



***The Protection of Alaska Native Subsistence Rights and Use:
Overview of Alaska's Subsistence Framework***

**Presentation for the
Alaska Federation of Natives**

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Prior to Territorial Era

- **Alaska Native subsistence use since time immemorial**
- **Russia “discovers” Alaska (1741)**
 - Under international law, discovering or colonizing nations had exclusive right to engage with Indigenous people with respect to land ownership and intergovernmental relations.
- **Treaty of Cession (1867)**
 - United States acquires Alaska from Russia.
 - Article III: “[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.”

Pre-Statehood

- **Organic Act (1884)**

- Established a civil government within Alaska.
- “[T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress....”

- **Other laws exempt Alaska Native people from harvest restrictions**

- Extension of federal mining laws to Alaska provided that Alaska Native people were not to be disturbed in their use and occupancy of lands.
- Hunting for food, clothing, and boat manufacture exempted from take restrictions on fur seals.
- Hunting regulations exempted hunting for food or clothing by “native Indian or Eskimos or by miners, explorers, or travelers on a journey when in need of food.”

Early Statehood Era

- **Statehood Act (1958)**

- Did not resolve Alaska Native land claims or subsistence rights.
- Sec. 4: the State must disclaim any right to the property of Alaska Native people (including fishing rights) and that such property remained under the “absolute jurisdiction and control of the United States....”
- Sec. 6(b): granted the State the right to select an amount of public lands (not to exceed 102,550,000 acres) which “are vacant, unappropriated, and unreserved at the time of their selection.”

- **Protests over State selection of lands**

- Selected land was occupied and used by Alaska Native people under aboriginal title.
- Formation of AFN in 1966.

- **Discovery of oil in Prudhoe Bay in 1968**

Alaska Native Claims Settlement Act (ANCSA)

- **ANCSA extinguished any aboriginal title and hunting/fishing rights**
 - 43 U.S.C. § 1603(b): “All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.”
- **No explicit protection of subsistence rights**
 - Congressional Conference Report states: “The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.” H.R. Rep. No. 92-746 at 37 (1971).

Existing Subsistence Management Framework

- **Multi-faceted management structure based on location, species, purpose of harvest, status of species**
- **Resource specific Federal statutes**
 - Marine Mammal Protection Act
 - Endangered Species Act
 - Migratory Bird Treaty Act
 - Whaling Convention Act
 - Magnuson-Stevens Fishery Conservation and Management Act
- **Federal lands and waters**
- **State and private lands and waters**

Marine Mammal Protection Act (MMPA)

- **Applies to all marine mammals**
- **Jurisdiction split between NMFS and USFWS**
 - NMFS: dolphin, porpoise, seals, sea lion, whales
 - FWS: polar bear, sea otter, walrus
- **Prohibits the taking (harass, hunt, capture, or kill) of marine mammals**
 - Issuance of permits for incidental take or harassment, scientific research and enhancement of species
 - No “unmitigable adverse impact” on species availability for subsistence
 - Exemption for subsistence use and self-defense

MMPA Subsistence Exemption

- **Applies to: any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean.**
- **Exempts the take of any marine mammal:**
 - (1) for subsistence purposes; or
 - (2) for creating and selling authentic Native articles of handicrafts and clothing; and
 - (3) the taking must not be accomplished in a wasteful manner.

MMPA Regulation of Subsistence

- **NMFS or FWS may regulate subsistence take if a species or stock is determined to be “depleted.”**
 - “Depleted” means:
 - The species or population stock is below its optimum sustainable population; or
 - The species or population stock is listed as threatened or endangered under the Endangered Species Act.
- **Requires notice and administrative hearing prior to implementation.**
- **Regulation must be removed as soon as the need for its imposition has disappeared.**

MMPA Cooperative Agreements

- **Section 119**

- NMFS and FWS can enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.

- **Section 112**

- NMFS and FWS can enter into contracts, leases, cooperative agreements, or other transactions as may be necessary . . . with any Federal or State agency, public or private institution, or other person.

- **Various Alaska Native organizations have entered these agreements**

MMPA Title V

- **Implements the U.S.-Russia Agreement on Conservation and Management of Alaska-Chukotka Polar Bear Population**
- **Bilateral Commission**
 - Four Commissioners (two each from U.S. and Russia)
 - U.S. Commissioners represent Federal government and Alaska Native people
 - U.S. Commissioners must agree on any vote at Commission
 - Establishes sustainable harvest level and annual taking limit
 - 2019: 85 polar bears (no more than 1/3 female) split equally between the countries
- **FWS has authority for domestic implementation**
 - Prohibition on any taking of polar bear in violation of the Agreement or any annual taking limit or other restriction adopted by the Commission.
- **FWS may share authority for management of polar bear subsistence taking with the Alaska Nannut Co-Management Council**

Endangered Species Act (ESA)

- **Applies to any species listed as threatened or endangered**
- **Designation of critical habitat**
- **Prohibition on “take” (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect) of endangered species**
 - Take prohibition can also be applied to threatened species
- **Consultation on Federal agency actions**
- **Issuance of permits for incidental take, scientific research, enhancement of species, and experimental populations**
- **Exemption for subsistence and self-defense**

ESA Subsistence Exemption

- **Applies to: any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or any non-Native permanent resident of an Alaskan Native village.**
- **Authorizes the take of any listed species if primarily for subsistence purposes.**
 - Cannot be accomplished in wasteful manner.
 - Non-edible byproducts may be sold in interstate commerce when made into authentic Native articles of handicrafts and clothing.

ESA Regulation of Subsistence

- **NMFS or FWS may regulate subsistence take that materially and negatively affects the species.**
 - Requires notice and administrative hearing.
 - Removed as soon as Services determine need for regulation has disappeared.
- **Secretarial Order 3225 establishes consultation framework for subsistence exemption:**
 - Full and meaningful participation by Alaska Natives in evaluating and addressing conservation concerns.
 - Work collaboratively with Alaska Natives to develop cooperative agreements that conserve species, fulfill subsistence needs, co-manage subsistence uses, and preclude need for regulations.
 - Ensures participation of Alaska Natives to maximum extent practicable in all aspects of management of subsistence species.

Migratory Bird Treaty Act (MBTA)

- **Applies to more than 1,000 species of birds.**
- **Unlawful to pursue, hunt, take, capture, kill, possess, sell, purchase, transport, etc. any migratory bird or any part, nest, or egg, or product consisting of bird part.**
 - Allows hunting of migratory game birds in fall-winter season.
- **Authorizes FWS to issue regulations for the taking of migratory birds and collection of eggs by indigenous inhabitants of Alaska for nutritional and other essential needs during certain seasons.**

MBTA Regulation of Subsistence

- **Allows subsistence harvest of certain migratory birds and eggs between March 10 and September 1.**
 - Eligible participant is permanent resident of a village within a subsistence harvest area.
- **Alaska Migratory Bird Co-Management Council develops recommendations for management regulations.**
 - Representatives from FWS, ADF&G, and 12 Alaska Native regions (3 votes total; one for each group).
 - FWS: approves recommendations, publishes in Federal Register, and enforces harvest.
- **Alaska Natives may sell or re-sell any authentic Native article of handicraft or clothing that contains inedible byproduct of identified bird species that were taken for food.**

Whaling Convention Act (WCA)

- **International Convention for the Regulation of Whaling (ICRW) and International Whaling Commission (IWC) regulate international whaling and subsistence harvest.**
- **WCA provides domestic implementation of ICRW and quota established by IWC.**
- **Alaska Eskimo Whaling Commission co-manages bowhead whale subsistence harvest through cooperative agreement with NMFS.**
 - NMFS issues U.S.-share of catch limit to AEWC for allocation and enforcement.
 - Seven-year catch limit (2019-2025) of 392 bowhead whales with annual strike limit of 67 (plus unused strike quota carryover).
 - Automatic strike/catch limit renewal under status quo conditions.

Magnuson-Stevens Fishery Conservation and Management Act

- **Applies to Federal fisheries from 3 to 200 miles offshore.**
- **Alaska fisheries managed by North Pacific Fishery Management Council (NPFMC).**
 - Arctic Fishery Management Plan (2009) prohibits commercial harvest in Federal waters of all finfish, marine invertebrates, and other fish resources in Beaufort and Chukchi Seas.
- **Does not provide explicit subsistence exemption.**
 - NPFMC has established a subsistence halibut fishery in SE Alaska.
 - NPFMC developing protocols for use of traditional knowledge for ecosystem-based management of Bering Sea fisheries.
- **State of Alaska manages fishing within 3-mile limit.**

Alaska National Interest Lands Conservation Act (ANILCA) - Title VIII

- **Protects subsistence uses on public lands:**

- “The continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.”
- “The utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands.”



ANILCA - Federal Subsistence “Rural” Priority

- **Priority for subsistence uses:**

- “The taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded **priority** over the taking on such lands of fish and wildlife for other purposes.”

- **Subsistence uses are defined as:**

- “the **customary and traditional uses** by **rural Alaska residents** of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.”

ANILCA – Application of Rural Priority

- **If it is necessary to restrict subsistence uses to protect the continued viability of fish and wildlife populations, the rural priority is implemented through limitations based on the following criteria:**
 - (1) customary and direct dependence as the mainstay of livelihood;
 - (2) local residency; and
 - (3) availability of alternative resources.
- **Temporary closures to subsistence uses**
 - Only if necessary for reasons of public safety, administration, or to assure the continued viability of particular fish or wildlife population.
 - Requires prior consultation with State and adequate notice and public hearing.
- **Emergency closures to subsistence uses**
 - When extraordinary measures must be taken for public safety or to assure the continued viability of particular fish or wildlife population.
 - Effective immediately, and may not extend more than 60 days without notice and public hearing.

ANILCA – Other Subsistence-Related Provisions

- **Access**. Rural residents engaged in subsistence uses required to have reasonable access to subsistence resources on public lands subject to reasonable regulation. 16 U.S.C. § 3121.
- **Evaluation of Effects on Subsistence**. In determining whether to permit the use, occupancy, or disposition of public lands, Federal agencies are required to evaluate, and take reasonable steps to minimize, the effects subsistence uses and needs. 16 U.S.C. § 3120(a).
- **Cooperative agreements**. Authorizes cooperative agreements with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations to achieve ANILCA's purposes and policies. 16 U.S.C. § 3119.
- **Judicial review**. Provides a private right of action for subsistence users, tribes, and organizations to sue the Federal (or State) government in Federal court for a failure to provide the priority for subsistence uses. If successful, can get injunctive relief and recoup costs and attorney fees. 16 U.S.C. § 3117(a).
- **Research**. Secretary shall undertake research on species and subsistence uses on public lands, seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses. 16 U.S.C. § 3122.

ANILCA Federal-State Relationship

- **State of Alaska authorized to manage subsistence uses on Federal public lands if the State enacts law extending the priority for rural residents to all lands.**
 - 1982: Alaska assumed management responsibility with regulatory regime consistent with ANILCA.
 - 1989: Alaska Supreme Court found that “rural” priority for subsistence use was unconstitutional.
- **1990 to present: dual Federal and State management.**
 - Federal government assumes management of subsistence on Federal public lands, and affords priority to rural Alaskan subsistence uses.
 - State fishing, hunting, and trapping regulations apply to all Alaska residents.

ANILCA – Federal Management Structure

- **Federal Subsistence Board (FSB) establishes all Federal subsistence hunting, trapping, and fishing regulations for species under ANILCA.**
- **Alaska is divided into 10 subsistence resource regions, each with a Regional Advisory Council (RAC).**
 - RAC members are local residents with knowledge of subsistence practices and uses in that area.
- **RACs hold at least two public hearings a year to gather local information and make recommendations to the FSB on subsistence issues.**
- **FSB is required to defer to recommendations of each RAC unless not supported by substantial evidence, violates principles of fish and wildlife conservation, or would be detrimental to subsistence needs.**

State Management

- **Alaska has general management authority for fish and wildlife unless modified or diminished by acts of Congress.**
- **Managed through Alaska Department of Fish and Game**
 - Board of Game
 - Board of Fisheries
- **Board Composition and Roles**
 - Each Board is comprised of seven members, and purpose is to conserve and develop Alaska's wildlife and fishery resources.
 - Consider regulatory changes on region-based, three-year scheduling cycles.
- **Local Advisory Committees**
 - 84 Advisory Committees throughout State.
 - Provide local forum for fish and wildlife issues, develop and evaluate regulatory proposals, make recommendations to Boards.

State Management of Subsistence

- **Alaska definition of subsistence:**
 - “the noncommercial, customary and traditional uses of wild, renewable resources **by a resident of the state** for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of inedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption...”
- **Unlike ANILCA, State does not limit subsistence to “rural” residents.**
 - If an Alaska resident for 12 consecutive months, both urban and rural residents can participate in subsistence harvests.
- **Subsistence harvests are not authorized in “nonsubsistence areas.”**
 - Where dependence on subsistence is not a principal characteristic of the economy, culture, and way of life. Areas around Anchorage, Fairbanks, Juneau, Ketchikan, and Valdez.

State Management of Subsistence

- **Each Board identifies fish stocks or game populations that customarily and traditionally taken by Alaska residents for subsistence uses.**
 - Determination is based on application of eight criteria.
- **If harvest can occur consistent with sustainable yield, each Board determines the amount of harvest that is reasonably necessary for subsistence uses.**
- **Each Board adopts subsistence regulations that provide “reasonable opportunity” for subsistence uses before providing for other uses of harvestable surplus (“subsistence priority”).**
- **If harvestable portion insufficient for subsistence use, Board will limit subsistence users based on:**
 - Customary and direct dependence on the fish or game population by the subsistence user for human consumption as a mainstay of livelihood, and
 - Ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

Some Challenges for Subsistence Management

- **Lack of priority for Alaska Natives' subsistence use**
 - Federal management based on rural residents
 - State management reflects interests of urban residents
- **Multiple species and multiple management frameworks**
 - Complex interplay between jurisdictions, agencies, forums, entities
 - Different restrictions and seasons depending on location
 - Varying roles in subsistence management decisions
 - Obstacles to informed participation
- **Different management approaches and values**
 - Western science versus indigenous knowledge
 - Species management versus traditional/cultural practices
- **No consistent framework for co-management**
 - Approaches differ by statute, agency, and species

Next Workshops

- **WORKSHOP 2: Native Participation in Subsistence Decision-Making.**
 - **May 12, 10:00 am to Noon**
 - This workshop will explore what are the avenues of Native participation among the Federal Subsistence Board, Alaska State Legislature, State of Alaska Boards of Game & Fisheries, and significant court challenges.
- **WORKSHOP 3: Options and Considerations for more Comprehensive Alaska Native Subsistence Rights and Use.**
 - **May 19, 10:00 am to Noon**
 - This workshop will focus on concrete options and action steps to advance AFN's subsistence-related objectives.

Thank you!

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