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# Subsistence Uses of Resources in Alaska: An Overview of Federal Management

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# Subsistence Uses of Resources in Alaska: An Overview of Federal Management

Certain federal statutes provide avenues for individuals to engage in subsistence uses of natural resources. The term *subsistence uses* or *subsistence* in federal statutes and regulations generally refers to the practice of relying on the surrounding environment as a source of food and materials for daily life. For some, the term *subsistence uses* includes only such nutritional or economic purposes. For others, the concept of subsistence use extends beyond sustenance to encompass activities tied to their historical and cultural identities.

More than any other state, Alaska's residents rely on subsistence uses of natural resources—including the hunting, fishing, harvesting, trading, and consumption of fish, wildlife, and plant life—for their daily nutritional needs. According to federal estimates, rural Alaskans harvest approximately 18,000 tons of wild foods annually for subsistence uses. Although the State of Alaska generally manages subsistence harvests on state lands and certain private lands, the federal government is responsible for managing subsistence uses on federal lands and waters and across all lands for certain species.

Congress has passed numerous statutes that either directly or indirectly provide for the protection and/or recognition of subsistence uses on lands and waters in Alaska. Some of these laws, such as the Alaska National Interest Lands Conservation Act (ANILCA; P.L. 96-487), apply only to subsistence uses of resources located on lands owned and managed by the federal government. Other federal laws may apply to subsistence uses of specific species both on and off federal lands. For example, the Endangered Species Act (ESA; 16 U.S.C. §§1531-1544), the Marine Mammal Protection Act (MMPA; 16 U.S.C. §§1361 et seq.), and the Migratory Bird Treaty Act (MBTA; 16 U.S.C. §§703-712) provide exceptions from certain prohibited activities under the acts to allow qualifying individuals in Alaska to engage in specified subsistence uses of species protected by the acts.

Given the cultural and economic importance of subsistence uses in Alaska, issues related to the protection and management of subsistence use are of significant interest at the local, state, and federal levels. Many of these issues revolve around whether, or the degree to which, the federal government should have a role in managing the subsistence use of resources. Others relate to the extent of the federal government's jurisdiction and whether the federal government has the authority to regulate certain lands and waters for subsistence use purposes. Additional concerns have arisen when state and federal regulations for subsistence uses conflict, particularly in instances when state and federal lands are abutting. Federal agencies also may face challenges balancing their statutory obligations under the various laws that govern the management of lands under their jurisdiction, some of which they may view as conflicting with subsistence hunting, fishing, harvesting and other related subsistence use activities.

Other issues in recent years have focused on the importance of subsistence uses to Alaska Native communities. In particular, some Alaska Native communities have criticized the term *subsistence* for not adequately capturing how such practices are integrated into their cultural, religious, and social systems. These communities also have raised concerns as to whether the current statutory framework adequately protects and prioritizes their traditional subsistence practices and culture. Some Alaska Native communities have suggested that the extension of subsistence use priorities or exemptions under federal law to non-Alaska Native communities does not satisfy commitments the federal government made to Alaska Native communities.

Other concerns have been raised regarding the federal government's ability to regulate subsistence uses effectively due to the size of the federal estate, the complexity of the subsistence use legal framework, and general law enforcement challenges in Alaska. In addition, issues related to climate change have created challenges for traditional subsistence use practices in Alaska and have potential implications for federal land management agencies' subsistence use responsibilities.

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Subsistence uses—including the hunting, fishing, harvesting, trading, and consumption of fish, wildlife, and plant life—are necessary for the livelihood of many residents of Alaska. More than the residents of any other state, Alaska’s residents rely on subsistence uses of fish, wildlife, and plant life for their daily nutritional needs. In particular, subsistence harvests provide Alaska’s numerous rural communities with a large share of their food supply. These communities may not have regular access to commercial food sources due to their distance from urban centers and the high cost of flying foods into some areas. In addition, for many Alaskans, the role of subsistence uses is about more than food consumption and economics; it is directly tied to their history and central to their customs and traditions. In many Alaska Native communities, subsistence uses are vital not only as a source for food but also as they relate to clothing, transportation, trade, ceremonial activities, and other purposes.<sup>1</sup>

Given the cultural and economic importance of subsistence uses to certain communities in Alaska, and the potential for protections of such uses to affect other resource priorities, issues related to the management of subsistence use are of significant interest at the local, state, and federal levels. Both state and federal law have recognized and protected the usage of resources from Alaska’s lands and waters for subsistence purposes. The State of Alaska generally manages subsistence uses on state lands, Alaska Native Corporation (ANC) lands, and other private lands.<sup>2</sup> The federal government manages these practices both on federal lands and in the territorial sea and exclusive economic zone in offshore waters beyond state waters (i.e., generally from 3 to 200 nautical miles from the baseline of low sea level).<sup>3</sup> In addition, the federal government may exercise authority to manage subsistence uses outside federal boundaries when concerning a particular species or a specific region in Alaska.

This report begins with an overview of subsistence uses of resources in Alaska and the traditional and current practices of those who partake in such activities. The report then discusses selected federal statutes that apply to subsistence uses of fish, wildlife, and plant life; their application in Alaska; and how federal agencies implement and administer these statutory requirements. Federal management of subsistence uses of natural resources in Alaska is complex and governed by various laws depending on the type of species involved, where such activities take place, and other factors; this report highlights only certain federal statutes of congressional interest. As part of this discussion, the report explores whether, or to what degree, such statutes provide a preference for certain groups in protecting the right to subsistence practices. Finally, the report examines various issues in which Congress may have, or has previously expressed, an interest.

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<sup>1</sup> For example, see National Park Service (NPS), “Subsistence: Preserving a Way of Life,” at <https://www.nps.gov/gaar/learn/historyculture/subsistence.htm>. See also Bureau of Indian Affairs, “Subsistence Branch,” at <https://www.bia.gov/regional-offices/alaska/subsistence-branch>; and Testimony from Rosita Worl, Alaska Federation of Natives, in U.S. Congress, Senate Committee on Energy and Natural Resources, *Subsistence, To Examine Wildlife Management Authority within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act*, 113<sup>th</sup> Cong., 1<sup>st</sup> sess., September 19, 2013, S. Hrg. 113-118 (Washington: GPO, 2013). Hereinafter referred to as S. Hrg. 113-118.

<sup>2</sup> For more information on Alaska Native Corporations, see CRS Report R46997, *Alaska Native Lands and the Alaska Native Claims Settlement Act (ANCSA): Overview and Selected Issues for Congress*, by Mariel J. Murray.

<sup>3</sup> States are generally responsible for managing offshore waters up to 3 nautical miles (nm) from shore. Federal management of offshore waters generally extends from 3 nautical miles (nm) to 200 nm from shore. This includes territorial seas up to 12 nm seaward of the baseline and the exclusive economic zone (EEZ), which extends up to 200 nm from the baseline. For more information on offshore jurisdictional zones, see CRS Report R45952, *U.S. Offshore Aquaculture Regulation and Development*, by Anthony R. Marshak.

## What Does *Subsistence Uses* Mean?

Although usage varies, generally speaking, the term *subsistence uses* or *subsistence* in federal statutes and regulations refers to the practice of relying on the surrounding environment as a source of food and materials for daily life. For some, the term *subsistence uses* includes only such nutritional or economic purposes. For others, the concept of subsistence use extends beyond sustenance to encompass activities tied to their historical and cultural identity. In particular, some Alaska Native communities have criticized the term *subsistence* and its usage for not adequately capturing how such practices are integrated into their cultural, religious, and social systems.<sup>4</sup> For many Alaska Natives, subsistence uses of fish, wildlife, and plant life are directly tied to their way of life and rooted in their historical and cultural identities.<sup>5</sup> Beyond relying on these resources for food, these communities may rely on harvesting and processing wild resources for clothing, fuel, transportation, construction, traditional arts and crafts, customary trade, and other purposes.

Certain federal laws and regulations—including those that directly address land management in Alaska—include definitions for *subsistence* or *subsistence uses*.<sup>6</sup> For example, the Alaska National Interest Lands Conservation Act (ANILCA), the primary statute governing subsistence activities on federal lands in Alaska, defines *subsistence uses* 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.”<sup>7</sup>

ANILCA does not define *wild, renewable resources*, but agencies generally have interpreted the law to apply to animals; plants, including timber and berries; and other living resources, such as fungi.<sup>8</sup> Other statutes and regulations define *subsistence* similarly but may be narrower in scope due to the applicability of the law in question. For example, implementing regulations for the Migratory Bird Treaty Act (MBTA) define *subsistence* to mean “the customary and traditional harvest or use of migratory birds and their eggs by eligible indigenous inhabitants for their own nutritional and other essential needs.”<sup>9</sup> (See “Selected Federal Statutes Governing Subsistence Uses of Resources in Alaska” for more information.) Generally, laws distinguish between hunting, fishing, or harvesting in the *customary and traditional* nature of subsistence practices and for recreational or commercial purposes.<sup>10</sup>

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<sup>4</sup> S. Hrg. 113-118. See also Isaac Stone Simonelli, “The Subsistence Economy Is More Than Cash and Calories,” *Alaska Native Magazine*, May 16, 2022.

<sup>5</sup> Meghan Sullivan, “Can Indigenous Subsistence Rights Still Be Protected in Alaska?” *KTOO*, October 28, 2021. Hereinafter referred to as Sullivan, “Indigenous Subsistence Rights.”

<sup>6</sup> For the purposes of this report, *subsistence* is used in the context of management of natural resources and the harvesting of such resources for personal or traditional purposes. Other federal laws define *subsistence* for different purposes unrelated to the topics discussed in this report.

<sup>7</sup> 16 U.S.C. § 3113.

<sup>8</sup> See implementing regulations for the Alaska National Interest Lands Conservation Act (ANILCA; P.L. 96-487) at 36 C.F.R. Part 242 and 50 C.F.R. Part 100.

<sup>9</sup> 50 C.F.R. §92.4.

<sup>10</sup> 36 C.F.R. §242.4 defines *customary and traditional use* for the purposes of ANILCA to mean a long-established, consistent pattern of use, incorporating beliefs and customs that have been transmitted from generation to generation, that plays an important role in the economy of the community. Regulations outline an eight-part criteria for determining customary and traditional use at 50 C.F.R. §100.16.

For the purposes of this report, the term *subsistence* is used throughout for consistency and due to the legal significance of the term and its general use within and across federal statutes. However, the usage and description of *subsistence* herein may not fully encompass all aspects of the term or its meaning across all stakeholder groups. CRS recognizes that *subsistence* may have different applicability based on statutory context and that some stakeholders may raise concerns about the adequacy of the term or its scope based on their specific perspectives and interests.

## Brief History and Background

Alaska Native communities have relied on harvesting fish and wildlife resources for subsistence for thousands of years. Various birds, fish, marine mammals, land mammals, and plants have all been historical sources of food and supplies, with some communities more reliant on certain resources due to their geographic location, seasonality, and cultural traditions. Today, both Alaska Native communities and non-Alaska Natives use natural resources for subsistence purposes. Subsistence harvesting of fish and wildlife resources is particularly critical in rural Alaska, where it remains a cornerstone of food security and daily life. This is due, in part, to many rural Alaskans' limited access to commercial centers and the often high cost of retail food across many parts of the state.<sup>11</sup> According to federal estimates, approximately 18,000 tons of wild foods are harvested annually by rural Alaskans for subsistence uses.<sup>12</sup> The largest share comes from harvesting fish, which makes up roughly 56% of the subsistence harvest statewide.<sup>13</sup>

From 1867 (the year the United States purchased Alaska) until Alaska's statehood in 1959, the federal government was primarily responsible for managing Alaska's fish and wildlife resources. Starting in the early 20<sup>th</sup> century, Congress passed numerous laws aimed at restricting hunting practices to protect certain species. Many of these laws expressly exempted hunting and fishing for subsistence uses from such limitations or seasonal closures. For example, the Alaskan Game Law of 1902 restricted the taking of game animals but exempted hunting for food or clothing by "native Indians or Eskimos or by miners, explorers, or travelers on a journey when in need of food."<sup>14</sup> Upon Alaska's statehood, the federal government transferred the general authority to manage fish and wildlife to the new state government, consistent with the traditional role of states in managing such resources, and the Alaskan government subsequently enacted laws recognizing subsistence harvesting of fish and wildlife resources.<sup>15</sup>

In the 1970s and early 1980s, Congress passed legislation that reasserted a federal role in protecting and managing subsistence uses in Alaska for certain species or lands. When Congress

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<sup>11</sup> James A. Fall and Marylynne L. Kostick, "Food Security and Wild Resource Harvests in Alaska," Alaska Department of Fish and Game, Division of Subsistence, July 2018.

<sup>12</sup> Department of the Interior (DOI), "Federal Subsistence Management Program," at <https://www.doi.gov/subsistence>. Estimates from the Alaska Department of Fish and Game are generally similar to those provided by DOI. Estimates for total subsistence harvests can be difficult to track, as most estimates are reliant on self-reporting from communities and individuals. As a result, precise estimates for annual subsistence harvests are not readily available.

<sup>13</sup> *Ibid.*

<sup>14</sup> Act of June 7, 1902, 32 Stat. 327, amended, Act of May 11, 1908, 35 Stat. 102. Here and throughout this report, the term *Eskimo* is used due to its inclusion in and legal significance under federal laws. CRS recognizes that the term may be considered derogatory or offensive to some Alaska Native communities.

<sup>15</sup> For example, the Act of Apr. 16, 1960, Alaska Sess. Laws 179, recognized subsistence fishing and placed limitations on such practices (e.g., requiring subsistence fishers to obtain a license and establishing income limitations for issuing such licenses). For more information on states' role in managing fish and wildlife resources both on and off federal lands and waters, see CRS Report R45103, *Hunting and Fishing on Federal Lands and Waters: Overview and Issues for Congress*, by Christopher R. Field, and CRS Report R44267, *State Management of Federal Lands: Frequently Asked Questions*, by Carol Hardy Vincent.

passed or amended laws protecting certain species on a national scale and passed a law to manage species on federal lands in Alaska, it included specific exemptions for subsistence users—particularly those in Alaska—from certain otherwise prohibited activities. The sections below discuss a selection of these laws.

## **Alaska Native Land Claims and Subsistence Use Rights**

Matters involving the resource rights of American Indians and other Indigenous communities often are complex and may require consideration of treaties, executive orders, acts of Congress, regulations, case law, and deeds or other land title documents. For many American Indians in the lower 48 states, hunting and fishing rights (including hunting and fishing for subsistence uses) were preserved and generally are governed by long-standing treaties with the federal government. In Alaska, however, the federal government used a different approach to resolving land claims and established a land entitlement system distinct from the reservation system in place for many tribes in the lower 48 states.

The Alaska Native Claims Settlement Act (ANCSA), enacted in 1971, extinguished Alaska Natives' claims to over 360 million acres of land.<sup>16</sup> In exchange, Alaska Natives received approximately 45 million acres of land and a settlement payment of \$962.5 million (roughly \$5.24 billion in current dollars). Pursuant to ANCSA, the majority of this land and cash settlement was divided among ANCs, which include more than 200 village corporations and 12 regional corporations. Unlike tribal governments, which have government-to-government relationships with the United States, ANCs are business entities organized under the laws of Alaska. Once an ANC receives title to land under ANCSA, the land is considered private property. This ownership structure differs from most tribal lands in the lower 48 states, which are owned by the federal government and held in trust for the benefit of the tribe communally or tribal members individually. Accordingly, whereas tribal lands in the lower 48 states are generally federal lands managed pursuant to a federal trust relationship, ANC and village corporation lands in Alaska are private lands managed by the corporations and governed under federal, state, and local laws.<sup>17</sup>

In addition to extinguishing prior title and land claims held by Alaska Natives, ANCSA extinguished “any aboriginal hunting or fishing rights” on lands in Alaska.<sup>18</sup> As a result, federal hunting and fishing rights of most Alaska Native communities are determined by various laws enacted after ANCSA’s passage rather than pursuant to preexisting rights preserved in treaties. These governing laws include those discussed in this report.

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<sup>16</sup> Alaska Native Claims Settlement Act (ANCSA; P.L. 92-203, codified at 43 U.S.C. §§1601 et seq., as amended). For more information on Alaska Native land claims and ANCSA, see CRS Report R46997, *Alaska Native Lands and the Alaska Native Claims Settlement Act (ANCSA): Overview and Selected Issues for Congress*, by Mariel J. Murray.

<sup>17</sup> Although most Alaska Native communities ceded their tribal land—and subsequently their hunting and fishing rights to those lands—to the federal government under ANCSA, there were some exceptions. The Metlakatla Tribe opted not to join the ANCSA settlement. The Metlakatla Reservation near Ketchikan is the only federal reservation in Alaska, established by Congress in 1891. As a result, courts have interpreted that the Metlakatla retained certain rights to hunt and fish both within their reservation boundaries and in certain off-reservation waters where the tribe had traditionally fished. For more information, see *Metlakatla Indian Community v. Dunleavy*, No. 21-35185 (9<sup>th</sup> Cir. Sept. 8, 2022).

<sup>18</sup> 43 U.S.C. §1603(b).



## Selected Federal Statutes Governing Subsistence Uses of Resources in Alaska

Although the State of Alaska generally manages subsistence uses of resources on state lands and certain private lands, including Native allotments and ANC lands,<sup>19</sup> the federal government plays a significant role in managing subsistence uses in Alaska. Congress has passed a number of statutes that either directly or indirectly provide for the protection and/or recognition of subsistence uses. Some of these laws, such as ANILCA, apply only to the harvesting and use of resources located on lands owned and managed by the federal government.<sup>20</sup> Other federal laws may apply when concerning subsistence uses of specific species both on and off federal lands. For example, the Endangered Species Act (ESA) includes an exemption that generally allows Alaska Natives to harvest listed species for food or for crafting certain traditional handicrafts, the Marine Mammal Protection Act (MMPA) governs subsistence harvests of marine mammals, and the Migratory Bird Treaty Act (MBTA) governs the harvest of migratory birds in certain areas in Alaska.<sup>21</sup> The applicability and enforcement of these statutes extend beyond the federal lands and inland waters that are generally covered under ANILCA.

This section provides a brief overview of selected federal statutes that govern subsistence uses of resources in Alaska. It discusses their applicability, as well as the role of the federal government in enforcing relevant subsistence use provisions. Because federal management of subsistence uses in Alaska is complex and can depend on various factors, this report highlights only certain federal statutes that may be of interest to Congress.<sup>22</sup>

### Alaska National Interest Lands Conservation Act

Enacted in 1980, ANILCA is the primary statute governing the management of federal lands within Alaska. ANILCA designated more than 100 million acres of federal land in Alaska as new or expanded *conservation system units* that included national parks and preserves, national wildlife refuges, wilderness areas, and other designations.<sup>23</sup> Among its many provisions, ANILCA specifically recognized and protected subsistence uses on the newly designated lands, as well as all conservation system units in Alaska established prior to and after ANILCA's enactment.

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<sup>19</sup> *Native allotments* are private lands conveyed to Alaska Natives pursuant to the Native Allotment Act of 1906 (34 Stat. 197) or the Native Townsite Act of May 25, 1926 (44 Stat. 629). Under these laws, Alaska Natives were authorized to acquire individual allotments of up to 160-acre parcels of unreserved, unappropriated land.

<sup>20</sup> ANILCA is codified at 16 U.S.C. §§3101 et seq.

<sup>21</sup> The Endangered Species Act (ESA) is codified at 16 U.S.C. §§1531 et seq.; the Marine Mammal Protection Act (MMPA) is codified at 16 U.S.C. §§1361 et seq.; and the Migratory Bird Treaty Act (MBTA) is codified at 16 U.S.C. §§703-712.

<sup>22</sup> Other statutes that may be applicable to certain species or in specific geographic areas are not included here but still may impact subsistence uses of resources in Alaska. For example, the Northern Pacific Halibut Act of 1982 (16 U.S.C. §§773-773k) can govern subsistence fishing of Pacific halibut in waters in and off Alaska, whereas, the Fur Seal Act of 1966 (16 U.S.C. §1153) provides exceptions for "subsistence uses" for the taking of fur seals for "Aleuts, Eskimos, and Indians" residing on the coasts of the North Pacific Ocean.

<sup>23</sup> ANILCA defines *conservation system unit* to mean "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument." This includes units in existence prior to the enactment of ANILCA; units established, designated, or expanded pursuant to ANILCA, as well as additions to such units; and any such unit established moving forward (16 U.S.C. §3102(4)). For information on these and other federal land designations, see CRS Report R45340, *Federal Land Designations: A Brief Guide*, coordinated by Laura B. Comay.



ANILCA governs subsistence use of “wild, renewable resources” on federal lands in Alaska (for more information on the extent of ANILCA’s applicability, see “Multiple Land Management Mandates and Jurisdictional Questions”).<sup>24</sup> Title VIII of the law specifically provides for preference to be given to “the taking on public lands of fish and wildlife for nonwasteful subsistence uses” over the taking of fish and wildlife for other purposes.<sup>25</sup> Specifically, the law mandates that “rural residents of Alaska, including both Natives and non-Natives,” be given priority for subsistence uses of fish and wildlife on federal public lands and waters in Alaska.<sup>26</sup> It further requires that the Secretary of the Interior “ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.”<sup>27</sup>

ANILCA’s priority for subsistence uses authorizes federal agencies to limit or restrict the taking of fish and wildlife for other purposes to protect the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population.<sup>28</sup> In addition, ANILCA requires federal agencies to consider potential adverse impacts upon subsistence uses and resources that may result from land use decisions. For example, if a federal agency proposes to dispose of or lease public lands in a way that would significantly restrict subsistence uses, the agency is required to hold a hearing in the vicinity of the proposed action. In addition, the agency must make a determination as to the necessity of the impending action and steps it would take to minimize any adverse impact upon subsistence uses.<sup>29</sup>

## **Federal Management of Subsistence Uses Under ANILCA**

Title VIII of ANILCA provides the opportunity to manage subsistence hunting and fishing on Alaskan federal lands to the State of Alaska in lieu of the federal government.<sup>30</sup> Under ANILCA, such management is contingent upon the state legislature enacting laws consistent with certain provisions and terms of the legislation. This includes ANILCA’s requirements for establishing a priority for subsistence hunting and fishing for rural Alaskans. Following the enactment of ANILCA, the State of Alaska enacted a law that limited the definition of *subsistence uses* to residents of “rural areas,” thereby complying with Title VIII of ANILCA.<sup>31</sup> Pursuant to Title VIII, the State of Alaska, through the state Board of Fisheries and Board of Game, managed subsistence uses on federal lands for the first decade following ANILCA’s enactment. Then in 1989, the Alaska Supreme Court held that the rural residency preference established by state law (and required under ANILCA) violated the equal access clause of the Alaska state constitution.<sup>32</sup> Pursuant to the ruling, the state removed the rural preference from its subsistence use law, which caused the law to no longer comply with the requirements of Title VIII of ANILCA for state management on federal lands. Because the Alaska state constitution prevents the state from

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<sup>24</sup> 16 U.S.C. §3113. ANILCA does not define *wild, renewable resources*, but, as discussed above, agency regulations have interpreted the term to apply to animals (including non-living parts), plants, fungi, timber, berries, and other renewable resources found in nature.

<sup>25</sup> 16 U.S.C. §3114. ANILCA defines *take* or *taking* to mean to “pursue, hunt, shoot, trap, net capture, collect, kill, harm, or attempt to engage in any such conduct” (16 U.S.C. §3102).

<sup>26</sup> 16 U.S.C. §§3111-3126.

<sup>27</sup> 16 U.S.C. §3121(a).

<sup>28</sup> 16 U.S.C. §3114.

<sup>29</sup> 16 U.S.C. §3120(a).

<sup>30</sup> 16 U.S.C. §3115(d). ANILCA does not impact the state’s ability to exercise its own jurisdiction over state and private lands.

<sup>31</sup> Act of May 30, 1986, ch. 52, 1986 Alaska Sess. Laws 1.

<sup>32</sup> *McDowell v. State of Alaska*, 785 P.2d 1, 1 (Alaska 1989).

enacting a law to manage subsistence uses that is consistent with Title VIII of ANILCA, the federal government has managed subsistence uses on federal lands in Alaska since Alaska changed its state law in 1990.

At that time, the Department of the Interior (DOI) and the Department of Agriculture (USDA) determined that federal management of subsistence uses on the public lands required “an administrative structure ... to execute the Secretaries’ subsistence responsibilities and perform functions specific to public lands.”<sup>33</sup> In light of the federal responsibilities at stake, the Secretaries of the Interior and Agriculture established the Federal Subsistence Board (FSB) in 1992, delegating to the FSB the authority to oversee subsistence use programs authorized under Title VIII of ANILCA.<sup>34</sup>

DOI and USDA promulgated regulations outlining the FSB’s authorities and responsibilities. These include issuing rules and regulations for the management of subsistence harvests of fish and wildlife on Alaska public lands and waters, setting open season dates and harvest limits, making determinations of rural and non-rural communities and areas, and determining customary and traditional subsistence uses.<sup>35</sup> The authority of the FSB extends only to Alaska federal lands, primarily those administered by the U.S. Fish and Wildlife Service (FWS), the National Park Service (NPS), the Bureau of Land Management (BLM), and the U.S. Forest Service (FS).<sup>36</sup> Certain waters within or adjacent to federal public lands also have been under the FSB’s jurisdiction since 1995, when the U.S. Court of Appeals for the Ninth Circuit held that “subsistence priority applies to navigable waters in which the United States has reserved water rights” pursuant to the reserved water rights doctrine.<sup>37</sup> The reserved water rights doctrine provides that when the United States withdraws land from the public domain for a particular federal purpose, it implicitly reserves appurtenant waters that have not otherwise been appropriated, though only to the extent necessary to fulfill the reservation’s purpose.<sup>38</sup>

## Endangered Species Act

The ESA (16 U.S.C. §§1531 et seq.) aims to conserve species and their ecosystems by identifying certain species in danger of extinction, either presently or in the foreseeable future. Those species are then listed as endangered or threatened and are subject to certain statutory and regulatory protections.<sup>39</sup> Among other things, the act prohibits any individual from *taking* or importing an

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<sup>33</sup> U.S. Fish and Wildlife Service (FWS) and U.S. Forest Service (FS), “Temporary Subsistence Management Regulations for Public Lands in Alaska,” 55 *Federal Register* 27118, June 29, 1990.

<sup>34</sup> FWS and FS, “Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C,” 57 *Federal Register* 22940-22964, May 29, 1992.

<sup>35</sup> Federal subsistence regulations outlining the authorities of the Federal Subsistence Board (FSB) can be found at 36 C.F.R. Part 242 and 50 C.F.R. Part 100. *Open season* means the time when wildlife may be taken by hunting or trapping; an open season includes the first and last days of the prescribed season period (36 C.F.R. §242.25). Regulations require the FSB to consider traditional use patterns when establishing harvest levels, open season dates, and methods and means of harvesting.

<sup>36</sup> ANILCA defines *public lands* generally to include all lands under federal ownership following the enactment of ANILCA, with certain exclusions. Exclusions include certain lands owned by the federal government pending conveyance to the state, Native corporations, or individuals under certain federal statutes (e.g., the Alaska Statehood Act and the Alaska Native Claims Settlement Act). 16 U.S.C. §3102(3).

<sup>37</sup> *Alaska v. Babbitt* (Katie John I), 72 F.3d 698, 700 (9<sup>th</sup> Cir. 1995). Prior to this decision, the federal government had taken the position that the term *public lands*, as used in ANILCA, did not include navigable waters and, therefore, the state retained fish and game management authority of subsistence fishing in navigable waters in Alaska.

<sup>38</sup> *Katie John I*, 72 F.3d 698, 703 (9<sup>th</sup> Cir. 1995).

<sup>39</sup> 16 U.S.C. §§1531, 1532, 1533, 1539. For more information on the ESA, see CRS Report R46677, *The Endangered*

endangered species.<sup>40</sup> Under the act, *taking* means harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting the species, or attempting to do the same.<sup>41</sup> The prohibitions that apply to endangered species generally may be extended to threatened species by regulation.<sup>42</sup>

The ESA allows for certain exceptions from one or more of the act's prohibitions, including an exception for Alaska Natives.<sup>43</sup> Under the exception, any "Indian, Aleut, or Eskimo" who is native to and resides in Alaska, and any non-Alaska Native who is a permanent resident of an Alaskan Native village and who primarily depends on taking fish and wildlife for consumption or for creating authentic native articles of handicraft and clothing, is not prohibited from taking endangered or threatened species or from importing any species so taken.<sup>44</sup> Any such taking must be "primarily for subsistence purposes" and "not accomplished in a wasteful manner."<sup>45</sup> The act does not define *subsistence* in general but does specify that subsistence includes selling edible portions of the fish or wildlife, so long as these portions are sold and consumed in Alaskan Native villages and towns.<sup>46</sup>

The act also allows nonedible byproducts of such fish and wildlife to be sold in interstate commerce when they are turned into "authentic native articles of handicrafts and clothing".<sup>47</sup> To qualify, the handicrafts or clothing must be wholly or in a significant respect composed of natural materials and must be made or decorated "in the exercise of traditional native handicrafts" without using any pantographs, multiple carvers, or mass copying devices.<sup>48</sup> Examples of such crafts include weaving, beading, or drawing.<sup>49</sup>

FWS or the National Marine Fisheries Service (as applicable) can regulate taking of listed species by "Indian[s], Aleut[s], or Eskimo[s]," or non-Alaska Native residents of Alaskan Native villages, when either agency determines that such taking is "materially and negatively" affecting the listed species.<sup>50</sup> Any such regulations may specify the geographical area and season for taking the species and any other factors related to why the regulation is being implemented.<sup>51</sup> The regulations must be removed once the reason for imposing them no longer exists.<sup>52</sup>

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*Species Act: Overview and Implementation*, by Pervaze A. Sheikh and Erin H. Ward.

<sup>40</sup> 16 U.S.C. §§1533(d), 1539.

<sup>41</sup> 16 U.S.C. §1532(19).

<sup>42</sup> 16 U.S.C. §1533(d).

<sup>43</sup> 16 U.S.C. §1539.

<sup>44</sup> 16 U.S.C. §1539(e). See also 50 C.F.R. §17.5.

<sup>45</sup> 16 U.S.C. §1539(e). See also 50 C.F.R. §17.5.

<sup>46</sup> 16 U.S.C. §1539(e)(3)(i).

<sup>47</sup> 16 U.S.C. §1539(e)(1).

<sup>48</sup> 16 U.S.C. §1539(e)(3)(ii).

<sup>49</sup> *Ibid.*

<sup>50</sup> 16 U.S.C. §1539(e)(4). FWS administers the ESA for terrestrial, freshwater species, and catadromous species (e.g., eels that spawn in saltwater and live in freshwater as adults) and the National Marine Fisheries Service administers the ESA for marine and anadromous species (e.g., salmon that spawn in freshwater and live in saltwater as adults).

<sup>51</sup> 16 U.S.C. §1539(e)(4).

<sup>52</sup> *Ibid.*

## Migratory Bird Treaty Act

The MBTA implements four bilateral treaties governing migratory birds. These treaties between the United States and Canada, Japan, Mexico, and Russia generally include similar—but distinct—provisions. In general, each treaty requires the party nations to provide for the protection of certain migratory birds, allowing for the designation of hunting seasons for certain game birds and providing for certain exceptions.<sup>53</sup> Exceptions for Alaska Native subsistence uses differ across each treaty. The treaties with Russia and Japan include general exceptions from the treaties' prohibitions for Alaska Natives for subsistence needs.<sup>54</sup> The original treaty with Canada included a limited exception for specific species of nongame birds, and the original treaty with Mexico did not contain an exception for Alaska Natives.<sup>55</sup> In the 1990s, the treaties with Canada and Mexico were amended to allow for seasonal subsistence harvesting for Alaska Natives.<sup>56</sup>

The MBTA was initially enacted in 1918 to implement the bilateral treaty with Canada and has been amended to reflect the subsequent treaties and amendments to these agreements. In general, the MBTA prohibits hunting, taking, capturing, killing, or engaging in an array of commerce-related activities with respect to specific migratory birds unless that activity is authorized pursuant to prescribed migratory bird hunting regulations or permits issued for specific purposes.<sup>57</sup> As an exception to these prohibitions, the MBTA authorizes FWS to issue regulations as needed to ensure the Indigenous inhabitants of Alaska may take migratory birds and collect their eggs for their own nutritional and other essential needs during seasons established by FWS.<sup>58</sup>

FWS has issued regulations implementing this exception for Alaska Natives.<sup>59</sup> These regulations must be consistent with all four treaties.<sup>60</sup> To assist with implementation, FWS established the Alaska Migratory Bird Co-management Council.<sup>61</sup> The council comprises representatives from

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<sup>53</sup> Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., August 16, 1916, 39 Stat. 1702 [U.S.-Canadian Treaty]; Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., February 7, 1936, 50 Stat. 1311 [U.S.-Mexico Treaty]; Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, March 4, 1972, 25 U.S.T. 3329 [U.S.-Japan Treaty]; Convention Between the United States of America and the Union of Soviet Socialist Republics [Russia] Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., November 26, 1976, 29 U.S.T. 4674 [U.S.-Russia Treaty]. See also U.S. Department of State, *Treaties in Force*, 238, 296 (2020) (listing subsequent amendments to the treaty).

<sup>54</sup> U.S.-Japan Treaty, art. III, 1(e); U.S.-Russia Treaty, art. II, 1(c). The treaty with Japan used the phrase “for their own food and clothing” and the treaty with Russia used the phrase “for their own nutritional and other essential needs.”

<sup>55</sup> U.S.-Canadian Treaty, art. II, cl. 3.

<sup>56</sup> Protocol Between the Government of the United States of America and the Government of Canada Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, U.S.-Can., December 14, 1995, S. Treaty Doc. No. 104–28, 2473 U.N.T.S. 329; Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, May 5, 1997, S. Treaty Doc. 105-26.

<sup>57</sup> 16 U.S.C. §§703-704.

<sup>58</sup> 16 U.S.C. §712. This section of the MBTA was added by the Fish and Wildlife Improvement Act of 1978 (P.L. 95-616, §3(h)(2), (3), Nov. 8, 1978, 92 Stat. 3112).

<sup>59</sup> 50 C.F.R. part 92.

<sup>60</sup> See *Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 940-41 (9<sup>th</sup> Cir. 1987); S. Rep. No. 1175, 95<sup>th</sup> Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 7641.

<sup>61</sup> 50 C.F.R. §92.10(a).

the federal government, Alaska, and Alaska Natives from 12 regional management areas.<sup>62</sup> The council develops recommendations for regulations related to the subsistence harvest; procedures and criteria for areas and communities to become eligible; and recommendations for other areas, such as law enforcement policies, population monitoring, research and use of traditional knowledge, and habitat protection.<sup>63</sup> The council holds public meetings at least twice a year that provide an opportunity for public comment.<sup>64</sup>

FWS regulations identify certain subsistence harvest areas and allow other areas to be designated as such upon recommendation by the Alaska Migratory Bird Co-management Council.<sup>65</sup> Permanent residents of villages in subsistence harvest areas are eligible to harvest migratory birds and eggs for subsistence purposes; immediate family members of such residents also may assist with the customary spring and summer subsistence harvest with permission of the village's or tribe's council, as applicable.<sup>66</sup> The regulations identify which species are eligible for subsistence harvesting and provide region- and species-specific periods during which harvest may occur. They also prohibit certain methods and means of harvesting the birds or eggs.<sup>67</sup> The regulations reserve FWS's right to close or temporarily suspend any regulations as needed to address imminent threats to the conservation of any listed species or migratory bird population.<sup>68</sup>

FWS's regulations for migratory bird subsistence harvesting in Alaska apply only during the closed season (March 10 to September 1 each year), when hunting otherwise would be prohibited.<sup>69</sup> During the open season, the regulations that govern the hunting of migratory game birds apply equally to subsistence harvesting.<sup>70</sup>

## **Marine Mammal Protection Act**

The MMPA prohibits taking or importing marine mammals or marine mammal products except as provided for in the act.<sup>71</sup> The act provides an exemption from the taking prohibition for Alaska Natives.<sup>72</sup> The exemption applies to "any Indian, Aleut, or Eskimo who resides in Alaska" along the Arctic Ocean or north Pacific Ocean coasts.<sup>73</sup> To qualify, the Alaska Native must take the marine mammal for "subsistence purposes" or to create and sell authentic native articles of handicrafts and clothing.<sup>74</sup> The taking also must be accomplished in a manner that is not wasteful.<sup>75</sup> Alaska Natives may sell edible components of marine mammals only in Alaska Native

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<sup>62</sup> 50 C.F.R. §§92.10, 92.11.

<sup>63</sup> 50 C.F.R. §92.10(c).

<sup>64</sup> 50 C.F.R. §92.10(d).

<sup>65</sup> 50 C.F.R. §92.5(a), (c).

<sup>66</sup> 50 C.F.R. §92.5(a), (d).

<sup>67</sup> 50 C.F.R. §§92.20, 92.22, 92.31.

<sup>68</sup> 50 C.F.R. §92.21.

<sup>69</sup> 50 C.F.R. §92.3.

<sup>70</sup> *Ibid.* The regulations that govern hunting migratory game birds and crows during the regular open season for non-subsistence use are found in 50 C.F.R. part 20.

<sup>71</sup> 16 U.S.C. §1371(a).

<sup>72</sup> 16 U.S.C. §1371(b); 50 C.F.R. §§18.23, 216.23.

<sup>73</sup> 16 U.S.C. §1371(b).

<sup>74</sup> 16 U.S.C. §1371(b)(1)-(2).

<sup>75</sup> 16 U.S.C. §1371(b)(3).

villages and towns or for native consumption, but they may sell native handicrafts and clothing in interstate commerce.<sup>76</sup>

Take by Alaskan Natives may be regulated with respect to species or stocks of marine mammals that are determined to be *depleted* under the MMPA.<sup>77</sup> A species or stock is depleted when it is listed as endangered or threatened under the ESA or when an appropriate federal or state agency determines the species or stock is below its *optimum sustainable population*.<sup>78</sup> The optimum sustainable population of a species or stock is the population level that will maximize the species' or stock's productivity, based on its habitat and the health of its ecosystem.<sup>79</sup> Any such regulations may establish particular geographical areas or seasons for taking, as well as any other factors related to the reason for imposing the restriction.<sup>80</sup> The regulations must be removed once the reason for imposing them no longer exists. The National Marine Fisheries Service has enacted regulations governing the take of beluga whales in Cook Inlet and fur seals on the Pribilof Islands.<sup>81</sup> FWS has enacted regulations governing take of the Pacific walrus.<sup>82</sup>

## Issues for Congress

Subsistence hunting and fishing in Alaska has long been an issue of congressional and stakeholder interest. Over the years, various groups, including Alaska Native communities, rural residents, and other interest groups, have identified an array of issues pertaining to subsistence use. These issues range from general concerns, such as the role of the federal government in managing such activities or the impacts of climate change on communities that engage in subsistence use practices, to more specific concerns regarding priority access and harvesting limits. This section provides an overview of selected issues that have been of interest to Congress in recent years.

## Federal Versus Nonfederal Management

The role of the federal government in overseeing subsistence uses in Alaska is an ongoing issue of congressional interest. Some concerns generally relate to federal ownership and management of land, such as whether Congress should transfer ownership of some lands or delegate some resource management responsibilities to the State of Alaska. Other concerns are specific to federal programs addressing subsistence uses, such as federal management under the FSB, and federal engagement and cooperation with local and Alaska Native communities.

In general, the federal government has recognized states' traditional authority to manage fish and resident wildlife within their borders. That authority typically extends to federal lands, barring specific preemptions.<sup>83</sup> For subsistence harvests in Alaska, however, the federal government—primarily through ANILCA—asserted authority over certain aspects of natural resource

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<sup>76</sup> 16 U.S.C. §1371(b).

<sup>77</sup> 16 U.S.C. §1371(b).

<sup>78</sup> 16 U.S.C. §1362(1).

<sup>79</sup> 16 U.S.C. §1362(9).

<sup>80</sup> 16 U.S.C. §1371(b).

<sup>81</sup> 50 C.F.R. §§216.23, 216.71-216.74.

<sup>82</sup> 50 C.F.R. §18.23(c).

<sup>83</sup> Examples include the closure of certain national park units and national wildlife refuges to hunting and fishing under federal laws, as well as the limitations on taking certain species under other federal wildlife laws.



management on federal lands. To address this potential conflict, Title VIII of ANILCA provides the state with the opportunity to manage subsistence harvesting on federal lands in place of the federal government so long as state subsistence laws are in compliance with ANILCA. However, following the aforementioned legal decisions in the late 1980s (see “Federal Management of Subsistence Uses Under ANILCA”), the federal government has overseen management of fish, wildlife, and plant life for subsistence purposes through the FSB since 1990. This management transfer to the FSB has continued to be an issue of ongoing debate.<sup>84</sup>

Initially, some stakeholders and state lawmakers assumed federal management under ANILCA would be temporary until the state came into compliance through legislative or administrative action.<sup>85</sup> The initial regulations for the FSB were promulgated as temporary rules “in anticipation of the State returning to compliance with Title VIII.”<sup>86</sup> The agencies further stated that “it is preferable to have [subsistence fish and game] management responsibility lie with the State.”<sup>87</sup> However, since the state has not resolved the question of compliance with both Title VIII and the Alaska state constitution, federal management under the FSB has continued despite opposition from some stakeholders. For example, some have suggested that because a federal management entity was not envisioned by ANILCA (it is not explicitly mentioned or alluded to in the law), the FSB’s management role is out of step with Congress’s initial intent in enacting ANILCA.<sup>88</sup> Others have suggested expanding the federal government’s role in managing subsistence uses. This approach has included proposals for the federal government, rather than the state, to manage subsistence on the roughly 45.5 million acres of Alaska Native-owned land conveyed under ANCSA.<sup>89</sup>

In addition to concerns regarding the extent of the federal government’s authority, some stakeholders have questioned the federal government’s ability to provide for adequate subsistence harvests for qualified users. They have raised questions of whether the federal government can adequately manage the substantial land area subject to ANILCA (more than 60% of land in Alaska is under federal jurisdiction). Others have suggested that the FSB and other federal agencies have failed to prioritize land management decisions that ensure healthy and abundant populations are available for continued subsistence use.<sup>90</sup> To address these issues, stakeholders have advocated for allowing state managers to conduct management activities on federal lands.<sup>91</sup> Others have argued that implementation of state wildlife strategies—and in particular, *intensive* or active management approaches—would directly conflict with the statutory mandate some federal agencies have in managing wildlife resources (see “Multiple Land Management Mandates and Jurisdictional Questions” for more information).<sup>92</sup>

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<sup>84</sup> S. Hrg. 113-118.

<sup>85</sup> Frank Norris, “Alaska Subsistence: A National Park Service Management History,” DOI, 2002.

<sup>86</sup> FWS and FS, “Temporary Subsistence Management Regulations for Public Lands in Alaska,” 55 *Federal Register* 27114, June 29, 1990.

<sup>87</sup> *Ibid.*

<sup>88</sup> Kyle Joly, Sanford P. Rabinowitch, and Julie Lurman Joly, “Dual Management of Wildlife in Alaska: Making Federal Practice Align with Federal Mandates,” *The George Wright Forum*, vol. 32, no. 1 (2015), pp. 18-24.

<sup>89</sup> Kyle Hopkins and Sean Cockerham, “Subsistence Rights Expected to Headline AFN Convention,” *Anchorage Daily News*, October 19, 2009, updated September 17, 2016.

<sup>90</sup> S. Hrg. 113-118, p 16. Testimony from Craig Fleener, Deputy Commissioner, Alaska Department of Fish and Game.

<sup>91</sup> *Ibid.*

<sup>92</sup> Coalition to Protect America’s Parks, “Coalition Condemns Cynical Proposal to Repeal NPS Alaska Hunting Regulations,” September 24, 2018.

Other concerns pertain to the manner in which the federal government engages and interacts with local and Alaska Native communities. Some Alaska Native stakeholders have pointed to past failures by federal agencies to allow traditional subsistence harvest practices as a source of ongoing distrust and frustration between these communities and the government.<sup>93</sup> Still others have suggested federal agencies should strengthen resource management partnerships via cooperative agreements and comanagement relationships with Alaska Native and local communities.<sup>94</sup> Alaska Native communities have called on federal agencies to incorporate and prioritize Indigenous knowledge into federal fish and wildlife management, monitoring, and research programs.<sup>95</sup> The federal government has conducted reviews of its programs managing subsistence harvesting of resources and has made changes in response to some of these concerns. Past Administrations also have pointed to the “bottom-up management” approach provided by regional advisory councils—administrative bodies that provide advice and recommendations to the FSB about subsistence hunting and fishing issues in Alaska.<sup>96</sup> Pursuant to regulations, these councils must have representation from local communities within the applicable region with knowledge of issues relating to subsistence harvest, which some argue allows for local residents to have a substantial role in guiding the federal subsistence program.<sup>97</sup>

## Multiple Land Management Mandates and Jurisdictional Questions

Although ANILCA and other statutes establish a management priority (or exemption) for subsistence uses, the federal government is required to balance these requirements with other management provisions established under other laws (e.g., the National Wildlife Refuge System Administration Act for FWS and the National Park Service Organic Act of 1916 for NPS).<sup>98</sup> The purposes and mandates of these laws are not always easily balanced, and at times agencies may be directed to engage in activities that seem at odds with one another. As a result, some agencies have been reluctant to engage in certain activities that support subsistence uses but may not advance the management goals established under other authorities. In particular, some agencies have declined, at times, to pursue the type of *active* or *intensive* management of fish and wildlife populations (e.g., predator control, habitat enhancements) that some stakeholders claim is necessary to sustain subsistence needs.<sup>99</sup> For example, stakeholders and state management officials have suggested NPS and FWS have resisted these types of management practices in Alaska because of their interpretation of the NPS Organic Act of 1916 (NPS) and the National

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<sup>93</sup> For example, in 2018, FWS issued a formal apology to Indigenous Alaskans for regulations implemented pursuant to the MBTA in the 1960s and 1970s that severely impacted these communities’ ability to harvest birds and eggs during the spring season. See FWS and Alaska Department of Fish and Game, “Apology for Harmful Impacts of Past Bird Harvest Prohibitions,” September 13, 2018, at <https://www.fws.gov/node/267704>.

<sup>94</sup> DOI and USDA, *Federal Subsistence Policy Consultation Summary Report*, June 14, 2022, at [https://www.bia.gov/sites/default/files/dup/tcinfo/final-subsistence-consultation-summary-report\\_6.10.22\\_508.pdf](https://www.bia.gov/sites/default/files/dup/tcinfo/final-subsistence-consultation-summary-report_6.10.22_508.pdf). Hereinafter referred to as DOI and USDA, *Federal Subsistence Policy*.

<sup>95</sup> *Ibid.* See also Isabella Turilli, “Survival, Subsistence, and Food Sovereignty in Alaska,” *Think Global Health*, January 17, 2023.

<sup>96</sup> S.Hrg. 113-118, p. 11. Testimony of Beth Pendleton, Regional Forester, Alaska Region, FS.

<sup>97</sup> *Ibid.* Membership requirements for the FSB and the regional advisory councils can be found at 36 C.F.R. §242.10 and 36 C.F.R. §242.11, respectively.

<sup>98</sup> The National Wildlife Refuge System Administration Act is codified at 16 U.S.C. §§668dd-668ee, and the NPS Organic Act of 1916 is codified at 54 U.S.C. §§100101 et seq.

<sup>99</sup> S.Hrg. 113-118. See also Tim Bodony, “State Sues Federal Land Managers over Predator Hunting Restrictions,” *Alaska Public Media*, January 18, 2017.

Wildlife Refuge System Administration Act (FWS) and those laws' emphasis on "park values" and "natural diversity," respectively.<sup>100</sup> Agencies generally have highlighted the difficulty in balancing the demands of subsistence users with multiple legal mandates and other public interests.<sup>101</sup> In other instances, agencies such as FS and BLM are explicitly required by statute to manage lands and resources under their jurisdiction for multiple uses, including energy development, livestock grazing, recreation, and timber harvesting, which some have claimed prevents subsistence use from being properly prioritized. Specifically, some stakeholders have pointed to BLM's onshore oil and gas leasing program as having potential harmful impacts to subsistence users.<sup>102</sup> Others, including some Alaska Native stakeholders, suggest that present and future oil and gas development is the foundation of a sustained local economy and must be balanced with ensuring future subsistence use.<sup>103</sup>

Other challenges include balancing competing objectives within the same statute, as some laws that require protection of migratory birds or threatened or endangered species also authorize subsistence harvests. To address some of these concerns, DOI has established policies requiring agencies to consult with Alaska Native communities when regulating subsistence harvest of endangered or threatened species.<sup>104</sup> These consultation requirements aim to preserve subsistence harvest rights while minimizing adverse impacts on listed species.

In addition to conflicting mandates, some stakeholders have argued that sustainable resource management challenges are compounded when multiple governmental entities (state and/or federal) have jurisdiction over the same or similar resources. In particular, the "dual regulation of fish and game resources where state and federal jurisdictions intersect" has created confusion among subsistence and rural communities in Alaska, according to some stakeholders.<sup>105</sup> For example, in instances where state and federal regulations have different limits for a certain species, subsistence users must be aware of the jurisdiction in which they are hunting or fishing to know whether they are harvesting in accordance with applicable regulations. This exercise can become further complicated when hunting or fishing near the boundary between such lands, particularly if no clear markers delineate the federal-state boundary. In addition, some have argued that implementing a federal regulatory framework alongside a similar state system increases administrative costs that might otherwise be avoided with a single regulatory body.<sup>106</sup>

Other jurisdictional concerns relate specifically to whether and where the federal government has jurisdiction over inland waters, bringing them under the definition of *public lands* for purposes of ANILCA and therefore requiring subsistence use management of the inland waters and their

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<sup>100</sup> S.Hrg. 113-118, Testimony from Craig Fleener, Deputy Commissioner, Alaska Department of Fish and Game, p. 18.

<sup>101</sup> S.Hrg. 113-118, Testimony from Gene Peltola, Assistant Regional Director, Office of Subsistence Management, FWS.

<sup>102</sup> For example, see Scott Streater, "Biden Plan Could Advance Massive Arctic Oil Project," *E&E News*, July 11, 2022. Additional concerns have been raised regarding potential oil and gas development in the Arctic National Wildlife Refuge. For information on this issue, see CRS In Focus IF12006, *Arctic National Wildlife Refuge: Status of Oil and Gas Program*, by Laura B. Comay.

<sup>103</sup> For example, see Testimony of Richard Glenn, Arctic Slope Regional Corporation, U.S. Congress, House Committee on Natural Resources, Subcommittee on Energy and Mineral Resources, *Promoting Onshore Oil and Gas Development in Alaska*, 115<sup>th</sup> Cong., 1<sup>st</sup> sess., July 18, 2017, S. Hrg 115-17 (Washington: GPO, 2017).

<sup>104</sup> See for example, DOI, Secretarial Order No. 3225, *Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order No. 3206)*, January 19, 2001.

<sup>105</sup> S.Hrg. 113-118, p. 20.

<sup>106</sup> S.Hrg. 113-118, Testimony from Craig Fleener, Deputy Commissioner, Alaska Department of Fish and Game.

fishery stocks. As noted below, waters within or adjacent to federal public lands have been under the jurisdiction of the FSB since a Ninth Circuit decision in 1995 (for more information, see text box “The *Katie John* Litigation”).<sup>107</sup> Since that decision, the degree or extent to which ANILCA’s subsistence use priority—and in, turn, FSB regulations—applies to waters and fishery stocks has been the subject of litigation and concern for some stakeholders.<sup>108</sup> In some instances, state and federal officials have issued conflicting orders opening and/or closing fishing in the same waters. For example, in 2021, the Alaska Department of Fish and Game opened driftnet salmon fishing on the lower Kuskokwim River within the Yukon Delta National Wildlife Refuge on certain days to all Alaskans through an emergency order, but FWS had opened fishing only to qualified subsistence users under ANILCA.<sup>109</sup> In May 2022, the federal government sued the state to block the state’s emergency order; the U.S. District Court of Alaska later granted an injunction preventing the state from implementing the order.<sup>110</sup>

**Navigable Waters and Alaska National Interest Lands Conservation Act (ANILCA): The *Katie John* Litigation**

The *Katie John* trilogy, a series of decisions by the U.S. Court of Appeals for the Ninth Circuit, has been influential in establishing the balance between federal and state authority in the management of subsistence fisheries in the state. Together, these cases reinforce the existence of Alaska Native subsistence fishing rights and outline the federal government’s trust responsibility to protect those rights. They also provide important interpretations of ANILCA’s provisions.

In the initial years following ANILCA’s enactment, the federal government played a minimal role in the management of fish populations for subsistence purposes. Instead, Alaska’s navigable waters were managed by the state, much like the navigable waters throughout the rest of the country. Even following the transfer of federal management to the Federal Subsistence Board in 1990, agencies specifically excluded federal jurisdiction over navigable waters, which were defined as “those waters used or susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water” (55 *Federal Register* 27114).

*Katie John*, an Alaska Native elder, and other members of her community filed their first federal lawsuit in 1983 to argue that the State of Alaska was violating their subsistence fishing rights through regulatory actions such as restricting access to fishing areas and imposing permit requirements. The ensuing litigation spanned several decades and multiple cases and appeals. Three final decisions by the U.S. Court of Appeals for the Ninth Circuit are sometimes referred to as *Katie John I*, *II*, and *III*, or the *Katie John* trilogy.

In 1995’s *Katie John I*, the Ninth Circuit held that Alaska navigable waters were not entirely under either federal or state control. Instead, the court concluded that ANILCA’s definition of “public lands” includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.” The reserved water rights doctrine provides that when the United States withdraws land from the public domain for a particular federal purpose, it implicitly reserves appurtenant waters that have not otherwise been appropriated, though only to the extent necessary to fulfill the reservation’s purpose. In the context of Alaska Native subsistence use rights, that means that certain—though not all—waters in Alaska that otherwise would be subject to state management are instead subject to ANILCA’s rural subsistence use priority.

In its decision, the court also held that the federal agencies administering ANILCA’s subsistence use priority are responsible for identifying those waters, despite that “heavy administrative burden.” The U.S. Fish and Wildlife Service (FWS) and the U.S. Forest Service (FS) subsequently tried to identify the navigable waters subject to reserved water rights. The Ninth Circuit reviewed their efforts in 2001’s *Katie John II*. Although a majority of the

<sup>107</sup> Federal responsibility to manage subsistence fisheries was added following the Ninth Circuit Court of Appeals decision in *Alaska v. Babbitt*, in 1995; however, federal subsistence fisheries regulations did not become effective until 1999 (64 *Federal Register* 1276).

<sup>108</sup> See, for example, *Alaska v. Babbitt*, 72 F.3d 698 (1995); *John v. United States*, 247 F.3d 1032 (2001) (en banc); *John v. United States*, 720 F.3d 1214 (2013);

<sup>109</sup> Greg Kim, “State announces Kuskokwim fishing opening, but feds say it’s illegitimate,” *KTOO*, June 25, 2021, at <https://www.ktoo.org/2021/06/25/state-announces-kuskokwim-fishing-opening-but-feds-say-its-illegitimate/>.

<sup>110</sup> *United States v. State, Dep’t of Fish & Game*, Case No. 1:22-cv-00054-SLG, 2022 WL 2274545 (D. Alaska June 23, 2022).

court agreed that *Katie John I* was incorrectly decided, the court “could not come to a controlling agreement about why that was true.” The court therefore concluded that *Katie John I* “should not be disturbed or altered,” and it remains controlling law.

Finally, in 2013’s *Katie John III*, the Ninth Circuit upheld FWS and FS’s determination that the “public lands” subject to ANILCA’s rural subsistence use priority “included waters within and adjacent to federal reservations” but that reserved water rights for Alaska Native Settlement allotments were “best determined on a case-by-case basis.” Accordingly, certain inland waters in or appurtenant to federal lands in Alaska are subject to ANILCA and its subsistence fishing provisions, but federal agencies must make these determinations on a case-by-case basis.

For further reading about the *Katie John* litigation, see generally Robert T. Anderson, “The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights After ANILCA,” *Arizona State Law Journal*, vol. 51, no. 845 (2019), pp. 846-877.

**Sources:** *State of Alaska v. Babbitt*, 72 F.3d 698, 703–04 (9<sup>th</sup> Cir. 1995) (“*Katie John I*”); *John v. United States*, 247 F.3d 1032 (9<sup>th</sup> Cir. 2001) (en banc) (“*Katie John II*”); *John v. United States*, 720 F.3d 1214, 1226 (9<sup>th</sup> Cir. 2013) (“*Katie John III*”).

## Access to Subsistence Rights or Exemptions

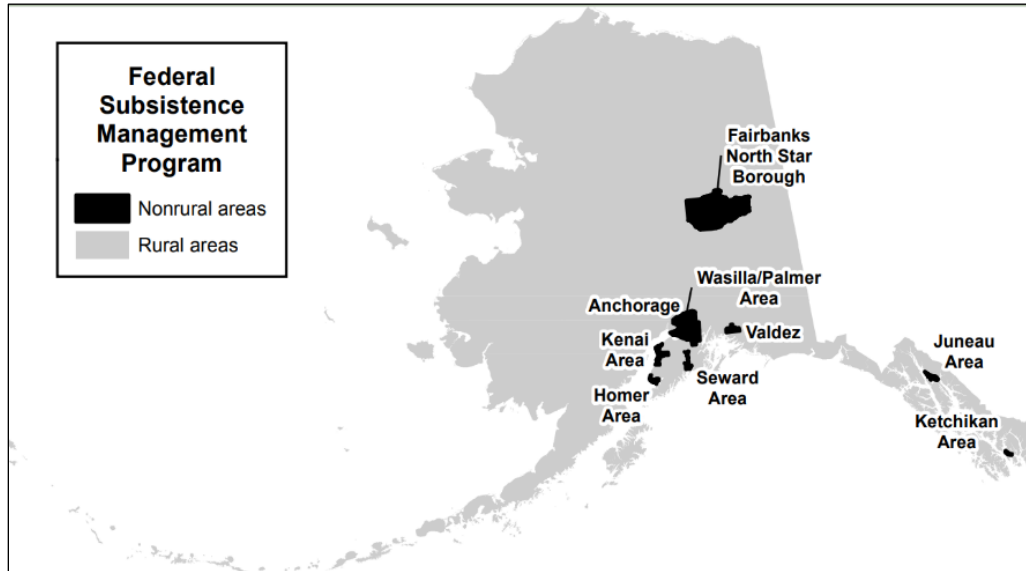
Another issue raised by some stakeholders concerns which Alaska residents are eligible for subsistence use priority or exemptions. Some of these concerns relate to how the government determines or defines eligibility under certain laws. In particular, the process by which the FSB determines *rural* status in Alaska under ANILCA has come under scrutiny. Other concerns relate to potential confusion caused by the varying eligibility standards established for subsistence use priorities or exemptions across multiple statutes. Finally, some Alaska Native communities have suggested that the extension of subsistence use priorities or exemptions to non-Alaska Native communities does not adequately protect their traditional subsistence practices and culture.

### Rural Priority Determination

Title VIII of ANILCA establishes a priority use of federal lands for subsistence purposes that applies only to “rural residents of Alaska.” Because ANILCA does not define which individuals or communities qualify as *rural*, the FSB determines when a community or area of Alaska should or should not be considered rural using guidelines and characteristics defined by the Secretaries (see **Figure 1**).<sup>111</sup> Determinations of *non-rural* status—and subsequent ineligibility for the Title VIII subsistence priority—have been the subject of debate at times.

<sup>111</sup> Communities determined to be non-rural can be found at 36 C.F.R. §242.23 and 50 C.F.R. §100.23.

**Figure I. Federal Subsistence Board Non-rural and Rural Determinations**  
(as of December 2022)



**Source:** Department of the Interior, “Federal Subsistence Management Program, Non-rural Areas,” p. 1, at <https://www.doi.gov/sites/doi.gov/files/non-rural-areas.pdf>.

One specific issue that has generated concern is the factors that the FSB considers in making such a determination. Under previous regulations, the FSB would determine if a community was rural or non-rural based primarily on set population ranges (e.g., communities of 2,500 or fewer residents were deemed rural).<sup>112</sup> The regulations required these determinations to be reviewed every 10 years. Through this review process, the FSB had determined that a number of rural areas had become non-rural and therefore would become ineligible for the Title VIII subsistence use priority.<sup>113</sup> After stakeholders raised concerns about the implications of individuals becoming ineligible, the federal government promulgated new regulations in 2015 that removed specific guidelines for the non-rural determination process, including requirements regarding population data, the aggregation of communities, and the decennial review.<sup>114</sup> According to the agencies, these new regulations provide the FSB with more discretion in making decisions by taking into account regional differences across Alaska and allow for greater input from relevant stakeholders.<sup>115</sup> Even with the new regulations, certain stakeholders believe the revised regulations continue to exclude certain residents—especially Alaska Native residents living in non-rural areas—for whom subsistence uses on federal lands are important to maintaining a

<sup>112</sup> FWS and FS, “Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C,” 57 *Federal Register* 22940-22964, May 29, 1992. Under these regulations, the FSB was required to take into consideration community or area “characteristics” when evaluating rural or non-rural status. These characteristics could include the use of fish and wildlife in daily life, the development and diversity of the economy, community infrastructure, and other factors.

<sup>113</sup> See, for example, a 2007 decision to list Prudhoe Bay as *non-rural* (FS, FWS, “Subsistence Management Regulations for Public Lands in Alaska, Subpart C; Nonrural Determinations,” 72 *Federal Register* 25688, May 7, 2007) and the proposed rule to change the status of the Kodiak area from *rural* to *non-rural* (71 *Federal Register* 46416, August 14, 2006).

<sup>114</sup> 80 *Federal Register* 68245-68248.

<sup>115</sup> DOI, “Federal Subsistence Board Adopts Policy on Nonrural Determinations,” press release, January 18, 2017, at [https://www.doi.gov/sites/doi.gov/files/uploads/fsb\\_nonrural.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/fsb_nonrural.pdf).



connection with their culture and traditional practice (see “Alaska Native Versus Non-Alaska Native Eligibility”).<sup>116</sup>

### **Differences in Subsistence Use Eligibility Across Statutes**

Each of the statutes discussed in this report establishes explicit exemptions or priority use for certain subsistence practices across Alaska. How and when these exemptions or priorities apply vary depending on the law in question. Some statutes establish subsistence priorities or exemptions based on the racial or ethnic identity of the user, whereas others base applicability on certain geographic regions. Still others some consider both racial and geographic factors. For example, the ESA explicitly exempts “native Alaskans” from prohibitions on taking or importing endangered or threatened species for subsistence purposes.<sup>117</sup> Under the law, *native Alaskan* includes any “Indian, Aleut, or Eskimo” who resides in Alaska—as well as non-Alaska Native individuals who are permanent residents of Alaskan Native villages.<sup>118</sup> Meanwhile, the subsistence use exemption under the MMPA applies only to “Indian, Aleut, or Eskimo” individuals and further limits the exemption to only those individuals living “on the coast of the North Pacific Ocean or the Arctic Ocean.”<sup>119</sup> Non-Alaska Native individuals are not eligible for an exemption under the MMPA.

By contrast, the MBTA and ANILCA do not specifically limit subsistence use rights on the basis of race or racial heritage. The MBTA exemption applies to “indigenous inhabitants of the State of Alaska,” and FWS regulations define the term to mean “a permanent resident of a village within a subsistence harvest area, regardless of race.”<sup>120</sup> Similarly, although ANILCA recognizes the importance of subsistence uses to “Native physical, economic, traditional, and cultural existence,” the law does not restrict subsistence hunting and fishing on federal lands to Alaska Natives or grant priority rights for such practices on the basis of tribal or Native affiliation. Instead, the law defined *subsistence uses* in terms of the customary and traditional uses by “rural Alaska residents,” effectively extending the subsistence use priority on federal lands to both Alaska Native and non-Alaska Native residents.<sup>121</sup>

Given the complexity of this statutory framework, and the manner in which these laws may overlap and apply different qualifying standards, when and for whom subsistence use rights and exemptions apply can cause confusion. For example, an individual eligible for subsistence use priority under ANILCA may not be able to continue subsistence harvest practices with respect to a particular species if the species is subsequently listed as endangered or threatened under the ESA. Similarly, although FWS has indicated that no migratory birds open for harvest during the subsistence season in Alaska are currently threatened or endangered species, a future listing could cause a person previously eligible to hunt a species under the MBTA to no longer be eligible to hunt it under the ESA due to the differing eligibility provisions of the two statutes.

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<sup>116</sup> See, for example Raegan Miller, “Advisory Council Advances Proposal to Open Federal Subsistence Hunts and Fisheries to Ketchikan Residents,” KRDB Community Radio, October 27, 2022.

<sup>117</sup> 16 U.S.C. §1539(e).

<sup>118</sup> As discussed above, the term *Eskimo* may be considered derogatory or offensive to some Native Alaskan communities but is used due to its legal significance under federal laws (see footnote 14).

<sup>119</sup> 16 U.S.C. §1371(b).

<sup>120</sup> 50 C.F.R. §92.4

<sup>121</sup> 16 U.S.C. §3114.

## Alaska Native Versus Non-Alaska Native Eligibility

Another issue that has been a topic of debate is whether, or the degree to which, subsistence use priorities or exemptions apply to non-Alaska Native communities. Only the MMPA subsistence use exemption applies exclusively to “Indian, Aleut, or Eskimo” individuals (and only when those individuals are living on the coast of the North Pacific Ocean or the Arctic Ocean). Other subsistence-related statutes generally apply to both Alaska Native and non-Alaska Native individuals. Some Alaska Native communities object to the extension of subsistence use rights and exemptions to non-Alaska Native communities, claiming this approach risks not adequately ensuring and protecting Alaska Native subsistence practices and culture.<sup>122</sup> The lack of explicit protections or priority for Alaska Native subsistence users in ANILCA (which instead confers such benefits to “rural Alaska residents”) in particular has been an issue of concern for some Alaska Native communities.

With the passage of ANCSA in 1971, aboriginal hunting and fishing rights were extinguished for participating Alaska Native communities.<sup>123</sup> Although the conference report for ANCSA indicates that Congress may have expected that the Secretary of the Interior and the State of Alaska would use their authorities to protect specifically Alaska Native interests in subsistence activities,<sup>124</sup> following the law’s passage many stakeholders expressed dissatisfaction with any such limitation.<sup>125</sup> The passage of ANILCA in 1980 was intended, in part, to resolve the issues of Alaska Native subsistence uses through Title VIII’s rural priority provision,<sup>126</sup> which extends to both Alaska Natives and non-Alaska Natives. Since then, some Alaska Native communities have contended that ANILCA insufficiently protects the continuation of Alaska Native subsistence use rights and have advocated for amending the law to provide an explicit Alaska Native priority or higher priority for Alaska Natives, which they believe would better protect their traditions and culture.<sup>127</sup>

By contrast, some have highlighted that subsistence uses are also vitally important to the food security of non-Alaska Natives in rural communities and therefore have advocated for a modified rural priority under ANILCA.<sup>128</sup> Under this approach, ANILCA’s subsistence use priority would

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<sup>122</sup> Sullivan, *Indigenous Subsistence Rights*.”

<sup>123</sup> As mentioned above, not all Alaska Native communities ceded their land claims—and subsequently their hunting and fishing rights to those lands—to the federal government under ANCSA.

<sup>124</sup> H.Rept. 92-746, 91<sup>st</sup> Cong., 1<sup>st</sup> sess. (1970), reprinted in 1971 *U.S. Code Cong. & Adm. News* 2247, 2248. (“The conference committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority.”)

<sup>125</sup> David S. Case and David A. Voluck, *Alaska Natives and American Laws*, 3<sup>rd</sup> ed., Fairbanks, AK: University of Alaska Press, 2012), pp. 292-293 (“Some nine years later it was compellingly clear that neither the state nor the Secretary were likely to protect subsistence in the manner Congress had contemplated”). See also Kristin McCarrey, “Alaska Natives: Possessing Inherent Rights to Self-Governance and Self-Governing from Time Immemorial to Present Day,” *American Indian Law Journal*, vol. 2, no. 1 (May 2017), pp. 437-452.

<sup>126</sup> The legislative history of ANILCA indicates that Alaska Native subsistence use was an overriding concern in developing the Title VIII provision. See, for example, U.S. Congress, House Committee on Interior and Insular Affairs, *Alaska National Interest Lands Conservation Act of 1979*, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., April 18, 1979 (Washington: GPO, 1979), p. 230 (“The importance of subsistence uses ... to the physical, economic and cultural well-being of Alaska Natives and other rural residents has been exhaustively chronicled in testimony presented at hearings, town meetings and workshops held by the committee during consideration of both the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act.”).

<sup>127</sup> For example, see Alaska Federation of Natives, “Subsistence Action,” at <https://www.nativefederation.org/subsistence-action-workshops/>.

<sup>128</sup> Miranda Strong, “Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can

extend to Alaska Natives living in both rural and urban communities—as well as to non-Alaska Natives living in rural designated areas. According to these advocates, such a proposal would recognize that Alaska Natives in urban communities maintain a customary and traditional connection to subsistence activities, while also ensuring rural, non-Alaska Natives have access to subsistence practices that are vital to their food security. Other stakeholders oppose any subsistence use priority based on an individual’s race or tribal affiliation and claim that federal lands in Alaska should be open to anyone, as Alaska’s state constitution would provide.<sup>129</sup>

### ***Haaland v. Brackeen* and Equal Protection: Should Laws Benefiting Tribes Be Subject to Strict Scrutiny?**

In *Haaland v. Brackeen*, argued before the Supreme Court in November 2022 during the October 2022 term, the Court is considering, among other issues, an equal protection challenge to Congress’s establishment of special rules that apply to “Indian children” in the Indian Child Welfare Act (25 U.S.C. §§1901 et seq.). The Fourteenth Amendment’s Equal Protection Clause prohibits state government actors from denying “any person within its jurisdiction the equal protection of the laws.” Although the Fourteenth Amendment applies only to state governments, the Court has analyzed federal equal protection claims under the Fifth Amendment “precisely the same” as those brought under the Fourteenth Amendment. These equal protection provisions, according to the Supreme Court, require that “all persons similarly situated should be treated alike.”

The challenges before the Court allege that Congress violated the Fifth Amendment’s guarantee of equal protection by distinguishing between “Indian children” and other children in the Indian Child Welfare Act, thereby treating individuals differently based on race in a way that does not hold up to strict scrutiny. *Strict scrutiny* is a legal test that asks whether a classification in a law, such by race, (1) serves a compelling government interest and (2) is narrowly tailored to further that interest. This challenge relies primarily on two Supreme Court precedents. First, in *Adarand Constructors v. Peña*, the Supreme Court established that any time the federal government subjects individuals to unequal treatment based on their race, that action is subject to “strict scrutiny.” Second, in *Rice v. Cayetano*, the Supreme Court recognized that “[a]ncestry can be a proxy for race” and therefore subject to the same constitutional limitations as explicitly race-based classifications. Based on these two cases, the plaintiffs in *Brackeen* argue that classifications based on Native American ancestry must satisfy strict scrutiny.

On the other side, the federal and tribal defendants argue that such classifications require only a rational basis. The defendants argue that Supreme Court jurisprudence has established that the federal government’s relationship with federally recognized Indian tribes is based on a *political*, rather than racial, categorization. Political classifications are not among the classes subject to heightened scrutiny. The Constitution’s Indian Commerce Clause provides authority for Congress to “regulate Commerce ... with the Indian tribes” and is the principal constitutional basis for many statutes and regulations governing the federal relationship with tribal sovereigns. For example, in *Morton v. Mancari*, the Court upheld a Bureau of Indian Affairs’ employment preference for members of federally recognized tribes because the preference was a political classification: that is, it applied to members of tribal entities who have a unique relationship with the federal government, not all persons with Native American heritage. The Supreme Court further opined that because “[l]iterally every piece of legislation dealing with Indian tribes” is “explicitly designed to help only Indians,” deeming such legislation as invidious racial discrimination would jeopardize “the solemn commitment of the Government toward the Indians.”

Assuming the Court reaches this issue, its decision may clarify the question of how equal protection principles apply to federal Indian legislation. Of the 574 current federally recognized tribes that may be affected by this litigation, 227 are Alaska Native entities.

**Sources:** Nos. 21-376, 21-377, 21-378, and 21-380 (U.S.); U.S. Const. amend. XIV; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); U.S. Const. art. I, § 2; *Adarand Constructors v. Peña*, 515 U.S. 200, 226 (1995); *Rice v. Cayetano*, 528 U.S. 495, 496 (2000); U.S. Const., art. I, § 8, cl. 3; *Morton v. Mancari*, 417 U.S. 535 (1974); 87 *Federal Register* 4637 (Jan. 28, 2022).

Alaska Thaw Out Rural & Alaska Native Subsistence Rights,” *Alaska Law Review*, vol. 30, no. 1 (2013), pp. 71-94.

<sup>129</sup> For example, see Alaska Outdoor Council (AOC), “AOC Views,” at <https://alaskaoutdoorcouncil.org/aoc-views/>. For a discussion of the equal access clause in the Alaska Constitution and its applicability to federal management under ANILCA, see “Federal Management of Subsistence Uses Under ANILCA.”

## Enforcement

Other potential challenges facing federal agencies involve the enforcement of subsistence use provisions under the law. Some of these issues are not specific to subsistence use but rather reflect overall challenges regarding the enforcement of wildlife and conservation laws, particularly in Alaska.<sup>130</sup> As mentioned, more than 60% of land in Alaska is under federal jurisdiction, comprising more than a third of the entire federal estate.<sup>131</sup> Many of these lands are in remote regions, making enforcement and oversight challenging. In some cases—due, in part, to the sheer scale of their jurisdictional boundaries—federal agencies rely on citizen reports and/or whistleblowers to identify crimes and enforce penalties.<sup>132</sup> Some Members of Congress have introduced legislation that would aim to improve the protection of whistleblowers and support funding of certain wildlife and conservation statutes.<sup>133</sup>

Other potential law enforcement challenges may be more specific to subsistence uses and harvests. For example, agencies may run into difficulties verifying for whom and when subsistence use privileges or exceptions apply. Although the harvest and taking of certain species for subsistence purposes may require a permit from the state, other subsistence practices only require eligible individuals to provide identification or some other proof of residency.<sup>134</sup> This could create challenges in ensuring or verifying eligibility for subsistence users. Verification challenges have been of particular concern for subsistence use provisions under the MMPA, which (as discussed in “Alaska Native Versus Non-Alaska Native Eligibility”) are limited to “Indian, Aleut, or Eskimo” individuals living on the coast of the North Pacific Ocean or the Arctic Ocean.<sup>135</sup> Other challenges have involved the limits, or reach, of federal enforcement due to litigation around the jurisdictional authority provided under federal laws (see also “Multiple Land Management Mandates and Jurisdictional Questions”).<sup>136</sup> Still others, primarily subsistence users and Alaska Native communities, have suggested that some enforcement practices from both state and federal agencies have been overly aggressive and have focused too much on subsistence users, who make up a small percentage of Alaska’s annual resource harvest.<sup>137</sup>

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<sup>130</sup> For general issues regarding challenges in enforcing wildlife laws, see Kenneth J. Peak, “Enforcing the Laws of Wildlife and Recreation (Part One),” *Law Enforcement Bulletin*, September 27, 2017.

<sup>131</sup> See CRS Report R42346, *Federal Land Ownership: Overview and Data*, by Carol Hardy Vincent and Laura A. Hanson.

<sup>132</sup> For example, see National Whistleblower Network, *Special Report: The Critical Role in Whistleblowers in Enforcing Wildlife Protection Laws*, September 14, 2019, at [https://www.whistleblowers.org/wp-content/uploads/2019/09/Wildlife\\_Report-Sept-2019.pdf](https://www.whistleblowers.org/wp-content/uploads/2019/09/Wildlife_Report-Sept-2019.pdf); see also Tinker Ready, “Guest Post: Whistleblowers Could Help Expose Wildlife Criminals in Remote Alaska-Yukon,” *Whistleblower Network News*, August 25, 2019.

<sup>133</sup> For example, H.R. 6059, the Wildlife Conservation and Anti-Trafficking Act of 2021, in the 117<sup>th</sup> Congress. In 2018, the Government Accountability Office (GAO) published a report looking into the use of financial awards specifically for the purposes of wildlife trafficking; such findings could be relevant to broader wildlife and conservation statutes. See U.S. Government Accountability Office, *Combating Wildlife Trafficking: Opportunities Exist to Improve the Use of Financial Rewards*, GAO-18-279, April 2018, at <https://www.gao.gov/assets/gao-18-279.pdf>.

<sup>134</sup> For regulations regarding permit requirements for subsistence purposes under ANILCA, see 50 C.F.R. § 100.6.

<sup>135</sup> Steve J. Langdon, “Determination of Alaska Native Status Under the Marine Mammal Protection Act,” *Sealaska Heritage Institute*, August 2016.

<sup>136</sup> Elliot Louthen, “Subsistence and Sturgeon: Federal Enforcement on Alaska’s Rivers,” *Alaska Law Review*, vol. 36, no. 2 (June 4, 2020), pp. 179-192. This law review article discusses potential challenges facing federal law enforcement of ANILCA’s subsistence provisions in light of the Supreme Court’s ruling in *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019), holding that navigable waters within Alaska’s national parks are outside the scope of the NPS’s normal regulatory authority.

<sup>137</sup> For example, see 74 *Federal Register* 23336 (“[FWS] received nine comments regarding the enforcement of the

## Climate Change

Issues related to climate change also may impact subsistence use practices in Alaska and may have implications for federal land management and agencies' subsistence use responsibilities. For example, in Arctic regions, studies have shown that climate-related stressors such as sea ice retreat and melting permafrost have shifted patterns in animal migration and impacted people's ability to reach animals overland or safely on sea ice.<sup>138</sup> In addition, changing climate conditions—such as changes in terrestrial conditions, seasonality, and fire regimes—may affect populations of wildlife and fish stocks upon which subsistence users customarily have relied.<sup>139</sup> Climate change also may result in potentially harmful alterations to a subsistence species' habitat, such as fluctuations in water salinity and shifts in vegetation growth. In addition to shifting and impeding access to subsistence species, climate change may complicate food preservation, a vital component of subsistence practices for many rural Alaskans.<sup>140</sup> For example, melting permafrost could affect the ability to store food in traditional ice cellars and may leave food more susceptible to pathogens that can cause food-borne illnesses.

In light of these changes, federal agencies may wish to reconsider or reevaluate their approach to land management to provide continued access to traditional subsistence resources affected by climate change. For example, in response to concerns raised by regional advisory councils across Alaska, the FSB encouraged federal land management agencies to “develop investigative plans that examine how recent changes in the environment affect fish and wildlife populations.”<sup>141</sup> The FSB also may change harvest stock limits in response to declines in population for certain species, as it did in 2019 for the Mulchatna caribou herd.<sup>142</sup> Some rural Alaskans view changes in harvest limits as a direct threat to their ability to source food and nutrients, whereas others argue that additional limits are necessary to ensure the sustainability of future stocks.<sup>143</sup> Some stakeholders also have called for greater federal support for climate resilience programs in Alaska to address future threats to subsistence practices.<sup>144</sup>

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migratory bird subsistence regulations in the Barrow area. Commenters indicated that they believe enforcement was ‘too aggressive,’...and that the community and the Service should work together to find solutions and not resort to law enforcement.”). See also DOI and USDA, *Federal Subsistence Policy*.

<sup>138</sup> Kristen M. Green et al., “Climate Change Stressors and Social-Ecological Factors Mediating Access to Subsistence Resources in Arctic Alaska,” *Ecology and Society*, vol. 26, no. 4 (2021), at <https://doi.org/10.5751/ES-12783-260415>.

<sup>139</sup> Alaska Department of Fish and Game, “Climate Change Strategy,” November 2010, at <https://www.adfg.alaska.gov/static/lands/ecosystems/pdfs/climatechangestrategy.pdf>.

<sup>140</sup> E. Barrett Ristroph, “Still Melting: How Climate Change and Subsistence Laws Constrain Alaska Native Village Adaptation,” *Colorado Natural Resources, Energy & Environmental Law Review*, vol. 30, no. 2 (2019), pp. 248-249.

<sup>141</sup> Letter from Anthony Christianson, Chair, Federal Subsistence Board, to Nancy Morris Lyon, Chair, Bristol Bay Subsistence Regional Advisory Council, September 16, 2020, at <https://www.doi.gov/sites/doi.gov/files/13-board-final-r4-bbrac-fy19-arr-enclosure-508.pdf>.

<sup>142</sup> DOI, “Federal Subsistence Board Takes Action on Temporary Wildlife Special Action Requests WSA19-07 (Mulchatna Caribou) and WSA19-08 (Unit 13E Ptarmigan),” November 8, 2019, at <https://www.doi.gov/subsistence/news/general/federal-subsistence-board-takes-action-temporary-wildlife-special-action-0>.

<sup>143</sup> For perspectives on federal harvest limits, see Jacob Resneck, “Hearing Anxiety over Food Security, Subsistence Council Recommends Tighter Hunting Rules in Rural Southeast Alaska,” KCAW, October 14, 2021; Isabelle Ross, “Federal Board Reduces Mulchatna Caribou Harvest Limit,” Alaska Public Media, November 8, 2019.

<sup>144</sup> *Ibid.*

## **Conclusion**

Fish and wildlife management across the United States requires balancing a variety of uses by different stakeholders for many different purposes, all against a backdrop of changing populations



and ecosystems as species and landscapes adjust to climate change. In Alaska, such issues are further complicated by the protection of certain fishing and hunting rights through various statutory authorities rather than guarantees through treaties. Additional complicating factors in Alaska include the expansiveness of the landscape (which creates both resource scarcity and enforcement challenges), the large extent of federal land ownership, and the extent to which climate change might affect subsistence use resources and practices. Alaska Natives seek to preserve their ability to sustain themselves through fishing and hunting and their culture, religious practices, and way of life. Rural non-Alaska Natives may rely on subsistence hunting and fishing to survive in remote areas with limited access to channels of commerce. Many stakeholders have interests in preserving threatened and endangered species, marine mammals, migratory birds, and other species at risk of overuse. Finally, federal and state interests may not always align, and the split or shared jurisdiction has been a frequent subject of dispute. Congress may consider whether or to what degree the federal government should play a role in managing use of Alaska's fish and wildlife for subsistence purposes and how federal agencies should balance different interests and priorities when considering subsistence uses.

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