

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 215

[Docket No. 50705-5105]

## Subsistence Taking of North Pacific Fur Seals

**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.

**ACTION:** Emergency interim rule and request for comment.

**SUMMARY:** The NMFS issues and requests comment on an emergency interim rule regarding the subsistence taking of North Pacific fur seals (*Callorhinus ursinus*) by Indians, Aleuts, and Eskimos who live on the Pribilof Islands. This rule places restrictions upon the subsistence and handicraft taking of fur seals allowed under the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361, or alternatively under the Fur Seal Act (FSA), 16 U.S.C. 1151, and provides that the harvest may be suspended once the subsistence needs of the Pribilovians have been satisfied. Additionally, technical changes are made to update the regulations and bring them into conformity with the 1983 amendments to the FSA. Lastly, the NMFS states its intention to propose a permanent rule by September 30, 1985, and requests comment on the alternative approaches.

**EFFECTIVE DATES:** This emergency rule is effective July 3, 1985; the expiration date will be published in the *Federal Register*. Comments on this rule must be received on or before July 23, 1985. Comments on the rulemaking approach that should be followed in promulgating a permanent rule must be received by August 7, 1985.

**ADDRESS:** Comments should be addressed to the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D.C. 20235. A copy of the environmental assessment for this rule is available from the Office of Protected Species and Habitat Conservation from the same address.

**FOR FURTHER INFORMATION CONTACT:** Georgia Cranmore, 202-634-1792.

**SUPPLEMENTARY INFORMATION:****Background**

Since 1957, a harvest of fur seals on the Pribilof Islands has been conducted under the authority of the Interim Convention on Conservation of North

Pacific Fur Seals (Convention). The parties to the Convention are the United States, Canada, Japan, and the Soviet Union. The Convention came into force on October 14, 1957, and was extended in 1963, 1969, 1976, and 1980. Prior to the present Convention, harvests were conducted pursuant to the 1911 Convention for the Preservation and Protection of Fur Seals. The 1911 treaty was interrupted prior to World War II by the withdrawal of Japan, but the Pribilof Islands seal herd was protected between 1941 and 1957 by a provisional agreement between the United States and Canada.

Under the terms of the 1980 extension of the Convention, the Convention expired on October 14, 1984. On October 12, 1984, the parties to the Convention signed a protocol that, upon acceptance by all four parties, would extend the Convention until October 13, 1988. Japan, Canada, and the Soviet Union have ratified the 1984 protocol. On March 20, 1985, the President transmitted the protocol to the Senate, requesting its advice and consent regarding ratification. On June 28, 1985, the Senate adjourned until July 8, 1985, without taking action on the protocol. Although action on the protocol is expected in the near future, it will not occur before July 8, 1985, the date on which the 1985 fur seal harvest is scheduled to begin.

At its April 1985 meeting in Tokyo, the North Pacific Fur Seal Commission (Commission) recommended that up to 22,000 subadult male fur seals be commercially harvested on St. Paul Island in 1985. Additionally, the Commission recommended that a subsistence take of up to 329 fur seals be allowed on St. George Island. Under section 108 of the FSA, 16 U.S.C. 1158, the Secretary of State, with the concurrence of the Secretary of Commerce, is authorized to accept or reject, on behalf of the United States, recommendations made by the Commission. The Secretary of State, with the concurrence of the Secretary of Commerce, will be advising the Commission that given the present status of the Convention as it relates to the United States and given the continuing deliberations of the United States Senate on a Resolution of Ratification, it would not be appropriate to accept or reject the Commission's April 1985 recommendations.

The subsistence needs of the Pribilovians have traditionally been met from seals taken in the commercial harvest since the level of the commercial harvest historically had exceeded the estimated subsistence needs of the islanders. This is because

the level of the commercial take is set by a biological determination of the number of subadult male fur seals in the population which exceeds that necessary for meeting the full reproductive potential of the herd. In contrast, the level of the subsistence harvest of fur seals is dependent on the subsistence needs of the Pribilovians, but can be regulated as is necessary for the conservation, management, and protection of the population.

A limited subsistence take of fur seals has been authorized on St. George Island, but has been minimized to accommodate fur seal population research. The resultant shortfall in meeting the St. George residents' subsistence requirements has been offset by providing them with meat from the St. Paul commercial harvest.

**Applicable Laws**

Two statutes are potentially applicable to the taking of fur seals on the Pribilof Islands absent the Convention, the MMPA and the FSA. Both statutes provide for the subsistence taking of fur seals by Alaskan Indians, Aleuts, and Eskimos, but their provisions are not identical. The interplay between the two statutes is such that no clear determination can be made as to which of the competing subsistence regimes should be given precedence.

Section 101(b) of the MMPA, 16 U.S.C. 1371(b), provides that marine mammals may be taken by any Indian, Aleut or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—

- (1) Is for subsistence purposes; or
- (2) Is done for the purposes of creating and selling authentic native articles of handicrafts and clothing . . . ; and
- (3) In each case, is not accomplished in a wasteful manner.

Notwithstanding this provision, the Secretary of Commerce may prescribe regulations to limit the taking of marine mammals by Alaskan Natives if he determines the species to be depleted. Any regulations issued under the MMPA to restrict the native taking rights must be promulgated by formal, on the record, rulemaking after an opportunity for an agency hearing.

Subsistence is defined under the MMPA regulations at 50 CFR 216.3 as

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

The FSA provides for the subsistence take of fur seals under section 103, 16 U.S.C. 1153. Under the terms of section 103(a)

Indians, Aleuts, and Eskimos who dwell on the coasts of the North Pacific Ocean are permitted to take fur seals [if] . . . the seals are taken for subsistence uses as defined in section 109(f)(2) of the [MMPA] (16 U.S.C. 1379), and only in canoes . . . propelled entirely by oars, paddles, or sails, and manned by not more than five persons each, in the way hitherto practiced and without the use of firearms.

It is arguable that this section does not apply to the Pribilovians since they have harvested fur seals on land for nearly 200 years and have not "hitherto practiced" canoe based hunting.

Section 103(b) of the FSA states that—

Indians, Aleuts, and Eskimos who live on the Pribilof Islands are authorized to take fur seals for subsistence purposes as defined in section 109(f)(2) of the [MMPA] (16 U.S.C. 1379), under such conditions as recommended by the Commission and accepted by the Secretary of State. . . .

No such limitations on the subsistence harvest rights of the Pribilovians have been recommended by the Commission and accepted by the Secretary of State.

Subsistence purposes allowed pursuant to section 109(f)(2) of the MMPA differ slightly from the permissible takings authorized by MMPA section 101(b). Section 109(f)(2) defines "subsistence uses" as—

The customary and traditional uses of rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicrafts articles out of nonedible byproducts of marine mammals taken for personal or family consumption; and for barter, or sharing for personal or family consumption.

Section 101(b) allows the taking of marine mammals for the creation of handicrafts and clothing for sale, whereas section 109(f)(2) only permits handicraft articles to be made if the marine mammals were initially taken for consumption.

The definition of subsistence contained in the regulations which implement section 101(b) of the MMPA allow for marine mammal parts to be used by anyone who depends upon the taker to provide them with subsistence. In contrast, section 109(f)(2) allows personal or family consumption, or barter, or sharing for personal or family consumption.

Section 105(a) of the FSA empowers the Secretary of Commerce to "prescribe such regulations with respect to the taking of fur seals on the Pribilof Islands . . . as he deems necessary and

appropriate for the conservation, management, and protection of the fur seal population. . . ." It is under this broad authority that these regulations are issued whether the details of the subsistence harvest are governed by the native exception of the MMPA or the subsistence provisions of the FSA.

#### Need for Emergency Regulations

The Pribilof Island fur seal population is currently declining at the rate of 6.5 percent annually and is below levels which would result in maximum productivity. Extensive research conducted by the parties to the Convention indicates that a harvest of females, pups, or harem bulls could have a disastrous effect on the already declining fur seal population. One of the suspected causes of the population decline observed during the 1970s is the female harvests which occurred between 1956 and 1968. In contrast, it is believed that a harvest of subadult males at levels which allow for the future reproductive needs of the population will not have a negative impact on long term population trends.

As long as the native taking is unregulated, the harvest of fur seals for subsistence purposes is unrestrained. Without this emergency interim rule, the age and sex classes of fur seals that may be taken would not be limited. Females, pups, and harem bulls would be subject to harvesting as well as the subadult male fur seals that have been the sole target of the commercial harvest for the past 16 years. Absent this regulation, the harvesting would not be limited in time and place, but could continue as long as seals were available at any location where they congregate. Also, firearms could be used for a subsistence hunt without the restrictions contained in this rule.

This rule provides harvest restrictions to ensure that none of the haulout areas of the bachelor males is overharvested. Hauling grounds on St. Paul Island may be harvested only once each week. Since, at any one time, many of the subadult male seals are away from the islands and feeding at sea, the rotation of harvest sites is intended to allow a sufficient number of young seals to escape the harvest to return to breed in later years.

Under this emergency rule, only taking by traditional harvesting methods is allowed. These methods have been determined to be painless and humane by a number of prominent veterinarians, including the Panel on Euthanasia of the American Veterinary Medical Association. By restricting the harvest to traditional techniques, taking will be humane and it is believed that the

disruption of the fur seal rookeries will be minimized and that the risks of mistakenly taking female seals will be reduced.

The longstanding fur seal research program would be jeopardized without the provisions of this rule. It is this scientific program which is seeking the causes of the observed decline in the fur seal population. If an unrestricted harvest is permitted on St. George Island, much valuable data providing insight into the possible effect of the harvest and other information on the population decline would be lost.

As the Environmental Impact Statement on the Convention (EIS), issued in February 1985 states at p. 15,

Regulation of the take in terms of season, sex and length limits and killing techniques, ensures that only those seals not needed as replacements for the breeding stock are taken, and that the harvest is carried out in the most humane way possible without undue stress to the animals.

Pursuant to their rights under the native taking provisions of either the MMPA or the FSA, the Pribilovians have indicated their intent to begin harvesting fur seals on July 8, 1985. Because of the potentially disastrous effects of an unrestrained harvest on the fur seal population and the disruption of a valuable scientific research program, the Assistant Administrator for Fisheries has determined that it is essential to have these regulations in place by July 8.

As it was not known that the Senate would fail to act on ratification of the protocol before the scheduled start of the harvest, it was not possible previously to issue these regulations. In light of the imminent harm which is likely to befall the fur seal population in the absence of this rule it is impracticable and contrary to the public interest to provide notice and opportunity for comment upon, or to delay for 30 days the effective date of these regulations, under the provisions of 5 U.S.C. 553(b) and (d).

If the MMPA alone, rather than the FSA, were the appropriate vehicle for regulating the 1985 harvest of fur seals, NOAA would be still compelled to issue these regulations under the general authority of section 105(a) of the FSA. Any limitations of the harvest under the terms of MMPA section 101(b) require promulgation through formal rulemaking. Although formal rulemaking procedures may be expedited, regulations could not possibly be in place to manage this year's harvest.

#### Discussion of Regulatory Provisions

*Definitions.* Several definitions are added to § 215.2 to accompany the

substantive regulatory changes of other sections. Also, the definition of "director" and "convention" are deleted since the former term is obsolete and the latter is defined in the FSA. The most important definitional additions are those for "subsistence", and "wasteful manner". The definition of "wasteful manner" is functionally identical to that for the same term used in the MMPA regulations at 50 CFR 216.3. The only modifications are the restriction of the definition to the Pribilof Islands and to the taking of fur seals and a change to conform to the definition of subsistence used in this rule. The definition of subsistence is taken from section 109(f)(2) of the MMPA. Definitions also are added for "Assistant Administrator", "handicraft articles", "Pribilovians", and "Protocol".

*Conforming provisions.* The penalty provisions of § 215.3 are amended to bring them into conformity with changes made to the enforcement section of the FSA in 1983. This is merely a technical amendment and no discretion is exercised in its adoption.

Sections 215.11, 215.12, and 215.13 are amended to reflect a nomenclatural change in the structure of the NMFS. The title of Director has been replaced by that of Assistant Administrator. To avoid the confusion which may result from having dual titles for the same position in the regulations, the regulations are updated to conform to current practice.

#### Subsistence Harvest of Fur Seals

Section 215.31 states the general conditions under which fur seals may be harvested by Pribilovians. The MMPA management scheme of section 109(f)(2), as referenced in section 103 of the FSA, is adopted in this rule. Its definition of subsistence provides the most harmonious resolution of the conflicting provisions of the two acts and is more restrictive. Under this rule permissible takings must be for subsistence purposes as defined in section 109(f)(2) of the MMPA. Subsistence under this rule includes the customary and traditional use of fur seals for food, shelter, fuel, clothing, tools, or transportation. Subsistence purposes also include use of seal parts for barter or sharing for personal or family consumption. Additionally, handicraft articles may be made and sold if they are fashioned from nonedible byproducts of marine mammals taken for personal or family consumption.

In adopting this definition, the NMFS intends to allow seals to be transferred to other Alaskan Natives to the extent such transfers have traditionally been

done if the recipients will put the seal part to a subsistence use. Transfers of this type are particularly important under the terms of this rule. To provide for the continuation of important scientific research which is designed to yield data essential to the management and conservation of fur seals, the harvest on St. George Island is limited to 329 seals, a number below any credible estimate of that island's subsistence needs. So as not to place unreasonable subsistence limitations on the St. George Islanders, provisions are made whereby they may obtain fresh meat from St. Paul Island. This rule provides that seal meat may readily be transferred from harvesters on St. Paul Island to St. George natives.

Nonedible byproducts of fur seals taken for personal or family consumption may be used for making traditional and customary handicrafts articles. As far as the NMFS is aware, no tradition of creating such items exists on the Pribilof Islands. Under the definition of handicraft articles in § 215.2(c) of this rule, items which may be created and sold under this authority must have been commonly produced on or before October 14, 1983, must be composed in some significant respect of natural materials, and must be significantly altered from their natural form. It should be emphasized that this authority does not give the Pribilovians carte blanche to establish a handicrafts industry. Before sales are allowed under this provision, the Pribilovians should make a showing that any handicraft articles that they plan to make and sell were customarily produced prior to October 14, 1983, and otherwise fit within the regulatory definition.

Perhaps the most difficult provision of this rule to apply, and undoubtedly the most controversial, is § 215.31(c) which requires that any takings may not be accomplished in a wasteful manner. There are three facets to the definition of the term "wasteful manner". First, it means any taking which is likely to result in the killing of fur seals beyond those needed for subsistence purposes. Second, wasteful manner includes takings which result in the waste of a substantial portion of the fur seal. Lastly, it means the employment of a taking method which is not likely to assure the killing and retrieval of the fur seal.

The harvesting method employed by the Pribilovians has been shown to be a very effective means of taking fur seals that virtually guarantees that the targeted seals will be killed and retrieved. Provided that the traditional harvesting techniques are followed, the

provisions of the last prong of the wasteful manner definition is satisfied.

In order to determine if taking is wasteful under the first criterion, the level of taking which is necessary to meet the subsistence and handicraft needs of the Pribilovians must be established. Also, it should be noted that the second standard of wastefulness closely relates to this determination. As part of accurately estimating subsistence needs, one must have some idea of what portion of a fur seal is reasonably usable for subsistence purposes. These determinations are crucial to the operation of this rule since the Assistant Administrator is authorized by § 215.32(a) to suspend the harvest when he determines that the subsistence needs of the Pribilovians have been satisfied or that the harvest is otherwise being conducted in a wasteful manner.

Since the commercial harvest of fur seals on the Pribilof Islands has historically exceeded the subsistence needs of the Pribilovians, no accurate record exists of the extent of that need. Whereas the levels of the commercial harvest have been documented each year, no such figures are available concerning the eventual fate of non-commercial seal parts. The excess availability of seal carcasses for subsistence has resulted in the selective use of prime seal meat portions and the discard or other use of less desirable parts.

Although the NMFS has no data on the amount of seal meat actually consumed by Pribilovians, estimates may be derived from a variety of historical records (summarized in Veltre and Veltre, 1983), from extrapolations based on certain subsistence use data recently recorded for St. George Island, and from testimony and written reports provided by contemporary Pribilovians. Two assumptions have been used in the following discussions of subsistence estimates: (1) That the current *native* population is 483 on St. Paul Island and 153 on St. George Island (U.S. Bureau of Census, 1980); and (2) that a subadult male fur seal dresses to 25 pounds of meat. See Hearings before the Committee on Expenditures in the Department of Commerce, "Investigations of the Fur Seal Industry," 63rd Cong. 2d Sess. (1914) at 514. It should be noted that the population figure for the Pribilofs that is used in these calculations does not include Alaskan Natives who are not permanent residents but who have traditionally shared in the meat from the harvests. Thus, the resultant estimates

may, to some degree, understate subsistence needs.

In one of the earliest discussions of subsistence needs, Elliot (1881) made the following observation concerning Pribilovians on St. Paul Island:

(T)hey consume on an average fully 500 pounds a day the year round; and they are, by the permission of the Secretary of the Treasury, allowed every fall to kill 5,000 or 6,000 seal pups, or an average of 22 to 30 young "kitickie" for each man, woman, and child in the settlements. The pups will dress 10 pounds each. This shows an average consumption of nearly 600 pounds of seal-meat by each person, large and small, during the year.

If 600 lbs. of seal meat per person per year is still required for subsistence purposes then 15,264 seals, would be required annually. (600 lbs. x 636 people/25 lbs. per seal.) Alternatively, Osgood *et al.* (1914) found that "the total amount of seal meat needed for one native for a year is 17.5 carcasses. This amounts to not more than one pound of meat free of bone per day for each person." This equates to 11,130 seals to feed a native population of 636. (17.5 carcasses per person x 636 people.)

If seal meat is the sole source of animal protein, however, there is some evidence that one pound per person per day may be insufficient. A recent article in the Arctic Policy Review (January 1985, pp. 5-8) noted that 1.2 pounds of whale meat is needed to satisfy daily animal protein requirements of Eskimos of the far north. Thus, if the nutritional value of seal meat is equivalent to that of whale meat, approximately 21 carcasses per person may be the necessary subsistence take, using Osgood's figure that 17.5 carcasses yields one pound of meat per person per day. This higher estimation of nutritional needs leads to a subsistence harvest of 13,356 animals. (21 carcasses per person x 636 people.)

Also in support of a higher subsistence need is a statement made by Mr. George Clark in 1914. He stated that "a ration of a little over 1 pound of meat a day through the year [was] a ridiculously small allowance." See Hearings before the Committee on Expenditures in the Department of Commerce, "Investigation of the Fur Seal Industry," 63rd Cong. 2d Sess. (1914) at 477.

Yet another historic estimate can be drawn from the harvest records of 1912-1917. During this period, the commercial harvest was suspended and only a taking for food was allowed. The average number of seals taken per year throughout these years for "subsistence" was 4,581. The Aleut population during this period averaged 309 for St. Paul and

St. George Islands combined. If that rate of taking is extrapolated, the 1985 subsistence need is 9,429. (4,581 seals/309 residents x 636 present residents.) In using this calculation, one should bear in mind the contemporary statement by Mr. Clark that 5,000 seals is an inadequate allowance to meet the food demands of 300 island residents.

Limited data exist on the use of fur seal meat for food by contemporary Pribilovians on St. George Island. Since 1973, the St. George seal harvest has been restricted to about 350 seals annually. However, St. George residents have been allowed to collect additional meat from the harvest on St. Paul to satisfy their subsistence needs. In 1984, for example, 3,200 pounds of fresh seal meat and 3,000 pounds of frozen meat were shipped to St. George Island. This is equivalent to 248 seals (6,200 lbs./25 lbs. per seal), assuming no selection for certain more desirable cuts of meat. However, Pribilovians are known to prefer certain seal parts, such as foreflippers (Veltre and Veltre, 1983). In 1980, for example, the approximately 8,500 pounds of seal meat shipped to St. George Island reportedly included 2,680 flippers (from 1,340 seals). The addition of 350 seals taken on St. George that year results in a St. George subsistence estimate of 1,690 seals. If 1,690 are required by the 153 residents of St. George then about 5,335 are needed on St. Paul Island, for a total need of 7,025 seals. (1,690 seals x 483 people on St. Paul/153 people on St. George.) Alternatively, a subsistence need on St. George Island of 3,000-4,000 has been claimed by island residents (letter to Carmen Blondin from Iliodor Philemonof, February 27, 1984). This estimate is the basis for the 12,000 annual need estimate presented in the EIS at 37.

Veltre and Veltre (1983) report a rough estimate provided by the Tanadgusix Corporation that six kilograms per week is the amount of fur seal consumed per household on St. Paul. They conclude: "Thus, about 30,000 kg of seal meat are used in St. Paul each year, or about 60 kg per person per year." Using assumptions described earlier, this figure equates to 3,358 seals needed annually. (60 kg. x 2.2 lbs. per kg. x 636 people/25 lbs. per seal.) This estimate, of course, assumes a 100 percent utilization of available meat, rather than selection of only certain parts for consumption.

In testimony before the Senate Committee on Foreign Affairs (June 13, 1985), St. Paul Pribilovians provided an estimate based upon a house to house survey on the Islands, that 15,170 seals are required to meet subsistence needs

on both islands. This figure is presumed to supply sufficient prized seal parts, including flippers, hearts and livers, to satisfy the cultural needs of the Pribilof households.

According to Pribilovian representatives, satisfying subsistence needs on the islands will be particularly important this year. Because the NMFS, pursuant to the 1983 Fur Seal Act amendments, has withdrawn most financial support for and employment of the Pribilovians, fur seal meat may be more important than in previous years. Families may be expected to eat more, rather than less, seal meat in the winter and spring of 1985-1986 than they have in the recent past. In addition, the use of freezing facilities allows more seals to be used than in past years when preservation was by salting, which necessarily limited seal intake. On the other hand some of the estimates based upon historical information may be excessive since food sources other than those available in the past are currently utilized and patterns of seal meat usage may have been significantly altered.

Under the terms of this rule, not only must the subsistence harvest not exceed the subsistence needs of the Pribilovians, but there must be substantial use made of each seal taken. Because of the wide range of the estimates of subsistence need (3,358 to over 15,000), this element of the "wasteful manner" definition takes on added importance. Since no one target number may be set for the subsistence needs, the NMFS believes that the best way to ensure that the harvest is accomplished in a non-wasteful manner is to monitor the use of those seals which are taken.

The NMFS representatives that will be on the Pribilof Islands during the harvest will collect three types of information to aid in making the findings required by § 215.32(a). Each day it will be noted how many seals are killed. Then, with the cooperation of the Pribilovians, the NMFS officials will weigh the total amount of meat taken from the carcasses for subsistence uses. At the end of each day's harvest, a survey will be made of the remaining carcasses to see that substantial utilization has been made of each animal taken. Substantial use of a carcass will mean that it has been dressed out and that the front flippers, shoulders, and most other readily obtainable and utilizable tissues and organs have been removed for subsistence uses. If this monitoring program indicates that the carcasses are not being fully utilized or suggests that the subsistence needs of the islanders

have been satisfied, the Assistant Administrator intends to exercise his authority under § 215.32(a) to suspend the harvest.

Additional research will be conducted to assist in more accurately estimating subsistence needs. During the period of the harvest, an unbiased estimate of the average percentage of utilization of seal carcasses will be made. Based upon a random sample of no less than 25 fur seals, the following data will be collected:

1. The weight of the entire animal immediately following exsanguination,
2. The weight of the pelt with blubber still attached,
3. The weight of the organs and tissues removed for food purposes, and
4. The weight of any additional carcass parts that are removed.

Section 215.32(b)(1) Provides that only traditional methods of harvesting may be used to take fur seals. These methods consist, in part, of organized drives of subadult male fur seals from the haulout sites to killing fields located some distance inland. Drives are conducted only in the early morning hours when the temperature is low and the stress placed upon the seals is minimal. Once at the killing fields, the driven animals are separated into smaller groups and selected individuals are stunned by a sharp blow to the head with a long club. The stunning is followed immediately by exsanguination.

Limiting the harvest to the use of traditional methods will ensure that humane methods are used, will minimize the disruption to rookeries which may result from other methods of taking, and will lessen the risk that female seals will be taken. Since the discontinuation of the female harvest in 1968, this method of harvesting has resulted in an accidental taking of females well below one percent of the total take.

Section 215.32(b)(2) clarifies that only subadult male fur seals may be taken. The Scientific Committee of the Commission has recommended that only this component of the fur seal population be harvested. The rule specifies that no adult fur seals or pups may be taken. Because of difficulties in distinguishing between immature male and female fur seals, the rule provides for the occasional accidental taking of a subadult female fur seal which may arise during the harvest. Intentional taking of subadult females, however, is not allowed.

The integrity of NOAA's research effort on fur seals will be maintained only if the traditional harvesting methods are followed. The fur seal research program has yielded much valuable data necessary for the

management and conservation of the fur seal, and a major goal of the program is to determine the cause of the continuing decline in the fur seal population.

Assuring that the harvest of North Pacific fur seals is conducted consistently from year to year is important for the quantity and quality of research in several ways. The harvest is currently the only source of information available for estimating the mortality rates of juvenile males on St. Paul Island. Data from the harvest have been used to monitor the rate of entanglement in debris and to determine body weight, body length, tooth size, levels of toxic substances and changes in the age structure of the male portion of the population. These data are also used to assess the status of the population, to monitor population trends, to evaluate rates of population interchange between the island and to seek explanations for the observed dynamics of the population. The harvest has also been used to retrieve tags applied for various research purposes.

To insure that new data are comparable to existing data and not confounded by procedural changes, it is advisable to maintain as much continuity in the harvest methods as possible. General features of the harvest such as time of day, length of season, beginning and ending dates, numbers of rounds, and driving methods, as well as other aspects of the harvest procedures, should remain constant over time in order to enable the comparison of current conditions with historic conditions. It is important, in this regard, that the order of harvest rounds remain unchanged from year to year, although the harvest should be started on a different haulout site each year. Where possible, every effort should be made to ensure that the specific procedures of the harvest follow historic practices.

This rule seeks to accommodate the research requirements to the extent possible. The schedule that would have been followed had there been a commercial harvest this year is incorporated into the regulations at § 215.32(b)(3). It should be stressed that this rule authorizes only the subsistence taking of fur seals even though the methods and schedule employed are derived from the commercial harvest.

Although not specified in the regulations, the following practices are considered to be encompassed by the phrase "traditional harvesting methods." Animals should be arranged in rows for scientific sampling, and certain numbers of living animals should be made available for tagging and release by research scientists as consistent with previous practices. Every attempt should

be made to achieve a proportional harvest that reflects the relative abundance of 2, 3, 4 and 5-year olds in the population; no age class selectivity should be made. An age-neutral harvest is necessary for estimating survival rates, one of the most important pieces of information produced by the harvest generated research.

Aside from research motives, the commercial harvest schedule has been adopted to avoid an unacceptable taking of female fur seals. Under this rule, no fur seals may be taken on St. Paul Island after August 5, 1985. After approximately the first week in August, immature fur seals begin to arrive on St. Paul Island in significant numbers. Also, the harem structure breaks down in early August and many females begin using the haulout areas. Extending the harvest period would likely result in a marked increase in the accidental take of female seals. As illustrated by the population decline which followed the female harvests of the 1950s and 1960s, any increase in the taking of females is likely to have a detrimental effect on the fur seal population.

The provisions applicable to the St. George Island harvest are drawn from past practice and the recommendations of the Commission. They are incorporated into this rule primarily to safeguard the research program which has been conducted on the Pribilof Islands since 1973. So as not to jeopardize this research, which compares the dynamics of harvested and unharvested populations, it has been recommended that the harvest level on St. George not exceed 329 animals. As with St. Paul Island, only subadult males may be taken. Restrictions are also placed on the location of drives and number of seals that may be taken per day.

The harvest restrictions placed upon St. George Island are strict and do not allow its residents to take enough fur seals to satisfy their subsistence requirements. It should be noted, however, that this allotment is consistent with the harvest levels that have been permitted on St. George since 1973. To mitigate the burden placed on St. George residents, the Department of Commerce will provide free air transportation between St. George and St. Paul Islands at least once a week throughout the duration of the St. Paul harvest to allow St. George residents to obtain additional quantities of fresh meat for subsistence purposes. This service was provided during the 1984 harvest and appeared to satisfy the needs of the St. George natives.

Section 215.33 governs the disposition of fur seal parts to any person other than an Alaskan Native. Fur seal parts, under this rule may be transferred from the taker to other Alaskan Natives in accordance with section 109(f)(2) of the MMPA.

There are only three situations in which fur seal parts may be transferred or sold to anyone other than an Alaskan Native. Parts that have first been transformed into an article of handicraft may be sold to non-natives if they have been fashioned from the nonedible byproducts of seals taken for a subsistence purpose. Skins that have been retained from the subsistence take for conversion into handicrafts may be transferred to a registered tannery for processing, as long they are returned directly to the Pribilovian from whom they were obtained. Skins from fur seals that were taken for subsistence purposes, if not used for that purpose, may be transferred to the United States Government which will hold the skins in storage pending a final determination of the disposition.

Given the fact that the United States Senate has not yet acted finally on a resolution of ratification, the Convention is not presently in force. Were the Senate to give its advice and consent to the Protocol extending the Convention, the obligations which the United States has had under the Convention would be rejuvenated. The principal obligations stated in an abbreviated fashion are:

1. Coordination of scientific research and cooperation in investigating fur seal resources;
2. Prohibition of pelagic sealing by any person or vessel subject to U.S. jurisdiction;
3. Prohibition of trade in fur seal skins taken in violation of the Convention; and
4. Delivery to Canada and Japan of 15 percent each of the fur seal skins taken under the recommendations of the Commission.

The Commission's recommendations are based upon the findings of the Scientific Committee of which U.S. scientists are active participants. The United States has consistently taken the position that it can accept or reject the recommendations of the Commission, pursuant to section 108 of the Fur Seal Act Amendments of 1983, 16 U.S.C. 1158. If the United States were to reject the Commission's recommendations it is the consensus of the Parties that there is a duty to consult with the other Parties to the Convention. Since the Convention is under active consideration by the United States, the U.S. Government has not been in a position to accept or reject

the recommendations of the Commission.

At this juncture it would be inappropriate to assume that the Senate will not pass a resolution of ratification. However, while the Protocol is pending advice and consent in the United States Senate, no commercial harvest will be conducted. Even so, it appears that a substantial number of fur seals will be harvested to fulfill the subsistence needs of the Pribilof Islanders, and further that it would be inappropriate to discard the skins from the seals killed for subsistence purposes. What use those skins will be put to at a later date—whether for use in native Alaskan handicrafts or other subsistence uses, or to satisfy rejuvenated obligations under the Convention—is not a matter which needs to be determined immediately. It is appropriate, however, to treat the skins in such a manner that none of the various options are foreclosed. Comments are invited on this subject.

Certain uses of fur seal parts now in existence incidental to the commercial harvest would not be allowed under this regulation. No part of a fur seal may be sold to a non-native unless it is a nonedible byproduct of a seal taken for personal or family consumption that has first been converted into an article of handicraft as defined in § 215.2(d). For example, the bacula of male seals (sealsticks) cannot be sold as aphrodisiacs and excess seal meat cannot be converted into dog food.

The Pribilovians are not required to transfer skins to the U.S. Government but may do so to assist the U.S. in meeting treaty obligations which may be resurrected. Before the skins can be stored for the U.S., initial processing, including removal of blubber, washing, soaking in brine, salting, and packing for storage, must be done. In acknowledgment of this additional effort as well as special accommodations for scientific research, agreements may be entered into pursuant to section 205(F) and 207 of the FSA.

No reporting requirements are placed upon the Pribilovians under this rule. However, § 215.34 requires those who take fur seals to cooperate with NMFS representatives in compiling scientific information and information regarding the extent of taking and uses to which seal parts are being put. The compilation and analysis of this information is essential to the Assistant Administrator's monitoring of the harvest and will be used to determine the point at which subsistence needs have been satisfied. This data may also be used as evidence that the harvest is or is not otherwise being conducted in a wasteful manner.

Other than the portions of this rule which make technical or nondiscretionary amendments not subject to notice and comment rulemaking under 5 U.S.C. 553, this rule is only interim in nature. Pursuant to § 215.35, Subpart D will cease to have effect once the emergency has passed, either when permanent regulations are promulgated or when the protocol enters into force.

If no action is taken by the Senate to ratify the protocol it will be necessary to issue permanent regulations to replace this interim emergency rule. Even if the protocol is ratified it may be necessary to promulgate such regulations, depending upon the terms of the ratification.

Arguments can be made that the FSA or the MMPA is the appropriate authority under which to regulate the subsistence taking of fur seals. In the absence of a functioning Convention, it is not clear what force should be afforded various provisions of the FSA. Some section obviously have an authority independent of the Convention, others may not.

The provisions of section 113(a) of the MMPA further confuses the issue of determining which statute should govern the subsistence harvest. Section 113(a) states that the provisions of the MMPA—

Shall be deemed to be in addition to and not in contravention of the provisions of any existing international treaty, convention, or agreement, or any statute implementing the same, which may otherwise apply to the taking of marine mammals.

If it is determined that section 113(a) is inapplicable to the current situation, the competing provisions of the FSA and the MMPA must otherwise be reconciled.

Before issuing proposed regulations for the long-term management of a subsistence harvest of fur seals, NOAA, in consultation with other Federal agencies, will make a determination of the more appropriate authority under which to issue such a rule. Because of the complexity of the legal interplay between the statutes and the diversity of interested parties, NOAA solicits comments on this issue. Any comments which address the choice of the applicable statute for the permanent regulation of the taking of fur seals must be received by August 7, 1985.

If NOAA determines that the MMPA is the appropriate authority under which to manage the taking of fur seals, regulations will be issued in compliance with the terms of section 101(b) of the MMPA. Pursuant to that section, the subsistence or handicraft taking of fur seals may only be regulated if the

Secretary of Commerce determines the species to be depleted. The MMPA defines "depleted", among other things, to mean "any case in which the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under . . . this act, determines that a species or population stock is below its optimum sustainable population. . . ."

A status review of the North Pacific fur seal conducted pursuant to the Endangered Species Act of 1973, and published in the *Federal Register* on March 6, 1985, (50 FR 9232) contained findings on the current population status in relation to its optimum sustainable population (OSP). Since the current population is below 50 percent of the levels observed in the 1940's and early 1950's, the population is believed to be below a level which can maintain maximum net productivity, the lower bound of the OSP range as defined at 50 CFR 216.3.

Since a finding of depletion is a condition precedent to regulation under the MMPA, the NMFS, in order to facilitate issuance of permanent regulations in the most timely manner, is requesting comments on and any data relevant to the issue of depletion. Comments must be received on or before August 7, 1985.

Recognizing the interim nature of these emergency regulations, the NMFS intends to proceed with due diligence to issue permanent regulations as soon as possible. To allow the NMFS time to consider any comments received on this emergency rule or on other issues on which information is requested, and to analyze data on subsistence needs which will be developed during the 1985 harvest, the NMFS intends to issue proposed permanent regulations by September 30, 1985.

#### Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this rule is necessary to respond to an emergency situation and is consistent with the Marine Mammal Protection Act, the Fur Seal Act, and other applicable law.

The Assistant Administrator also finds that, due to the imminence of the harvest, the failure of the Senate to take action on the 1984 protocol prior to the date upon which the harvest will begin, and the likelihood that an unrestricted harvest of fur seals will occur unless NOAA acts to restrict it, good cause justifying promulgation of these rules on an emergency basis exists and also make it impracticable and contrary to the public interest to provide notice and

opportunity for comment upon, or to delay for 30 days the effective date of these emergency regulations, under the provisions of section 553(b) and (d) of the Administrative Procedure Act.

The Assistant Administrator has determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal zone management program of the State of Alaska. This determination has been submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act.

This emergency rule is exempt from the normal review procedures of Executive Order 12291 as provided in section 8(a)(1) of that order. This rule is being reported to the Director of the Office of Management and Budget with an explanation of why it is not possible to follow the procedures of that order.

The Assistant Administrator prepared an environmental assessment (EA) for this action and concluded that there will be no significant impact on the human environment. A copy of the EA is available from the Assistant Administrator at the address listed above. This rule does not contain a collection of information requirement and therefore is not subject to the provisions of the Paperwork Reduction Act. This rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior public comment.

#### References

Elliot, Henry W. 1881. The seal-islands of Alaska. Government Printing Office, Washington, D.C.

Osgood, W.H., E.A. Preble, and G.H. Parker. 1914. The Fur Seals and Other Life of the Pribilof Islands, Alaska, in 1914. Bulletin of the Bureau of Fisheries, Vol. XXXIV, 1914.

Veltre, D. and M. Veltre. 1983. The Northern fur Seal: A subsistence and commercial resource for Aleuts of the Aleutian and Pribilof Islands, Alaska. Paper presented at the symposium Megagauna of the Seas: Large Sea Mammal Hunting and Use Among Native Societies at the XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, Canada, 20-25 August, 1983.

#### List of Subjects in 50 CFR Part 215

Administrative practice and procedure, Marine mammals, Penalties, Pribilof Island, Reporting and recordkeeping requirements.

Dated: July 2, 1985.

Carmen J. Blondin,  
Deputy Assistant Administrator for Fisheries  
Resource Management, National Marine  
Fisheries Service.

#### PART 215—[AMENDED]

Accordingly, 50 CFR Part 215 is amended as follows:

1. The authority citation is revised to read:

Authority: 16 U.S.C. 1151-1175, 16 U.S.C. 1361-1384.

2. Section 215.2 is revised to read as follows:

#### § 215.2 Definitions.

In addition to definitions contained in the Act, and unless the context otherwise requires, in this Part 215:

(a) "Act" means the Fur Seal Act, as amended, 16 U.S.C. 1151-1175.

(b) "Assistant Administrator" means the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(c) "Fur seal" means north Pacific fur seal, scientifically known as *Callorhinus ursinus*.

(d) "Handicraft articles" means items made by an Indian, Aleut, or Eskimo from the nonedible byproducts of fur seals taken for personal or family consumption which were commonly produced on or before October 14, 1983, and are composed wholly or in some significant respect of natural materials, and are significantly altered from their natural form and 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. Improved methods of production utilizing modern implements such as sewing machines or modern tanning techniques at a tanner registered pursuant to 50 CFR 216.23(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 a cooperative, is permitted so long as no large scale mass production results.

(e) "Public display" means, with respect to fur seals, display, whether or not for profit, for the purposes of education or exhibition.

(f) "Pribilovians" means Indians, Aleuts, and Eskimos who live on the Pribilof Islands.

(g) "Protocol" means the 1984 Protocol Amending the Interim Convention on Conservation of North Pacific Fur Seals.

(h) "Subsistence uses" means the customary and traditional uses of fur seals taken by Pribilovians for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fur seals taken for personal or family consumption; and for barter, or sharing for personal or family consumption.

(i) "Wasteful manner" means any taking or method of taking which is likely to result in the killing of fur seals beyond those needed for subsistence uses or which results in the waste of a substantial portion of the fur seal and includes, without limitation, the employment of a method of taking which is not likely to assure the capture or killing of a fur seal or which is not immediately followed by a reasonable effort to retrieve the fur seal.

3. Section 215.3 is revised to read as follows:

#### § 215.3 Penalties.

(a) *Criminal penalties.* Any person who knowingly violates any provision of the Act or of any permit issued thereunder or regulation contained in this Part shall, upon conviction, be fined not more than \$20,000 for such violation, or be imprisoned for not more than one year, or both.

(b) *Civil penalties.* Any person who violates any provision of the Act or of any permit issued thereunder or regulation contained in this Part may be assessed a civil penalty of not more than \$10,000 for each such violation.

#### §§ 215.11 through 215.13 [Amended]

4. Sections 215.11, 215.12, and 215.13 are amended such that wherever the word "Director" appears it is replaced by the phrase "Assistant Administrator."

5. A new Subpart D is added to Part 215 to read as follows:

#### Subpart D—Takings for Subsistence Purposes

Sec.

- 215.31 Allowable take of fur seals.
- 215.32 Restrictions on taking.
- 215.33 Disposition of Fur Seal Parts.
- 215.34 Cooperation with federal officials.
- 215.35 Effective date.

#### Subpart D—Takings for Subsistence Purposes

##### § 215.31 Allowable take of fur seals.

Pribilovians may take fur seals on the Pribilof Islands if such taking is:

- (a) For subsistence uses, and
- (b) In each case, not accomplished in a wasteful manner.

##### § 215.32 Restrictions on taking.

(a) The Assistant Administrator is authorized to suspend the take provided for in § 215.31 when he determines that the subsistence needs of the Pribilovians have been satisfied or that the harvest is otherwise being conducted in a wasteful manner.

(b)(1) No fur seal may be taken except by experienced sealers using the traditional harvesting methods, including organized drives of subadult male fur seals to killing fields and separation into smaller groups for selective stunning followed immediately by exsanguination.

(2) Only subadult male fur seals may be taken. Any taking of adult fur seals or pups, or the intentional taking of subadult female fur seals is prohibited.

(3) The following schedule and take limits apply:

(i) *St. Paul Island*—Any harvest of fur seals on St. Paul Island will be conducted in accordance with the following provisions:

(A) The harvest season will begin on July 8, 1985, and will consist of 19 harvest days. The harvest will terminate when seals have been harvested on 19 days, on August 5, 1985, upon the expiration of this rule, or upon suspension of the harvest by the Assistant Administrator under the provisions of § 215.32(a) whichever occurs first.

(B) A five-day per week harvest schedule will be maintained during the course of the harvest schedule season. Seals may be driven from the following haulouts according to the following schedule:

- Monday—Zapadni
- Tuesday—Reef
- Wednesday—Northwest Point
- Thursday—Polovina, Little Polovina, Lukinin, Kitovi
- Friday—English Bay

(C) Only male subadult seals 124.5 centimeters or less in length may be taken.

(D) Seals with blue, yellow, or pink roto-tags may not be taken.

(E) Seals with entangling debris may only be taken if so directed by scientists studying fur seal entanglement.

(ii) *St. George Island* Any harvest of fur seals on St. George Island shall be conducted in accordance with the following provisions:

(A) Fur seals may only be taken at the east haulout area of the North Rookery. No more than two drives may be conducted per week and no more than 50 seals may be taken per day.

(B) Only subadult male seals 124.5 centimeters or less in length may be taken.

(C) The total take on St. George Island shall not exceed 329 seals in 1985. To meet their subsistence needs, air transportation between St. George and St. Paul Islands will be made available to St. George native residents free of charge at least once per week during the St. Paul harvest to allow them to obtain additional quantities of fresh meat, if needed for subsistence uses.

##### § 215.33 Disposition of Fur Seal Parts.

(a) No part of a fur seal taken for subsistence uses may be sold or transferred to any person other than an Alaskan Native, as that term is defined in 50 CFR 216.3, unless:

(1) It is a nonedible byproduct which has been transformed into an article of handicraft, or

(2) It is being sent by a Pribilovian to a tannery registered under 50 CFR 216.23(c) for the purpose of processing, and will be returned directly to the Pribilovian, or

(3) It is a skin from a fur seal which was taken for subsistence uses, in which case it may be transferred to the United States Government.

(b)(1) Any skins which are transferred to the United States Government will be held pending a determination of their final disposition.

(2) The United States may enter into an agreement as authorized by sections 205(f) and 207 of the Act, 16 U.S.C. 1185(f) and 1167, to ensure the initial processing of transferred skins which is required for their preservation or to provide for assistance in conducting research efforts.

##### § 215.34 Cooperation with federal officials.

Pribilovians who take fur seals for subsistence uses shall, consistent with 5



CFR 1320.7(k)(3), cooperate with the National Marine Fisheries Service's representatives on the Pribilof Islands who are responsible for compiling on a daily basis the following information:

- (a) The number of seals taken each day,
- (b) The weight of meat taken for subsistence uses,
- (c) The extent of the utilization of fur seals taken, and
- (d) Other information determined by the Assistant Administrator to be necessary for determining the subsistence needs of the Pribilovians or for making determinations under § 215.32(a).

**§ 215.35 Effective date.**

Subpart D shall cease to have effect  
Upon promulgation of a permanent  
rule; or

Upon ratification or provisional  
application of the Protocol,  
whichever occurs first.

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