



The Protection of Alaska Native Subsistence Rights and Use: Options and Considerations for More Comprehensive Alaska Native Subsistence Rights and Use

Presentation for the Alaska Federation of Natives

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To Recap...

- **Workshop 1: Overview of Alaska's Subsistence Framework**
 - Review of Alaska's subsistence framework, including laws impacting Native subsistence rights such as ANCSA, ANILCA, and MMPA.
- **Workshop 2: Native Participation in Subsistence Decision-Making**
 - Explored the State and federal processes used by Alaska Natives to participate in subsistence hunting and fishing.
- **Workshop 3: Options and Considerations for More Comprehensive Alaska Native Subsistence Rights and Use**
 - <https://www.nativefederation.org/subsistence-action-workshops/>

ANCSA and ANILCA

- **ANCSA extinguished any aboriginal title and hunting/fishing rights.**
 - No explicit protection of subsistence rights, but Congress expected the federal government and State of Alaska would protect the subsistence needs of Alaska Native people.
- **ANILCA provides current subsistence management regime, but priority is for “rural” residents.**
 - Protects subsistence uses on federal lands.
- **State could have managed subsistence uses on federal lands if it had adopted a rural preference on non-federal lands.**
 - State lost regulatory authority over federal lands following *McDowell* (1989)
- **Result → dual federal-state management system**

Current State of Affairs

- **Federal priority from ANILCA Title VIII applies on federal lands.**
- **Non-federal lands (including ANC-owned and tribally owned lands) are subject to the State's subsistence laws.**
- **Other federal statutes have subsistence implications (e.g., MMPA, ESA, MBTA, WCA, etc.).**
- **Some resulting challenges:**
 - Lack of priority for Alaska Natives' subsistence use
 - Multiple species and multiple management frameworks
 - Different management approaches and values
 - No consistent framework for co-management



**What can be done to achieve
meaningful subsistence
management reform?**

Federal Legislative Options

Repeal ANCSA extinguishment clause

- **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.”
- **Options:**
 - Total repeal
 - Repeal limited to public lands
 - Repeal limited to ANCSA lands
- **Would require implementing a replacement framework.**

Amend ANILCA to provide Alaska Native or “Native Plus” priority

- **ANILCA protects subsistence uses on public lands for rural residents of Alaska 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 priority for rural residents could be amended to provide a higher priority for Alaska Natives or Alaska Natives plus rural residents (“Native Plus”).**

Revise definition of “Alaska Native”

- **Revise definition to include members of recognized tribes in Alaska and/or “descendants” of Alaska Natives**
- **Revision of definition in ANCSA**
- **Statute-specific revisions**
 - ANILCA, MMPA, etc.
- **Depending on context, could be addressed through regulation**

Revise ANILCA Title VIII to improve federal subsistence management program

- **Preclude State management on federal lands**
- **Address and protect subsistence fisheries**
- **Authorize Alaska Native management of Alaska Native-owned land**
- **Alaska Native self-determination to support customary and traditional way of life**
- **Recognize that many Alaska Native subsistence users are not “rural”**

Targeted ANILCA amendments to address specific management issues

- **Amend ANILCA § 809 (cooperative agreements) to establish requirements for Alaska Native co-management**
- **Standards for Department of the Interior and Department of Agriculture**
- **Incorporate lessons learned from Ahtna and Kuskokwim efforts**

Revisions to other federal statutes to address discrete issues

- Amend MMPA to address standards for cooperative agreements to address co-management
- Amend MMPA to require consultation with ANOs/development of conflict avoidance agreements regarding incidental take permitting
- Amend MSFCMA to add Alaska Native seat(s) to NPFMC
- Address resource allocation conflicts (e.g., subsistence versus other uses)
- Advocate for funding for ANOs to participate effectively in co-management

Address Alaska Native handicraft issues

- **Amend MMPA to preempt any state bans on ivory**
 - E.g., S. 804 (2019) (Sullivan) ; H.R. 1806 (2019) (Young)
- **Amend MBTA to address issues of Alaska Native articles of handicraft**
 - E.g., S. 2577 (2021) (Sullivan)

Appropriations

- **Lack of funding is significant barrier to effective Alaska Native participation in federal management processes.**
- **Seek congressional appropriations for funding to implement existing programs and allow more effective participation.**

Federal Administrative Options

Executive Order mandating co-management on federal lands

- **Current directives fall short of requiring co-management.**
 - 2016 Secretarial Order 3342 by Secretary of the Interior Sally Jewell
 - “Identifying Opportunities for Cooperative and Collaborative Partnership with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources.”
 - 2021 Joint Secretarial Order 3403 by Secretary of the Interior Deb Haaland and Secretary of Agriculture Thomas Vilsack
 - “Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters.”
- **Executive Order would promote greater ability for Alaska Natives to inform and direct federal management decisions.**
- **Effectiveness could be constrained by existing statutes.**

Incorporate IK/TEK into federal decision-making

- **Federal policy reflects different management approaches and values.**
 - Western science versus indigenous knowledge
 - Species management versus traditional/cultural practices
- **Revise regulations/policies to incorporate Indigenous Knowledge/Traditional Ecological Knowledge.**
 - For example, include IT/TEK as “best available science”
- **Recent agency initiatives:**
 - NOAA Fisheries and National Ocean Service Guidance and Best Practices for Engaging and Incorporating Traditional Ecological Knowledge in Decision-Making (2019)
 - Extends beyond federally recognized tribes and Alaska Native corporations to apply to the collection and use of TEK from Indigenous peoples regardless of federal recognition status
 - White House Office of Science & Technology Policy/Council and Environmental Quality Memorandum on Elevating ITEK in federal scientific and policy processes

Amend definition of “rural”

- **Amend process for evaluating community status as rural or non-rural to curtail overbreadth of non-rural determinations.**
- **Options:**
 - Treat tribes as a “community/population” like a city or census designated place or group of census designated places is treated.
 - Require FSB to give greater weigh to socioeconomic factors or community characteristics when considering aggregation of communities for purposes of determining rural/nonrural status.

Adopt regulations for Alaska Native co-management

- **Amend regulations for more effective implementation of ANILCA Sec. 809.**
- **Move from “cooperative agreements” to “co-management agreements.”**
- **Regulations for co-management under MMPA and other statutes.**

Extend federal jurisdiction under Title VIII of ANILCA to Alaska Native allotments

- **Alaska Native allotments are currently managed under the State management regime.**
- **Could amend ANILCA regulations to bring allotments within the federal subsistence management framework.**

Secretarial Order declaring Title VIII of ANILCA as “Indian legislation”

- **Would direct that the subsistence management program be implemented in a manner that resolves ambiguities in ANILCA in a manner that favors the Alaska Native people.**

Expand tribal compacting/contracting of subsistence programs

- **Encourage the federal government to expand its contracting with Alaska tribes and ANCs in operating significant portions of the federal subsistence management program.**

Presidentially authorized working group to examine subsistence reform

- **Request that the President convene a high-level interagency working group to examine and propose reforms to Alaska subsistence management.**
 - Could examine multiple proposals for administrative reform.
 - Focus on Alaska Native relationship to land and continuation of traditional way of life.
- **Potential model of White House Council on Native American Affairs.**

Revise structure and operation of FSB and RACs

- **Move Federal Subsistence Board to be stand-alone office that reports directly to the Secretary of the Interior.**
- **Make further changes to composition of Federal Subsistence Board.**
 - Currently comprised of 8 voting members:
 - One chair (historically an Alaska Native individual)
 - Two rural residents
 - Five agency representatives (BIA, BLM, FWS, NPS, USFS)
- **Increase deference to Regional Advisory Councils.**

State Legislative and Administrative Options

State constitutional amendment authorizing a rural, Native, or “Native plus” subsistence priority

- **Amendment adopting a rural preference would bring Alaska into compliance with Section 805 of ANILCA.**
- **Would allow State of Alaska to seek restoration of management on federal lands.**

Governor commitment to co-management and/or other reforms

- Pursue executive action increasing or requiring co-management of resources on State lands, Alaska Native-owned lands, etc.
- Identify other opportunities for tribes, ANCs, and ANOs to increase participation in State subsistence management programs.

Panel Discussion