

Strategies for Strengthening Alaska Native Village Roles in Natural Resource Management

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ABSTRACT

Unlike tribes in other U.S. jurisdictions, Alaska's tribes do not typically have sovereignty or direct ownership over the traditional lands and natural resources on which they depend for their nutritional and cultural survival. This article identifies and evaluates a range of tools that could help Alaska Native Villages increase their influence over wildlife and land management decisions, including following international bodies such as the Arctic Council; entering into consultation agreements with federal and state agencies as well as other entities; participating in development decisions by becoming a cooperating agency or establishing an oversight committee; forming or participating in state and federal advisory councils; pursuing co-management agreements under federal laws in corporation with state entities; designating Traditional Cultural Properties to provide for more consultation; incorporating as a municipality; pursuing agreements with industry to mitigate development impacts; working with Native Village Corporations to manage and protect resources on corporate land, perhaps by forming a Tribal Conservation District; drafting tribal guidelines and encouraging regulatory agencies to adopt them; enacting a code or ordinances to address land within the tribe's jurisdiction; asking the Interior Secretary to take land into trust status; and pursuing an aboriginal title claim. As these strategies require financial and staff resources, and may encounter resistance, a tribe should start with one or two that seem most feasible.

I. BACKGROUND

This article identifies tools, programs, laws, and opportunities for Alaska Native Villages¹ to exercise greater control in decisions regarding development, land use, wildlife, and the environment. While Alaska tribes retain some of the inherent sovereign powers held by all U.S. tribes,² they generally lack jurisdiction over what were once their lands.³ The Alaska Native Claims Settlement Act (ANCSA),⁴ passed in 1971, purported to extinguish all Alaska Native land claims and aboriginal title-based hunting and fishing rights.⁵

In place of the lower forty-eight's system of Indian reservations and treaties, ANCSA established regional and village Native corporations endowed with almost one billion dollars and the right to select forty-four million acres of land.⁶ *Alaska v. Native Village of Venetie Tribal Government* suggested that, aside from Metlakatla Reservation,

¹ This term refers to the 229 federally recognized Alaska tribes as well as the physical settlement associated with each tribe.

² See 25 U.S.C. § 476 (h)(1) (2016) (“[E]ach Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section”); 25 U.S.C. § 3601(4) (2016) (“Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems.”); Felix S. Cohen, *Handbook of Federal Indian Law* 248 (1982 ed.) (“A tribe may determine who are to be considered members by written law, custom, intertribal agreement, or treaty with the United States.”); *Kimball v. Callahan*, 590 F.2d 768, 777-78 (9th Cir. 1979) (inherent power to determine membership does not depend on having a territorial base, so even tribes with no Indian country may retain this power); *Baker v. John*, 982 P.2d 738 (Alaska 1999) (holding that ANCSA did not extinguish tribal sovereignty); Act of May 1, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 473a) (amending the Indian Reorganization Act of 1934 to include Alaska Natives).

³ P.L. 280 Act of Aug. 15, 1953 (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360) Transferred control of many aspects of tribal jurisdiction to the state and warrants discussion in a full analysis of Alaska tribal jurisdiction. It is not considered in this article because it exempts hunting, fishing, and trapping rights that are protected by treaty, agreement, or statute, and is thus less relevant to subsistence. See *id.*; Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 444 (2000).

⁴ 43 U.S.C. §§ 1601-1629 (2016).

⁵ 43 U.S.C. § 1603 (2016).

⁶ 43 U.S.C. §§ 1605-1607, 1611 (2016).

the only “Indian country” over which Alaska tribes may have some jurisdiction consists of those native allotments⁷ and townsites⁸ that are still held in trust by the federal government.⁹ This may change as a result of *Akiachak v. Jewell* and the Bureau of Indian Affairs’ rulemaking removing the limitation against taking Alaska lands into trust.¹⁰

The federal and state hunting and fishing regulatory scheme in Alaska leaves little room for regulation by entities other than federal and state agencies. Under the federal scheme established by the Alaska National Interest Land Claims Act (ANILCA) in 1971, subsistence by “rural” residents was granted a preference over that by non-residents.¹¹ But ever since the Alaska Supreme Court determined that the rural preference violated the Alaska Constitution,¹² ANILCA has been applied only to federal public lands (around 60% of the State¹³). State law governs subsistence on state and private lands (including those owned by Native corporations).¹⁴ While state law prioritizes subsistence over other

⁷ See Alaska Native Allotment Act of 1906, Pub. L. No. 171, 34 Stat. 197 (1906), (formerly codified at 43 U.S.C. §§ 270-1 through 210-3 (1970), repealed with a savings clause for pending applications by ANCSA, 43 U.S.C. § 1617).

⁸ See Alaska Native Townsite Act, Pub. L. No. 69-280, 44 Stat. 629, (formerly codified at 43 U.S.C. § 733, repealed by Section 703(a) of the Federal Land Policy and Management Act (1976), 90 Stat. 2789).

⁹ See *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 521-22 (1998) (“Other Indian country [besides the Metlakatla Reservation] exists in Alaska post-ANCSA only if the land in question meets the requirements of a ‘dependent Indian community’ under our interpretation of § [18 U.S.C.] 1151(b), or constitutes allotments under 1151(c).”); David Case & David Voluck, *Alaska Natives and American Laws*, 3rd Ed. (2012).

¹⁰ See *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1 (D.D.C. 2013); Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648, 24,649 (proposed May 1, 2014); see *infra* Section V(D)).

¹¹ 16 U.S.C. § 3114 (2016). ANILCA defines subsistence uses as “the customary and traditional uses by rural Alaska residents of wild, renewable resources 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 fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.” 16 U.S.C. § 3113 (2016).

¹² See *McDowell v. State*, 785 P.2d 1, 10-11 (Alaska 1989).

¹³ See Land Ownership in Alaska, Alaska Department of Natural Resources, (March 2000), available at http://dnr.alaska.gov/mlw/factsht/land_fs/land_own.pdf

¹⁴ See Case & Voluck, *supra* note 9 at 265, 297; *State v. Morry*, 836 P.2d 358, 368 (Alaska 1992). (comparing between the state and federal regimes), see United Fishermen of Alaska, Subsistence

uses in subsistence areas,¹⁵ it does not distinguish between Natives and non-Natives or urban and rural residents.¹⁶ In areas identified as “non-subsistence areas” (generally urban areas), there is no subsistence priority at all.¹⁷

Some of the strongest protections for tribal power could come from changes to ANCSA, ANILCA, and other federal and state laws. But changes to federal laws can be difficult to achieve, particularly if the laws have been in place a long time and there is little political appetite to interfere with the status quo. Rather than focus on legislative changes, this article focuses on strategies available under the current law.

II. INTERNATIONAL OPTIONS

A. Pursuing an International Claim

There are a number of international instruments establishing rights to self-determination, property, culture, a clean environment, and food security. In considering the rights these instruments establish, it is important to distinguish between *covenants* (which are binding on those who sign them) and *declarations* (which are non-binding but may express customary international law).

management information, federal or state, *available at* <http://www.subsistmginfo.org/fvss.htm> (last updated Jan. 30, 2007).

¹⁵ See ALASKA STAT. § 16.05.258 (2016).

¹⁶ See *id.* Article VIII of the Alaska Constitution precludes awarding preferences to a particular group of Alaskans. See also Alaska Const. art. VIII, § 3 (reserving naturally occurring fish, wildlife, and waters to the people for common use); *id.* at § 15 (prohibiting the creation of exclusive rights or access privileges to fisheries); *id.* at § 17 (laws governing the use or disposal of natural resources apply equally to all similarly situated persons); *McDowell v. State*, 785 P.2d 1, 10-11 (Alaska 1989). ALASKA STAT. § 16.05.258(b)(4) (2016) does distinguish among users in times of scarcity, using the same criteria established in ANILCA.

¹⁷ See ALASKA STAT. § 16.05.258(c) (2016); ALASKA ADMIN. CODE tit. 5 § 99.015 (2016) (establishing non-subsistence areas).

The right to self-determination has arguably become part of customary international law, as evidenced by instruments including the Universal Declaration on Human Rights,¹⁸ the United Nations (UN) Charter,¹⁹ and the UN Declaration on the Rights of Indigenous Peoples.²⁰ Of particular importance is the International Covenant on Civil and Political Rights (ICCPR), which provides: “All peoples have the right of self-determination. . . . In no case may a people be deprived of its own means of subsistence.”²¹ This is one of the few human rights conventions that the United States has signed, although the United States did not sign an important protocol (similar to an addendum) providing a right of action for violations of ICCPR.²²

There is uncertainty regarding the scope of the right to self-determination, particularly on who may exercise this right (i.e., a defined state or a “people” within a state). The right is generally interpreted to provide for some control over governance (which may range from increased participation in public affairs to autonomous

¹⁸ Universal Declaration on Human Rights, G.A. Res., 217(III) A, U.N. Doc. A/RES/217(III)(Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr/>.

¹⁹ U.N. Charter, art. 1, para. 2.; *see also id.* art. 73, *available at* <http://www.un.org/en/documents/charter/>.

²⁰ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007), *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

²¹ International Covenant on Civil and Political Rights, Art. 1, G.A. Res. 2200 A (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966),

[http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2200\(XXI\);](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2200(XXI);) Ratification status *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

²² *See* Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 1966) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

government)²³ rather than the right to action that would impair the territoriality of a sovereign state.²⁴

An important case concerning this right was brought by Lubicon Lake Band (a Canadian indigenous group) against Canada before the Human Rights Committee.²⁵ Canada argued that the Lubicon Lake Band was not a “people” because it was only a small part of the Cree, and that a claim based on the right to self-determination could only be brought by a people, not individuals. The Committee agreed with Canada that the individuals could not bring a complaint based on an alleged violation of ICCPR Art. 1 under the Protocol to ICCPR. But the Committee did find a violation of ICCPR Art. 27 in regard to the rights of minorities.

In addition to ICCPR, the American Convention on Human Rights has been an important statement of human rights in the western hemisphere (although the United States is not a signatory).²⁶ This Convention does not specifically provide for self-determination, though it provides for other rights regarding lands traditionally used by indigenous peoples. The Inter-American Human Rights Court has recognized these rights in various cases.²⁷

²³ *Indigenous Peoples' Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur*, E/CN.4/Sub.2/2004/30/Add.1 (July 13, 2004), at 17, (by Erica-Irene A. Daes), <http://www.indianlaw.org/node/140>.

²⁴ Convention on Elimination of Racial Discrimination, General Recommendation No. 21: Right to self-determination, para. 6.

²⁵ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40), available at <http://www.refworld.org/cgi-bin/telex/vtx/rwmain?docid=4721c5b42>.

²⁶ American Convention on Human Rights (July 1978) http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

²⁷ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. Hm. Rts., Series C, No. 79 (Aug. 31, 2001) available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf. (Indigenous groups have the right to live freely in their own territory; state ordered to delimit, demarcate, and title the territory belonging to the community); *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-Am. Ct.

Since the U.S. is not a signatory to the Convention, it cannot be brought before the Court. Still, complaints have been brought by Americans to the Inter-American Commission on Human Rights established by the Convention. An example is the petition brought in 2005 by Inuit Circumpolar Council Chairperson Sheila Watt-Cloutier alleging that the United States violated international law by contributing to global warming.²⁸ The petition received much public attention but was denied.²⁹

One high-profile Commission case, *Mary and Carrie Dann v. United States*,³⁰ concerned a claim to lands by members of the Western Shoshone Nation. The Commission found that the United States had violated petitioners' right to equality under the law, the right to a fair trial, and the right to property as defined in the 1948 American Declaration of the Rights and Duties of Man³¹ (which is not binding); and that the United

Hm. Rts., Series C No. 146 (Mar. 29, 2006) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf (discussing jurisprudence on indigenous lands: (1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left or loss possession of their traditional lands maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution or to obtain other land of equal extension and quality); *Saramaka Peoples v. Suriname*, Inter-Am. Ct. Hm. Rts., Series. C, No. 172 (Nov. 28, 2007) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf. (state violated American Convention Art. 21 (right to property), which requires state to ensure the effective participation of indigenous people (including free, prior, informed consent) regarding development on their traditional territory and that the people will receive a reasonable benefit from development).

²⁸ Petition to the Inter American Commission on Human Rights Seeking Relief from Violation Resulting from Global Warming Caused by Acts and Omissions of the United States (2005) *available at* http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

²⁹ See *Inuit petition on climate change rejected*, World War 4 Report (Dec 17, 2006) *available at* <http://www.ww4report.com/node/2922>.

³⁰ *Mary and Carrie Dann v. United States*, Inter-Am. Comm'n H.R., Case 11.140, Report No. 75/02, OEA/Ser.L/V/II.117, (Dec. 27, 2002), *available at* <http://www1.umn.edu/humanrts/cases/75-02a.html>.

³¹ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6

States had failed to “fulfill its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent on the part of the Western Shoshone people as a whole.” The United States refused to accept the Commission’s findings, and has not reformed its laws or otherwise addressed the Commission’s recommendations.³²

The force of international law in the United States is only as strong as the willingness of the federal government to be bound by it. The United States’ lack of willingness to be sign human rights agreements and submit to the jurisdiction of international courts suggests that an international claim against the United States could consume a lot of resources without leading to the desired results.

B. Participating in International Government Organizations

1. Arctic Council

There are several international indigenous groups that represent Alaska Natives, including the Inuit Circumpolar Conference, the Arctic Athabaskan Council, the Gwich’in International Council, and the Aleut International Association. All four are Permanent Participants in the Arctic Council.³³ Permanent Participants can take part in all

rev.1 at 17 (1992), *available*

at <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>.

³² Indian Law Resource Center, *The Dann Case before the Inter-American Commission on Human Rights: A Summary of the Commission’s Report and its Significance for Indian Land Rights* (July 2006) <http://www.msubillings.edu/cas/NAMS/taliman/1%2015%20Dann%20Case%20Inter-American%20Comm%20on%20Human%20Rights%20summary.pdf>.

³³ Arctic Council, *Permanent Participants*, <http://www.arctic-council.org/index.php/en/about-us/permanent-participants>.

Arctic Council meetings and activities and have full consultation rights in connection with the Council's negotiations and decisions.³⁴

To be eligible as a Permanent Participant, an indigenous group must represent either a single indigenous people resident in more than one Arctic State, or more than one Arctic indigenous peoples residing in a single Arctic State.³⁵ This means that individual tribes or groups of one "people" based only in the United States would not be eligible to be Permanent Participants. It is not clear whether different peoples in Alaska (say, the Iñupiat and the Gwich'in) could join forces as a Permanent Participant.

An individual tribe or U.S.-based group could look into Observer status, which is open to non-Arctic states, inter-governmental and inter-parliamentary organizations, global and regional, and non-governmental organizations.³⁶ Individual tribes do not clearly fall into any of these categories, so they would need to consider incorporating a 501(c)(3) non-profit group to be eligible for this status (along with a number of grant opportunities open only to non-profits). Observer status requires a demonstration of financial ability to contribute to Permanent Participants' work.

Observers can participate in working groups, and, at the discretion of the meeting chair, make statements after Arctic states and Permanent Participants, present written

³⁴ Arctic Council Rules of Procedure, II(4) (Rev. 2013), available at https://oaarchive.arctic-council.org/bitstream/handle/11374/940/2015-09-01_Rules_of_Procedure_website_version.pdf?sequence=1

³⁵ Arctic Council, Permanent Participants, *supra* note 33.

³⁶ Arctic Council Rules of Procedure, V(36), *supra* note 34; Arctic Council, Observers, available at <http://www.arctic-council.org/index.php/en/about-us/arctic-council/observers>.

statements, submit relevant documents and provide views on the issues under discussion.³⁷ Observers may also submit written statements at ministerial meetings.³⁸

2. United Nations

The Inuit Circumpolar Conference and the Aleut International Association hold Consultative Status (Category II or Special Status) with the United Nations Economic and Social Council (ECOSOC).³⁹ This allows them to make written and oral presentations to ECOSOC and its bodies. To obtain consultative status, an entity must be a non-governmental, non-profit public, or voluntary organization that has been in existence for at least two years.⁴⁰ There is no requirement for the entity to be international. At least one Lower 48 tribe, the Ewiiapaayp Band of Kumeyaay Indians, has obtained consultative status.⁴¹

³⁷ Arctic Council, Observers, *supra* note 37.

³⁸ *Id.*

³⁹ See UN, E/2014/INF/5, Economic and Social Council (Dec. 3, 2014) List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2014, available at <http://csonet.org/content/documents/E-2014-INF-5%20Issued.pdf>. Consultative Status has its foundation in Article 71 of Chapter 10 of the United Nations Charter:

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

“Special status” means that the entity has competence in certain specialized areas of ECOSOC’s jurisdiction, as opposed to general knowledge in all areas. ECOSOC resolution 1996/31, part III, para. 22-23, available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>.

⁴⁰ ECOSOC resolution 1996/31, part IX, paragraph 61(h).

⁴¹ Economic and Social Council, List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2014, U.N. Doc. E/2014/inf/5 (Dec. 3, 2014).

Even without consultative status, indigenous groups have participated in UN bodies that focus on indigenous peoples' issues, including the UN Permanent Forum on Indigenous Issues and the UN Expert Mechanism on the Rights of Indigenous Peoples.⁴²

3. International Maritime Organization

As climate change opens up Arctic waters to increased shipping activities, marine subsistence may be affected by noise, pollution, and even ship strikes. Coastal tribes may want to seek representation before the United Nations' International Maritime Organization (IMO), which has the power to establish ship traffic directives, pollution control, and areas to be avoided.⁴³

Non-governmental international organizations that can demonstrate their capability to contribute to IMO's work may be granted consultative status.⁴⁴ An organization must also show it has no means of access through other organizations already in consultative status and that it has international membership.⁴⁵ Thus far, none of Alaska's international indigenous organizations have sought this status.

⁴² Inter-Agency Support Group on Indigenous Peoples' Issues, *The Participation of Indigenous Peoples in the U.N.* Doc. 2 (June 2014)

⁴³ See generally Elizabeth Barrett Ristroph, Esq., *Loosening Lips to Avoid Sinking Ships: Designing a Ship Communications System for the Bering Strait Region*, 24 IND. INT'L & COMP. L. REV. 581 (2014).

⁴⁴ IMO, Member States, IGOs, and NGOs, <http://www.imo.org/en/About/Membership/Pages/Default.aspx> (last visited September 17, 2015).

⁴⁵ *Id.*

III. WORKING WITH FEDERAL AGENCIES

A. Government-to-Government Consultation

1. Consultation Federal Agency Consultation Policies Applicable to Tribes

Executive Order No. 13,175 requires each agency to “have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”⁴⁶ To make this Order more meaningful, President Obama’s 2009 Presidential Memo directed each agency to submit a detailed plan for implementing the Order.⁴⁷ Each agency was also directed to submit annual progress reports on the status of each action in its implementation plan and any proposed updates.

Many of the policies lack specific details on timelines for consultation or the nature of meetings or communications between tribes and agencies. Some policies are general on purpose, in recognition that each tribe is unique.⁴⁸

⁴⁶ Exec. Order No. 13,175, 3 C.F.R. 304, 305 (2000), *superseding* Exec. Order No. 13084, 63 Fed. Reg. 27655 (May 14, 1998), requires FWS and NMFS to consult with tribes when “undertaking to formulate and implement policies that have tribal implications.” Secretarial Order No. 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, (Aug. 27, 1999), explains the responsibilities of the Departments of the Interior and Commerce when actions taken pursuant to the Endangered Species Act may affect the exercise of American Indian tribal rights. Secretarial Order No. 3225, Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206) (Jan. 19, 2001), clarifies the application of Secretarial Order No. 3206 to Alaska, and requires consultation as soon as any conservation concern arises regarding a species that is listed as endangered or threatened under the Endangered Species Act and also used for subsistence.

⁴⁷ The White House, Memorandum for the Heads of Executive Departments and Agencies, Tribal Consultation (Nov. 5, 2009), *available at* <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

⁴⁸ *E.g.*, US Army Corps of Engineers Tribal Consultation Policy (2013), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/CoP/2013_nap_brochure.pdf.

a. Department of Interior

The Department of the Interior (DOI) includes three major land management agencies in Alaska: the Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service (FWS);⁴⁹ and the National Park Service (NPS), responsible for Gates of the Arctic National Park. DOI also houses the successors to the Mineral Management Service—the Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE).

DOI has a general policy applicable to all tribes. The policy applies when DOI's "regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity ... may have a substantial direct effect on an Indian Tribe on matters."⁵⁰ DOI's policy requires that consultation notice include "a description of the topic(s) to be discussed ... [in] sufficient detail ... to allow Tribal leaders an opportunity to fully engage in the consultation."⁵¹ DOI also covers consultation in its Departmental Manual, Part 512. The Manual requires an agency to provide tribes with at least 30 days'

⁴⁹ In addition to interacting with FWS as a land manager, tribes may be consulting with FWS regarding species listed under the Endangered Species Act and some marine mammals, including walruses and polar bears. See Fish & Wildlife Serv., Laws & Regulations, <http://www.fws.gov/international/animals/marine-mammals.html>. Other marine mammals are regulated by the National Marine Fisheries Service. *Id.* The National Marine Fisheries Service (NMFS) has jurisdiction over whales, dolphins, porpoises, seals, and sea lions, under the MMPA and ESA. See NOAA Fisheries, Endangered and Threatened Marine Species under NMFS' Jurisdiction, <http://www.nmfs.noaa.gov/pr/species/esa/listed.htm#mammals>.

⁵⁰ Department of the Interior Policy on Consultation with Indian Tribes (undated, but sometime after 2009), <http://www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>. Examples of tribal matters provided in the policy includes:

1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands;
2. The ability of an Indian Tribe to govern or provide services to its members;
3. An Indian Tribe's formal relationship with the Department; [and]
4. The consideration of Department's trust responsibilities to Indian Tribes." (at 3).

⁵¹ *Id.* at 14.

notice of a consultation opportunity, and encourages the agency to follow up with tribes if there is no reply.⁵² When the matter under consultation involves confidential or culturally sensitive information, the agency must work with the tribe to “address[] the sensitivity of the information to the extent permitted by Federal law.”⁵³

DOI has a policy specific to Alaska tribes, expressing a commitment to consult as early as possible “prior to taking action or undertaking activities that will have a substantial, direct effect on federally recognized Tribes, their assets, rights, services, or programs.” The policy states that “Agency actions shall favor maximum participation of federally recognized Tribes in Alaska.”⁵⁴

Some agencies situated within DOI, including FWS, BOEM, BLM, and NPS, have their own consultation policies or guidance.⁵⁵ Among the Interior agencies, FWS has the most detailed policy.⁵⁶ It provides suggestions for arranging and conducting meetings, following up after meetings, and developing a formal agreement with a tribe on how consultation should take place. FWS issued a revised draft proposal for public comment in August 2015.⁵⁷ Section 6 of this draft describes communication, consultation, and collection and protection of community knowledge, while Section 7

⁵² 512 Dep’t Manual 5.5 (Dec. 2, 2014).

⁵³ 512 Dep’t Manual 5.5(B)(2).

⁵⁴ Fed. Emergency Mgmt Agency, Alaska Policy for Government-to-Government Relations with Alaska Native Tribes (Jan. 18, 2001), *available at* http://www.ncai.org/attachments/Consultation_AhjHkVpHCjMcIwzUzrXAAdBEUPMoHIZFIcgUFIGQihSfesztbZM_9%20FEMA_Consultation_Policy.PDF.

⁵⁵ The Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement do not have their own consultation policies.

⁵⁶ Tribal Consultation Handbook (Dec. 6, 2011), http://www.fws.gov/mountain-prairie/tribal/documents/Tribal_Consultation_Guide_Apr_2013.pdf. This document provides far more detail on communication with tribes than FWS’s 1994 Native American Policy, <http://www.fws.gov/nativeamerican/pdf/native-american-policy.pdf>.

⁵⁷ Native American Policy for the U.S. Fish and Wildlife Service, 80 Fed. Reg. 46043-01 (Aug. 3, 2015).

sets out a range of collaborative management opportunities and establishes principles of co-management where tribes and FWS have shared responsibility.

A 2014 BOEM memo provides for guidance beyond what is stated in the DOI Departmental Manual. The Guidance designates the BOEM Chief Environmental Officer as the agency's Tribal Liaison Officer.⁵⁸ It requires BOEM staff who interact with tribal officials to have training for that purpose.⁵⁹

BLM's guidance, which appears in Section 8120 of its Manual, is "primarily aimed toward implementing the tribal coordination and consultation responsibilities that stem from historic-preservation, archaeological resource-protection, and related cultural resource authorities."⁶⁰ NPS has some general policies in its handbook that mostly apply to access to cultural resources.⁶¹ Tribes should look to DOI policy regarding development projects approved by BLM and NPS, and other DOI agencies.

It is important to keep in mind that Alaska Native Corporations also have the right to government-to-government consultation.⁶² In 2012, the Department of Interior drafted

⁵⁸ Bureau of Ocean Energy Mgmt., Guidance and Background (May 5, 2014), ¶1.

⁵⁹ *Id.* at ¶7.

⁶⁰ Bureau of Land Mgmt., Guidelines for Conducting Tribal Consultation, BLM Manual Handbook, H-8120-1, I-1 (Dec. 3, 2004) http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.38741.File.dat/H-8120-1.pdf.

⁶¹ U.S. Nat'l Park Serv. Mgmt. Policies 2006, http://www.nps.gov/policy/mp/policies.html#_Toc157232639.

⁶² This is the result of a rider to a 2004 appropriations bill added by Alaska Senator Ted Stevens. *See* 2004 Consolidated Appropriations, Pub. L. 108-199, div. H, Sec. 161, Jan. 23, 2004, 118 Stat. 452, (quote on page 450): "The Director of the Office of Management and Budget shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175."; 2005 Consolidated Appropriations Pub. L. 108-447, div. H, title V, Sec. 518, Dec. 8, 2004, 118 Stat. 3267 (quote on page 459): "Public Law 108-199 is amended in Division H, Section 161, by inserting "and all Federal agencies" after "Office of Management and Budget"; Effective statutory text (codified in notes to 25 U.S.C.A. sect. 450): "The Director of the Office of Management and Budget and all Federal agencies

a consultation policy specific to corporations.⁶³ The policy requires consultation with corporations regarding “activities that may substantially affect ANCSA [Alaska Native Claims Settlement Act] Corporation land, water areas, or resources” or “impact the ability of an ANCSA Corporation to participate in Departmental programs for which it qualifies.”⁶⁴ The policy states, “To the extent that concerns expressed by Indian Tribes and ANCSA Corporations substantively differ, Departmental officials shall give due consideration to the right of sovereignty and self-governance of federally recognized Indian Tribes.”⁶⁵

b. National Oceanic and Atmospheric Administration

The National Marine Fisheries Service (NMFS), a division of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, plays a role similar to FWS in regard to the management of most marine mammals. NOAA’s policy states that it “will offer government-to-government consultation at the earliest practicable time it can reasonably anticipate that a proposed policy or initiative may have tribal implications.”⁶⁶

shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175, November 6, 2000.”

⁶³ Dep’t of the Interior, Tribal Consultation Policy, <http://www.doi.gov/tribes/Tribal-Consultation-Policy.cfm>.

⁶⁴ Dep’t of the Interior Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations (Aug. 10, 2012), http://www.fws.gov/alaska/external/native_american/doi_ancsa_policy.pdf.

⁶⁵ *Id.* ASRC urged DOI to have one policy applicable to both tribes and corporations, but DOI did not take this route. April 26, 2012 Comments of Arctic Slope Regional Corporation Draft Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations -- 77 Federal Register 13137 (March 5, 2012), *available at* <http://www.doi.gov/tribes/upload/ASRC-Comments-on-ANC-Consultation-04-26-12.pdf>.

⁶⁶ NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations, p. 9 (Nov. 12, 2013), *available at* <http://www.legislative.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213>.

Tribal consultation is considered a formal process; “informal communications ... are not, taken by themselves, government-to-government consultation.”⁶⁷ NOAA initiates the process with a formal letter that typically requests a written response from a tribe within a certain timeframe, usually 30 days.⁶⁸ Alternatively, a tribe can initiate consultation, and if the tribe demonstrates that the proposed action may have tribal implications, NOAA will proceed with formal consultation.⁶⁹ The NOAA policy also applies to Alaska Native Corporations and uses language similar to that of DOI to differentiate between tribes and corporations.⁷⁰

c. Forest Service

Tribes in areas of south-central and southeast Alaska that contain National Forests have the opportunity to consult with the Forest Service, a division of the U.S. Agriculture Department (USDA). USDA has a Departmental Regulation on tribal consultation, which requires USDA agencies to respect the sovereignty of tribes and record-keeping of all communications to ensure accountability.⁷¹ The regulation requires consultation with corporations and encourages coordination of consultation with inter-tribal organizations and states.⁷²

pdf. Examples of actions requiring consultation include: a policy or action with effects on an Alaska Native village; a policy or action that may impact tribal trust resources or the rights of a tribe; and a policy or action that affects a tribe’s traditional way of life.

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 10.

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 16.

⁷¹ USDA Departmental Regulation No. 1350-002, Tribal Consultation, Coordination, and Collaboration (Jan. 18, 2013), ¶5.

⁷² *Id.* at ¶7, 8(d,g).

Chapter 10 of the Forest Service’s American Indian and Alaska Native Relations Handbook⁷³ require that a Forest Service officer (as opposed to field staff) engage in consultation with tribes.⁷⁴ For “widely applicable national issues” that affect multiple tribes or have a nationwide scale, tribes must be given at least 120 days of notice prior to consultation. Smaller issues may require less time for consultation.⁷⁵ The Handbook outlines specific steps in the consultation process⁷⁶ and allows (but does not require) the Forest Service to compensate tribal participants for their expenses and expertise.⁷⁷

The Forest Service consults with Alaska Native corporations on a “government-to-corporation basis” rather than a government-to-government basis.⁷⁸

d. Environmental Protection Agency

Tribes may consult with the Environmental Protection Agency (EPA) on permits for water discharges and air emissions. EPA’s most recent policy says that the agency “takes an expansive view of the need for consultation,” considering “tribal interests whenever EPA takes an action that ‘may affect’ tribal interests.”⁷⁹

⁷³ Forest Service Handbook, FSH 1509.12, American Indian and Alaska Native Relations Handbook (April 1, 2014). The Forest Service Manual at 1563.01g, Consultation with Tribes on Forest Service Regulations, Policies, and Actions (July 18, 2012) reiterates the consultation requirement.

⁷⁴ *Id.* at § 11.1.

⁷⁵ *Id.* at § 11.2.

⁷⁶ *Id.* at § 11.3.

⁷⁷ *Id.* at § 11.4.

⁷⁸ *Id.* at § 11.1.

⁷⁹ EPA Policy on Consultation and Coordination with Tribes (May 4, 2011) <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>. Examples of actions that may affect tribes include regulations or rules, policies, guidance documents, directives, budget and priority planning development, and legislative comments.

Alaska's Department of Environmental Conservation (ADEC) has taken control of certain water discharge permits formally handled by EPA under Section 402 of the Clean Water Act.⁸⁰ Permits issued by ADEC do not involve a "federal action," such that neither the National Environmental Policy Act (NEPA) process nor federal government-to-government consultation is required. ADEC does provide some mechanism for tribal input as discussed in Section IV(A)(2).

e. Army Corps

When a proposed project would require dredging or filling of navigable waters, a permit from the Army Corps of Engineers (under the Department of Defense) is required under Section 404 of the Clean Water Act.⁸¹ This and other activities⁸² trigger consultation between the Army Corps and tribes. Unlike some other policies stating that consultation is not the same as agreement, the Army Corps' policy states, "To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken."⁸³

⁸⁰ *See generally*, Clean Water Act § 402(b), 33 U.S.C. § 1342(b) & ALASKA ADMIN. CODE tit. 18, § 83 (2015). On August 27, 2005, the Governor signed Senate Bill 110 (SB 110) into law, authorizing the State to pursue primacy for the National Pollutant Discharge Elimination System wastewater discharge permitting and compliance program established under the Clean Water Act. On May 1, 2008, the State of Alaska submitted a final application to EPA for authority to permit wastewater discharges in Alaska, and on October 31, 2008, EPA approved the application. ADEC assumed full authority to administer the wastewater and discharge permitting and compliance program for Alaska on October 31, 2012.

⁸¹ 33 U.S.C. § 1344.

⁸² Activities that trigger consultation include "[a]ny activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands-individual projects, programs, permit applications, real estate actions, promulgation of regulations and policies-regardless of land status." Army Corps Policy, *supra* note 48, at 3.

⁸³ *Id.* at 2.

The Army Corps policy does not address Alaska Native Corporations.⁸⁴ "Indian Lands" do not include Alaska Native Corporations lands or "unrestricted" lands owned by a tribe but not held in trust.⁸⁵

The State of Alaska has previously considered obtaining "primacy" over 404 Permits.⁸⁶ If this happened, then 404 Permits would no longer be federal actions triggering review under the National Environmental Policy Act (NEPA) and federal government-to-government consultation, unless the project takes place on federal land; or it involves fresh water susceptible to commerce, waters influenced by tide, or wetlands adjacent to either of these.⁸⁷

f. Department of State

The Department of State is the lead agency for policy matters involving the United Nations Convention on the Law of the Seas (pertaining to offshore jurisdiction and transit rights), the International Maritime Organization (which issues vessel traffic schemes), the Arctic Council, and the Agreement on the Conservation of Polar Bears.

⁸⁴ Memorandum from Secretary of the Army, re American Indian and Alaska Native Policy (Oct. 24, 2012), attaching Department of Defense American Indian and Alaska Native Policy, 20 October 1998 at 1(a) [note: this attachment appears to be later since it refers to the year 2011].

⁸⁵ Memorandum from Secretary of the Army, on re American Indian and Alaska Native Policy (Oct. 24, 2012), at 2.

⁸⁶ Senate Bill No. 27, ch. 12 SLA 2013 (Alaska) authorized spending to explore 404 primacy, but funding was cut in 2014. Elwood Brehmer, "State shifts from 404 primacy to wetlands mitigation options," Alaska Journal of Commerce (Jan. 15, 2015), available at <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/January-Issue-3-2015/State-shifts-from-404-primacy-to-wetlands-mitigation-options/>. The State appears to have shifted to a broader "404" program, *id.*, including the development of a "Wetland Program Plan" with funding from EPA. See letter from Michael Szerlong, EPA, to James Rypkamp, Alaska Department of Environmental Conservation (Sep. 25, 2015), available at http://dec.alaska.gov/Water/wwdp/wetlands/docs/WPP_Final_Approval_Letter_Alaska_09-25-2015.pdf.

⁸⁷ CWA § 404(g) and 40 C.F.R. § 233.11; 33 C.F.R. § 323.5.I.

Communicating with the Department of the State could be important in shaping U.S. policy in international issues.

The Department's Office of the Special Representative for Global Intergovernmental Affairs is responsible for maintaining a plan of action to implement Executive Order No. 13175 and updating the plan based on input from tribes.⁸⁸ Other than this fairly limited plan, the Department has no guidelines or policies.⁸⁹ According to the plan, consultations are supposed to be announced to the tribes and to the public thirty days beforehand.⁹⁰ There is little substance to the current plan of action, so it may be useful for a tribe to enter into a MOU to clarify consultation requirements.

g. Federal Emergency Management Act

The Federal Emergency Management Act (FEMA) may have greater interaction with Alaska tribes and land management issues as flooding disasters become more problematic. FEMA issued a new consultation policy in August 2014, which addresses tribes but not corporations.⁹¹ Either a FEMA officer or a tribe can initiate consultation, but the Senior Agency Official must consider whether an action has tribal implications warranting consultation.⁹² This officer considers what level of consultation is appropriate,

⁸⁸ E-mail from Luis R. Alvarez, Jr., then-Special Representative, U.S. Dep't of State, Plan to Implement Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000): Consultation and Coordination with Indian Tribal Governments, 3 (received July 9, 2014).

⁸⁹ No policies or guidelines were available on the Internet at the time of this research (July 2015).

⁹⁰ *Id.* at 5.

⁹¹ FEMA Tribal Consultation Policy, FP 101-002.01, August 12, 2014, *available at* http://www.fema.gov/media-library-data/1409069195960-43918fffaed7909d0c4f94757751719e/FEMA%20Tribal%20Consultation%20Policy_508.pdf.

⁹² *Id.* at IX.b.1.i.

which could range from face-to-face meetings to webinars.⁹³ The Policy has fairly detailed requirements for consultation, including provisions for follow-up on input received during the consultation process.⁹⁴

2. Putting Consultation into Action

Tribes should consider how to best make use of consultation opportunities with the resources available. While the agency is required to attempt consultation, there may be no consultation at all if the tribe does not respond to phone calls and letters requesting consultation. Unless an agency states that its consultation guidelines are enforceable, a tribe cannot sue an agency over its failure to conduct government-to-government consultation.⁹⁵ That said, if an agency approves a project without adequate consultation,

⁹³ *Id.* at IX.b.2. and c.3.

⁹⁴ *Id.* at IX.e.

⁹⁵ See Exec. Order No. 13,175 65 Fed. Reg. 67249 §. 10 (2000) (“*Judicial Review*. This order 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, enforceable at law by a party against the United States, its agencies, or any person.”) While the duty to consult with tribes is based on the federal government’s common law trust responsibility to them, no court has held that this common law duty, standing alone, creates a private cause of action for Indian tribes. Colette Routel and Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 448 (2013). Specific agency policies, which typically are issued informally rather than through notice-and-comment rulemaking, are largely unenforceable by Indian tribes. The Ninth Circuit has held that handbook provisions are not binding on an agency unless they “have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress,” and “prescribe substantive rules - not interpretive rules, general statements of policy or rules of agency organization, procedure or practice.” *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982); see also *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071-72 (9th Cir. 2010); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 901-02 (9th Cir. 1996). In *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1987), a tribe sued the Bureau of Indian Affairs (BIA) for lack of consultation regarding BIA’s office move. The Ninth Circuit held that BIA’s 1972 Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs were unenforceable because the agency had not conceded they had the force of law, and instead of being promulgated through notice-and-comment rulemaking, the guidelines were “in letter form and unpublished.” But in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979), the Eighth Circuit enforced the same guidelines, because BIA conceded in that case that the guidelines were enforceable. When the BIA argued that the same guidelines were unenforceable in later litigation, District courts in the Eighth Circuit rejected this about-face. See *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D.S.D. 2006) (“Where the BIA has

the tribe may be able to bring a lawsuit under the Administrative Procedure Act on grounds that the decision was arbitrary and capricious for lack of consultation.

A tribe may want to enter into a Memorandum of Understanding (MOU) with an agency specifying how, when, and with whom consultation will take place. The process of negotiating a MOU can help promote communication and understanding between the tribe and the agency and increase the likelihood that the parties will remember and follow the contents of the MOU.⁹⁶ The negotiation can occur over several meetings with a facilitator who works to make sure the tribe's concerns are adequately addressed.⁹⁷

It is important to note that agencies differ in their views on when tribal consultation is actually required. For example, when new migratory bird regulations were proposed for the North Slope in 2009, North Slope tribes argued that the regulations effectively limited their subsistence take and thus required formal tribal consultation. A FWS representative said that formal consultation was not required because the regulations would be issued pursuant to the Migratory Bird Treaty Act—an act that affects Natives and non-Natives alike.⁹⁸

established a policy requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given."); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399-400 (D.S.D. 1995) (noting that the BIA had interpreted these consultation provisions as binding in the past and had not narrowed or eliminated them, and requiring the agency to "tell[] the truth and keep[] [its] promises"); *see also Winnebago Tribe of Neb. v. Babbitt*, 915 F. Supp. 157, 163 (D.S.D. 1996) (holding that the BIA has the discretion to terminate employees but must first consult with the affected tribe).

⁹⁶ Communication with Rob Rosenfeld, Rosenfeld Consultant Services (June 25, 2014).

⁹⁷ *Id.*

⁹⁸ Email from Larry Bell, Assistant Regional Director, FWS to Barrett Ristroph, North Slope Borough (Feb. 2, 2009) citing Letter from David Verly, Acting Assistant Secretary of the Interior to Joe A. Garcia, President National Congress of American Indians (Sep. 14, 2007). In fact, the Migratory Bird Treaty Act exempts "indigenous inhabitants of the State of Alaska" but does not define the term. 16 U.S.C. § 712 (2015). FWS's regulations define "indigenous inhabitant" as "a permanent resident of a village within a

Some agency personnel may not be familiar with all of the requirements for consultation, particularly when there is a high level of turnover.⁹⁹ It may be helpful for a MOU to provide for ongoing training on consultation.¹⁰⁰ This could involve agency personnel from Washington, DC, who have more decision-making power and are more familiar with consultation policies.¹⁰¹ When DC personnel are involved, it is important to inform state and regional level agency personnel of their involvement and, where practical, include both state/regional and DC personnel in meetings.¹⁰²

A tribe should consider having a standing consultation meeting that takes place regularly when there is ongoing development or a long NEPA process. Another possibility would be for the tribe to establish a standing meeting once a month with more than one agency to cover a variety of issues pertinent to the tribe.

To ensure that consultation is meaningful and effective, each consultation meeting should end with the development of action items, along with a timeline for completing these items and the names of personnel responsible for completion.¹⁰³ Each meeting should begin with a progress report on previous action items.¹⁰⁴

Tribes may want to work with corporations to coordinate their consultation with federal agencies on a given project. On the other hand, if there is tension or disagreement

subsistence harvest area, regardless of race.” Migratory Bird Subsistence Harvest in Alaska, Definitions, 50 C.F.R. § 92.4 (2004).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Communication with Rob Rosenfeld, Rosenfeld Consultant Services (June 25, 2014).

¹⁰⁴ *Id.*

between a tribe and a corporation, the tribe may feel that the agency is only listening to the corporation.

3. Other Federal Consultation/Participation Opportunities

Beyond Executive Order No. 13,175 and NEPA, there are other laws that require consultation or opportunities to participate in federal decision-making. Two important laws are the National Historic Preservation Act (NHPA) and the Alaska National Interest Lands Conservation Act (ANILCA).

a. National Historic Preservation Act

Under NHPA Section 106, when a federal action could affect a property that is eligible to be listed on the National Register of Historic Places (even if it is not actually listed), the agency must consult “with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance” to the property.¹⁰⁵ “Tribe” is defined broadly to include Alaska Native Corporations as well as Alaska Native Villages.¹⁰⁶ The right to consultation exists regardless of whether the property is on tribal land or Indian Country.¹⁰⁷

For purposes of cultural protection, the right to consultation under Section 106 may be stronger than the right to government-to-government consultation provided for

¹⁰⁵ 16 U.S.C. § 470a(d)(6) (2014); 36 C.F.R. § 800.2(c)(2)(200).

¹⁰⁶ See NHPA § 301, 16 U.S.C. § 470w (4) (2014) (“‘Indian tribe’ or ‘tribe’ means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act”); 36 C.F.R. § 800.16(m).

¹⁰⁷ *Id.* Consultation with the federal Advisory Council on Historic Preservation and the State Historic Preservation Office is also required. 16 U.S.C. § 470f; 16 U.S.C. § 470a(b)(3)(I); 36 C.F.R. § 800.2(c).

tribes in Executive Order No. 13,175.¹⁰⁸ First, it is a statute rather than an executive order. This means that it cannot be changed by a future president—only by an act of Congress. This also makes it easier for tribes to bring a lawsuit based on inadequate consultation.¹⁰⁹

Second, NPHA applies to any tribe that attaches cultural or religious significance to a property, regardless of whether tribe members reside on or own the property.¹¹⁰ By comparison, agencies charged with implementing Executive Order No. 13,175 may find that a project does not have “tribal implications”¹¹¹ such that the Order does not require consultation.

While the right to consultation under NHPA does not mean that tribes will always be satisfied with the manner in which consultation takes place,¹¹² it is a useful procedural tool for protecting traditional land. Tribes could take full advantage of this law by

¹⁰⁸ Exec. Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000) at 3(c), requires agencies to consult with tribes when “undertaking to formulate and implement policies that have tribal implications.”

¹⁰⁹ This was one of the claims in *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 787 (9th Cir. (Cal.) 2006).

¹¹⁰ See 36 C.F.R. § 800.2(c)(2)(ii): “... Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party. ... It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the Section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.”

¹¹¹ Exec. Order No. 13,175 § 3(c) requires agencies to consult with tribal officials when a policy has tribal implications. “Policies that have tribal implications” is defined in § 1(a) as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution.” 65 Fed. Reg. 67249 (Nov. 9, 2000).

¹¹² See generally Colette Routel and Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417 (2013) (noting inadequacies in the various statutes and orders requiring consultation, and inconsistencies between different agency policies).

establishing a Traditional Cultural District on important lands, as discussed in Section III(E).

b. Alaska National Interest Lands Conservation Act § 810

ANILCA prioritizes subsistence uses over other consumptive uses of fish and wildlife on Alaska's federal lands.¹¹³ Whenever a federal agency is considering "whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands," the agency must follow the requirements of ANILCA Section 810.¹¹⁴ The agency must do the following:

- Evaluate alternative uses or lands that avoid interference with lands needed for subsistence purposes;
- Give notice to the appropriate Regional Advisory Council (the entity discussed in Section III(C)(1));
- Hold a hearing in the vicinity of the area involved; and
- Before proceeding with a decision that significantly restricts subsistence uses, find that the decision is consistent with sound land management principles; the use will involve the minimal amount of lands possible; and reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources.¹¹⁵

¹¹³ 116 USC § 3114 (2015). The subsistence priority is based on rural residency rather than Native status. *Id.* At §§ 3111, 3114. ANILCA does not apply to marine mammals or migratory birds. *See id.* at § 3115(4).

¹¹⁴ 16 U.S.C. § 3120.

¹¹⁵ *Id.*

The required hearing is a good opportunity for tribes to provide input, even if the agency does not ultimately take the tribe's advice.¹¹⁶

B. Cooperating Agency Status

The Council on Environmental Quality's regulations implementing NEPA allow federal agencies (as lead agencies) to invite tribal, state, and local governments as well as other federal agencies to serve as cooperating agencies in preparing environmental impact statements (EISs) and other NEPA reviews.¹¹⁷

DOI regulations explain cooperating agency procedures and require every DOI agency to offer cooperating agency status to all eligible partners for all EISs. A tribe is eligible to serve as a consulting agency when it has jurisdiction by law or special expertise,¹¹⁸ which includes traditional knowledge.¹¹⁹ If a project is taking place on land that has historically been important to a tribe (even if it's not tribal land or Indian Country), the tribe should be given the opportunity to participate.¹²⁰

¹¹⁶ Courts have found that ANILCA Sec. 810 is largely a procedural step. *See Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1230 (9th Cir. 1999) (agency "not only had to consider rural residents' subsistence interests" but a multitude of other issues as well); *Akiak Native Community v. U.S. E.P.A.* 625 F.3d 1162, 1172 (9th Cir. 2010) (finding that Section 810 of ANILCA establishes a procedure for federal agencies to evaluate the effects of federal land use on subsistence resources but that the Environmental Protection Agency is not required to consider Section 810 of ANILCA when acting under the Clean Water Act).

¹¹⁷ 40 CFR §§ 1501.6, 1508.5 (2010). The State of Alaska does not have similar requirements for projects requiring state permits, though state agencies often serve as cooperating agencies on federal projects.

¹¹⁸ 43 CFR §§ 1601.0-5(d)(2), 46.225(a)(3).

¹¹⁹ Bureau of Land Mgmt., *A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners*, p. 22 (2012), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/NEPS.Par.93370.File.dat/BLM_DeskGuide_CA_Relationships.pdf.

¹²⁰ *Id.* at 24.

A tribe serving as a cooperating agency enters into a MOU with the lead agency.¹²¹ Before committing to serve as a cooperating agency, a tribe should keep in mind a couple of caveats. First, the lead agency often will not provide funding to the cooperating agency to cover the costs of participation.¹²² Second, the entities involved will not necessarily come to a consensus on the best alternative or other elements of the EIS; the lead agency will make the final decision. In some cases, a tribe may not want to be associated with an unfavorable EIS. That said, a cooperating agency does not lose the right to protest or appeal an unfavorable EIS or decision based on that EIS.¹²³ And cooperating agency status provides a tribe with a greater opportunity to comment and shape the outcome of an EIS than just commenting on an already-published EIS.

If a tribe does not have time and resources to participate as a cooperating agency and cannot get grant funding, it may be better to simply engage through tribal consultation. Federal agencies are obligated to provide tribes with tribal consultation opportunities, even if the tribe does not have resources, whereas federal agencies are not obligated to allow tribes to serve as cooperating agencies.

¹²¹ See generally

[http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/NEPS.Par.12804.File.dat/\(12.1.4\)%20Cooperating%20Agency%20Model%20MOU%20from%20IB%202009-106.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/NEPS.Par.12804.File.dat/(12.1.4)%20Cooperating%20Agency%20Model%20MOU%20from%20IB%202009-106.pdf) (a sample Memorandum of Understanding).

¹²² See 40 CFR § 1501.6(b)(5) (CEQ regulation stating that each cooperating agency normally uses its own funds).

¹²³ Dep't of the Interior, Bureau of Land Mgmt., *Northeast National Petroleum Reserve-Alaska Final IAP/EIS 1998 Record of Decision* at 6, 14, 40, 41.

http://www.blm.gov/ak/st/en/prog/planning/npra_general/ne_npra/ne_npr-a_1998_iap.html (last visited Mar. 3, 2016).

C. Federal Advisory Councils

Tribes can appoint representatives to sit on federal advisory councils such as the Federal Subsistence Regional Advisory Council. Some of councils are filled only by tribal or municipal representatives, while others are open to the public. The advisory councils discussed below are just examples—there are a variety of councils associated with different agencies.

1. Federal Subsistence Regional Advisory Councils

The Federal Subsistence Board is the decision-making body that manages fish and wildlife for subsistence use on Alaska's federal lands.¹²⁴ It is made up of the regional directors of FWS, NPS, BLM, the Bureau of Indian Affairs (BIA), and the U.S. Forest Service, along with three public members appointed by the Secretaries of the Interior and Agriculture.¹²⁵ The Alaska National Interest Lands Conservation Act (ANILCA) established a number of Regional Advisory Councils to review the Board's policies and management plans and provide recommendations.¹²⁶ Anyone may nominate themselves to the advisory councils, so this is a tool that is not unique to tribal members.¹²⁷ The Interior Secretary appoints members.¹²⁸

Dep't of the Interior, *Federal Subsistence Board*, <http://www.doi.gov/subsistence/board/index.cfm> (last visited Mar. 3, 2016).

¹²⁵ *Id.*

¹²⁶ Dep't of the Interior, Federal Subsistence Management Program, Federal Subsistence Regional Advisory Councils to hold meetings statewide (published, Sept. 3, 2015), *available at* <https://www.doi.gov/subsistence/news/general/federal-subsistence-regional-advisory-councils-hold-meetings-statewide>.

¹²⁷ See Dept' of the Interior, Resource Advisory Council—Alaska, <http://www.blm.gov/ak/st/en/res/rac.3.html>.

¹²⁸ Communication with Eva Patton, North Slope Regional Advisory Council Coordinator (Feb. 10, 2014).

The Board generally gives deference to Council recommendations on fish and wildlife proposals, as required by ANILCA Section 805.¹²⁹ The Board's website indicates that, in recent years, the Board has accepted the Council recommendations over 95% of the time.¹³⁰ The Alaska Federation of Natives (AFN) has expressed frustration with the Board's position that it only needs to give deference to recommendations that involve the "taking" of fish or wildlife, and not on whether a community is "rural" or has customary and traditional use of fish or wildlife within their respective regions.¹³¹ AFN urges the Board to give deference to recommendations on all matters relating to subsistence uses, including (1) rural determinations, (2) customary and traditional use determinations, (3) issues that arise outside of the normal regulatory cycle; and (4) special actions and emergency regulations.¹³²

Some who have participated in federal advisory councils have described them as being better processes than state advisory councils.¹³³ The North Slope Regional Advisory Council was able to get the first federal restricted hunting area at Red Sheep Creek and Cane Creek south of Barter Island. In January 2012, the Federal Subsistence Board closed these areas to sheep hunting except by federally qualified residents of

¹²⁹ *Id.* Under ANILCA 805, "The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision." 16 U.S.C. § 3115(c).

¹³⁰ Dep't of the Interior, Regional Advisory Councils, *supra* note 126.

¹³¹ Carol Daniel and Rosita Worl, AFN, *Administrative Actions Needed to Ensure Food Security for Alaska Natives*, <http://www.doi.gov/cobell/commission/upload/Administrative-Actions-Needed-to-Ensure-Food-Security.pdf> (last visited Mar. 3, 2016).

¹³² *Id.*

¹³³ Communications with North Slope Regional Advisory Council members (Jan. 21, 2014 and Feb. 5, 2014).

Arctic Village, Venetie, Fort Yukon, Kaktovik, and Chalkyitsik.¹³⁴ That said, there have been challenges in getting the Board to accept traditional practices related to bartering, trade, and funerary practices (i.e., moose potlatch).¹³⁵ There are also frustrations, as with all management groups, regarding the Board's limited jurisdiction.¹³⁶

The Board has its own government-to-government consultation policy that attempts to time consultation so as to respect the subsistence cycle.¹³⁷

2. NPRA Subsistence Advisory Panel

The NPRA Subsistence Advisory Panel (NPRASAP) was established in 1998 as part of a Record of Decision (ROD) on an EIS for the northeastern part of NPRA.¹³⁸

Later NPRA RODs specifically referred to the need for consultation with NPRASAP on various oil and gas activities affecting subsistence.¹³⁹ In 2010, NPRASAP expanded its

¹³⁴ Dep't of the Interior, WP14-51 Executive Summary, <http://www.doi.gov/subsistence/councils/ns/upload/10-NS-WP14-51.pdf> (last visited Mar. 3, 2016).

¹³⁵ Communications with North Slope Regional Advisory Council member (Feb. 5, 2014).

¹³⁶ Patton Communication, *supra* note 128 (Council members are frustrated by limited scope of council, which only pertains to subsistence on federal lands—there is no jurisdiction over non-federal lands and development; migratory birds and marine mammals are covered by other commissions).

¹³⁷ Government-to-Government Tribal Consultation Policy, *Federal Subsistence Board Government to Government Tribal Consultation Policy* (2012), available at <http://www.doi.gov/subsistence/upload/FSB-Tribal-consultation-policy-5-1-12.pdf>.

¹³⁸ Bureau of Land Mgmt., Northeast National Petroleum Reserve-Alaska Final IAP/EIS 1998 Record of Decision, available at http://www.blm.gov/ak/st/en/prog/planning/npra_general/ne_npra/ne_npra_1998_iap.html.

¹³⁹ Northwest NPR-A, Integrated Activity Plan /Environmental Impact Statement (IAP/EIS) - Record of Decision, Required Operating Procedure (ROP) H-1, App. B-11 (Jan. 2004) available at http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/nw_npra.Par.98372.File.dat/nwnpra_rod.pdf (Requiring consulting with NPRASAP to discuss the timing, siting and methods of proposed operations before submitting an application to the BLM; submitting a proposed Plan of Operations early enough to allow for a thorough review by the SAP; and working with the SAP when creating a monitoring plan for permanent facilities during the development phase of operation); Northeast Supplemental Record of Decision. ROP, H-1, H-2, 57-59 (July 2008) available at http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/ne_npra_final_supplement.Par.91580.File.dat/ne_npra_supp_iap_rod2008.pdf.

purview to include reviewing and disseminating information on scientific research projects in NPRA.¹⁴⁰

NPRA SAP consists of designated representatives from North Slope tribes, including ICAS and the Native Villages of Anaktuvuk Pass, Atkasuk, Barrow, Nuiqsut, Point Lay, and Wainwright.¹⁴¹ An elected official or employee from the North Slope Borough serves as the eighth member.¹⁴²

NPRA SAP has made hundreds of recommendations to BLM on ways to minimize the impacts of oil and gas exploration and development on subsistence practices in and around NPRA.¹⁴³ Many of the recommendations have been repetitive, and there has been frustration on the part of NPRA SAP members that their recommendations are not really being followed.¹⁴⁴ The panel is only advisory and cannot force BLM to take its advice.

3. Western Arctic Caribou Herd Working Group

The annual meeting held by the Western Arctic Caribou Herd Working Group brings federal and state decision-makers together with subsistence users, other Alaskan hunters, reindeer herders, hunting guides, transporters, and conservationists.¹⁴⁵ Unlike the

¹⁴⁰ Bureau of Land Mgmt., NPR-A Subsistence Advisory Panel Background, *available at* http://www.blm.gov/ak/st/en/res/npra_sap/npra_sap_background.html; NPRA SAP Bylaws, No. 6.

¹⁴¹ NPRA SAP Bylaws, No. 9.

¹⁴² *Id.*

¹⁴³ Bureau of Land Mgmt., Northeast National Petroleum Reserve-Alaska Final IAP/EIS Record of Decision (1998), *available at* http://www.blm.gov/ak/st/en/prog/planning/npra_general/ne_npra/ne_npra_1998_iap.html.

¹⁴⁴ Communication with NPRA SAP member (Jan. 17, 2014).

¹⁴⁵ WACH Working Group, The Group, (Feb. 27, 2013, 11:36 AM) *available at* <http://westernarcticcaribou.org/the-group/>.

advisory councils described above, there is no law or plan mandating the existence of this group—it is organic. There are 14 seats representing rural communities engaged in subsistence hunting of caribou.¹⁴⁶ Each representative is chosen informally by the community or communities that he or she represents; they need not represent or be selected by a tribe.¹⁴⁷ Representatives from BLM, FWS, NPS, and the Alaska Department of Fish and Game (ADFG) provide information and support to the Group, which in turn identifies concerns, requests information, and advocates for actions that will conserve and benefit the herd, including habitat studies or protections from the impacts of development.¹⁴⁸

In 2011, the Group issued a revised cooperative management plan for the herd.¹⁴⁹ The plan is not binding on the management agencies, but the agencies have been respectful of it, as they generally share similar herd management goals with the Group.¹⁵⁰ It is not clear whether the recommendations of the Group would be able to shape a land management decision like those that BLM makes regarding NPRA.¹⁵¹ Still, several people who have participated in the meetings regard them as a useful information exchange.¹⁵²

¹⁴⁶ WACH Working Group, Member Profiles, (Nov. 16, 2015, 2:22 PM) *available at* <http://westernarcticcaribou.org/home/member-profiles/>.

¹⁴⁷ Communication with WG member (Feb. 6, 2014).

¹⁴⁸ WACH, *Supra* note 145.

¹⁴⁹ Western Arctic Caribou Herd Working Group. Western Arctic Caribou Herd Cooperative Management Plan, 47 (Revised 2011) *available at* http://westernarcticcaribou.org/wp-content/uploads/2013/02/WAH-composite-book_FINAL.pdf.

¹⁵⁰ WG communication, *supra* note 147.

¹⁵¹ Communication with WG member (Feb. 6, 2014).

¹⁵² Communications with WG member and meeting participants (Feb. 5-6, 2014).

D. Federal Co-Management Agreements

Co-management agreements with federal agencies as well as state agencies (discussed in more detail in Section IV(C)) are an opportunity for tribes to influence decisions regarding subsistence harvests. Several laws provide authority for these agreements, as discussed below.

1. Alaska National Interest Lands Conservation Act Section 809

Section 809 of ANILCA allows the Interior Secretary to “enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and acting through the Secretary of State, other nations to effectuate the purposes and policies of this title.” Agreements with Native entities have primarily related to harvest monitoring activities, but have also attempted to minimize conflicts among different users.¹⁵³ One example is the 1991 agreement signed between FWS and the Tanana Chiefs Conference (the non-profit tribal services entity for Interior Alaska) to document subsistence uses in four villages and report subsistence harvests of caribou in three villages.¹⁵⁴ Perhaps more commonly, Section 809 authority is used to fund Alaska Department of Fish and Game studies.¹⁵⁵

¹⁵³ Eric Smith, *Some Thoughts on Comanagement*, 14 HASTINGS W.-N.W. J. ENV. L. & POL'Y 763, 769 (2008).

¹⁵⁴ James A. Schwarber, *Conditions leading to grassroots initiatives for the co-management of subsistence uses of wildlife in Alaska*, Thesis, University of British Columbia (1992), available at <https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0086163>.

¹⁵⁵ Caroline L. Brown, et. al., *The 2002-2003 Harvest of Moose, Caribou, and Bear in Middle Yukon and Koyukuk River Communities*, ADFG Technical Paper No. 280 (Apr. 2004).

2. Tribal Self-Governance Act

The 1994 Tribal Self-Governance Act (TSGA) allows federal agencies to transfer authority over aspects of federal programs, including land management, to Indian tribes.¹⁵⁶ TSGA permits tribes to petition DOI agencies to manage federal programs that are of "special geographical, historical, or cultural significance"¹⁵⁷ to the tribe.¹⁵⁸ A number of Lower 48 tribes have used this authority to enter into co-management agreements, such as those between NPS and the Navajo Nation to manage Canyon de Chelly.¹⁵⁹ Canyon de Chelly is a national monument that was established by Congress within the boundaries of the Navajo reservation, but primarily owned by the federal government.¹⁶⁰

Alaska tribes have used TSGA to enter into agreements with BIA and the Indian Health Service,¹⁶¹ but most of the natural resource co-management agreements in Alaska have not been signed under TSGA authority. The first (and perhaps one of the only) TSGA agreements in Alaska was signed in 2004 by the Council of Athabascan Tribal

¹⁵⁶ TSGA is Title IV of the Indian Self-Determination Act. 25 U.S.C. §§ 458aa-hh (2006). TSGA addresses non-Bureau of Indian Affairs ("BIA") programs within the Department of the Interior. One limit of the law is that an agency cannot "enter into any agreement . . . with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe." 25 USCS § 458cc(k).

¹⁵⁷ 25 U.S.C. § 458cc(c).

¹⁵⁸ 25 USCS § 458bb describes the criteria for participating tribes. The Interior Secretary may select up to 50 new tribes per year from those who apply. To apply, the tribe needs to pass a resolution requesting participation, demonstrate that it has been financially stable for the past three years (i.e., no significant problems with audits), and complete a planning phase that includes legal and budgetary research. *See also* 25 CFR 1001.2 (Applicant eligibility).

¹⁵⁹ Mary Ann King, *Co-Management or Contracting? Agreements between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475 (2007).

¹⁶⁰ Pub. L. No. 71-667, 46 Stat. 1161 (Feb. 14, 1931), 16 U.S.C. § 445.

¹⁶¹ *See Case & Voluck, supra* note 9, 235.

Governments and FWS for the Yukon Flats Wildlife Refuge.¹⁶² The agreement was the product of almost two years of negotiations.¹⁶³ It allowed the Council to perform activities including locating easements, environmental education and outreach, and monitoring the moose population and hunt in cooperation with ADFG.¹⁶⁴

3. Marine Mammal Protection Act

The Marine Mammal Protection Act¹⁶⁵ gives the National Marine Fisheries Service (NMFS) and FWS authority to enter into cooperative agreements with Alaska Native organizations. An example is the agreement between the Eskimo Walrus Commission (EWC), which represents 19 villages, and FWS to monitor the walrus harvest.¹⁶⁶ There has been some friction in this arrangement regarding the goals of management, what constitutes waste, and the lack of enforcement authority on the part of both EWC and FWS.¹⁶⁷

¹⁶² See Fish and Wildlife Service and Council of Athabascan Tribal Governments Sign Annual Funding Agreement, 69 Fed. Reg. 41838-41845 (July 12, 2004).

¹⁶³ U.S. Fish and Wildlife Service, News Release, Council of Athabascan Tribal Governments, Reach Agreement (Feb. 13, 2004), available at <http://www.fws.gov/news/ShowNews.cfm?ID=4AF518E3-AC1B-46BF-82CB8826E9BB0720>.

¹⁶⁴ *Id.*

¹⁶⁵ Marine Mammal Protection Act, Pub. L. No. 103-238, §119, 16 U.S.C. § 1388.

¹⁶⁶ See Eskimo Walrus Commission, <http://www.kawerak.org/ewc.html>. In 1987, prior to the 1994 amendment to the Marine Mammal Protection Act authorizing co-management agreements, EWC entered into a Memorandum of Agreement with FWS and the Alaska Department of Fish and Game. EWC entered into another agreement with FWS in 1997, and in 2004 EWC and FWS issued guidelines to prevent waste. Eskimo Walrus Commission and U.S. Fish and Wildlife Service, Walrus Harvest Guidelines (2004) (cooperatively developed guidelines to address waste), cited in Martin Robards & Julie Lurman Joly, *Interpretation of "Wasteful Manner" Within the Marine Mammal Protection Act and Its Role in Management of the Pacific Walrus*, 13 OCEAN & COASTAL L.J. 171, 189 (2008).

¹⁶⁷ See generally Robards and Joly, *supra* note 166; Jessica Cardinal, *Master's Thesis, Pacific walrus management in a world of changing climate: experiences and observations from King Island walrus hunters* (2004) p. 21 available at <http://ir.library.oregonstate.edu/jspui/handle/1957/4255>. The lack of enforcement authority relates to the fact that the walrus is not categorized as "depleted" under MMPA 16 U.S.C. § 1371, limiting FWS's authority.

Perhaps a more successful and well known example is the agreement between the Alaska Eskimo Whaling Commission (AEWC) and NOAA to manage the bowhead whale hunt, which has been renewed every few years since 1981. AEWC is responsible for ensuring that local hunters follow the International Whaling Commission's quota limits and other regulatory measures, and NOAA must consult with AEWC "on any action undertaken or any action proposed to be undertaken by any agency or department of the Federal Government that may affect the bowhead whale and/or subsistence whaling."¹⁶⁸

4. Migratory Bird Treaty Act

The Alaska Migratory Bird Co-management Council (AMBCC) was formed in 2000 in response to a change in the United States' treaty with Canada regarding migratory bird regulation.¹⁶⁹ The treaty amendment and the corresponding amendment to the Migratory Bird Treaty Act recognized and authorized the traditional spring and summer migratory bird hunt by northern peoples.¹⁷⁰

AMBCC is a statewide management body consisting of FWS, the Alaska Department of Fish and Game, and Alaska tribes. There are three votes allocated to

¹⁶⁸ NOAA and AEWC Cooperative Agreement (2013), *available at*

http://www.nmfs.noaa.gov/ia/species/marine_mammals/inter_whaling/aewc_cooperative.pdf.

¹⁶⁹ FWS, Common Questions about the Alaska Migratory Bird Co-Management Council, *available at* http://www.fws.gov/alaska/ambcc/About%20Us_files/Question%20and%20Answers%20for%20AMBCC%20members.pdf.

¹⁷⁰ See Protocol Amending the 1916 Convention for the Protection of Migratory Birds, December 14, 1995, Senate Treaty Doc. 104-28, Article II (4)(b)(ii): "Indigenous inhabitants of the State of AK shall be afforded an effective and meaningful role in the conservation of migratory birds including the development and implementation of regulations affecting the non-wasteful taking of migratory birds and the collection of their eggs, by participating on relevant management bodies." FWS set up AMBCC as the "management body" after the Protocol was ratified and arranges semi-annual meetings.

members: one to FWS, one to the state, and one to the collective group of tribes.

AMBCC's role is to "provide meaningful input in the development of recommendations on regulations for spring and summer harvest and conservation of migratory birds in Alaska."¹⁷¹ AMBCC's recommendations are advisory only.¹⁷² Native representatives experienced some frustration in 2008, when AMBCC's recommendation not to impose additional restrictions on North Slope migratory bird subsistence hunting was ignored.¹⁷³

5. Evaluation of Co-Management Agreements

Several factors affect the success of co-management agreements. One is trust: co-management cannot function without a willingness by all parties to build trusting relationships.¹⁷⁴ Lack of trust between tribes and the State of Alaska has been a particular challenge.¹⁷⁵ Another factor is the need for tribal capacity-building to carry out the agreements.¹⁷⁶ Funding and accountability are also important factors, since management relies heavily on federal funding.¹⁷⁷ The success of AEWG as a co-management entity relates to its ample funding (including support from industry and the North Slope

¹⁷¹ *Establishment of Management Bodies in Alaska To Develop Recommendations Related to the Spring/Summer Subsistence Harvest of Migratory Birds*, 65 Fed. Reg. 16405-01, (Mar. 28, 2000).

¹⁷² Communication with Donna Dewhurst, Wildlife Biologist for the Office of AMBCC in Anchorage, Alaska (Nov. 19, 2008).

¹⁷³ See North Slope Borough's comments to FWS on Proposed Harvest Regulations for Migratory Birds in Alaska during the 2010 Season (Feb. 18, 2010) pp. 2-3 *available at*

<http://www.regulations.gov/search/Regs/home.html#docketDetail?R=FWS-R7-MB-2009-0082>

¹⁷⁴ Marine Mammal Commission, Review of Co-management, Efforts in Alaska, iv, 6-8 February 2008, Anchorage, Alaska, *available at* http://www.mmc.gov/wp-content/uploads/mmc_comgmt.pdf.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* In 2008, the Marine Mammal Commission estimated that, "Under the best circumstances, capacity-building will take decades."

¹⁷⁷ *Id.*

Borough (NSB)), scientific expertise (provided by NSB Wildlife Management),¹⁷⁸ and the feasibility of regulating a limited harvest (less than a hundred individuals of a single species). Favorable agreements like that between NOAA and AEWC can give a tribe a good amount of control over management, above and beyond what can be gained by consultation, cooperating agency status, and advisory councils. In other cases, “co-management” amounts to no more than consultation.

E. Traditional Cultural Properties

A tribe can designate a place as a Traditional Cultural Property (TCP) to highlight its cultural and historic significance. A TCP found eligible for listing on the National Register of Historic Places (“the Register”) is entitled to consideration under the National Historic Preservation Act of 1966 (NHPA)¹⁷⁹ in federal decisions that may impact historic or cultural aspects of the place.

A TCP designation does not prohibit development, but it requires federal agencies to communicate with tribes and consider mitigation measures when planning activities that could affect cultural resources.¹⁸⁰ A property may be designated as a TCP by a tribe or any other entity. TCPs can be designated anywhere—on federal or non-federal land.

¹⁷⁸ See NOAA, Final Environmental Impact Statement for Issuing Annual Quotas to the Alaska Eskimo Whaling Commission for a Subsistence Hunt on Bowhead Whales for the Years 2013 through 2018, 10 (Jan. 2013) (“the role of cooperative management in this case is highly distinctive in the degree to which the AEWC and the North Slope Borough (NSB) committed to a major peer-reviewed program of scientific research to improve understanding of the bowhead population status and dynamics in order to persuade the IWC to increase the subsistence catch limits”).

¹⁷⁹ PL 89-665, 80 Stat. 915, 16 U.S.C. § 470a (1966) (repealed 2014).

¹⁸⁰ See Section IV(E)(1) (National Historic Preservation Act), *supra*.

A TCP designation can provide some measure of protection for what are traditionally thought of as a cultural resource (like a sod house) or something much bigger, like an entire landscape¹⁸¹ or perhaps even the range of an animal (i.e., the Western Arctic Caribou Herd).¹⁸² A tribe can designate a collection of TCPs as a Traditional Cultural District.¹⁸³

Examples of traditional cultural districts in the Lower 48 include the Helkau Historic District in northern California and Badger-Two Medicine area in Montana. The Helkau Historic District was designated based on its significance to tribal medicine makers as a quiet area with extensive views of natural landscape and a lack of modern intrusions.¹⁸⁴ The 89,000-acre Badger-Two Medicine area was recognized for its cultural, spiritual, and subsistence importance to the Blackfeet tribe.¹⁸⁵

NPS, the agency responsible for listing TCPs on the Register, determines the eligibility for listing.¹⁸⁶ It is important to remember that a TCP may be eligible for listing

¹⁸¹ See 16 U.S.C. § 470a(a)(1)(A) (repealed 2014).

¹⁸² See *Dugong v. Rumsfeld*, No. C 03-4350, 2005 WL 522106 (N.D. Cal. Mar. 1, 2005) (observing that the presence of culturally significant animals had been the basis for several determinations of eligibility, including several animal habitats important in Native American tribal histories, and that the U.S. National Register included three wildlife refuges culturally associated with certain species).

¹⁸³ Patricia L. Parker & Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, 11, U.S. Dep't of the Interior (1998), available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>.

¹⁸⁴ *Id.* at 20.

¹⁸⁵ See Determination of Eligibility Notification, National Register of Historic Places National Park Service, Badger-Two Medicine Blackfoot Traditional Cultural District (Dec. 14, 2001).

¹⁸⁶ NPS's eligibility criteria are at 36 C.F.R. § 60.4. In 2012, NPS launched a process to update its guidelines on identifying, evaluating, and documenting Traditional Cultural Properties and Native American Landscape ("Bulletin No. 38). Comments regarding the existing guidelines and the need for new guidelines can be viewed at National Register of Historic Places Program: Traditional Cultural Properties Request for Comments http://www.nps.gov/nr/publications/guidance/TCP_comments.htm#extension. As of this writing, the bulletin is going through final editing and should be released soon. Personal communication with Alexis Abernathy, National Park Service (Nov. 9, 2015).

in the Register—and get many of the benefits of listing—without ever being formally nominated or listed on the Register.¹⁸⁷ A tribe may decide that it is not worth the additional time and resources to pursue a formal listing,¹⁸⁸ even though the most expensive part of the process for determining eligibility (hiring consultants to research the property’s cultural significance) has already taken place.¹⁸⁹ Or a tribe may be concerned that if a property appears in the Register, it could attract outside hunters and tourists or lead to vandalism and grave robbing.¹⁹⁰ To alleviate this concern, tribes should be aware that the exact location of a site in the Register can remain confidential.¹⁹¹

¹⁸⁷ 36 C.F.R. § 800.2(c)(2) (2016). Subsection A explains that the Secretary (through the National Park Service) shall administer a program of direct grants for the preservation of properties included on the National Register. Subsection B states that the Secretary may also make grants or loans to Indian tribes and cultural organizations “for the preservation of their cultural heritage”—for this subsection there is no requirement that property be listed on the Register. *See also* NPS, Tribal Heritage Grants, <http://www.nps.gov/thpo/tribal-heritage/index.html>; Tribal Heritage Grants Program Guidelines and Application Instructions, *available at* <http://www.nps.gov/thpo/tribal-heritage/downloads/FY2016Guidelines.pdf> (explaining grants available to properties listed on the Register and those not listed).

¹⁸⁸ In the case of the Badger-Two Medicine Area, pursuing a formal listing was not a priority for the tribe. Nomination for listing on the Register was more of a concern when there were more oil and gas leases in the area, but many of the leases were bought out with assistance from non-profit organizations. Personal Communication with Keith Tatsey, Member of Blackfeet Tribe on Badger-Two Medicine Area (April 30, 2013). Another reason why the Blackfeet did not pursue a nomination may relate to the difficulty in singling out a particular portion of the Blackfeet’s traditional land as being worthy of the Register: one tribe elder noted that there is no specific part of the land that is more important than the rest of the land. *Id.*

¹⁸⁹ Communication with Paul Lusignan, National Park Service (Reviewer of eligibility for properties in western states) (March 19, 2013).

¹⁹⁰ *Id.*

¹⁹¹ NHPA § 304, 16 U.S.C. § 470w-3 (information about traditional cultural properties must be kept confidential if disclosure may result in an “invasion of privacy,” “risk harm to the historic” property, or “impede the use of a traditional religious site”).

IV. WORKING WITH THE STATE

A. Consultation

Compared to the federal government, the State offers few opportunities for tribal consultation beyond the public process.

1. Alaska Department of Fish and Game

In 2002, during the administration of Governor Tony Knowles, the Alaska Board of Game adopted a finding supporting a tribal consultation policy.¹⁹² The policy is supposed to apply to any action of ADFG or the Boards of Fisheries and Game “that significantly or uniquely affect a tribal government in Alaska” as well as any tribal action that significantly or uniquely affects ADFG or the Boards. The policy requires ADFG and the Boards to notify tribes as early as possible about actions that could affect fish, wildlife, or habitat.

It is not clear how relevant this policy is now. Subsequent state administrations have been less supportive of tribes and rural subsistence, and many of the 2002 members on the Boards have been replaced. That said, some field biologists and even ADFG leaders see the value in regular and informal consultation with tribal representatives, particularly regarding challenging issues like fishing closures.¹⁹³

¹⁹² Alaska Department of Fish and Game, Alaska Boards of Fisheries and Game Policy on Government-to-Government Relations with the Federally Recognized Tribes of Alaska (May 1, 2002), available at <http://www.adfg.alaska.gov/static/regulations/regprocess/gameboard/pdfs/findings/02136bog.pdf>.

¹⁹³ Communication with former Alaska Dep’t of Fish and Game biologist (Nov. 6, 2015).

2. Alaska Department of Environmental Conservation

ADEC has guidelines for local and tribal government participation in water discharge permitting under the Alaska Pollutant Discharge Elimination System (APDES).

¹⁹⁴ The policy applies equally to local governments—it is not exclusive to tribes. ADEC is supposed to prepare a Permit Issuance Plan (PIP) identifying proposed wastewater permits for the next two to three years, and annually mail this plan to all tribes.¹⁹⁵

ADEC is supposed to identify tribes that have the potential to be affected by an APDES permitting decision and provide an opportunity to meaningfully participate if the tribal governments believe the discharge from the permitted facility or activity will affect them.¹⁹⁶ A tribe is considered “affected” if there is a real possibility that cultural and natural resources of importance to the tribe may be affected by an action; actions are proposed that will significantly or uniquely affect the tribe’s access to or use of fish, wildlife, or habitat; or any action is proposed that will have a substantial, direct effect on tribes.¹⁹⁷

ADEC must “solicit and consider local and traditional knowledge ... during the early local and tribal government notification process; information can be provided for consideration by whatever means most efficient for the local or tribal government.”¹⁹⁸

The guidelines do not specify the nature of consultation required; rather, ADEC “may

¹⁹⁴ Alaska Department of Environmental Conservation, APDES Guidance for Local and Tribal Governments (July 2012), *available at* http://dec.alaska.gov/water/TribalCommunication/docs/APDES_Guidance_for_Local_and_Tribal_Governments_FINAL.docx.

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.* at 2.

¹⁹⁸ *Id.* at 4.

schedule a communication or coordination effort if the local or tribal government requests more information to understand concerns or information submitted by local or tribal governments or to discuss potential resolutions or alternatives to a permitting action.”¹⁹⁹

B. State Advisory Committees for Fish and Game Boards

Unlike federal agencies, most of Alaska’s state agencies do not have legally established advisory councils. An important exception relates to the Alaska Boards of Fisheries and Game, which oversee fish and game management on all Alaska lands not managed by the federal government.²⁰⁰ Each Board consists of seven members appointed by the governor and confirmed by the legislature.²⁰¹ The Board of Game regulates open and closed seasons, areas for taking game, bag limits, and hunting methods,²⁰² while the Board of Fisheries open and closed seasons and areas for taking fish, catch limits, and fishing methods.²⁰³

Local advisory committees (under the authority of the Joint Board of Fisheries and Game²⁰⁴) develop regulatory proposals and make recommendations to the Boards.²⁰⁵

¹⁹⁹ *Id.* at 4.

²⁰⁰ See Case & Voluck, *supra* note 9, 294, 303.

²⁰¹ ALASKA STAT. ANN. § 16.05.221 (2015).

²⁰² The Board of Game’s authority to adopt regulations as described in ALASKA STAT. ANN. § 16.05.255 (2015). See 5 ALASKA ADMIN. CODE tit. 5, §§ 84, 85, 92, and 99 (2015).

²⁰³ Alaska Department of Fish and Game (last visited March 3, 2016), <http://www.adfg.alaska.gov/index.cfm?adfg=fisheriesboard.main>; Alaska Board of Game (last visited March 3, 2016), <http://www.adfg.alaska.gov/index.cfm?adfg=gameboard.main>.

²⁰⁴ Alaska’s Fisheries and Game Board Process, <http://www.adfg.alaska.gov/index.cfm?adfg=process.main>; ALASKA ADMIN. CODE tit. 5, §§ 96, 97 (2015).

²⁰⁵ ALASKA STAT. ANN. § 16.05.260 (2015).

As of 2015, there were 84 local fish and game advisory committees around the state.²⁰⁶ The nomination process is controlled by the Joint Board and is designed to get a broad spectrum of user groups from each community (not necessarily just tribal members).²⁰⁷

A report by ADFG identified a number of problems faced by some advisory committees, including limited meetings, lack of broad representation from all user groups, lack of organization at meetings, and lack of preparation for meetings.²⁰⁸ A member of the Koyukuk River Advisory Committee expressed frustration with what he perceived as the Board of Game's unwillingness to entertain proposals from subsistence users.²⁰⁹

A number of participants in both the federal and state process expressed greater frustration with the state process than the federal process. One person indicated that the state Board of Game has tried to weaken restrictions on moose hunting and is constantly micromanaging the hunt and allowing more nonresident hunting.²¹⁰

C. State Co-Management Agreements

State co-management agreements have typically emerged organically rather than being mandated by state law. One example of a state co-management regime is the

²⁰⁶ *Advisory Committees*, Alaska Department of Fish and Game, <http://www.adfg.alaska.gov/index.cfm?adfg=process.advisory> (last visited March 3, 2015).

²⁰⁷ See ALASKA ADMIN. CODE tit. 5, § 96.060 (2002).

²⁰⁸ Alaska Department of Fish and Game, 2013, Overview on the Advisory Committee System, available at www.adfg.alaska.gov/static-files/regulations/regprocess/pdfs/fjbmeetings/2013-10-12/advisory_committee_overview_2013_rc4.pdf.

²⁰⁹ Communication with advisory council member, Jan. 21, 2014.

²¹⁰ Communications with advisory council members, Jan. 21, 2014, Feb. 5, 2014, Feb. 6, 2014.

Kuskokwim River Salmon Management Working Group, formed in 1988 by the Alaska Board of Fisheries in response to requests from local fishermen.²¹¹

The Group is made up of 13 member seats representing elders, subsistence fishermen, processors, commercial fishermen, sport fishermen, members at large, federal subsistence regional advisory committees, and the Alaska Department of Fish and Game (ADFG).²¹² There is no formal nomination process. Members meet 10 to 20 times a year, with facilitation is provided by the FWS Office of Subsistence Management and the Alaska Department of Fish and Game.²¹³ During the meetings, members review reports on subsistence and commercial catch, fishing methods, and other information, and make recommendations on salmon management to ADFG.²¹⁴ According to the Group's bylaws, the goal is for all parties to reach consensus regarding fishery management.²¹⁵ Motions are passed by consensus. Final authority rests with ADFG.

Another example is the Western Alaska Brown Bear Management Area Working Group, which was established to give local input on brown bear regulations for Game Management Unit 18 that were inconsistent with Yup'ik customs.²¹⁶ This conflict led to the formation of a Western Alaska Brown Bear Management Area, where permits are available for subsistence hunters who pursue bears primarily for meat.

²¹¹ Alaska Dep't of Fish and Game, Commercial Salmon Fisheries, Kuskokwim Management Area, available at <http://www.adfg.alaska.gov/index.cfm?adfg=commercialbyareakuskokwim.kswg>.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Kuskokwim River Salmon Management Working Group Bylaws, III(2) (June 22, 2010) available at <http://www.adfg.alaska.gov/index.cfm?adfg=commercialbyareakuskokwim.kswg>.

²¹⁵ *Id.*

²¹⁶ Carole Healy, Alaska Dep't of Fish and Game, Brown Bear Management Report (Dec. 2001), available at https://www.adfg.alaska.gov/static/home/library/pdfs/wildlife/mgt_rpts/mbr01_nw.pdf.

D. Working with a Borough

Article X, Section 3 of Alaska's constitution provides for the state to be divided into organized boroughs (similar to counties in other states). Unincorporated areas form “the unorganized borough”²¹⁷ governed directly by the state legislature.²¹⁸ Thus, functions typically thought of as local, such as planning and zoning, may be governed by an entity hundreds of miles away.

Boroughs have different levels of power. Whereas a “general law” borough can exercise only those powers designated by state law,²¹⁹ a “home rule” borough can exercise any power not prohibited by state or federal law or its home rule charter.²²⁰ This provides substantial opportunities to regulate land use and development, but not subsistence or pollution.²²¹ Regardless of whether a borough is general law or home rule, it generally has land use planning authority over federal, state, and Native

²¹⁷ ALASKA STAT. § 29.03.010 (2015).

²¹⁸ Alaska Const., Art. X, §6 (2015).

²¹⁹ *Id.* at §§ 9-11; ALASKA STAT. § 29.04.010-020 (2015).

²²⁰ *See* Alaska Const. art. X, § 1 (providing for maximum local self-government and liberal construction of powers of local government); Alaska Const. art. X, § 11 (home rule borough may exercise all legislative powers not prohibited by law or by charter); ALASKA STAT. § 29.04.010 (2015) (“A home rule municipality has all legislative powers not prohibited by law or charter.”); *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974) (rejecting the doctrine of state pre-emption by “occupying the field”; the test is one of prohibition, rather than traditional tests such as statewide versus local concern).

²²¹ ALASKA STAT. § 29.35.180(b) (2015) provides that, “A home rule borough shall provide for planning, platting, and land use regulation.” Regulation of land use under ALASKA STAT. § 29.35.180(b) is distinct from a state or federal agency’s regulation of the environment. *See California Coastal Com’n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (“Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.”). Generally, the State regulates resources in their natural state, *see* Article VIII, Section 3 of the Alaska Constitution, while the borough regulates resources are appropriated for private use by project applicants; *see Constantine v. Alaska*, 739 P.2d 188, 194 (Alaska App. 1987) (“Game fish, wildlife, fisheries, and water are recognized as belonging to the state so long as in a natural state . . . once an animal is taken in compliance with law, it becomes the property of the taker, subject to use or disposition within the law.”).

Corporation land within their boundaries.²²² For coastal boroughs, jurisdiction extends to 3 nautical miles offshore.²²³

Unincorporated regions of the state that meet certain requirements²²⁴ may incorporate directly as a home rule borough by adopting a charter with voter approval and filing a petition with the Alaska Local Boundary Commission.²²⁵

On the North Slope, incorporation as a borough in 1972 and adoption of a home rule charter in 1974²²⁶ provided a means of ensuring a voice in oil and gas development and taking advantage of a lucrative tax base. The Borough seat (Barrow) now has a diversity of residents, though it is still majority Native. The population of other villages in the Borough, along with the make-up of the Borough Assembly, is almost all Native

²²² See *Native Village of Eklutna v. Alaska R.R. Corp.*, 87 P.3d 41 (Alaska 2004) (requiring a governmental entity seeking an exemption from local zoning laws to prove that a balance of several factors weighs in favor of immunity); *State v. Prince*, 53 P.3d 157, 162 (Alaska App. 2002) (generally speaking, a municipality's authority to enforce its ordinances on land within its boundaries does not depend on the identity of the landowner).

²²³ This parallels state jurisdiction set by the 1953 Submerged Lands Act 43 USC 1301, 1312.

²²⁴ See ALASKA STAT. § 29.05.031(a) (1994): An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality: (1) the population of the area is interrelated and integrated as to its social, cultural, and economic activities, and is large and stable enough to support borough government; (2) the boundaries of the proposed borough or unified municipality conform generally to natural geography and include all areas necessary for full development of municipal services; (3) the economy of the area includes the human and financial resources capable of providing municipal services; evaluation of an area's economy includes land use, property values, total economic base, total personal income, resource and commercial development, anticipated functions, expenses, and income of the proposed borough or unified municipality; (4) land, water, and air transportation facilities allow the communication and exchange necessary for the development of integrated borough government. See also ALASKA ADMIN. CODE tit. 3, §§110.045, 110.050 (2015) (requiring 1000 residents). The commissioner of the Department of Commerce, Community, and Economic Development will decide whether incorporation meets the best interests of state ALASKA ADMIN. CODE tit. 3§110.065 (2015).

²²⁵ ALASKA STAT. § 29.05.060; ALASKA ADMIN. CODE tit. 3, §110.045-.060 (2015); Department of Commerce, Community, and Economic Development, Community and Regional Affairs, Borough Incorporation, *available at* <https://www.commerce.state.ak.us/dnn/dcra/LocalGovernmentOnline/MunicipalGovernment/BoroughIncorporation.aspx>.

²²⁶ North Slope Borough, A Historical Perspective, *available at* https://www.municode.com/library/ak/north_slope_borough/codes/code_of_ordinances?nodeId=NOSLBOHIPE

tribal members. For North Slope Natives, incorporation has been a valuable tool in maintaining control over land use. As stated in the introduction to the municipal code, “The very existence of this Code is proof that the Iñupiat of the North Slope have succeeded in returning self-rule to their land.”²²⁷

The Northwest Arctic Borough, which incorporated as a First Class Borough in 1986 and became a Home Rule Borough in 1987²²⁸, has similarly been able to take advantage of the tax base generated by the Red Dog Mine. Like the North Slope Borough, the population of Northwest Arctic Borough communities continues to be majority Native, with the vast majority of assembly members consisting of tribal members.

In addition to providing a great deal of tax revenue, incorporation has allowed the Northwest and North Slope Boroughs to apply for and obtain municipal grants. The North Slope Borough has an entire Grants Division with a staff devoted to applying for grants. Incorporation also allows a borough to obtain up to 10% of the total vacant unappropriated and unreserved state land within borough boundaries.²²⁹

The large size of the North Slope and Northwest Arctic Boroughs (nearly that of Michigan and Maine, respectively) and the resource development across these lands has made borough incorporation a viable option for these areas. In the absence of a major development project or other source of revenue, borough incorporation could be less

²²⁷ *Id.*

²²⁸ Northwest Arctic Borough, <http://www.nwabor.org/about.html>.

²²⁹ ALASKA STAT. § 29.65.030 (2005).

desirable, because it means taxing residents and adding another layer of government.²³⁰ But if tribes are concerned about the prospect of a large development such as a road, the land use authority that comes with being a home rule borough could be powerful.²³¹ For instance, the borough could zone an area as “subsistence use” and set limits or conditions on the development that can occur there.

Borough incorporation does not directly affect tribal council jurisdiction. Tribes could influence borough government through their members’ votes and participation on the borough assembly. Tribes could also negotiate with a borough for zoning ordinances that require consultation with the tribal council in decision-making processes such as the review of applications for permits and rezoning.

E. Working with Corporations

1. Consultation and Cooperation with Alaska Native Corporations

As discussed in Section III(A), Alaska Native Corporations, like tribes, are entitled to government-to-government consultation with federal agencies on activities that affect corporations’ interests. Tribes should assess the pros and cons of holding simultaneous consultation with both corporations and federal agencies (and perhaps other state or municipal entities). It may also be useful to establish some sort of standing consultation meeting between corporations, tribes, and perhaps municipal entities to

²³⁰ ALASKA STAT. § 29.35.170 (2015) (requires boroughs to assess property taxes).

²³¹ The North Slope Borough has regulated oil and gas development through Title 19 of its code as well as through permits and zoning ordinances that provide for resource development. The Matanuska-Susitna Borough has adopted land use ordinances to address coal bed methane production, which requires significant amounts of water to be pumped out of the ground and re-injected. *See* Matanuska-Susitna Borough Chapter 17.62 (Conditional Permit for Coal Bed Methane Exploration and Development).

exchange ideas. Multiple stakeholders could meet to hear all perspectives and seek agreement where possible.

Beyond consultation, tribes may want to form agreements with corporations regarding the management of ANCSA lands. An example is the MOU between Ukpeagvik Iñupiat Corporation (UIC) and the Native Village of Barrow (NVB), which recognizes that, “UIC and NVB have a mutual interest in assuring that hunting and fishing are managed on UIC’s lands for the mutual benefit of UIC, other ANCSA shareholders and NVB’s members so long as most of them are the same people.”²³² The agreement gives NVB limited jurisdiction over UIC’s land for the purpose of implementing the agreement. It sets forth hunting and fishing policies and requires non-ANCSA shareholders to obtain permits to hunt and fish on UIC land.²³³ UIC also cooperated with the Native Village of Barrow and the North Slope Borough to enter a Memorandum of Agreement with FWS regarding FWS’s implementation of its 2009 North Slope migratory bird hunting regulations.

2. Tribal Conservation Districts

A tribal conservation district is a non-profit partnership between a tribe and the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS) to provide for the utilization and conservation of reservation lands (or village

²³² Memorandum of Agreement between Ukpeagvik Iñupiat Corporation and Native Village of Barrow (Aug. 29, 2008) at p. 2. *See id.*

²³³ *See id.*

corporation lands in Alaska).²³⁴ The partnership helps coordinate tribal governments with NRCS and other sources of assistance.

In Alaska, a Tribal Conservation District starts with an agreement between the tribe, the village corporation, and USDA.²³⁵ If Alaska tribes gain the ability to have land taken into trust for them, then there could potentially be an agreement just between the tribe and USDA. Once an agreement is reached, the District is then incorporated as a non-profit and eligible for funding from USDA and participation in a range of USDA programs beyond just land conservation.²³⁶ The District does not have regulatory powers, as it is based on voluntary cooperation between stakeholders.

As of 2015, there are 14 TCDs in Alaska.²³⁷ One example of a successful project was the effort led by the Tyonek Tribal Conservation District (TTCD). TTCD was able to obtain \$1.3 million in funding for a project to replace narrow culverts that blocked salmon passage under roads. As a neutral non-profit, TTCD was in a good position to obtain cooperation between landowners, the tribe, other road users, and agencies with technical expertise, focusing on areas where all could agree. The project opened up many miles of passages to salmon and had the added benefit of reducing road flooding.²³⁸

²³⁴ Tribal Conservation Districts, NRCS, http://www.nrcs.usda.gov/wps/portal/nrcs/detail/mt/about/outreach/tribal/?cid=nrcs144p2_057877 (last visited Oct. 13, 2015).

²³⁵ Angela Peter & Kristine Harper, PowerPoint, Tribal Conservation Districts, *available at* <http://aktca.org/how-to-form-a-tcd/> (last visited Oct. 13, 2015).

²³⁶ *Id.*

²³⁷ Communication with Christy Cincotta, Tyonek Tribal Conservation District (October 29, 2015).

²³⁸ *Id.*

3. Agreements with Industry

This section describes how North Slope tribal organizations have been able to broker agreements with industry representatives to mitigate and avoid subsistence impacts. None of these agreements are directly required by federal, state, or borough law. They might serve as models for tribes in other areas dealing with large-scale natural resource development.

a. Conflict Avoidance Agreement

In 1978, Northwest Alaska tribes with whaling traditions designated authority to AEWC to regulate whaling in coordination with the federal government.²³⁹ AEWC started working with the oil and gas industry in the 1980s to address the immediate threats to human life posed by the industry's large vessels passing through waters occupied by small whaling boats.²⁴⁰ AEWC's voluntary annual agreements with industry representatives have evolved significantly over time to cover issues such as pollution control.²⁴¹

²³⁹ These tribes include Gambell, Kivalina, Savoonga, Whales, and the Inupiat Community of the Arctic Slope, which has been delegated authority by the North Slope villages. *See* Concurrent Resolution of the Native Villages of Gambell, Kivalina, Savoonga, Wales, and the Inupiat Community of the Arctic Slope (March 26, 1978).

²⁴⁰ Jessica S. Lefevre, *A Pioneering Effort in the Design of Process and Law Supporting Integrated Arctic Ocean Management*, 43 ELR 10893 (2013), citing Cooperative Programs for the Beaufort Sea, Oil/Whalers Working Group (July 9, 1986). Signatories include Pete Woodson, Shell Western E&P Inc., Wayne Smith, Amoco Production Company, Frank Locascio, Geophysical Services, Inc., L.E. Bratos, Western Geophysical, Arnold Brower Jr., Chairman, Alaska Eskimo Whaling Commission, Darrel Kava, Secretary, Alaska Eskimo Whaling Commission, Nolan Solomon, Treasurer, Alaska Eskimo Whaling Commission, Thomas Napageak, Alaska Eskimo Whaling Commission.

²⁴¹ *See* 2012 Open Water Season Programmatic Conflict Avoidance Agreement (Mar. 1, 2012), available at http://www.nmfs.noaa.gov/pr/pdfs/permits/bp_openwater_caa2012.pdf, at § 108 (providing for meetings with subsistence hunters to discuss the timing and location of industrial activities); § 402(b) (notice of geophysical equipment testing); § 403 (monitoring plan for impacts on whales); § 503(a) (prohibiting waste discharge in some areas); § 203(b)(1) (providing for funding).

Following the CAA model, a tribe could consider negotiating an agreement with industry or researchers operating in a defined area regarding issues such as the timing of operations, avoiding subsistence disturbance, and altitude restrictions for aircraft. Nothing obliges industry to enter into such an agreement, but once signed, the agreement would be binding.

b. Oil Spill Contingency Mitigation Agreement

In the early 2000s, the North Slope Borough (NSB), AEWC, and ICAS developed a template for an Oil Spill Contingency Mitigation Agreement designed to provide emergency funding in the event that an oil spill reached the ocean and destroyed subsistence resources. The agreement requires the developer to put up a bond equivalent to the estimated costs of relocating subsistence hunters, transporting subsistence foods, and other likely expenses in the event of a catastrophic oil spill.²⁴² Some NSB authorizations have required development applicants to enter such agreements as a condition of approval,²⁴³ though NSB has not consistently required these agreements in connection with the rezoning process. In some cases, developers voluntarily signed agreements.

V. EXERTING TRIBAL JURISDICTION

Alaska tribes have several regulatory tools of their own, including the ability to issue use permits on Native allotments and townsites, jurisdiction over their members, the

²⁴² See, e.g., ExxonMobil Point Thomson Project, Oil Spill Contingency Mitigation Agreement, Part E (Nov. 17, 2009).

²⁴³ E.g., Planning Commission Resolution 2009-05 concerning the rezone for Beechy Point.

ability to issue persuasive resolutions regarding the activities of non-members, and innovative opportunities to expand jurisdiction as Native law evolves.

A. Exercising Jurisdiction over Allotments and Townsites

The *Venetie* decision suggests that Alaska tribes can still exert jurisdiction over land that is held in trust, including Native allotments and townsites²⁴⁴ considered “restricted property.”²⁴⁵

On the North Slope, both ICAS and NVB have exercised their authority to require use permits for industry activities taking place on allotments.²⁴⁶ These permits are processed through the Bureau of Indian Affairs (BIA). NVB has had problems with lack of awareness regarding permit requirements and lack of compliance. Some operators have moved activities just outside the allotment boundaries so a permit is not required, but owners still feel the impact.

A tribe could pass a zoning code regarding activities that can take place on restricted properties, or adopt an existing zoning code from the municipality in which the tribe is located. A zoning code could limit activities that would directly harm allotments

²⁴⁴ These are allotments established under the Alaska Native Allotment Act, Act of May 17, 1906, 43 U.S.C. §§ 270-1 to 270-3, repealed with savings clause, 43 U.S.C. § 1617(a) and townsites established under the Alaska Native Townsite Act, 43 U.S.C. §§ 733,735, repealed under Federal Land Policy Management Act, section 701, with savings clause. See *Aleknagik Natives Ltd v. U.S.*, 886 F.2d 237 (9th Cir. 1989).

²⁴⁵ See 25 CFR 1.4(a) (prohibiting state or local regulation of “zoning or otherwise governing, regulating, or controlling the use of any real or personal property . . . that is held in trust or is subject to a restriction against alienation imposed by the United States”); 25 CFR 1.4(b) (giving the Interior Secretary authority to agree on zoning regulations, in consultation with the affected tribe); *Santa Rosa Band of Indians v. Kings County*, 532 F. 2d. 655 (9th Cir. 1975), cert. den. 429 US 1038 (upholding 25 CFR 1.4); *People of South Naknek v. Bristol Bay Borough*, 466 F.Supp. 870 (D. Alaska 1979) (Taxation by local government prohibited).

²⁴⁶ NVB passed Resolution 2005-07, providing that \$10,500 be paid to allotment owners for revocable use permits to enter allotments.

by contaminating or altering the land. But it would only apply to the small percentage of land that constitutes restricted property, and it could not control activities happening just outside of this land.

B. Tribal Bylaws or Guidelines

This section provides two examples of tribes seeking to directly regulate a species.

1. Point Lay Beluga Guidelines

Point Lay's traditional beluga hunt is regulated by National Marine Fisheries Service and the Alaska Beluga Whale Committee, a co-management body endorsed by the Point Lay Village through an authorizing resolution in 1996.²⁴⁷ In 2008, the Tribal Council of Point Lay adopted its own bylaws to protect and manage the traditional community beluga hunts.²⁴⁸ The bylaws aim to regulate resident hunters, visitors (including visiting hunters, journalists, photographers, and scientists), and aircraft flying near Point Lay during the hunt period.

The Tribal Council is tasked with addressing violations. It is not clear if the Council could enforce all aspects of the Guidelines, particularly those related to visitors

National Marine Fisheries Service and Alaska Beluga Whale Committee (1999) Agreement between the National Marine Fisheries Service and the Alaska Beluga Whale Committee for Co-Management of the Western Alaska Beluga Whale Population, November 1, 1999, 8 pages, *available at* <http://alaskafisheries.noaa.gov/protectedresources/whales/beluga/abwcagrefinal.pdf>.

²⁴⁸ Robert J. Wolfe, *Sensitive Tribal Areas on the Arctic Slope, An Update of Areas, Issues, and Actions in Four Communities*, 8 (Sep. 2013), citing Bylaws for the Traditional Beluga Hunt by the Tribal Village of Point Lay, June 27, 2008, 4 pages. (Point Lay Native Village, 2008).

and scientists.²⁴⁹ But the Council would clearly have jurisdiction over the conduct of its own hunters, and the Guidelines may encourage voluntary compliance by others.

2. Kaktovik Polar Bear Viewing Guidelines

Commercial guides that conduct polar bear tours in Kaktovik are subject to a number of regulations, including the State of Alaska's insurance requirements, FWS's special use permit for commercial polar bear viewing operations in the Arctic National Wildlife Refuge, NSB's commercial recreation ordinances, and the City of Kaktovik's permit requirement for commercial filming of polar bears.²⁵⁰ FWS has a set of guidelines for polar bear viewing in the areas over which the agency has jurisdiction, including the land and waters of the Arctic Refuge outside of Kaktovik.²⁵¹ The content for these guidelines was provided by the Kaktovik Polar Bear Committee (KPBC).²⁵² KPBC also established similar guidelines for polar bear viewing within Kaktovik.²⁵³ The Guidelines aim to regulate polar bear viewers and commercial guides.²⁵⁴

FWS prints and posts the KPBC guidelines each year. KPBC has youth ambassadors that explain the Guidelines to outsiders.²⁵⁵ KPBC is an informal coalition,

²⁴⁹ The Federal Aviation Administration (FAA) has jurisdiction over aircraft, so the Tribal Council may not be able to enforce a 1500 altitude if this is inconsistent with FAA regulations. Also, the Tribal Council may not be able to control what people do with photographs taken in a public place on public land.

²⁵⁰ See generally, FWS, Polar Bear Viewing Information, available at <http://www.fws.gov/alaska/nwr/arctic/pdf/pbguidelines2013.pdf>; NSB 19.40.070.

²⁵¹ Communication with Jennifer Reed, Fish and Wildlife Service Visitor Services Coordinator, (Feb. 3, 2014); see also <http://www.fws.gov/alaska/nwr/arctic/pdf/pbguidelines2013.pdf>.

²⁵² Reed Communication, *supra* note 251.

²⁵³ *Id.*; Robert J. Wolfe, *Sensitive Tribal Areas on the Arctic Slope, An Update of Areas, Issues, and Actions in Four Communities*, 18 (Sep. 2013).

²⁵⁴ Wolfe, *supra* note 248, at 18.

²⁵⁵ Meghan Murphy, *Teen ambassadors volunteer to help polar bears, visitors coexist safely*, ARCTIC SOUNDER (Oct. 12, 2013), available at http://www.thearcticsounder.com/article/1241teen_ambassadors_volunteer_to_help_polar.

and many individuals and entities—including the Native Village of Kaktovik, Nanuq Commission, Kaktovik Iñupiat Corporation, and the U.S. Airforce—have played a role in the KPBC Guidelines.²⁵⁶

While tribal bylaws such as those enacted by Point Lay in 2008 on belugas²⁵⁷ could be enforced insofar as they regulate the conduct of Point Hope tribal members, bylaws pertaining to the conduct of outside hunters and aircraft would not be enforceable by the Tribe alone. In contrast, the Kaktovik polar bear guidelines established by village entities as well as the U.S. Fish and Wildlife Service²⁵⁸ are more easily enforced, because they have the support of the federal government and a federal regulatory component.

C. Drafting Resolutions

Even though a tribe cannot issue a binding resolution regarding activities on its traditional land and resources (outside of restricted property), it can craft a resolution that expresses its intent for how management should take place. Examples include the resolution enacted by many tribes opposing offshore drilling and Alaska House Bill 77, as well as the resolution drafted by the Native Village of Nuiqsut opposing the Greater Mooses Tooth (GMT) development as proposed by ConocoPhillips Alaska, Inc.²⁵⁹

While these resolutions cannot force government agencies to act, they are persuasive and may catch the attention of higher level officials. It is noteworthy that more

²⁵⁶ Reed Communication, *supra* note 251.

²⁵⁷ Wolfe, *supra* note 248, at 8 (citing Bylaws for the Traditional Beluga Hunt by the Tribal Village of Point Lay, June 27, 2008, 4 pages). (Point Lay Native Village, 2008).

²⁵⁸ Reed Communication, *supra* note 251; Wolfe, *supra* note 248, at 18.

²⁵⁹ Native Village of Nuiqsut Resolution 2013-10, Opposition to the Project for Development Greater Moose's Tooth (GMT-1) (Sep. 23, 2013).

than 30 tribes provided the state administration with resolutions opposing H.B. 77,²⁶⁰ and the bill did not pass in 2014 (despite changes proposed by the administration).²⁶¹ The resolution opposing GMT was provided to DOI officials in Washington D.C., which may have contributed to trips by these officials to Anchorage and the North Slope.

D. Putting Land into Trust Status

In *Akiachak v. Salazar*, Alaska Natives sought to invalidate regulations (25 C.F.R. Part 151) prohibiting the Interior Secretary from acquiring title to land in trust on behalf of tribes. On March 31, 2013, the U.S. District Court for the District of Columbia held that the Secretary has the authority under Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465 to take land into trust on behalf of Alaska Natives—not just on behalf of those in the Lower 48.²⁶² The court rejected the State's argument that ANCSA prohibits taking land into trust. The court did not grant a specific remedy until September 30, 2013, when it nullified the final sentence of 25 C.F.R. § 151.1.²⁶³ The State of Alaska appealed to the D.C. Circuit Court of Appeals.

On December 23, 2014, after a notice and comment period, the Bureau of Indian Affairs (BIA) published a revised regulation in the Federal Register removing the final

Alexandra Gutierrez, *Tribal Councils Express Opposition To Permitting Bill*, ALASKA PUBLIC MEDIA (Jan. 16, 2014), available at <http://www.alaskapublic.org/2014/01/16/tribal-councils-express-opposition-to-permitting-bill/>.

²⁶⁰ Wyn Menefee, Division Operations Manager, ADNR Div. Mines Land and Water (Jan. 17, 2014); see H.B. 77, Bill History/Action for 28th Legislature, THE ALASKA STATE LEGISLATURE, available at http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20%2077.

²⁶² *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013).

²⁶³ See *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1 (D.D.C. 2013); 25 C.F.R. § 151.1 (Go to the description of this Headnote. "These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it[s] members.").

sentence of 25 C.F.R. § 151.1.²⁶⁴ Pursuant to the district court's order, BIA will not approve any applications while the appeal is pending.²⁶⁵ Governor Walker, who took office at the end of 2014, chose to continue the litigation.²⁶⁶

Assuming the litigation is resolved in favor of the plaintiffs, a tribe could submit a written request to BIA, asking that the land be taken into trust. The Secretary cannot reject the request on grounds of ANCSA, though she could find that the request does not meet the criteria for trust status in 25 C.F.R., part 151. Under this chapter, land may be placed into trust if the tribe already owns an interest in the land, or the acquisition is necessary to facilitate tribal self-determination, economic development, or housing needs.²⁶⁷ The Secretary considers a number of factors, including

- The tribe's need for additional land;
- The purposes for which the land will be used;
- The impact on the State and Borough's tax revenue (since restricted property can't be taxed);
- Jurisdictional problems and potential conflicts of land use which may arise; and
- Whether BIA can handle the additional responsibilities related to the land.²⁶⁸

²⁶⁴ Bureau of Indian Affairs, Interior, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888-76897 (2014).

²⁶⁵ *Akiachak v. Jewell*, 995 F.Supp.2d 7 (D.D.C. 2014).

²⁶⁶ *Akiachak v. Jewell*, No. 13-5360, (D.D.C.) (Aug. 24, 2015), <http://law.alaska.gov/pdf/press/150824-Akiachak.pdf>.

²⁶⁷ 25 C.F.R. § 151.3 (2001).

²⁶⁸ 25 C.F.R. § 151.10 (2001).

If the land is being acquired for business purposes, the tribe must submit a plan specifying the anticipated economic benefits.²⁶⁹ The state and local governments have 30 days to provide written comment on the request.²⁷⁰

If a tribe could acquire a large amount of land that covers areas where tribal members conduct subsistence, trust status could be beneficial, as it would limit the state's control over land use and wildlife management and increase tribal control over the regulation of alcohol, domestic violence, and other health, safety, and welfare issues. But there would be additional oversight by the federal government, restrictions on alienation, and limitations on leasing without BIA approval. Also, the tribe would need to have enough resources to acquire and manage the land.

VI. CLAIMING ABORIGINAL RIGHTS

Aboriginal subsistence hunting and fishing rights are part of "aboriginal title," the possessory rights that tribes retain by virtue of their use and occupancy for centuries or even millennia. There have been several court cases on the issue of whether an Alaska tribe can claim aboriginal title to parts of the ocean that have traditionally been used for hunting and fishing. In *Iñupiat Community of the Arctic Slope v. United States*,²⁷¹ the Ninth Circuit extended the effect of ANCSA to the use of sea ice many miles from shore. This suggests that it would be difficult for a tribe to claim exclusive sovereign rights to

²⁶⁹ 25 C.F.R. § 151.11 (2001).

²⁷⁰ *Id.*

²⁷¹ *Inupiat Community of Arctic Slope v. United States*, 548 F.Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985).

the outer continental shelf of the Arctic Ocean.²⁷² Still, a tribe may be able to claim non-exclusive rights over offshore subsistence resources.²⁷³ Non-exclusive rights would probably mean that NOAA would have some rights to control fisheries and marine mammals and allocate resources in the claimed area among users.²⁷⁴

*Native Village of Eyak v. Blank*²⁷⁵ provides guidance on what a tribe or group would have to prove to demonstrate non-exclusive rights (no tribe has done so thus far):

- The claimant had “actual, exclusive, and continuous use and occupancy ‘for a long time’” of the claimed area, measured “in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers”;²⁷⁶
- The claimant’s members were the only users in the area, or other people were not able to access the area because of the claimant’s control;²⁷⁷
- The claimant constituted one social, cultural, and linguistic group;

²⁷² See also *Eyak Native Village v. Daley*, 364 F.3d 1057 (9th Cir. 2004), upheld by *Native Village of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012), *cert. denied* 134 S. Ct. 51(2013) (holding that “the federal paramountcy doctrine” barred the Native Villages’ aboriginal title claims to the OCS, including exclusive hunting and fishing rights); see also *North Slope Borough v. Andrus*, 642 F.2d at 611-12; see also *United States v. Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980).

²⁷³ In *Village of Gambell v. Hodel*, 869 F.2d 1273, 1278-80 (9th Cir. 1989), the Ninth Circuit held that ANCSA did not extinguish aboriginal claims to the OCS and left open the question of whether a tribe could assert “non-exclusive” subsistence rights in the OCS area.

²⁷⁴ In *United States v. Washington* and other cases, the courts have interpreted treaty-reserved rights to be non-exclusive, and have therefore apportioned resource rights between tribal and non-tribal users. See, e.g., *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *aff’d sub. nom.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979). Such rights are also subject to regulation of seasons, manner of fishing, and size of take for purposes of conservation. See, e.g., *Puyallup Tribe v. Dep’t of Game*, 391 U.S. 392 (1968).

²⁷⁵ *Native Vill. Of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 51; 187 L. Ed. 2d 23 (2013).

²⁷⁶ 688 F. 3d at 622 (citing *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967)).

²⁷⁷ *Id.* at 626.

- The claimant had (and has) the capacity, technology, and opportunity to hunt and fish in far and deep waters;
- The claimant had the capacity (and population level) to occupy the area;
- No other tribes or nations have fished or hunted in or on the periphery of the claimed area, as it was under the full dominion and control of the tribe; and
- The claimant has never voluntarily surrendered any of its aboriginal lands and waters.

If a tribe wants to pursue an aboriginal claim, it should be prepared to invest in anthropological research that could show a court that the *Native Village of Eyak v. Blank* criteria are met. It could then draft a resolution asserting aboriginal title, shaped by what the research can support. The resolution could call on the federal government to enter into an agreement recognizing aboriginal rights and outlining a management scheme. The tribe could share the resolution with the federal government, including the State Department, NOAA, and FWS. The tribe could also work with the media and international organizations like the Arctic Circle participants to bring international attention to the issue.

In a best-case scenario, the federal government would recognize the authority and work with the tribe on some type of management agreement. If the federal government ignores the resolution, the tribe could consider other strategies for offshore co-management or file suit.

VII. SUMMARY AND CONCLUSION

Below is a list of the key recommendations in this article:

- International Issues: Follow international case law and the proceedings of bodies such as the Arctic Council. Evaluate whether the current participants are sufficiently representing the tribe's international interests.
- Consultation: Consider entering into consultation MOUs with federal and state agencies as well as other entities (such as Alaska Native Corporations, other tribes, and municipalities) that the tribe regularly deals with, even if these entities lack consultation policies. The MOU could set the terms for government-to-government consultation and provide for regular and joint meetings if warranted.
- Specific Projects: Follow proposed development projects on or near the tribe's subsistence areas and consider the benefits of becoming a cooperating agency in a NEPA process, establishing an oversight committee, or providing for specific consultation meetings. At a minimum, ensure that the appropriate hearings are held under ANILCA Section 810 and that NEPA is followed.
- Advisory Councils: Identify the state, federal, and local boards with jurisdiction over the tribe's subsistence areas. Consider whether they have advisory councils to which tribal member representatives could be appointed, or whether a new advisory council should be formed to address a management issue. When establishing a new council, provide for bylaws that ensure a strong voice for tribal representatives.
- Co-management: Consider whether to pursue a co-management agreement under federal laws with a federal agency, or a more organic arrangement with state agencies regarding an area of land or a wildlife management issue. Consider how

- to bring both federal and state agencies as well as any relevant municipality into the process.
- Traditional Cultural Property: Consider designating an area as a TCP and then making sure consultation takes place under the National Historic Preservation Act in regard to the property.
 - Boroughs: For tribes in the unorganized borough, consider the pros and cons of forming a borough with nearby villages. For tribes already in a borough, consider working with the borough to adopt code changes granting the tribe a defined role in planning, zoning, and major permit decisions and creating a zone that protects subsistence.
 - Agreements with Corporations: Consider whether there are regulatory gaps that could be filled by voluntary agreements with corporations, both Native and non-Native. Perhaps the tribe could cooperate with a Native Village Corporation on an agreement to manage corporation lands, or form a Tribal Conservation District in partnership with USDA.
 - Tribal Ordinances on Restricted Property: Consider enacting a code or ordinances to require land use permits on restricted allotments and townsites as well as any property taken into trust on the tribe's behalf.
 - Tribal Ordinances on Other Property: For lands not under the tribe's exclusive jurisdiction, adopting tribal ordinances or resolutions governing land use and hunting. Encourage federal and state agencies to harmonize their regulations with

- those of the tribe, and/or pursue a co-management agreement or MOU with state and federal agencies through which tribal ordinances could be implemented.
- Trust Land: If the tribe has land or is able to obtain it through purchase or an agreement with a Native Corporation, consider asking the Secretary to place the land into trust status for the tribe's benefit.
 - Aboriginal Title: Consider whether the tribe is in a good position to pursue an aboriginal title claim over an offshore area. If so, conduct the appropriate research and enact a resolution asserting the claim.

It is certainly easier to describe these strategies in an article than to make them happen in real life. They all require a tribe to have financial resources and staff training and continuity. Also, a tribe may encounter resistance from entities that are content with the status quo. A tribe should prioritize what it wants to do based on its values and available resources, perhaps entering into consultation agreements with federal agencies and figuring out possibilities for partnering with a village corporation. It is encouraging that tribes have been able to enter agreements with a variety of entities even without provisions for such agreements in the law.