose of selling their tusks, he may not do so without a permit. (b) This subsection authorizes the Secretary, in cases where he determines that species or stocks of marine mammals require protection from native taking, to prescribe appropriate limitations on this taking. It was recommended as an additional management tool by the State of Alaska. Once the need for such limitations has been removed, as for example, following the regrowth of a depleted stock, the limitations must be removed.

Id. See also H.R. CONF. REP. NO. 92-1448, at 11 (1972) (The House Bill preempted state law, but allowed cooperative agreements with the States in harmony with the purposes of the Act).

77. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990) ("Where . . . Congress has expressly included a broadly worded preemption provision in a comprehensive statute . . . [the] task of discerning congressional intent is considerably simplified.")

78. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992).

79. H.R. REP. NO. 92-1448, at 12 (1972).

80. *See* Alaska v. Arnariak, 941 P.2d 154, 157 (Alaska 1997) ("The report of the Committee on Merchant Marine and Fisheries of the House of Representatives concerning the MMPA makes clear that the act was not intended to interfere with state sanctuaries which protect marine mammals.").

a cooperative relationship between federal and state agencies: "[T]he bill permits and indeed requires the development of an extensive management program in the agencies concerned, with full opportunity for cooperative federal-state management programs designed to carry out the purposes and policies of the [MMPA]."[81] Thus, the court inaccurately concluded that Congress expressed no desire to "interfere" with state sanctuaries, because Congress recognized a need to develop national standards concerning marine mammals, and that a cooperative effort was conceivable.

In the spirit of this "cooperative effort," Congress provided specific guidelines for the transfer of federal authority to state representative agencies.[82] Therefore, a state is not without recourse in determining the livelihood of its local marine mammals and their habitats. State enforcement of state laws or regulations is prohibited unless the federal government transfers management authority to the state.[83] In this case, the federal government did not transfer management authority for marine mammals to the State of Alaska.[84] Even if Alaska had properly obtained management authority from the federal government, it is important to note that the State

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81. H.R. REP. NO. 92-707, at 17 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4151. The bill states in pertinent part:

> The bill permits and indeed requires the development of an extensive management program in the agencies concerned, with full opportunity for cooperative federal-state management programs designed to carry out the purposes and policies of the act. There is no intention or desire within the Committee to remove any incentive from the states to carry out necessary research or to protect animals residing within their jurisdictions . . . The bill establishes reasonable protection for Alaskan natives taking marine mammals for purposes of food or clothing, where the primary purpose is not commercial sale. It couples this protection with adequate tools to allow the Secretaries to prevent abuse of these privileges or to limit the taking in order to protect endangered or depleted species or stocks.

See also id. at 13. Stating that:

> U.S. knowledge and research programs devoted to the rest of the seals, including the seal lions and the walruses, is tiny — as have been our efforts to control significantly the activities of man affecting these animals. The management activities that have taken place to date have been almost exclusively handled by the states. Many of these state programs are soundly based, and should be encouraged. Other state management programs involved the payment of bounties on marine mammals of various types. There is, in brief, little semblance of any sort of integrated rational program for management of all marine mammals within the United States; given the divided nature of the regulatory structure which affects them, this is scarcely surprising.

82. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1379 (1994).

83. *See id.* § 1379(a).

84. *See* Alaska v. Arnariak, 893 P.2d 1273, 1275 (Alaska Ct. App. 1995) ("The State of Alaska has not maintained regulations containing a preference for rural subsistence hunting of marine mammals, and the federal government has not transferred management authority for marine mammals to the State of Alaska.").

would still be obligated to implement a program" consistent with the purposes, policies, and goals" of the MMPA.[85] Because the MMPA recognizes a need for national standards of conservation and care of species and habitats, a transfer of management authority is never absolute.

In order for the MMPA to preempt Alaskan law, the particular law needs to regulate the same subject matter as the MMPA.[86] Alaskan legislative findings concerning the Walrus Islands recognized the vital importance of these islands to the survival and maintenance of the Pacific Walrus.[87] The Alaska legislature stated that the ultimate purpose of the statute was to protect walruses and "other game" on the islands.[88] This purpose supports the Alaska Administrative Code's provision requiring an access permit and forbidding the discharge of firearms. The regulations of the Code also use terms specifically set out in the MMPA concerning the term "take."[89] Given these factors, federal preemption of these regulations is permissible because they "relate to" the taking of walruses, and therefore come within the subject matter regulated by the MMPA.

The Supreme Court of Alaska concluded that a "governmental attempt to require public access to private property is unconstitutional and invalid unless the government first follows the condemnation process and pays just compensation."[90] In making this determination, the court noted that implementation of the MMPA would "require" the State to allow access to "private land" for Alaska natives to hunt marine mammals.[91] Such a requirement, the court stated, would constitute a "permanent physical occupation."[92] The United States Supreme Court has determined that a "permanent physical occupation" occurs when individuals are given a "permanent and continuous right to pass to and fro, so that the real property may continuously be traversed."[93] If a "permanent physical occupation" did

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85. 16 U.S.C. § 1379(b)(1)(A).

86. *See* Alaska v. Arnariak, 941 P.2d 154, 163 (Alaska, 1997) (Shortell, J. pro tem, dissenting).

87. *See id.* at 163. ("The State correctly points out that 'shortly after statehood, Alaska's Legislature created the sanctuary because it found that the Walrus Islands were the sole remaining place in Alaska where walruses annually haul out on land.'").

88. ALASKA STAT. § 16.20.090(4)(b) (Michie 1998) (The purpose of AS 16.20.090–16.20.098 is to protect the walruses and other game on the Walrus Islands).

89. ALASKA ADMIN. CODE tit. 5, § 92.066(2)(D): (The "[d]ischarge of firearms, disturbance or harassment of wildlife, removal of wildlife or parts of wildlife, swimming, and recreational diving are all prohibited on Round Island and in adjacent waters within three miles of Round Island.").

90. Alaska v. Arnariak, 941 P.2d. at 156.

91. *See id.* at 157.

92. *See id.* at 156 (citing Nollan v. California Coastal Comm'n, 438 U.S. 825 (1987)).

93. Nollan v. California, 483 U.S. 825, 831–32 (1987).

result from federal preemption of state laws and regulations, it is clear that an unconstitutional result would follow.[94]

The court found that section 1379(a)'s federal preemption of the Alaskan regulations was unconstitutional. Alternatively, another interpretation finding federal preemption constitutional and justified may be more applicable.[95] Specifically, section 1379(a) preempts the applicable Alaska regulations affecting and controlling walruses.[96] The MMPA was designed to protect and preserve marine mammals and their habitats. As Congressional action denotes, federal legislation of an "interstate commerce" activity necessarily involves the purpose of creating a national standard of that activity to promote fairness and equity. Thus, MMPA preemption over these Alaskan regulations could be construed as an affirmation of the national standards that the MMPA embodies.

If federal preemption in this instance deals primarily with regulations concerning the walrus, an unconstitutional result may not follow from its implementation. Property owners all possess a common law right to prevent trespass upon their land.[97] The court determined that this right was infringed upon and resulted in a taking without just compensation. However, if the MMPA preempts only those regulations concerning walruses, it may not follow that the State cannot enforce the common law right to prevent trespass over its property — it is simply that the prosecution of a trespass violation in this instance may not involve that specific common law right, but rather encompass only activities relating to marine mammals.[98] Thus, a determination can be made that this potential federal preemption may not be unconstitutional by asking whether the law or regulation itself, rather than a reason for enforcing it, relates to walrus taking.[99]

Implementing the presumption against finding federal preemption in areas traditionally regulated by the states, the court concluded that "Congress

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94. *See id. See also* Alaska v.Arnariak, 941 P.2d at 156.

95. *See id.* at 164–65 (Shortell, J. pro tem, dissenting):

> Thus, the MMPA cannot reasonably be interpreted to prevent the State from using its general right to prevent trespass to exclude persons from Round Island . . . If § 1379(a) is not so broad as to supersede the State's ability to enforce its general right to prevent trespass, the MMPA would not unconstitutionally impinge on the State's right to exclude others from its property.

96. *See id.*

97. *See* Brown Jug, Inc. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 959, 688 P.2d 932, 938 (Alaska 1984).

98. *See* Alaska v. Arnariak, 941 P.2d. at 164 (Shortell. J. pro tem, dissenting). ("The State's power to enforce this right, of course, exists separately from the State's power to prosecute violations of 5 AAC 99.066.").

99. *See id.*

has not manifested in the MMPA in clear and definite language a desire to displace the state's ability to ban certain activities in state wildlife sanctuaries."[100] A state wildlife sanctuary is, by definition, an area "traditionally regulated by the states." Moreover, the right to prevent trespass is also a state-controlled activity.

In this case, Adam and Marie Arnariak would not be prosecuted under the state laws and regulations if the MMPA were found to preempt the state laws and regulations because they are Alaskan natives. Viewed in this light, the issue would then be whether native Alaskan hunting is an area recognized as "traditionally regulated by the states." The answer can be found in a 1979 United States District Court case, *People of Togiak v. United States*,[101] where Alaskan natives sought an order to declare invalid certain regulations of the Department of Interior purporting to transfer to the State of Alaska power to regulate the hunting of marine mammals.[102] The Alaskan natives sought such invalidation arguing that the federal law preempted the field to the exclusion of state authority.[103] More importantly, in making its determination of matter, the court found that in an "analysis of the preemption issue, it is not without significance that the subject matter being regulated is one which has traditionally been a federal responsibility."[104] That is, the court found that native taking is "an area where federal responsibility and involvement are and always have been exceptionally strong and direct."[105] Given this formation, the court concluded that the MMPA permitted Alaska natives to hunt non-depleted walrus as specified under section 1371 of the Act.[106] However, in *Arnariak*, the Alaska Supreme Court did not conclude that the MMPA permitted Alaskan natives to hunt walrus. The court determined that state regulations concerning the hunting of walrus in a state sanctuary were controlling, and hunting activities were under traditional state control. Thus, the court failed to take into account the "federal responsibility" involved when a native taking occurs.

The transfer of authority from the Secretary to the state is accomplished through a process of "transferal of authority" under the MMPA.[107] In this case, no transfer of authority occurred.[108] It is conceivable that even if such

100. *Id.* at 157.
101. 470 F. Supp. 423 (D.D.C. 1979).
102. *See id.* at 424.
103. *See id.*
104. *Id.* at 428.
105. *Id.*
106. *Id.* at 423.
107. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1379 (1994).
108. *See* Alaska v. Arnariak, 893 P.2d 1273, 1275 (Alaska Ct. App. 1995).

a transfer of authority had occurred, the issue of whether or not natives could take marine mammals in this sanctuary would still be unresolved. However, following *Togiak*, state authority would probably be supplanted by the MMPA. The *Arnariak* court, in holding that a taking without just compensation would occur if the MMPA were construed as to prevent a state from preventing entry to individuals, seems to be concluding that a cognizable "land use regulation" could supplant federally mandated issues, including federal control of native takings.

V. CONCLUSION

The decision of the court in *Arnariak* opens the door for state control over federally legislated issues under the guise of "land use regulations." In doing so, the court failed to recognize the potential for local abuse if a nationally protective program is not followed. The purposes and goals of the MMPA are designed to prevent such abuse. State control of marine mammal taking regulations may arguably lead to such abuse. Thus, a federally dominant structure of such regulations may prove more beneficial in controlling the takings of marine mammals. Through the transfer of authority to the state from the Secretary, a state may control the marine mammals under its jurisdiction, but even this control is subject to the purposes and goals of the MMPA. As this control may be deemed too restrictive in certain circumstances, consideration of the ultimate purposes and goals of the MMPA, combined with an opportunity for local input, may provide for a more equitable determination of marine mammal questions.