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# How the ESA Can Swallow Alaskan Tribal Sovereignty: The Story of the Iliamna Lake Seals

## **Cover Page Footnote**

Charisse M. Arce graduated with her J.D. from Seattle University School of Law in May 2014, and she is an enrolled member of the Iliamna Village Council. The author was born and raised in Iliamna, Alaska on the shores of Lake Iliamna. The author would like to thank Professor Catherine O'Neill and Professor Eric Eberhard for their encouragement and support of this piece as well as the laudable efforts of the AILJ staff.

## HOW THE ESA CAN SWALLOW ALASKAN TRIBAL SOVEREIGNTY: THE STORY OF THE ILIAMNA LAKE SEALS

BY CHARISSE ARCE\*

*“Those involved in Native issues wrestle with the huge challenge of how to help lift the economic boats of Alaska’s Native peoples while simultaneously protecting the cultures, lands, and waters of our peoples.”*

– Paul Ongtooguk<sup>1</sup>

### INTRODUCTION

Tucked away in the southwest part of Alaska lies Lake Iliamna, stretching 77 miles long and 22 miles wide. It is the largest and deepest body of fresh water in Alaska, and the seventh largest fresh water lake in the United States.<sup>2</sup> Iliamna Lake is home to the Iliamna Lake freshwater seal, one of just five different populations of freshwater seals found in the northern hemisphere.<sup>3</sup> The land in this region is vast and sparsely populated, but Alaskan Natives have resided here for centuries; now there are a handful of permanent communities around the lake. This paper examines the conflict between federal conservation efforts of the seals in Lake Iliamna, how it threatens the economic vitality and tribal sovereignty of the villages in southwest Alaska, and offers a solution that will preserve both interests.

On May 17, 2013, the Center for Biological Diversity submitted a petition to the Secretary of Commerce and the National Oceanic and Atmospheric Administration (NOAA), through the National Marine Fisheries Service (NMFS), to “list the Iliamna Lake seal as a threatened or endangered species

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<sup>1</sup> LIBBY RODERICK, ALASKA NATIVE CULTURES AND ISSUES: RESPONSES TO FREQUENTLY ASKED QUESTIONS, 41 (2010).

<sup>2</sup> “About the Lake and Peninsula Borough,” [http://www.lakeandpen.com/index.asp?Type=B\\_BASIC&SEC={E4E1AF70-DAB9-4462-942A-C4B21F8A2D31}](http://www.lakeandpen.com/index.asp?Type=B_BASIC&SEC={E4E1AF70-DAB9-4462-942A-C4B21F8A2D31}) (last visited Oct 3, 2014) [hereafter “Lake & Pen Borough”]; *Petition to List Iliamna Lake Seal, Distinct Population Segment of Pacific Harbor Seal (Phoca Vitulina Richardsi) Under the Endangered Species Act*, Center for Biological Diversity (2012), [http://www.biologicaldiversity.org/species/mammals/Iliamna\\_Lake\\_seal/pdfs/Iliamna\\_Lake\\_Seal\\_Petition\\_11-19-12.pdf](http://www.biologicaldiversity.org/species/mammals/Iliamna_Lake_seal/pdfs/Iliamna_Lake_Seal_Petition_11-19-12.pdf) [hereafter “Petition”].

<sup>3</sup> Van Lanen, *Iliamna Lake Seals Local and Scientific Understanding*, ALASKA FISH & WILDLIFE NEWS, May 2012, [http://www.adfg.alaska.gov/index.cfm?adfg=wildlifeneews.view\\_article&articles\\_id=553](http://www.adfg.alaska.gov/index.cfm?adfg=wildlifeneews.view_article&articles_id=553) (last visited Oct. 4, 2014). (The four other freshwater seal populations found in the northern hemisphere are: (1) Lake Baikal, Russia; (2) Lake Lagoda, Russia; (3) Lake Saimaa, Finland; and (4) Lac de Loups, Canada.)

and to designate critical habitat to ensure its survival and recovery.”<sup>4</sup> The Endangered Species Act (ESA) is a powerful statute that seeks to conserve the ecosystem upon which endangered species and threatened species depend, and provides a program for the conservation of such endangered species and threatened species.<sup>5</sup> Across the nation’s political and cultural lines, today’s society would largely agree that species that are threatened or endangered deserve protection. The effect of inclusion of the Lake Iliamna seal on Alaska Natives is an area of concern because this particular ESA listing near tribal lands infringes on tribal sovereignty and undermines Alaskan Native values based on holistic management principles and subsistence values.

This paper will examine whether an ESA listing for the Iliamna Lake fresh water seal will be burdensome or beneficial to the five predominantly Alaska Native communities that reside on the shores of Lake Iliamna. Part I provides a brief background on Lake Iliamna and the Iliamna Lake seal. Part II explains the various statutory schemes of the ESA, the Marine Mammal Protection Act (MMPA), and the Alaska Native Claims Settlement Act (ANCSA). Part III offers an application and critique of the various statutes and concludes with a recommendation that the Iliamna Lake seal not be listed as threatened under the ESA because the listing would inhibit any future development around Lake Iliamna. The Iliamna Lake seal should, however be listed as a distinct population stock under the MMPA to allow for less intrusive protective measures.

## PART I. LAKE ILIAMNA

*“It flows into Qizhjah Vena, which is known as Lake Clark...That same water from the head of Lake Clark travels all the way into the salt water. That is why long ago they used to say water travels farther than human beings.”*

- Story from Nondalton – Antone Evan<sup>6</sup>

### A. *The People of Lake Iliamna*

Development around Lake Iliamna is very limited due to its low population numbers, remote location and the fact that there are no roads leading in or out.<sup>7</sup> The only communities connected by road are Newhalen and Iliamna. Numerous rivers and streams run into Lake Iliamna, including the Newhalen River, but the lake has only one outlet to the sea via the Kvichak River.<sup>8</sup> Lake Iliamna and

<sup>4</sup> Petition, *supra* note 3, at 47, 60.

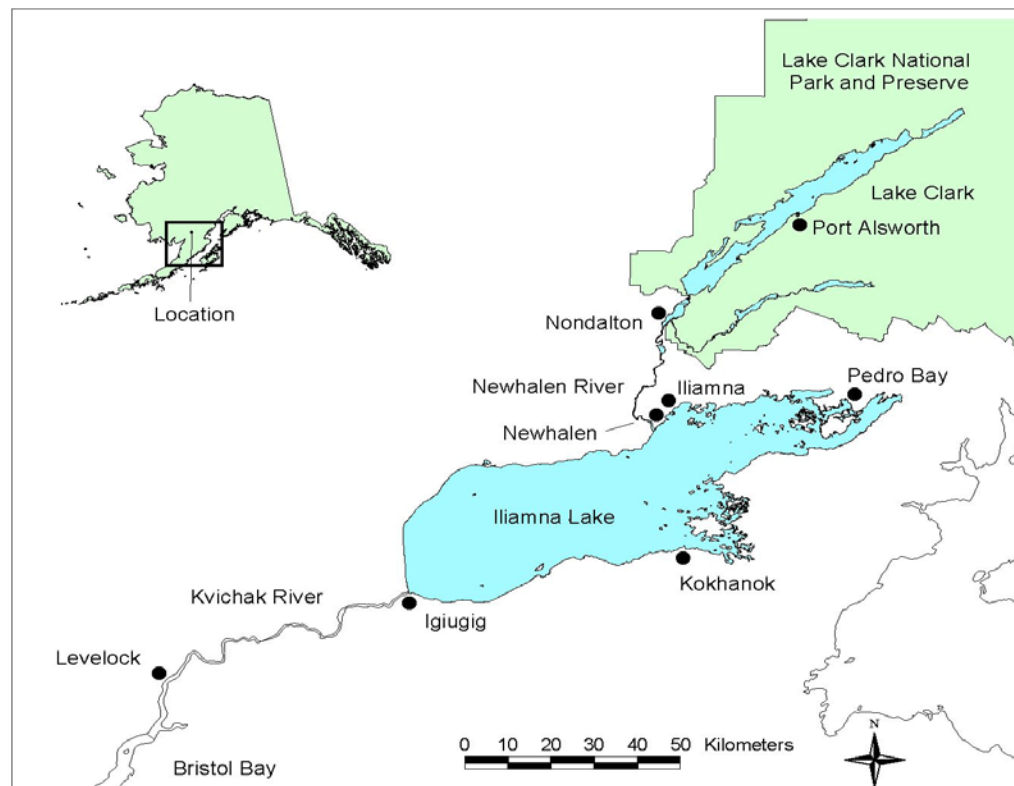
<sup>5</sup> See *generally*, Endangered Species Act, 16 U.S.C. § 1531 (2006).

<sup>6</sup> History & Culture, Lake Clark National Park & Preserve, *available at* <http://www.nps.gov/lacp/index.htm> (last visited Oct. 19, 2014) [hereinafter “Lake Clark National Park”].

<sup>7</sup> Lake & Pen Borough, *supra* note 3.

<sup>8</sup> *Id.*

the Kvichak river system support the largest sockeye salmon run in the world.<sup>9</sup> The Lake Iliamna region is home to a mixture of Yup'ik Eskimos, Alutiiq Aleuts, Athabascan Indians, and Inupiaq people, and has been for the last 6,000 years.<sup>10</sup> The indigenous peoples in this area have depended on the bounty of the land and lake for generations. There are five predominately Alaskan Native villages that reside on the shores of Lake Iliamna: Igiugig, Iliamna, Kokhanok, Pedro Bay, and Newhalen. Each community contains populations of less than 225 people; some villages have fewer than 50 people.<sup>11</sup>



Iliamna Lake Map, available at <http://www.mappery.com/map-of/Iliamna-lake-Map>

<sup>9</sup> About Bristol Bay, Environmental Protection Agency, available at <http://www2.epa.gov/bristolbay/about-bristol-bay> (last visited Oct. 3, 2014).

<sup>10</sup> Lake & Pen Borough, *supra* note 3.

<sup>11</sup> *Id.*

### **B. The Animals and Vegetation of Lake Iliamna**

On Lake Iliamna, many different animals and vegetation are harvested for subsistence purposes during the various seasons. Subsistence is generally defined as an economy and a way of life involving the acts of harvesting, processing, distributing, and consuming the wild animals, fish, and plants.<sup>12</sup>

One of the resources harvested is the Iliamna Lake seal, which has been documented as resident to the lake since at least the early nineteenth century.<sup>13</sup> Alaska Natives use virtually all of the seal for food, clothing, and other products. For example, after the oil and meat are processed for



Seals at a haul-out site in Lake Iliamna, (Associated Press Photo/NOAA, Dave Winthrow).

consumption, the skin of the seal is used to make winter hats and mittens, which protect against the harsh winter elements.<sup>14</sup>

The Iliamna Lake seals are generally considered to be a population of the Pacific harbor seal (*Phoca vitulina richardsi*), but are isolated from other seal populations through a combination of

<sup>12</sup> Thomas F. Thornton, "Alaska Native Subsistence: A Matter of Cultural Survival," CRISIS ON THE LAST FRONTIER (Fall 1998), available at <https://www.culturalsurvival.org/ourpublications/csqa/article/alaska-native-subsistence-a-matter-cultural-survival> (last visited Oct. 3, 2014).

<sup>13</sup> Petition, *supra* note 3, at 4.

<sup>14</sup> Ronald H. Brower Sr., "Cultural Uses of Alaska Marine Mammals Part II," ALASKOOL TRADITIONAL LIFE (Dec. 2001), available at <http://www.alaskool.org/projects/traditionallife/brower/brower-pt2.htm> (last visited Oct. 3, 2014).

ecological, behavioral and geographical factors.<sup>15</sup> The Iliamna Lake seal is only known to occur in the northeastern half of Lake Iliamna and approximately 125 miles of lake and river separates this population of seals from the nearest population of saltwater seals in Bristol Bay.<sup>16</sup>

The Center for Biological Diversity<sup>17</sup> seeks to have the Iliamna Lake seal listed as threatened under the ESA. The first reason for listing relates to the effects of climate change and ocean acidification from greenhouse gas emissions on the sockeye salmon, a key prey species for the seals.<sup>18</sup> The Petition states that “[u]nless greenhouse gas emissions are cut dramatically in the immediate future, wide-scale ecological changes including declines of Bristol Bay salmon are essentially assured and threaten the Iliamna Lake seal with extinction.”<sup>19</sup> Additionally, the Petition cites the threat of the Pebble Project development,<sup>20</sup> “[t]he Pebble Project would likely result in loss or severe decline of salmon runs, decreased water quality, increased human noise and activity, and degradation of both aquatic and terrestrial habitat.”<sup>21</sup>

## PART II. PROTECTIVE STATUTORY SCHEMES

### A. *The Endangered Species Act*

#### 1. *Endangered or Threatened Listing*

The Endangered Species Act authorizes the Secretaries of the Departments of the Interior and Commerce, respectively, through the United States Fish and Wildlife Service (FWS), and the National

<sup>15</sup> Petition, *supra* note 3, at 1.

<sup>16</sup> Petition, *supra* note 3, at 1.

<sup>17</sup> Programs, CENTER FOR BIOLOGICAL DIVERSITY, *available at* <http://www.biologicaldiversity.org/programs/> (last visited Oct. 4, 2014, 8:05 AM). (The Center for Biological Diversity is a nonprofit membership organization based in Tucson, Arizona. “The Center’s programs are devoted to protecting biodiversity in different arenas through science; legal action; policy advocacy; negotiation with government and industry; and creative, strategic media and outreach.”).

<sup>18</sup> Petition, *supra* note 3 at 2.

<sup>19</sup> Petition, *supra* note 3, at 1.

<sup>20</sup> *Preliminary Assessment of the Pebble Project, Southwest Alaska*, NORTHERN DYNASTY MINERALS LTD. (Feb. 17, 2011), *available at* [http://www.northerndynastyminerals.com/i/pdf/ndm/Pebble\\_Project\\_Preliminary%20Assessment%20Technical%20Report\\_February%2017%202011.pdf](http://www.northerndynastyminerals.com/i/pdf/ndm/Pebble_Project_Preliminary%20Assessment%20Technical%20Report_February%2017%202011.pdf). (An examination of the Pebble Project is outside the scope of this article. The Pebble Project is a copper-gold-molybdenum porphyry deposit in the advanced exploration stage. The mineral deposit sits about 17 miles northwest from the community of Iliamna. The development of the project would be extensive considering the lack of existing infrastructure in the area. One aspect of the project would require the construction of a 77-mile access road from the mine site to Cook Inlet. Another aspect would require the construction of two parallel pipelines along the proposed road. A third aspect would require the construction of a deep-water port in Cook Inlet to ship the slurry from the mine site to oversea smelters. The pipelines would carry slurry from the mine site to Cook Inlet; the water would be separated from the slurry and then sent back in a return pipeline to the mine site to be reused. The road and pipelines will likely run parallel to the north side of Lake Iliamna. “Preliminary Assessment of the Pebble Project, Southwest Alaska,” Northern Dynasty Minerals Ltd.).

<sup>21</sup> *Id.*

Fisheries Service to identify species in need of protection by placing them on the endangered or threatened species lists.<sup>22</sup> Species eligible for listing as “endangered” are those that are in imminent danger of extinction. While “threatened” species are those that are likely to become endangered within the foreseeable future.<sup>23</sup> The ESA prohibits any person from taking a listed species or adversely modifying occupied or essential habitat, and requires the FWS and the NMFS to designate “critical habitat”<sup>24</sup> for listed species.<sup>25</sup>

In designating critical habitat, the secretaries must first identify occupied or unoccupied land that is suitable to meet the statutory criteria of the ESA, based on the best scientific data available.<sup>26</sup> The following factors are used in identifying a critical habitat: (1) space for individual and population growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, or rearing of offspring; and (5) habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.<sup>27</sup>

Additionally, the regulations further direct NMFS to, “focus on the principal biological or physical constituent elements...that are essential to the conservation of the species,” and specify that the “known primary constituent elements shall be listed with the critical habitat description.”<sup>28</sup> These primary constituent elements (PCEs) include, but are not limited to: “roost sites, nesting grounds, spawning sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.”<sup>29</sup> When designating critical habitat, the Secretary of Commerce must consider the impacts on the economy, national security, and any other relevant impacts.<sup>30</sup>

After considering those impacts, the agency determines what areas should be excluded from the critical habitat designation, weighing the benefits for and against the designation. What is

<sup>22</sup> 16 U.S.C. §§ 1533-1544 (2013).

<sup>23</sup> *Id.*

<sup>24</sup> Critical habitat is defined as “the specific areas within the geographical area occupied by the species, at the time it is listed...on which are found those physical or biological features essential to the conservation of the species and [] may require special management considerations or protections.” Also, “specific areas outside the geographical area occupied by the species at the time it is listed” may be designated as critical upon determination by the secretaries that such areas are essential for conservation of the species. 16 U.S.C. §§1532(5)(A) (2013).

<sup>25</sup> *Id.*

<sup>26</sup> 16 U.S.C. §§ 1533(b)(2) (2013).

<sup>27</sup> 50 C.F.R. § 424.12(b) (2012); *Ringed, Ribbon, Spotted and Bearded Ice Seals*, NOAA FISHERIES, NAT’L MARINE FISHERIES SERVICE, available at <http://alaskafisheries.noaa.gov/protectedresources/seals/ice.htm> (last visited Oct. 11, 2014).

<sup>28</sup> 50 C.F.R. § 424.12(b) (2013).

<sup>29</sup> *Id.*

<sup>30</sup> 16 U.S.C. §§1533(b)(2) (2013).



particularly considered is where “the failure to designate such area as critical habitat will result in the extinction of the species.”<sup>31</sup>

## 2. ESA Protections and Limitations

As soon as a species is listed as endangered or threatened, a number of safeguards and protections immediately apply. The first protection comes under Section 7 of the ESA, which calls for consultation by federal agencies to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of [its] habitat.”<sup>32</sup> Examples of a “federal action” include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water or air.<sup>33</sup> Tribal development projects can be subject to Section 7 requirements because they often require federal authorization or funding approval.<sup>34</sup>

The second protection that applies immediately upon listing is Section 9 of the ESA, which prohibits the “taking” of an endangered species of fish or wildlife.<sup>35</sup> This section of the Act reaches far beyond federal agency action because it applies to “any person or agency.” “Take” is defined to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.”<sup>36</sup> The term “harm” has been interpreted here as an act which actually kills or injures wildlife.<sup>37</sup> It may include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>38</sup>

Section 10(e) provides an exemption for Alaskan Natives from the Section 9 prohibition applying to “any person.” This is the only subsection in the ESA that provides an exemption from the takings prohibition. Alaskans and non-Native permanent residents of Alaska Native villages are exempt if the taking is primarily for subsistence purposes.<sup>39</sup> Aside from this subsistence exception, the ESA makes no mention of any obligation on the part of the federal government to consult or work with tribes when

<sup>31</sup> *Id.*

<sup>32</sup> 16 U.S.C. § 1536(a)(2) (2013).

<sup>33</sup> 50 C.F.R. § 402.02 (2013).

<sup>34</sup> Marren Sanders, *Implementing the Federal Endangered Species Act in Indian Country*, JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS, JOPNA No. 2007-01, 6 (2007) [hereinafter Sanders]. Sanders, *supra*, at 6.

<sup>35</sup> 16 U.S.C. § 1538(a)(1)(B) (2013).

<sup>36</sup> 16 U.S.C. § 1532(19) (2013).

<sup>37</sup> 50 C.F.R. § 17.3 (2013); See also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 715 (1995).

<sup>38</sup> *Babbitt*, 515 U.S. at 708.

<sup>39</sup> 16 U.S.C. § 1539(e) (2013).

a threatened or endangered species resides on or near their lands. To fill the gap in the ESA, Secretarial and Executive Orders were passed by different administrations in attempts to recognize tribal sovereignty.

In 1997, the Secretary of the Interior and the Secretary of Commerce jointly released Secretarial Order 3206 (SO 3206), entitled “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.”<sup>40</sup> SO 3206 states it was created to clarify the responsibilities of the Departments of the Interior and Commerce and their component agencies, bureaus, and offices (collectively “Departments”) when actions taken under authority of the ESA affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights.<sup>41</sup> Under SO 3206, the Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species.<sup>42</sup> The Departments carry out their responsibilities under the ESA in a manner that harmonizes the federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments.<sup>43</sup> Additionally, the Departments should strive to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.<sup>44</sup>

One critique of SO 3206 is that it fails to recognize the sovereign tribal governments<sup>45</sup> of the 229 federally recognized tribes<sup>46</sup> in Alaska by not including Alaskan tribes in the SO. According to the United States Fish and Wildlife Service (USFWS) website, Alaska Natives were not included in the Order because there was a concern that their subsistence exemption under 10(e) of the ESA might be otherwise impacted.<sup>47</sup> However, the Departments agreed to make an independent study of the Alaska Native situation within one year of the signing of the 1997 Order.<sup>48</sup> On January 19, 2001, Secretarial Order 3225, Endangered Species Act and Subsistence Uses in Alaska (Supplemental to SO 3225), was signed in recognition that an ESA listed species may be important for Alaska Native subsistence.<sup>49</sup> The act establishes a consultation framework and reiterates the government-to-government

<sup>40</sup> Secretarial Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act*, available at <http://www.fws.gov/nativeamerican/laws.html> (last visited Oct. 11, 2014) [hereinafter “SO 3206”].

<sup>41</sup> *Id. supra* at 1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Sanders, *supra* note 35.

<sup>46</sup> *Alaska’s 229 Federally Recognized Tribes*, ROOTS WEB ANCESTRY [http://www.rootsweb.ancestry.com/~akgenweb/AKTribes\\_August2005.pdf](http://www.rootsweb.ancestry.com/~akgenweb/AKTribes_August2005.pdf) (last visited Oct. 11, 2014). Quick Facts for Alaska, *supra* note 37.

<sup>47</sup> *Working With Tribes I Frequently Asked Questions*, U.S. FISH & WILDLIFE ENDANGERED SPECIES (July 15, 2013) available at <http://www.fws.gov/endangered/what-we-do/tribal-faq.html>, (last visited Nov. 17, 2014).

<sup>48</sup> *Id.*

<sup>49</sup> SO 3206 (sup), *Endangered Species Act and Subsistence Uses in Alaska*, UNITED STATE DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY (Jan. 19, 2001), available at <http://www.fws.gov/alaska/external/pdf/SO3225.pdf> (last visited Oct. 12, 2014).

requirements for ESA implementation in Alaska.<sup>50</sup> Government-to-government consultation with NMFS is guaranteed if hunting seasons or quotas are deemed necessary and, or proposed by NMFS.<sup>51</sup>

In 2000, Executive Order 13,175<sup>52</sup> (EO 13,175) was signed, which set the framework for regular and meaningful consultation and collaboration with Alaska Native representatives in the development of policies, legislation, regulations, and programs.<sup>53</sup> EO 13,175 was meant to strengthen the United States' government-to-government relationships with tribes, and reduce the imposition of unfunded mandates upon them.<sup>54</sup> EO 13,175 is clear that it is intended only to "improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural."<sup>55</sup> President Obama recommitted his Administration to the EO in 2009, and the Department of Commerce issued a new Tribal Consultation and Coordination Policy for the Department of Commerce (DOC Policy) in 2013.<sup>56</sup> The DOC Policy describes the manner in which the Department works with Tribes on a government-to-government basis when formulating or implementing policies that have Tribal implications.<sup>57</sup> The policy outlines consultation procedures for all operating units within the Department of Commerce.<sup>58</sup> Like EO 13,175, this policy is intended only for NOAA internal management purposes and does not create any right or benefit, substantive or procedural, enforceable against the United States."<sup>59</sup>

Take prohibitions, mandatory consultations, and critical habitat designations are not the only requirements under the ESA. The ESA also requires the Secretary to develop and implement recovery plans for the conservation and survival of endangered and threatened species.<sup>60</sup> The recovery plan must describe site-specific management actions for the conservation and survival of the species, as

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Exec. Order No. 13175, 65 FR 67249 (2000) (The new Executive Order expressly revoked E.O. 13,084).

<sup>53</sup> *Tribal Consultation in Alaska*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION'S NATIONAL MARINE FISHERIES SERVICES, available at <http://alaskafisheries.noaa.gov/tc/default.htm>, (last visited Oct. 9, 2014).

<sup>54</sup> Sanders, *supra* note 27, at 10.

<sup>55</sup> Exec. Order No. 13175, 65 FR 67249 (2000).

<sup>56</sup> Federal Register, "*Final NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations*," available at <http://alaskafisheries.noaa.gov/notice/78fr68819.pdf> (last visited Dec. 3, 2013). FEDERAL REGISTER, (2013).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> "*NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations*," NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, NOAA 13175 POLICY (Nov. 12, 2013) available at <http://www.legislative.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213.pdf>.

<sup>60</sup> 16 U.S.C. § 1533 (2014).

well as objective, measurable criteria to contribute to the recovery of the species, within a planned time-frame.<sup>61</sup>

## **B. The Marine Mammal Protection Act (MMPA)**

### **1. Purpose and History of the MMPA**

The Marine Mammal Protection Act (MMPA) was enacted in 1972 to protect all marine mammals.<sup>62</sup> The MMPA prohibits, with certain exceptions, the “take” of marine mammals in United States waters and by United States citizens on the high seas and the importation of marine mammals and marine mammal products into the United States.<sup>63</sup> In 1994, the MMPA was amended substantially in order to provide certain exceptions to the take prohibition. The 1994 amendments added Section 119 to enhance conservation and management of marine mammal population stocks that are taken by Alaska Natives for subsistence purposes.<sup>64</sup> Section 119 is comparable to the 10(e) “take” exception in the ESA. This section also allows the Secretaries of Commerce and the Interior to “enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”<sup>65</sup>

### **2. Protections under the MMPA**

One example of the protections afforded under the MMPA is the determination of the health of each individual population stock. Under the MMPA, if the Secretary determines that a species or population stock is below its optimum sustainable population, a stock is considered “depleted;” consequently, measures will be taken to replenish these species or stocks.<sup>66</sup> Additionally, if the Secretary determines “any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo.”<sup>67</sup> The Center for Biological Diversity seeks to list the Iliamna Lake seal as a distinct population segment under the Endangered Species Act because Iliamna Lake seals are separated from other species of seals and possess differing characteristics from the Pacific Harbor

<sup>61</sup> *Id.*, Phone Interview with Jon Kurland, Assistant Regional Administrator for Protector Resources, National Marine Fisheries Service (Dec. 16, 2013).

<sup>62</sup> 16 U.S.C. § 1361 (2014).

<sup>63</sup> *Id.*

<sup>64</sup> 16 U.S.C. § 1371 (2014).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 16 U.S.C. § 1371 (b)(3) (2003).

seal.<sup>68</sup> Presently, the seals in Iliamna Lake are considered part of the Bristol Bay harbor seal stock, and not a separate stock as defined by the Marine Mammal Protection Act.<sup>69</sup>

### **C. The Alaska Native Claims Settlement Act**

Landownership in Alaska is unique and deserves examination. While an in-depth analysis of the different structures of land ownership in Alaska is outside the scope of this article, a brief overview follows. Stated simply, in 1971 Congress passed the Alaska Native Claims Settlement Act (ANCSA), which established business corporations, owned by Alaska Natives, to manage their land claims settlements of nearly \$1 billion and 44 million acres.<sup>70</sup> Subsequently, twelve<sup>71</sup> regional and more than 200 village corporations were organized. By 1973, about 75,000 Alaska Natives were enrolled as shareholders with their respective regional and local village corporations.<sup>72</sup> The Act provided that the village corporations would receive the surface estate and the regional Corporations would receive the subsurface estate.<sup>73</sup> The Native Corporations were given the broad task of benefiting their shareholders and future generations of shareholders, but the form the benefits ought to take, and how to generate them were not clear.<sup>74</sup> Today, through trial and error, many of the Native Corporations have become powerful economic forces by participating in various industries ranging from tourism, mining, timbering, military contracting, to energy production. It seems only fitting that if *any entity* can petition to list a species as threatened or endangered, where the land affects Native Corporation-owned land, the shareholders and organizations should play a role in this assessment.

<sup>68</sup> See generally, Petition, *supra*.

<sup>69</sup> "Endangered and Threatened Wildlife; 90-day Finding on a Petition to List Iliamna Lake Seals as Threatened or Endangered Species," OFFICE OF THE FEDERAL REGISTRAR, available at <https://federalregister.gov/a/2013-11869> (last visited Oct. 15, 2014).

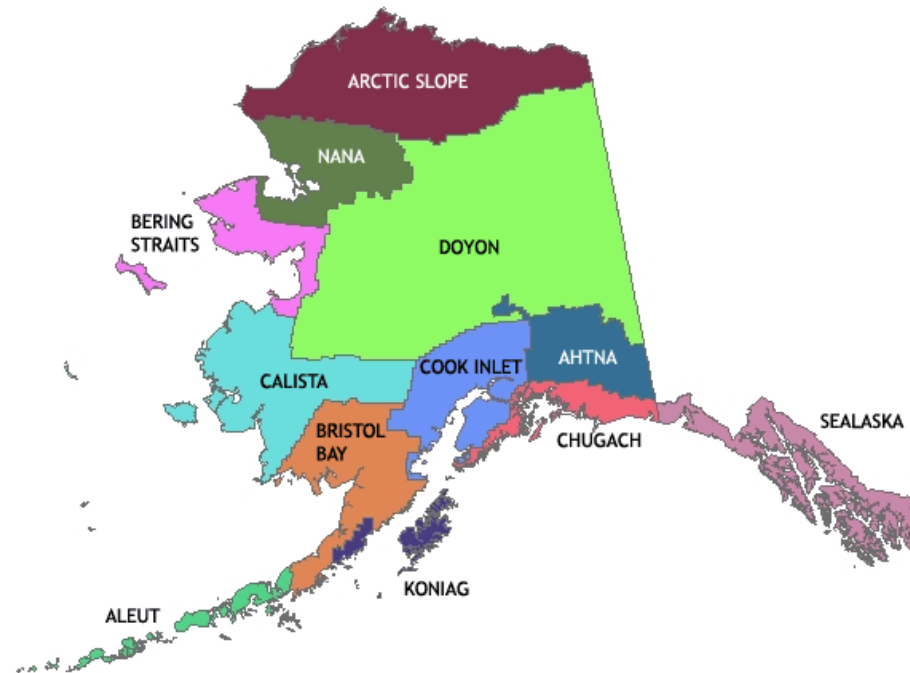
<sup>70</sup> 43 U.S.C. § 1601 (2014); "Benefits from Alaska Native Corporations," UNIVERSITY OF ALASKA ANCHORAGE INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH, (2009), available at, [http://www.iser.uaa.alaska.edu/Publications/8\(a\)/C.pdf](http://www.iser.uaa.alaska.edu/Publications/8(a)/C.pdf) [hereinafter ISER Study].

<sup>71</sup> A 13<sup>th</sup> regional corporation was later established to accommodate some of those Alaska Native People who had moved outside the state.

<sup>72</sup> *Id.*

<sup>73</sup> See generally 43 U.S.C. § 1601 (1971).

<sup>74</sup> ISER Study, *supra* note 71, at 1.



The twelve regional land-based Alaska Native Corporations.<sup>1</sup>

The land surrounding Lake Iliamna was a part of the ANCSA land settlement. Three village corporations<sup>75</sup> and one regional Native Corporation<sup>76</sup> collectively own the surface and subsurface land surrounding Lake Iliamna, where the seals have been observed during aerial surveys.

The statutory schemes of the ESA and MMPA are different. Each scheme provides certain protections, but each has its limitations. As a result, and because of the way land ownership is structured under the ANCSA land settlement, whether the Iliamna Lake seal is protected under a certain statute could have broad-sweeping effects on Native landowners.

### **PART III. THE ILIAMNA LAKE SEALS SHOULD NOT BE LISTED AS ENDANGERED**

#### ***A. More Information on the Lake Seals Needs to be Collected***

Regardless of whether the Iliamna Lake seal is listed as threatened or endangered under the ESA, they are currently protected under the MMPA. As it stands, the seals in Iliamna Lake are considered part of the Bristol Bay harbor seal stock, and not a distinct population. The current designation could be due to the fact that little is known about the seal population. Since 2011, the University of Alaska Anchorage, the Bristol Bay Native Association (BBNA), the Newhalen Tribe, and the Alaska Department Fish and Game have been working in partnership to conduct quarterly aerial

<sup>75</sup> Iliamna Village Council, Pedro Bay Corporation, and Alaska Peninsula Corporation.

<sup>76</sup> Bristol Bay Native Corporation.

surveys to assess the population of the Iliamna Lake seal.<sup>77</sup> Funding for the surveys is a five-year project that extends from 2009 until 2014.

For two cycles, the North Pacific Research Board (NPRB) funded BBNA, who took the lead in gathering environmental baseline data through interviews and aerial surveys. In the second NPRB funding cycle, the Alaska Department of Fish and Game chose to take the lead in gathering baseline data.<sup>78</sup> Last year, the Bristol Bay Marine Mammal Council (BBMMC) wrote a letter to the NMFS expressing its opposition to listing the Iliamna Lake seal as a threatened or endangered species because studies show the population to be healthy and not in decline.<sup>79</sup> The letter noted that the Lake serves as a main mode of transportation for everyday travel and also for traditional subsistence harvesting of salmon, freshwater fish species, seals, waterfowl, large land animals, and wild edible plants.<sup>80</sup> Additionally, the lake is used, “to transport wood for heat, for fuel barge services, and other barge services for the Lake Iliamna residents.”<sup>81</sup> The BBMMC stated that not enough data was available to determine whether the Iliamna Lake seal is a distinct population under the ESA. The council also urged NMFS and the Center for Biological Diversity “to hold face-to-face Tribal Consultation with the Iliamna Lake-area Tribal Councils and the BBMMC.”<sup>82</sup>

Allowing any citizen to petition to list a species is a concern for tribal governments because these petitioners lack important tribal government input, and may have no expertise in determining whether the listing is warranted at all. More research should be conducted to determine whether the Iliamna Lake seal is genetically different from the harbor seals in Bristol Bay. If the Iliamna Lake seal were determined to be a distinct population species, it would qualify as a separate stock under the existing regulatory framework of the MMPA. If the seals were recognized as a separate stock, the Secretary would have more discretion to protect the seals in Iliamna Lake from the threats unique to its habitat and environment.

### **1. The SO and EO's Do Not Sufficiently Protect Tribal Sovereignty**

The existing Secretarial and Executive Orders are not sufficient to protect tribal sovereignty. While EO 13,175 and SO 3225 have resulted in positive internal agency policies, they do not create

<sup>77</sup> “Alaska Harbor Seal Research Plan,” NOAA National Marine Fisheries Service, (2011), available at, <https://alaskafisheries.noaa.gov/protectedresources/seals/harbor/researchplan12.pdf> (study to estimate Harbor Seal Distribution, Abundance, and Seasonal Timing in Lake Iliamna).

<sup>78</sup> E-mail Interview with Helen Alderman (Chythlook), Marine Mammal Program Manager, Bristol Bay Marine Mammal Council (Dec. 16, 2013).

<sup>79</sup> Letter from the Bristol Bay Marine Mammal Council to the Alaska Region National Marine Fisheries Service from the Bristol Bay Marine Mammal Council (Dec. 5, 2012) (on file with author).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

rights for tribal governments or strengthen tribal sovereignty because tribal land may still be designated as critical habitat. A sovereign government would possess the inherent authority to determine whether the ESA should apply to lands they owned at all. What EO 13,175 and SO 3225 have resulted in, is a good faith effort on behalf of the current Administration to work with tribes on a government-to-government basis in developing policy. If the Lake Iliamna seal were listed, the National Marine Fisheries Service, a division of NOAA and the Department of Commerce, would continue to operate under the guiding framework of EO 13,175, SO 3225, and the DOC Policy in dealing with tribal governments and Alaska Native organizations. Assuming this EO and SO are supported by the Administration in office. Unfortunately, this guiding framework can be expressly revoked if a newly elected Administration does not believe in supporting tribal sovereignty.

Where the ESA and MMPA diverge is in the requirement to designate critical habitat for the species. The ESA mandates that when NMFS lists a species as endangered or threatened, the agency must also concurrently designate critical habitat for the species, “to the maximum extent prudent and determinable.”<sup>83</sup> In its petition to list the Iliamna Lake seal, the Center for Biological Diversity (Center), “expects that NMFS will comply with this unambiguous mandate and designate critical habitat concurrently with the listing of the Iliamna Lake seal.”<sup>84</sup> The Center states that critical habitat must include the islands and shoreline in the northeast half of Iliamna Lake that are known to be used by the seals for hunting and resting.<sup>85</sup> What the petition fails to mention, is that critical habitat listing is not limited to the islands and shoreline of Iliamna Lake; it extends to air and aquatic zones as well.

## **2. Potential Effects of an ESA Listing of the Lake Seal**

If critical habitat were designated on Native corporation-owned land, these corporations would be stifled in deciding how to manage their lands. Critical habitat designation in Alaska, on Native corporation-owned lands, raises critical issues of concern. For example, a federal action that may trigger Section 7 consultation under the ESA would be if a community sought to build a landing dock on the side of the lake. The action would likely require a regulatory permit from the Army Corp of Engineers, and several permits from the State of Alaska. The issuance of a permit is considered a “federal action.”<sup>86</sup> Due to the fact there are no roads in or out, marine transportation is important because it supports the movement of critical commodities such as food, fuel, and building supplies at a significantly lower cost than flying it in by airplane. In early 2012, three communities on Lake Iliamna received approval to construct vital barge landings.<sup>87</sup> If the Iliamna Lake seal were listed as threatened, and critical habitat was designated, the approval for the three barge landings would likely have been

<sup>83</sup> 16 U.S.C. § 1533(b) (2014).

<sup>84</sup> Petition, *supra* note 69, at 61.

<sup>85</sup> *Id.*

<sup>86</sup> 50 C.F.R. § 402.02 (2014).

<sup>87</sup> E-mail Interview with Lamar Cotton, Borough Manager, Lake and Peninsula Borough (Dec. 16, 2013).



delayed due to the Section 7 consultation requirements. This delay would have been detrimental to the projects because the Alaska construction season is a very limited due to the weather conditions and the shortened summer season. Another example would be if any roads were built near the lake that required a right-of-way. It would be necessary to assess whether the construction and traffic on a road could potentially affect the seal's habitat, or be classified as a "taking."<sup>88</sup> The future of the region is wide open, and development for some corporations may not mean the same thing. Ultimately, it should be up to each corporation to decide what is best for its shareholders. Therefore, it is vital that tribes and Native Corporations are included in ESA listing determinations.

If the Iliamna Lake seal were listed as threatened under the ESA, there could be positive outcomes. The tribes around the lake would still be able to practice their subsistence activities of harvesting the seal because tribal members would be granted an exemption. Additionally, there is great potential for the local tribes and NMFS to work collectively towards more fully understanding the Iliamna Lake seals. For example, in northwest Alaska (near the Chukchi Sea), the Native Village of Kotzebue launched a three-year study to better understand the seasonal movement, habitat use, and dive behavior for the ringed seals in Alaska, which are a listed threatened species.<sup>89</sup> The project proposal recognized, "[t]here is a critical need to further marine mammal research in Alaska with Tribal involvement and to develop management strategies for ice seals where none currently exist."<sup>90</sup> The project declaration arguably holds true for the future of management strategies for all species found in Alaska waters, land, and air. It is critical for partnerships between local tribes and NMFS to form, not only to validate traditional knowledge and acknowledge sovereignty, but also for the preservation and growth of all species for future generations. The report for the Kotzebue Ringed Seal Study stated that, "[e]ffective marine mammal management in Alaska requires [that] resource users trust the information being used in management decisions. There is no better way to develop trust in management decisions than by undertaking cooperative projects to acquire the needed information."<sup>91</sup>

The Iliamna Lake seal is a welcome and respected neighbor to the tribes that call Lake Iliamna home. It is important for the local tribes and the state and federal agencies to develop their understanding of this unique population. If anything, more resources should be allocated to gathering accurate population numbers and the genetic differences from the harbor seals species, so they can be listed as a distinct population under the MMPA. If the Iliamna Lake seal were recognized as a

<sup>88</sup> See generally 16 U.S.C. §§ 1532(5), (19) (2014); 16 U.S.C. 1533 § 1(e) (2014).

<sup>89</sup> "Kotzebue Sound Ringed Seal Tagging Project," THE NORTH SLOPE BOROUGH, *available at* <http://www.north-slope.org/departments/wildlife-management/co-management-organizations/ice-seal-committee/isc-research-projects/kotzebue-sound-ice-seal-research#KOTZRingedSealTaggingProject> (last visited Oct. 15, 2014) [hereinafter Kotzebue Project].

<sup>90</sup> *Id.*

<sup>91</sup> *Kotzebue Sound Ringed Seals-what have we learned?* KOTZEBUE MARINE MAMMAL NEWS, May 2012, at 15, *available at* [http://www.north-slope.org/assets/images/uploads/Kotzebue%20Marine%20Mammal%20News%20May%2029%202012\\_55837.pdf](http://www.north-slope.org/assets/images/uploads/Kotzebue%20Marine%20Mammal%20News%20May%2029%202012_55837.pdf)

distinct population segment, the population levels would be monitored on an annual or tri-annual basis to ensure the seals do not fall below their optimum sustainable population.<sup>92</sup>

**3. *Alaska Native Organizations should be included in the Future Management of the Lake Seal***

At this time, it is premature to list the Iliamna Lake seals as threatened without devoting more time and resources to research this distinct seal population. If the Secretary decides to list the Iliamna Lake seal as threatened, it would inhibit the local and regional Native Corporations from developing land around the lake that may require the issuance of a federal permit or right-of-way. At a minimum, the Iliamna Lake seal should be listed as a distinct population stock under the MMPA, which would provide protections to Alaska Native subsistence and management interests. Irrespective of whether the Iliamna Lake seal is listed or not, local Alaska Native organizations should be included in the future co-management of the species. The time is now for a more inclusive and holistic management of the ESA on Alaska Native owned land.

<sup>92</sup>See generally 16 U.S.C. § 1362 (2003).