



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington D.C. 20240



Memorandum

To: Regional Director, Alaska Region

From: Director

Subject: Interpretation of the Service's Regulations Implementing the Marine Mammal Protection Act (MMPA) Native Exemption for the Taking of Marine Mammals

Introduction

The Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361-1423h, generally prohibits the taking of marine mammals, but section 101(b) provides an exemption for any "Indian, Aleut, or Eskimo" (collectively referred to as "Alaskan Natives" elsewhere in the Act) who resides in Alaska and dwells on the coast to harvest marine mammals in a non-wasteful manner for subsistence purposes or for the creation of authentic native articles of handicraft or clothing. Based on a written opinion from the Solicitor of the Department of the Interior, this memorandum provides a definitive interpretation regarding who qualifies for this exemption pursuant to the definition of "Alaskan Native" in the Service's implementing regulation at 50 C.F.R. § 18.3. Consistent with the Solicitor's memo, the Service's interpretation does not exclude persons with blood quantum of less than one-fourth degree from qualifying under the second standard expressed in the regulatory definition.

Discussion

Section 101(b) of the MMPA, as amended, reads:

Except as provided in section 109, the provisions of this Act 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 or the Arctic Ocean if such 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.

Notwithstanding the preceding provisions of this subsection, when, under this Act, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this Act. Such regulations shall be prescribed after notice and hearing required by section 103 and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.

The Service's regulation implementing section 101(b), which is found at 50 C.F.R. § 18.3, defines "Alaskan Native" to mean:

A person defined in the Alaska Native Claims Settlement Act (43 U.S.C. section 1603(b) (85 Stat. 588)) as a citizen of the United States who is of one-fourth degree or more Alaska Indian (including Tsimshian Indians enrolled or not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any Native, as so defined, either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or town of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town. Any citizen enrolled by the Secretary pursuant to section 5 of the Alaska Native Claims Settlement Act shall be conclusively presumed to be an Alaskan Native for purposes of this part.

In summary, the Service's regulation provides three alternative means of qualifying as an Alaskan Native for the purposes of the MMPA exemption. The first is based on a blood quantum threshold, the second is based on being "regarded as" an Alaska Native, and the third is based on Alaska Native Claims Settlement Act (ANCSA) enrollment. The first and third of these are unambiguous, independent means of determining who qualifies for the exemption and are therefore not further addressed in this memorandum.

With regard to the second means, the following sentence in the regulation has proven to be ambiguous in practice:

It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or town of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town.

The clause "in the absence of proof of a minimum blood quantum" has previously been interpreted by the Service restrictively, *i.e.*, as excluding persons with a known blood quantum of less than one-fourth degree from qualifying under the standard expressed in the remainder of the sentence. However, that regulatory clause can also be interpreted permissively, *i.e.*, as confirming that the means of eligibility described in the remainder of the sentence is available to any person who cannot prove their blood quantum is of at least one-fourth degree, including those who know they are of less than the minimum blood quantum.

The Solicitor found that the restrictive interpretation is not consistent with the law and that the Service lacks discretion to interpret its regulation in this manner. After a review of the text of the MMPA, its legislative history, and relevant case law, I agree that a permissive interpretation of the clause reflects the best interpretation of the exemption, i.e., one that does not impose a minimum blood quantum as a pre-requisite to the second means of qualifying. This does not alter the use of a minimum blood quantum as a valid way of qualifying under the first means; blood quantum is only problematic under the law if used as a means to limit individuals who would otherwise be qualified under the second means.

This conclusion is based on the following considerations. First and foremost, the MMPA does not specify any degree of blood quantum as a prerequisite for taking marine mammals pursuant to the section 101(b) exemption nor does it adopt or even reference the definition in ANCSA. In addition, the legislative history of the MMPA clearly reflects Congress' broad intent to protect not only a food source for coastal-dwelling Indians, Aleuts, and Eskimos, but also their cultural identity and way of life without any mention of or limitation relating to blood quantum. And finally, the Indian Canon of Statutory Construction requires any statutory or regulatory ambiguity in Indian law to be resolved in favor of Native peoples.

Conclusion

For these reasons, the Service necessarily rejects the restrictive interpretation and adopts the permissive interpretation of the second eligibility standard expressed in the definition in its regulations defining "Alaskan Native." Therefore, the Service will consider any citizen of the United States who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean to qualify for the exemption who is:

- 1) one-fourth degree or more Alaska Indian (including Tsimshian Indians enrolled or not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or combination thereof, including any Native, as so defined, either or both of whose adoptive parents are not Natives; or
- 2) regarded as an Alaska Native by the Native village or town of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town; or
- 3) enrolled by the Secretary pursuant to section 5 of the Alaska Native Claims Settlement Act.

This interpretation does not address a number of important implementation questions under the second standard, such as the role of Tribes, Alaska Native Organizations (ANOs), the consideration of current and future co-management agreements, regionally-specific (e.g., North Slope, Southeast Alaska, etc.) and species-specific considerations, and conservation objectives. These questions should be addressed in implementing guidance developed by the Service in consultation with affected Alaska Native Tribes, Alaska Native Organization co-management partners, and discussions with the National Oceanic and Atmospheric Administration and the Marine Mammal Commission, among other stakeholders.

This memorandum is intended to improve the internal management of the U.S. Fish and Wildlife Service and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person