



Dated: May 27, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

RIN 1018-AT48

Marine Mammals; Native Exemptions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the Fish and Wildlife Service (Service), propose to amend regulations implementing the Marine Mammal Protection Act of 1972 (MMPA), as amended. This action would revise our existing definition of

“authentic native articles of handicrafts and clothing” to reflect a December 28, 1992, Court ruling, which found that our regulation defining “authentic native articles of handicrafts and clothing” is inconsistent with the MMPA.

DATES: We will consider comments on the proposed rule if received by August 3, 2004.

ADDRESSES: You may submit comments by any of the following methods:

- By mail or hand-delivery to: Diane Bowen, Division of Federal Program Activities, U.S. Fish and Wildlife Service, Attention: Native Handicrafts, Room 400, ARLSQ, 4401 North Fairfax Drive, Arlington, Virginia 22203.

- By fax to: (703) 358-1869, Attention: Diane Bowen.
- By Internet, electronic mail by sending to: FW9MMM@fws.gov. Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include "Attn: RIN 1018-AT48" and your name and return address in your Internet message subject header. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at U.S. Fish and Wildlife Service, Branch of Resource Management Support, (703) 358-2161.

Background information and any comments that we receive on this action are available for inspection during normal business hours from 8 a.m. to 4:30 p.m., Monday through Friday, at the U.S. Fish and Wildlife Service, Division of Federal Program Activities, Room 400, Arlington Square, 4401 North Fairfax Drive, Arlington, Virginia. To be sure someone is available to help you, please call (703) 358-2161 before visiting.

FOR FURTHER INFORMATION CONTACT:

Diane Bowen, Division of Federal Program Activities, in Arlington, Virginia, at 703/358-2161.

SUPPLEMENTARY INFORMATION:

Background

After passage of the Marine Mammal Protection Act in 1972, we promulgated regulations at 50 CFR part 18 to implement this authority. We included in our proposed regulations a definition similar to that in section 101(b)(2) of the MMPA for "authentic native articles of handicrafts and clothing" (37 FR 25524; December 1, 1972), part of which read:

. . . items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting, so long as the use of pantographs, multiple carvers, or similar mass copying devices, or other improved methods of production utilizing modern implements, such as sewing machines, are not utilized. . . .

The final rule (37 FR 28173; December 21, 1972) added the requirement that these items must be "commonly produced on or before December 21, 1972" and read:

. . . items which (a) were commonly produced on or before December 21, 1972, and (b) are composed wholly or in some significant respect of natural materials, and (c) which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs,

multiple carvers, or similar mass copying devices, or other improved methods of production utilizing modern implements, such as sewing machines. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

Although our MMPA implementing regulations were published on December 21, 1972, as a final rule, we invited the public to provide comments, suggestions, and objections for a 60-day period. Based on comments received, we issued a proposed rule to amend our implementing regulations (38 FR 22143; August 16, 1973), followed by a final rule (38 FR 7262; February 25, 1974). The definition for "authentic native articles of handicrafts and clothing" at 50 CFR 18.3 was amended by the following additions: (1) The articles must have been made by an Indian, Aleut, or Eskimo; (2) the articles must be significantly altered from their natural form; (3) modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large scale mass production industry results; and (4) the formation of traditional native groups, such as cooperatives, is permitted as long as no large scale mass production results.

The regulations were enforced and subsequently challenged in court. While initially upheld in court, the U.S. District Court for the District of Alaska called for a thorough administrative review of the section of the regulations (50 CFR 18.23) that addresses the taking of northern sea otters under the native exemptions. Following the review, the Service published a notice of proposed rulemaking on November 14, 1988, to clarify the regulations as they apply to the sea otter (53 FR 45788). Those proposed regulations would prohibit all takings of sea otters by Alaska Natives for the purpose of creating and selling handicrafts or clothing. An interim rule was subsequently published on April 20, 1990 (55 FR 14973). This 1990 rule was identical to the 1974 rule, but included an additional restriction that stated "[P]rovided that it has been determined that no items created in whole or in part from sea otter meet part (a) [that is, "were commonly produced on or before December 21, 1972"] of this definition and therefore no such items may be sold" (55 FR 14973). We further stated in the rule that, following the completion of a management plan for northern sea otter, we would replace the interim rule with a final rule, if appropriate. The interim rule became effective on May 21, 1990. Although we developed and issued a "Conservation Plan for the Sea Otter in Alaska" in June 1994, we did not revisit the regulatory

definition put into place by our interim rule, and the language still exists in 50 CFR 18.3.

In 1990, a number of parties challenged our definition as violating the MMPA. On July 17, 1991, in *Didrickson v. U.S. Department of the Interior*, the U.S. District Court for the District of Alaska ruled in favor of the Plaintiffs. The Court wrote that we had defined "authentic," as used in the phrase, "authentic native articles of handicrafts and clothing * * *" (in the Native exemption section of the Act), "in such a way as to broaden [the Service's] own regulatory authority over [Native] activities that the plain language of the statute would not otherwise permit." The Court further ruled that the MMPA did not mandate restriction of its Alaska native handicraft exemption to apply only to artifacts commonly produced on or before December 21, 1972. In its conclusion, the Court stated that, while its "opinion should not be construed as authorizing a "free-for-all" killing of hundreds of sea otters," the Service "does not have the authority to regulate the harvesting of sea otters for purposes of creating native handicrafts absent a finding of depletion." The Court also stated that the Service has the authority to take enforcement action against any takings that are wasteful. This decision was appealed to the Ninth Circuit Court of Appeals, which, on December 28, 1992, affirmed the District Court's ruling.

Our present proposed rulemaking revises our regulations in 50 CFR part 18 to make them consistent with the court rulings described above. Specifically, this action would eliminate the requirement in 50 CFR 18.3 for "Authentic native articles of handicrafts and clothing" to have been commonly produced on or before December 21, 1972, and would delete the language at the end of the definition that states:

"Provided that, it has been determined that no items created in whole or in part from sea otter meet part (a) of this definition and therefore no such items may be sold."

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule.

Our practice is to make all comments, including names and home addresses of

respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold also from the rulemaking record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations/notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain unnecessary technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the proposed rule in the "Supplementary Information" section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to the following address: Execsec@ios.doi.gov.

Required Determinations

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this proposed rule is not a significant regulatory action. The Office of Management and Budget makes the final determination under Executive Order 12866.

a. This proposed rule will not have an annual economic impact of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. There are no compliance costs to any sector of the economy. A cost-benefit analysis is not

required. We do not expect that any significant economic impacts would result from the revision of this definition. The only expenses related to this will be to the Federal government to write the rule and required Record of Compliance, and to publish the final rule in the **Federal Register**; these costs should not exceed \$25,000.

b. This proposed rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This proposed rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. This proposed rule will not raise novel legal or policy issues.

Regulatory Flexibility Act

We certify that this proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2). This rule:

a. Does not have an annual effect on the economy of \$100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

a. This proposed rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required.

b. This proposed rule will not produce a Federal mandate of \$100 million or greater in any year. As such, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, this proposed rule does not have significant takings implications. We have determined that the rule has no potential takings of private property

implications as defined by this Executive Order because it will remove a regulatory definition determined by a Federal Court to exceed the statutory provisions of the MMPA. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this proposed rule does not have significant federalism effects. A federalism assessment is not required. This proposed rule will not have substantial direct effects on the State, in the relationship between the Federal government and the State, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This proposed regulation does not contain collections of information that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* The proposed regulation will not impose new record keeping or reporting requirements on State or local governments, individuals, and businesses, or organizations.

National Environmental Policy Act

We have considered this action with respect to section 102(2)(C) of the National Environmental Policy Act of 1969, and have determined that the action is categorically excluded, pursuant to U.S. Department of the Interior criteria, from the NEPA process; the preparation of an Environmental Assessment is not required as defined by USDI categorical exclusion 1.10 (516 DM, Chapter 2, Appendix 1, Departmental Categorical Exclusions). This categorical exclusion exempts "[p]olicies, directives, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature." Given that this proposed rule seeks to amend a regulation to make the regulation consistent with a court ruling, the exclusion applies to this action.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive

Order 13175 and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized tribes on a government-to-government basis. We have evaluated possible effects on federally recognized Indian tribes. Because this rule would amend our regulations to lift regulatory restrictions consistent with a court order, we have determined that there are no negative effects.

Energy Supply, Distribution or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not a significant regulatory action under Executive Order 12866 and it is not expected to have any effect on energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 18, subpart A of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 18—MARINE MAMMALS

1. The authority citation for 50 CFR part 18 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. In § 18.3, revise the definition for *Authentic native articles of handicrafts and clothing* as follows:

§ 18.3 Definitions.

* * * * *

Authentic native articles of handicrafts and clothing means items made by an Indian, Aleut, or Eskimo that (a) are composed wholly or in some significant respect of natural materials

and (b) are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass-copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large-scale mass-production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted so long as no large-scale mass production results.

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Dated: May 20, 2004.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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