United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 8, 2025

Memorandum

To: Director, U.S. Fish and Wildlife Service

From: Robert T. Anderson, Solicitor

Subject: Eligibility of Alaskan Natives to Take Marine Mammals Pursuant to Section 101(b) of the Marine Mammal Protection Act and the U.S. Fish and Wildlife Service's Implementing Regulation at 50 C.F.R. § 18.3

I. Background

You have requested my opinion concerning the best interpretation of the U.S. Fish and Wildlife Service's (Service, or FWS) regulation at 50 C.F.R. § 18.3, implementing section 101(b) of the Marine Mammal Protection Act of 1972 (MMPA or Act).[1] The MMPA generally prohibits the take of marine mammals but provides an exemption in section 101(b) for subsistence- or handicraft-related harvest 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" (hereinafter "MMPA Native exemption" or "exemption").[2] The Act does not define any of these terms or provide any guidance on how they should be interpreted.

The FWS has attempted to clarify, via a regulation at 50 C.F.R. § 18.3, who qualifies as "Indian, Aleut, or Eskimo who resides in Alaska" for purposes of the section 101(b) exemption. The regulation provides three alternative means of qualifying. The first means is based on a blood quantum threshold, the second is based on being "regarded as" Alaska Native, and the third is based on Alaska Native Claims Settlement Act (ANCSA) enrollment. I have been asked to advise on how to interpret the second means of qualifying, which reads:

> 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 informally 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 eligibility standard expressed in the remainder of the sentence. However, that regulatory clause can also be interpreted permissibly, *i.e.*, as confirming that the means of eligibility described in the remainder of the

[1] Pub. L. No. 92-522, 86 Stat. 1027, codified at 16 U.S.C. § 1361-1423h.
[2] 16 U.S.C. § 1371(b).

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.

Based on a review of the text of the MMPA, its legislative history, and relevant case law, I find that the restrictive interpretation is not consistent with the law and that the Service lacks discretion to interpret its regulation in this manner. For the reasons detailed below, I find that the permissive interpretation of the clause is the best interpretation of the exemption.

II. Analysis

In enacting the MMPA, Congress found that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities."[3] The MMPA thus established a moratorium and prohibitions on the taking and importation of marine mammals and marine mammal products.[4] However, section 101(b) of the Act also provides an exemption to the moratorium and prohibitions for "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 the taking is either "for subsistence purposes" or "done for purposes of creating and selling authentic native articles of handicrafts and clothing" and, in either case, the take "is not accomplished in a wasteful manner."[5]

A. Statutory Interpretation

Any interpretation of a statute must start with its plain meaning.[6] If the statutory language lacks plain meaning, courts will next employ other tools including canons of construction and a review of the legislative history.[7]

i. The Text of the Statute

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.

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[3] 16 U.S.C. § 1361.
[4] 16 U.S.C. § 1371(a), 1372(a).
[5] 16 U.S.C. § 1371(b).
[6] *United States v. Lillard*, 935 F.3d 827, 833 (9th Cir. 2019).
[7] *Id.* at 833-834.

> 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 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.[8]

The terms "Indians," "Aleuts," and "Eskimos" are not further defined in the MMPA and are sociological terms that can apply broadly or narrowly.

Dictionary definitions of "Indian," "Aleut," and "Eskimo" do not provide much guidance other than that each definition begins with "a member" generally of an "Indigenous people[]" and none of the definitions include any reference to blood quantum or other similar limiting criteria.[9] According to a leading treatise: "Who counts as an Indian for purposes of federal Indian law varies according to the legal context. Federal law provides no universally applicable definition. Furthermore, many federal definitions associate Indian status with citizenship in a tribe under tribal law, so the different citizen criteria tribal nations employ must be folded into federal definitions of who is an Indian."[10]

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[8] 16 U.S.C. § 1371(b).

[9] The Oxford English Dictionary defines "Indian" in relevant part as "A member of the Indigenous peoples of (any part of) the Americas" and noting that "Inuit of northern Canada and Alaska are often excluded from this term." Oxford English Dictionary, "Indian (adj. & n.)," https://www.oed.com/dictionary/indian_adj?tl=true (last visited December 30, 2024). The Merriam-Webster Dictionary defines "Indian" in relevant part as "a member of any of the Indigenous peoples of the western hemisphere except often certain peoples (such as the Yupik and Inuit) who live in arctic regions." Merriam-Webster Dictionary, "Indian (noun)," https://www.merriam-webster.com/dictionary/Indian#word-history (last visited December 26, 2024). The Oxford English Dictionary defines "Aleut" as "A member of a people native to or inhabiting the Aleutian Islands, other islands in the Bering Sea, and parts of western Alaska." Oxford English Dictionary, "Aleut, (n. & adj.)," https://www.oed.com/search/dictionary/?scope=Entries&q=Aleut (last visited December 26, 2024). The Merriam-Webster Dictionary defines "Aleut" as "a member of a people of the Aleutian and Shumagin islands and the western part of Alaska Peninsula." Merriam-Webster Dictionary, "Aleut (noun)", https://www.merriam-webster.com/dictionary/Aleut (last visited December 26, 2024). The Oxford English Dictionary defines "Eskimo" as "A member of any of several closely related Indigenous peoples inhabiting the Arctic coasts of Canada and Greenland, and parts of Alaska …." and noting that the word "Inuit" has generally superseded the word "Eskimo" but that "Eskimo … is the only term which applies to the Eskimo peoples as a whole, including not only Inuit of Canada, Greenland, and Alaska, but also the Yupik of Siberia and the Inupiaq of Alaska." Oxford English Dictionary, "Eskimo (n. & adj.), https://www.oed.com/search/dictionary/?scope=Entries&q=Eskimo&tl=true (last visited December 26, 2024). The Merriam-Webster Dictionary defines "Eskimo" as "a member of a group of Indigenous peoples of southwestern and northern Alaska, Greenland, eastern Siberia, and especially in former use arctic Canada." Merriam-Webster Dictionary, "Eskimo (noun)", https://www.merriam-webster.com/dictionary/Eskimo (last visited December 26, 2024).

[10] Cohen's Handbook of Federal Indian Law § 4.03[1], p. 214 (N. Newton and K. Washburn eds. (2024)).

To determine the plain meaning, courts will "examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy."[11] When the D.C. District Court reviewed the statutory scheme of the MMPA, it found:

> Substantively, two major competing policy considerations are here involved the need for protecting marine mammals from depletion, on the one hand, and the responsibility of the federal government to protect the way of life of the Alaskan Natives (see pp. 428-429, [i]nfra), including their tradition of hunting marine mammals for their subsistence, on the other. What emerges vividly from an examination of the total statutory scheme is that the Congress carefully considered these competing considerations and deliberately struck a balance which permits continued hunting by the Alaskan Natives as long as this is done in a non-wasteful manner, is restricted to the taking of non-depleted species, and is accomplished for specified, limited purposes.[12]

The statute is best understood to mean that members of an Indian, Aleut, or Eskimo Tribe or Group who reside in Alaska qualify for the exemption if the other limitations (resides in Alaska, dwells on the coast and non-wasteful taking) are satisfied. The text of the MMPA provides no support for a limitation based on a minimum blood quantum either directly by incorporating a minimum blood quantum or indirectly through a reference to the statutory provision in ANCSA or other provision of law that contains a minimum blood quantum.

ii. History of the Statutory Language

As originally enacted, section 101(b) of the MMPA[13] stated:

> The provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—
>
> (1) is for subsistence purposes *by Alaskan natives who reside in Alaska*,[14] 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.

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[11] *Children's Hosp. & Health Center v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999).

[12] *People of Togiak v. United States*, 470 F. Supp. 423, 426-27 (D.D.C. 1979).

[13] When the law was codified at 16 U.S.C. § 1371, the U.S. Code added a heading to subsection 101(b) stating, "Exemptions for Alaskan natives." Language added in the codification is not a part of the law, but merely a tool for helping the reader understand the organization for the section and should not be considered when interpreting the statute. A helpful website to see the MMPA as amended is https://www.govinfo.gov/content/pkg/GOVPUB-Y3_M33_3-PURL-gpo117958/pdf/GOVPUB-Y3_M33_3-PURL-gpo117958.pdf.

[14] Italics added here to denote language subsequently removed in the 1981 Amendments to the MMPA. The clause "by Alaskan natives" was deleted entirely from section 101(b) and the clause "who reside in Alaska" was moved to just after the initial "any Indian, Aleut, or Eskimo" in the first clause of Section 101(b). Section 2 of P.L. 97-58 (October 9, 1981); 95 Stat. 979, 981).

> 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 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.[15]

However, the changes to the statute in other sections demonstrate that the removal of "Alaskan natives" from section 101(b)(1) was not meant to change who is included as "Indian, Aleut, or Eskimo." The 1981 Amendments inserted "Alaskan Natives" into other sections of the MMPA which refer back to the exemption.[16] In the MMPA, Congress appears to consider the phrase "Indians, Aleuts, and Eskimos who reside in Alaska" to be synonymous with "Alaskan Natives." However, just as the statute leaves undefined who is considered "Indian, Aleut, or Eskimo," it also leaves "Alaskan Native" undefined.

iii. Use of the same terms in other statutes

Around the same time the MMPA was enacted, Congress included a similar exception in the Endangered Species Act that allowed for the take of endangered species for subsistence purposes by "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska."[17] Consequently, in 1980, the D.C. Circuit Court of Appeals recognized that:

> (e)very statute and treaty designed to protect animals or birds (e.g., Marine Mammal Protection Act, 16 U.S.C. § 1371(b); ESA, 16 U.S.C. § 1539(e)) has a specific exemption for Native Alaskans who hunt the species for subsistence purposes. These statutes have been construed (e.g., *People of Togiak v. U.S.*, 470 F. Supp. 423, 428 (D.D.C. 1979)) as specifically imposing on the Federal government a trust responsibility to protect the Alaskan Natives' rights of subsistence hunting.[18]

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[15] P.L. 92-522 (Oct. 21, 1972) (emphasis added); 86 Stat. 1027, 1031.

[16] In the same 1981 Amendment, Congress amended section 109(e)(2)(B), where the MMPA provides for what happens when a State that has taken over management under the Act and that management is returned to the Federal government. It provides that the Secretary shall regulate the taking of marine mammals in that case and specifies that "in the case of Alaskan Natives, section 101(b) and subsection (i) of this section shall apply upon such revocation or return of management authority." Additionally in section 508(a)(1), added by Pub. L. 109–479, title IX, § 902(a), Jan. 12, 2007, 120 Stat.
3664 and codified at 16 U.S.C. § 1423g(a)(1), the MMPA refers to the exemption as "the exemption for Alaskan natives under section 101(b) of this Act as applied to other marine mammal populations."

[17] Section 10 of the Endangered Species Act of 1973, P.L. 93-205, 87 Stat. 884 (1973); codified at 16 U.S.C. § 1539(e)(1)(A).

[18] *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980).

However, none of the laws and treaties considered by that court require a particular blood quantum to demonstrate status as an Indian, Aleut, or Eskimo.[19]

The Alaska Native Allotment Act of 1906, as amended in 1956, also used "Indian, Aleut, and Eskimo" to encompass all of the Native populations of Alaska.[20] For similar purposes, the Alaska Native Townsite Act of 1926 used "Indian or Eskimo."[21] Both acts specified that the terms include "full or mixed blood" but neither specify a minimum blood quantum.

The same Congress passed both the MMPA and the Alaska Native Claims Settlement Act of 1971 (ANCSA).[22] ANCSA uses "a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla[23] Indian Community) Eskimo, or Aleut blood, or combination thereof ..." within its definition of the term "Native".[24] Despite the 92nd Congress passing both Acts, the MMPA does not use this definition of Native or otherwise offer any delineation of Indian, Aleut, and Eskimo. The ANCSA also uses "Alaska Native" in the same definition of Native, but the MMPA used "Alaskan native" within the original language of section 101(b)(1). No explanation in the legislative history was found for why the MMPA used "Alaskan native" and "Indian, Aleut, and Eskimo" instead of "Alaska Native" or "Native." Notably, with the MMPA enacted less than a year after ANCSA, the drafters of the MMPA had at their disposal the language in ANCSA concerning blood quantum and did not include it in the MMPA or any cross-reference to ANCSA.

iv. Indian Canon of Construction

An important canon of construction for this statute is that "[s]tatutes that touch upon federal Indian law 'are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"[25] Most notably, the District Court for the District of Columbia used this canon in a case called *People of Togiak v. U.S.* when it found the section 101(b) exemption preempts State regulation of subsistence harvesting by Alaskan Natives even after the State of Alaska assumed management authority under the MMPA for walrus pursuant to section 109 of the MMPA.[26] The Ninth Circuit similarly applied this canon when finding that a regulation impermissibly limited the eligibility of who qualifies as Indian for the purposes of higher education grants.[27] Thus, when applying this canon of construction to section 101(b), a court would almost certainly construe "Indians, Eskimos, and Aleuts who reside in Alaska" to the benefit of Alaska Natives and reject regulatory or interpretative limitations, such as a minimum blood quantum, not found in the MMPA.

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[19] *Id.*
[20] 43 U.S.C. § 270-1 (originally enacted in 1906, repealed in 1971).
[21] 43 U.S.C. § 733 (originally enacted in 1926, repealed in 1971).
[22] 43 U.S.C. §§ 1601 et seq.
[23] Spelling used in the original ANCSA text. Probably should be "Metlakatla."
[24] 43 U.S.C. § 1602(b).
[25] *See Metlakatla Indian Cmty. v. Dunleavy*, 58 F.4th 1034, 1042 (9th Cir. 2023) (citing *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)).
[26] *People of Togiak v. United States*, 470 F. Supp. 423, 428 (D.D.C. 1979).
[27] *Zarr v. Barlow*, 800 F.2d 1484, 1493 (9th Cir. 1986).

v. Legislative history

When a statutory term is ambiguous, courts will often turn to the legislative history to determine if Congress clarified the meaning of the term. While addressing the need for a moratorium on the taking of marine mammals, Congress explicitly recognized the need to protect certain Indians, Aleuts, and Eskimos from the effects of the Act. Congress recognized that "Many Alaska Natives, particularly Eskimos along the coast, depend upon ocean mammals for their existence." (statement of Sen. Stevens).[28] Senator Stevens further explained:

> Mr. President, I believe that passing this bill without this exception would disastrously affect the Alaskan Natives. If this exception were not included, Alaskan Natives would lose their traditional way of life, the way they have lived for centuries, dependent upon seals, walruses, and whales. This way of life has not adversely affected the numbers of any of ocean mammals. As one Eskimo told me during Senate Commerce Committee hearings in Alaska last May our taking away the Natives' right to hunt these animals would be similar to taking away "beef from the non-native people." If we deprived non-native people of beef, pork, and chicken, this would be doing just what we would do to the Eskimos if we deprived them of seal, walrus, and whale.[29]

The Senator also pushed strongly for an amendment to provide an exemption for the taking of marine mammals for the purpose of Native handicraft. Stevens explained:

> the way of life of the Alaskan Native is threatened by the proposed legislation. If Congress enacts provisions outlawing all but subsistence hunting by Alaskan Natives, not only will this group of Americans have their economic livelihood stripped from them, but they will face the certain fate of cultural extinction.[30]

His emphasis on protecting culture continued:

> . . . I urge the Senate to reach a reasonable solution to the problem and to take into account not only the biological aspect, but also the sociological and anthropological effects of this legislation. We must not destroy a civilization in the process.[31]

Senator Hollings acknowledged that an early version of the MMPA has "carefully and considerately exempted from the act the Alaskan Eskimos, Aleuts, and Indians who rely upon the marine mammals for food and clothing as well as their small, limited cash economy."[32] Senator Stevens concurred, saying "[w]e have sought a solution that would protect the mammals, yet not wipe out the Eskimo culture and several important native handicraft activities in the process."[33]

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[28] 118 Cong. Rec. 8400 (1972).
[29] 118 Cong. Rec. 25258 (1972).
[30] 118 Cong. Rec. 8400 (1972).
[31] 118 Cong. Rec. 8401 (1972) (emphasis added).
[32] 118 Cong. Rec. at 25254 (Statement of Sen. Hollings).
[33] 118 Cong. Rec. at 25258 (Statement of Sen. Stevens).

Senator Hollings also praised the legislation's ability to protect the Indians, Aleuts, and Eskimos.[34]

While the legislative history clearly reflects Congress's intent to protect Indian, Aleut, and Eskimo people and their way of life, it does not shed light on the scope of these terms or otherwise explain how a person may qualify as an Indian, Aleut, or Eskimo for purposes of the Act. The Department of Commerce recommended that Congress add the following definition to the MMPA: "(e) 'Natives' shall mean any Indians, Aleuts, Eskimos, or other aborigines traditionally deriving their subsistence or livelihood, in whole or in part, by taking marine mammals."[35] However, this recommendation was not adopted, and no attempt was made in either the legislative history nor in the Act to define who qualifies as Indian, Aleut, or Eskimo.

In sum, the legislative history as a whole[36] demonstrates the Congressional intent to protect not just a food source, but the cultural identity and way of life for the Indians, Aleuts, and Eskimos who dwell on the coast in Alaska. The statements supporting the exemption highlights the importance of the ability to hunt marine mammals for subsistence and use the materials to create Native handicraft to coastal-dwelling Alaska Native peoples. While the legislative history does not clearly define what qualifies a person as an Indian, Aleut, or Eskimo, it demonstrates the exemption was intended to allow Native harvest of marine mammals to continue, such that Native traditions, ways of life, and cultural identities may be preserved.

Interpreting the section 101(b) exemption as applicable only to individuals with a minimum blood quantum would, in practice, serve to increasingly frustrate this Congressional intent over time. Data from a 2016 Sealaska Heritage Institute report shows how quickly blood quantum is reduced in successive generations.[37] While this data reflects only the Sealaska region, statistically, the same pressures will hit all regions in time; the proportion of the population that will be ineligible if a one-fourth blood quantum is applied as an eligibility criterion is destined to grow in all regions, although both the percentages and rate of the increase in ineligibility will vary by region.

In a recent letter to the FWS, Richard Peterson, the President of the Central Council Tlingit and Haida Indian Tribes of Alaska stated:

> the most detrimental effect of this arbitrary regulation is that it is preventing the passage of traditional knowledge and skills from our elders to our younger tribal citizens. Our tribal citizens who can legally harvest sea otters and work with sea otter pelts often cannot teach their skills to other tribal citizens because those

[34] 118 Cong. Rec at 25285 ("Then, too, we have to protect the Aleuts, Eskimos, and Indians, and they are protected.") (Statement of Sen. Hollings).
[35] H.R. Rep. No. 92-70, at 37 (1971).
[36] A review of the legislative history for the 1981 Amendment did not identify material that addresses who qualifies as Indian, Aleut, or Eskimo.
[37] S. Langdon, Determination of Alaska Native Status Under the Marine Mammal Protection Act, at 30-43.

> citizens do not meet the one fourth blood quantum standard. Our young people need to learn these necessary skills to keep our cultural practices alive.[38]

The application of a blood quantum requirement has the potential of creating a real-world effect where it is increasingly more difficult to pass on cultural practices from one generation to another. Over time, the data suggests this dilution effect will worsen.

To summarize, the plain language of the MMPA does not define how a person must qualify as an Indian, Aleut, or Eskimo or impose a minimum blood quantum or other limitation on qualifying; the Indian canon of construction dictates that any interpretation of the terms Indian, Aleut, or Eskimo must be construed in favor of the person claiming to be an Indian, Aleut, or Eskimo; and, the legislative history highlights congressional intent to continue the Alaska Native culture and civilizations without reference to any technical limitation concerning who qualifies as an Indian, Aleut, or Eskimo by blood quantum or otherwise.

B. Regulation

i. Regulatory Authority

There are three sources of regulatory authority in the MMPA. Section 103 of the MMPA provides:

> The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 2 of this Act.[39]

Section 112(a) of the MMPA provides more broadly:

> The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this title.[40]

Last, within the exemption provision itself, section 101(b) provides:

> 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

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[38] Letter from Richard Peterson, President, Central Council of Tlingit and Haida to Sara Boario, Alaska Regional Director, U.S. Fish and Wildlife Service, *Request to Enter into a Co-Management Agreement between the USFWS and the Central Council of Tlingit & Haida Indian Tribes of Alaska,* dated October 2, 2023.
[39] 16 U.S.C. § 1373.
[40] 16 U.S.C. § 1382(a).

> 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.[41]

As used here, "Secretary" refers to the Secretary of the Interior with respect to marine mammals managed by the FWS (*e.g.*, polar bears, walruses, and sea otters), and to the Secretary of Commerce with respect to marine mammals managed by the National Marine Fisheries Service (NMFS) (*e.g.*, whales and seals). These Secretaries have delegated certain MMPA authorities to FWS and NMFS, respectively, and both FWS and NMFS have promulgated regulations intended to clarify ambiguities concerning who is eligible to harvest marine mammals pursuant to section 101(b).

ii. FWS's Implementing Regulation

This analysis considers whether FWS's regulation implementing section 101(b) of the MMPA is consistent with the best reading of the statute. As discussed below, the regulatory definition of "Alaskan Native" largely adopts the definition in the Alaska Native Claims Settlement Act but does not reflect the nuances of the MMPA regulatory scheme.[42] In its entirety, the FWS's regulatory definition states:

> *Alaskan Native* means 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 Metlaktla[43] 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. [44]

The differences in this language from the ANCSA definition of "Native" are the addition of the citation to the ANCSA,[45] the inclusionary language for the people of the Metlakatla Indian Community, the inclusion in the last sentence of a third way to show a person is an Alaskan

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[41] 16 U.S.C. § 1371(b).
[42] *See* 50 C.F.R. § 18.3.
[43] Spelling used in the original ANCSA text. Probably should be "Metlakatla."
[44] 50 C.F.R. § 18.3. *See also* 39 FR 7262, Feb. 25, 1974, as amended at 70 FR 48323, Aug. 17, 2005.
[45] The citation in the regulation to the ANCSA definition is incorrect. It should state 43 U.S.C. section 1602(b).

Native by being on the ANCSA rolls, and the FWS's regulation uses "Native village or Native town"[46] instead of "Native village or group."

While the MMPA text and legislative history contain no direct or indirect reference to the ANCSA definition of "Native," that does not necessarily mean, and this memorandum does not conclude, that the general use of the ANCSA definition in the FWS's regulation is problematic for determining whether a person qualifies for the section 101(b) exemption.[47] This memorandum focuses on a particular aspect of the definition that is susceptible to more than one interpretation, one of which is inconsistent with the MMPA. Understanding the issue here requires additional analysis of FWS's regulatory definition.

FWS's definition describes multiple means of qualifying as an "Alaskan Native" for the purpose of harvesting marine mammals, and qualifying under any one of these means is sufficient to render an individual eligible to harvest. Briefly summarized, the first is based on possessing at least one-fourth degree of Alaska Indian, Eskimo, or Aleut blood (or combination thereof), the second is being regarded as an Alaska Native, and the third is based on enrollment under ANCSA. The standards for qualifying under the first and third means are clear and unambiguous, *i.e.*, a prospective harvester either meets the one-fourth blood quantum standard or does not meet that standard, and a prospective harvester is either enrolled under ANCSA or is not so enrolled. For this reason, these two standards require no further discussion or analysis herein. However, there is ambiguity with respect to the second means of qualifying, which reads in its entirety:

> 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 (or, if deceased, was) regarded as a Native by any Native village or town.

The key question concerns whether the clause "in the absence of proof of minimum blood quantum" serves to limit the scope of who may qualify as "Alaskan Native" pursuant to the remainder of the sentence by excluding individuals with a blood quantum of less than one-fourth degree.

The rationale that it does impose such a limitation stems from an application of statutory construction applied to regulations, i.e., reading regulations as a whole and, if possible, giving effect to every word and every provision. It can be argued that the only way to give effect to the clause "in the absence of proof of minimum blood quantum" is as a limitation; after all, FWS could have allowed individuals with blood quantum of less than one-fourth degree to nevertheless qualify as "Alaskan Natives" by simply omitting the clause from its regulatory definition.

But this is not the only possible interpretation. One can alternatively interpret the clause "in the absence of proof of minimum blood quantum" as a recognition that not all Alaska Natives have

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[46] FWS regulations define "Native village or town" to mean "any community, association, tribe, band, clan, or group." 50 C.F.R. § 18.3.

[47] Many federal bureaus have adopted the definition of Native from the ANCSA for Alaska Natives in their regulations, including the Small Business Administration, Veterans Affairs, Bureau of Land Management, Bureau of Indian Affairs, FWS, and NMFS.

proof of their blood quantum and those who do not meet the blood quantum may still qualify as "Alaskan Natives" via the means described in the remainder of the sentence. This interpretation gives greater effect to the first clause, "[i]t also includes," which suggests an alternate means of qualifying that is largely rendered ineffective if it applies only to that category of individuals who have greater than the minimum blood quantum but cannot prove it. It is not unusual for regulatory provisions to address practical realities related to demonstrating and verifying compliance, as is illustrated by the final sentence of this "Alaskan Native" definition, which describes a scenario under which eligibility "shall be conclusively presumed" but does not articulate additional eligibility criteria per se.

Past interpretations of the regulatory language have assumed a restrictive reading of the clause and concluded that any Alaska Native with a blood quantum of less than one-fourth cannot qualify as "Alaskan Native" for the exemption. The view expressed has been either taken or assumed by FWS at various points in time by various officials. But this interpretation found its support in analyses focused only on the regulatory language and created a restriction that is absent from the MMPA text, not addressed in its legislative history, and contrary to case law interpreting analogous statutory and regulatory provisions.

Courts have struck down FWS regulations that imposed restrictions on the section 101(b) exemption that were not found in the statutory text. In 1976, the State of Alaska took over the management of walrus in Alaska pursuant to section 109 of the MMPA. In order for the State to manage walrus, while still following the State's constitutional mandate that all people are treated the same, the FWS adopted a regulation that rescinded the MMPA Native exemption for the take of walrus and allowed management in accordance with title 16 of the Alaska Statutes.[48] The D.C. District Court in a case called *People of Togiak* found the FWS regulation improperly contravened the provisions of section 101(b) and found the regulation invalid.[49]

A similar result occurred in a 1991 Alaska District Court opinion in *Didrickson v. U.S.*, in which the Court found that FWS lacked authority to adopt a regulation which prohibited the take of sea otters for the purpose of creating native handicraft without any showing the sea otter population was depleted.[50] The Court found "the term 'authentic native article of handicraft or clothing' was not left undefined by Congress" in the MMPA.[51] Therefore, the Court resolved the question as to whether or not the Secretary's interpretation is consistent with that definition as a matter of pure statutory construction and found no need to give deference to the agency's interpretation.[52]

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[48] *People of Togiak*, 470 F. Supp. at 425.

[49] *Id.* at 425 and 430. The 1981 Amendments referred to in the History of the Statutory Language section added "Except as provided in section 109" to section 101(b) following *People of Togiak* to expressly allow State management to override the MMPA Native exemption. Section 2 of P.L. 97-58 (October 9, 1981); 95 Stat. 979, 981.

[50] *Didrickson v. United States Dep't of the Interior*, 796 F. Supp. 1281, 1291 (D. Alaska 1991), *upheld by Beck v. United States Dep't of Commerce*, 982 F.2d 1332 (9th Cir. 1992). The Didrickson Court also acknowledged it was coming to a different conclusion than it had in *Katelnikoff v. United States Dep't of the Interior*, 657 F. Supp. 659 (D. Alaska 1986), where the Court had previously upheld FWS' ability to adopt regulations which limited the types of Native handicraft.

[51] *Id.* at 1288.

[52] *Id.*

In the 1990 case of *Clark v. U.S.*, the Ninth Circuit upheld a FWS regulation defining "wasteful manner" from section 101(b)(3) of the MMPA.[53] The regulation defined wasteful manner as a process "which results in the waste of a substantial portion of the marine mammal . . . ."[54] The Court found in "light of the legislative history, the regulation does not exceed the statutory authority."[55] While predating *Didrickson*, *Clark* confirms, notwithstanding a potential interpretation of *Didrickson*, FWS authority to promulgate regulations that interpret ambiguous section 101(b) terms (including the "Indian, Aleut, or Eskimo who resides in Alaska" clause relevant here) without first making a depletion finding as long as those regulations do not restrict the harvest of a particular stock or species.

In 1986, the Ninth Circuit reviewed a Bureau of Indian Affairs (BIA) regulation that, like the current FWS regulation, created a blood quantum requirement not contemplated in the statute.[56] The BIA promulgated a regulation establishing a requirement that an applicant must have a blood quantum of at least one-fourth Indian blood to be eligible for a higher education grant.[57] The Court reviewed the Snyder Act, 25 U.S.C. § 13, which provides the authority for the BIA to make grants for education, to determine if the regulation is "consistent with governing legislation."[58] The Court found the "Snyder Act nowhere contains a definition of Indian or any restrictive eligibility standard; therefore, it would have been reasonable for the BIA to look to other expressions of congressional intent in formulating an eligibility standard to 'fill the gap.'"[59] The Court then reviewed other recent changes to Indian law to see Congress has been removing blood quantum requirements in other contexts, including school funding.

> Where Congress has determined to make Indian blood quantum an eligibility factor in the past, it has expressly so provided. See, e.g., 25 U.S.C. § 297. It did not do so in the Snyder Act, and we refuse to construe its general language authorizing appropriations for educational assistance for "the Indians throughout the United States" as authority to continue restrictive distinctions among members of federally recognized tribes.[60]

Last, the Court applied the canon of construction that ambiguities in laws intended for the benefit of Native Americans need to be resolved in favor of Native Americans.[61] The Court concluded that the regulation fell outside of BIA's authority, and that it was not reasonably related to the purposes of the various congressional enabling acts.[62]

People of Togiak, *Didrickson*, and *Clark*, when considered collectively, demonstrate a reviewing court will take a hard look at a regulation that places restrictions on the MMPA native exemption. A court will review the statutory text and legislative intent and invalidate regulations that fail to give full force to the exemption. The definition of "Alaskan Native" at 50 C.F.R. § 18.3, if

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[53] *Clark v. United States*, 912 F.2d 1087, 1090 (9th Cir. 1990).
[54] 50 C.F.R. § 18.3 (1989).
[55] *Clark*, 912 F.2d at 1090.
[56] *Zarr*, 800 F.2d at 1485.
[57] *Id.* at 1485 (citing 25 C.F.R. § 40.1).
[58] *Id.* at 1489.
[59] *Id.*
[60] *Id.* at 1492.
[61] *Id.* at 1493.
[62] *Id.*

applied in a restrictive manner, would also create a restriction on the Native exemption that is neither reflected in the MMPA nor supported by the legislative intent of protecting Native culture. Similarly, the *Zarr* case reflects another instance in which a court interpreted a law for the benefit of Natives and invalidated a regulation that created a limitation on the law's benefit. The *Zarr* Court found the current trend away from using blood quantum in legislation further undercut the reasonability of BIA's choice to adopt a blood quantum standard in its regulation, which suggests a court would not support a restrictive reading of 50 C.F.R. § 18.3 that inserts a blood quantum requirement into the MMPA exemption. Last, both the *Didrickson* and *Zarr* courts were careful to consider the authority for the agency to issue the regulations. In *Didrickson*, the court reviewed a regulation addressing other language within section 101(b) and found it invalid due to a lack of authority. If strictly followed, a court could invalidate the definition of Alaskan Native in 50 C.F.R. § 18.3 because FWS did not first establish the presence of a depleted resource prior to issuing a regulation affecting the exemption. However, the *Didrickson* rationale is best understood as limited to circumstances where the regulation attempts to place limits on the take of specific species or stocks of marine mammals, like the sea otters in that case.[63]

Another significant consideration in this analysis is that, like the court in *Zarr,* the Indian canon of construction, although typically applied to statutory interpretation, is also appropriately used in construing an ambiguous regulation. Accordingly, the phrase "in the absence of proof of a minimum blood quantum" would likely be interpreted by a reviewing court in a permissive, not restrictive, fashion that benefits Native hunters. As the Ninth Circuit has indicated, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[64]

iii. The ANCSA Definition

While the MMPA text and legislative history lack any direct or indirect reference to the ANCSA definition of "Native," it is instructive to review any relevant caselaw and legislative history regarding that ANCSA definition to the extent it may shed light on the interpretation of the regulation.

While no court has squarely confronted the interpretation, dicta from court cases reviewing the ANCSA definition of "Native" support a permissive reading of the phrase "in the absence of proof of a minimum blood quantum" as the process that is followed when a person either cannot prove or does not meet the minimum blood quantum.[65] Courts have read the ANCSA definition

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[63] Notably, the regulation upheld by the *Clark* court provides a definition for a word within section 101(b) and was promulgated under section 112 of the MMPA. 912 F.2d at 1090.

[64] *U.S. v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (*quoting Jones v. United States*, 529 U.S. 848, 858 (2000)).

[65] Relatedly, see Resolution 24-01 of the Alaska Federation of Natives, which requests the federal government to "amend the different definitions of 'Alaska Native' in ANCSA, ANILCA, and the Marine Mammal Protection Act to create one unified definition of 'Alaska Native' which removes the federally defined one-fourth Native blood quantum eligibility and instead allows for self-determination by including citizens of Federally Recognized Tribes, and voting shareholders of Alaska Native Corporations ..." https://nativefederation.org/wp-content/uploads/2024/10/2024-AFN-Resolutions.pdf.

as providing two independent methods to establish a person is Native. In a concurring opinion, Justice Breyer used the ANCSA definition as an example of a broad statute:

> The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement).[66]

The Alaska District Court has likewise read the phrase as providing a second way to establish a person as Native without reference to blood quantum.

> "Natives" means both persons of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood or combination thereof but also any person who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or if deceased, was) regarded as Native by the village or group.[67]

The issues raised in both cases did not require the court to interpret the ANCSA definition, but each court expressed a view in dicta that supports a permissive reading of the "in the absence of proof of minimum blood quantum" clause.[68]

The legislative history of this definition in ANCSA also provides insights on how the definition was intended to be applied. During consideration of the bill, it was argued that the definition should apply a requirement of one-quarter blood quantum to avoid inflating the number of people enrolled as Natives thus diluting the settlement amongst more people.[69] However, the Alaska Federation of Natives (AFN) provided comments that are instructive as to the reasons the definition of "Native" was expanded:

> Two changes are suggested. First the Task Force desired to extend benefits of the settlement to Alaska Natives who are adopted by non-natives. Without appropriate language, such persons would probably not be included on the rolls.
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> Second, there are many natives who are uncertain of their blood lines but they are regarded by their people as natives. The most striking example are the Aleut

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[66] *Rice v. Cayetano*, 528 U.S. 495, 526, 120 S. Ct. 1044, 1061-62 (2000) (Breyer concurrence) (citing 43 U.S.C. § 1602(b)).

[67] *Cape Fox Corp. v. United States*, 456 F. Supp. 784, 798 (D. Alaska 1978) (citing 43 U.S.C. § 1602(b)).

[68] No case law was found in which the phrase "in the absence of proof of minimum blood quantum" in the ANCSA definition, or any of the regulations adopting that definition, was at issue in a case or directly addressed by a court.

[69] From the 1971 Senate Report: "The Act, through the operation of this subsection, provides benefits only to the descendents [*sic*] of those tribes, bands, and groups of Indians, Eskimos and Aleuts who are of one-fourth degree or more Alaska Indian, Eskimo or Aleut blood, or a combination thereof. The language of the subsection as approved by the Committee provides that in cases where there is no proof of blood quantum, the views of the members of the Village or Native group may be determinative as to whether an individual is eligible for enrollment as a "Native" under this Act. When there is proof that a person does not qualify the views of members of the Village would be immaterial." S. Rep. 92-405 at 109 (92d Cong., 1st sess., Oct. 21, 1971) (emphasis added).

> people who have been in contact with white men for hundreds of years. The proposed amendment permits a person of Native ancestry to be included in the absence of proof as to minimum blood quantum and even if the blood quantum is known to be less than one-quarter native, provided such person and at least one parent is regarded as Native.
>
> The AFN has no strong opinion on blood quantum. Under the Task Force bill one-quarter blood was included as a requirement largely in the belief that the Department of the Interior desired it, and also to avoid undue inflation of the rolls. However, the task force proposal, S. 2906/H.R. 15049, permits benefits to be extended to persons of less than one-quarter blood in a manner somewhat similar to such provisions in Section 10 of this bill.[70]

While the relevant caselaw and legislative history of the ANCSA definition provide certain insights into the interpretation of the FWS regulatory definition, they are ultimately inconclusive as to the best interpretation under the MMPA.

III. Conclusion

The U.S. Fish and Wildlife Service should interpret its existing regulations at 50 C.F.R. § 18.3 as providing three independent means of qualifying as an "Indian, Aleut or Eskimo" for purposes of the section 101(b) exemption of the MMPA. More specifically, FWS may not interpret its regulations as precluding persons who lack one-fourth blood quantum from qualifying as "Indian, Aleut, or Eskimo" if they are "regarded as an Alaska Native by the Native village or town of which he claims to be a member" and their "father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town."

However, qualifying as "Indian, Aleut, or Eskimo" does not itself establish eligibility to take marine mammals pursuant to section 101(b) because this statutory exemption is further limited to those who reside in Alaska and dwell on the coast of the North Pacific Ocean or the Arctic Ocean. Also, section 101(b) only exempts take that is conducted for subsistence purposes or for purposes of creating and selling authentic Native articles of handicrafts and clothing, and that is not accomplished in a wasteful manner.

[70] 114 Cong. Rec. 21943 (1968).