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APPENDIX A

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TO: F/SWR - E. Charles Fullerton
THRU: GCSW - Martin B. Hochman *Martin B. Hochman*
FROM: GCSW - Robert W.K. Farrell *M.B. Hochman for*
SUBJECT: A Review of the Uses of "Subsistence" Exceptions in Various Statutes and Regulations Relevant to Reviewing the Provisions for Subsistence Takings of Sea Turtles

I.

INTRODUCTION

"Subsistence" is an important concept in an exception to the prohibitions of the Endangered Species Act of 1973 (hereafter "ESA" or "Act"). The taking of threatened or endangered species by Alaskan natives is permissible if the taking is primarily for subsistence purposes and is not accomplished in a wasteful manner. 16 U.S.C. § 1539(e)(1) and (2). In addition to this statutory exemption for Alaskan natives, a subsistence exception exists in regulations implementing the ESA for the taking of green sea turtles by residents of the Trust Territory of the Pacific Islands. 50 C.F.R. § 17.42(b)(1)(vi), 50 C.F.R. § 227.72(f).

Despite the presence of a subsistence exception in the statute the term "subsistence" is not defined in the ESA. The U.S. Fish and Wildlife Service (FWS) has defined the term in regulations implementing the ESA for threatened and endangered species under the jurisdiction of that agency. 50 C.F.R. § 17.3. However, there is no comparable definition in the regulations implementing the ESA for endangered and threatened species under the jurisdiction of the Department of Commerce/National Marine Fisheries Service (NMFS). 50 C.F.R. § 222-227.

The purpose of this memorandum is to consider the meaning of "subsistence" as it applies in the ESA threatened sea turtle regulations. Because of a lack of complete information about the intent and purpose of the sea turtle subsistence exception, the meaning of the term under the statutory Alaskan native exception will be considered. This discussion will include an



examination of a comparable subsistence exception for Alaskan natives in the Marine Mammal Protection Act of 1972. The two Alaskan native exceptions provide a general understanding of the concepts implicit in the term "subsistence" and the legislative intent behind the creation of those exemptions. The memo will also discuss the subsistence concepts utilized by the International Whaling Commission (IWC) to regulate the hunting of bowhead whales by Alaskan natives as well as the implications of the American Indian Religious Freedom Act on claims of native rights to take sea turtles.

Using the framework developed in the Alaskan native area, the specifics of the sea turtle exception will then be examined. A comparison of the Alaskan native and sea turtle subsistence exceptions will be made and a list of general criteria underlying the creation of a subsistence exception will be identified and discussed. Finally, some particular problems associated with the sea turtle exception will be examined.

II.

ALASKAN NATIVE SUBSISTENCE EXCEPTION

The subsistence exception for Alaskan natives under the ESA provides in part:

§ 1539. (e)(1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by --

(A) any Indian, Aleut, or Eskimo who is an Alaskan native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village; if such taking is primarily for subsistence purposes. Non-edible by-products of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection --

(i) The term "subsistence" includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns;

Remaining portions of the exception define "authentic native articles of handicrafts and clothing" (16 U.S.C. § 1539(e)(3)(ii)) and provide for the restriction of native subsistence taking upon a determination that an endangered or threatened species is being materially and negatively affected by the activity. (16 U.S.C. § 1539(e)(4)).

The legislative history of this section indicates that it was made a part of the ESA because of the special role that certain threatened and endangered species play in the traditional culture, livelihood and social structure of Alaskan native groups;

It has become apparent to the Committee in hearings that the case of the Alaskan native Indians, Aleuts, and Eskimos required special attention. Certain native inhabitants depend on traditional hunting practices not only for subsistence but as a means for preserving social unity. Further, it was shown that their "take" was not the principal threat to the animals involved. Accordingly, S. 1983 does not apply with respect to the taking of any endangered or threatened species by such natives, provided that the action is for the purpose of consumption or use in a native community or for creation and sale of native articles of handicrafts and clothing, and is not accomplished in a wasteful manner.

S. Rep. No. 307, 93rd Cong., 1st Sess. 7 (1973) reprinted in COMM. ON ENVIRONMENT & PUBLIC WORKS, 97th CONG. 2d Sess., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 AS AMENDED, at 304 (1982).

The legislative history also reveals that the Alaskan native exception was based upon a similar exception contained in the MMPA and was drafted to avoid some of the problems encountered in implementing the MMPA exception.

There is also a specific exception for Alaska Natives. This was written utilizing the Marine Mammal Protection Act of 1972 (86 Stat. 1027) as a guide and was reviewed in detail with my staff and is entirely agreeable to me. I believe it provides the protection necessary for Alaskan Natives. Many of the technical changes were made as

a result of certain problems we have found in the implementation of the marine mammal bill and certain questions that have subsequently been raised by those agencies in enforcing that Act. Hopefully this will eliminate many of these ambiguities and will also, I intend, clarify our original interpretation of the Marine Mammal Protection Act.

CONG. REC. (1973) (remarks of Sen. Stevens) reprinted in COMM. ON ENVIRONMENT & PUBLIC WORKS, 97th CONG., 2d SESS., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 AS AMENDED, at 370 (1982).

In order to understand the meaning of "subsistence" as it is used in the ESA statutory exception, the constituent elements of the section must be examined. As the ESA Alaskan native exception is based largely upon the comparable MMPA exception, the following discussion will make references to the MMPA where appropriate.

A. WHO IS INCLUDED IN THE EXEMPTION

The ESA provision is very specific in describing to whom the exception applies. Only Indians, Aleuts or Eskimos who are Alaskan natives and who reside in Alaska or non-native permanent residents of an Alaskan native village come within the exception. 16 U.S.C. § 1539(e)(1)(A) and (B).

1) Alaskan Natives: The term "Alaskan native" is not defined in either the ESA or the MMPA. However, "Alaskan native" is defined in the NMFS regulations implementing the MMPA at 50 C.F.R. § 216.3. According to this definition, an "Alaskan native" is a) a U.S. citizen who is at least one quarter Alaskan Indian, Eskimo or Aleut or combination thereof, including individuals with one quarter native blood with non-native adoptive parents, or b) any U.S. citizen who is regarded as an Alaskan native by the native village or group of which he claims to be a member and whose father or mother is or was regarded as native by any native village or group. In addition, any citizen enrolled by the Secretary of the Interior pursuant to section 5 of the Alaska Native Claims Settlement Act (ANCSA) is conclusively presumed to be an Alaskan native. This same definition was adopted by the FWS in regulations implementing the ESA for species under the jurisdiction of that agency. 50 C.F.R. § 17.3.

Under section 1539(e)(1)(A) of the ESA, any Indian, Aleut or Eskimo who is an Alaskan native and who resides in Alaska is eligible for the exemption. The comparable provision in the MMPA limits the exemption to "... any Indian, Aleut or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean ..." 16 U.S.C. § 1371(b). This version was added to the MMPA by amendment in 1981.

Problems had arisen under the original MMPA provision in defining the geographical scope of the North Pacific Ocean and in determining whether Indians residing on the coast of the North Pacific in areas other than Alaska were included in the exception. See NOAA Legal Memoranda: "Participation in Joint Ventures for the Taking of Marine Mammals", Carol Teather, May 19, 1975 and "... MMPA Sensitive Cases: Application of Native Exception to Non-Alaska Natives", David Fitch, January 3, 1980. The phrase "who resides in Alaska" was added to the MMPA provision in 1981 to clarify that only Indians residing in Alaska are eligible for the exemption. The ESA provision was drafted to avoid this type of problem by specifying that only Alaskan natives residing in Alaska come within the exemption.

2) Non-Native Residents of an Alaskan Village:

The ESA exception also applies to non-native permanent residents of an Alaskan native village. The legislative history of the ESA exception indicates that this language was originally part of a separate "hardship" exception intended to include certain individuals who were permanent residents of Alaskan native communities and who relied upon subsistence hunting for survival but who did not otherwise qualify as Alaskan natives. This exception was intended to apply to no more than a dozen individuals. CONG. REC. (1973) (remarks of Senator Stevens), reprinted in COMM. ON ENVIRONMENT & PUBLIC WORKS, 97th CONG., 2d SESS., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 AS AMENDED, at 378-379 (1982). In the final version of the ESA, this exemption emerged as part of the overall Alaskan native exception.

The MMPA exception adopted a more restrictive approach, not permitting a subsistence or handicraft take by non-native Alaskans. 16 U.S.C. § 1371(b). When provisions of the MMPA and ESA conflict, the ESA provides that the more restrictive provisions of the MMPA will take precedence. 16 U.S.C. § 1543. For this reason, it is arguable that the MMPA exception would control a situation where non-native Alaskans were taking threatened or endangered marine mammals.

B. PURPOSES FOR WHICH THE ANIMAL MAY BE TAKEN

The ESA Alaskan native exception is applicable only if the taking is "primarily for subsistence purposes." The exemption also provides that the non-edible by-products of an animal taken primarily for subsistence purposes may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing. 16 U.S.C. § 1539(e)(1). This differs from the MMPA exception where it is permissible to take a marine mammal if the taking is 1) for subsistence purposes or 2) for the purpose of creating and selling authentic articles of native handicraft and clothing. 16 U.S.C. § 1371(b). Under either exemption, the taking cannot be accomplished in a wasteful manner. 16 U.S.C. § 1371(b), 16 U.S.C. § 1539(e).

The second part of the MMPA exception was included to permit the continuation of the native "cottage industries" in the production of handicrafts and clothing out of the parts of marine mammals. H.R. & S. CONF. REP. NO. 1488, 92nd Cong., 2d Sess., 2, reprinted in (1972) U.S. CODE CONG. & ADMIN. NEWS 4187, 4188. The ESA exception also recognizes the native cottage industries, but requires that the initial taking be primarily for subsistence purposes -- only then can the inedible by-products of the animal be transformed into native handicrafts for sale in interstate commerce. This is consistent with the policy of the ESA not to permit commercial exploitation of threatened or endangered species, while acknowledging the important role of the cottage industries in the subsistence economy of Alaskan natives.

Although the ESA exception permits limited commercial activity in native handicrafts, neither the Act nor its regulations control the manner in which the trading will occur. The MMPA, however, does regulate the sale and transfer of native handicrafts by Alaskan natives. 50 C.F.R. § 216.23(b). Again, the ESA's statutory deference to more restrictive provisions of the MMPA suggests that commercial activity in native handicrafts manufactured from the parts of threatened or endangered marine mammals will be governed by the MMPA procedure at 50 C.F.R. § 216.23.

C. PERMISSIBLE USES

As explained at the outset, the term "subsistence" is not defined in the ESA exception or elsewhere in the Act. However, definitions of "subsistence" can be found in regulations under the MMPA and in the FWS regulations implementing the ESA.

"Subsistence" is defined in the regulations implementing the MMPA for species under the jurisdiction of NMFS as:

... the use of marine mammals taken by Alaskan Natives for food, clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker or those who depend upon the taker to provide them with such subsistence.

50 C.F.R. § 216.3

The FWS uses the same definition in the regulations implementing the MMPA for species under its jurisdiction at 50 C.F.R. § 18.3

The FWS also has a definition of "subsistence" in its regulations implementing the ESA;

'Subsistence' means the use of endangered or threatened wildlife for food, clothing,

shelter, heating, transportation and other uses necessary to maintain the life of the taker of the wildlife, or those who depend upon the taker to provide them with such subsistence, and includes selling any edible portions of such wildlife in native villages and towns in Alaska for native consumption within native villages and towns;

50 C.F.R. § 17.3.

The most recent and comprehensive definition of "subsistence" is that contained in a section of the MMPA that was added by amendment in 1981. The section concerns the transfer of management authority for species of marine mammals to state agencies.

Under 16 U.S.C. § 1379(f)(1), management authority over marine mammals cannot be transferred to the State of Alaska unless the State management plan meets certain criteria relating to subsistence and consumptive uses of the species. Section 1379(f)(2) defines the meaning of "subsistence" and related concepts:

(2) For purposes of paragraph (1), the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of marine mammals 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 marine mammals taken for personal or family consumption; and for barter, or sharing for personal or family consumption. As used in this paragraph --

(A) The term "family" means all persons related by blood, marriage, or adoption, or any person living within a household on a permanent basis.

(B) The term "barter" means the exchange of marine mammals or their parts, taken for subsistence uses --

(i) for other wildlife or fish or their parts, or

(ii) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

16 U.S.C. § 1379(f)(2).

The legislative history of § 1379(f) indicates that this definition of "subsistence" was derived from a similar definition in the Alaska National Interests Land Conservation Act (ANILCA). H.R. REP. No. 228, 97th Cong., 1st Sess., 28, reprinted in (1981) U.S. CODE CONG. & ADMIN. NEWS 1458, 1478. The specificity of

the ANILCA definition reflects the fact that it was drafted with both the ESA and MMPA subsistence exceptions in mind. S. REP. NO. 413, 96th Cong., 1st Sess., 233 reprinted in (1980) U.S. CODE CONG. & ADMIN. NEWS 5070, 5177. Because the definition incorporates the concepts of both the ESA and MMPA exceptions, the ANILCA definition is the most recent and useful version of "subsistence." However, the definition is not binding upon either the ESA or MMPA Alaskan native exceptions. The ANILCA definition and its counterpart in MMPA Section 1379(f)(2) are not incorporated into the ESA, and Section 1379(f)(2) of the MMPA, by its terms, does not apply to the MMPA as a whole. For this reason the ANILCA definition is only a useful guide to the meaning of subsistence, not the definitive statement.

Based upon the foregoing definitions and the provisions of the ESA exception, it is possible to describe the permissible uses for which an Alaskan native may take a threatened or endangered marine mammal. Under all of the definitions, the animal may be taken for any purpose clearly involving a subsistence use; personal or family use for food, clothing, shelter, fuel, tools or transportation. In addition, under the FWS definition at 50 C.F.R. § 17.3, edible portions of the animal may be sold in native villages and towns for native consumption within such villages and towns. Inedible portions remaining after subsistence usage may be transformed into native handicrafts and sold in interstate commerce. Finally, under the ANILCA definition, marine mammal parts may be exchanged for other foodstuffs or for non-edible items other than money if the exchange is of a limited, non-commercial nature. Although the ESA exception and its implementing regulations do not specifically endorse the concept of "barter," it is arguable that such trading between Alaska natives could come within the meaning of the phrase "other uses necessary to maintain the life of the taker" as used in the FWS definition.

D. RESTRICTIONS UPON SUBSISTENCE TAKING

Under § 1539(e)(4) of the ESA Alaskan native exception, the Secretary may halt or limit native subsistence hunting in appropriate circumstances. If the Secretary determines that 1) a threatened or endangered species is the subject of subsistence taking by Alaskan natives and 2) the taking is materially and negatively affecting the species population, subsistence taking may be restricted by geographical area, season or in some other manner.

E. GENERAL CONCEPTS OF SUBSISTENCE

Several general concepts implicit in the term "subsistence" emerge when the various definitions are considered;

1) The taking must be "customary" and "traditional" in the native culture. Although not directly mentioned in the definitions found in the implementing regulations of the ESA, it is clear from the legislative history of the Act that the

traditional nature of subsistence hunting among Alaskan natives was an overriding factor in the decision to permit an exception to the Act. Sen. Rep. No. 307, supra, at 5. The ANILCA definition explicitly refers to "customary and traditional use" by Alaskan natives.

2) Several types of "subsistence" use are permissible. Under the definitions, personal or family use of an animal for food, clothing, shelter, fuel, tools or transportation are clearly legitimate subsistence uses.

3) The taking must be for the personal use of the taker or those who depend on the taker to provide the necessities of life. The ANILCA definition refers to this as "... direct personal or family consumption." The implementing definitions refer to it as "... uses necessary to maintain the life of the taker ... or those who depend upon the taker to provide them with such subsistence." Essentially, this is a requirement that the taking be for personal or family use and not for commercial purposes.

4) Although the taking must be for personal or family consumption, certain other uses of the animal are permissible;

- edible portions of an animal may be sold in native villages and towns for native consumption within villages and towns. This is provided in the ESA exception.

- as long as the taking is primarily for a subsistence purpose (ie., for personal or family use as food, clothing, shelter, fuel, tools or transportation) the inedible by-products of the animal can be made into native handicrafts and sold in interstate commerce. This is also provided in the ESA statutory exception.

- it may be permissible to trade or barter marine mammal products as long as the taking is of a limited, non-commercial nature. As mentioned in the discussion of subsistence uses on pages 9-12, barter is explicitly recognized in the ANILCA definition but not in the ESA or its implementing regulations. However, the definition of "subsistence" used by FWS under the ESA statutory exception approves of "other uses necessary to maintain the life of the taker." Since a broad range of subsistence uses are sanctioned under the various Alaskan native definitions, a limited barter system between Alaska natives may be permissible as an "other use necessary to maintain the life of the taker."

III.

SUBSISTENCE CONCEPTS UTILIZED BY THE INTERNATIONAL WHALING COMMISSION (IWC)

The IWC was created under the Convention for the Regulation of Whaling, 49 Stat. 3079, September 24, 1931, a multinational

agreement to establish a system of international regulation of whale fisheries to ensure the conservation and development of whale stocks. Part of the function of the IWC is to periodically review and update the regulatory measures contained in the Convention Schedule.

In the late 1970's, the IWC began work on the development of a management plan for subsistence whaling by Alaskan natives. The development of this plan was necessitated by the fact that the population of the bowhead whale, the principal target of the native subsistence hunt, was severely depleted and an orderly method was needed to limit the native take.

Several definitions of "subsistence" and related terms were utilized by the IWC in considering the management options available. In the Report of the Panel to Consider Cultural Aspects of Aboriginal Whaling in North Alaska, February, 1979, "subsistence use of whale products" was defined as:

- 1) The personal consumption of whale products for food, fuel, shelter, clothing, tools, or transportation by participants in the whale harvest.
- 2) The barter, trade, or sharing of whale products in their harvested form with relatives of the participants in the harvest, with others in the local community or with persons in locations other than the local community with whom local residents share familial, social, cultural, or economic ties. A generalized currency is involved in this barter and trade, but the predominant portion of the products from each whale are ordinarily directly consumed or utilized in their harvested form within the local community.
- 3) The making and selling of handicraft articles from whale products, when the whale is harvested for the purposes defined in (1) and (2) above.

In the IWC Technical Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches by Aboriginal Peoples (U.S. Report, 1981) the following definitions were developed:

Indigenous peoples means aboriginal or native people who are permanent residents of native villages, who have conducted subsistence whaling operations for as long as their history is known. The terms indigenous, aboriginal, and native are used interchangeably in this report.

Subsistence catches are whales hunted and used for personal consumption by aboriginal people, for food, clothing, shelter, handicrafts, tools, transportation and other personal uses, including the sale of parts of whales as traditional native handicrafts. They do not include whales whose parts are sold in any other manner or for any other purpose.

Local consumption is subsistence use of catches by aboriginal peoples.

The Report of the Ad Hoc Technical Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches of Whales by Indigenous (Aboriginal) Peoples, 1981, drafted these subsistence definitions:

Aboriginal Subsistence Whaling means whaling, for purposes of local aboriginal consumption, carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties relating to a continuing traditional dependence on whaling and the use of whales. The term includes trade in items which are by-products of subsistence catches.

Local Aboriginal Consumption means the traditional use of whale products by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence and cultural requirements.

Subsistence Catches are catches of whales by aboriginal subsistence whaling operations.

These IWC definitions share the same general subsistence concepts as those developed under the MMPA and ESA definitions. Under the IWC definitions, the taking must be customary and traditional in the native culture and the taking must primarily be for personal or family consumption. A broad range of subsistence uses (food, clothing, shelter, tools and transportation) are permitted. Finally, some non-subsistence uses (barter, sale as native handicrafts) are permissible as long as the animal was taken primarily for a subsistence purpose. The take of bowhead whales by Alaska natives is limited to the use of traditional harvesting methods and weapons under the terms of the NOAA-Alaska Eskimo Whaling Commission Cooperative Agreement.

It was also evident from the IWC review of the various options available that the IWC had to balance the subsistence

needs of the native community with the need to protect the resource, just as U.S. legislators did in drafting the MMPA and ESA exceptions. As in the legislative debate over the ESA exception, the IWC was presented with evidence detailing the crucial role of the bowhead whale hunt in the culture and social structure of the affected natives.

Probably the single most important aspect of the bowhead whale hunt has been the development, integration, and maintenance of the native community and, indeed, a whole native culture. The whale hunt is an important element throughout the culture, including the role of the bowhead whale and the hunt in bowhead whale ceremonies and festivals; the spiritual relationship of the bowhead whale to the daily life of the Eskimo; the activity of the hunt and its preparation; the sharing and cooperative and competitive social structure; the distribution of the meat among villages; the leadership role played by whaling captains; and the daily consumption of whale meat throughout the year. These components link the Eskimo community, giving it a clear identity and purpose.

IWC Technical Committee Report (1981), supra p.15, at p.4

Other studies reviewed by the IWC suggested that the bowhead whale was not an essential source of nutrition in the native diet and that alternative food sources were available. However these studies reiterated that the bowhead is more than just a source of food in the native culture;

It is equally important to understand that such alternative resources would not replace bowhead whales. Whales are much more than food for the north Alaskan Eskimos. From this perspective, nothing can compensate for the absence of bowhead whale meat, muktuk, and other whale products, and certainly no activity can replace whaling as a focal subsistence tradition among these Eskimos ... Because whales provide more than food, we conclude that whaling activities themselves cannot be replaced. A simple discussion of whales as food would miss the fundamental fact that whaling is a pivotal element in north Alaskan Eskimo culture ..."

Report of the Panel to Consider Cultural Aspects of Aboriginal Whaling in North Alaska, 1979, p.23-24.

Because of the similar balancing process faced by the IWC and the drafters of the ESA exception, it is not surprising that the same general subsistence concepts emerged in both situations. Again, however, it is debatable whether the bartering of whale parts sanctioned in the IWC definitions of subsistence would be permissible under the ESA exception.

IV.

IMPACT OF THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT

Another Federal statute which has some bearing on the subsistence issue is the American Indian Religious Freedom Act (AIRFA). The statute provides:

On or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

It should be noted that a native group must demonstrate that the taking has both past and present religious significance to come within AIRFA. The language of AIRFA and the legislative history of the Act both indicate that the law was designed to protect the ongoing religious practices of Native American religions. H.R. Rep. No. 1308, 95th Congress, 1-5, reprinted in (1978) U.S. CODE CONG. & ADMIN. NEWS, p. 1262-1266.

If a native group covered by AIRFA is able to establish that the taking of a threatened species has special significance to the group as an ongoing religious practice, the group may have a valid claim for an allowable take under threatened species regulations. However, the assertion of rights under AIRFA, standing alone, is not sufficient to exclude a native group from the prohibitions of the ESA. As in the Alaskan native situation, some legitimate subsistence needs will probably have to be documented in addition to religious and cultural significance to justify the taking of threatened or endangered marine mammals.

V.

SEA TURTLE SUBSISTENCE EXCEPTION UNDER REGULATIONS IMPLEMENTING THE ESA

Green, loggerhead and Pacific Ridley sea turtles were listed as "threatened" species under the ESA in regulations promulgated by the Department of Commerce and the Department of

Interior on July 28, 1978. (43 Fed. Reg. 32800), 50 C.F.R. §§ 17.11, 17.42, 227.71, 227.72. These regulations also listed certain breeding populations of the Green and Pacific Ridley sea turtles as "endangered" under the Act. 50 C.F.R. § 17.11.

In the same regulations, a subsistence exception was created for residents of the Trust Territory of the Pacific Islands which permits a limited take of green sea turtles. 50 C.F.R. § 227.72(f). How and why such a subsistence exception became a part of the ESA sea turtle regulations will be examined in the following section.

A. PROPOSED SEA TURTLE REGULATIONS

The proposed regulations creating a "threatened" status for the above-mentioned species of sea turtles were published on May 20, 1975. 40 Fed. Reg. 21982 (1975). In the proposed regulations, no exception for subsistence taking was contemplated. As the following excerpt indicates, the drafters of the proposed sea turtle regulations were not convinced that the need for a subsistence exception outweighed the need to protect the threatened and endangered sea turtle populations;

While we recognize that there is some subsistence taking of these species for food purposes by persons subject to the jurisdiction of the United States, these regulations do not allow for such taking. It is believed that in no case should taking for food purposes be allowed on or near nesting beaches. Although there may be a limited subsistence taking in other areas for food purposes, we do not believe it to be a dominant factor in maintaining life, as there are alternative food sources from species other than those that are believed to be threatened with extinction.

40 Fed. Reg. 21982, 21984.

After the proposed regulations were published, NMFS and FWS reached an agreement on the jurisdictional responsibilities of each agency under the ESA sea turtle regulations. Under this agreement, NMFS assumed jurisdiction over sea turtles and activities impacting sea turtles while the turtles were in the marine environment. "Marine environment" was defined as "... the oceans and seas, the bays and estuaries, and brackish water areas." FWS assumed jurisdiction over sea turtles while on the land. (Memorandum of Understanding Defining the Roles of F.W.S. and N.M.F.S. In Joint Administration of the ESA of 1973 As To Marine Turtles, July 18, 1977).

B. FINAL REGULATIONS

NMFS and FWS jointly published final regulations listing and protecting certain species of sea turtle as threatened under the ESA on July 28, 1978. 43 Fed. Reg. 32800. These regulations did contain a limited subsistence exception for residents of the Trust Territory of the Pacific Islands. The exception provides:

(f) Subsistence. The prohibition in §227.71(b) shall not apply with respect to the taking of any member of the species of green sea turtle (Chelonia mydas) in waters seaward of mean low tide for personal consumption by residents of the Trust Territory of the Pacific Islands if such taking is customary, traditional and necessary for the sustenance of such resident and his immediate family. Sea turtles so taken cannot be transferred to non-residents or sold.

During the comment period following publication of the proposed sea turtle regulations and the draft Environmental Impact Statement, NMFS and FWS received several responses supporting a subsistence exception. Generally these comments were from Territorial governors and State agencies in the areas where subsistence taking was occurring. In the preamble to the final regulations and in the final Environmental Impact Statement, NMFS and FWS discussed why a subsistence exception was or was not granted to each of the principal regions seeking inclusion in the exemption.

The Caribbean - NMFS and FWS gave several reasons for not permitting a subsistence take in the Caribbean region. Initially, agencies found that there was no traditional, cultural reliance among natives in the Caribbean area upon a subsistence take of sea turtles. The agencies found no documentation supporting the contention that sea turtles were relied upon as a source of food by natives in the region. In addition, the agencies were concerned about enforcement aspects of a subsistence exception in the area. Because of the volume of inter-island commerce, a subsistence exception would make it very difficult to determine which takings were for legitimate subsistence purposes.

43 Fed. Reg. 32800, 32806.

Hawaii - Hawaii argued that an existing State regulation limiting the taking of green sea turtles for home consumption to those at least 36 inches in carapace length would adequately protect the sea turtle populations. The regulation, however, did not limit the purposes for which a sea turtle could be

taken to those related to the subsistence needs of the taker. Sport hunting and recreational takings were permissible as long as the turtle was 36 inches or greater in carapace length.

NMFS and FWS decided against permitting a subsistence exception for the Hawaiian Islands. The agencies were concerned that despite the State regulation, there had been an increase in the taking of sea turtles and in the sale of turtle parts as tourist items in Hawaii. In addition, the agencies felt that alternative food sources were available in Hawaii to replace sea turtles in the diet of the native Hawaiians. 43 Fed. Reg. 32800, 32806. (July 28, 1978)

Western Pacific Region - NMFS and FWS granted a subsistence exception for the taking of green sea turtles by residents of the Trust Territory of the Pacific Islands. Three main reasons were advanced for this decision. First, the agencies found that turtle meat and eggs were a traditional, customary source of food in the region and that the taking of green sea turtles was an important part of the culture of certain inhabitants of the area, citing the Yap Island residents in particular. The agencies were also persuaded that green sea turtle meat provided a major source of food for many island residents. Finally, the agencies concluded that a subsistence harvest conducted in the traditional manner would not have a major impact upon the existing population of green sea turtles in the region. 43 Fed. Reg. 32800, 32806.

The discussion of the western Pacific in the preamble to the final regulation concerned the population of the threatened and endangered sea turtles in the western Pacific other than Hawaii. 43 Fed. Reg. 32806. However, the subsistence exception which emerged was limited to residents of the Trust Territory of the Pacific Islands. Thus, certain areas of the western Pacific subject to U.S. jurisdiction which are outside of the Trust Territory itself (Guam, American Samoa, Wake Island) were excluded from the exception. There was no explanation of why these areas were not included in the exemption. Apparently the agencies found the conditions listed above only applied to the Trust Territory itself, not outlying areas.

VI.

SCOPE OF THE ESA SEA TURTLE SUBSISTENCE EXCEPTION

The subsistence exception for green sea turtles in the ESA regulations is considerably narrower than the statutory subsistence exception for Alaskan natives in Section 1539(e) of the Act. An examination of the scope of the sea turtle subsistence exception reveals its limitations.

A. WHO IS INCLUDED IN THE EXCEPTION

Only residents of the Trust Territory of the Pacific Islands may take green sea turtles for subsistence purposes. The term "residents of the Trust Territory of the Pacific Islands" is not defined in the regulations or elsewhere. There is no requirement that the "resident" of the Trust Territory be a native or possess an identifiable relationship with a native group or culture, as in the Alaskan native situation. Thus the exemption would appear to apply to all residents of the geographical area of the Trust Territory, regardless of their cultural background. This broad definition of who is included in the exception is, however, restricted by language stating that residents can only take sea turtles "... if such taking is customary, traditional and necessary for the sustenance of such resident and his immediate family." This appears to be an effort to limit the exception to resident native groups without actually defining such groups.

The exception also provides that a green sea turtle may be taken for personal consumption by the taker and his "immediate family." Although the term "immediate family" is not defined, a close definitional analogy can be found in the ANILCA Alaskan native exception and the MMPA version of the ANILCA subsistence exception at 16 U.S.C. § 1379(f). As defined therein, "family" means "all persons related by blood, marriage or adoption, or any person living within a household on a permanent basis."

B. PURPOSES FOR WHICH SEA TURTLES MAY BE TAKEN

Only a limited range of subsistence usage is permitted by the exemption at 50 C.F.R. § 227.72(f). Under that provision, a taking must be for the "personal consumption" of the taker and his immediate family and the taking must be necessary for the "sustenance of those individuals." Again, these terms were not defined in the regulations. It is apparent from the preamble to the proposed and final regulations, however, that NMFS and FWS considered "personal consumption" to mean consumption for nutritional purposes. See 40 Fed. Reg. 21982, 21984, and 43 Fed. Reg. 32800, 32806. There was no indication in these comments that NMFS and FWS contemplated an exception for native handicrafts, as in the statutory Alaskan native exception. However, it is arguable that some other subsistence uses may come within the limited definition provided in § 227.72(f). The preamble to the final regulations explicitly cited the traditional, cultural usage of sea turtles by Yap Islanders as one reason why a subsistence exception for the Trust Territory was allowed. 43 Fed. Reg. 32800, 32806. For this reason, it is conceivable that some traditional, non-food uses, such as use of the turtle for clothing, tools, or other implements, may be permissible. Such uses fit the § 227.72(f) criteria, as they are a form of personal consumption, they are traditional, cultural uses and they fit within the dictionary definition of the term "sustenance." Establishing that such uses are

"necessary" to the sustenance of the taker and his immediate family is the only apparent barrier to including such subsistence uses in the § 227.72(f) definition.

C. PERMISSIBLE USES

In addition to limiting the purposes for which a green sea turtle may be taken, the exception imposes restrictions upon the use of a turtle once it is taken. Even if the turtle was legitimately taken for personal consumption, the taker cannot sell the turtle or its parts and cannot transfer the turtle or its parts to a non-resident. This language does not preclude a transfer of subsistence taken turtles among residents; however, so some type of barter system among residents may be permissible.

D. RESTRICTIONS UPON SUBSISTENCE TAKING

Three additional restrictions upon subsistence taking should be noted. The exception does not permit residents of the Trust Territory to take any species of sea turtle other than the green sea turtle (Chelonia mydas). This effectively bans the taking of the hawksbill turtle, which has been identified as another species of sea turtle that has been subject to a traditional harvest by native groups in the Pacific region. NMFS Memorandum, "A Review of Information on the Subsistence Use of Green and Hawksbill Sea Turtles on Islands Under U.S. Jurisdiction in the Pacific Ocean," R. S. Johannes, January, 1984. The hawksbill turtle is listed as "endangered" under the ESA, and thus a subsistence exception is precluded by §9(a) of the Act. 16 U.S.C. § 1538(a).

The exception also attempts to protect the stocks of the green sea turtle by permitting them to be taken only while in the water ("...waters seaward of mean low tide"). This restriction was designed to protect nesting beaches and the female turtles and eggs located upon these beaches.

Finally, NMFS and FWS have an obligation to obtain data on the extent of subsistence harvesting and the effect of such harvesting upon the green sea turtle population. The agencies are to base future decisions about the level of subsistence taking upon this data. 43 Fed. Reg. 32800, at 32806. This provision is similar to that in the ESA statutory exception for Alaskan natives, which permits the Secretary to restrict subsistence taking if such taking is materially and negatively affecting the subject species. 16 U.S.C. § 1539(e)(4).

VII.

COMPARISON OF ESA STATUTORY AND REGULATORY SUBSISTENCE EXCEPTIONS

It is apparent that the ESA regulatory subsistence exception for the taking of green sea turtles is different in many respects

than the ESA statutory exception for Alaskan Natives. Among the principal differences between the exceptions:

- Only one species of threatened sea turtle, the green sea turtle, may be taken under the exception at 50 C.F.R. § 227.72(f). The Alaskan native exception permits a subsistence taking of any species as long as the other requirements of the section are met.

- 50 C.F.R. § 227.72(f) permits subsistence taking to occur only when the green sea turtles are in the water. There is no comparable restriction on where a taking can occur under the Alaskan native exception, other than that the taking must not be accomplished in a wasteful manner.

- The only purpose for which a green sea turtle can be taken under 50 C.F.R. § 227.72(f) is for the personal consumption of the taker and his immediate family. The taking must also be necessary for the sustenance of the taker and his immediate family. As discussed in the preceding section, there is no indication that NMFS and FWS intended to sanction a broad range of subsistence uses in drafting the exception. The use of green sea turtles for food and nourishment was the only apparent subsistence use contemplated by the drafters.

The subsistence uses permitted under the Alaskan native exception are much broader. Although the taking must be for personal or family consumption under both exceptions, "personal consumption" under the Alaskan native exception includes using the animal for clothing, transportation, fuel, shelter or tools. 50 C.F.R. 17.3.

- The sea turtle subsistence exception does not permit turtles to be taken for the purpose of creating items of native handicraft or art. The Alaskan native exception provides that inedible by-products of an animal taken primarily for subsistence purposes can be transformed in authentic native handicrafts and sold in interstate commerce.

- The sea turtle subsistence exception prohibits any sale of a taken green sea turtle or its parts. The Alaskan native exception permits edible portions of an animal taken primarily for subsistence purposes to be sold to other Alaskan natives within native village and towns. In addition, inedible portions of such an animal may be transformed into authentic native handicrafts and sold in interstate commerce.

In other areas, the two exceptions share certain similarities;

- Both subsistence exceptions are based upon determinations that the taking of certain endangered or threatened species is a traditional part of the culture and social unity of particular native groups. In the sea turtle exemptions, there is an express requirement that the taking be customary

and traditional. In the Alaskan native exception, the importance of the traditional and cultural aspects of subsistence hunting to the affected Alaskan natives is evident from the legislative history of the section.

- Although not explicitly approved, it appears that a limited barter system among residents/Alaskan natives is permissible under both exemptions. The sea turtle subsistence exception provides that a legitimately taken green sea turtle "... cannot be transferred to a non-resident or sold." 50 C.F.R. § 227.72(f). The clear implication of this language is that while the sale of a legitimately taken turtle is prohibited, transfer between residents is permissible. In such a barter system, the subsistence taker could probably exchange a turtle or its parts with another resident for goods other than food if such goods were necessary for the sustenance of the taker and his immediate family, a requirement under the regulation. Given the limited subsistence usage permitted by the exception, however, it will probably be incumbent upon the ultimate transferee to use the turtle in a legitimate manner - i.e., for personal or family consumption as food.

A similar barter system is permissible under the ESA Alaskan native subsistence exception. Although the statutory exception does not directly address an exchange system among Alaskan natives, the exception does provide for the sale of authentic native articles of handicrafts and clothing, 16 U.S.C. § 1539(e)(1)(13), and thus a barter system would clearly seem permissible. In addition, the definition of "subsistence" in the regulations implementing the statutory exception includes "...other uses necessary to maintain the life of the taker of the wildlife, or those who depend upon the taker for subsistence." 50 C.F.R. § 17.3. Since the statutory exception permits a broad range of subsistence uses and sale, a limited, non-commercial system of exchange between Alaskan natives to further legitimate subsistence purposes will not violate the ESA statutory exception.

- Both exceptions have methods by which the subsistence take can be curtailed or halted if it is determined that the harvested species are being detrimentally affected by the activity. In the Alaskan native exception, the Secretary can prescribe regulations upon a determination that the native subsistence taking is materially and negatively affecting the species. According to the preamble to the final sea turtle regulations, NMFS and USFWS will obtain data on the extent of the subsistence take and its impact upon the sea turtle populations and base future regulations upon this data.

VIII.

PURPOSES UNDERLYING SUBSISTENCE EXCEPTIONS

From the foregoing analysis of the ESA statutory and regulatory subsistence exceptions, it is possible to elicit

some general concepts guiding the creation of such exceptions. Following is a list of certain criteria which reflect the theoretical and practical aspects of subsistence that were considered by Congress and the executive agencies in drafting the statutory and regulatory exceptions.

A. THE CUSTOMARY, TRADITIONAL NATURE OF SUBSISTENCE TAKING

This is unquestionably the most important factor underlying a subsistence exception. The entire notion of a subsistence exception is that a particular cultural group has traditionally relied upon taking certain species of wildlife to provide the necessities of life. To ban the taking of such species is essentially to deny that cultural group the right to continue their traditional way of life. The disruptive effect of such an action on the native group's ability to survive in an environment with limited resources provides the justification for an exception to the prohibitions of the Act.

Although a traditional, cultural reliance upon the taking of a certain species may be viewed as a prerequisite for a subsistence exception, the mere presence of a cultural tradition does not assure that an exception will be granted. The other criteria identified in this section may, in a given situation, dictate against inclusion of an otherwise qualified native group.

B. THE EFFECT OF SUBSISTENCE TAKING ON THE POPULATION OF THE SUBJECT SPECIES

Another important factor in determining whether or not to allow a subsistence exception is the impact which the subsistence hunting or fishing has on the population of the affected species. A showing that the subsistence take is not threatening existing populations or that existing populations are viable enough to support a traditional subsistence harvest is strong support for an exception. A lack of evidence indicating that subsistence hunting was adversely affecting the green sea turtle population was one of the principal reasons why NMFS and FWS permitted a subsistence take of the turtles in the Trust Territory.

The available information on the Western Pacific green turtle population is, at best, incomplete. Reports indicate increased harvesting of eggs and adults have occurred in some areas due to improved native transportation to remote islands. These activities may be instrumental in causing the population declines reported in some areas. However, information submitted showed certain nesting colonies were healthy. There was no strong evidence to support a seriously declining green

turtle population which could not support historical harvest levels conducted in a traditional manner.

(43 Fed. Reg. 32800, 32806)

Conversely, a showing that subsistence taking is having an adverse impact upon the population of a threatened or endangered species will hinder efforts to obtain a subsistence exception. If all other considerations support granting an exception but there is evidence that the subsistence take is depleting the population stock of the subject species, it is likely that an exemption will be denied or drafted in a manner restricting the allowable subsistence harvest.

C. USE OF THE ANIMAL FOR PERSONAL OR FAMILY CONSUMPTION

A key element in any definition of subsistence is that the taking is necessary for the sustenance of the taker and his immediate family. This is not an unyielding rule, however, as some commercial usage is permitted under the ESA Alaskan native exception. But, even under the statutory exception, the animal must be taken primarily for a personal or family subsistence purpose before a commercial use may be made of it. Without some documentation that commercial usage is part of the customary, traditional subsistence take of a group, such as with Alaskan natives, it is unlikely that any commercial use will be sanctioned in a regulatory subsistence exception.

D. AVAILABILITY OF OTHER FOOD SOURCES

Even if all of the factors listed above support an exemption, a subsistence exception may be denied if there is a finding that alternative food sources are available to replace the loss of the target species in the diet of the native group. This is particularly true when the sole or primary subsistence use of the species is as food. The availability of alternate sources of food was a principal reason why NMFS and FWS denied a subsistence exception for the taking of sea turtles to natives of the Hawaiian Islands and the Caribbean area. 43 Fed. Reg. 32806, 32800. The availability of replacement food-stuffs is less important when the species is being used for a variety of subsistence purposes, as in the Alaskan native situation. Since it is permissible under the statutory exception for Alaskan natives to take threatened or endangered species for use as clothing, shelter, handicrafts, tools and transportation as well as for food, it makes less sense to condition that exemption upon the availability of replacement foods. In any event, the presence of alternative food sources will inevitably weaken the claim by a particular native group that taking a threatened or endangered species is necessary for the survival of the group.

E. ENFORCEMENT CONSIDERATIONS

A final factor influencing the allowance of a subsistence exception is the enforcement problems that may be encountered. These concerns can take several forms. In any subsistence exception there will be the problem of assuring that the animal was taken for a permissible purpose. This may be of considerable concern when there are several subsistence purposes recognized by the exception and/or some commercial use of the animal is permitted. In this situation the subjective intent of the taker may be crucial; i.e., was the animal taken for a legitimate subsistence/commercial use or for some other purpose. Determining this intent will often be a difficult, if not impossible task.

A related problem exists in assuring that the animal is taken in a permissible manner under the terms of the exemption. For example, the sea turtle exception specifies that the green sea turtle may only be taken "in waters seaward of mean low tide." 50 C.F.R. § 227.72(f). Essentially this requires an enforcement agent or willing witness to observe the actual taking as there is no other reliable way to determine after-the-fact if a turtle was taken on land or in the water.

Another enforcement problem lies in regulating illegal trade in endangered or threatened species parts once a subsistence exception has been created. An exception to the prohibitions of the ESA for subsistence taking creates the opportunity to circumvent the law if an initial taking not for subsistence purposes can be disguised as a subsistence take. This was one of the concerns that led NMFS and FWS to deny a sea turtle exception to the Caribbean area -- once a subsistence take is approved for a certain island, the flow of turtle parts throughout the entire region becomes difficult to stop. It was also a principal reason why no sea turtle exception was granted to the Hawaiian Islands. Even with an existing State regulation restricting the take of sea turtles, NMFS and FWS found an increase in takings and in the production of turtle parts for sale to tourists. 43 Fed. Reg. 32800, 32806.

Finally, there may be enforcement problems in simply policing the areas where subsistence taking is permitted. Alaska and the Trust Territory are broad, expansive areas to regulate. It is not realistic to expect a handful of enforcement agents to adequately assure that the provisions of a subsistence exception are being followed in such areas. Without an effective enforcement program, the entire purpose of the exception is thwarted. Lack of enforcement may promote wholesale disregard of the exception by both the persons subject to it and those not otherwise eligible to participate. This in turn may lead to a decision not to extend a subsistence exception to areas where there will be foreseeable enforcement problems due to a lack of manpower, or to curtail an existing exception for the same reason. This was one of the concerns that led to the decision not to create an exception for the Trust Territory in

the proposed regulations. 40 Fed. Reg. 21982, 21984. Despite the fact that an exception was made a part of the final regulations, enforcement problems remain in the Trust Territory.

IX.

CONCLUSION:

As stated at the outset, each of the factors discussed above reflect criteria that influenced the Congressional decision to create subsistence exceptions to the ESA and MMPA for Alaskan natives and the NMFS/FWS decision to provide residents of the Trust Territory of the Pacific Islands with a subsistence take under the threatened sea turtle regulations. The importance of some factors varied according to the particular circumstances involved. For example, NMFS and FWS had no need to be concerned about a NMFS/FWS decision to provide residents of the Trust Territory broad range of subsistence uses in shaping the sea turtle exception, as a limited exception for food purposes was all that was ever contemplated. This lessened the importance of certain enforcement aspects of the exception, such as regulating the permissible non-food and commercial uses of the species. On the other hand, the limited subsistence usage allowed by the regulation heightened the importance of another factor, the availability of alternative food sources.

Despite the shifting nature of some of the factors, some fundamental concerns remain constant. Any erosion of the traditional, cultural basis for the subsistence take will seriously undermine the need for such an exception. This appears to be an increasing problem in some areas of the Trust Territory, where a growing cash economy is lessening the need of residents to take green sea turtles for food. NMFS Memoranda, "A Review of Information on the Subsistence Uses of Green and Hawksbill Sea Turtles on Islands Under U.S. Jurisdiction in the Pacific Ocean," *supra* p. 26. Likewise, a finding that subsistence taking is causing serious deterioration of the population of a threatened or endangered species will likely lead to restriction or termination of the subsistence exception.

By way of summary, the five principal concepts and/or considerations underlying the subsistence exception for the taking of green sea turtles are outlined below. All of these categories should be carefully considered in any decision to limit or expand the current sea turtle subsistence exception.

A. CUSTOMARY, TRADITIONAL NATURE OF THE TAKING

As stated throughout this memo, the traditional cultural nature of the subsistence hunt is the overriding consideration behind any subsistence exception. A finding that the customary reliance upon the taking of green sea turtles for food has diminished among residents of the Trust Territory would raise a serious question as to the continued viability of the exception. Similarly, evidence or a lack of evidence of traditional,

cultural subsistence usage among native groups in areas such as Guam, American Samoa, and the Hawaiian Islands should be very influential in any decision to expand the exemption.

B. PERSONAL OR FAMILY CONSUMPTION

Another important subsistence concept is that the taking must be for the personal consumption of the taker and his immediate family and not for commercial usage. This is clearly the case under the sea turtle subsistence exception, which states that the turtle must be taken for personal or family consumption and which prohibits the sale or transfer of the turtle to non-residents. Evidence of commercial exploitation of sea turtles in the Trust Territory or other areas desiring to come within the exception should weigh against continuation and/or extension of the exemption.

C. PRESENCE OF ALTERNATIVE FOOD SOURCES

This is a particularly important factor with reference to the sea turtle subsistence exception, as the exception only permits a subsistence take for food purposes. Evidence indicating that alternate food sources are available to native groups in a particular region would be very damaging to that region's efforts to come within the exception. Again, this is a primary reason why no exception was granted in 1978 to the Caribbean and Hawaiian Island regions. Should similar evidence indicate that residents of the Trust Territory are no longer dependent upon the sea turtle as a source of food, their claim to a continued exemption would be substantially weakened.

D. EFFECT UPON THE SPECIES POPULATION

While this is certainly an important factor, it apparently is not an overriding concern under the sea turtle exception as there has not been a showing that subsistence taking has had an adverse impact upon the green sea turtle population in the Trust Territory. As previously stated, however, such a finding would probably require a more restrictive exception to further limit subsistence taking. It would seem that if Guam, American Samoa, the Hawaiian Islands or some other area desire to come within the sea turtle exception, a prerequisite should be a showing that the population stocks in the area are sufficient to support a subsistence take and that such a take will not adversely affect the size of the stock.

E. ENFORCEMENT ASPECTS

Finally, enforcement aspects of the exception are a very important consideration. The sheer size of the Trust Territory precludes effective enforcement of the existing exception.

Given this situation, it is debatable if an outright prohibition on the taking of all sea turtles would have any significant impact upon the residents of the Trust Territory. It may be more beneficial to recognize the practical limitations upon enforcing the exception and leave it intact in the hope that over the course of time it will effect a change in the residents' attitude toward the sea turtles. These same concerns should be considered in any decision to expand the exception to additional areas such as the Hawaiian Islands, Guam or American Samoa, although with different factual settings the conclusions drawn may, of course, be different.

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- List of Authorities and Sources of Information

Sea Turtle Subsistence Exception

List of Authorities and Sources of Information

STATUTORY SOURCES

I. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 et seq.

16 U.S.C. § 1362 (Definitions)

16 U.S.C. § 1371(b) (Alaskan Native Exemption)

16 U.S.C. § 1379(f) (Transfer of Management Authority to the States.)

Implementing Regulations

50 C.F.R. § 18.3 (Definitions - FWS)

50 C.F.R. § 18.23 (Native Exemption - FWS)

50 C.F.R. § 216.3 (Definitions - NMFS)

50 C.F.R. § 216.23 (Native Exemption - NMFS)

II. Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

16 U.S.C. § 1539(e) (Alaskan Native Exemption)

Implementing Regulations

50 C.F.R. § 17.3 (Definitions - FWS)

50 C.F.R. § 17.5 (Alaskan Native Exemption - FWS)

50 C.F.R. § 17.11 (Listing of Sea Turtles as Threatened - FWS/NMFS)

50 C.F.R. § 17.31 (Regulations for Threatened Wildlife - FWS)

50 C.F.R. § 17.42 (Special Rules - Threatened Sea Turtles - FWS)

50 C.F.R. § 222.23 (Jurisdiction over Sea Turtles - FWS/NMFS)

50 C.F.R. § 227 (Regulations for Threatened Sea Turtles - NMFS)

III. American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996

IV. Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 et seq.

16 U.S.C. § 3113 (Definition of "Subsistence Uses")
V. Alaska Native Claims Settlement Act (ANSCA), 43 U.S.C. §
1601 et seq.

43 U.S.C. § 1602(b) (Definition of "Native")
43 U.S.C. § 1604 (Enrollment - Eligible Natives)

LEGISLATIVE SOURCES

I. Marine Mammal Protection Act of 1972

Legislative History of the MMPA, as reprinted in (1972)
U.S. CODE CONG. & ADMIN. NEWS 4144-4191.

Legislative History of the MMPA (1981 Amendments), as
reprinted in (1981) U.S. CODE CONG. & ADMIN. NEWS 1458-1483.

Interim Regulations, MMPA (Preamble and Definitions) 37
Fed. Reg. 28117. December 21, 1972.

Final Regulations, MMPA. (Preamble) 39 Fed. Reg. 1852.
January 15, 1974.

II. Endangered Species Act of 1973

Legislative History of the ESA (and Amendments through
1980). Senate Committee on the Environment and Public Works,
February 1982.

Final Regulations, 50 C.F.R. § 17.3 (Preamble) 40 Fed.
Reg. 44415. September 26, 1975.

Proposed Regulations, 50 C.F.R. § 227. 40 Fed. Reg.
21982. May 20, 1975.

Final Regulations, 50 C.F.R. § 227. 43 Fed. Reg. 32800.
July 28, 1978.

III. AIRFA

Legislative History of AIRFA, as reprinted in (1978)
U.S. CODE CONG. & ADMIN. NEWS, 1262.

IV. ANILCA

Legislative History of ANILCA, as reprinted in (1980)
U.S. CODE CONG. & ADMIN. NEWS, 5070. p. 5177-5178.

MISCELLANEOUS SOURCES

I. Alaskan Native Exception

Memorandum, "Regulation of Bowhead Whale Taking by Alaskan Natives Under the MMPA" Ronald Naveen, GCF, June 5, 1979.

Memorandum, "Participation in Joint Venture for the Taking of Marine Mammals" Carol Teather, GC, May 19, 1975.

Memorandum, "Evolution of Title VIII of ANILCA," Department of Interior, Office of the Solicitor. Undated.

Memorandum, "Subsistence, the MMPA and Walruses." Department of Justice, February 20, 1981.

Comments on NMFS proposed Regulations Implementing the MMPA, Senator Stevens (Alaska), February 15, 1973.

Memorandum, "Regulations Governing Taking and Importing of Marine Mammals - Violations Involving the Alaskan Native Exception," GC, December 5, 1974.

NOAA Letter to Sen. Stevens (Alaska) regarding Native Handicrafts Portion of the Exemption, Robert W. White, July 26, 1974.

Legal Opinion, Native Subsistence, NOAA, James W. Brennan, October 23, 1973.

Memorandum, "Application of Native Exception to Non-Alaskan Natives," David Fitch, GCEL, January 3, 1980.

Final Report, Subsistence Task Force, Alaska Department of Fish & Game, November 20, 1978.

Joint Board of Fisheries and Game (Alaska), Policy Statement on Subsistence. December 8, 1981.

List, Authentic Natives Articles of Handicraft and Clothing. NMFS, Harry L. Rietze, December 10, 1973.

II. IWC Bowhead Whale Exception

Report of the Ad Hoc Technical Committee Working Group on Development of Management Principles and Guidelines for

Subsistence Catches of Whales by Indigenous (Aboriginal) Peoples, 1981.

Report of the Panel to Consider Cultural Aspects of Aboriginal Whaling in North Alaska, 1979.

International Whaling Commission Technical Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches by Aboriginal Peoples -- United States Report, 1981.

Excerpts from IWC Schedule Setting Forth Catch Limits for Aboriginal Subsistence Whaling, February 1983.

IWC Resolution Concerning Aboriginal Subsistence Whaling, 1982.

Review of Bowhead Whale Policy, prepared by Joan MacKenzie (GCOS) prior to 1982 IWC meeting.

III. Sea Turtle Exception

Final Environmental Impact Statement, "Listing and Protecting the Green Sea Turtle, Loggerhead Sea Turtle and Pacific Ridley Sea Turtle Under the Endangered Species Act of 1973." Department of Commerce, July, 1978.

Peter C. Pritchard, Ph.d., "Marine Turtles of Micronesia" Chelonia Press 1977.

George H. Balazs, "Sea Turtles and Their Traditional Usage in Tokelau" Project Report for the World Wildlife Fund and Office for Tokelau Affairs.

George H. Balazs, "Synopsis of Biological Data on the Green Turtle in the Hawaiian Islands" NOAA Technical Memorandum, October 1980.

Memorandum of Understanding, Department of Commerce and Department of Interior, Jurisdiction over Sea Turtles. July 18, 1977.

Synopsis of Sea Turtle Decisions Embodied in Final Regulations, NMFS, August 7, 1978.

Letter to Doyle Gates, NMFS, regarding problems encountered by Hawaiian natives because of the prohibition against subsistence hunting of sea turtles. November 27, 1981.

Memorandum, "American Indian Religious Freedom Act of 1978" GCF, Mary Beth West August 8, 1979.

Memorandum, "A Review of Information on the Subsistence Use of Green and Hawksbill Sea Turtles on Islands Under United States Jurisdiction in the Pacific Ocean"; R.E. Johannes for WPP0, February 6, 1984

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APPENDIX B

National Marine Fisheries Service Response to Public Comments on Subsistence Uses of Green Sea Turtles in the Central and Western Pacific Islands.

On April 20, 1983, the National Marine Fisheries Service (NMFS) published a Federal Register notice (Vol.48, No.77, pp.16925-16926) announcing its intention to review the regulations governing the taking of green sea turtles for subsistence purposes in the central and western Pacific. The notice set forth a schedule for public hearings in Hawaii, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa and opened a comment period for submission of written comments which closed June 21, 1983. The purpose of the public comment period was to collect information on all aspects of the use of sea turtles for subsistence purposes.

Apparently most of those submitting comments perceived the request for information as a proposed change in the regulations. Many of the comments received discussed the status of the green sea turtle populations and either opposed or supported changing the regulation to authorize subsistence taking of green sea turtles in areas other than the Trust Territory of the Pacific Islands (TTPI). Only a few of the comments received provided information on subsistence uses of green sea turtles or rationale for liberalizing the existing exception for subsistence use of green sea turtles in Hawaii, Guam, and American Samoa.

A summary of the comments received and the NMFS response follows:

1. Comment: Twenty-eight commentators stated that the Hawaiian population of green turtles has been reduced and could not sustain a harvest.

Response: Monitoring of the Hawaiian green sea turtle population began in 1973. No significant increase has been demonstrated to date, although the data suggest an upward trend. The NMFS has concluded that the current annual rate of recruitment is too small to support a harvest.

2. Comment: Fifteen comments were received indicating that the economic situation in Hawaii does not meet the prerequisite for the subsistence take of green turtles where a modern cash economy prevails.

Response: Johannes (1984) concluded that Hawaii, Guam, the CNMI, and American Samoa had departed on traditional dependence from the sea and westernization had provided alternatives to a subsistence lifestyle.

3. Comment: Three commentators stated that in order to preserve green turtles as part of a cultural heritage in Hawaii, protection of the depleted stock of turtles would be necessary.

Response: None.

4. Comment: Four commentators stated that subsistence fishing for green turtles should not be permitted in Hawaii because of the difficulty in enforcing any restrictions and the probable harvest of the breeding population of turtles if it were allowed.

Response: The NMFS agrees that enforcement of subsistence taking regulations would be difficult. This was one reason the NMFS and the FWS did not authorize a take of green sea turtles in Hawaii, Guam, and American Samoa in the regulations published when the green sea turtle was listed in 1978.

5. Comment: Two commented that the greatest impact to the Hawaiian population of green turtles has come from commercial operations.

Response: Turtle harvests were uncontrolled in Hawaii from the mid-1800's when the traditional Hawaiian "Kapu" system was abolished until 1974 when the State of Hawaii prohibited commercial exploitation of sea turtles and regulated the taking of green sea turtles for home use. Commercial utilization was likely the major contributing factor to the decline of the Hawaiian green sea turtle population.

6. Comment: A single commentator stated that the biological evidence points to strengthening the restrictive regulations, not liberalizing them.

Response: None.

7. Comment: One commentator noted that the restriction on subsistence take in Hawaii is necessary to prevent commercial trade in meat and jewelry.

Response: Current regulations that authorize subsistence taking prohibit the commercial utilization of turtle products. However, the NMFS recognizes enforcement problems that are likely to be associated with any exception to the prohibitions on the taking of turtles.

8. Comment: Two commentators suggested continuing the prohibitions on taking until the stocks have recovered.

Response: The NMFS agrees that once the stocks are recovered, sound principles of resource management can be applied and a regulated take could occur.

9. Comment: More and better information concerning the status of green turtles in Hawaii is required prior to permitting any subsistence take in Hawaii.

Response: None.

10. Comment: Two commentators indicated that the petitions requesting a review of the subsistence exemption in 50 CFR § 227.27(f) provided no justification for including Hawaii or Guam in such an exemption.

Response: The NMFS determined that there was sufficient evidence of unresolved issues regarding subsistence take of green turtles to justify initiating a review of the regulations.

11. Comment: There are four comments asserting that the Hawaiian population of green turtles are healthy and could withstand a harvest for home consumption.

Response: No significant increase in the Hawaiian green sea turtle population has been detected since 1973 when monitoring began. The NMFS has concluded that the current rate of recruitment is too small to sustain a harvest. Based on comparisons with recovered sea turtle populations in other parts of the world the Hawaiian population is likely to require a decade or more of complete protection before a significant increase may be demonstrated. Anecdotal accounts that turtles are more abundant on foraging grounds are an indication that recovery is underway.

12. Comment: Two comments were received indicating a desire to take green turtles for sport/recreational purposes in Hawaii because it was done in the past.

Response: A sport harvest could be authorized only when the green sea turtle has been removed from the threatened species list.

13. Comment: One commentator stated that green turtles needed to be controlled around the island of Kauai so that they do not deplete the algae that other desirable herbivorous fish utilize.

Response: Changes in abundance of fish species are more likely the result of fishing pressure rather than competition with green sea turtles for a food resource.

14. Comment: Four comments were received regarding the role of turtles in traditional Pacific island religion and mythology. Turtles are an important part of Polynesian mythology, ancient stories of creation, and in many instances are considered the family totem or "aumakua."

Response: The practice of traditional native religions involving turtles would not necessarily be precluded by the continued protection of the green turtle. If the subject of the religious practice in question were to be destroyed the viability of that practice may be diminished.

15. Comment: Four commentators stated that the term "subsistence" needed to be defined more clearly.

Response: The NMFS has obtained a legal review of the term "subsistence" from NOAA General Counsel. This opinion formed the basis of the definition in the review of the sea turtle regulations.

16. Comment: Five comments were received regarding the traditional native medicinal uses of green turtles. Turtle oil was apparently used to treat various skin problems such as burns and rashes. Warm, green turtle blood was used to treat asthma. Turtle oil was also apparently used during post-western contact ranching activities in Hawaii to treat saddle burns on horses. Of these five comments three requested that a take of green turtles be allowed in Hawaii for traditional medical purposes.

Response: None of the commentators indicated that they lived a traditional native Hawaiian lifestyle or that they depended on sea turtles for medicinal purposes. Alternative treatments to the ailments described are available.

17. Comment: Three commentators stated that habitat degradation was the primary cause in the decline of green turtles in Hawaii. Pollution (i.e. runoff and siltation from sugar and pineapple plantations and the ocean dumping of bagasse) was implicated as a major cause of the loss of feeding habitat around the island of Hawaii. Shoreline development was identified as a factor in the loss of nesting habitat in the main Hawaiian islands.

Response: Habitat degradation has contributed to the decline in the Hawaiian population of green turtles. Siltation eliminates foraging grounds and contributes to compacting beach soil so that nests cannot be dug. This may be a factor prohibiting recolonization of beaches on Lanai. The recovery team should consider methods of mitigating the effects of environmental degradation.

18. Comment: Four comments were received asserting that the taking of turtles was part of the "Hawaiian lifestyle" and is a right of the native Hawaiians.

Response: Authorization for a subsistence harvest is dependent on the identification of a culture that is dependent on the taking of sea turtles for its continued existence, evidence that the sea turtle population could sustain the harvest, and documentation that the taking is necessary for the sustenance of the members of the cultural or ethnic group in question. The NMFS found these criteria are only satisfied by a few groups inhabiting the low islands in the Trust Territory.

19. Comment: Two commentators refuted earlier statements and references to the exclusive nature of green turtle use in pre-contact Hawaii asserting that there was no distinction between the ali'i (nobility) and the commoners as to who could and could not eat turtle.

Response: The dispute over who was allowed to eat turtles in Hawaii is an indication of the quality of the documentation of the native Hawaiian culture. Regardless of the outcome of this dispute the criteria discussed in the previous response must be satisfied before a subsistence harvest could be authorized.

20. Comment: Three comments were received concerning the various traditional methods used to capture turtles in Hawaii. Floating turtle nets made from bark fibers (olona), harpoons, lassos, hooks and line for snagging and simply grabbing the turtles by hand were identified as traditional methods.

Response: All of these methods have been previously identified in the literature. Some of these techniques are still in use today in some areas of the TTPI.

21. Comment: One comment was received indicating that some traditional Hawaiian implements had been made of green turtle bone and are still in use today.

Response: There is an abundance of materials available to fashion implements. Fabrication of these implements does not necessarily depend on the availability of green turtle parts.

22. Comment: Three comments were received concerning the use of green turtles for maintenance of traditional Hawaiian fishponds. One commentator asserted that green turtles were used to control algal blooms and stimulate diatom production for fish food in these ponds. Two commentators were in favor of allowing a take for "traditional" fishpond maintenance.

Response: A review of the literature and investigations by workers in the field (Johannes, Balazs, Kay) produced no evidence of the use of green turtles for fishpond maintenance in pre-contact Hawaii. Turtles were kept in fishponds, but only to be held for later consumption.

23. Comment: One commentator indicated that more information on the status and biology of green turtles around Guam was needed before considering any change in the subsistence exemption.

Response: The NMFS agrees that before a harvest of green turtles is authorized the population must be recovered and enough information available for the application of sound principles of resource management.

24. Comment: Three comments were received asserting the population of green turtles around Guam could not withstand a harvest because of their depleted status.

Response: Although there is no baseline data, loss of nesting habitat to development and disturbance, unregulated take prior to 1978 and illegal taking since 1978 may have contributed to a decline in the green turtle stocks around Guam and the Northern Mariana Islands. There is no new evidence to support the view that the stock(s) are large enough to sustain a harvest, and anecdotal information indicates that the stock(s) are depressed and require protection.

25. Comment: Comments from six individuals asserted that the economic situation in Guam (modern cash economy) does not meet the prerequisite for subsistence taking of green turtles.

Response: Johannes (1984) concluded that Guam had departed substantially from a traditional dependence on the sea.

26. Comment: Four comments were received in favor of permitting an allowance for home consumption of green turtles in Guam. It was argued that because of the apparent continuity of the turtle stock between Guam and the Northern Marianas and the shared cultural heritage of these areas, Guam should be included in the exemption for subsistence take as is the

CNMI. It was further stated that the present regulations discriminate against the residents of Guam and that if turtles require protection, they should be protected throughout their range, not limited to a solitary island amidst many where taking is permitted.

Response: In reviewing the cultural dependence of the CNMI on sea turtles, the NMFS concluded there was not sufficient justification for a subsistence take in the CNMI. When the Trust governing the TTPI dissolves, the CNMI will lose its exception from the prohibitions on the taking of sea turtles. If the Trust is not dissolved by the time the NMFS and the FWS have completed a recovery plan for Pacific turtles, the NMFS will initiate rulemaking to exclude the CNMI from the subsistence taking exception.

27. Comment: One commentator requested an allowance for a sport/recreational take of green turtles in Guam because it had been conducted in the past.

Response: An historical precedent does not justify authorizing a harvest. A sport/recreational take can be authorized only after the population has recovered and is eligible for management.

28. Comment: One comment was received stating that the exemption allowing a subsistence take of green turtles in the CNMI should remain in effect until and unless information is developed indicating that the green turtle stocks around the CNMI are threatened or endangered.

Response: The green sea turtle stock in the CNMI are currently listed as threatened. There is no evidence that the sea turtles in the CNMI are more abundant now than they were in 1978. Anecdotal information indicates the stock is depressed and requires protection.

29. Comments: Three comments were received regarding the subsistence issue in American Samoa. One indicated the need for more biological information regarding the status of the green turtle stocks in American Samoa before any changes to the present regulations are initiated. Another commentator stated that the green turtle population around American Samoa could not withstand a harvest because of its low numbers. The third commentator asserted that green turtles were not needed for subsistence uses in American Samoa.

Response: It is unlikely that any significant new information regarding green turtle stocks around American Samoa will be developed in the near future. Based on available information the green turtle stocks around American Samoa would not likely be able to sustain a subsistence take. No information was presented during the review or in the Johannes paper supporting the need for a subsistence authorization in American Samoa.

30. Comment: One commentator called for a review of the exemption for subsistence take of green turtles in the TTPI due to a marked change in economic status of these island entities.

Response: The dependence on green turtles as a source of protein has diminished in the former district centers and current state or national capitols where cash economies are replacing traditional subsistence

economies. The outer islands still depend a great deal on the availability of green turtles for subsistence purposes because of the lack of protein sources. The taking of sea turtles in these outer islands is a significant factor in maintenance of the Micronesian culture. Once the Trust dissolves, the various Governments will be responsible for management of their marine resources.

31. Comment: One comment was received supporting continued subsistence taking in the Caroline Islands based on biological and not sociological parameters.

Response: Little biological information is available for the area. However, the NMFS agrees as taboos and traditional restrictions on the taking of sea turtles disappear, cultural needs of outer island inhabitants will have to be weighed against biological needs of the turtle stocks in the development of management strategies.