

# Strengthening Government-to-Government Consultation Related to Marine Subsistence Resources in Alaska

An Exploration of Key Issues, Challenges, and Opportunities



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## Executive Summary

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Under Executive Order 13,175, the federal government must consult with tribal governments when making decisions that may affect tribal interests, a requirement stemming from the trust relationship the federal government has with tribes. Consultation is essential for sustainable and just management of trust resources; however, the consultation requirement has proven to be a complex and challenging mandate to implement. Federal agencies are required to engage in consultation but have not received additional resources to support these efforts; likewise, Alaska Native communities that wish to engage in consultation must find the personnel, time, and funding to effectively participate in myriad meetings. These difficulties are exacerbated in Alaska, a state characterized by its tremendous size, remote populations, extreme weather, and complex social and community structures.

The overarching goal of this Consultation Report is to support the role of Alaska Natives in government-to-government consultation related to marine resources, and to help ensure consultation is an effective, efficient, and meaningful process that actually leads to sustainable—and just—management. Specifically, the Report examines challenges with consultation processes in Alaska and offers ideas for how the processes could be improved. It is the hope that this Report will serve as a resource for those who are engaged in consultation and other collaborative processes; will stimulate additional thinking about how to improve the process; and ultimately will lead to improved approaches to consultation related to marine resources in Alaska.



This Report combines research and analysis of laws, policies, and procedures related to consultation with in-depth conversations with Alaska Natives, federal agency staff engaged in consultation, and others (such as private practice attorneys, nongovernmental representatives, and members of academia) through individual conversations and workshop discussions. These meetings provided additional information that has been essential to the authors' ability to identify the primary challenges to consultation and potential approaches to solving them.<sup>1</sup> While the Report could not exist without the input of those interviewed, the authors highlight that any and all errors in the Report are the sole responsibility of the Environmental Law Institute (ELI).

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<sup>1</sup> The Report is not a quantitative assessment of management community perspectives on consultation. Rather, the discussions with Alaska Native community members, federal agency staff, and others were used to identify key challenges, considerations, and practices as a foundation that informed the Report as a whole. Further, to preserve the confidentiality of those interviewed, this Report does not attribute specific recommendations or identified challenges to any one person unless the information has been obtained from a previously published document. However, the authors endeavor to indicate whether a recommendation was identified by one or more interviewees or whether it is a recommendation that comes directly from the authors based on their expertise. Although not identified by name, the authors want to acknowledge and express their gratitude for the time and effort that the interviewees and meeting participants provided. Without their expertise, experience, and willingness to share their knowledge, this Report would not be possible.



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## Challenges to Government-to-Government Consultation in Alaska

1. **Communicating in Alaska.** Alaska is an enormous state with extreme weather, and communities have both overlapping and distinct interests.
2. **Operating effectively in a complex system of engagement.** Consultation alone is not enough, and the many engagement processes can create confusion. Perceptions differ as to how and if government-to-government consultation and co-management should be linked.
3. **Knowing what counts as consultation.** Given the complexity of the many processes that link communities and federal agencies, it is not always clear when an activity is part of the consultation process or another element of the engagement framework.
4. **Giving adequate notice.** Agencies lack a consistent approach to providing consultation notice and lack a consistent process for tribes to initiate consultation with agencies. For example, some agencies use multiple methods to reach out and others mainly use letters to give notice about opportunities to consult.
5. **Ensuring all appropriate parties participate.** There is a lack of consistency among agencies as to who participates in consultation meetings; a lack of clarity in federal agencies about who to contact within the tribes; and varying views on the role of tribally-authorized organizations in the consultation process.
6. **Exchanging the right information at the right time.** Core to effective consultation is information exchange, which can be hampered by form, timing, and content.
7. **Consulting at the right time.** Mismatches between subsistence/cultural event calendars and agency action calendars can lead to agency initiation of consultation when Alaska Native communities are not available to participate.
8. **Establishing a flexible and collaborative process.** The consultation process is often viewed as more focused on information sharing rather than multiple-party decision-making.
9. **Ensuring accountability and transparency.** Agencies often fail to inform tribes about how consultation informs decision-making, leading to a lack of transparency and fewer mechanisms to ensure accountability.
10. **Operating with limited capacity and resources.** In many instances, both Alaska Native communities and federal agencies lack the capacity, training, and resources needed to effectively engage in robust consultation.
11. **Coordinating consultation.** Due to various limitations, agencies rarely work collaboratively across agencies to engage with Alaska Native communities, which can create inefficiency, confusion, and repetitive information sharing.
12. **Establishing trust.** Trust is an overarching concern that cuts across other challenges, from communicating effectively to ensuring accountability.





## Ideas for Improving Consultation

### Staffing

1. **Expand tribal liaison staff** in federal agencies and sub-agencies.
2. **Establish positions in communities** to build long-term relationships.
3. **Establish third-party ombudsman** to help facilitate consultation processes.

### Before Consultation

4. **Start the consultation process early**, at the equivalent of a 'scoping' stage.
5. **Improve notice of consultation opportunities** by providing sufficient information and effectively reaching potential participants.
6. **Establish a collective federal agency calendar** that includes consultation opportunities, timelines, processes, and plans.
7. **Establish and maintain regional or village subsistence calendars** to share with federal agencies in order to avoid overlap between key subsistence activities and consultation.
8. **Clarify consultation contacts.** Alaska Native communities could provide agencies with guidance on who to consult with on different issues.

### During Consultation

9. **Ensure in-person engagement is a first step** when working with communities.
10. **Go slower** to the extent allowed by statutes and regulations in order to fit better with Alaska Native community needs.
11. **Design and use a standard federal protocol for recording input** received during consultation.
12. **Track input and multi-party decision-making** during the consultation process to improve transparency and accountability.
13. **Establish information exchange procedures** to ensure information is shared far enough in advance and in an appropriate format to enable sufficient time to review and formulate responses.

### After Consultation

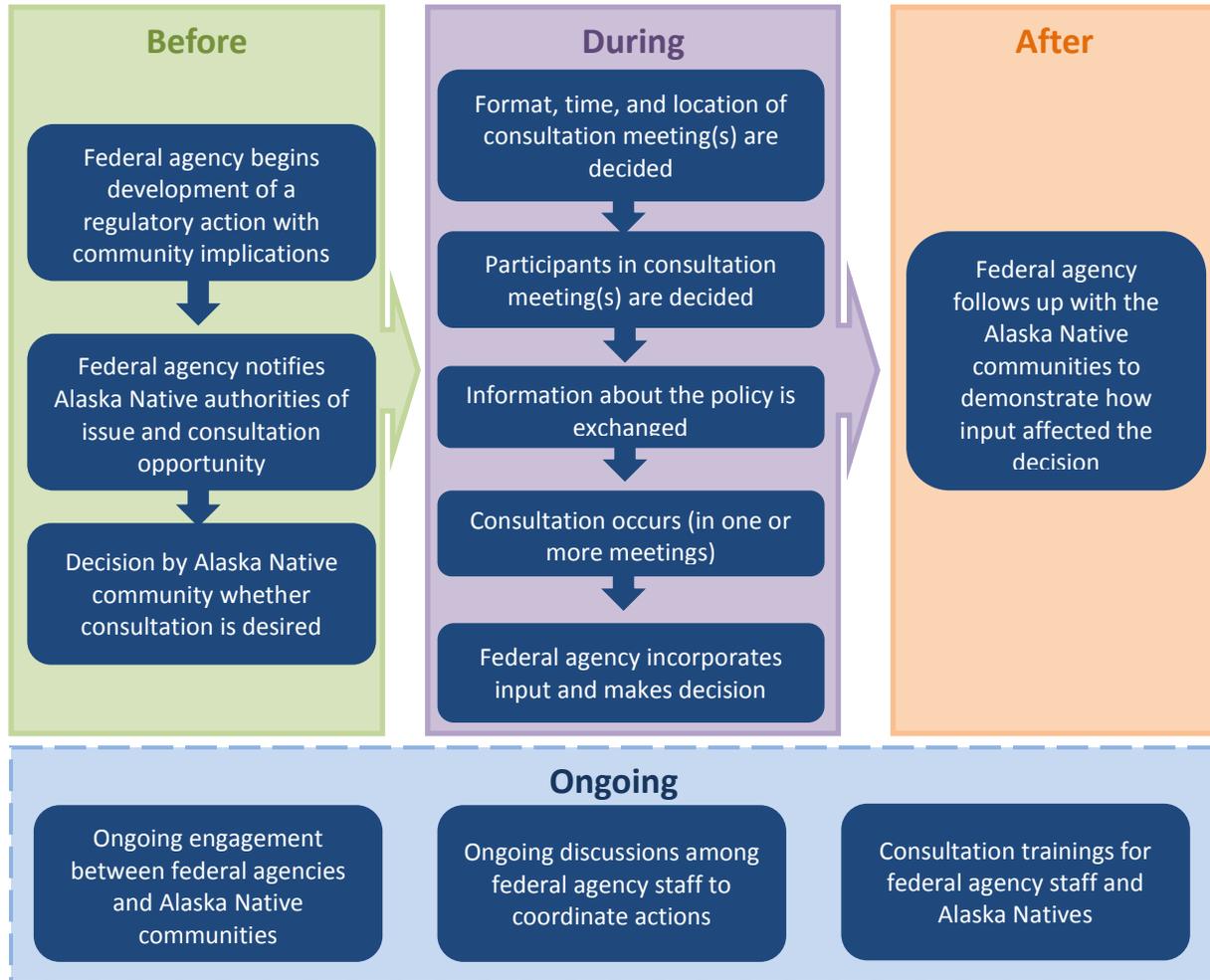
14. **Establish and use a standard protocol for follow up** after consultation to provide participants with a record of information exchanged and how consultation affected the decision.
15. **Develop community standards for follow up.** Alaska Natives could develop standards for the

type and format of follow up they desire from federal agencies subsequent to consultation.

### Cross-cutting

16. **Share anticipated actions annually** at key annual state and/or regional meetings to flag issues and identify preliminary consultation needs/requests.
17. **Expand federal engagement**, including the number and type of community activities.
18. **Establish more uniform consultation processes** across agencies.
19. **Establish an interagency forum** for ongoing discussions among tribal liaisons and other agency representatives to improve interagency coordination on consultation and engagement with Alaska Native communities.
20. **Develop a glossary of key terms** frequently used in consultation to clarify when something is consultation versus other processes.
21. **Develop tribal consultation policies.** Alaska Native communities could develop and share their consultation policies and procedures with federal agencies.
22. **Examine the system of federal-Alaska Native engagement** in order to develop model communication approaches that could be adapted by villages and/or regions.
23. **Clarify when consensus-based decision-making is appropriate** by joint effort between agencies and communities.
24. **Train agency participants in consultation** about how to work with Alaska Native communities.
25. **Train tribal participants** to help communities improve their ability to engage in consultation processes.
26. **Explore ways to minimize burdens and costs and maximize engagement** in order to address the extreme challenges with the cost of consultation and the capacity to consult given the size of Alaska, the number of tribes, and the number of potential consultation opportunities.

## Conceptual Approach to Consultation



### About the Environmental Law Institute

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