

A R T I C L E S

Understanding the Government-to-Government Consultation Framework for Agency Activities That Affect Marine Natural Resources in the U.S. Arctic

by Greta Swanson, Kathryn Mengerink, and Jordan Diamond

Greta Swanson is a Visiting Attorney at the Environmental Law Institute.

Kathryn Mengerink is a Senior Attorney and Co-Director of the Ocean Program at the Environmental Law Institute.

Jordan Diamond is a Staff Attorney and Co-Director of the Ocean Program at the Environmental Law Institute.

Summary

Alaska Natives work with the federal government in managing resources in the Arctic. Federal consultation with tribes is one of the ways that such cooperative management can be achieved. Existing federal-level policies require consultation with tribes when federal agencies make decisions affecting tribal interests in Alaska. Taking into account the unique circumstances for tribes in Alaska, it is necessary to explore existing consultation policies and procedures, highlighting those that strengthen the underlying framework and how consultation occurs in practice.

I. The Role of Federal Government Consultation With Alaska Native Tribes

A. The Need for Collaborative Governance With Alaska Native Communities

The U.S. Arctic is home for many Alaska Natives—federally recognized tribal members who have specific rights to resources and rights to collaborate in federal decisionmaking. Laws, regulations, memoranda, and policies help to frame the trust responsibilities of federal agencies to tribes, and call upon federal agencies to work collaboratively with Alaska Native communities when making decisions that affect them. Just as important, federal agencies have much to gain by working with Alaska Native communities. As holders of traditional ecological knowledge (TEK), many members of Alaska Native communities can help federal agencies make better informed decisions about how to manage resources in a highly dynamic, isolated, and extreme environment in a way that also protects the lives and livelihoods of the Arctic communities.

This Article explores the legal and policy mechanisms available for federal agencies to formally work with Alaska Native communities in managing ocean and coastal resources. In Part I, the authors provide an overview of the need for consultation and the legal and policy framework designed to enable it. In Part II, the authors discuss the trust relationship that underpins consultation requirements, and Executive Order No. 13175, Consultation and Coordination With Indian Tribal Governments (EO 13175),¹ which details consultation requirements. The section also discusses statutory protections for subsistence resources for tribes and requirements for tribal participation in decisionmaking. Part III summarizes the elements of consultation as identified by EO 13175 and other recommendations. Part IV compares agency policies based on the elements of consultation identified in Part III.

Authors' note: The authors express their appreciation for the funding provided by Oak Foundation and the Wilburforce Foundation, which made the research and writing possible. We also wish to express our deep gratitude to John Sky Starkey for his thorough review of the Article, and to the many Arctic experts who lent their expertise to help us understand the complexities of subsistence management and consultation in the U.S. Arctic, with particular thanks to Jessica Lefevre for her continued guidance on the legal and social frameworks. All errors and omissions are the responsibility of the authors alone.

1. Consultation and Coordination With Indian Tribal Governments, Exec. Order No. 13175 of Nov. 6, 2000, 65 Fed. Reg. 67249, §3 (Nov. 9, 2000).

B. Understanding the Legal Framework for Alaska Native Communities

Alaska Native communities are represented by an array of entities authorized by tribal, state, and federal governments. These entities have both explicit and potential roles to play in managing subsistence resources and engaging in the consultation process. While the legal authorities relating to such entities are addressed throughout this Article, it is useful to summarize the key ones at the outset in order to understand the immense complexity of government-to-government consultation in the U.S. Arctic.

At the smallest level of organization is the individual village, which can range from tens of people to a few thousand in size. Each Alaska Native village is designated as a federally recognized tribe—in all, this includes 229 tribes (Figure 1).² Each village has a tribal government, and 200 of the villages have a village corporation. A village also may have a local and/or regional government under state law (e.g., Barrow, Alaska, is home to the North Slope Borough).

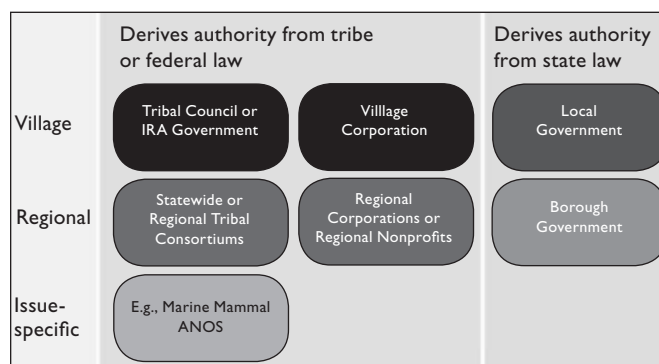
A larger unit of organization occurs at the regional level, which varies in size and organization based on the entity. At the regional level, Alaska Native communities are divided into 12 geographic regions that have corresponding regional nonprofit associations and regional corporations (there is also a 13th corporation for nonresident Alaska Natives).³ The Alaska Native Claims Settlement Act (ANCSA) issued 44 million acres to the regional corporations. Out of this land, village corporations selected land within and near the village to which they own the surface rights. The regional corporations retained the rights to subsurface resources under village corporation land, as well as surface and subsurface rights to the remaining regional corporation land. The regional nonprofit Alaska Native associations provide health and environmental services for the tribes within the region.

Another type of organizational structure is by issue. Among these, a variety of co-management bodies are authorized by Alaska Native tribes and/or federal law to represent tribal interests in managing subsistence resources. Known as Alaska Native organizations (ANOs) under the Marine Mammal Protection Act (MMPA),⁴ these co-management bodies include, for example, the following: Alaska Eskimo Whaling Commission (AEWC); Eskimo Walrus Commission; Nanuq Commission; Ice Seal Committee; and the Alaska Beluga Whale Committee, among others. Another regulatory authority establishes the co-manage-

ment structure of the Alaska Migratory Bird Co-Management Council.

At the state or broader level of organization, some state and even international entities bring together leaders to discuss Alaska Native interests. For example, the Indigenous People’s Council for Marine Mammals is comprised of 17 marine mammal commissions, and the Alaska Federation of Natives is a statewide entity with members representing villages, Alaska Native corporations, regional nonprofits, and other Alaska Native groups.

Figure 1. Alaska Native Entities Potentially Relevant to Consultation



All of these types of institutions may have a role to play in the consultation process. Specifically, government-to-government consultation can occur with representatives of a few different entities: (1) tribal governments; (2) “authorized intertribal organizations,”⁵ which receive delegated consultation authorities from tribes; and (3) Alaska Native corporations. For the purpose of this Article, the authors focus on consultation between the federal government and federally recognized tribes or authorized intertribal organizations. Legal mandates for consult with Alaska Native corporations are not explored in detail.⁶

C. Consultation Is One Form of Participatory Governance

Government-to-government consultation is one element of a broader Alaska Native-federal government framework of collaborative and participatory governance. This framework includes a spectrum of participatory activities ranging from information-sharing and public notice-and-comment processes to consultation and co-management.

Information-sharing and public notice and comment are broad mechanisms that include all stakeholders and

2. See *infra* notes 13 and accompanying text.

3. See *infra* notes 38-41 and accompanying text. Note that regional nonprofits are arms of regional corporations.

4. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-410.

5. EO 13175, §§1(d), 5.

6. Pub. L. No. 108-199, 118 Stat. 452, as amended by Pub. L. No. 108-447, 118 Stat. 3267.

government bodies. For example, public commenting in the context of notice-and-comment rulemaking is a basic requirement of the Administrative Procedure Act and other federal laws that allow anyone, including Alaska Natives, to provide input into a decisionmaking process.⁷

Other participatory and collaborative processes, including consultation and co-management, reflect the special status of federally recognized tribes as domestic dependent nations. As reviewed in this Article, consultation requires a higher level of information exchange and collaboration than public notice-and-comment requirements. Co-management typically requires greater involvement still, involving collaborative research and actions under co-management agreements.

These diverse processes create different ways for Alaska Natives to engage in federal decisionmaking, which can be beneficial. However, the number of different mechanisms can also muddle both community and agency understanding of the individual processes and how one is similar to or different from another.

This Article addresses the meaning of consultation and the policies that implement it in order to better clarify consultation procedures and requirements.

II. The Trust Relationship and Alaska Native Involvement in Decisionmaking

A. The Federal Trust Responsibility

The Bureau of Indian Affairs notes that

[t]he federal Indian trust responsibility is . . . a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.⁸

The federal government's trust responsibilities developed out of the history of the federal government's treaty-making with tribes.⁹ In part, because tribes were often at a disadvantage when making treaties with the U.S. government, the U.S. Supreme Court and lower courts have interpreted treaties by resolving unclear language in favor of tribes.¹⁰ This interpretation also applies to statutes, and the Supreme Court has ruled that "statutes passed for the benefit of the dependent Indian tribes or communities are to

be liberally construed, doubtful expressions being resolved in favor of the Indians."¹¹ However, federal agencies must balance these trust responsibilities with other federal mandates, including protection of the environment and federal lands and waters¹² and other statutory duties.

Consultation requirements derive from this fundamental trust responsibility of the U.S. government to protect Native American rights and resources. Over 80,000 Alaska Natives are members of the 229 designated federal Indian tribes in Alaska,¹³ and thus encompassed within consultation directives.

B. Executive Policies Related to Tribal Consultation and Coordination

In 2000, President William J. Clinton issued EO 13175. The Order establishes consultation requirements for all federal agencies, recognizing that Native American tribes are considered domestic dependent nations with inherent sovereign powers recognized by the U.S. Constitution, treaties, statutes, executive orders, court decisions, and policies.¹⁴

To ensure that the federal government satisfies its trust duties, the Executive Order establishes criteria to be applied when a federal agency is "formulating and implementing policies that have tribal implications."¹⁵ The EO defines "[p]olicies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."¹⁶

7. Public comments are also required by some individual statutes, such as the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, or MSA), Pub. L. No. 94-265, as amended by Pub. L. No. 109-479, 16 U.S.C. §§1801 et seq., and the Outer Continental Shelf Lands Act (OCSLA), Pub. L. No. 106-580, 43 U.S.C. §§1301 et seq.

8. U.S. Department of the Interior, Bureau of Indian Affairs, *Frequently Asked Questions*, <http://www.bia.gov/FAQs/index.htm> (last visited July 18, 2013).

9. Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 272-74 (2003) (describing the origins of the Indian trust doctrine); see also *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

10. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 29 ELR 20557 (1999).

11. *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 79 (1918).

12. Tsosie, *supra* note 9 (advocating consultation and co-management as a way to resolve potential conflicts); Mary Turnipseed et al., *Legal Bedrock for Rebuilding America's Ocean Ecosystems*, 324 SCI. 183 (2009) (discussing federal public trust obligations).

13. See, e.g., Office of American Indian Trust, Department of the Interior, Departmental Manual Part 512, ch. 2, Departmental Responsibilities for Indian Trust Resources. The U.S. Department of the Interior publishes a list of federally recognized sovereign tribes, which includes 227 Native Alaskan tribes and villages. 25 U.S.C. §479a; 77 Fed. Reg. 47868 (Aug. 10, 2012). An *Indian tribe* is "Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §479a." EO 13175, *supra* note 1, §1(b). See also Department of the Interior, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60810 (Oct. 1, 2010).

14. Specifically, EO 13175 states that [t]he United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

EO 13175, §3, *supra* note 1.

15. EO 13175, *supra* note 1.

16. *Id.* §1(b).

When developing policies that have tribal implications, EO 13175 calls upon federal agencies¹⁷ to recognize the unique legal relationship with Indian tribes as domestic dependent nations; to work with Indian tribes on a government-to-government basis; and to acknowledge the right of Indian tribes to self-government and tribal self-determination. As recognized by the EO, federal statutes and regulations “establish and define a trust relationship,” and it is a fundamental principle of the federal government to “work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.”¹⁸

EO 13175 defines a general consultation requirement for agencies. When developing regulatory policies with tribal implications, each agency must have “an accountable process to ensure meaningful and timely input by tribal officials.”¹⁹ The consultation process is to be carried out with “tribal officials,” defined as “elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.”²⁰ Furthermore, agencies are required to designate an official tasked with implementing the EO, and to submit a description of the agency’s consultation process to the Office of Management and Budget (OMB).

The Executive Order establishes additional specific requirements under three different circumstances in which the federal government’s actions have implications for tribes: (1) formulating and implementing policies; (2) creating legislative proposals; and (3) developing regulations.

- (1) For formulating and implementing policies with tribal implications—which include policies, regulations, and legislation—EO 13175 outlines certain policymaking criteria: the federal government must encourage tribes to develop their own policies; defer to tribal standards when possible; and consult with tribal officials when determining whether to establish federal standards.²¹
- (2) When creating legislative proposals, agencies are to satisfy the same procedures as required for formulating policies with tribal implications, and to certify to OMB that the EO requirements have been met.
- (3) When developing regulations that have tribal implications and either (a) impose unfunded costs on tribal governments not required by statute (and the agency has not paid the costs) or (b) preempt tribal law, the agency, to the extent practicable and permitted by law, must consult with tribal officials early in

the process of developing the proposed regulation, as well as satisfy the criteria for formulating and implementing policies.²² When publishing such final regulations, the agency must document the consultation with a “tribal summary impact statement” in the *Federal Register* and show the extent to which the agency has met the concerns of tribal officials.²³ Additional requirements include that the agency must provide OMB with copies of written communication between tribes and agencies.²⁴ Further, when the consultation concerns issues that relate to tribal self-government, tribal trust resources, or Indian tribal treaty or other rights, agencies should “explore, and where appropriate, use” consensual decisionmaking mechanisms (including negotiated rulemaking).²⁵

Almost one decade after EO 13175 was issued, President Barack Obama revived the Order in November 2009, when he released a memorandum requiring agencies to develop detailed plans of action to implement EO 13175.²⁶ Agencies were directed to draft plans within 90 days of the issuance of the memorandum, to submit progress reports on the plans to OMB by August 2, 2010, and to submit annual progress reports thereafter. Departments and agencies were to consult with Indian tribes and tribal officials to develop the action plans²⁷ and to designate an agency official to coordinate implementation plans and progress reports.

In July 2010, OMB issued guidance to clarify agency requirements for consultation and progress reports, and to update earlier guidance on EO 13175. One of the issues that the OMB Guidance addresses is the role of the tribal consultation official, who has the “principal responsibil-

22. This specific process applies only when developing “regulations.” EO 13175, *supra* note 1, §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. §5(a).

23. §5(b) and (c). The National Marine Fisheries Service (NMFS) has included a tribal impact summary statement for two final fisheries rules in 2010. *See* Fisheries of the Exclusive Economic Zone Off Alaska; Chinook Salmon Bycatch Management in the Bering Sea Pollock Fishery, 75 Fed. Reg. 53026 (Aug. 30, 2010) (final rule); Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea Subarea, 75 Fed. Reg. 41123 (July 15, 2010) (proposed regulations); Fisheries of the Exclusive Economic Zone Off Alaska; Chinook Salmon Bycatch Management in the Bering Sea Pollock Fishery, 75 Fed. Reg. 14016 (Mar. 23, 2010) (proposed regulations); and Fisheries of the Exclusive Economic Zone Off Alaska; Modified Nonpelagic Trawl Gear and Habitat Conservation in the Bering Sea Subarea, 75 Fed. Reg. 61642 (Oct. 6, 2010) (final rule).

24. EO 13175, *supra* note 1, §5(b) and (c).

25. *Id.* §5(d). The Negotiated Rulemaking Act of 1996, 5 U.S.C. §§501 et seq., applicable to all agencies, defines “negotiated rulemaking,” as “rulemaking through the use of a negotiated rulemaking committee” (§502(6)), which is in turn defined as “an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule” (§502(7)). Consensus means “unanimous concurrence among the interests represented on a negotiated rulemaking committee,” unless the committee defines it differently (§502(2)).

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

27. *Id.* at 1.

17. “Agencies” are defined as “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).” *Id.* §1(c).

18. *Id.* §2.

19. *Id.* §5(a).

20. *Id.* §1(d).

21. *Id.* §3.

ity for the agency's implementation" of the Executive Order. It calls upon agency tribal consultation officials to "assure that the agency program personnel have considered the fundamental principles and policymaking criteria stated in [the EO] in formulating or implementing policies, and in the development of legislative proposals, that have tribal implications."²⁸ Although EO 13175 "is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law,"²⁹ the OMB Guidance states that the tribal consultation official must certify that the Executive Order requirements are met "in a meaningful and timely manner" when submitting draft regulations to OMB.³⁰ Although tribal beneficiaries do not have the right to enforce the consultation policies of the Executive Order in court, the Executive Order is a mandate to agencies to fulfill trust obligations in part through consultation.

Until 2010, the consultation requirements only applied to federal decisions that could impact Indian tribes.³¹ Through a provision in a 2010 omnibus bill, the requirement for OMB and agencies to consult with tribes under EO 13175 was explicitly extended to include Alaska Native corporations, and the OMB Guidance calls for all federal agencies to consult with Alaska Native corporations "on the same basis as Indian tribes."³² It may be noted that the corporations, as for-profit entities, may or may not have interests consistent with tribal interests. Further, because village corporations own only the surface rights to their land, while regional corporations own the subsurface rights, there may be conflicting interests between the village and regional corporations.

C. The Trust Relationship and Alaska Native Rights to Subsistence Resources

Satisfying tribal trust responsibilities through government-to-government consultation is uniquely challenging in Alaska. This is due, in part, to issues involving the extent of tribal rights to subsistence resources retained by Alaska Natives, the number of designated tribes, the structure of the Alaska Native governance framework, the

remote location and difficulty of reaching Alaska Native villages, and the myriad laws designed to manage use of key trust resources.

As discussed in the previous section, all federal agencies are to consult with tribal officials on federal policy, regulatory, or legislative actions that may have substantial effects on tribes, their relationship with the federal government, or the distribution of power between tribes and the federal government. A particularly important issue for Alaska Native communities, and one that often triggers federal-tribal consultation, is the protection of subsistence fishing and hunting practices and resources. Several statutes protect Alaska Native subsistence rights to marine and other living resources, in particular through provisions that exempt Alaska Natives' subsistence harvest from prohibitions on take. These provisions are described in this section.³³

As explained in Secretarial Order 3206, which sets out the tribal obligations of the Secretaries of the U.S. Departments of the Interior (DOI) and Commerce (DOC) under the Endangered Species Act (ESA),³⁴ "tribal trust resources" are defined as "natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States."³⁵ Based on this definition, those subsistence resources to which Alaska Natives have legal hunting and fishing rights are among the "tribal trust resources."³⁶ Therefore, the federal government's trust responsibility to Alaska Native tribes requires government-to-government consultation when a federal agency takes actions that may affect subsistence resources.³⁷

28. Peter Orszag, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies on Guidance for Implementing E.O. 13175, "Consultation and Coordination With Indian Tribal Governments," 2-3 (July 30, 2010) [hereinafter OMB Guidance].

29. EO 13175, *supra* note 1, §10 (Judicial Review).

30. OMB Guidance, *supra* note 28, at 4.

31. EO 13175, *supra* note 1, §1(b).

32. OMB Guidance, *supra* note 28. The memorandum stated that 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 Consolidated Appropriations Act requires that [t]he Director of the Office of Management and Budget shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175.

Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. H. Sec. 161, 118 Stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. H., Title V. Sec. 518, 118 Stat. 2809, 3267 (2004).

33. The authors provide a more extensive exploration of the information summarized here about Alaska Native marine subsistence hunting and fishing rights and the existing and potential management roles for Alaska Natives in a forthcoming paper in the *Fla. A&M U. L. Rev.* (forthcoming 2013).

34. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

35. Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997), issued by the Secretary of the Interior and the Secretary of Commerce.

36. Secretarial Order 3225 is an Alaska-specific DOI Order that supplements Secretarial Order 3206 by expanding the recognized tribes to include Annette Island Reserve, which is a formally designated Indian reservation. The order also expands upon the consultation policy for DOI. DOI, Secretarial Order 3225, Endangered Species and Subsistence Uses in Alaska (supplement to Secretarial Order 3206) (Jan. 19, 2001).

37. See *Klamath Tribes v. United States*, 1996 WL 924509 (D. Or. Oct. 2, 1996) (consultation required before sale of timber from tribal land "to avoid adverse effects on treaty resources"); *Yakima Nation v. U.S. Dept. of Agric.*, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010) (requiring consultation before placing landfill next to tribal lands, because would interfere with tribe's treaty-protected hunting, gathering, and fishing rights); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) (requirements under the National Historic Preservation Act); *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.2d 1072 (9th Cir. 2011) (Energy Policy Act requirements to consult in developing electrical transmission congestion studies); cf. *Center for Biological Diversity v. Salazar*, slip op. 2011 WL 6000497 (D. Ariz., Nov. 30, 2011) (in the context of a challenge to a DPS listing, the court found that, in contrast to other situations that involve tribal treaty rights or specific statutory or regulatory requirements, "Congress and Interior have not imposed such consultation obligations in the ESA context." Therefore, the court would not impose specific standards when statute or regulations did not specify them).

While the trust responsibility applies broadly, the contours of its application depend on the particular rights or statutes involved.³⁸ Regarding the subsistence rights of Alaska Natives, there are several relevant doctrines, statutes, and judicial decisions that outline subsistence rights and delineate the federal government's trust responsibilities. This section briefly reviews these rights and authorities.

The 1958 Alaska Statehood Act forbade the state from taking lands held by Alaska Natives under aboriginal title, under legally cognizable rights, or "by the United States in trust for said natives."³⁹ During the next decade, conflict developed over land title and native claims, especially with the discovery of oil on the North Slope, and Congress passed the ANCSA of 1971 to address these conflicts.⁴⁰ ANCSA created the current land tenure framework for Alaska Natives.⁴¹ As described previously, the Act established 13 for-profit regional native corporations and 200 smaller village corporations.⁴² The Act extinguished all land claims based on aboriginal use, right, or title and all aboriginal hunting and fishing rights in Alaska. In exchange, village corporations could claim a prescribed amount of land in the area where their township was situated, proportional to the size of the village, but the rights of village corporations are limited to the surface estate.⁴³ An additional 44 million acres was conveyed to regional corporations, which also own the subsurface resources under village corporation land.⁴⁴

The territorial scope of extinguished Alaska Native claims and rights is limited, in part, by the phrase "in Alaska."⁴⁵ Specifically, ANCSA provides that "[a]ll aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, *including* submerged land underneath all water areas, both inland and offshore, and *including* any aboriginal hunting or fishing rights that may exist, are hereby extinguished."⁴⁶ However, as courts have noted, ANCSA applies to state lands and state waters out to three miles, so Alaska Natives may retain aboriginal

hunting and fishing rights in federal waters and claims to the submerged lands on the outer continental shelf.⁴⁷

Although ANCSA formally extinguished aboriginal claims in Alaska, Congress intended that Alaska Natives maintain subsistence rights⁴⁸ and believed that the Secretary of the Interior had the power to and would protect those rights.⁴⁹ Congress subsequently passed the Alaska National Interest Lands Conservation Act (ANILCA), in part with the intent to protect Alaska Native subsistence rights.⁵⁰

Under ANILCA, special status is given to subsistence harvesting of wildlife on federal lands in Alaska.⁵¹ ANILCA provides that fish and wildlife taken on federal public land for non-wasteful subsistence purposes shall be afforded priority over the taking of fish and wildlife for all other purposes. It is important to note, however, that ANILCA does not apply to endangered species, marine mammals, migratory birds, marine fisheries, or marine invertebrates.⁵²

The Federal Subsistence Board administers the subsistence harvest of fish and wildlife on federal public lands in Alaska. It is made up of the U.S. Fish and Wildlife Service (FWS), National Park Service, Bureau of Land Management, Bureau of Indian Affairs, the U.S. Forest Service, and two rural representatives.⁵³ When making its decisions, the Federal Subsistence Board must give deference to the subsistence recommendations of the Regional Advi-

38. See *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (federal trust relationship includes a general trust responsibility, specific statutory responsibilities, and a fiduciary relationship when the federal government manages tribal assets); Tsosie, *supra* note 9, at 276-77; *Gros Ventre Tribe v. United States*, 469 F.2d 801, 810 (9th Cir. 2006); *Shoshone-Bannock Tribes v. Reno*, 56 F.2d 1465, 1482 (D.C. Cir. 1995); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011) (common law of trusts did not require more than specific statutory provisions that asserted that fulfilled trust obligation to tribes); Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENVER UNIV. L. REV. 1069 (2006).

39. Alaska Statehood Act, 48 U.S.C.A. ch. 2 §4 (1958).

40. 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.lbbllawyers.com/ANCSA%20at%2035%20Delivering%20on%20the%20Promise%20Proof%2010-25-07.pdf>.

41. 43 U.S.C.A. §1621(c).

42. 43 U.S.C.A. §1606.

43. 43 U.S.C.A. §1607.

44. 43 U.S.C.A. §1611 (b).

45. Public Lands Act, 43 U.S.C. §1603(b).

46. Emphasis added. Public Lands Act, 43 U.S.C. §1603(b).

47. *Amoco Production Co. v. Gambell*, 480 U.S. 531, 533, 17 ELR 20574 (9th Cir. 1987). The U.S. Court of Appeals for the Ninth Circuit has held that ANCSA did not extinguish any preexisting aboriginal rights on the outer continental shelf (*Village of Gambell v. Hodel*, 869 F.2d 1273, 19 ELR 21150 (9th Cir. 1989)), and Supreme Court decisions hold that the reserved rights doctrine applies (*United States v. Winans*, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908)). The reserved rights doctrine states that any rights not explicitly granted by a tribe to the federal government are reserved by that tribe. This doctrine supports Alaskan Natives' rights to marine subsistence resources where they have not otherwise been limited. See *Amoco Production*, 480 U.S. 531. Under the ESA, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has found a federal trust responsibility to protect Alaska Natives' subsistence resources, although the responsibility was discharged by carefully taking into account the needs of the Alaska Natives under the statute. *North Slope Borough v. Andrus* 486 F. Supp. 332, 10 ELR 20115 (D.D.C. 1980), *affid in part and revid in part*, 642 F.2d 589, 614, 10 ELR 20832 (D.C. Cir. 1980).

48. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS, 291-92 (3d ed. 2012) ("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, 92d Cong., 1st Sess. (Dec. 14, 1971)).

49. See H.R. CONF. REP. NO. 92-746, at 24 (1971), reprinted in 1971 U.S.C.C.A.N. 2247, 2250. ("The conference committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority.") (cited in Jack McGee, *Subsistence Hunting and Fishing in Alaska: Does ANILCA's Rural Subsistence Priority Really Conflict With the Alaska Constitution?*, 27 ALASKA L. REV. 221, 228 (2010); Regina M. Cutler, *A Question of Trust: The Role of Alaskan Native Tribes in Natural Resource Damage Action*, p. 24 (2000), available at <http://www.msaj.com/papers/alaska.htm>; S. CONF. REP. NO. 481, 92d Cong., 1st Sess. (1971); H.R. CONF. REP. NO. 746, 92d Cong., 1st Sess. (1971)).

50. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, §§801, 802 (1980). ANILCA's language applies generally to all rural Alaskans.

51. 16 U.S.C.A. §3114.

52. 16 U.S.C.A. §3125.

53. 36 C.F.R. §242.10.

sory Councils, made up of 70% rural subsistence, typically tribal, representatives.⁵⁴

In addition to subsistence rights under ANILCA, other federal laws, such as the ESA, the MMPA, and the Migratory Bird Treaty Act, have provisions that protect Alaska Native subsistence rights. These rights include rights to resources and, in some instances, rights to share management responsibilities with the federal government. International instruments, and U.S. statutes that help implement them, also recognize the rights of Alaska Natives to subsistence resources. Among these resources are fur seals, migratory birds, polar bears, and bowhead whales; Alaska Natives also have the rights to share management responsibilities for the resources. The following section provides a brief overview of these laws and their subsistence provisions.

The **ESA** generally prohibits the taking of endangered and threatened species in the United States. It, however, provides an exemption for Alaska Native subsistence harvest.⁵⁵ Any Alaska Native, or non-native who permanently resides in an Alaskan village, is exempt from the prohibition on the take of endangered species, as long as the take is for subsistence purposes and is not accomplished in a wasteful manner.⁵⁶ Subsistence use is defined to include the sale of edible products sold for native consumption in native villages and towns in Alaska.⁵⁷ An exemption for non-edible byproducts, made into native handicrafts, allows them to be sold in interstate commerce.⁵⁸ Restrictions on take can only be imposed if the protected species in question is being negatively affected by subsistence harvest.⁵⁹ Such regulations must be preceded by public notice and hearings, and must be removed once it is determined that the regulations are no longer needed.⁶⁰

The **MMPA** imposes a moratorium on the take of all marine mammals and importation of their products, with some exceptions.⁶¹ One exemption from the prohibition on take is for Alaska Native subsistence harvests of marine mammals.⁶² Any Alaska Native who dwells along the coast of the North Pacific or the Arctic Ocean is exempt from the moratorium on the taking of marine mammals, and may take marine mammals for subsistence consumption⁶³ and to create native articles of handcraft, if the resources

are harvested in a non-wasteful manner.⁶⁴ The MMPA provides that edible portions of marine mammals may be sold in native villages and towns for native consumption and that native handicrafts may be sold in interstate commerce.⁶⁵ Regulations may be imposed if the Secretary decides a stock of marine mammal is becoming depleted.⁶⁶

The MMPA also includes a provision for cooperative marine mammal management between the federal government and Alaska Native organizations.⁶⁷ A related memorandum of agreement provides that individual agreements will include funding terms, but that funding is subject to the availability of agency appropriations.⁶⁸

The **Migratory Bird Treaty Act** protects migratory birds by prohibiting, subject to regulation, activities that include hunting, killing, possessing, transporting, selling, importing, and exporting certain migratory birds.⁶⁹ The Act includes several seabirds and shorebirds found in Alaska.⁷⁰ Hunting is permitted by regulation during fall and winter, but prohibited during the summer. In 1978, the Act was amended to allow Alaska Natives within subsistence areas to continue their traditional subsistence harvest of migratory birds and their eggs during the closed summer season,⁷¹ subject to regulation by the Secretary of the Interior.⁷²

A treaty protocol with Canada, which the U.S. Senate approved in 1997, authorized co-management of the subsistence harvest with Alaska Natives, whose representatives were to be given “an effective and meaningful role” in conservation of migratory birds, and development of subsistence harvest regulations.⁷³ The Alaska Migratory Bird Co-Management Council, formed in 2000 and authorized by the protocol, develops proposed subsistence regulations. It consists of Alaska Natives and federal and state representatives who work together as equals to develop proposed regulations and guidelines governing subsistence harvest of migratory birds.⁷⁴

54. The Regional Advisory Councils also have a role under §810(a) of ANILCA. Before a federal agency disposes of land, it must give notice to local committees and regional councils, as well as state agencies, and hold a hearing in the area of the proposed action. In its final decision, the agency must determine that any restriction of subsistence uses is necessary and consistent with “sound management practices” and involves the minimum impact on public lands and it must take steps to minimize adverse impacts on subsistence uses. 16 U.S.C. §3120(a).

55. ESA, 16 U.S.C. §§1538-39.

56. 16 U.S.C.A. §§1539(e)(1)-(2).

57. 16 U.S.C.A. §1539(e)(3)(i).

58. 16 U.S.C.A. §1539(e)(1)(B).

59. 16 U.S.C.A. §1539(e)(4).

60. *Id.*

61. MMPA, 16 U.S.C. §§1371-72.

62. 16 U.S.C.A. §1371(b).

63. 16 U.S.C.A. §1371(b)(1).

64. 16 U.S.C.A. §1371(b)(2).

65. *Id.*

66. 16 U.S.C.A. §1371(b)(3).

67. 16 U.S.C.A. §1388(a): “The Secretary may enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”

68. Memorandum of Agreement for Negotiation of Marine Mammal Protection Act Section 119 Agreements Among the U.S. Department of Commerce, National Marine Fisheries Service, the Department of the Interior, Fish and Wildlife Service and the Indigenous Peoples Council for Marine Mammals, Section VI, p. 7, provides that “Funding for individual agreements will be obligated under agreements executed under section 119 of the Marine Mammal Protection Act.”

69. 16 U.S.C.A. §703.

70. 50 C.F.R. §10.13.

71. 50 C.F.R. §93.3.

72. 16 U.S.C.A. §712.

73. Historical Timeline, Alaska Migratory Bird Co-Management Council, available at <http://alaska.fws.gov/ambcc/ambcc/Historical%20Timeline.pdf>, 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), art. II(4)(2)(b)(ii).

74. 50 C.F.R. §92.10.

The **Fur Seal Act**,⁷⁵ which generally prohibits the taking of fur seals in the North Pacific,⁷⁶ allows Indians, Aleuts, and Eskimos to take fur seals for subsistence purposes and by traditional means.⁷⁷

Polar bear take and management is governed by a few laws and treaties. It is a marine mammal, so take is managed in accordance with the MMPA and it is listed as a threatened species under the ESA. Further, the International Agreement on the Conservation of Polar Bears⁷⁸ allows parties to exempt taking “by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party.”⁷⁹ An agreement between the United States and Russia⁸⁰ establishes a United States-Russia Polar Bear Commission and calls for an Alaska Native to be included as one of two members of the U.S. delegation.⁸¹ In implementing this treaty, §119 of the MMPA gives the Alaska Nanuuq Commission (the ANO representing 15 villages in the management of polar bears) authority to co-manage polar bears.

The **International Convention for Regulation of Whaling** allows “aboriginal subsistence whaling” within agreed-upon catch limits in the Bering, Chukchi, and Beaufort Seas as codified in the Schedule to the International Convention for Regulation of Whaling.⁸² The U.S. Whaling Convention Act requires compliance with the International Convention, and regulations lay out the framework for subsistence harvest of bowhead whales.⁸³ The regulations grant the “relevant Native American whaling organization” the authority to allocate quotas, monitor the hunt, and tally whale strikes and landings.⁸⁴ It also requires reporting by whaling captains and the whaling organization.

The recognition of Alaska Native subsistence rights by these statutes and treaties indicates that Alaskan tribal trust resources include subsistence resources. It is these rights to resources that trigger government-to-government consultation when federal agencies plan actions that could affect the resources.

D. *Examples of Consultation Requirements and Other Opportunities for Collaboration*

Consistent with the trust responsibilities of the federal government to protect Alaska Natives’ rights to subsistence, policies or regulations under the ESA, the MMPA, the Outer Continental Shelf Lands Act (OCSLA) (with regard to alternative energy development), and the National Historic Preservation Act require tribal consultation at particular points in decisionmaking. Several statutes also require public participation processes beyond the mandates of the Administrative Procedure Act, to accommodate the interests of the public or particular governing units, which can include tribes. This section describes some of the legal requirements for agency engagement with Alaska Natives during decisionmaking, to provide context for understanding the consultation framework.⁸⁵

I. The National Environmental Policy Act

The National Environmental Policy Act (NEPA)⁸⁶ is a procedural law requiring agencies to conduct environmental impact statements for all major federal actions that are likely to significantly affect the human environment.⁸⁷ NEPA regulations allow for “cooperative consultation” with tribes.⁸⁸ These provisions support and could provide a procedural mechanism for consultation in the NEPA context, although they do not replace other mandates to consult. Agencies have consulted with tribes during the NEPA scoping process and reviewed the adequacy of consultations in environmental impact statements.

First, NEPA provides the opportunity for tribes to participate in the environmental assessment as cooperating agencies—meaning that tribes work side by side with the agency to conduct the environmental review.⁸⁹ In its declaration of policy, NEPA states that its environmental goals are to be achieved “in cooperation with State and local governments, and other concerned public and pri-

75. Fur Seal Act, 16 U.S.C. §§1151-1187.

76. 16 U.S.C. §1152.

77. 16 U.S.C. §1153. Aleuts include the tribes of the Aleutian Islands in Alaska. Eskimos include the Yup’ik and Inuit people of northern Alaska.

78. 27 U.S.T. 3918 (Nov. 15, 1973).

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

80. 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, in force Sept 23, 2007.

81. *Id.* art 8.

82. International Convention for the Regulation of Whaling, 1946: Schedule ¶ 13 (2011).

83. Title 50 C.F.R. §§230.1-230.8.

84. 50 C.F.R. §230.8.

85. As noted previously, the authors provide a more extensive discussion of this summary of Alaska Native roles in subsistence resource management in a forthcoming article in the *Fla. A&M U. L. Rev.* See *supra* note 33.

86. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

87. 42 U.S.C. §§4331 et seq.

88. 40 C.F.R. §1501.1(b), which states that one purpose of agency planning is “[e]mphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.” This regulatory provision combined with the potential for a tribe to be designated as a “cooperating agency” (see *infra* note 87 and accompanying text) for the purpose of NEPA would create regulatory justification for including tribes as cooperating agencies and then consulting early in the NEPA process.

89. 40 C.F.R. §1508.5 states:

Cooperating agency” means any federal agency other than a lead agency that 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.

40 C.F.R. §1501 on NEPA and Agency Planning.

vate organizations.”⁹⁰ Before developing an environmental impact statement, action agencies must consult with those federal agencies that have relevant jurisdiction or expertise with respect to environmental impacts.⁹¹ The Council for Environmental Quality (CEQ) has promoted tribal involvement as cooperating agencies in memoranda to both agencies and tribal leaders.⁹²

The Bureau of Ocean Energy Management (BOEM) invited tribes to participate as cooperating agencies during the preparation of environmental impact statements, such as for the 2012-2017 five-year offshore oil and gas leasing program. However, actual tribal involvement in Alaska has been extremely limited.⁹³ NOAA worked with the AEWG as a cooperating agency for the recent bowhead whale quota environmental assessment.⁹⁴

Second, CEQ regulations governing the NEPA scoping process require that the agency will “[i]nvite the participation of . . . any affected Indian tribe,”⁹⁵ implying that tribes have the opportunity to become involved early on during the scoping stage. Further, agencies frequently use the scoping process as a framework for consulting with tribes and subsequently documenting that consultation.⁹⁶ Scoping is the first step in a NEPA process that is designed to help the agency frame the suite of issues that may be relevant in a NEPA analysis. Agencies may conduct government-to-government consultations during the scoping and public comment periods.⁹⁷ For example, the National Marine Fisheries Service (NMFS) notifies Alaskan Native tribes and organizations of the opportunity for consultation when it sends a notice of intent for scoping under NEPA and when it issues a draft environmental impact statement

for comments.⁹⁸ BOEM (and its predecessor agencies) has documented consultation in environmental impact statements.⁹⁹ Participation may be limited, however, in the case of certain federal actions affecting the environment that are exempt from NEPA requirements.¹⁰⁰

2. The Endangered Species Act

Although tribes are exempt from the ESA take prohibition, the Secretaries of the Interior and Commerce can regulate subsistence harvest if the take will materially and negatively affect a protected species.¹⁰¹ The Secretaries must provide notice and a hearing before imposing any regulations. DOI Secretarial Order 3225, which applies only in Alaska,¹⁰² requires the Secretary to seek the “full and meaningful participation in evaluating and addressing conservation concerns” of Alaska Natives, tribes, and other Native organizations whenever there are conservation concerns about an endangered or threatened species that Alaska Natives also use for subsistence.¹⁰³

Secretarial Order 3225 sets out requirements for consultation whenever the Secretary identifies conservation concerns related to subsistence species that are threatened or endangered or seeks to regulate subsistence take. Under the requirements, both FWS and NMFS (together, the Services)¹⁰⁴ are required to work collaboratively with Alaska Natives to achieve goals that include preserving Alaska Natives’ subsistence rights and minimizing adverse impacts on listed species. Engagement with tribes is to take place at several points in decisionmaking¹⁰⁵:

90. 42 U.S.C. §4331.

91. 42 U.S.C. §4332.

92. 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; January 30, 2002, memorandum regarding “Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act”; a Memorandum for Tribal Leaders of February 4, 2002, further encouraged tribes to participate as cooperating agencies when they have legal jurisdiction or special expertise on relevant actions.

93. Notice of Intent to Prepare and Scope an Environmental Impact Statement (EIS) for the Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2012-2017 (Mar. 30, 2010), *available at* (<http://www.doi.gov/whatwedo/energy/ocs/upload/Scoping-For-5yr-Leasing-Program-on-OCS-2012-2017.pdf>). Bureau of Ocean Energy Management, *Outer Continental Shelf Oil and Gas Leasing Program, 2012-2017; Draft Programmatic Environmental Impact Statement*, 1-3 (Nov. 2011).

94. U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Final Environmental Impact Statement for Issuing Annual Quotas to the Alaska Eskimo Whaling Commission for a Subsistence Hunt on Bowhead Whales for the Years 2013-2018 (January 2013).

95. 40 C.F.R. §1501.7(a)(1).

96. *See, e.g.*, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Bering Sea Chinook Salmon Bycatch Management, Final Environmental Impact Statement (Dec. 2009); OCS EIS/EA BOEMRE 2011-041, Chukchi Sea Planning Area, Oil and Gas Lease Sale 193 in the Chukchi Sea, Alaska, Final Supplemental Environmental Impact Statement, 315-19 (Aug. 2011).

97. *See, e.g.*, Bureau of Ocean Energy Management, Regulation and Enforcement, Alaska OCS Region, U.S. Chukchi Sea Planning Area, Oil and Gas Lease Sale 193 in the Chukchi Sea, Alaska, *Revised Draft Supplemental Environmental Impact Statement*, OCS EIS/EA BOEMRE 2010-034, at 2.

98. NMFS, Alaska Region, Sustainable Fisheries Division, Tribal Consultation Process (2012), <https://alaskafisheries.noaa.gov/tc/> (last visited Aug. 14, 2013) [hereinafter Alaska SFD Consultation Process].

99. U.S. Chukchi Sea Planning Area, Oil and Gas Lease Sale 193 in the Chukchi Sea, Alaska, *Revised Draft Supplemental Environmental Impact Statement*, *supra* note 89, at 2.

100. Section 7(c) of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §793(c)(1), exempts certain actions under the Clean Air Act from NEPA requirements. Second, the Clean Water Act exempts discharges from oil and gas exploratory activities from NEPA by excluding exploratory wells and activities from the definition of “new source.” Therefore, the NPDES permits do not require NEPA review.

101. 16 U.S.C. §1539(e)(4).

102. DOI, Secretarial Order 3225, *supra* note 36.

103. 16 U.S.C. §1538; §10(e) states in pertinent part:

Except as provided in paragraph (4) of this subsection the provisions of this Act shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by—(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or (B) any non-native permanent resident of an Alaskan native village; if such taking is primarily for subsistence purposes.

The §10 subsistence exemption also allows for sale of “byproducts of species taken pursuant to this section” when they are made into “authentic native articles of handicrafts and clothing.” The provisions do not apply to non-natives who are not primarily dependent upon the taking of fish and wildlife for consumption or sale of authentic native handicrafts.

104. The policy applies to both NMFS and FWS.

105. 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.

- (1) Agencies are to obtain information and input from tribes in evaluating and addressing conservation concerns, in order to determine whether subsistence take is negatively and materially affecting listed species;
- (2) Agencies are to work with Alaska Natives to develop “cooperative agreements that will conserve the species, fulfill the subsistence needs, and preclude the need for regulations”;
- (3) Agencies are to ensure to the maximum extent practicable that Alaska Natives participate in all aspects of management of the listed species, including in planning, monitoring, enforcement, education, research, habitat protection, and recovery projects; and
- (4) If regulations are needed, full consultation with Alaska Natives is to take place during the development and implementation of the regulations.

Secretarial Order 3225 also addresses consultation requirements for other provisions of the ESA. It refers to existing departmental policy to guide the application of other sections of the ESA, such as §7 consultation.¹⁰⁶ It further states that “[t]he Department of the Interior will ensure that consultation with Alaska Natives continues on a government-to-government basis as it has to date.”¹⁰⁷ Also, the Order states that DOC will follow the 1995 American Indian and Alaska Native Policy of the DOC for all DOC interactions with Alaska Natives.¹⁰⁸

3. The Marine Mammal Protection Act

The MMPA contemplates Alaska Native participation in decisions that impact marine mammals in at least two circumstances. First, the MMPA provides for cooperative agreements with Alaska Native organizations and co-management of marine mammal subsistence uses.¹⁰⁹ Second, Alaska Natives may be involved in determining whether to allow and in the monitoring of incidental take and incidental harassment authorizations for offshore oil and gas activities.

Alaska Natives are exempt from the prohibition on take for subsistence or handicraft purposes. If the species is depleted the federal government may regulate subsistence take.¹¹⁰ Alaska Natives may generally regulate their own

subsistence take of marine mammals.¹¹¹ However, §119(a) provides for the development of cooperative agreements between the Secretary of Commerce or of the Interior and Alaska Native organizations, in order to both “conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”¹¹² The agreements may include provisions for research, regulation, allocation, and enforcement.¹¹³ The statute also authorizes funding for data collection, harvest monitoring, research, and developing marine mammal co-management structures. A Memorandum of Agreement for the Negotiation of MMPA §119 Agreements requires a substantive role for Alaska Natives in the agreements. Its principles state that “[t]he best way to conserve marine mammal populations in Alaska is to provide full and equal participation by Alaska Natives in decisions affecting the subsistence management of marine mammals, to the maximum extent allowed by law.”¹¹⁴ Further, decisionmaking under the co-management agreements is to be through consensus; and Alaska Natives are to have equal representation within decisionmaking structures. Carrying out the agreements entails close cooperation and communication, the use of TEK, and information exchange.

Co-management agreements may provide for joint decisionmaking between Alaska Natives and the agency. The agreements may also provide for consultation as a method of reaching joint decisions. For example, an agreement with the Ice Seal Committee sets out issues for consultation between the Committee and NMFS.¹¹⁵ In these circumstances, consultation is a means to achieve consensus on an issue covered by co-management.

Offshore oil and gas activities can adversely impact marine mammals. Incidental take regulations set out specific procedures that companies must follow in order to obtain an Incidental Take Authorization or Letter of Authorization for activities that may kill or harm “small numbers” of marine mammals. Incidental harassment authorizations (IHAs) may be obtained when the effects of the oil or gas activity are expected to harass and not kill a “small number” of marine mammals, and provide a more streamlined process for companies to obtain permission to affect marine mammals. In both cases, the activity must have only “a negligible impact on such species or stock and . . . not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.”¹¹⁶

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.

106. The Secretary, through the Services, must ensure that agency actions do not place or threaten to put species in jeopardy. 16 U.S.C. §1536(a)(2), (3).

107. Secretarial Order 3225, *supra* note 36.

108. *Id.* The Department of Commerce issued its final consultation policy, 78 Fed. Reg. 33331, Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, June 4, 2013, which “builds upon and expands the principles” of the 1995 tribal policy.

109. NMFS, Alaska Regional Office, Tribal Consultation in Alaska, <https://alaskafisheries.noaa.gov/tc> (last visited Mar. 28, 2013).

110. 16 U.S.C.A. §1371(b).

111. See Eric Smith, *Some Thoughts on Comanagement*, 14 HASTINGS W.-Nw. J. ENVTL. L. & POL’Y 763 (Winter 2008).

112. 16 U.S.C. §1388(a).

113. §119(b), 16 U.S.C. §1388(b).

114. Memorandum of Agreement for the Negotiation of Marine Mammal Protection Act Section 119 Agreements, Among U.S. Department of Commerce National Marine Fisheries Service, U.S. Department of Interior Fish and Wildlife Service and Indigenous Peoples Council for Marine Mammals (Oct. 30, 2006).

115. Agreement Between the Ice Seal Committee and the National Marine Fisheries Service for the Co-Management of Alaskan Ice Seal Populations, Section VIII, Consultations (Oct. 25, 2006).

116. 16 U.S.C. §1371(a)(5).

Incidental take and incidental harassment regulations provide that if oil and gas development may affect subsistence harvest, companies have the option to consult or, for some regulations, must consult with affected Native communities and develop a Plan of Cooperation (POC) to minimize and mitigate these effects.¹¹⁷ The POC is submitted as part of an application for an Incidental Take Authorization or IHA. NOAA then reviews the application and determines whether the proposed activity will negatively impact subsistence resources, among other impacts. Thus, although consultation is involved, it is the oil or gas company—not the federal agency—that engages with the tribe for consultation.¹¹⁸ Requirements for peer review of monitoring and reporting also provide some community input into oil and gas activities' effects on marine resources in the Arctic.¹¹⁹ Peer review of monitoring plans occurs annually at the Arctic Open-Water Meeting.¹²⁰

4. The Magnuson-Stevens Fishery Conservation and Management Act

Alaska Natives have long relied upon fisheries as a key subsistence resource. Although rural residents of Alaska, including Alaska Natives, have a subsistence priority under ANILCA, the Magnuson Stevens Fishery Conservation and Management Act does not explicitly require any consideration of subsistence, nor does it impose tribal consultation requirements in the Act.¹²¹ It only provides that the public be given an opportunity to comment during the development of a plan, amendment, or regulation.¹²² It also gives stakeholders an opportunity to be appointed to the Council and participate on various committees, although the statute does not call for members with knowledge of subsistence resources.¹²³

5. The Outer Continental Shelf Lands Act

OCSLA governs both oil and gas and renewable energy development on the outer continental shelf. Both forms of development can impact the trust (or subsistence)

117. MMPA §101(a)(5)(A)-(D) sets out the overall requirements for incidental take regulations; 50 C.F.R. §§18.111-119; 18.121-129 cover incidental take of polar bears and Pacific walrus in the Chukchi and Beaufort Seas; 50 C.F.R. §§216.101-216.108 are incidental harassment authorization regulations for Arctic waters.

118. 50 C.F.R. §18.27; 50 C.F.R. §216.104(12).

119. 50 C.F.R. §216.108(d).

120. NOAA Fisheries, Arctic Open Water Meeting, <http://www.nmfs.noaa.gov/pr/permits/openwater.htm> (last visited Aug. 14, 2013).

121. However, under the Convention Between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, managed internationally by the International Pacific Halibut Commission, and implemented by the Northern Pacific Halibut Act of 1982 (16 U.S.C. §§773-773k; Pub. L. No. 97-176, *as amended*, the NPFMC administers a subsistence halibut program. National Marine Fisheries Service, Alaska Regional Office, "Subsistence Halibut Fishing in Alaska," available at <http://alaskafisheries.noaa.gov/ram/subsistence/halibut.htm>.

122. 16 U.S.C. §§1852(h)(3), (i)(2)(D).

123. 16 U.S.C. §1852; National Marine Fisheries Service Response to NMFS and Tribal Representatives Workgroup Meeting Report and Recommendations at 7 (Nov. 9-10, 2009); 16 U.S.C. §1852(i)(2)(D).

resources of tribes. The statute does not require consultation with tribes for oil and gas development, although provisions that call for state and local government input could include tribal input. In contrast, newer statutory provisions governing renewable energy development require tribal consultation.

For oil and gas development, OCSLA sets out various opportunities for third parties to provide input. These include requirements for public comment, input from states and local governments, consultation with parties with interests in the outer continental shelf, and cooperative agreements with states. While the statute does not specifically require consultation with tribes, Alaska tribes could potentially participate in several of these opportunities, as they are members of the public, local governments, and parties with interests in the outer continental shelf.

During the development of five-year plans for oil and gas development, states and affected local governments, as well as other interested parties, may submit comments on the plans.¹²⁴ Before approving a proposed five-year plan for offshore oil and gas development, the Secretary is required to explain to the president and Congress "why any specific recommendation of . . . a State or local government was not accepted."¹²⁵ A caveat to this provision is that local governments must first submit their recommendations to the governor of the state.¹²⁶ The state may therefore place its interests, which may not be consistent with those of local governments, ahead of the requests of local governments.

OCSLA also allows for periodic consultation with lessees, state and local governments, and those involved in activities on the outer continental shelf, including those engaged in shellfish and other fisheries.¹²⁷ Although tribes are governments and have subsistence resource interests on the outer continental shelf, regulations have implemented this provision narrowly, providing only for an advisory board comprised of oil and gas interests, and for following the public notice requirements during the development of the five-year plan.¹²⁸

Following completion of the five-year plan, BOEM defines sale areas and issues leases.¹²⁹ When making leasing decisions, the Secretary must accept states' and may accept local governments' recommendations for size, timing, and location of proposed sales if, after an opportunity for consultation, the Secretary determines that the recommendations "provide for a reasonable balance between the national interest and the wellbeing of the citizens of the affected State."¹³⁰ However, any local government recommendations must first be submitted to the governor of the state.¹³¹ In addition, the Secretary may

124. 30 C.F.R. §§556.16(a), 556.17(a).

125. 43 U.S.C. §1331(d)(2), 30 C.F.R. §556.17(c).

126. 30 C.F.R. §§556.16(a), 556.17(b).

127. 43 U.S.C. §1344(f)(4).

128. §556.19, *see* OCS Advisory Board, <http://ocsadvisoryboard.org/index.html>.

129. 30 C.F.R. §§556.23-556.29.

130. 30 C.F.R. §556.31(b).

131. 30 C.F.R. §556.31(a).

enter into cooperative agreements with states for a variety of purposes related to leasing.¹³² In a 2009 Resolution, the National Congress of American Indians unsuccessfully called for cooperative agreements with tribes under this provision.¹³³

In contrast to oil and gas development, provisions concerning the granting of offshore renewable and alternative energy leases require the agency to “coordinate and consult” with “any affected Indian tribe,” as well as other governmental units.¹³⁴ The agency must consult both when considering areas to lease and in developing measures to mitigate effects on the human, marine, and coastal environments.

6. Section 706 of the Coast Guard Authorization Act of 2010

Section 706(a) of the Coast Guard Authorization Act of 2010¹³⁵ requires the Secretary of Homeland Security to develop a tribal consultation policy for the U.S. Coast Guard “to improve the Coast Guard’s consultation and coordination” with tribal governments “with respect to oil spill prevention, preparedness, response and natural resource damage assessment.” It also provides for the Coast Guard to create and fund cooperative agreements with tribal governments on these issues.¹³⁶

7. The National Historic Preservation Act

The National Historic Preservation Act contains explicit requirements for consultation with tribes as to identification of historic sites, and the process for determining their protection under the statute. Section 106 of the Act requires a federal agency that undertakes, spends money for, or issues a license for an activity that may affect a place or item eligible or potentially eligible for inclusion on the National Register of Historic Places to allow the Advisory Council on Historic Preservation to comment on the undertaking.¹³⁷ Regulations that set out procedures for the §106 process require consultation with Indian tribes on undertakings that affect properties on tribal lands or, importantly for Alaska tribes, properties of significance to Indian tribes, whether or not they are on Indian land.¹³⁸ Section 800.2(c)(2) specifies procedures, including giving Indian tribes “a reasonable opportunity to identify its concerns,” “advise on the identification and evaluation” of properties, “articulate its views,” and “participate in the resolution of adverse effects.” It states that “consultation should commence early in the planning process.” In addition,

the agency shall consult with representatives determined by tribes. These requirements are similar to but more specific than the policies of EO 13175, although several agency policies also contain specific procedures. Unlike the policies of the Executive Order, however, the NHPA consultation regulations may be enforced by courts.

III. Key Elements of Consultation

Building from the relevant legal framework and some of the ways that Alaska Natives can engage in cooperative governance, this part turns back to consultation specifically to explore key elements of the process and the approaches that agencies take to satisfy them.

Therefore, the following synthesis summarizes key elements of consultation and uses these elements to compare federal agency policies. The authors identified these elements by reviewing the requirements of EO 13175 and considering other published suggestions that tribes have made for improvements to consultation procedures,¹³⁹ including the report *Tribal Consultation: Best Practices in Historic Preservation (Best Practices Report)*.¹⁴⁰ Although the *Best Practices Report* addresses consultation that is required by regulation, the analysis is applicable to best practices for government-to-government consultation under the Executive Order. Tribes’ comments on the implementation of the Executive Order identify similar needs. In all, the authors focused on the following six key elements: (1) including the right participants; (2) engaging in meaningful information exchange; (3) creating a timely and early process; (4) establishing a flexible and collaborative process; (5) creating an accountable process; and (6) ensuring adequate resources. Several elements are interrelated; in particular, timing and process affect the extent to which meaningful information is exchanged.

132. 43 U.S.C. §1344(e); 30 C.F.R. §581.13 provides for joint federal-state cooperation and joint task forces.

133. National Congress of American Indians, Resolution #PSP-09-024, Outer-Continental Shelf Protection and Coordination (Oct. 11-16, 2009).

134. §8(p)(4) and (7), 43 U.S.C. §1337(p)(4) and (7); 30 C.F.R. §285.211(b).

135. Pub. L. No. 111-281, Oct. 15, 2010, 124 Stat. 2905, 33 U.S.C. §1321b.

136. 33 U.S.C. §1321b(d).

137. 16 U.S.C. §1470f.

138. 36 C.F.R. Part 800.

139. National Congress of American Indians, Background and Recommendations on Tribal Consultation and Government-to-Government Coordination, submitted to Secretary Locke (Dec. 11, 2009); NMFS and Tribal Representatives Workgroup Meeting Report and Recommendations, Nov. 9-10, 2009 [hereinafter Tribal Representatives Workgroup]; National Congress of American Indians, White House Meeting With Tribal Leaders: Background Paper on Tribal Consultation and Tribal Sovereignty (2009) [hereinafter White House Meeting Background Paper]; National Congress of American Indians, Final Federal Consultation Recommendations (2010); Department of Homeland Security Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175 (Mar. 1, 2010) [hereinafter DHS Plan] (summarizes input received from tribes about consultation challenges and needs).

140. NATIONAL ASSOCIATION OF TRIBAL PRESERVATION OFFICERS, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION (May 2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf [hereinafter BEST PRACTICES REPORT].

A. Including the Right Participants

As previously described, EO 13175 specifies that “tribal officials,” defined as “elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations,”¹⁴¹ are to be involved in government-to-government consultation. This means that tribes may be represented in consultations individually or as part of a larger tribal organization. Consultation is also extended by statute to ANCSA corporations. For ANCSA corporations, for example, DOI policy requires consultation with ANCSA corporation officials or designees, defined as “official[s] or ANCSA member[s] designated in writing by an ANCSA corporation.”¹⁴²

EO 13175 requires agencies to designate tribal consultation officials to coordinate the consultation program for the agency, but does not require a particular agency official to engage in the actual consultation. In practice, multiple agency personnel may be engaged in consultation decisions.¹⁴³

The *Best Practices* Report summarizes the results of surveys of agency staff and tribal officials engaged in consultation. Its authors concluded that an agency tribal liaison contributes to the success of the consultation process.¹⁴⁴ Also, tribes and some agencies agree that, in addition to using a tribal liaison, agencies should contribute a subject matter expert to the consultation process, along with persons with authority to make decisions and implement policy.¹⁴⁵

B. Engaging in Meaningful Information Exchange

EO 13175 requires that the consultation process enable tribal officials to contribute “meaningful” input. Tribal summary impact statements, required in some circumstances, are to recognize and respond to tribal concerns.¹⁴⁶ The quality of the information exchanged between agencies and Alaska Native entities is thus a key part of the Executive Order. Meaningful input requires the exchange of information before a consultation meeting and is related to the elements of timing and process. The *Best Practices* Report found that, for consultation to be successful, agencies should provide full information about proposed agency action to tribes and ANOs before consultation.¹⁴⁷ An initial notice about a consultation opportunity should provide sufficient detail about the scope of the subject matter at issue that the tribes can make a decision on whether to participate in consultation,

request technical assistance, and submit additional questions. Tribes should also have substantial opportunity to contribute information and concerns. They have suggested that the exchange of information and ideas be comparable to agencies’ dealings with a state.¹⁴⁸

TEK has become an increasingly important part of the consultation process, although the Executive Order does not address it directly. It is central to issues concerning subsistence resources in particular. Policies under the ESA and the MMPA require that decisionmakers consider TEK (which also has been referred to as traditional knowledge and wisdom or local and traditional knowledge) during consultation and decisionmaking.¹⁴⁹ EPA, NMFS, BOEM, and the Coast Guard also have developed policies or practices requiring the use of TEK.¹⁵⁰ A study by the U.S. Geological Survey stressed the importance of traditional knowledge to oil and gas development in the Arctic.¹⁵¹ Under the MSA, Congress created a pilot program that incorporates traditional knowledge in fisheries decisions. Finally, Alaska Natives have requested that they be allowed to contribute TEK to the scientific stage of decisionmaking.¹⁵²

C. Creating a Timely and Early Process

EO 13175 requires consultation to be “timely,” and to begin “early” in the process. Timeliness will vary based on the issue involved, the time line of the action, and the calendars of both Alaska Natives and agencies. For example, timing should take into account subsistence hunting calendars. In addition to addressing timeliness generally, initiating processes early is particularly important to ensure that consultation can meaningfully affect the outcome of the decision.

When agencies develop regulations that impose substantial costs on tribes or preempt tribal law, EO 13175

141. EO 13175, §1(d), *supra* note 1.

142. *Department of the Interior Policy on Consultation With Alaska Native Claims Settlement Act (ANCSA) Corporations* (Aug. 10, 2012) [hereinafter DOI ANCSA Corporation Policy], available at <http://www.doi.gov/news/press-releases/Interior-Announces-Consultation-Policy-for-Alaska-Native-Corporations.cfm>.

143. For example, DOI tribal consultation policy identifies appropriate officials as those who are knowledgeable, are authorized to speak for the Department, and have decisionmaking authority.

144. BEST PRACTICES REPORT, *supra* note 140.

145. Tribal Representatives Workgroup, *supra* note 139.

146. EO 13175, §5, *supra* note 1.

147. BEST PRACTICES REPORT, *supra* note 140, at 144.

148. Tribal Representatives, Workgroup, *supra* note 139.

149. *See, e.g.*, Secretarial Order 3225 (consultation policy for ESA §10(e) concerning subsistence uses of endangered or threatened species in Alaska), *supra* note 36; ESA Section 7 Consultation Handbook, “Coordination With Tribal Governments,” §2.6; Memorandum of Agreement for Negotiation of MMPA Section 119 Agreements; and Magnuson-Stevens Act §305(j)(2)(E), 18 U.S.C. §1855(j)(2)(E). Unless the definition requires that the different terms be considered separately, this Article refers to all of these considerations as TEK or “traditional ecological knowledge.”

150. EPA’s Tribal Strategy: Partnership to Improve Environmental Decisionmaking in Indian Country and Alaska Native Villages promotes the use of TEK; Report to Congress: U.S. Coast Guard Polar Operations FY 2008 (Coast Guard makes statement that TEK is important part of its work); Alaska Groundfish Fisheries: Final Programmatic Supplemental Environmental Impact Statement ES-25 (2004) (TEK is to be incorporated into fisheries management); Bureau of Ocean Energy Management, Regulation and Enforcement, Alaska OCS Region, U.S. Chukchi Sea Planning Area, Oil and Gas Lease Sale 193 in the Chukchi Sea, Alaska, *Revised Draft Supplemental Environmental Impact Statement*, OCS EIS/EA BOEMRE 2010-034; *see, e.g.*, inclusion of TEK regarding impacts of development on marine mammals and subsistence resources in Final Supplemental Impact Statement, Chukchi Sea Planning Area Oil and Gas Lease Sale 193 in the Chukchi Sea, Alaska, OCS EIS/EA, BOEMRE 2011-041.

151. U.S. Geological Survey, *An Evaluation of the Science Needs to Inform Decisions on Outer Continental Shelf Energy Development in the Chukchi and Beaufort Seas*, Alaska Circular 1370 (2011).

152. Tribal Representatives Workgroup, *supra* note 139.

requires that the agency has “consulted with tribal officials early in the process of developing the regulation.”¹⁵³ In addition to specific requirements of the Executive Order, the *Best Practices* Report recommended that agencies engage in an early effort to identify issues of concern to tribes: having tribes participate in setting the agenda and planning the consultation; establishing multiple contacts beginning early in the process; and continuing through the decision-making process. Tribes also have suggested that consultation include early informal scoping to address tribal issues before defining federal action, so that the agency incorporates tribal viewpoints in its consideration of actions.¹⁵⁴ However, challenges exist. As stated by the National Congress of American Indians, early consultation can be challenging because proposals are not yet formulated, while later consultation may occur too late in the process when decisions are already made.¹⁵⁵

D. Establishing a Flexible and Collaborative Process

When tribal self-government, tribal trust resources, or Indian tribal treaty or other rights could be affected by proposed regulations, EO 13175 states that agencies should use *consensual mechanisms*, including negotiated rulemaking, when appropriate.¹⁵⁶ As stated by the National Congress for American Indians, “tribal consultation should be redefined as a process of decisionmaking that works in a cooperative process toward reaching a consensus before a decision is made or an action is taken.”¹⁵⁷ The *Best Practices* Report found that consultation was most successful when there was an ability to come to consensus or final resolution in an agreement, although a consultation could still be successful even without consensus or an agreement. Tribes have sought to reach a mutually agreeable understanding that acknowledges the interests of both federal and tribal governments.

The *Best Practices* Report also found that an effective process that complies with the spirit of the consultation requirement requires flexibility that maintains the goal of a collaborative approach to the issues.¹⁵⁸ Similarly, the National Congress for American Indians noted that formal consultation should be combined with informal discussions to help agencies understand tribal issues.¹⁵⁹

Some suggest multiple consultation venues, formal and informal meetings, and meetings at regional levels, at sub-regional levels, and with individual tribes. Several recommendations reflect the need to have face-to-face meetings, along with other meetings that are carried out by conference call or by webinar.¹⁶⁰

E. Creating an Accountable Process

EO 13175 requires each agency to have “an *accountable process*.” When practical and permitted by law, EO 13175 calls upon agencies to produce a tribal summary impact statement that documents tribal concerns raised in the process and the agency’s responses to them, along with written communication exchanged.¹⁶¹ However, for other actions, it does not require that the agency explain to tribes how their input was used. Many reports that document tribal concerns indicate that tribes are frustrated by the lack of accountability in the consultation process. For example, in the Department of Homeland Security’s effort to get input from tribes about its consultation policy, it noted that tribal leaders are frustrated by the significant time that tribes dedicate to consultation and the apparent lack of consideration of tribal recommendations—a reflection, in part, of the lack of accountability mechanisms in place.¹⁶² Tribes seek adequate notice, accountability, and tracking mechanisms,¹⁶³ and that the agency follows up with tribes to explain how it used the results of the consultation in its final decisions.¹⁶⁴

F. Ensuring Adequate Resources

EO 13175 does not address funding for consultation. The *Best Practices* Report and many tribal leaders call for adequate *resources* for tribes to support meaningful consultation.¹⁶⁵ In particular, the agency should provide sufficient resources for travel and/or hold meetings or consultation on tribal land.¹⁶⁶ Some tribes also suggest that consulting agencies fund tribal participation and provide alternative means to ensure that tribal leaders can participate.¹⁶⁷ Adequate resources are necessary for consultation to allow satisfactory participation, information exchange, a collaborative process, and accountability.

IV. Comparing Agency Consultation Policies

A. Overview of Agency Policies

Pursuant to the requirements of EO 13175 and the presidential memorandum, federal agencies have been developing overarching tribal consultation policies. Such policies apply to all departmental or agency actions in which there are tribal implications, not only those for which there are statutory requirements to consult. These policies are summarized in the table below.

153. EO 13175, §5(b)(1) and (c)(1), *supra* note 1 (emphasis added).

154. National Congress of American Indians, White House Meeting Background Paper, *supra* note 139.

155. White House Meeting Background Paper, *supra* note 139.

156. EO 13175, *supra* note 1, §5(d).

157. White House Meeting Background Paper, *supra* note 139.

158. BEST PRACTICES REPORT, *supra* note 140; White House Meeting Background Paper, *supra* note 139.

159. White House Meeting Background Paper, *supra* note 139.

160. *See, e.g.*, DHS Plan, *supra* note 139, at 3.

161. EO 13175, §5; *see supra* note 1; *see* NMFS rules, *supra* note 17.

162. DHS Plan, *supra* note 139, at 2.

163. DHS Plan, *supra* note 139, at 3.

164. Tribal Representatives Workgroup, *supra* note 139.

165. BEST PRACTICES REPORT, *supra* note 140; Tribal Representatives Workgroup, *supra* note 139; DHS Plan, *supra* note 139, at 3.

166. Tribal Representatives Workgroup, *supra* note 139.

167. *Id.*

Figure 2

ELEMENTS OF CONSULTATION^a	DOI tribal policy^b	DOI ANCSA corporation policy^c	Dept. of Homeland Security^d	U.S. Environmental Protection Agency (EPA)^e	DOC tribal policy^f	Federal Subsistence Board (tribal policy)^g
DEFINITION OF CONSULTATION	“a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process” (consultation defined in tribal policy and adopted by corporation policy)		the “direct, timely, and interactive involvement of Indian Tribes regarding proposed Federal actions on matters that have Tribal Implications”	“a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes”	“accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications” (EO definition)	“a direct two-way communication conducted in good faith to secure meaningful participation in the decision-making process to the full extent allowed by law. The Board will consider and respond to the Tribes’ concerns brought forth through the consultation process (as defined in this policy) before making final decisions”
PARTICIPANTS						
Tribal liaison or similar	Tribal governance officer and tribal liaison officers	Refers to DOI Policy on Consultation with Indian Tribes	Tribal liaison	Designated consultation official; tribal consultation advisors	Tribal consultation official; head of operating units to coordinate	OSM Native liaison Board members
Agency participants	Appropriate official who is knowledgeable, authorized, and exercises delegated authority		Typically local level personnel	No specific provisions	Designated officials	Federal land managers
Tribal/intertribal organization/ ANCSA corporation participants	Appropriate tribal officials (designated in writing by tribe to represent it); in some cases Tribal Leader Task Force convened by the agency	Appropriate ANCSA corporation officials (designated in writing by an ANCSA corporation)	Tribal governments, which include Indian Tribes and Alaska Native Villages under ANCSA Tribal officials	Tribal officials	Appropriate tribal officials; tribes	Tribes ANCSA corporations
INFORMATION EXCHANGE	Adequate notice required, including sufficient detail for tribes to “fully engage” in consultation	Refers to Policy on Consultation with Indian Tribes, with adjustments for status of ANCSA corporations	Notice to tribes gives “sufficient detail” about proposed decision; DHS receives input from Tribal Governments	Initial notice should provide sufficient information for tribes to decide whether to continue and to provide input	Reasonable effort to identify and provide timely and accurate information for consultation	Ensure two-way exchange on regulatory proposals, after proposals analyzed by federal staff, advisory council, and Federal Subsistence Board (FSB) meetings

ELEMENTS OF CONSULTATION ^a	DOI tribal policy ^b	DOI ANCSA corporation policy ^c	Dept. of Homeland Security ^d	U.S. Environmental Protection Agency (EPA) ^e	DOC tribal policy ^f	Federal Subsistence Board (tribal policy) ^g
TIMING	Consultation early in the planning process and during the proposal development stage; take into account the input of tribes in planning timeline; when receive request from tribes	Follows tribal consultation policy, with adjustments for unique status of ANCSA corporations	Consultation as early as reasonably possible in decisionmaking process; consultation required before adopting policies or regulations with tribal implications	Consultation early enough to be meaningful in deciding whether, how, and when to act on decision; continued consultation during proposal development	Policy does not specify timing of consultations, except that ongoing communication is part of relationship; Department to make reasonable efforts to respond to tribal requests; and tribes should have enough time to prepare and submit views	Communication is timely in order to “maximize opportunities to provide input to the Board’s decisions”; early notification and respect for tribal timeframes; when receive request from tribes
FLEXIBLE AND COLLABORATIVE PROCESS	May include negotiated rule-making, tribal leader task force, series of open tribal meetings, and single meetings; process should maximize the opportunity for tribal input and account for departmental schedules and tribal timelines	Refers to Policy on Consultation with Indian Tribes, with adjustments for unique status of ANCSA corporations	Flexible: Can be with local tribal officials or involve larger workgroups or national meetings to be determined by DHS officials and Tribal Governments	Flexible—how consultation occurs should be based on the particular action under consideration	Coordinates with tribal officials to plan process, which can include formal and informal meetings, letters, conference calls, webinars, on-site visits, or participation in regional or national events; reasonable efforts to accommodate tribal requests	Flexible—consider all aspects of the issue in planning
ACCOUNTABILITY	Annual reporting requirements; may have post-consultation review process in which it invites tribal input	Refers to Policy on Consultation with Indian Tribes, with adjustments for unique status of ANCSA corporations	Incorporate tribal input into final decision; communicate decision to tribes.	For each consultation, agency provides written document to tribes to explain how concerns taken into account	Written document after consultation that summarizes communication and responds to tribal concerns	Yearly evaluation of the consultation process, with tribal input

a. The consultation element related to ensuring adequate resources is not included here, since the existing policies do not specifically address funding needs.
 b. Secretary of the Interior, *Department of the Interior Policy on Consultation With Indian Tribes* (Dec. 1, 2011), available at <http://www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf> [hereinafter DOI Consultation Policy]. DOI has a separate policy for Alaska Native Corporations.
 c. DOI ANCSA Corporation Policy, *supra* note 141.
 d. Published May 11, 2011, available at <https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consultation%20Policy%20Final%20PDF.pdf>.
 e. EPA Policy on Consultation and Coordination With Tribes (May 4, 2011).
 f. Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 Fed. Reg. 33331 (June 4, 2013) [hereinafter DOC Consultation Policy].
 g. *Federal Subsistence Board Government-to-Government Tribal Consultation Policy* (May 9, 2012), available at <http://alaska.fws.gov/asm/pdf/consult/tribal.pdf>. ANCSA Corporation policy under development.

The following section explores in more detail how agency policies address the different consultation elements described in the previous section.

B. Including the Right Participants

The issue of *who* consults, both from the tribal perspective and the agency perspective, is an important and complex one.

I. The Tribal Entities Involved

First, the structure of Alaska Native communities and their representatives is complex. More than 200 villages are designated as individual tribes, multiple ANOs are involved in co-managing tribal trust (or subsistence) resources and may have consultation agreements with federal agencies, Alaska Native corporations have consultation authority, and regional nonprofits and other regional tribal entities may have consultation authority.

While the number of potential consultations may be limited in part by the breadth of the decision being made—e.g., a federal decision may only affect a single type of resource found in one or a few villages—federal agencies may need to engage in consultation with three different types of entities: consultation with village tribal councils; consultation with Alaska Native corporations; and consultation with intertribal organizations. And many tribal trust resources involve species that are migratory and are targeted by many communities. Therefore, the potential required consultations could include multiple villages, intertribal organizations, and corporations.

Consistent with the special legal relationship between the federal government and tribes upon which consultation is based, most policies list tribes as entities with which they must conduct government-to-government consultation. For example, DOI consultation policy requires that it consult with tribes on departmental policies with tribal implications.¹⁶⁸ In addition, DHS lists Alaska Native villages “defined in or established pursuant to ANCSA” as entities with which it must consult.

As previously discussed, an omnibus bill extended consultation to Alaska Native corporations (ANCSA corporations). DOI and the FWS both address such consultation with separate policies. DOI’s ANCSA corporation policy states that, “when taking departmental action that has a substantial direct effect on ANCSA corporations, the department will initiate consultation with ANCSA corporations.”¹⁶⁹

Because the definition of “tribal officials” in the Executive Order encompasses officials of “authorized intertribal organizations,” the requirement to consult could and

sometimes does include consulting with larger multi-tribal entities. These entities can include both ANOs and larger networks of Alaska Natives, such as the Alaska Federation of Natives. The NMFS-Alaska Sustainable Fisheries Division policy is to notify federally recognized tribes, regional nonprofits, ANCSA corporations, and local governments of the opportunity for consultation on proposed actions known to be of interest to tribes.¹⁷⁰

In addition to overarching DOI and DOC policies, FWS and NMFS carry out consultation under the ESA and the MMPA, as discussed previously. Secretarial Order 3225, under the ESA, requires FWS and NMFS to “consult with “affected Alaska Natives, tribes, and other Native organizations”¹⁷¹ in relation to §10(e) subsistence exemption decisions. For example, FWS has consulted with the Alaska Nanuq Commission on its deterrence guidelines for polar bears¹⁷² and obtained peer review from the Commission on the status assessment and proposed listing.¹⁷³

FWS and NMFS have entered into numerous co-management agreements with marine mammal ANOs under MMPA §119. In addition to carrying out co-management responsibilities, the agencies may consult on specific issues with Alaska Native marine mammal organizations. NMFS’ Alaska Region website states that its consultation on marine mammals is governed by the MMPA.¹⁷⁴

Individual marine mammal co-management agreements also may set out specific consultation requirements.¹⁷⁵ For example, the beluga whale co-management agreement provides that the Alaska Beluga Whale Committee and NMFS will consult concerning co-management issues.¹⁷⁶ Similarly, NOAA and the AEWWC have agreed to consult on issues that concern the Commission through their co-management agreement.¹⁷⁷

170. Alaska SFD Consultation Process, *supra* note 97.

171. See *supra* notes 101-07 and accompanying text, for an overview of the ESA and consultation requirements.

172. Dept. of the Interior, Fish and Wildlife Service, Marine Mammal Protection Act, Deterrence Guidelines, 75 Fed. Reg. 61631, 61635 (Oct. 6, 2010).

173. Dept. of the Interior, Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 20212, 28251 (May 15, 2008).

174. NMFS, Alaska Regional Office, Tribal Consultation in Alaska, *supra* note 108.

175. See *supra* notes 109-19 and accompanying text, for an overview of the MMPA and consultation requirements.

176. 18 U.S.C. §1388(a).

177. Cooperative Agreement Between the National Oceanic and Atmospheric Administration and the Alaska Eskimo Whaling Commission (as amended 2008) ¶ 8, specifically stating:

NOAA and the AEWWC shall consult during the operation of this Agreement concerning the matters addressed herein as well as all other matters related to bowhead whales which either party believes are suitable for such consultation. Specifically, NOAA shall consult with the AEWWC on any action undertaken or any action proposed to be undertaken by any agency or department of the Federal Government that may affect the bowhead whale and/or subsistence whaling and shall use its best efforts to have such agency or department participate in such consultation with the AEWWC.

168. DOI Consultation Policy, *supra* Figure 2, note b.

169. DOI ANCSA Corporation Policy, *supra* note 142, Federal Subsistence Board Alaska Native Claims Settlement Act (ANCSA) Corporation Consultation Policy (draft), available at <http://alaska.fws.gov/asm/pdf/consult/ancsa.pdf>.

2. The Federal Agency Entities Involved

Federal agencies may include one or more of the following types of personnel in a consultation process: (1) participants with decisionmaking authority; (2) tribal liaisons that have established relationships with communities; (3) technical experts; and/or (4) local personnel. However, the participation of these types of personnel may vary according to the stage of the process and the type of meeting. Furthermore, some agencies have specific policies or procedures about who should be involved in consultation, while other agencies provide little information about who they expect to engage in a consultation process.

DOI policy provides qualifications for departmental officials involved in the consultation: they are to be knowledgeable about the subject matter; be authorized to speak for the Department; and have delegated authority to make decisions on and implement agency actions.¹⁷⁸

As stated in its policy, the FSB uses its Native Liaison in the Office of Subsistence Management as the key contact for consultation with tribes, and the Native Liaison is tasked with assisting in consultation “as requested and needed.”¹⁷⁹ The policy also calls upon federal land managers and staff with local relationships to maintain effective communication and coordination.¹⁸⁰

EPA Region 10, which includes Alaska, also has a well-defined suite of personnel involved in the consultation process. In its Region 10 Tribal Consultation and Coordination Procedures, EPA designates roles and responsibilities for its personnel as follows:

- The Regional Administrator and Deputy Regional Administrator may be involved in consultation when there are significant tribal issues or a high degree of tribal interest.
- The Senior Tribal Policy Advisor advises EPA senior management on effective communication with tribes and/or participates in tribal consultations.
- The EPA Project Lead, the person with primary responsibility in an EPA action, has the primary responsibility for the relevant consultation process with support from the tribal specialists. The Project Lead is to inform the Tribal Specialist of activities that may affect the tribe.
- The Tribal Specialist is the main point of contact and source of information and support on tribal issues in each program office.
- Tribal Coordinators serve as liaisons between the tribes and EPA and assist in the consultation.
- Region 10 also has an Alaska Resource Extraction Tribal Policy Advisor who serves as a coordinator

for consultation and community involvement when large-scale resource extraction projects are at issue.¹⁸¹

C. Engaging in Meaningful Information Exchange

Information exchange is an important component of the consultation process, and agency policies, for the most part, provide little clarity about what information is shared and how the information is shared. For example, NMFS Alaska Region, Sustainable Fisheries Division, calls for the agency to e-mail, mail, or fax relevant information in advance of the consultation and answer questions about the information in informal telephone conversations, but the Division does not indicate what type of information is typically shared or the format of information.¹⁸² The FSB states that information includes (but is not limited to) traditional knowledge, research, and scientific data.¹⁸³

EPA Region 10 tribal consultation procedures provide more detailed direction for information exchange. They call upon the points of contact (tribal and federal) to discuss what information each party will need for the consultation and state that the parties should share technical and factual information whenever possible.¹⁸⁴ They recognize that tribes and EPA may wish to designate technical points of contact to discuss data and findings in advance of a consultation meeting that includes decisionmakers.¹⁸⁵ The procedures also recognize that tribes may lack the resources necessary to conduct a legal and technical review and that it may be beneficial to host a technical meeting or workshop.¹⁸⁶ Furthermore, EPA notes that the Agency may not be able to meet tribal expectations, so it encourages clarifying the consultation process to help address this challenge.¹⁸⁷

D. Creating a Timely and Early Process

EO 13175 requires that consultation procedures allow for “timely” input by tribal officials. When regulations impose substantial costs on tribes or preempt tribal law, the Executive Order specifically requires agencies to consult “with tribal officials early in the process of developing the proposed regulation.”¹⁸⁸ Most departmental and agency policies reviewed recognize that consultation should take place early in the process. EPA Region 10 policy states that initial consultation should take place early enough so tribes can potentially affect the action or decision; this “will often involve notifying a tribe of an expected action or decision.” DOI policy calls for consulting as early as possible when

178. DOI Consultation Policy, *supra* Figure 2, note b.

179. *Federal Subsistence Board Government-to-Government Tribal Consultation Policy*, *supra* Figure 2, note g, at 3.

180. *Id.*

181. U.S. EPA, EPA Region 10 Tribal Consultation and Coordination Procedures, EPA 910-K-12-002, 6-7 (2012) [hereinafter EPA Region 10 Consultation Procedures].

182. Alaska SFD Consultation Process, *supra* note 97.

183. *Federal Subsistence Board Government-to-Government Tribal Consultation Policy*, *supra* Figure 2, note g, at 3.

184. EPA Region 10 Consultation Procedures, *supra* note 181, at 13.

185. *Id.* at 14.

186. *Id.*

187. *Id.*

188. EO 13175, *supra* note 1, §5(b)-(c).

considering an action with tribal implications. DHS policy tells federal actors to contact tribes as early as is reasonably possible in the decisionmaking process. The FSB policy states that information-sharing should occur early and often.

In addition, most agency policies call for consultation and communication throughout the consultation process. Agencies vary as to the extent to which they spell out when and how to engage. Some agencies have robust declarations of their process and are developing consultation procedures that provide further detail about the agencies' approaches to timing. Both DOI and EPA emphasize that consultation should take place throughout the policymaking process. DOI provides an example of a more robust approach. It divides consultation into three stages: (1) the initial planning stage, which calls upon the agency to consult with tribes "as early as possible when considering a Departmental Action with Tribal Implications"; (2) the proposal development stage, which calls upon the agency to maximize the opportunity for timely input at this stage and develop a process with the tribes that considers tribal structures, traditional needs and schedules; and (3) the implementation of the final federal action stage, which allows for a post-consultation review process.¹⁸⁹

In addition to describing "early" consultation, EPA Region 10's consultation procedures also consider timing more fully, including taking into account fishing and hunting seasons. They adopt the following approaches:

- Provide another communication opportunity "far enough along in the process that EPA can provide significant detail about the decision or action the Region is considering." Ideally, it would "have active communication throughout the data gathering and decision process about the scope and nature of consultation that the tribe desires."
- Consider timing of tribal elections and fishing, hunting, and gathering seasons when scheduling consultation.¹⁹⁰

The FSB states that consultation should take place throughout the process of developing the policy, regulation, or proposed legislation. FSB policy identifies several points in the process of developing a rule when consultation should take place: when rules are proposed; after an initial expert ("Team") review; during Regional Advisory Council meetings; and during FSB meetings.

More generally, DOC policy calls for "ongoing communication" as a regular part of the government-to-government relationship. The Department and its units are to engage in an ongoing dialogue, and they are to "make every effort to provide timely and accurate information for consultation."¹⁹¹

A special issue as to timing occurs with the applicability of consultation requirements to the North Pacific Fishery Management Council. The MSA gives the primary authority for developing fishery management plans (FMPs) to regional fishery management councils, which submit proposed FMPs to NMFS. NMFS may approve, disapprove, or partially approve the plans. Alaska's federal marine fisheries are covered by the North Pacific Fishery Management Council (NPFMC). The Council has taken the position that EO 13175 does not apply to it because it does not have the status of a federal agency. Instead, the Council has developed a stakeholder involvement policy.¹⁹² To carry out the policy, in August 2009, it convened a Rural Community Outreach Committee, which is to arrange for communication with rural communities on an ongoing basis. It has also created outreach plans for specific proposals.¹⁹³ NMFS conducts consultation after the NPFMC submits the proposed FMP to it, although it has also participated in some of the outreach meetings. With this regulatory structure, there is an issue as to whether consultation can take place "early" in the development of the regulation when formal consultation actually takes place after development of the proposed plan.

E. Establishing a Flexible and Collaborative Process

I. Initiating the Consultation Process

Usually, agencies indicate that either the tribe or the agency can initiate the consultation process. For example, the NMFS Alaska Region, Sustainable Fisheries Division, consultation process acknowledges that either the Sustainable Fisheries Division or a tribe can initiate the consultation process.¹⁹⁴ NMFS initiates its consultation after it receives a proposed regulation from the North Pacific Fishery Management Council. Similarly, the FSB states that a tribe or the Board can initiate consultation.¹⁹⁵

EPA Region 10's consultation procedures provide some recommendations for how to address a consultation request from a tribe. They call for the request to be forwarded to the appropriate program officer, who should acknowledge receipt of the request within two weeks of receiving it.¹⁹⁶ The program office should respond to the letter "in a reasonable time" and notify appropriate tribal personnel.

192. Statement of Organization, Practices, and Procedures of the North Pacific Fishery Management Council Sect. 3.10, at 12, Draft (June 20, 2008); North Pacific Fishery Management Council, Groundfish Policy Workplan at 2 (revised February 2008); Summary and Results of Outreach Plan for DEIS on Chinook Salmon Bycatch in the Bering Sea Pollock Fishery (April 2009).

193. North Pacific Fisheries Management Council, Proposed Community Outreach Plan for the Arctic FMP at 1 (Dec. 2007).

194. Alaska SFD Consultation Process, *supra* note 97.

195. *Federal Subsistence Board Government-to-Government Tribal Consultation Policy*, *supra* Figure 2, note g, at 3.

196. EPA Region 10 Consultation Procedures, *supra* note 181, at 12.

189. DOI Consultation Policy, *supra* Figure 2, note b.

190. EPA Region 10 Consultation Procedures, *supra* note 181.

191. DOC Consultation Policy, *supra* Figure 2, note b.

2. Means of Notifying Tribes

Several policies describe the notice of consultation that must be given, including DOI, EPA, Alaska Sustainable Fisheries Division, and DOC policies. Agencies take similar approaches to notifying tribes about consultation opportunities: the main methods of notification are hard copy letters, e-mails, fax, and phone calls. Agency policies and procedures differ in the extent to which they make an effort to ensure tribes have received reasonable notification. For instance, the NMFS, Alaska Region's Sustainable Fisheries Division consultation process only requires that tribes be notified through letters that describe the proposed actions.¹⁹⁷ EPA Region 10's consultation procedure also calls for a letter to be sent to tribes; the procedure also sets forth key information to include in the letter.¹⁹⁸ It further states that, when possible, the Agency should follow up with phone calls, e-mail, or fax to ensure receipt of the letter or to open the dialogue.¹⁹⁹ If the tribe does not respond, the procedure recommends that the EPA project lead work with its tribal coordinator to reach out to the tribe.²⁰⁰

3. Planning the Process

Policies differ in the extent of coordination that they require with tribes. For example, DOI, DOC, NMFS Alaska, and EPA Region 10 require widely varying levels of coordination with tribal officials to plan the process. DOI policy states that it will make reasonable efforts to comply with tribes' view as to process time line and in addressing sensitive information. DOC and its units are to "coordinate with tribal officials to plan logistical considerations for the consultation." NMFS, Alaska Sustainable Fisheries Division requires only coordination as to date and time, and whether tribes would like to include other tribes, organizations, or staff. EPA Region 10 is most detailed: its policy advises that EPA and tribal contacts "should work together in order to develop a mutually acceptable approach to planning, preparing for, and implementing the consultation process." The policy addresses planning for goals and expectations, incorporating consultation policies of tribes and the Agency, identifying authorized tribal officials, determining scope and number of meetings, consultation plan, meeting dates and locations, information exchange, and meeting facilitation.

4. Ways to Host Consultation

Several policies provide for different means of hosting consultation. The NMFS Alaska Region, Sustainable Fisheries Division notes that while staff sometimes travel to villages for consultation, consultations are usually held

by teleconference.²⁰¹ It also may conduct outreach meetings together with the Council. For example, during the Council's development of the Chinook salmon bycatch regulations, NMFS staff participated in some of the Council outreach meetings.²⁰²

EPA Region 10 procedures call for leadership meetings between tribal and Agency decisionmakers to be "held face-to-face whenever possible, preferably on tribal homelands."²⁰³ It recognizes that in-person meetings are not always possible and, if telephone consultation is needed, "participants should take extra care" to ensure that proper protocols are followed and that tribal participants are given appropriate opportunity to speak.²⁰⁴ DOI considers the possibility of inviting tribal leaders to attend a series of open meetings; single meetings are considered appropriate for local, regional, or tribe-specific issues.

5. Consensual Processes

The Executive Order states that when tribal self-government, trust resources, or tribal treaty or other rights are involved, agencies should explore the possibility of consensual mechanisms for developing regulations. The DOI policy specifies consideration of processes during proposal development that include negotiated rulemaking and using a tribal leader task force. While not mentioning negotiated rulemaking, EPA Region 10 policy requires staff to try to understand the tribe's point of view and "make a concerted effort to identify solutions that do not negatively impact a tribe's rights, resources and interests."

6. Other Methods

The FSB calls for familiarity and use of tribes' constitutions and consultation protocols to ensure more effective consultation.

F. Creating an Accountable Process

In addition to the Executive Order's requirement to certify compliance with the Executive Order to OMB, and in some circumstances to submit a tribal summary impact statement,²⁰⁵ agency policies may create other procedures

201. Alaska SFD Consultation Process, *supra* note 98.

202. Bering Sea Chinook Salmon Bycatch Final EIS—December 2009, at 9, April 2009.

203. EPA Region 10 Consultation Procedures, *supra* note 181, at 13.

204. *Id.* at 16.

205. NMFS included a tribal impact summary statement for two final fisheries rules in 2010. *See* Fisheries of the Exclusive Economic Zone Off Alaska; Chinook Salmon Bycatch Management in the Bering Sea Pollock Fishery, 75 Fed. Reg. 53026 (Aug. 30, 2010) (final rule); Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea Subarea, 75 Fed. Reg. 41123 (July 15, 2010) (proposed regulations); Fisheries of the Exclusive Economic Zone Off Alaska; Chinook Salmon Bycatch Management in the Bering Sea Pollock Fishery, 75 Fed. Reg. 14016 (Mar. 23, 2010) (proposed regulations); and Fisheries of the Exclusive Economic Zone Off Alaska; Modified Non-Pelagic Trawl Gear and Habitat Conservation in the Bering Sea Subarea, 75 Fed. Reg. 61642 (Oct. 6, 2010) (final rule). For example, the final rule for Chinook Salmon bycatch documented the Fisheries Service's consultation with Native groups. The Service initiated consultation at the beginning

197. Alaska SFD Consultation Process, *supra* note 97.

198. EPA Region 10 Consultation Procedures, *supra* note 181, at 11.

199. *Id.*

200. *Id.* at 12.

for accountability. Of particular interest are requirements to provide a written summary to tribes of the decision, included in DHS, EPA, EPA Region 10, DOC, and Alaska Sustainable Fisheries policies. Policies may also require that the written summary explain why tribal input was incorporated or not incorporated into the final decision. For instance, Alaska Sustainable Fisheries is to send a draft summary of the meeting, with responses to questions, to participants. After receiving and incorporating comments, a final summary is sent to participants. DOC requires that a formal written communication that summarizes the consultation and responds to the issues and concerns be provided to tribal officials. EPA and EPA Region 10 policies go further in addressing tribes' concerns that their views be taken into account in the final decision; the policies require that written feedback after consultation explains how tribal input was considered in the final action. DOI and FSB policies provide a level of accountability by requiring a yearly or ongoing review of the consultation process, and DOI also provides for an optional post-consultation review.

V. Conclusion

The federal government carries out its trust relationship with Native Americans and Alaska Natives in myriad ways. One such mechanism is government-to-government consultation, as required by EO 13175 and advanced in several resource management statutes. This Article explored the legal framework for engaging in consultation with Alaska Natives on matters related to offshore natural resources.

Stepping back from questions about how consultation has occurred in practice, it provided an overview and comparison of legal and policy requirements in order to highlight the potential for the consultation process.

As described in the Article, there are several key elements that are critical to achieving consultation that meaningfully integrates tribal input into decisionmaking. They include establishing mechanisms to ensure consultation brings together the right participants, including specified agency personnel; involving tribes early and throughout the decisionmaking process; and fully exchanging information, including incorporating TEK in decisionmaking and providing technical support. As for how the consultation is conducted, agencies and tribes should mutually develop a collaborative and flexible process, and agencies should provide feedback to tribes about how their input was used in the decision. As a general matter, consultation requires sufficient resources. Finally, most federal agencies could improve their consultation frameworks by more fully articulating consultation guidelines, procedures, and protocols, and ensuring that the policies respond to tribal concerns and reflect best practices.

In a perfect world, consultation would result in decisions that maximize the satisfaction of all parties involved and affected. In Alaska, consultation is a particularly important tool as federal agencies strive to find ways to fulfill their trust responsibilities to protect tribal interests and the environment, and tribes face increasing pressures caused by quickly changing ecosystem and socioeconomic conditions.

of the EIS scoping process (after the North Pacific Fisheries Management Council submitted certain fisheries management alternatives). It received 12 letters of comment from tribal representatives. The Council also conducted outreach meetings and open council meetings, at which "a number of tribal representatives and tribal organizations provided written public comments and oral public testimony." 75 Fed. Reg. 53053.