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# RIGHTS AND ROLES: ALASKA NATIVES AND OCEAN AND COASTAL SUBSISTENCE RESOURCES

*Jordan Diamond,\* Greta Swanson,\*\* and Kathryn Mengerink\*\*\**

## ABSTRACT

*This article explores the strengths and weaknesses of the two pillars of the framework for managing marine subsistence resources in Alaska: the pillar that protects Alaska Native rights to marine subsistence resources, and the pillar that protects the resources themselves. It focuses on how well the pillars support subsistence practices and Alaska Native leadership in the management framework. Part I summarizes the management challenge posed by the effects rapid climate change is causing in the Arctic, including impacts to the marine subsistence resources upon which Alaska Natives depend. Part II explores the laws and doctrines related to Alaska Native subsistence hunting and fishing rights in the marine environment and the benefits and drawbacks of the framework. Part III examines Alaska Native involvement in the existing system for managing and protecting subsistence marine resources and ensuring their long-term sustainability. The goal of the paper is to pro-*

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*vide the reader with an understanding of the framework that defines Alaska Natives' rights to use marine subsistence resources and to engage in managing the resources themselves.*

## I. MARINE SUBSISTENCE RESOURCES IN ALASKA

Countless generations of Alaska Natives have thrived in the often extreme conditions of Alaska. Subsistence hunting and fishing has been one of the keys to their survival—for thousands of years, the residents of the region have hunted on land, on ice, and in open water for resources that provide food, goods, and other services. The U.S. Fish and Wildlife Service has estimated that rural residents of Alaska harvest roughly 22,000 tons of wild food each year—an average of 375 pounds per person.<sup>1</sup> From great whales to caribou, subsistence resources are core not only to Alaska Native sustenance but also to their social and economic well-being.<sup>2</sup>

Many subsistence species spend either their entire or a portion of their lives in ocean and coastal waters. These include marine mammals such as whales, seals and polar bears, saltwater fish, and seabirds. This article focuses on the legal system that protects Alaska Native subsistence and fishing rights, and the role of Alaska Natives in the legal system for managing and protecting subsistence resources generally.

While Arctic marine subsistence resources have supported humans for thousands of years, rapidly changing conditions in the region may affect their long-term availability.<sup>3</sup> Alaska has experienced double the rate of warming compared to the rest of the country, a trend that is predicted to continue—the climate in Alaska is projected to warm by four to eight degrees Fahrenheit by the end of the 21st cen-

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1. *Federal Subsistence Management Program: About the Program*, U.S. Fish & Wildlife Serv., <http://alaska.fws.gov/asm/about.cfm> (last updated June 3, 2008).

2. For multiple articles on subsistence hunting and fishing by subsistence users, see *Crisis on the Last Frontier*, 22.3 CULTURAL SURVIVAL QUARTERLY (1998), available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/223-fall-1998-crisis-last-frontier>; see also Harry Brower, Jr. & Taqulik Hepa, *Subsistence Hunting Activities and the Inupiat Eskimo*, 22.3 CULTURAL SURVIVAL QUARTERLY (1998); RONALD J. GLASS ET AL., U.S. FOREST SERV., RESEARCH PAPER NE-638, *SUBSISTENCE AS A COMPONENT OF THE MIXED ECONOMIC BASE IN A MODERNIZING COMMUNITY* (1989); Katie J. Moerlein & Courtney Carothers, *Total Environment of Change: Impacts of Climate Change and Social Transitions on Subsistence Fisheries in Northwest Alaska*, 17 *ECOLOGY & SOC'Y* 10 (2012).

3. See, e.g., Moerlein & Carothers, *supra* note 2; Sue E. Moore & Henry P. Huntington, *Arctic Marine Mammals & Climate Change: Impacts and Resilience*, 18 *ECOLOGICAL APPLICATIONS* S157 (2008); RONALD O'ROARKE, *CHANGES IN THE ARCTIC: BACKGROUND AND ISSUES FOR CONGRESS*, CONGRESSIONAL RESEARCH SERVICE NO. R41153 (2013).

ture.<sup>4</sup> Among its many other effects, this temperature rise will likely have immense impacts on ocean and coastal conditions. Already climate change is altering the extent and thickness of sea ice,<sup>5</sup> which affects the presence of marine resources and access to them.

In addition to temperature increases, increasing atmospheric carbon dioxide is altering the acidity of marine waters,<sup>6</sup> which may change species habitats, distributions, and behavior, making them both more vulnerable and more difficult to access. Other changes include melting permafrost,<sup>7</sup> which not only increases the risk of subsidence but also alters freshwater supply and runoff, among other things. Furthermore, climate change is altering weather patterns, which could put hunters at greater risk as conditions become less predictable and traditional environmental cues less reliable.<sup>8</sup>

Simultaneously, commercial activity in Arctic waters is steadily increasing as sea ice recedes and consumer demand expands. Arctic Alaska is estimated to hold a mean average of 29,961 million barrels of undiscovered oil and 221,398 billion cubic feet of natural gas,<sup>9</sup> and in the summer of 2012, Shell engaged in oil and gas exploratory drilling in federal waters of both the Chukchi and Beaufort Seas.<sup>10</sup> With drilling comes the expansion of exploratory activities that include geophysical testing and increased ship traffic, as well as the risk of oil spills. As sea ice continues to decrease in the region, longer ice-free seasons may enable new commercial shipping routes.<sup>11</sup> As the region becomes more accessible to vessel traffic, there may be increased risk of ship strikes and invasive species introduction. In addition, tourism is expanding in the Arctic.

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4. See NAT'L CLIMATE ASSESSMENT & DEV. ADVISORY COMM., NATIONAL CLIMATE ASSESSMENT—DRAFT FOR PUBLIC COMMENT, Ch. 22—Alaska, at 760–61 (v. 11 Jan 2013).

5. *Id.* at 762–66.

6. *Id.* at 771–73.

7. *Id.* at 767–70.

8. U.S. GEOLOGICAL SURVEY, DEP'T OF THE INTERIOR, CIRCULAR 1379, THE UNITED STATES NATIONAL CLIMATE ASSESSMENT—ALASKA TECHNICAL REGIONAL REPORT (Carl J. Markon et al. eds., 2012).

9. U.S. GEOLOGICAL SURVEY, DEP'T OF THE INTERIOR, FACT SHEET 2008-3049, CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE (2008).

10. The news coverage before and during Shell's oil and gas exploration was extensive. For a thorough review of Shell's 2012 exploratory activities, see U.S. DEP'T OF THE INTERIOR, REPORT TO THE SECRETARY, REVIEW OF SHELL'S 2012 ALASKA OFFSHORE OIL AND GAS EXPLORATION PROGRAM (Mar. 8, 2013), available at <http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf>.

11. See Markon et al., eds., *supra* note 8, at 59-60.

The changing conditions and increasing commercial interest mean that Arctic Ocean and coastal subsistence resources face increasing risk of excessive human impact. This risk highlights the need for an effective management system that ensures the long-term maintenance of the ecosystem and provides food security for Alaska Natives. Achieving food security requires maintenance of strong subsistence hunting and fishing relative to other interests. Alaska Native leadership is critical to the success of such efforts to manage impacts to marine subsistence resources in the face of these growing challenges. Alaska Natives have an integral relationship with subsistence resources and the marine environment, and many Arctic communities hold traditional and contemporary ecological knowledge (“TEK”) learned from experience and handed down through generations about subsistence species and the ecosystems that support them.<sup>12</sup> In addition, subsistence communities stand to be most affected by changes in the long-term health and abundance of subsistence marine resources, with potential nutritional, cultural, and economic implications.<sup>13</sup>

## II. ALASKA NATIVE RIGHTS TO MARINE SUBSISTENCE RESOURCES

The following section provides an overview of the doctrines, common law decisions and statutory and regulatory frameworks that define Alaska Native subsistence rights today. The framework is neither simple nor transparent. The overview is followed by a discussion of its strengths, weaknesses, and uncertainties.

### A. *Aboriginal Rights, ANCSA, and ANILCA*

The relationship between the federal government and the indigenous peoples of the United States is an evolving one. Addressed

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12. D.S. Pensely, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 ENVTL. L. REP. 10366 (2012) (“The vertically integrated market and its enabling cornucopian myth—the unbounded nature of oceans and lakes as a generative source of calories and dollars and concurrently as an assimilative sink for wastes—have no place within a regime based upon the right to celebrate and to perpetuate the long-term health of a watershed.”) (citations omitted) (discussing the preservation of subsistence in the Copper River Delta and the potential application of the National Historic Preservation Act).

13. For discussion of food security for the Inuit in Alaska, including subsistence and its importance to Inuit diet, culture, and food economies, see Sophie Thériault et al., *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35 (2005). “. . . Inuit subsistence activities and foods are not valuable merely from a nutritional and health perspective. They also correspond to the food preferences of a large number of Alaskan Inuit and promote both the cultural vitality and the food economy of Inuit communities.” *Id.* at 49 (citations omitted).

through treaties, statutes, and common law development, the relationship is, in part, defined by a complex suite of laws and policies with resounding implications for those affected. With respect to Alaska Natives, the relationship became more complex when the United States purchased Alaska from Russia in 1867,<sup>14</sup> admitted Alaska as a State in 1959,<sup>15</sup> and implemented the Alaska Native Claims Settlement Act in 1971.

Members of Alaska Native villages are identified under federal law as tribes.<sup>16</sup> This federal tribal status is also recognized by the State of Alaska.<sup>17</sup> As federally-recognized tribes, they are considered to be “domestic dependent nations”<sup>18</sup>—they retain sovereign powers of self-government and self-determination and have a relationship with the U.S. federal government that is often described as a trust relationship.

In the first Supreme Court decision regarding the relationship between the federal government and Indian tribes, the Court held that tribes retained a right of occupancy to land unless the federal government extinguished that right.<sup>19</sup> The concept of aboriginal title derived from this and subsequent cases. According to these cases, tribes retain

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14. The treaty for the purchase of Alaska by the United States from Russia was signed and ratified by the Senate in 1867, although the House of Representatives did not appropriate the necessary monies until 1868. See *JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA*, Vol. 17, p. 675 (Apr. 9, 1867); *Congressional Globe*, House of Representatives, 40th Congress, 2nd Session, p. 4055 (July 14, 1868); both documents accessible online via the Library of Congress, <http://www.loc.gov/rr/program/bib/ourdocs/Alaska.html>.

15. Congress provided for the entry of Alaska as a state in July, 1958. See *An Act to Provide for the Admission of the State of Alaska into the Union*, Pub. L. No. 85-508, 72 Stat. 339 (July 7, 1958). President Eisenhower signed the proclamation admitting the State of Alaska into the Union the following January, Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 3, 1959).

16. *Federally Recognized Indian Tribe List Act of 1994*, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994); 25 U.S.C. §§ 479a, 479a-1. The Act defines an “Indian tribe” as “any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.” Historically, tribes obtained federal recognition through treaties and other means, but under current law, a tribe becomes “federally recognized” by congressional act, administrative procedure, or decision of a U.S. court. The Department of the Interior must update the list regularly and publish it annually, and only Congress can remove a tribe from the list. The 2012 list includes 229 Alaska Native entities. *Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs*, 77 Fed. Reg. 47868-01 (Aug. 10, 2012).

17. *Administrative Order No. 186*, Office of the Governor, Juneau, Alaska (Sept. 29, 2000), available at <http://www.gov.state.ak.us/admin-orders/186.html> (establishing the policy of the State of Alaska on Tribes and their Tribal governments).

18. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

19. *Johnson v. M’Intosh*, 21 U.S. 543 (1823). For a robust discussion of aboriginal title generally and in Alaska specifically, see DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS*, ch. 2 (3d ed. 2012).

aboriginal title, or the right of occupancy, unless it is clearly extinguished by Congress.<sup>20</sup> Aboriginal title extends to a variety of rights, including hunting and fishing rights on aboriginal lands and waters.<sup>21</sup>

Aboriginal title can be extinguished by treaties between the United States and specific tribes, as well as through statutes that explicitly extinguish it. When Alaska was admitted as a state in 1959, the Alaska Statehood Act did not extinguish aboriginal title within the state.<sup>22</sup> During the next decade, however, conflict arose over land title and the existence and extent of Alaska Native rights; among the major driving forces for clarification was the discovery of oil at Prudhoe Bay in the late 1960s. The result was the passage of the federal Alaska Native Claims Settlement Act (ANCSA) in 1971,<sup>23</sup> which created a land tenure framework for Alaska Natives that is still in place today.

By its terms, ANCSA settled Alaska Native land claims based on aboriginal title in exchange for the creation of Native-owned corporations, fee simple title to select lands, and a one-time cash payment.<sup>24</sup> In exchange, ANCSA expressly extinguished all aboriginal land claims in the state, including “any aboriginal hunting or fishing rights.”<sup>25</sup> This extinguishment includes any claims to federal or state lands or

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20. David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1, 3–5 (2004).

21. See, e.g., *Native Village of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012) (per curiam) (finding that the Native Village of Eyak failed to present facts necessary to demonstrate that they had exclusive and unchallenged claim to the OCS area in question and therefore to hunting and fishing resources).

22. See Pub. L. No. 85-508, *supra* note 14, at § 4 (in which the United States disclaims right and title to lands and other property in Alaska, without mentioning aboriginal title). In subsequent litigation, the Supreme Court found that this section was meant to preserve the status quo of the rights that existed before statehood. See *CASE & VOLUCK*, *supra* note 19, at 73-74 (citing *Kake v. Egan*, 369 U.S. 60 (1962)).

23. James D. Linxwiler, *Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, Paper 12, 53RD ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE (2007), available at <http://www.lbblawyers.com/anca/ANCSA%20at%2035%20Delivering%20on%20the%20Promise%20Proof%2010-25-07.pdf>.

24. The Act notes that Congress had found “an immediate need for a fair and just settlement” for all aboriginal land claims in Alaska. 43 U.S.C. § 1601. The Act created thirteen regional Native-owned corporations, one for each of the twelve geographic regions of the state and one for nonresident Natives. *Id.* § 1606. It also established over 200 for-profit or non-profit corporations for each Native village. *Id.* § 1607. In total, the Native corporations received roughly forty-five million acres of land; village corporations divided the surface estate of up to twenty-two million acres, in amounts proportionate to their populations, while the subsurface rights to those areas generally (although not always) went to the regional corporations. 43 U.S.C. §§ 1610–13. For a concise description of the details of the conveyances, see *CASE & VOLUCK*, *supra* note 19, at 170–78. The Act also created the Alaska Native Fund, into which the federal and state government deposited \$962.5 million, to be distributed among the regional corporations according to the size of their respective Native populations. *Id.* § 1605.

25. 43 U.S.C. § 1603(b).

resources, and to state waters. But the physical extent of this extinguishment has been the subject of litigation in the years since. One issue that has been litigated is aboriginal title in federal waters and seabed (beyond three nautical miles from shore).

In *Amoco Production Co. v. Village of Gambell*,<sup>26</sup> the Supreme Court held that the Alaska National Interest Lands Conservation Act<sup>27</sup> does not apply to the Outer Continental Shelf (“OCS”); in *People of Village of Gambell v. Hodel*,<sup>28</sup> the Ninth Circuit construed the reasoning to apply to ANCSA as well. Therefore ANCSA does not extinguish aboriginal title on the OCS. In *Native Village of Eyak v. Trawler Diane Marie, Inc.*,<sup>29</sup> however, the Ninth Circuit affirmed that the paramouncy doctrine<sup>30</sup> precludes Alaska Native *exclusive* rights to use and occupancy of the OCS based on aboriginal title. This leaves open the possibility that Alaska Natives retain *non-exclusive* aboriginal use rights in federal waters beyond three nautical miles from shore.

That said, it may be difficult for Alaska Natives to provide sufficient evidence to demonstrate aboriginal title in federal waters and seabed. In a second case involving the Native Village of Eyak’s aboriginal rights to fisheries resources in federal waters, the Ninth Circuit found that the Village did not provide the evidence needed to demonstrate that it had an “exclusive and unchallenged claim to the disputed area” and thus establish aboriginal rights.<sup>31</sup> The Ninth Circuit heard the case en banc in order to resolve potential conflicts between case law regarding the coexistence of aboriginal rights and the paramouncy doctrine.<sup>32</sup> Because it upheld the district court finding that the plaintiff villages had not successfully demonstrated aboriginal title,

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26. 480 U.S. 531 (1987).

27. See *infra* text surrounding notes 37–44.

28. 869 F.2d 1273 (9th Cir. 1989).

29. 154 F.3d 1090 (9th Cir. 1998). For a critical discussion of the case, see Bloch, *supra* note 20.

30. The paramouncy doctrine holds that in the absence of express transfer, the United States retains primary rights to and control of all offshore areas due to the involvement of national concerns and responsibilities such as foreign commerce, foreign relations, and national defense. See 154 F.3d at 1092-93 (citing *United States v. California*, 332 U.S. 19 (1947)); see also *United States v. Louisiana*, 339 U.S. 699, 704 (1950).

31. *Native Village of Eyak v. Blank*, 688 F.3d 619, 624 (9th Cir. 2012) (per curiam) (citing *Sac & Fox Tribe of Indians of Okla.*, 315 F.2d 896, 906 (Ct. Cl. 1963)). A dissenting opinion representing four judges would have held that the Chugach “established aboriginal hunting and fishing rights within *at least part* of the claimed area of the OCS.” *Id.* at 634 (W. Fletcher, dissenting) (emphasis added). Three of those judges would have also held that aboriginal rights on the OCS may exist without conflicting with the paramouncy doctrine. *Id.* at 636.

32. The court cited the potential conflict between *Village of Gambell v. Hodel*, 869 F.2d 1273, and its holding “that aboriginal rights and the doctrine of federal paramouncy can



however, it did not reach the conflict question.<sup>33</sup> The district court found the plaintiffs “were unable to prove aboriginal rights because they did not show by a preponderance of the evidence that they were in a position to occupy or exercise exclusive control of the claimed areas.”<sup>34</sup> While the court found the plaintiffs had demonstrated continuous use and occupancy, it did not find they had demonstrated exclusivity, including the right to expel, over the claimed areas.<sup>35</sup>

While ANCSA extinguished *aboriginal* hunting and fishing rights in Alaska, the congressional record indicates that Congress intended for the Secretary of the Interior to protect Alaska Native rights to subsistence.<sup>36</sup> However, this intention was not expressed in the Act itself. Thus ANCSA’s language left Alaska Native rights to subsistence resources uncertain. Some clarification was achieved in 1980 with the passage of the Alaska National Interest Lands Conservation Act (ANILCA).<sup>37</sup> The goals of ANILCA were to set aside land for preservation and protection, and “to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.”<sup>38</sup>

ANILCA set aside over 100 million acres of land in Alaska for national parks, wildlife refuges, forests, or monuments. In addition, Title VIII of the Act addressed the protection of rural Alaska residents’ subsistence rights. It defined subsistence 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.<sup>39</sup>

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coexist,” and *Native Village of Eyak*, 154 F.3d 1090, and its holding “that the paramountcy doctrine trumps Native claims based on aboriginal title.” *Id.* 621.

33. *Id.* at 621–22.

34. *Id.* at 622–23 (citations omitted).

35. *Id.* at 623.

36. See *CASE & VOLUCK*, *supra* note 19, at 291–92 (“The Conference Committee report that accompanied the Claims Act makes it clear that Congress viewed neither the extinguishment of hunting and fishing rights nor the absence of specific subsistence provisions as the end of Alaska Native subsistence interests.”) (citing H.R. Conf. Rep. No. 92-746, 92nd Cong., 1st Sess., Dec. 14, 1971).

37. 16 U.S.C. §§ 3101–3103.

38. 16 U.S.C. § 3101. The Congressional declaration of findings notes that “the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.” *Id.* § 3111(1).

39. 16 U.S.C. § 3113 (2012).

Thus subsistence rights under ANILCA are not specific to Alaska Natives but apply to all “rural Alaska residents.” Title VIII also establishes a priority on public lands for the taking of fish and wildlife by rural Alaska residents for non-wasteful subsistence uses over all other purposes.<sup>40</sup> This priority applies on all federal lands in Alaska, but not state lands (see below for discussion of subsistence management on state lands). Under ANILCA, subsistence takings may be restricted when necessary “to protect the continued viability” of the fish and wildlife.<sup>41</sup>

With regard to marine species, it is important to note that ANILCA is preempted by the Endangered Species Act, Marine Mammal Protection Act of 1972, Migratory Bird Treaty Act, and Magnuson-Stevens Fishery Conservation and Management Act.<sup>42</sup> Therefore, these laws play a leading role in the management of subsistence resources in the marine environment as discussed below.

Initially, management of the subsistence program under ANILCA was delegated to the state of Alaska—the Act provided for State management if it instituted laws of general applicability that implemented the subsistence definition, preference, and participation specified in ANILCA.<sup>43</sup> Alaska did so, but the Alaska Supreme Court found that ANILCA’s rural resident subsistence preference, by excluding urban residents, violated the Alaska State Constitution.<sup>44</sup> Thus, Alaska became noncompliant with ANILCA, and the Departments of the Interior and Agriculture assumed responsibility for implementing the management program.

Federal oversight of subsistence hunting and fishing under ANILCA continues today under the Federal Subsistence Management Program.<sup>45</sup> The multi-agency program monitors subsistence hunting and fishing with the goal of maintaining sustainable fish and game populations. It is overseen by the Federal Subsistence Board, which consists of regional directors from the U.S. Fish and Wildlife Service

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40. 16 U.S.C. § 3114.

41. *Id.* Restrictions must be implemented according to the dependence of the populations on the resources, local residency, and the availability of alternatives. *Id.*

42. 16 U.S.C. § 3125.

43. 16 U.S.C. § 3115(d).

44. *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989) (“We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.”). For a discussion of the possibility that the federal and state provisions are not in conflict, cf. Jack B. McGee, *Subsistence Hunting and Fishing in Alaska: Does ANILCA’s Rural Subsistence Priority Really Conflict with the Alaska Constitution?*, 27 ALASKA L. REV. 221 (2010).

45. See 50 C.F.R. §§ 100.1 – 100.28.

(FWS), National Park Service, Bureau of Land Management, Bureau of Indian Affairs, U.S. Forest Service, two rural representatives, and a chairman appointed by the Secretaries of the Interior and Agriculture. The Program divides Alaska into ten geographic regions, each of which has a Regional Advisory Council makes recommendations regarding subsistence hunting and fishing regulations and that advises the Federal Subsistence Board on subsistence practices in each region.<sup>46</sup>

The State of Alaska oversees subsistence on state and private lands within the state, except for species under federal jurisdiction. As noted previously, the Alaska Supreme Court rejected the legality of providing preferential allocations to "rural residents" to harvest fish and wildlife for subsistence purposes.<sup>47</sup> Thus, in 1992, the State of Alaska amended its subsistence law to grant a subsistence priority to all Alaska residents who qualify as subsistence users, regardless of where they live.<sup>48</sup> In subsistence areas,<sup>49</sup> the Alaska Board of Fisheries and Board of Game are responsible for identifying subsistence fish stocks and game populations,<sup>50</sup> based on a variety of criteria including a long-term consistent pattern of noncommercial taking, use, and reliance, and whether the pattern includes the passing of knowledge between generations, among others.<sup>51</sup> The Boards must then determine, with preference for subsistence uses, what portion of the population can be harvested.<sup>52</sup> If the Board finds it necessary to restrict consumption, it is required to restrict non-subsistence harvests before limiting subsistence harvests.<sup>53</sup>

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46. *Id.* Each Regional Advisory Council is comprised of between 10 and 13 local residents who review policies and management plans and provide recommendations and other relevant information to the Federal Subsistence Board. *See Regional Advisory Councils*, Federal Subsistence Management Program, U.S. Fish & Wildlife Service, <http://alaska.fws.gov/asm/rac.cfml>.

47. McDowell, 785 P.2d at 9.

48. *See* Subsistence Use and Allocation of Fish and Game, ALASKA STAT. § 16.05.258. Again, this priority only applies to state-managed species – for example, marine mammals remain under federal jurisdiction regardless of location.

49. The Boards (i.e., the Board of Fisheries and the Board of Game) jointly identify by regulation the boundaries of nonsubsistence areas. ALASKA STAT. § 16.05.258(c). The subsistence priority does not apply in nonsubsistence areas. ALASKA ADMIN. CODE TIT. 5, § 99.016. Nonsubsistence areas are identified at ALASKA ADMIN. CODE TIT. 5, § 99.015.

50. ALASKA STAT. § 16.05.258(a).

51. ALASKA ADMIN. CODE TIT. 5, § 99.010(b).

52. ALASKA STAT. § 16.05.258(a)-(b).

53. ALASKA STAT. § 16.05.258(b). If it is necessary to restrict subsistence uses, the regulations provide criteria for differentiating among subsistence users. ALASKA ADMIN. CODE TIT. 5, § 99.010(c). One of the Tier II criteria, proximity of the user's residence to the stock or population, was struck down by the Alaska Supreme Court in 1995, severing it from the remainder of the statute. *See* CASE & VOLUCK, *supra* note 19, at 309; *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

An open question concerns the extent of federal versus state jurisdiction in navigable waters. The issue of native rights in navigable waters in Alaska was the central issue in the *Alaska v. Babbitt* and *Katie John* litigation.<sup>54</sup> The matter was whether all navigable waters within the State of Alaska fell within the statutory definition of federal “public lands” for purposes of federal subsistence management. The answer depended on whether, under the reserved water rights doctrine,<sup>55</sup> the United States intended to reserve un-appropriated waters in Alaska as necessary to accomplish the purpose of the reserved land—the purpose, in this case, being subsistence use. The Ninth Circuit upheld the application of the reserved water rights doctrine; thus, federal public lands in Alaska include both lands to which the federal government holds title and “certain navigable waters,” which the federal agencies administering the subsistence priority are responsible for identifying.<sup>56</sup> Litigation on this subject continues.<sup>57</sup>

In sum, there are multiple legal frameworks affecting subsistence hunting and fishing in Alaska and adjacent waters. First, the federal government lays out a framework for subsistence hunting and fishing on federal public lands and certain navigable waters within Alaska (i.e., out to three nautical miles from shore). Second, the state of Alaska delineates a framework for subsistence hunting and fishing on state and private lands in Alaska (i.e., out to three nautical miles from shore). A Memorandum of Understanding helps state and federal staff coordinate their subsistence management and related information exchange within these areas.<sup>58</sup> Finally, the legal framework for

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54. *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698 (9th Cir. 1995), cert. den. 516 U.S. 1036 (1996); affirmed by the Ninth Circuit in *Katie John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en banc).

55. The reserved water rights doctrine, derived from the Commerce and Property Clauses of the U.S. Constitution, holds that when the federal government “reserves” public lands for a federal purpose, it also reserves un-appropriated waters adjacent to or within the public lands to the extent necessary for the purpose of the reservation. *Katie John II*, 72 F.3d at 703 (citing *Cappaert v. United States*, 426 U.S. 128 (1976)). Intent can be inferred. *Id.* at 138.

56. *Babbitt*, 72 F.3d 698.

57. For a more thorough discussion of *Alaska v. Babbitt*, *Katie John*, and related case law including the *Totemoff* decision, please see CASE & VOLUCK, *supra* note 19, at 305–08. On July 5, 2013, the Ninth Circuit issued a decision on two consolidated challenges to the Interior Secretary’s 1999 Final Rules implementing the parts of ANILCA relevant to subsistence, based on interpretation of the federal reserved water rights doctrine. The court upheld the *Katie John I* decision and the 1999 Final Rules. *Katie John v. United States*, No. 09-36122 (9th Cir. July 5, 2013).

58. MEMORANDUM OF UNDERSTANDING FOR COORDINATED INTERAGENCY FISH AND WILDLIFE MANAGEMENT FOR SUBSISTENCE USES ON FEDERAL PUBLIC LANDS IN ALASKA BETWEEN THE FEDERAL SUBSISTENCE BOARD (U.S. FISH AND WILDLIFE SERVICE, U.S. FOREST SERVICE, NATIONAL PARK SERVICE, BUREAU OF LAND MANAGEMENT, BUREAU OF INDIAN

federal marine waters and seabed (i.e., from three to 200 nautical miles from shore) lies outside of the ANILCA and state subsistence priority frameworks, and has an added layer of complexity with the possibility of retained non-exclusive aboriginal title to areas of the OCS and its resources in addition to the multiple federal laws that govern these areas.

*B. Subsistence rights to marine mammals, protected species, and migratory birds*

In addition to overarching subsistence rights on federal lands and in federal waters, federal laws also generally provide for the continuation of Alaska Native subsistence harvests of marine mammals and threatened and endangered species. The species management measures established by these statutes are described in greater detail in Part III.

The Marine Mammal Protection Act (MMPA) prohibits the taking of marine mammals and importation of marine mammal products, unless specifically permitted.<sup>59</sup> Alaska Native subsistence activities, however, are exempt from the Act's taking prohibitions so long as they are not conducted in a wasteful manner.<sup>60</sup> The MMPA applies in all U.S. jurisdictional areas, including state and federal waters, as well as to anyone under U.S. jurisdiction on the high seas.<sup>61</sup> The Act encourages, but does not require, the acting Service (either the Department of the Interior's FWS or the Department of Commerce's National Marine Fisheries Service (NMFS)) to designate essential habitat for each marine mammal species.<sup>62</sup>

Per the subsistence exemption, an Alaska Native living along the North Pacific or Arctic Ocean may take marine mammals for subsistence purposes, including selling edible portions in native villages and towns for native consumption, or for the creation and sale (including interstate commerce) of authentic native articles of handicrafts and

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AFFAIRS, AND SECRETARIAL APPOINTED CHAIR) AND STATE OF ALASKA (ALASKA DEPARTMENT OF FISH AND GAME (ADF&G) AND ALASKA BOARD OF FISHERIES AND ALASKA BOARD OF GAME (STATE BOARDS)) (2008), available at <http://alaska.fws.gov/asm/pdf/mou.pdf>. The Federal Subsistence Board (FSB) is currently working on an updated version of the Memorandum. See 2012 and 2013 FSB meeting agendas and transcripts, <http://alaska.fws.gov/asm/board.cfml>.

59. See 16 U.S.C. § 1371-72. The term "take" is defined to include "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(13).

60. 16 U.S.C. § 1371(b).

61. 16 U.S.C. § 1372.

62. 16 U.S.C. § 1361(2).

clothing.<sup>63</sup> However, the Secretary of the jurisdictional agency (either Commerce or the Interior) may regulate subsistence takings if the species is determined to be depleted. In addition to public notice and hearings, before any determination of depletion is made or regulations promulgated, the Secretary must demonstrate that it is supported by substantial evidence.<sup>64</sup>

The Endangered Species Act (ESA) prohibits the taking of listed species within the United States or its territorial sea.<sup>65</sup> If an otherwise lawful action, either by a state or private party, would incidentally result in the taking of a listed species, the Service with jurisdiction (FWS or NMFS) can issue an “incidental take permit” allowing the activity to proceed.<sup>66</sup>

The ESA provides an exception for Alaska Natives—or non-native permanent residents of Alaskan villages—from the prohibition on taking listed species so long as the taking is primarily for subsistence purposes and not conducted in a wasteful manner.<sup>67</sup> The statute defines subsistence as including the sale of edible portions in native villages and towns for native consumption,<sup>68</sup> and non-edible byproducts can be made into authentic native handicrafts and clothing and then sold in interstate commerce.<sup>69</sup> Similar to the MMPA, under the ESA the Secretary of the jurisdictional agency may regulate subsistence harvest of a protected species if it is being “materially and negatively” affected by the subsistence use. The regulations, preceded by public notice and hearings, must be removed once they are no longer needed.<sup>70</sup>

Subsistence rights also are recognized in international instruments, as well as the U.S. statutes that implement them domestically.

63. 16 U.S.C. § 1371(b)(1)-(2). The statute defines “authentic native articles of handicrafts and clothing” as “items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices.” They include, among other items, “weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.” *Id.* § 1371(b)(2).

64. 16 U.S.C. § 1371(b)(3).

65. 16 U.S.C. § 1538(a)(1)(B). The term “take” is defined to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

66. 16 U.S.C. § 1539(a)(1)(B).

67. 16 U.S.C. § 1539(e)(1)-(2). Non-native permanent residents of an Alaska Native village must be primarily dependent on subsistence.

68. 16 U.S.C. § 1539(e)(3)(i).

69. 16 U.S.C. § 1539(e)(1). The statutory definition of “authentic native articles of handicrafts and clothing” under the ESA is the same as the definition under the MMPA. *See supra* note 63; 16 U.S.C. § 1539(e)(3)(ii).

70. 16 U.S.C. § 1539(e)(4).

The Migratory Bird Treaty Act (MBTA) prohibits the actual or attempted pursuit, hunt, take, capture, kill, possession, sale, barter, purchase, shipment, export, import, transport, or carriage of any migratory bird protected by four treaties that have been enacted between the United States and Canada (1916),<sup>71</sup> Mexico (1936), Japan (1972), and Russia (1976).<sup>72</sup> The prohibition applies both to the birds and to their nests and eggs. The list of migratory bird species includes numerous seabirds and shorebirds found in Alaska;<sup>73</sup> the state is home to the majority of seabirds in the United States and up to half of all shorebirds in North America.<sup>74</sup>

The treaties with Canada and Mexico prohibited take of migratory birds during the nesting season, from March 10 to September 1. The timing of this prohibition was problematic for Alaska Natives in the Arctic who only had access to the species during the summer months; it effectively prohibited any harvest by subsistence users in the Arctic. A 1978 amendment to the MBTA allows Alaska Natives to continue traditional subsistence summer harvests of migratory birds and their eggs.<sup>75</sup> The United States and Canada later negotiated a protocol to the treaty requiring that Alaska Natives have a meaningful role in management of the subsistence harvest.<sup>76</sup> The U.S. Senate approved the protocol in 1997 and the Fish and Wildlife Service issued implementing regulations in 2002.<sup>77</sup>

In implementing the protocols, the MBTA allows the Secretary of the Interior to issue regulations permitting Alaska Natives to take

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71. The treaty was originally established between the U.S. and Great Britain, which was acting on behalf of Canada.

72. 16 U.S.C. § 703(a).

73. The list of migratory birds is available at 50 C.F.R. § 10.13; the list of subsistence migratory bird species is available at 50 C.F.R. § 92.22. "Seabirds" are all species within the families Alcidae, Laridae, Procellariidae, and Phalacrocoracidae, and "shorebirds" all are all species listed within the families Charadriidae, Haematopodidae, and Scolopacidae, listed at 50 C.F.R. § 92.32. 50 C.F.R. § 92.4.

74. U.S. Fish & Wildlife Service, Migratory Bird Management, Alaska Region, Shorebirds, <http://alaska.fws.gov/mbsp/mbm/shorebirds/shorebirds.htm> (last updated Sept. 18, 2008); U.S. Fish & Wildlife Service, Migratory Bird Management, Alaska Region, Seabirds, <http://alaska.fws.gov/mbsp/mbm/seabirds/seabirds.htm> (last updated Sept. 18, 2008).

75. Section 3(h) of the Fish and Wildlife Improvement Act of 1978 (P.L. 95-616) provided for the subsistence exemption.

76. Protocol between the Government of the United States of America and the Government of Canada Amending the 1916 Convention between Great Britain and the United States of America for the Protection of Migratory Birds in Canada and the United States (1996), Article II(4)(2)(b)(ii).

77. Procedures for Establishing Spring/ Summer Subsistence Harvest Regulations for Migratory Birds in Alaska, 67 Fed. Reg. 53511, (August 16, 2002).

migratory birds and eggs for subsistence purposes.<sup>78</sup> An open season, during which hunting of migratory birds is allowed, extends from September 1 to March 10; the subsistence regulations apply during the subsequent closed period that covers the spring and summer and extends from March 10 through September 1.<sup>79</sup>

Subsistence use is limited to the harvest of migratory birds and their eggs for human consumption and must be accomplished in a non-wasteful manner according to specified methods and means.<sup>80</sup> The allowance applies to permanent residents of villages within subsistence harvest areas, which are designated according to recommendations from the Alaska Migratory Bird Co-Management Council, and immediate family members if they receive permission from the Village Council.<sup>81</sup> The Co-Management Council, which consists of Alaska Native, federal, and state representatives with equal participation rights, develops recommendations for regulations and guidelines for statewide management of the spring and summer subsistence harvests.<sup>82</sup> If continuation of subsistence use poses an “imminent threat” to a threatened or endangered species or other migratory bird population, the Regional Director may implement an emergency closure or temporary suspension.<sup>83</sup> Such actions must be preceded by public notice.<sup>84</sup>

Other international instruments that recognize subsistence rights include treaties related to whaling and polar bears. The Schedule to the International Convention for Regulation of Whaling permits “aboriginal subsistence whaling” in the Bering, Chukchi, and Beaufort Seas.<sup>85</sup> The Whaling Convention Act implements the Convention domestically, and the federal regulations outline the regulatory framework for the subsistence harvest of bowhead whales.<sup>86</sup>

Similarly, the International Agreement on the Conservation of Polar Bears contains an exemption for takings “by local people using

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78. 16 U.S.C. § 712(1).

79. 50 C.F.R. § 92.3(a). The open season regulations are found at 50 C.F.R. Part 20. Those regulations provide for the subsistence takings of snowy owls and cormorants for food and skins between September 1 and April 1. 50 C.F.R. § 20.132.

80. 50 C.F.R. §§ 92.3, 92.6, 92.20. The regulations define “subsistence” as “the customary and traditional harvest or use of migratory birds and their eggs by eligible indigenous inhabitants for their own nutritional and other essential needs.” 50 C.F.R. § 92.4.

81. 50 C.F.R. § 92.5. Subsistence areas are identified in the regulations. *Id.*

82. 50 C.F.R. § 92.10.

83. 50 C.F.R. § 92.21.

84. 50 C.F.R. § 92.21.

85. Schedule to the International Convention for the Regulation of Whaling, ¶ 13, Dec. 2, 1946 (as amended July 2012).

86. 50 C.F.R. §§ 230.1–230.8.



traditional methods in the exercise of their traditional rights and in accordance with the laws of the Party.”<sup>87</sup> A subsequent agreement between the United States and Russia covering the Alaska-Chukotka polar bear population also recognizes the importance of subsistence polar bear hunting by native peoples and provides for an Alaska Native representative on the Commission.<sup>88</sup> In exercising their rights, indigenous Arctic peoples have coordinated among themselves to regulate the traditional harvest. An agreement between the Inuvialuit of Canada and Inupiat of the North Slope covering the Southern Beaufort Sea regulates polar bear conservation and subsistence use by Native users.<sup>89</sup>

### C. Discussion

The preceding overview is intended to highlight key elements of the Alaska Native subsistence rights framework that has accreted over time and its complexities. The variety of definitions and standards poses challenges for both those trying to manage and enforce them and those trying to adhere to them. For Alaska Natives, the possibility of limited or closed access to marine subsistence resources represents a risk to their nutritional, social, and economic health. As summarized by David Case and David Voluck, “[c]onfused state and federal jurisdiction and divergent state and federal legal standards have been said to compromise Indigenous ‘food security’ in Alaska.”<sup>90</sup>

Table 1 summarizes the coverage, definitions, and limitations of key laws and doctrines with provisions relevant to subsistence use of marine resources. It demonstrates the shifting management framework that an Alaska Native subsistence user may face depending on location, target species, purpose of harvest, and the status of the resource itself.<sup>91</sup>

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87. Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918.

88. Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea (2000); Agreement between the Government of the United States of America and the Government of the Russian Federation on the conservation and management of the Alaska-Chukotka polar bear population (2000) (the United States enacted implementing legislation in 2006).

89. Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea, *supra* note 88.

90. CASE & VOLUCK, *supra* note 19, at 51.

91. See Thériault et al., *supra* note 13.

TABLE 1. THE COVERAGE, DEFINITIONS, AND LIMITATIONS OF THE PRIMARY MARINE SUBSISTENCE RIGHTS LAWS IN ALASKA.

	Area/ resource	Users	Definition of subsistence	Possible (or known) limitations
<b>Generally applicable subsistence rights</b>				
<b>Aboriginal title</b>	Possibly federal ocean waters (3–200nm from shore)	American Indians and Alaska Natives	Would provide non-exclusive aboriginal use rights to the living marine resources of the OCS	Ninth Circuit rules that oceanic use rights are not exclusive under aboriginal title; in second ruling, held that a tribe did not provide sufficient evidence of exclusive use to prove aboriginal title
<b>Federal management (ANILCA)</b>	Federal lands and "reserved waters" in Alaska	Rural Alaska residents	"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 person or family consumption; for barter, or sharing for personal or family consumption; and for customary trade" <sup>92</sup>	Subsistence uses are prioritized over other takings, but may be limited "in order to protect the continued viability" of the population of fish or wildlife; in such cases, subsistence is restricted according to the users' dependence, residency, and availability of alternative resources <sup>93</sup>
<b>State management (Alaska statute)</b>	State and private lands and waters in Alaska	All residents of Alaska	Subsistence fish stocks or game populations are those "that are customarily and traditionally taken or used by Alaska residents for subsistence uses" according to listed criteria <sup>94</sup>	If the harvestable portion of a stock or population, determined by sustained yield, is insufficient "to provide a reasonable opportunity for subsistence uses," the relevant Board will distinguish among subsistence users according to their dependence and ability to obtain alternative food sources <sup>95</sup>

92. 16 U.S.C. § 3113.

93. 16 U.S.C. § 3114.

94. ALASKA ADMIN. CODE TIT. 5, § 99.010(b).

95. ALASKA STAT. § 16.05.258(b)(4).

Resource-specific subsistence rights				
<b>MMPA</b>	Marine mammals	Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean <sup>96</sup>	Takings for subsistence purposes, or for the purpose of creating and selling (including in interstate commerce) authentic native articles of handicrafts and clothing <sup>97</sup>	Subsistence may be regulated if a species is determined to be depleted
<b>ESA</b>	Threatened and endangered species	Indian, Aleut, or Eskimo who is an Alaska Native who resides in Alaska and non-native permanent residents of Alaska native villages who are primarily dependent on subsistence <sup>98</sup>	Takings primarily for subsistence purposes, which includes both creating and selling (including interstate commerce) authentic native articles of handicrafts and clothing out of non-edible byproducts, and selling edible portions of fish or wildlife in Alaska Native villages and towns for Alaska Native consumption within the village or town <sup>99</sup>	Subsistence may be regulated if subsistence use is materially and negatively affecting the species
<b>MBTA</b>	Migratory birds	Permanent residents of villages within a subsistence harvest area and, with permission, immediately family members that are permanent residents of excluded areas <sup>100</sup>	Customary and traditional harvest or use of migratory birds and eggs for the harvester's own nutritional and other essential needs <sup>101</sup>	Emergency closures or temporary suspensions of subsistence regulations may occur if continuing subsistence poses an "imminent threat" to a population

### III. ALASKA NATIVE INVOLVEMENT IN FEDERAL PROTECTION OF MARINE SUBSISTENCE RESOURCES

The previous section explored the legal framework for subsistence—specifically, Alaska Native rights to use subsistence marine resources. The next part shifts focus from the rights to subsistence

96. 16 U.S.C. § 1371(b).

97. 16 U.S.C. § 1371(b).

98. 16 U.S.C. § 1539(e).

99. 16 U.S.C. § 1539(e).

100. 50 C.F.R. § 92.5.

101. 50 C.F.R. § 92.4.

hunting and fishing to the Alaska Native role in the management system designed to protect the subsistence resources themselves. This discussion is meant to highlight potential legal avenues for Alaska Natives to play a meaningful role in management; it is not intended to assess the current use, practice, or availability. Further, the order in which they are discussed simply indicates range of applicability, from general cross-cutting mechanisms to resource- or activity-specific mechanisms, rather than their potential or utility.

It first describes cross-cutting Alaska Native management roles that cover a variety of resource protection processes, and then describes process-specific roles defined by individual statutes. It closes with an analysis of the strengths and weaknesses of the existing mechanisms for Alaska Native involvement and leadership in the decision-making processes.

A. *Cross-cutting Alaska Native roles in the protection of marine subsistence resources*

Two specialized mechanisms exist for Alaska Native involvement in marine subsistence resources management that extend beyond public participation approaches in the regulatory process that are available to any U.S. citizen: government-to-government consultation, and participation as cooperating agencies. Alaska Native engagement in government-to-government consultation is potentially applicable to all agency actions that affect tribal subsistence resources and other tribal interests. Alaska Native participation as cooperating agencies in environmental assessments is potentially applicable to a broad spectrum of federal actions.

i. Consultation

The requirement that the federal government consult with tribal governments on decisions that may affect tribal interests creates a potentially powerful role for Alaska Natives in ongoing management processes. As articulated in President Clinton's Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*,<sup>102</sup> each agency must "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This requirement is one way that the federal government meets its fiduciary obligations to domestic dependent nations. The consultation process must be man-

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102. 65 Fed. Reg. 67249-67252 (Nov. 9, 2000).

aged by a designated agency official.<sup>103</sup> Policies with “tribal implications” include government regulations, policies, actions, and laws that “have substantial direct effects on one or more Indian tribes.” As with other federal laws and policies, tribes include the 229 federally-recognized tribes in Alaska.<sup>104</sup> The consultation requirement also applies to Alaska Native corporations.<sup>105</sup>

The consultation requirements in the Executive Order to ensure that tribes provide “meaningful and timely input” into federal decisions apply broadly to “regulatory policies that have tribal implications.”<sup>106</sup> When agencies promulgate regulations that have (1) tribal implications, and (2) either impose unfunded costs on tribal governments not required by statute or preempt tribal law, then the agency must consult with tribal officials early in the process of developing the proposed regulation.<sup>107</sup> The agency must document this consultation through a “tribal summary impact statement” in the Federal Register and show the extent to which the agency has met the concerns of tribal officials.<sup>108</sup> Agencies also must provide the Office of Management and Budget with copies of written communication between tribes and agencies.<sup>109</sup> If appropriate, on issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty or other rights, agencies should use consensual mechanisms (including negotiated rulemaking) for developing regulations.<sup>110</sup> Despite these specific guidelines, the Executive Order explicitly notes that it is not intended to create an enforceable right.<sup>111</sup>

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103. Exec. Order No. 13,175, 65 Fed. Reg. 67249, § 5(a) (2000) [*hereinafter* E.O. 13175].

104. See *supra* note 16 for the definition of “Indian tribe” per the Federally Recognized Indian Tribe List Act of 1994 and reference to the 2012 list of tribal entities in the United States.

105. Memorandum from Peter Orzag to the Heads of Exec. Dep’ts and Agencies, and Indep. Regulatory Agencies on Guidance for Implementing E.O. 13175, “Consultation and Coordination with Indian Tribal Governments,” [*hereinafter* OMB Guidance] (July 30, 2010), “pursuant to Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267, OMB and all Federal agencies are required to “consult with Alaska Native corporations on the same basis as Indian tribes under Executive order No. 13175.” SEC. 161. The Director of the Office of Management and Budget shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

106. 65 Fed. Reg. 67249, 67250, *supra* note 102.

107. This specific process applies only when developing “regulations.” E.O. 13175 § 5(b). However, the requirement to consult, guided by the agency’s plan or policy for consultation, applies to all “regulatory policies” that have tribal implications. *Id.* § 5(a).

108. *Id.* § 5(b).

109. *Id.* §§ 5(b)–(c).

110. *Id.* § 5(d).

111. *Id.* § 10 (Judicial Review).

The implication of the consultation requirement is that each agency decision that affects tribal interests in Alaska should involve Alaska Native tribal input. According to the Executive Order, agencies should provide a process to ensure meaningful and timely input from tribes.<sup>112</sup> The consultation should include tribal officials or Alaska Native organization representatives, involve a meaningful information exchange,<sup>113</sup> and be an accountable process. Alaska Native groups have highlighted that an effective process also requires the federal agency to provide adequate resources for tribes to participate in the consultation.<sup>114</sup>

President Obama issued a memorandum in 2009 that required agencies to develop detailed plans of action by August 2, 2010, to implement the Executive Order<sup>115</sup> followed by agency-specific tribal consultation policies. Among others, the Environmental Protection Agency<sup>116</sup> and the Departments of Commerce,<sup>117</sup> the Interior,<sup>118</sup> and Homeland Security,<sup>119</sup>—all of which are involved in managing subsistence resources in Alaska—have completed final consultation policies. NOAA has published draft consultation procedures.<sup>120</sup> In addition, some regional agency divisions including EPA's Region 10 office,<sup>121</sup> which includes Alaska, and the Alaska Region Sustainable Fisheries

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112. E.O. 13175, § 5(a).

113. *Id.*

114. NMFS AND TRIBAL REPRESENTATIVES WORKGROUP MEETING REPORT AND RECOMMENDATIONS (Nov. 9–10, 2009).

115. Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation (Nov. 5, 2009).

116. U.S. 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>. The policy applies nationwide.

117. Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 Fed. Reg. 33331-02 (Tuesday, June 4, 2013). Policy applies nationwide.

118. SEC'Y OF THE INTERIOR, ORDER NO. 3317, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (Dec. 1, 2011), *available at* <http://www.doi.gov/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf> (Policy applies nationwide).

119. Letter from Janet Napolitano, Sec'y. of Homeland Sec, to Tribal Leaders (May 11, 2011), *available at* [http://www.mtwytlc.org/images/stories/users/01559\\_01039.pdf](http://www.mtwytlc.org/images/stories/users/01559_01039.pdf). Policy applies nationwide.

120. 78 FR 37795 June 24, 2013. "Notice announcing the availability of and request for comments on the Draft NOAA procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes. This Draft Handbook is intended to assist NOAA staff in conducting effective government-to-government consultations. Comment period through August 23, 2013."

121. U.S. EPA, 910-K-12-002, EPA REGION 10 TRIBAL CONSULTATION AND COORDINATION PROCEDURES (2012), *available at* [http://www.epa.gov/region10/pdf/tribal/consultation/r10\\_tribal\\_consultation\\_and\\_coordination\\_procedures.pdf](http://www.epa.gov/region10/pdf/tribal/consultation/r10_tribal_consultation_and_coordination_procedures.pdf). Policy applies to tribes in Alaska, Idaho, Oregon, and Washington.

Division of NMFS (a part of the Department of Commerce)<sup>122</sup> and Federal Subsistence Board, which operate solely in Alaska,<sup>123</sup> have also completed final consultation policies.

Despite the existing requirements and guidance, several key challenges to effective consultation remain. A primary challenge is the lack of a requirement regarding how or to what extent tribal input must be considered in the final decision-making.<sup>124</sup> Therefore, the effect of tribal input may vary depending on the issue, the agency, and/or the people involved in the process. If consultation is viewed by a federal agency primarily as a means of informing tribes of federal actions, there is little opportunity for tribes to contribute their views. Other challenges include the dispersed populations and villages of Alaska, the lack of broadband infrastructure for communication, extreme environments and geography, limited resources, and scheduling conflicts.<sup>125</sup>

## ii. Cooperating agency under the National Environmental Policy Act

Another potentially strong mechanism for Alaska Native involvement is the ability for tribes (and other Alaska Native governing bodies) to act as cooperating agencies under the National Environmental Policy Act (NEPA).<sup>126</sup> Cooperating agency status for tribes is authorized by NEPA, Council on Environmental Quality (CEQ) regulations, and CEQ memoranda. Examples of Alaska Native bodies acting as cooperating agencies include the North Slope Borough's (a unit of local government that represents some Alaska Native interests) status as a cooperating agency in BOEM's development of the 2012–2017 Five-Year Plan for offshore oil and gas development,<sup>127</sup> and the Alaska Eskimo Whaling Commission's status as a cooperating agency in the

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122. NMFS - Alaska Region, Sustainable Fisheries Division Tribal Consultation Process The policy is posted on NOAA's Alaska Fisheries website, available at <https://alaska.fisheries.noaa.gov/tc/sfprocess.pdf>. Policy applies only in Alaska.

123. FED. SUBSISTENCE BD., GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION POLICY (May 2012). Policy applies only in Alaska.

124. ELI, *Strengthening Government to Government Consultation Related to Marine Subsistence Resources in Alaska* (forthcoming).

125. *Id.*

126. 42 U.S.C. §§ 4331–4335.

127. Department of the Interior, Bureau of Ocean and Energy Management, *2012-2017 OCS Oil and Gas Leasing Program Final Programmatic EIS*, 1–3 (July 2012).

environmental impact statement (EIS) for issuing annual quotas for bowhead whale take.<sup>128</sup>

Broadly speaking, NEPA promotes environmental policy goals “in cooperation with State and local governments, and other concerned public and private organizations.”<sup>129</sup> It requires that “[p]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”<sup>130</sup> The Council on Environmental Quality (CEQ), which oversees agency implementation of NEPA, issued regulations that provide for “cooperative consultation among agencies” before preparing the EIS, for designating cooperating agencies, and that during the scoping process the lead agency shall invite the participation of other federal, state, and local agencies, “any affected Indian tribes,” the proponent of the action, and other interested persons.<sup>131</sup> CEQ regulations provide that a “cooperating agency” may include an Indian Tribe when the action will effect a reservation.<sup>132</sup> Although only one Alaska Native tribe lives on a reservation, CEQ memoranda and guidance suggest that Alaska Native tribes may be eligible to be cooperating agencies whether or not they live on reservations. Further, Department of the Interior NEPA regulations extend the statutory definition of a cooperating agency to an agency, including a tribe, that has jurisdiction either by law or by virtue of special expertise.<sup>133</sup>

In a 1999 memorandum, CEQ directs agencies to identify potential cooperating agencies, including tribes, before the EIS scoping process begins.<sup>134</sup> CEQ’s 1999 memorandum identifying criteria for

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128. See, e.g., DEPT. OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NMFS, DRAFT 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 2017/2018 (June 2012).

129. 42 U.S.C. § 4331.

130. 42 U.S.C. § 4332.

131. 40 C.F.R. §§ 1501.2, 1501.6, 1501.7(a).

132. 40 C.F.R. § 1508.5 states that “Cooperating agency” means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in Sec. 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.”

133. 43 C.F.R. § 46.225.

134. Its July 28, 1999, Memorandum for Heads of Federal Agencies on the “Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act,” states that “[a]s soon as practicable, but no later than the scoping process, federal agency officials should identify



choosing cooperating agencies includes tribal governments with jurisdiction by law or because of their special expertise. CEQ again promoted the use of cooperating agencies in 2002.<sup>135</sup> This action was followed closely by a Memorandum for Tribal Leaders that further encouraged tribes to participate as cooperating agencies when they have legal jurisdiction or special expertise on relevant actions.<sup>136</sup> Hence Alaska Native organizations with jurisdiction and special expertise, such as the Alaska Eskimo Whaling Commission with regard to bowhead whale issues, may be ideal partners for environmental assessments conducted pursuant to NEPA. In practice however, there have been limited instances of Alaska Native entities acting as cooperating agencies in the Arctic.

When tribes act as cooperating agencies, they are to “participate in the NEPA process at the earliest possible time.”<sup>137</sup> They are to participate in the scoping process,<sup>138</sup> which can include determining the scope of the issues to be analyzed.<sup>139</sup> Also they may have the responsibility for developing information that is to be part of the environmental analysis and for performing parts of the analysis itself<sup>140</sup> and may provide staff support.<sup>141</sup> Despite this cooperative opportunity, funding may limit tribes’ participation in practice, although the regulations state that the lead agency “shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies.”<sup>142</sup>

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state, tribal, and local governmental agencies which have jurisdiction by law and or special expertise with respect to reasonable alternatives or significant environmental, social and economic impacts [associated] with a proposed action that requires the preparation of an environmental impact statement.” The federal agency should then determine whether the non-federal agencies “are interested in assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. § 1501.6.”

135. Memorandum from James Connaughton, Chair, Council on Env'tl. Quality, to Heads of Fed. Agencies (Jan. 30, 2002). Its purpose was to “ensure that all Federal agencies are actively considering designation of Federal and non-federal cooperating agencies in the preparation of analyses and documentation required by [NEPA].”

136. Memorandum from James Connaughton, Chair, Council on Env'tl. Quality, to Tribal Leaders (Feb. 4, 2002).

137. 40 C.F.R. § 1501.6(b)(1).

138. 40 C.F.R. § 1501.6(b)(2).

139. 40 C.F.R. § 1501.7(a).

140. 40 C.F.R. § 1501.6(b)(3).

141. 43 C.F.R. § 1501.6(b).

142. 43 C.F.R. § 1501.6(b)(5).

B. *Alaska Native roles in the framework for protecting marine subsistence resources*

In addition to the cross-cutting roles described above, myriad statute-specific roles and responsibilities exist for Alaska Natives in marine subsistence resources management. This section begins with three of the statutes that explicitly provide for subsistence hunting and fishing, which were discussed in the previous section, and the avenues they provide for Alaska Native leadership. A discussion follows of resource management and conservation and protection statutes and policies that, while they do not explicitly protect subsistence activities, may also support Alaska Native engagement.

i. Marine Mammal Protection Act

As discussed in Section II, the Marine Mammal Protection Act<sup>143</sup> (MMPA) places a general moratorium on take and provides for management of exceptions to the moratorium.<sup>144</sup> Subsistence harvest of marine mammals by Alaska Natives, together with other forms of limited take, is exempted from the moratorium. The Act also allows incidental take of marine mammals under certain situations, including commercial fishing operations, offshore oil and gas development, and military readiness activities.<sup>145</sup> However, incidental take by activities other than commercial fishing must not impact the availability of marine mammals for subsistence.<sup>146</sup> The MMPA creates opportunities for Alaska Native involvement in decision-making related to preserving their right to take marine mammals for subsistence.

If the marine mammal species or population is not depleted, Alaska Natives have a lead role in managing the subsistence harvest and federal involvement in harvest regulation is limited.<sup>147</sup> However, if the federal regulatory agency makes a finding that the species is depleted, it may regulate the harvest.<sup>148</sup> The federal regulatory agency also may become involved to ensure that the harvest is not conducted in a “wasteful” manner.<sup>149</sup> In practice, the agencies are frequently in-

143. 16 U.S.C. § 1361 *et seq.*

144. MMPA § 101(a), 16 U.S.C. 1371(a).

145. 16 U.S.C. §§ 1371(a)(2), (a)(5)(A)(i), (a)(5)(A)(ii).

146. MMPA §§ 101(a)(5)(A)(i)(I) and 101(a)(5)(D)(i)(II), 16 U.S.C. § 1371.

147. Eric Smith, *Some Thoughts on Co-Management*, 14 *Hastings W.-N.W. J. Env. L. & Pol’y* 1, 2 (Winter, 2008).

148. 16 U.S.C. § 1371(b).

149. Martin Robards & Julie Lurman Joly, *Interpretation of ‘Wasteful Manner’ within the Marine Mammal Protection Act and its Role in Management of Pacific Walrus*, 13 *OCEAN*

volved in regulating the harvest of a number of marine mammals that Alaska Natives use for subsistence, either because the populations are depleted or because the mammals are threatened or endangered. For example, the northern fur seal is currently designated as depleted, the Cook Inlet beluga whale and bowhead whale as endangered, and the Arctic ringed seal and polar bear as threatened.<sup>150</sup> Federal agencies play important roles in regulating the harvest of these species, from prohibiting take as in the case of the Cook Inlet beluga whale to working with tribal organizations to manage harvest as in the case of polar bears.

Alaska Natives also become involved in marine mammal management through co-management. Co-management is a stronger provision for Alaska Native involvement than either the consultation or cooperating agency process, due to the fact that a goal of co-management is to reach consensus agreements between tribes or ANOs and the federal agency involved. Section 119(a) of the MMPA gives the Secretary (of either Commerce or the Interior, depending on the species) authority to “enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”<sup>151</sup> Conceptually, cooperative or co-management agreements can address management functions that include research, regulation, allocation, and enforcement.<sup>152</sup> Section 119 addresses the functions of research, data collection, and harvest monitoring that underlie regulation, and provides that funds are to support the development of “marine mammal co-management structures” that involve Alaska Native marine mammal organizations and Federal and State agencies. However, it does not provide further detail regarding the regulatory roles of the marine mammal co-management organizations.<sup>153</sup>

A Memorandum of Agreement for Negotiation of Marine Mammal Protection Act Section 119 Agreements (MOA)<sup>154</sup> elaborates upon

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AND COASTAL L. J. 171 (2008); *see*, definitions of ‘wasteful manner,’ 50 C.F.R. § 216.3 (NMFS definition) and 50 C.F.R. § 18.3 (FWS definition).

150. Office of Protected Resources, NAT’L. OCEANIC & ATMOSPHERIC ASS’N., <http://www.nmfs.noaa.gov/pr/species/mammals/>; U.S. Fish and Wildlife Service, About Marine Mammals, [www.fws.gov/International/pdf/factsheet-marine-mammal-policy-2012.pdf](http://www.fws.gov/International/pdf/factsheet-marine-mammal-policy-2012.pdf).

151. 16 U.S.C. § 1388(a).

152. Smith, *supra* note 138.

153. 16 USC § 1388(b). Smith, *supra* note 138 .

154. Memorandum of Agreement for Negotiation of Marine Mammal Protection Act Section 119 Agreements Among the U.S. Department of Commerce, National Marine Fisheries Service, U.S. Department of Interior, Fish and Wildlife Service, and the Indigenous Peoples’ Council for Marine Mammals (2006).

the functions of the co-management agreements. Among its guiding principles, the MOA recognizes that, to the extent allowed by law, Alaska Natives should have “full and equal participation” in decisions that affect “the subsistence management of marine mammals” and that, except for limitations in Section 101(b) and individual agreements, the MOA does not affect the subsistence harvest of marine mammals. The agreements can provide for research and data collection such as collecting and analyzing population data, and research and ecosystem monitoring, including contributing traditional ecological knowledge.<sup>155</sup>

In addition, cooperative agreements may be created under Section 112(c), which provides that the Secretary may enter into transactions, including cooperative agreements, with agencies, institutions, or persons for a variety of purposes.<sup>156</sup> The Alaska Eskimo Whaling Commission agreement with NMFS is in part based on Section 112.

Agreements also may provide for regulation and management of harvest practices, including setting guidelines for harvest levels, managing the efficiency of take, monitoring and reporting, and education. In the case of Pacific walrus harvest, the FWS and the Eskimo Walrus Commission created a harvest agreement addressing wasteful harvest; however, the U.S. Department of Justice has disagreed with the particular guidelines because, in its view, the guidelines are inconsistent with Fish and Wildlife Service regulations.<sup>157</sup>

Section 119 does not specifically authorize enforcement authority for Alaska Native organizations. In addressing enforcement, the MOA provides that Alaska Native organizations, including tribes and authorized co-management bodies, should participate in joint enforcement activities with Federal agency personnel “to the maximum extent possible.”<sup>158</sup> In the case of bowhead whales, the International Whaling Commission establishes subsistence harvest limits for which the Alaska Eskimo Whaling Commission has negotiated exclusive enforcement authority in its co-management agreement with NOAA.<sup>159</sup>

Another mechanism for Alaska Native involvement stems from the mandate that offshore activities other than commercial fishing

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155. MMPA § 119(b), 18 U.S.C. § 1388(b).

156. 16 U.S.C. § 1382(c) (2012).

157. Robards & Joly, *supra* note 140.

158. Memorandum of Agreement, *supra* note 146, p. 4.

159. COOPERATIVE AGREEMENT BETWEEN THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION AND THE ALASKA ESKIMO WHALING COMMISSION, as amended (2013). Should the AEWC not enforce the limitations, NMFS may enforce them.

must not have an “unmitigable adverse effect” on populations or availability of marine mammals used for subsistence.<sup>160</sup> This provision effectively places a priority on subsistence uses over unmitigated oil and gas development and other offshore activities (other than commercial fishing).<sup>161</sup> The MMPA and implementing regulations set out procedures for issuing incidental take authorizations (ITAs) and incidental harassment authorization (IHAs) for the take of marine mammals during these activities.<sup>162</sup> In both cases, incidental take must not significantly impact either the populations of marine mammals or the species’ availability for subsistence harvest.<sup>163</sup> NMFS and FWS issue separate regulations covering their respective species.<sup>164</sup> Incidental take provisions under the MMPA apply where there is a potential for serious injury or mortality of small numbers of marine mammals,<sup>165</sup> while the incidental harassment procedures may be used when only harassment and no physical harm is expected.<sup>166</sup>

If the activity would take place near a subsistence hunting area or affect the availability of a species or stock of marine mammal for subsistence uses in Arctic waters, NMFS regulations for both ITAs and IHAs require the applicant to submit either a plan of cooperation or information showing how impacts would be minimized, as part of a showing of “no unmitigable impact.”<sup>167</sup> A plan of cooperation under NMFS regulations must include a statement that a draft plan was provided to the community; that the applicant has met with affected communities to discuss the proposed activities and to resolve conflicts; a description of measures to ensure that the activities will not interfere with subsistence whaling or sealing; and an outline of ongoing plans

160. 50 C.F.R. § 216.104(a)(12).

161. See discussion of subsistence in *CASE & VOLUCK*, *supra* note 19.

162. 16 U.S.C. § 1371(a)(5).

163. 16 U.S.C. §§ 1371(a)(5)(A)(i)(I), 1371(a)(5)(D)(i); 50 C.F.R. § 216.102(a); A determination of “least practicable adverse impact on such species or stock” includes considering the “impact on the effectiveness of the military readiness activity.” 16 USC § 1371(a)(5)(A)(ii). 50 C.F.R. § 216.104(a)(12).

164. 50 C.F.R. 18.27; 50 C.F.R. 18.121-18.129; 50 C.F.R. 18.111-18.119 (FWS – incidental take authorizations); 50 C.F.R. 216.101-216.108 (NMFS – incidental take and incidental harassment authorizations); NMFS proposed rule for Beaufort Sea ITAs, 50 C.F.R. 217.140-217.150.

165. 50 C.F.R. § 18.27; 50 C.F.R. § 216.105.

166. 50 C.F.R. § 216.107.

167. 50 C.F.R. § 216.104(a)(12). These determinations take place after the initial leasing decisions have been made. See, e.g., OFFICE OF PROTECTED RES., NOAA FISHERIES, FINAL SCOPING REPORT FOR ENVIRONMENTAL IMPACT STATEMENT ON EFFECTS OF OIL AND GAS ACTIVITIES (SEISMIC AND EXPLORATORY DRILLING) IN THE ARCTIC OCEAN (June 2010).

for community meetings while the activity is in progress.<sup>168</sup> Similarly, Fish and Wildlife Service ITA regulations for Pacific walrus and polar bears in the Chukchi Sea require applicants to submit a record of community consultation, which must include a “summary of any concerns identified by community members and hunter organizations, and the applicant’s responses to identified concerns.”<sup>169</sup> Fish and Wildlife ITA regulations for the Beaufort Sea require that applicants submit a plan of cooperation to “mitigate potential conflicts between the proposed activity and subsistence hunting.” The applicant must document all consultations with potentially affected user groups, summarize subsistence users’ concerns, and show how it will respond to these concerns, including through the use of mitigating measures.<sup>170</sup>

The Alaska Eskimo Whaling Commission established the precedent for this type of approach, creating a robust collaborative process. Since 1986, it has directly negotiated an annual Conflict Avoidance Agreement (CAA) with oil and gas companies to place temporal, spatial, and other limits on oil and gas activities in Arctic waters in order to protect its subsistence harvest of the bowhead whale.<sup>171</sup> While the ITA and IHA regulations do not require a formal agreement with communities, the AEWC’s process involves a direct negotiation between the energy companies and the Alaska Native organization, which may result in an explicitly accepted arrangement. However, the process requires extensive time and resources on an annual basis,<sup>172</sup> and may not ensure that protections available one year in a CAA will be there the next, or that all operators will participate in a CAA.<sup>173</sup>

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168. *Id.* NOAA Fisheries Protected Species website, Incidental Take Authorizations, at <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#loa>.

169. 50 C.F.R. 18.114(c)(4).

170. 50 C.F.R. 18.124(c)(4).

171. *Open Water Season*, Alaska Eskimo Whaling Commission, [http://aewc-alaska.com/Open\\_Water\\_Season.html](http://aewc-alaska.com/Open_Water_Season.html) (last visited July 10, 2013). *see, e.g.*, 2012 Open Water Season Programmatic Conflict Avoidance Agreement Between BP Exploration (Alaska), Inc., ENI US Operating Company, Inc., Exxon Mobil Corporation, GX Technology Corp., Pioneer Natural Resources Alaska Inc., Shell Offshore Inc. and the Alaska Eskimo Whaling Commission, the Barrow Whaling Captains’ Association, the Gambell Whaling Captains’ Association, the Kaktovik Whaling Captains’ Association, the Kivalina Captains’ Association, the Little Diomedé Whaling Captains’ Association, the Pt. Hope Whaling Captains’ Association, the Pt. Lay Whaling Captains’ Association, the Savoonga Whaling Captains’ Association, the Wainwright Whaling Captains’ Association, and the Wales Whaling Captains’ Association (Mar. 1, 2012).

172. National Research Council, *Cumulative Environmental Effects of Oil and Gas Activities on Alaska’s North Slope* (2003) at 136.

173. In some years, individual companies have declined to participate in the CAA process, *see, e.g.*, Federal Register, Aug. 13, 2010 Notice, Docket No. 2010-19962, 49760, DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration RIN

## ii. Endangered Species Act

The goal of the Endangered Species Act (ESA),<sup>174</sup> as discussed earlier, is to conserve endangered and threatened species.<sup>175</sup> It prohibits take of species that are listed as threatened or endangered, but exempts Alaska Natives from this prohibition when the take is for subsistence purposes. The ESA also requires the relevant Secretary to designate critical habitat "to the maximum extent prudent and determinable."<sup>176</sup> Impacts of proposed federal actions<sup>177</sup> on both species and critical habitat must be taken into account before the actions are undertaken.

Alaska Natives participate in decision-making at several points. Most prominently, they play a role in decisions concerning the regulation of subsistence take. An order signed by the Secretaries of the Interior and Commerce requires consultations and involvement of Alaska Natives when regulating subsistence harvest of endangered or threatened species. Secretarial Order 3225, which applies only in Alaska, establishes a "consultation framework" for the section 10(e) subsistence exemption when the agency seeks to regulate the subsistence harvest due to conservation concerns relative to an endangered or threatened species that Alaska Natives also use for subsistence.<sup>178</sup> The implementing Service, FWS or NMFS, must promote a cooperative relationship with Alaska Natives that preserves their subsistence rights and at the same time identifies ways to minimize adverse impacts on listed species, thus protecting them from jeopardy. This policy provides for engagement with tribes at several steps in decision-making:<sup>179</sup> when determining whether subsistence take is materially and

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0648-XW13 Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Open Water Marine Seismic Survey in the Chukchi Sea, Alaska.

174. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44.

175. 16 U.S.C. § 1531(b).

176. 16 U.S.C. § 1533(a)(3)(A).

177. 16 U.S.C. § 1536.

178. DEP'T. OF THE INTERIOR, ORDER NO. 3225, ENDANGERED SPECIES ACT AND SUBSISTENCE USES IN ALASKA (Supplement to Secretarial Order 3206), signed Jan. 19, 2001).

179. The policy does not specifically set out these stages as sequential, but its language implies this sequence. The initial consultation is to take place "at the earliest stage after information arises indicating conservation concerns relative to a species that is listed as endangered or threatened under the ESA and also used for subsistence." After the agency makes a determination that subsistence take affects the species, the agency seeks to develop cooperative conservation agreements and then to implement them on an on-going basis. Finally, the agency only develops regulations if "needed," implying that it develops regulations only after it has already attempted to use conservation agreements to protect the species.

negatively affecting listed species; when developing cooperative conservation agreements that both conserve the species and fulfill subsistence needs, thereby precluding the need for regulations;<sup>180</sup> during ongoing management, which making recommendations for includes management plans and regulations, monitoring, enforcement, research including the use of traditional knowledge, habitat protection, and recovery;<sup>181</sup> and when developing and implementing regulations governing take.<sup>182</sup>

Alaska Natives may also engage when a federal agency undertakes what is known as Section 7 consultation with NMFS or FWS when it considers conducting, authorizing, or funding a project that may affect an endangered or threatened species or its habitat.<sup>183</sup> When such a decision may affect tribal interests, the Services' policy is to obtain input from tribes and to use TEK in the decision making.<sup>184</sup> Because Alaska Natives rely on a wide range of marine species, many federal actions that may affect endangered or threatened species in Alaska also affect tribal interests. An agency handbook states that the Services should notify tribes early in the process of taking actions, consider comments and information from tribes in developing reasonable and prudent alternatives, ensure that the decision does not discriminate against tribal interests, consider Indian traditional knowledge as a part of "best available" information, and notify tribes of final biological opinions.<sup>185</sup>

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180. The policy provides for the agencies to create cooperative agreements under the ESA only when subsistence take has a negative effect on the species.

181. The policy places this requirement in the context of agreements that are required because of the negative impact of subsistence take; therefore the requirements for on-going management probably only apply in that context.

182. ORDER NO. 3225, *supra* note 1786.

183. 16 U.S.C. §§ 1536(a)(3)–(4).

184. U.S. FISH & WILDLIFE SERV. & NAT'L. MARINE FISHERIES SERV., ENDANGERED SPECIES ACT CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING SECTION 7 CONSULTATIONS AND CONFERENCES, Section 2.6; The Handbook refers to and to some extent relies on Secretarial Order 3206, which does not apply to Alaska. However, in Order No. 3225, the supplemental order for Alaska, the Department of Interior refers to existing policy for § 7 consultation and the Handbook is part of existing policy. *See, e.g.*, BIOLOGICAL OPINION ON ISSUANCE OF INCIDENTAL HARASSMENT AUTHORIZATIONS FOR OIL AND GAS EXPLORATION ACTIVITIES IN THE CHUKCHI AND BEAUFORT SEAS IN 2010, p. 15.

185. U.S. FISH & WILDLIFE SERV., *supra* note 172.



## iii. Migratory Bird Treaty Act

The goal of the Migratory Bird Treaty Act (MBTA) of 1918<sup>186</sup> is to protect populations of migratory birds. As described previously, it implements the provisions of the 1916 Migratory Bird Treaty with Canada, and later treaties between the U.S. and Mexico, Japan, and Russia, together with the protocols that allow Alaska Natives to take migratory birds and their eggs for subsistence purposes during the summer months.

Through participation in the Alaska Migratory Bird Co-management Council, Alaska Natives play an important role in migratory bird management. As described in Section II, the Council, authorized by the protocol with Canada, consists of Alaska Natives and federal and state representatives who develop recommendations for subsistence harvest regulations, population and harvest monitoring, education, use of traditional knowledge, and habitat protection.<sup>187</sup> The Council submits its recommendations to the Fish and Wildlife Service, which makes final decisions and regulations.<sup>188</sup>

## iv. Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), which governs federal fisheries in the U.S. exclusive economic zone (EEZ),<sup>189</sup> contains mixed objectives. It is designed to advance the exploitation of U.S. fishery resources by commercial and recreational interests. At the same time, it aims to conserve and maintain populations of commercial fish species, protect habitat, and reduce bycatch. It does not address the issue of subsistence.

MSA goals are expressed as national standards,<sup>190</sup> including that fishery management plans achieve optimum yield and prevent overfishing, be based on the best scientific information available, minimize bycatch to the extent practicable, protect fishing communities, and promote the safety of life at sea. Although not a national standard, the MSA requires a certain degree of habitat protection: fishery management plans must describe and identify essential fish habitat and

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186. Migratory Bird Treaty Act of 1918 (16 U.S.C. §§ 703–12; Ch. 128; July 13, 1918; 40 Stat. 755) as amended.

187. 50 C.F.R. § 92.10 (c)(2)–(3).

188. 50 C.F.R. § 92.10(c); U.S. FISH & WILDLIFE SERV., COMMON QUESTIONS ABOUT THE ALASKA MIGRATORY BIRD CO-MANAGEMENT COUNCIL, *available at* [http://alaska.fws.gov/ambcc/About%20Us\\_files/Question%20and%20Answers%20for%20AMBCC%20members.pdf](http://alaska.fws.gov/ambcc/About%20Us_files/Question%20and%20Answers%20for%20AMBCC%20members.pdf).

189. 16 U.S.C. §§ 1801–1891(d).

190. 16 U.S.C. § 1851,1853(a).

incorporate measures to minimize, to the extent practicable, adverse effects of fishing.<sup>191</sup>

Fisheries management primarily takes place through eight regional fishery management councils.<sup>192</sup> Councils are comprised of representatives of the commercial and recreational fishing industry nominated by the governors, the NMFS regional director, state fishery management officers, and potentially others.<sup>193</sup>

The North Pacific Fishery Management Council (NPFMC) develops regulations and plans for Alaskan federal marine fisheries. The NPFMC is composed of eleven voting members: the heads of the Alaska Department of Fish and Game and Washington and Oregon wildlife agencies, the NMFS Alaska regional commissioner, and seven members who represent the commercial and recreational fisheries, as well as four non-voting members.<sup>194</sup> One of its primary duties is to develop fishery management plans for commercially targeted species in the region. The plans must comply with the provisions of the MSA,<sup>195</sup> and be approved by NMFS.<sup>196</sup>

The MSA does not specifically require input from Alaska Natives to protect subsistence fisheries,<sup>197</sup> and it does not reserve a spot on the North Pacific Fishery Management Council for a tribal representative, in contrast to the MSA's requirement for a tribal representative on the Pacific Fishery Management Council.<sup>198</sup> However, the statute and agency policy provide a few potential avenues for Alaska Native subsistence users to participate in the decision-making process.

First, to support engagement with Arctic communities, the Council has developed a stakeholder involvement policy.<sup>199</sup> It convened a standing Rural Community Outreach Committee in August 2009 for ongoing engagement with rural communities, which are primarily

191. 16 U.S.C. § 1853 (a)(7).

192. 16 U.S.C. § 1852.

193. 16 U.S.C. § 1852(b)(2).

194. 16 U.S.C. § 1852(a)(1)(G).

195. 16 U.S.C. § 1853.

196. NMFS may approve, partially approve, or disapprove a proposed plan. 16 U.S.C. § 1854.

197. The Pacific Council is the sole FMC on which tribes have statutorily required a representative. 16 U.S.C. § 1852(a)(1)(F).

198. 16 U.S.C. § 1852(a)(1)(F).

199. N. PACIFIC FISHERY MGMT. COUNCIL, STATEMENT OF ORGANIZATION, PRACTICES, AND PROCEDURES, Sect 3.10, at 12 (draft, June 20, 2008); N. PACIFIC FISHERY MGMT. COUNCIL, GROUND FISH POLICY WORKPLAN at 2 (rev. Feb. 2008); N. PACIFIC FISHERY MGMT. COUNCIL, SUMMARY AND RESULTS OF OUTREACH PLAN FOR DEIS ON CHINOOK SALMON BYCATCH IN THE BERING SEA POLLOCK FISHERY (Apr. 2009).

Alaska Native villages.<sup>200</sup> So far, the Committee has conducted outreach efforts for the Gulf of Alaska Chinook salmon bycatch plan, Arctic Fisheries Management Plan, Bering Sea chum salmon bycatch plan, and northern Bering Sea Research Plan.<sup>201</sup>

A second opportunity occurs as part of the public participation process associated with environmental impact assessments of fishery management plans, and the submissions of the Federal Subsistence Board to the NPFMC. The Federal Subsistence Board is charged by statute with protecting the subsistence priority of rural subsistence users. Because the Federal Subsistence Board represents rural subsistence users, including Alaska Natives, its input into environmental impact assessments can potentially provide a stronger voice for Alaska Native subsistence interests in the development of fishery management plans.<sup>202</sup> For example, both the Federal Subsistence Board and the North Pacific Fishery Management Council draft harvest regulations that affect stocks of anadromous salmon. Although the two entities are not required to coordinate their decisions, the decisions may impact each other. In the case of salmon bycatch, the Federal Subsistence Board and its Regional Advisory Councils have sent letters to the North Pacific Fishery Management Council requesting that subsistence needs be considered when setting bycatch restrictions.<sup>203</sup>

Third, traditional ecological knowledge is potentially valuable for fisheries analyses. Under National Standard 2,<sup>204</sup> Councils must use the “best scientific information available” in the scientific analysis of fisheries. NMFS has proposed regulatory revisions to National Standard 2 guidelines, which would “acknowledge” local and traditional knowledge and, to the extent possible, make an effort to “reconcile scientific information with local and traditional knowledge.”<sup>205</sup> Another

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200. Rural Community Outreach Committee, N. Pacific Fisheries Mgmt. Council, available at <http://alaskafisheries.noaa.gov/npfmc/rural-outreach/rural-community-outreach-committee.html>.

201. *Id.*, Rural Community Outreach Committee Meeting Report, September 13, 2011, available at [http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/rural\\_outreach/RCOCreport911.pdf](http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/rural_outreach/RCOCreport911.pdf); 74 Fed. Reg. 56734, Nov. 3, 2009.

202. *See, e.g.*, Letter from Michael R. Fleagle, Chair, Federal Subsistence Board, to Robert D. Mecum, Acting Administrator, Nat'l. Marine Fisheries Serv., (Feb. 10, 2010), available at <http://alaskafisheries.noaa.gov/sustainablefisheries/bycatch/salmon/chinook/feis/comments/02fedsubsistencebrd.pdf>.

203. N. PACIFIC FISHERIES MGMT. COUNCIL., SUMMARY AND RESULTS OF OUTREACH PLAN FOR DEIS ON CHINOOK SALMON BYCATCH IN THE BERING SEA POLLOCK FISHERY (April 2009), available at <http://www.fakr.noaa.gov/npfmc/PDFdocuments/bycatch/BycatchOutreach409.pdf>.

204. 16 U.S.C. § 1851(a)(2).

205. 74 Fed. Reg. 65724-01 (2009), the proposal would modify regulations at 50 C.F.R. 600.315.

MSA provision<sup>206</sup> requires the Secretary of Commerce to establish a pilot program in the North Pacific that includes a “means to consider local and traditional knowledge” in the science-based management of fisheries.<sup>207</sup> NOAA’s Alaska Science Research Center is conducting research in this area.<sup>208</sup>

#### v. Outer Continental Shelf Lands Act

One of the primary goals of the Outer Continental Shelf Lands Act (OCSLA) is to provide for the orderly and expeditious development, subject to environmental safeguards, of the resources of the OCS.<sup>209</sup> The statute requires consideration of environmental, marine resource, and ecosystem impacts as part of the decision-making process for development.<sup>210</sup> To accomplish its oil and gas objectives, OCSLA establishes a four-step process: (1) development of a five-year leasing program, (2) individual lease sales, (3) exploration, and (4) development and production. At each stage, the agency is required to consider the impacts on the environment, on living marine resources, and on other interests on the OCS, which may result in changes to plans and decisions. At each stage, the agency also obtains comment from the public and recommendations from state and potentially from local governments.

OCSLA does not carve out specific roles provisions for Alaska Natives in the decision-making processes. However, some provisions and policies, though not all used, open the door for Alaska Native involvement.

The greatest authority for Alaska Native involvement in oil and gas decisions may lie in the provisions related to local government: since many local governments, including boroughs, are led by Alaska Natives, the provisions enabling local government engagement provide opportunities for Alaska Native engagement. These provisions appear in relation to the five-year plan and individual lease sales. With the five-year plan, OCSLA states that during development the agency is to seek comments from states and federal agencies, is to obtain public

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206. 16 U.S.C. § 1855(j)(2)(E).

207. *Id.*

208. *Economic and Social Sciences Research: Traditional Ecological Knowledge of the North Pacific Marine Environment*, NOAA FISHERIES: ALASKA FISHERIES SCIENCE CTR., <http://www.afsc.noaa.gov/REFM/Socioeconomics/Projects/TEKNPME.php> (last visited Feb. 17, 2013).

209. 43 U.S.C. § 1332(3).

210. 43 U.S.C. § 1332 (2)–(5).

comment, and may consider comments from local governments.<sup>211</sup> One limitation on this provision, however, is that the local government must first submit its comments to the Governor of the state.<sup>212</sup> Once a proposed plan is developed, local governments (as well as individuals) may also submit comments on the plan directly to the Secretary.<sup>213</sup>

As local governments, Alaska Native villages could submit comments about proposed leasing or development and production plans.<sup>214</sup> Although BOEM is not required to accept local government recommendations, the agency has a degree of accountability; for example, the Secretary of the Interior must submit a proposed leasing plan to the President and Congress together with an explanation why any recommendations by local or state governments or the Attorney General were not accepted.<sup>215</sup>

The statute arguably also authorizes Alaska Native involvement in other ways. Alaska Natives' contribution of TEK is relevant to the scientific analysis of ecosystem, environmental, and living marine resource impacts. The statute requires that "existing information" concerning the geography, geology, and ecology of the region be considered.<sup>216</sup> BOEM currently collects TEK through its Environmental Studies Program,<sup>217</sup> and incorporates TEK from the Environmental Studies Program, tribal consultations, and public comments into the NEPA process.<sup>218</sup> As examples of the influence of TEK on its decisions, BOEM cites mitigation measures including the NMFS Open Water Season Meeting, lease stipulations, and a revision of the significance threshold for impacts on subsistence activities and resources.<sup>219</sup> Finally, BOEM is required to periodically "consult" with other interests, including "those involved in fish or shellfish recovery," on the OCS.<sup>220</sup> As OCS resource users, Alaska Natives could be part of this "consultation" should fish and shellfish recovery become an issue for Arctic communities.

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211. 43 U.S.C. § 1331.

212. 43 U.S.C. § 1344(c)(1).

213. 43 U.S.C. § 1344(c) and (d).

214. 43 U.S.C. § 1344(a).

215. 43 U.S.C. § 1331(c)(2), Section 18(c)(2).

216. 43 U.S.C. § 1331(a)(2)(A), Section 18(a)(2)(A).

217. BOEM OCEAN SCIENCE, SPECIAL ISSUE ON TRADITIONAL KNOWLEDGE, Vol. 9, Issue 2, April/May/June 2012, available at [http://www.boem.gov/uploadedFiles/BOEM/Newsroom/Publications\\_Library/Ocean\\_Science/OS\\_12\\_apr\\_may\\_jun.pdf](http://www.boem.gov/uploadedFiles/BOEM/Newsroom/Publications_Library/Ocean_Science/OS_12_apr_may_jun.pdf).

218. *Id.* at 11.

219. *Id.*

220. 43 U.S.C. § 1344(f)(4).

## vi. Federal Subsistence Board decisions

One of the goals of ANILCA,<sup>221</sup> for which Section II, above, provides a history and overview, is to allow rural residents of Alaska to continue to pursue a subsistence livelihood. It establishes and implements a subsistence priority for rural residents on federal lands and waters in the state of Alaska. A few marine waters lie under the jurisdiction of the Federal Subsistence Board; most are located in southeastern Alaska and the Alaska Peninsula.<sup>222</sup> Regulations governing subsistence uses are established through a process that involves ten Regional Advisory Councils (RACs).<sup>223</sup> The RACs develop proposed regulations and send them to the Federal Subsistence Board, which must give deference to the recommendations when making its final decisions.

Rural residents representing subsistence interests, which include Alaska Natives, are represented on the RACs and the Federal Subsistence Board, and contribute to the development of the subsistence regulations. Among the criteria for membership on the RACs is that individuals are rural residents knowledgeable about the region's fish and wildlife and about subsistence and other uses of the resources.<sup>224</sup> Current regulations require that RACs be composed of 70% subsistence and 30% other interests.<sup>225</sup> The Federal Subsistence Board includes two rural residents<sup>226</sup> and the current chair is an Alaska Native.<sup>227</sup>

## vii. National Ocean Policy

Existing conservation statutes, including the MMPA, ESA, and ANILCA, tend to focus on specific species and do not explicitly require ecosystem-based planning or protection. In response to calls for comprehensive, science- and ecosystem-based management of the U.S.

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221. Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq.*, Pub. L. 96-487, as amended.

222. Subsistence Management Information, *available at* <http://www.subsistmgtinfo.org/fvss.htm>.

223. 50 C.F.R. §§ 100.10, 100.11. FSB rules, however, do not apply to state or private land, which includes lands owned by ANCSA corporations.

224. 36 C.F.R. § 242.11(b)(1).

225. *Id.*; 50 C.F.R. § 100.11(b)(1); *see also* administrative order concerning this representation, 73 Fed. Reg. 19433-01.

226. 50 C.F.R. § 100.10(b)(1).

227. JOHN SKY STARKEY, CURRENT TRIBAL INVOLVEMENT IN FEDERAL FISHERIES MANAGEMENT IN ALASKA AND POSSIBILITIES OF EXPANDING TRIBAL PARTICIPATION IN THE FUTURE (2011).

oceans and coasts,<sup>228</sup> President Obama established the National Ocean Policy by Executive Order in July 2010. The Executive Order proclaims that “it is the policy of the United States to . . . protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources.”<sup>229</sup> The National Ocean Policy contains nine national priority objectives, including:

- 1) Adopt ecosystem-based management;
- 2) Implement coastal and marine spatial planning;
- 3) Increase knowledge to inform decisions and improve understanding;
- 4) Coordinate and support regional marine management;
- 5) Strengthen coastal resiliency and adaptation to climate change and ocean acidification;
- 6) Establish and implement integrated regional ecosystem protection and restoration;
- 7) Enhance water quality and sustainable practices on land;
- 8) Address changing conditions in the Arctic; and
- 9) Strengthen and integrate ocean, coastal, and Great Lakes observations, mapping, and infrastructure<sup>230</sup>

An interagency task force developed a set of final recommendations for the National Ocean Policy, which included a framework for coastal and marine spatial planning and were incorporated by reference in the Executive Order itself. The subsequent Implementation Plan<sup>231</sup> allows each region to choose whether or not to create a planning body to coordinate implementation.<sup>232</sup>

Should Alaska, as its own region, choose to create a regional planning body, Alaska Natives can choose to be represented on the planning body.<sup>233</sup> Regional planning bodies are to “develop a mechanism to engage other indigenous community representatives . . . throughout the CMSP process.”<sup>234</sup> They are also to provide “feedback and status reports to the appropriate . . . tribal leadership to share

228. See, U.S. Commission on Ocean Policy, *Final Report: An Ocean Blueprint for the 21st Century*, (2004).

229. Exec. Order No. 13,547, 75 Fed. Reg. 43023 (July 19, 2010); COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE (July 19, 2010) [*hereinafter* CMSP FRAMEWORK].

230. COUNCIL ON ENVIRONMENTAL QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE, 6 (July 19, 2010).

231. NATIONAL OCEAN COUNCIL, NATIONAL OCEAN POLICY IMPLEMENTATION PLAN (April 2013).

232. *Id.* at 22.

233. CMSP FRAMEWORK at 52.

234. *Id.* at 52–53.

lessons learned, best practices, and ensure routine and frequent communication.”<sup>235</sup>

Should a region choose not to create a regional planning body, Federal agencies still have mandates to coordinate with federally recognized tribes.<sup>236</sup> Alaska Native tribes would therefore have opportunities to provide input into the planning process coordinated by federal agencies.

### C. Discussion

This Part has explored the federal authorizations for Alaska Natives to participate in resource-related decision-making in the Arctic. Beyond fundamental rights to self-government and self-determination, Alaska Natives, through their intimate knowledge of the environment, can bring vital traditional and contemporary knowledge of Arctic ecosystems and their relationship to them into the scientific analyses underlying decisions. In addition, because Alaska Native subsistence interests are closely tied to the state of the environment, those needs should be reflected in decisions that affect both the environment generally and subsistence practices specifically.

As set out in Table 2, federal laws and policies provide numerous ways for Alaska Natives to participate in decision-making, including co-management, consultation, cooperative decision-making, and representation on policy-making or regulatory bodies, among others.

As described in this paper, the federal authorities for Alaska Native leadership in subsistence marine resource decision-making vary based on statute, and range from stakeholder participation offered to all constituents to specific joint management requirements that build from the recognition of Alaska Natives as members of federally-recognized tribes.

Perhaps the existing approach that provides the greatest level of Alaska Native decision-making authority in a federal process is co-management of subsistence resources. The co-management structure is, at its most fundamental level, designed to create a collaborative partnership between Alaska Native subsistence hunters and the federal staff that work on managing the subsistence resource.

Co-management is not a panacea, however. If subsistence practices lead to species depletion or jeopardy, unilateral federal agency

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235. *Id.* at 74.

236. National Ocean Policy Implementation Plan, 21-22.



TABLE 2. ALASKA NATIVE ROLES IN DECISION-MAKING  
RELATED TO MARINE RESOURCES

Statute/policy	Type of role in decision-making		Decisions affected	
	Co-management or representation on policy body	Other	Regulation of subsistence uses	Regulation of other impacts on subsistence resources
MMPA	Co-management	TEK contribution	Management of subsistence harvest	
MMPA - ITAs/IHAs		Consultation with private parties		Oil and gas conflicts with subsistence resources
MMPA - Conflict Avoidance Agreement	Negotiated agreement with private parties			Management of oil and gas conflicts with subsistence resources
ESA	Possibility of co-management	Consultation; TEK contribution	Management of subsistence harvest	
ESA		Consultation		Management of endangered/threatened species and habitat
MBTA	Co-management	TEK contribution	Recommendations for management of subsistence harvest of migratory birds	
MSA		Consultation with NMFS; commenting		Fisheries management in EEZ/ fisheries bycatch impacts on subsistence resources
OCSLA		Consultation under agency policy; TEK contribution; commenting		Oil and gas development in EEZ
ANILCA/ FSB	Representation on policy body	Consultation under agency policy; commenting	Management of the federal subsistence priority in Alaska	
National Ocean Policy	Representation on policy body;	TEK contribution; commenting		CMSP decisions
eTribal consultation		Consultation; TEK contribution		Federal agency decisions that could affect tribal interests
NEPA	Cooperating agency	Commenting		Environmental Impact Statements

actions may control. In addition, co-management structures only cover subsistence resources—they do not provide decision-making authority related to other marine resources or activities. Co-management bodies

may have limited decision-making authority; for example, most marine mammal organizations do not have authority to enforce harvest limits. Finally, few laws specifically call for co-management. As described previously, the only statutes with specific provisions allowing co-management of subsistence use are the MMPA and the MBTA.

Next to co-management, another approach that provides significant decision-making authority to Alaska Natives is the inclusion of Alaska Natives on decision-making bodies. For example, under ANILCA, rural residents—which can include Alaska Natives—are represented on the Regional Advisory Councils, of which 70% are rural, subsistence users, and Federal Subsistence Board, which includes two rural representatives. The RACs provide recommendations to the FSB, which regulates and protects the rural subsistence priority. Another example is found in the National Ocean Policy, which envisions a direct role for tribes in the regional planning bodies that will implement coastal and marine spatial planning. Similarly to co-management, however, requirements to include Alaska Native representatives on decision-making bodies are the exception rather than the norm.

A third potentially strong role for Native entities in marine subsistence resource management is evaluating potential environmental impacts as a NEPA cooperating agency. Cooperating agencies are closely involved in the development of environmental impact statements. Two caveats are associated with this approach. One is specific to cooperating agencies: considerations raised by cooperating agencies can be vetoed by the lead agency. The second is a more fundamental issue: NEPA is a procedural law for environmental evaluation but is not action-forcing.<sup>237</sup>

In contrast to these three approaches, which are limited in scope but are potentially powerful systems of collaborative governance, government-to-government consultation is a ubiquitous requirement for all agencies taking actions that will affect tribal interests.<sup>238</sup> It is meant to provide an opportunity for tribes to engage in the decision-making process on an early and ongoing basis for all agency decisions that affect tribal interests. But in practice, consultation can be a challenging process that may leave tribes feeling unheard.<sup>239</sup> Consultation may be limited to information-sharing rather than meaningful two-

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237. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, (1989).

238. E.O. 13175.

239. At the time of this article, ELI was completing a research report on government-to-government consultation related to Alaska marine subsistence resource management. These observations are based on the research and interviews conducted as part of that effort.

way dialog. Furthermore, as under NEPA, agencies are not required to change their decisions based on tribal concerns voiced during consultation. As stated in *Managing for the Future in a Rapidly Changing Arctic*, “[a] desire for more engagement and information may seem to contradict the desire for less process, but suggests that constituents and partners feel listened to but not heard.”<sup>240</sup>

Other policies and statutes fail to carve out a substantial role for Alaska Native leadership. These include, for example, the MSA and the OCSLA. Regarding federal fisheries, the MSA does not require that Native subsistence users be represented on the North Pacific Fishery Management Council, whose decisions on fishery bycatch, among others, directly affect the availability of resources to subsistence users. While the Rural Outreach Committee, a voluntary body, is a commendable step to improve Alaska Native engagement, it still falls short of a system that embraces Alaska Native self-governance and self-determination. Like the MSA, OCSLA has no specific mechanisms to enable robust Alaska Native participation in decision-making.

In a demonstration of Alaska Native ingenuity and creativity, the bowhead whaling community established a new leadership mechanism with regard to bowhead whale management—the Alaska Eskimo Whaling Commission directly negotiates with oil and gas companies to find solutions that satisfy subsistence whaling needs and oil and gas development goals. This whaler-industry approach, resulting in a Conflict Avoidance Agreement, has been annually negotiated for decades and ultimately is used to satisfy MMPA requirements that oil and gas companies mitigate adverse impacts to subsistence activities.<sup>241</sup>

#### IV. CONCLUSION

Alaska Natives have made the U.S. Arctic their home for millennia, subsisting off the resources around them. As conditions have changed and resources have evolved, they have adapted to the altered circumstances time and again. Today, as climate change and other developments rapidly affect the region and its resources, Alaska Natives

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240. *Managing for the Future in a Rapidly Changing Arctic, A Report to the President*, 35, Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska (March 2013).

241. However, as Meek notes, “The responsibility of coordinating with many oil and gas companies is a downside to devolved policy arrangements as NMFS could potentially bring more regulatory weight to bear on the negotiations, if the agency chose that direction.” Chanda Meek, *Comparing Marine Mammal Co-Management Regimes in Alaska: Three Aspects of Institutional Performance*, Ph.D. Thesis, University of Alaska Fairbanks, 2009, at 127.

are likely to be most affected by these changes and also best able to adapt to them. The U.S. marine management framework must both protect subsistence uses and learn from the subsistence hunters and fishers.

To the former, as discussed in Part II, subsistence hunting and fishing rights are codified and created by a variety of federal and state doctrines and statutes. The framework created is complex, varied, and sometimes unclear. It also continues to change, as both statutory amendments and judicial decisions attempt to answer outstanding questions and resolve tensions. While it includes some robust rights, a more consistent and predictable system would likely be stronger, more resilient, and generate greater certainty among subsistence users.

To the latter, as discussed in Part III, there are a variety of legal provisions and policies that call for and enable Alaska Native involvement in the federal decision-making process. However, all of the existing legal requirements in some way fall short of creating a robust system of collaborative governance that advances self-government and self-determination. Some requirements are limited by scope of application, while others apply ubiquitously but are not strong enough. As demonstrated by the success of the Conflict Avoidance Agreement in mitigating impacts of oil and gas on subsistence hunting of bowhead whales, perhaps Alaska Native communities themselves will use the same ingenuity, creativity, and adaptability that have sustained them for millennia to blaze a trail for new forms of effective collaborative governance in partnership with federal agencies.

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