

Briefing Regarding the NPS Rule for Subsistence Collection on Alaska Parklands and Unrelated Prohibitions

Cited Authorities

ANILCA Title I (16 U.S.C. §3101(c)): congressional direction to “provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.”

ANILCA Title II (16 U.S.C. §410hh): authorizing subsistence uses by local rural residents in Alaska on all national preserves and in specified national monuments and parks.

NPS Organic Act (54 U.S.C. §100101) (only cited in the EA and Responses to Comments in the final rule): congressional direction to “promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units” to, *inter alia*, “leave them unimpaired for the enjoyment of future generations” and to protect, manage and administer units “in light of the high public value and integrity of the System” not “in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.”

National NPS regulations at 36 CFR §2.1(a)(1): prohibiting the collection of wildlife, plants, or parts thereof.

National NPS regulations at 36 CFR §5.3: generally prohibiting engaging in any business without authorization.

Alaska-specific NPS regulations at 36 CFR Part 13, subpart F: regulating subsistence uses in Alaska park units, including allowances for fishing, hunting, trapping, timber cutting and plant material harvest.

Alaska-specific regulations at 50 CFR Part 100: implements the Federal Subsistence Management Program on all public lands in Alaska, including preserves and specified national monuments and parks; can be superseded by agency-specific regulations.

Non-Cited Authority

ANILCA Title XIII (16 U.S.C. §3202): requiring the taking of fish and wildlife be carried out in accordance with ANILCA and other applicable state and federal law, recognizing “the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands” and further requiring administration of Alaska park units to provide “the opportunity for the continuance of [subsistence] uses by local rural residents” where those uses are allowed.

Public Notice and Engagement

Almost exclusively focused on subsistence provisions. Proposed rule entitled “Alaska; Subsistence Collections” published in Federal Register with 90-day public comment period (January 13 through April 12, 2016). No advance notice of the proposed rule was provided to the public or to the State of Alaska. Meetings with the State during and after the comment period provided no information other than what was published in the Federal Register, despite inquiry. One press release was issued January 15 entitled “Changes Proposed for NPS Subsistence Regulations.” The fourth and fifth paragraphs briefly described new bait and live wildlife prohibitions, which were not a part of the multi-year rulemaking effort, including the associated 2012 Environmental Assessment. Every document posted on the park planning website, via the link “Subsistence Uses of Horns, Antlers, Bones and Plants,” related to the subsistence provisions. NPS Subsistence Resource Commissions and Federal Subsistence Resource Commissions had pre-scheduled meetings during the comment period, which were attended by NPS staff with presentations on the proposed rule. No equivalent presentation was given at the Alaska Board of Game meeting, also attended by NPS staff and pre-scheduled during the comment period (March 18-28). Tribes and ANCSA corporations were only notified of and offered consultation on the subsistence provisions, except that tribes associated with Wrangell-St. Elias National Park and Preserve were invited to consult on the proposed bait restrictions.

SUBSISTENCE COLLECTION

NPS Objective

To amend Alaska-specific NPS regulations to expressly allow qualified subsistence users to collect nonedible fish and wildlife parts and plant materials to create handicrafts for barter and customary trade, as requested by subsistence users. To authorize these uses in a manner to prevent or minimize adverse impacts to other park resources, values and uses.

NPS Justification

ANILCA recognizes the creation of handicrafts from nonedible natural materials has long been a part of the cultural, social and economic practices of those living a subsistence lifestyle in Alaska. Asserts existing regulations did not authorize the creation of handicrafts or the gathering of plant materials for barter and customary trade where subsistence uses are allowed on parklands.

NEPA Compliance

An Environmental Assessment on “Subsistence Collections and Uses of Shed or Discarded Animal Parts and Plants from NPS Areas in Alaska” was completed in January 2012; analysis was limited to considering the promulgation of new regulations to allow the titled uses to make handicrafts for personal or family uses, for barter, or for sale. By many accounts, there was extensive outreach and collaboration with subsistence users in the scoping phase. A FONSI was signed in April 2014 and amended in December 2016 to strike mandatory permits for the collection of plant materials to make handicrafts for barter and customary trade, instead allowing managers to post terms and conditions on park websites (which could include requiring written authorization).

Comments from Alaska Subsistence Users on the Proposed Rule

- Objection to circumventing established processes for managing wildlife on public lands in Alaska through the Federal Subsistence Board and the Alaska Board of Game
- Near unanimous opposition to late additions regarding bear baiting and live wildlife collection
- Strong objection to permit requirements, especially for animal parts; some suggested blanket permit for all subsistence users
- Requests for consultation between superintendents and Subsistence Resource Commissions in implementation
- Noting traditional exchange of unworked items before being made into handicrafts, particularly for cultural education

Corresponding Changes Made to the Proposed Rule

- None, cited general authority under NPS Organic Act
- None, little to no meaningful response to these (often detailed) comments was provided
- Permit requirement for animal parts retained, made discretionary for plant material; no blanket permits proposed
- None, no response to these comments was provided
- Definition of handicrafts not substantively changed; new allowances for cultural education limited to collection authority

Substantive but Non-Obvious Change to Existing Regulations

Both Gates of the Arctic National Preserve and Kobuk Valley National Park promulgated unit-specific regulations at 36 CFR §§13.1006 and 13.1504, respectively, to expand the definition of “customary trade” to include sale of handicrafts made from plant material harvested for subsistence uses without a permit. The rule applies this expanded definition to all park units where subsistence uses are allowed, but makes the use subject to terms and conditions posted on park websites. Because 36 CFR §§13.1006 and 13.1504 were not amended in this rulemaking, and reference to unit-specific exemptions was removed from the definition of “customary trade” in 36 CFR §13.420, it is unclear how subsistence users in these two park units will be impacted by the rule.

NON-SUBSISTENCE COLLECTION

NPS Objective

To prohibit the collection, capture or possession of live wildlife unless authorized by federal statute or pursuant to a research specimen collection permit (36 CFR §2.5). To establish that these activities are not considered hunting or trapping. To expressly prohibit such activities pursuant to any permit issued by the State of Alaska.

NPS Justification

Addresses “public inquiries” about the collection of raptor chicks in national preserves for training and use in sport hunting. Does not consider the collection, capture or possession of live wildlife to be a hunting or trapping activity, meaning it is prohibited on national preserves. Not intended to prohibit “use” (possession?) of live, trained raptors for hunting where authorized by federal and state law.

NEPA Compliance

Categorical exclusion covering modifications to existing regulations that does not increase public use or introduce non-compatible uses that might compromise the area’s nature and character or cause physical damage and does not conflict with or create a nuisance to adjacent ownership or land use. No extraordinary circumstances are present. Firstly, despite claims in the proposed and final rule, this was a wholly new addition, contradicting prior regulations, and is not a modification or a clarification. While wildlife collection is prohibited under 36 CFR §2.1(a)(1), this was preempted by Alaska-specific laws and regulations. Secondly, there are a lot of regulations that “do not” do the things listed but still require further assessment because of what they “do.” Lastly, at least one extraordinary circumstance is present: unresolved conflicts concerning alternative uses of available resources, namely preempted federal and state authorizations relating to falconry. See NEPA §102(2)(E); 40 CFR §1507.2(d); 43 CFR §46.215(c). Unlike the categorical exclusion determined to amend the FONSI relating to subsistence harvest of plant material, the categorical exclusion form for this use was not published on the park planning website or otherwise made readily accessible in concert with the rulemaking.

State Authorization at Issue

Congress granted the State of Alaska management authority over *fish and wildlife* on public lands in Alaska, not just the management of hunting and trapping. The practice of falconry in Alaska is not prohibited by federal regulations relating to migratory birds. As such, the State’s authority to issue falconry permits allowing the take and possession of live raptors is non-conflicting and authorized by federal statutes. Prohibition of this permitted activity thus presents a distinct contradiction in the new 36 CFR §13.42(j).

Falconry is the ancient art of training and using a raptor to hunt quarry. Raptors are harvested from the wild, almost always as chicks, to be trained and used to hunt. Falconry is permitted in Alaska as follows:

- 5 AAC 92.037 governs the permitting of falconry and the practice of falconry on all public lands in Alaska.
 - o Requires a permit and valid, current Alaska hunting license to take, transport or possess raptors for falconry.
 - o Before taking peregrine falcons, requires permittees to possess either an Alaska master class falconry permit or an Alaska general class falconry permit and have more than two years of experience at the general falconry level.
 - o Take for nonresidents (must be U.S. citizen) is tightly controlled and limited to one passage, hatching-year raptor.
- Federal permits are no longer issued; state permits and compliance with federal regulations (50 CFR §21.28-.29) are required.
 - o Migratory bird transfer, acquisition, release, loss or rebanding must still be reported to the State and the U.S. Fish and Wildlife Service (Form 3-186A) within five days of the activity.

BAIT PROHIBITIONS

NPS Objective

To adopt restrictions on the type of bait that may be used to take bears for subsistence uses under federal regulations in Alaska. Bait is limited to natural or legally harvested (non-salvageable) remains of native fish or wildlife. Bait including human-produced food items is prohibited but can be allowed by individual, annual permit for subsistence users in specified areas of Wrangell-St. Elias National Park and Preserve where compatible with park purposes and values and where natural bait is not reasonably accessible.

NPS Justification

Asserts baiting alters natural behaviors and can result in human food-conditioned bears more likely to cause injury and be taken in defense of life and property. Asserts bait stations tend to be in accessible areas typically used by multiple user groups, creating public safety concerns. No support for these assertions is provided in the rule or associated public documents. In the final rule's compliance section, the NPS acknowledges the infrequent use of this harvest method, which has been allowed since the 1980s, noting only three bears were taken over bait by subsistence users between 1992 and 2010. Because that harvest was mostly at Wrangell-St. Elias National Park and Preserve, an exemption was added to the final rule for this unit.

NEPA Compliance

Categorical exclusion covering modifications to existing regulations that does not increase public use or introduce non-compatible uses that might compromise the area's nature and character or cause physical damage and does not conflict with or create a nuisance to adjacent ownership or land use. No extraordinary circumstances are present. Firstly, this was a wholly new addition, limiting prior regulations, and is not a modification. Secondly, there are a lot of regulations that "do not" do the things listed but still require further assessment because of what they "do." Lastly, at least one extraordinary circumstance is present: unresolved conflicts concerning alternative uses of available resources, namely preempted federal and state authorizations related to harvesting bears over bait. See NEPA §102(2)(E); 40 CFR §1507.2(d); 43 CFR §46.215(c). Unlike the categorical exclusion determined to amend the FONSI relating to subsistence harvest of plant material, the categorical exclusion form for this use was not published on the park planning website or otherwise made readily accessible in concert with the rulemaking.

EVOLUTION OF THE REGULATIONS AT ISSUE

<u>Related To</u>	<u>Existing Regulations</u>	<u>Proposed Rule</u>	<u>Final Rule</u>
Take of wildlife in national preserves (36 CFR 13.42)	36 CFR 13.42 (added in 2015) and former regulations at 13.40 do not prohibit collection, capture or possession of living wildlife where authorized by non-conflicting state harvest regulations (e.g., 5 AAC 92.037 Permits for falconry) or specify permissible types of bait	prohibits collecting, possessing live wildlife, including eggs and offspring, unless authorized by federal statute or pursuant to 36 CFR 2.5, 50 CFR part 100 or unit-specific regulations limits the types of bait for subsistence harvest of bears to remains of native fish, wildlife	adds capturing; deletes specific reference to "eggs or offspring" and exemption for 50 CFR part 100 or unit-specific regulations relocates bait restrictions to 36 CFR 13.480 and adds unit-specific exception at 13.1902
Definitions (36 CFR 13.420)	"barter" limited to exchange of fish or wildlife or parts "customary trade" limited to exchange of furs for cash with unit-specific exceptions [none] "handicraft" at 50 CFR 100.25 limited to using fish or wildlife byproducts; item must be wholly or substantially composed of natural materials same definition of "subsistence uses" at 50 CFR 100.4 and 36 CFR 13.420	adds exchange of "handicraft articles" replaces with definition at 50 CFR 100.4, still limits to furs and adds "handicraft articles" adds definition of "animal parts" with exhaustive list and methods of collection adds modified version of 50 CFR 100.25, byproducts must be from harvests for personal or family consumption; adds plant material use; excludes trophies, certain mounts; does not include composition requirement adds "barter or sharing for personal or family consumption"	same; changes "handicraft articles" to "handicrafts" same; changes "handicraft articles" to "handicrafts" same; adds "hunted or trapped fish" (?) to method of collection adopts 50 CFR part 100 usage by reference; adds plant material use; excludes trophies, certain mounts same; changes "handicraft articles" to "handicrafts" and adds subsistence harvest under 50 CFR part 92 (MBTA) and 50 CFR 18.23 and 18.26 (MMPA)

<p>Take of wildlife for subsistence use (36 CFR 13.480)</p>	<p>36 CFR 13.480 (amended in 2015) requires compliance with 36 CFR part 13 and 50 CFR part 100 for subsistence hunting and trapping where allowed; former regulations additionally allowed harvest under applicable state law</p>	<p>[none]</p>	<p>adds new section limiting types of bait for subsistence harvest of bears to lawfully harvested, discarded or naturally occurring remains of fish and wildlife, unless authorized by a permit under the new 36 CFR 13.1902</p>
<p>Subsistence collection and use of animal parts (36 CFR 13.482)</p>	<p>[none]; the definition of “fish and wildlife” at 50 CFR 100.4 includes any mammal, fish, bird (including any migratory, non-migratory and treaty-protected endangered bird), amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and “any part, product, egg, or offspring thereof, or the carcass or part thereof”</p>	<p>allows collecting animal parts (excluding from migratory birds, marine mammals and T&E species) for subsistence use if:</p> <ul style="list-style-type: none"> - resident has a customary and traditional use determination - resident has permit from park superintendent identifying specific areas where the use is allowed; permit can include terms and conditions; open areas will be identified on a map posted on park website and at visitor center/headquarters - adopts non-conflicting state regulation on use of bear claws 	<p>same; removes migratory bird and marine mammal exceptions</p> <p>changes “resident” to location of user’s permanent residence same</p> <p>deleted</p> <p>adds authority to designate a “NPS-qualified” (?) subsistence user to collect on another’s behalf for making handicrafts:</p> <ul style="list-style-type: none"> - for personal use, customary trade or barter - for qualified educational or cultural programs <p>designee must obtain a permit from the superintendent and cannot charge the user</p> <p>allows collection by paid employees to create handicrafts solely for qualified educational or cultural programs</p>
<p>Subsistence use of timber and plant materials (36 CFR 13.485)</p>	<p>subsection (b) allows for the noncommercial harvest of fruits, berries, mushrooms, plant materials and dead or downed timber for firewood</p> <p>unit-specific regulations at 36 CFR §§13.1006 and 13.1504, defined “customary trade” in certain areas to include sale of handicrafts made from plant material harvested by subsistence users without a permit</p>	<p>non-substantive rewording of existing regulation; adds permit requirement for plant materials to make handicraft articles for customary trade or barter, can limit areas where use is allowed and other terms and conditions</p>	<p>same; changes “handicraft articles” to “handicrafts” and moves (now discretionary) permit requirement to new subsection (c); opens to all areas subsistence uses allowed</p> <p>adds authority to designate a “NPS-qualified” (?) subsistence user to collect on another’s behalf for making handicrafts:</p> <ul style="list-style-type: none"> - for personal use, customary trade or barter - for qualified educational or cultural programs <p>designee must obtain a permit from the superintendent and cannot charge the user</p> <p>allows collection by paid employees to create handicrafts solely for qualified educational or cultural programs</p>

Subsistence in Wrangell-St. Elias National Park and Preserve (36 CFR 13.1902)

[none]; existing regulations did not specify types of bait that could be used for subsistence bear harvest [none]

adds new subsection (d) "Use of bait for taking bears" allowing superintendent to issue annual permits for compatible (?) use in specified park locations of human-produced food items when natural bait is unavailable

OVERVIEW OF THE RULE AND RESPONSES FROM AFFECTED USERS

Subsistence Collections

- This is what the rule was intended to address, as demonstrated by the title, public outreach, the 2012 Environmental Assessment and the nearly ten-year engagement with subsistence users that culminated in these regulatory changes. The two provisions detailed below (falconry and bear baiting) do not belong in this discussion and regardless should be excised on their own merits.
- Several Subsistence Resources Commissions had been requesting recognition that customary and traditional practices included handicrafts – gathered, made, traded and sold – using wild, natural materials such as animal parts, minerals or plant materials.
- As initially proposed, regulatory amendments would address collecting and making handicrafts using discarded animal parts and plant materials, which could then be bartered, traded or sold.
- Though authorized under ANILCA, some change to existing regulations was deemed necessary by the NPS for enforcement and resource protection. This was largely welcomed by subsistence users to clarify that certain practices are allowed and to improve consistency.
- NPS regulations at 36 CFR §13.485 allow the collection of plant materials for subsistence uses, but federal regulatory allowances for handicrafts only included those made from animal parts. NPS also perceived potential conflict with System-wide regulations at 36 CFR §§2.1, 2.2 and 5.3 generally prohibiting certain activities.
- The commission chairs had requested "handicrafts" include those made from plant materials. The rule does this through a new definition of "handicrafts" in NPS-specific regulations.
- The commission chairs had requested "customary trade" include all subsistence uses, where the exchange of cash for subsistence resources is involved. This had been restricted to the sale of furs for cash. The rule expanded to include the sale of handicrafts for cash.
- Two park units had previously addressed this issue through deference to the Federal Subsistence Program and NPS subsistence regulations with a one sentence accommodation for handicrafts made from plant materials – gathered, made, traded and sold – without a permit. The rule goes well beyond this, based largely on speculations unreflective of success in this simpler approach.
- Of five alternatives in the Environmental Assessment, the NPS chose the most restrictive action alternative, in terms of both qualifications and requirements, with minor modifications to the description and mitigating measures. The three-sentence explanation for this was that it was cautiously responsive. At a minimum, ANILCA requires such prudence be justified.
- Subsistence users and advisory groups had also requested raw, unworked items be considered a handicraft for customary trade. There had been a tradition of trading unworked bones and antlers for their ultimate use in making handicrafts. This was not addressed in the rule. It was dismissed from consideration in the Environmental Assessment based on anecdotal assertions it could lead to wanton waste and a significant commercial enterprise (both of which are prohibited).
- Challenges to the extent of regulation (e.g., permit requirements) and its impacts on subsistence were provided to the NPS in the context of this rulemaking. These comprised the majority of comments made by the Federal Subsistence Resources Commissions on the proposed rule. Substantive comments were also submitted by subsistence users, the State of Alaska, Native Corporations, rural communities and tribal councils. **Summaries of comments from these groups:**
 - o Public requests and comments were not taken seriously. Inadequate consultation with the appropriate bodies. Under ANILCA, "proper regulation" and the "continuation of the opportunity for subsistence" require rural residents have a "meaningful role in the management of fish and wildlife and of subsistence uses." 16 U.S.C. §3111.
 - o Subsistence users were asking the NPS to acknowledge in regulation what was already allowed in law. The NPS presented and analyzed this as a request to "open" areas to use instead of what it was, under federal law: a closure.

- Because superintendents are granted broad discretion to incorporate terms and conditions, it is not clear when public closure process requirements would apply or be followed.
- Prior regulations had left the door open to expansive and unit-specific definitions of “customary trade.” However, the change to this definition in the rule forecloses the option of authorizing other activities.
- The permit requirement adds yet another layer of bureaucracy when users are already required to be a qualified subsistence resident zone community member with a customary and traditional use determination for the subsistence resource being collected. There is no need to require yet another level of permission to live a traditional way of life.
- Universal support for allowing collection without a permit so local residents have that opportunity to participate in traditional activities, to educate and preserve their culture and help support their families.
- If written permission is required, the best approach would be blanket permission for qualified residents, which would negate the need for individual permits and reporting. It would also allow for opportunistic gathering, the most common collection method.
- The time-intensive nature of collecting and creating handicrafts, with the processes by which they were made historically, would prohibit commercialization on its own. The individual, through work and talent, should also be able to set a price, not some arbitrary figure established by the NPS to prevent significant commercial enterprises.
- Impacts to scenic resources are questionable, considering horns and antlers are never on the landscape very long, they are naturally gone within a couple years.
- Emphasizing that unworked items are customarily and traditionally exchanged before being made into handicrafts, particularly for elders and culture camp activities.
- The NPS is now even more narrowly defining who can engage in subsistence uses, which is inconsistent with ANILCA provisions to provide for and cause the least adverse impact to those uses on park units open to subsistence. The confusion alone negatively impacts all users, particularly where they traditionally harvest together on mixed land ownership.
- Consultation that only occurs after a proposed action is published can result in proposals based on incomplete or inaccurate information and lead to unnecessary paperwork, delay, confusion, and controversy.

Falconry Provision

- This provision is *ultra vires*. Falconry, including the capture and possession of chicks for the purposes of falconry on national parklands, is managed by the State of Alaska and the USFWS.
 - See 5 Alaska Administrative Code 92.037 and 50 CFR §§21.28-.29
- Federal law grants the State of Alaska with the authority to manage fish and wildlife on all lands, including through harvest, unless expressly preempted by Congress.
- ANILCA specifies where harvest is permitted in Alaska park units. *See, e.g.*, 16 U.S.C. §3201. The Act further provides the NPS with authority to designate areas closed to hunting, fishing, trapping or entry, after consultation with the State, for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment. 16 U.S.C. §3201.
 - The NPS still has this authority, and it did not use it to promulgate this rule.
- Alaska-specific NPS regulations at 36 CFR §13.21 (pre-2006)/§13.40 (2007-15)/§13.42 (2015-) supersede System-wide regulations at 36 CFR §2.1; collection, capture and possession of live wildlife is not prohibited where authorized by state law. As noted, areas can be closed to this use where certain factors are present, through a public process, which was not done here.
- State authority was partially preempted by Congress in the Migratory Bird Treaty Act. Under that Act, the USFWS manages migratory birds on national parklands, including raptors.
- In 50 CFR §21.29(c)(2)(i)(E), the USFWS authorizes the collection of raptors under a year old from the wild during any period specified by the State. Any species of raptor can be taken through a state-issued permit except a threatened, endangered or enumerated species.
- In 50 CFR §21.29(c)(2)(i)(F), the USFWS authorizes the possession of raptors, including wild, captive-bred, or hybrid individuals, except a threatened, endangered or enumerated species.

- 50 CFR §21.29(c)(2)(ii) lists requirements for collection and possession, depending on the falconer's rank.
- 50 CFR §21.29(e) outlines how and when raptors can be collected, possessed and transported, with deference to state and tribal law.
 - o e.g., 50 CFR §21.29(e)(2)(iii): "*You may not take raptors at any time or in any manner that violates any law of the State, tribe, or territory on whose land you are trapping.*"
- The assertion that the NPS was acting beyond its authority, and details on federal and state laws governing falconry, were provided to the NPS in the context of this rulemaking. Substantive comments on the provision were also submitted by subsistence users, federal subsistence advisory groups, an Apprentice falconer, the State of Alaska and the Alaska Falconry Association. **Summaries of comments from these groups:**
 - o Questions impact of this use in Alaska parks, and thus the necessity of yet another regulation related to this activity.
 - o Having consistent regulations makes them easier to follow and helps avoid confusion for the users. Seems like no consideration is given to people trying to understand complex, differing regulations of the same thing.
 - o Questions why is it being put into regulation if it is already prohibited, as claimed. The proposed rule is unclear as to what is being prohibited where it proposes to close uses that would be or "might" be authorized by a state permit.
 - o Where such uses are not closed by the State to assure sustainability of wildlife populations, there is no justification for the NPS to prohibit authorized uses of park lands.
 - o The proposed rule bypasses state and federal regulatory processes for changing harvest regulations and imposes new wildlife restrictions that were not addressed in the Environmental Assessment and were developed without consulting the affected public.
 - o An Environmental Assessment should have been done and proposals should have been submitted to the Alaska Board of Game and the Federal Subsistence Board. This rule is not the appropriate process for addressing this topic.
 - o The take of raptors is allowed under current State and Interior regulations. Both recognize the art and practice of falconry by licensed falconers, including that raptors must be taken from the wild to support this practice.
 - o The proposed rule is titled "subsistence," which does not include this proposal, meaning it likely did not come to the attention of affected users during public review. The NPS did not reach out to affected users, the Alaska Board of Game or state fish and game advisory committees to notify and solicit insight on the prohibition of taking raptors on over 45 million acres of public land in Alaska.
 - o Raptors are managed by the State of Alaska and the USFWS, and are not designated or managed as part of a subsistence activity. Raptor species used in falconry are healthy and stable throughout Alaska.

Bear Baiting Provision

- This provision is *ultra vires*. Bear baiting for subsistence uses is managed by the State of Alaska through its Board of Game and the USFWS through the Federal Subsistence Board. The NPS can only temporarily close areas to subsistence use of fish and wildlife in an otherwise open park unit.
- Federal law grants the State of Alaska with the authority to manage fish and wildlife on all lands, including through harvest, unless expressly preempted by Congress.
- In ANILCA, Congress allowed for harvest restrictions to be put in place to protect subsistence uses where certain factors are present. Those restrictions are now the responsibility of the Federal Subsistence Board, administratively in USFWS and advised by 10 Regional Advisory Councils.
- The Interior Department manages federal subsistence on public lands in Alaska. *See* 36 CFR Part 242 and 50 CFR Part 100. NPS-specific regulations are also found at 36 CFR Part 13, Subpart F.
- ANILCA required the NPS to have a Subsistence Resources Commission for each park unit in Alaska where subsistence uses are allowed. These seven commissions monitor and make recommendations regarding federal actions and impacts to subsistence in the parks. 16 U.S.C. §3118. Under the Federal Subsistence Management Program, commissions can also advise on and propose harvest regulations for park units to submit to the Regional Advisory Councils and the Federal Subsistence Board.

- Unlike the regulatory changes addressing handicrafts and customary trade, the Subsistence Resources Commissions had not requested this or any remotely similar regulation in the context of this rule. The NPS only addressed this provision with the commissions after its publication.
- Proposing a limit on the type of bait that can be used for subsistence is a "closure," as is requiring a permit for exemption. This is especially true where, as here, the restriction imposes substantial limits, burdening subsistence users without supported justification or a conservation concern.
- The allowance of exemptions by permit in the area where most use occurs calls the justification presented for this limitation into question. Allowance via a permit, with undisclosed criteria, shows the concerns by the NPS to prohibit a state-authorized activity were improperly analyzed. This conclusion cannot be tested as no environmental analysis was performed.
- To close a park area to subsistence use of wildlife, the NPS must consult with both the State and the Federal Subsistence Board, stay within mandatory time limits, comply with public notice and process requirements, and demonstrate certain factors are present. 36 CFR §13.490. This process was not followed to enact the rule, which is also a *permanent* closure.
- The NPS did not address inquiries or conflicts identified by the State of Alaska prior to the final rule being published. For example, federal subsistence regulations require bait stations to be registered with the State, while the State has no ability or means to determine if an applicant is qualified under federal definitions. Under the rule, the State could authorize uses by unqualified persons, or refuse to permit those who might actually be qualified.
- The assertion that the NPS was acting beyond its authority, and diverse reasons why the closure should not be in place, were provided to the NPS in the context of this rulemaking. Substantive comments on the provision were also submitted by subsistence users, federal subsistence advisory groups, the State of Alaska, Native Corporations, rural communities and tribal councils. **Summaries of comments from these groups:**
 - o In spring (when bear baiting is allowed), fresh wild game meat and fish are usually not available to use for bait. Scraps from fall are used to trap, which is done by the time baiting comes around. Winter game is eaten, as well.
 - o The limits will make it much harder for hunters to have that prime bear hide and fresh game meat in the spring. Bear meat tastes good in the spring, and the meat from a bear feeding on rotten meat would be no good.
 - o Native fish and game meat as bait would attract more brown than black bears (only baiting black bears is permitted).
 - o Gut piles saturate the dirt, making it harder to clean up. Since contaminated soils must be removed from the site pursuant to the bear baiting permit, subsistence users could have to break another NPS regulation against disturbing or removing anything from parks.
 - o The limits on bait would completely preclude rural subsistence users from baiting bears because this type of bait is not readily available and would require special storage and transportation near the bait station, which is hardly if ever available, to prevent spoilage.
 - o Bears do not typically eat and would not likely be attracted to the authorized type of bait. Bears eat and leave the same parts humans do.
 - o This reflects a failure on the part of the NPS in learning and understanding the traditional practices and ways of baiting bears in Alaska, which does not include using animal parts.
 - o Extremely concerned about the NPS attempting to regulate wildlife, circumventing the established process. The Federal Subsistence Board and the Alaska Board of Game make regulations with experts that look at the population and ecosystem balance, not emotion.
 - o Baiting bears can actually help address problem bears, not create them. Bears around rural communities may have gotten into the garbage or landfill, and those are most likely to be attracted to a bait station with human food items and then harvested. There is no evidence that baiting habituates or creates nuisance bears. Subsistence users have been doing it for decades without any problems between bears and people.
 - o Subsistence Resources Commissions worked with the NPS for years to address these issues until, suddenly, the proposed rule included limitations on bait. The provision oversteps ANILCA, including that the NPS should have evaluated subsistence impacts.
 - o The two additions dealing with bear baiting and live wildlife should be dealt with through local and regional subsistence councils and the Federal Subsistence Board.