



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

An Exploration of Key Issues, Challenges, and Opportunities

April 2015



ACKNOWLEDGMENTS

This report was prepared by the Environmental Law Institute (ELI). The primary authors were Kathryn Mengerink and Jordan Diamond, who take full responsibility for the information contained within. The authors appreciate the research contributed by ELI staff and volunteers, including Greta Swanson. The authors also wish to express their gratitude to all the members of the Alaska marine management community who participated in conversations and provided background information. Without their teachings, and the lessons learned from their experience and dedication, this report would not have been possible.

ABOUT ELI PUBLICATIONS

ELI publishes Research Reports that present the analysis and conclusions of the policy studies ELI undertakes to improve environmental law and policy. In addition, ELI publishes several journals and reporters—including the *Environmental Law Reporter*, *The Environmental Forum*, and the *National Wetlands Newsletter*—and books, which contribute to education of the profession and disseminate diverse points of view and opinions to stimulate a robust and creative exchange of ideas. Those publications, which express opinions of the authors and not necessarily those of the Institute, its Board of Directors, or funding organizations, exemplify ELI’s commitment to dialogue with all sectors. ELI welcomes suggestions for article and book topics and encourages the submission of draft manuscripts and book proposals.

Strengthening Government-to-Government Consultation Related to Marine Subsistence Resources in Alaska. Copyright© 2015 Environmental Law Institute®, Washington, D.C. All rights reserved.

An electronic retrievable copy (PDF file) of this report may be obtained for no cost from the Environmental Law Institute website at www.eli.org; click on “ELI Publications,” then search for this report. [Note: ELI Terms of Use will apply and are available on site.]

(Environmental Law Institute®, The Environmental Forum®, and ELR® – The Environmental Law Institute Law Reporter® are registered trademarks of the Environmental Law Institute.)

Table of Contents

EXECUTIVE SUMMARY	5
Challenges to Government-to-Government Consultation in Alaska	6
Ideas for Improving Consultation	7
Model Approach to Consultation.....	1
I. GOALS, OBJECTIVES, AND METHODOLOGY	1
II. BACKGROUND	3
A. Understanding the Alaska Native Community Institutional Framework Related to Natural Resources.....	3
B. The federal trust responsibility and Alaska Native resource rights	4
C. Executive policies related to tribal consultation and coordination	5
III. CHALLENGES TO EFFECTIVE CONSULTATION	8
1. Communicating in Alaska.....	9
2. Operating effectively in a complex system of engagement	9
3. Knowing what counts as consultation	12
4. Giving adequate notice	13
5. Ensuring appropriate participation.....	15
6. Exchanging the right information at the right time	16
7. Consulting at the right time	18
8. Establishing a flexible and collaborative process.....	18
9. Ensuring accountability and transparency.....	19
10. Operating with limited capacity and resources	20
11. Coordinating consultation	22
12. Establishing trust.....	23
IV. OPTIONS FOR IMPROVING GOVERNMENT-TO-GOVERNMENT CONSULTATION	24
Staffing	25
Before Consulting.....	28
During Consultation	33
After Consultation.....	38
Cross-Cutting.....	39

V. CONCLUSION..... 50

Appendix 1. Model Consultation Notice Request..... 51

Appendix 2. Comparison of Consultation Provisions Found in Co-Management Agreements 52

EXECUTIVE SUMMARY

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

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

This Report combines research and analysis of laws, policies, and procedures related to consultation with in-depth conversations with Alaska Natives, federal agency staff engaged in consultation, and others (such as private practice attorneys, nongovernmental representatives, and members of academia) through individual conversations and workshop discussions. In particular, the Marine Mammal Commission and Indigenous People's Council for Marine Mammals meeting on consultation in December 2012 provided a substantial basis for the issues and ideas examined in this Report. These discussions and meetings provided information that has been essential to the authors' ability to identify the primary challenges to consultation and potential approaches to solving them.¹ While the Report could not exist without the input of those interviewed, the authors highlight that any and all errors in the Report are the sole responsibility of the Environmental Law Institute (ELI).

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

A note about terms—the authors use the term “Alaska Native communities” or “communities” to include the tribes and tribally authorized bodies who may engage in the consultation process, unless specifically addressing one or more tribe or tribal body.

Challenges to Government-to-Government Consultation in Alaska

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

Ideas for Improving Consultation

Staffing

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

Before Consultation

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

During Consultation

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

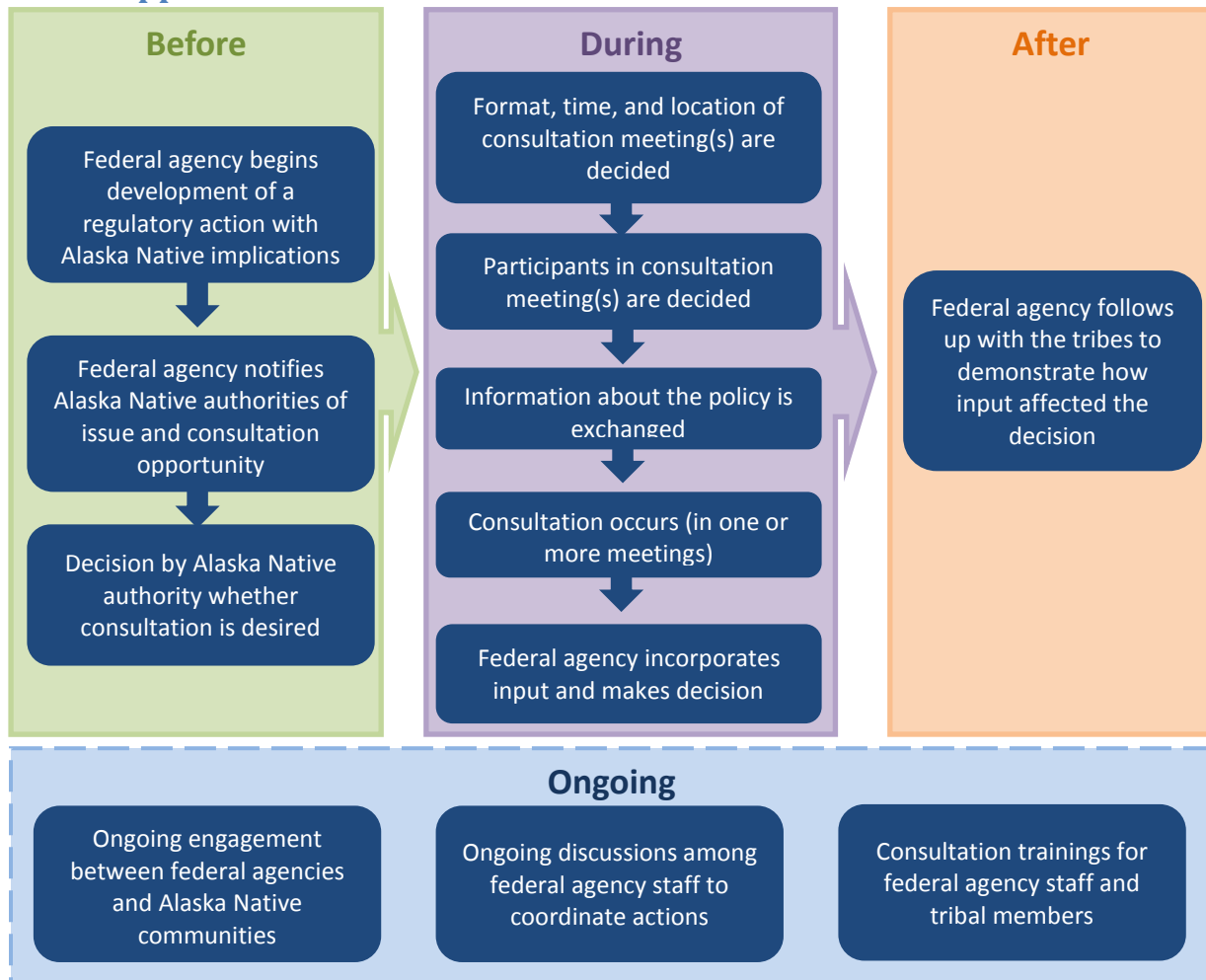
After Consultation

14. **Establish and use a standard protocol for follow up** after consultation to provide participants with a record of information exchanged and how consultation affected the decision.
15. **Develop community standards for follow up.** Alaska Natives could develop standards for the type and format of follow up they desire from federal agencies subsequent to a consultation meeting.

Cross-cutting

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

Model Approach to Consultation



I. GOALS, OBJECTIVES, AND METHODOLOGY

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

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

This Report combines research and analysis of laws, policies, and procedures related to consultation with in-depth conversations with Alaska Natives, federal agency staff engaged in consultation, and others (such as private practice attorneys, nongovernmental representatives, and members of academia). The legal research and analysis provides the structural framework for consultation, from the legal requirements and constraints to the policy goals and existing procedures. However, such “on-the-books” information does not shed light on how laws, policies, and procedures are implemented in practice. To gather this more complex implementation information requires learning from the experts who are engaged in the process. Therefore the authors spoke with roughly 40 people on an individual or small group basis, including approximately 13 people representing Alaska Natives, 20 federal agency personnel, and 11 members of private practice, nongovernmental organizations, and academia. The authors also participated in group meetings, including hosting a session on consultation at the Kawerak Inc. Bering Strait Regional Conference, facilitating a discussion at an Alaska Eskimo Whaling Commission meeting, and participating in and co-hosting with the Marine Mammal Commission and the Indigenous People’s Council for Marine Mammals a three-day meeting focused on consultation. These meetings provided additional information that has been essential to the authors’ ability to identify the primary challenges to consultation and potential approaches to solving them.

The Report is not a quantitative assessment of management community perspectives on consultation. Rather, the discussions with Alaska Native community members, federal agency staff, and others were

used to identify key challenges, considerations, and practices as a foundation that informed the report as a whole. Further, to preserve the confidentiality of those interviewed, this Report does not attribute specific recommendations or identified challenges to any one person unless the information has been obtained from a previously published document. However, the authors endeavor to indicate whether a recommendation was identified by one or more interviewees or whether it is a recommendation that comes directly from the authors based on their expertise.

Although not identified by name, the authors want to acknowledge and express their gratitude for the time and effort that the interviewees and meeting participants provided. Without their expertise, experience, and willingness to share their knowledge, this Report would not be possible.

While the Report greatly benefits from and would not exist without the input of those interviewed, the authors highlight that any and all errors in the Report are the sole responsibility of the Environmental Law Institute (ELI).

A note about terms—the authors use the term “Alaska Native communities” or “communities” to include the tribes and tribally authorized bodies who may engage in the consultation process, unless specifically addressing one or more tribe or tribal body.

II. BACKGROUND

This section provides a brief overview of the Alaska Native community framework related to marine natural resources, the federal trust responsibility, and an overview of government-to-government consultation.² The purpose of this section is to provide the context needed to understand the challenges that arise in consultation and the options to address them.

A. Understanding the Alaska Native Community Institutional Framework Related to Natural Resources

Alaska Native communities are represented by an array of tribally-, state-, and federally-authorized entities that have an explicit, or potential, role to play in managing natural resources (Figure 1). Understanding this community framework is essential for those engaged in collaborative management, including consultation, with Alaska Native communities.

Figure 1. Alaska Native community institutional framework related to marine resources



² For an in depth overview of government-to-government consultation in Alaska, see Greta Swanson, Kathryn Mengerink & Jordan Diamond, *Understanding the Government-to-Government Consultation Framework for Agency Activities that Affect Marine Natural Resources in the U.S. Arctic*, 43 ENVTL. L. REP. 10872 (2013).

First, each Alaska Native Village is designated as at least one federally-recognized tribe. Over 80,000 Alaska Natives are members of the 229 designated federal Indian tribes in Alaska³—a designation that comes with a suite of rights. Each village has a tribal government and a village corporation. A village also may have a municipal and/or borough government under state law (e.g., Barrow, Alaska is part of the North Slope Borough).

Second, Alaska Native communities are divided into twelve geographic regions⁴ that have corresponding regional corporations, and may also have corresponding non-profit associations.

Third, a variety of Alaska Native Organizations (ANOs) are authorized by Alaska Native tribes to represent tribal interests in managing subsistence resources. These co-management bodies include, for example, the Alaska Eskimo Whaling Commission, Eskimo Walrus Commission, Nanuuq Commission, Ice Seal Committee, and Alaska Beluga Whale Committee, among others.

Finally, some overarching entities have broader membership across the state. For example, the Indigenous People’s Council for Marine Mammals (IPCoMM) consists of 17 marine mammal commissions, councils, and other ANOs, who work together to address “issues of common concern regarding marine mammal conservation and subsistence issues” across all of Alaska.⁵ Another example is the Alaska Federation of Natives (AFN). With more than 178 members representing villages and corporations across Alaska, AFN’s mission is to “enhance and promote the cultural, economic and political voice of the entire Alaska Native community.”⁶

B. The federal trust responsibility and Alaska Native resource rights

Government-to-government consultation with tribes arises out of the fundamental trust responsibilities that the U.S. government bears to protect the rights and resources of Native Americans. Native American tribes are considered domestic dependent nations with inherent sovereign powers that are recognized by the Constitution, treaties, statutes, executive orders, court decisions, and policies.⁷ As

³ 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 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; 58 Fed. Reg. 54364 (Oct. 21, 1993). An *Indian tribe* is an “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.” *Consultation and Coordination with Indian Tribal Governments*, Exec. Order 13175 of Nov. 6, 2000, 65 Fed. Reg. 67249, § 3 (Nov. 9, 2000) [*hereinafter* E.O. 13175], § 1(b). See also Dept. 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).

⁴ A thirteenth regional corporation exists that is not specific to a particular geography.

⁵ IPCoMM, About Us, at <http://www.ipcommalaska.org/about.html>.

⁶ Alaska Federation of Natives, *About AFN*, at <http://www.nativefederation.org/about-afn/>.

⁷ For example, Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 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.” Exec. Order 13175 at § 3, *supra* note 3.

explained by the Bureau of Indian Affairs, “[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

C. Executive policies related to tribal consultation and coordination

In 2000, President Clinton issued Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (EO 13175),⁹ which establishes consultation requirements for all federal agencies. When developing policies that have tribal implications, EO 13175 calls upon federal agencies¹⁰ to recognize their unique legal relationship with Indian tribes as domestic dependent nations; work with Indian tribes on a government-to-government basis; and acknowledge the right of Indian tribes to self-government and tribal self-determination. As recognized by the EO, statutes and regulations “establish and define a trust relationship,” and it is a fundamental principle that the federal government “work with Indian tribes on a government-to-government basis.”¹¹

EO 13175 identifies specific consultation requirements. Each agency must have “an *accountable* process to ensure *meaningful* and *timely* input by tribal officials in the development of regulatory policies that have tribal implications.”¹² Furthermore, agencies are to designate an official tasked with implementing the EO, and agencies are required to submit a description of the agency’s consultation process to the Office of Management and Budget (OMB).

When formulating and implementing policies, EO 13175 outlines policymaking criteria regarding the development and implementation of policies with tribal implications, stating that 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.¹³ In addition to satisfying the policymaking criteria, when an agency promulgates regulations that both have tribal implications and either (a) impose unfunded costs on tribal governments not required by statute or (b) preempt tribal law, then the agency must consult with tribal officials early in the process of developing the proposed regulation.¹⁴ The agency must document this consultation through a “tribal summary impact statement” in the Federal Register and show the extent to which the agency has met

⁸ U.S. Department of the Interior, Bureau of Indian Affairs, *Frequently Asked Questions*, <http://www.bia.gov/FAQs/index.htm> (last visited Dec. 8, 2011).

⁹ Exec. Order 13175, *supra* note 3.

¹⁰ “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).

¹¹ *Id.* § 2.

¹² *Id.* § 5(a) (emphasis added). *Policies that have tribal implications* “refers to 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.” *Id.* § 1(b).

¹³ *Id.* § 3.

¹⁴ This specific process applies only when developing “regulations.” E.O. 13175 *supra* note 3, § 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).

the concerns of tribal officials.¹⁵ The agency must also provide OMB with copies of written communication between tribes and agencies.¹⁶

On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty or other rights, agencies should, if appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.¹⁷

Almost a decade after it was established, President Obama revived EO 13175 when he issued a memorandum that required agencies to develop detailed plans of action to implement the Order.¹⁸ According to the memorandum, agencies were to draft plans within 90 days of the memorandum and submit final plans to OMB by August 2, 2010, followed by annual progress reports. Departments and agencies were directed to consult with Indian tribes and tribal officials to develop the action plans¹⁹ and to designate an agency official to coordinate implementation plans and progress reports.

Shortly thereafter, OMB issued guidance to clarify agency requirements. The OMB Guidance describes the role of agency tribal consultation officials, calling upon them 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.”²⁰ Although EO 13175 “is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law,”²¹ OMB Guidance states that a tribal consultation official must certify that Executive Order requirements are met “in a meaningful and timely manner” when submitting draft regulations.²²

In addition, through a provision in a 2010 omnibus bill, the requirement for OMB to consult with tribes under EO 13175 was explicitly extended to include Alaska Native corporations. OMB Guidance calls for all federal agencies to consult with Alaska Native corporations “on the same basis as Indian tribes.”²³

¹⁵ § 5(b). The National Marine Fisheries Service has included a tribal impact summary statement for two final fisheries rules in 2010.¹⁵ See Fisheries of the Exclusive Economic Zone Off Alaska; Chinook Salmon Bycatch Management in the Bering Sea Pollock Fishery, 75 Fed. Reg. 53026 (August 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 (March 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 (October 6, 2010) (final rule).

¹⁶ *Id.* § 5(b)–(c).

¹⁷ *Id.* § 5(d).

¹⁸ 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>.

¹⁹ *Id.* at 1.

²⁰ 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].

²¹ E.O. 13175, *supra* note 3, § 10 Judicial Review.

²² *Id.* at 4.

²³ OMB Guidance, *supra* note 20. 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

As a result of these policies and statutory requirements, all federal agencies are to consult with tribal officials on issues that affect tribal trust resources.

Indian tribes under Executive Order No. 13175.” Consolidated Appropriations Act, 2004, Public Law 108-199, Div. H. Sec. 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Public Law. 108-447, Div. H., Title V. Sec. 518, 118 Stat. 2809, 3267 (2004).

III. CHALLENGES TO EFFECTIVE CONSULTATION

This chapter summarizes key challenges to effective government-to-government consultation in Alaska that were identified through interviews, research, and personal observations. Table 1 provides a brief overview.

Table 1. Twelve Challenges to Government-to-Government Consultation in Alaska

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

1. Communicating in Alaska

Consultation can be a challenging process in any place, but it is especially so in Alaska, if for no other reason than the geography: it is an enormous state with extremely remote communities, many of which are reachable in person only by airplane when weather permits. It is not unusual for travel plans to be delayed or cancelled or for travelers to stay longer in one spot than planned due to inclement weather. These geographic and logistical challenges translate directly to cost and capacity constraints for communities and agencies to engage in meaningful consultation.

To address geographic constraints to communication, agencies may use video conferencing, conference calls, and phone calls. Most interviewees indicate that teleconferences work reasonably well in most places (once relationships are established) and the ability to connect via webinar or tools like Skype is expanding. Most people view all of these methods as acceptable means of communication *if* conditions and available technology permit such an approach and once relationships are established. However, most interviewees agreed that initial meetings during a consultation process should occur in-person, and that long-term trust requires the development of in-person relationships.

2. Operating effectively in a complex system of engagement

Consultation is one element of a broader Alaska Native-federal agency relationship, which leads to several challenges.

First, while consultation is often viewed as an important mechanism, many interviewees recognized that consultation alone is not sufficient to ensure that Alaska Natives are appropriately included in management of Alaska's natural resources. Most comments reflected the idea that consultation was an essential formal process that occurred among decision-makers, but that the more frequent communications (e.g., meeting attendance, phone calls, emails, presentations at regional meetings) can help establish necessary linkages with community members and build trust, so that when consultation does occur, there is a greater chance for successful outcomes.

Second, while a broader system of engagement is clearly necessary, the existence of this broader system can lead to confusion as to when a meeting is considered "consultation" versus an informal engagement or other process. *For additional discussion of this challenge, see Section III(3).*

Third, some interviewees pointed out that the actions of agency officials outside of the consultation process can lead to challenges within the consultation process. This challenge was raised in the context of the actions of wildlife enforcement officials whose enforcement actions were perceived as impinging on the rights of the subsistence communities. Another situation discussed was agency researchers whose actions were perceived as ignoring the real-world implications of their conduct. While not directly related to consultation, these actions can erode trust between communities and federal

agencies at a general level. This erosion of trust can create challenges in and potentially undermine the consultation process.

Consultation and Co-Management

The authors observed many questions and different perceptions about the linkage between consultation and co-management. The conversations focused on the challenges that occur in the context of marine mammal co-management between Fish and Wildlife Service (FWS), the National Oceanic and Atmospheric Administration (NOAA), and marine mammal ANOs.

First, there is a lack of agreement among agency personnel, Alaska Natives, and other experts interviewed about whether communication that occurs between agencies and ANOs is equivalent to government-to-government consultation between a tribe and an agency, and if so, whether such consultation activities satisfy the federal government's consultation obligations for issues related to the particular marine mammal decision being considered.

One element of confusion may stem from the fact that some co-management agreements have specific language about consultation occurring between the federal agency and co-management body (*See Appendix 2*). However, whether the consultation that occurs under co-management is equivalent to government-to-government consultation is a matter of debate. Some interviewees indicated that such co-management consultation is part of government-to-government consultation, while others felt that it was something different. As one person with the latter perception described, consultation between tribal councils and agencies is "Big C" consultation while consultation between co-management bodies and agencies is "little c" consultation.

Another element of confusion may stem from the difference between FWS and NOAA approaches to consultation and co-management. Based on comments received from the agencies, FWS only views the co-management ANO as an appropriate authority for consultation *if* tribes have explicitly authorized it to consult on their behalf in writing. NOAA, on the other hand, has consulted with marine mammal ANOs in satisfaction of their government-to-government consultation responsibilities. These approaches vary over time and depend on the agency participants, and there may sometimes be a lack of clarity within the agencies themselves.

ANOs have authority to co-manage specific species on behalf of the tribes, authority which is delegated by the tribe to the ANO, typically in the form of a written resolution. In light of such delegation of authority, three questions have been identified by the authors, as well as several interviewees:

- Does the general tribal authorization to manage species on behalf of the tribes confer ***exclusive*** government-to-government consultation authority to the ANO, and therefore the agency can meet its consultation requirements by consulting with the ANO on relevant issues?
- Does the general tribal authorization to manage species on behalf of the tribes confer ***inclusive*** government-to-government consultation authority to the ANO, and therefore the agency should

provide government-to-government consultation opportunities to both the ANO and the delegating tribes?

- If the existing tribal authorization does not confer consultation authority, what language should tribes use to confer such authority if they want to have the ANOs represent them for consultation on issues related to the particular expertise of the ANO?

Alaska Natives, agency staff, and other experts who were interviewed about the consultation and co-management linkages had varying perceptions about how these two elements of the engagement framework are and should be linked.

Some interviewees felt strongly that co-management and government-to-government consultation are two separate activities involving different Alaska Native bodies (ANOs and tribes respectively). One person commented that co-management is not a substitute for consultation. Another person strongly viewed that consultation is completely separate from co-management and that agencies should always engage directly with individual tribal council members to satisfy government-to-government consultation requirements.

Some interviewees support the role of ANOs in the government-to-government consultation process. One interviewee noted that agencies miss an opportunity to learn from the Alaska Native communities if they do not consult with tribally-authorized ANOs. Another person expressed that consultation should funnel into co-management. This view was, in part, based on the perception that co-management is a stronger and more robust process than consultation, which is viewed as a weak process in practice. On a related note, three interviewees expressed concern that consultation could undermine co-management by creating an end run around the more robust co-management process.

Several interviewees expressed the need for and value in agencies engaging directly with tribes *and* ANOs. As one interviewee noted, ANOs represent the tribes' identified leaders on a particular issue, therefore agencies should engage with those leaders on relevant issues; and agencies should consult with tribes should they desire such consultation.

When asked what role co-management bodies or other regional or state entities could play in the ideal consultation process, a variety of issues, ideas, and notes of caution were raised, including the following:

- Several people noted the uneven capacity and funding across the ANOs, and that ANOs do not have dedicated resources to support the consultation process (e.g., one idea was for ANOs to help agencies connect with appropriate tribal councils on issues related to co-management).
- Two interviewees described a balancing act: on the one hand, working with ANOs or regional or statewide bodies creates a more efficient process and enables communities to speak with a unified and stronger voice; but on the other hand, individual voices and smaller-scale issues are lost by centralizing the process too much.

- In a similar vein, another interviewee expressed concern that by engaging only with a statewide representative body, for example, the information exchanged may not make it back to the communities who need to receive it.
- In support of a more regionalized process, one interviewee explained that Alaska Natives need to unite and speak with a common voice, in part because there are too many agency actions and activities for any one village or community to address on its own. And many people commented that many Alaska Native leaders are overburdened (*see Operating with limited capacity and resources, Section III(10)*). Also, agencies do not have the resources or capacity to consult with all communities in a timely and meaningful way.

Consultation and Alaska Native Corporations

In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native Corporations on the same basis as federally recognized Indian Tribes under the Executive Order. While not the focus of the authors' research or based on targeted questions, some interviewees raised the linkages between government-to-government consultation and these Alaska Native corporation consultation requirements.

First, several interviewees described consultation with tribes as deserving greater weight in the decision-making process, given their role as domestic dependent sovereigns, than consultation that occurs with corporations. Second, some interviewees commented on whether or not tribal and corporation consultation should be linked: one person commented that there is no reason to have separate processes for tribal consultation and consultation with the Alaska Native corporations; another person noted that the presence of the corporation could stifle the tribal voice. Finally, most interviewees noted that in practice corporations rarely engage in the consultation process.

3. Knowing what counts as consultation

In researching the implementation of consultation policy, the authors note that there is lack of clarity about when an activity satisfies the government-to-government consultation requirements. The following examples provide a flavor of the challenges that arise because of this lack of clarity:

- One interviewee described a situation where a high level agency official traveled to a remote destination to attend a meeting that the agency perceived to be a consultation meeting. However, the tribe did not have the same understanding, and therefore did not have the appropriate tribal officials in attendance in order to engage in consultation.
- One interviewee made reference to formal versus informal consultation, but noted that the difference between formal versus informal consultation is not well-defined.
- One interviewee described informal communication like phone calls, emails, and similar actions that are unrelated to regulatory actions as being informal engagement, while consultation is triggered by more formal policy actions like the development of regulations.

- When describing consultation, some interviewees thought of the entire process of engagement as fitting into the consultation framework. In other instances, interviewees thought of consultation as specific meetings among tribal officials and agency officials who are capable of making decisions.
- Several interviewees perceived a difference between consultation that occurs with tribal councils and consultation that occurs with Alaska Native Organizations (ANOs), with one person describing the difference as “Big C” consultation (i.e., government-to-government consultation with tribal councils) and “little c” consultation (i.e., government consultation with ANOs). See *previous section for a more in-depth examination of this challenge*.

4. Giving adequate notice

Key to giving notice of consultation opportunities is knowing (1) who to contact about opportunity; (2) how to contact them; and (3) when to contact them.

Who to Contact about Consultation Opportunities

In this day of modern technology, the issue of identifying the right people to contact about a given issue may not seem like a large hurdle. However, for a variety of reasons, many interviewees explained the challenge of identifying the right people to communicate with on a given issue. This is true for both Alaska Native communities as well as federal agencies.

Agencies face two issues related to who to contact. First, agencies need to know the right tribal authorities to contact for consultation. Second, agencies need to know who the actual people are within those authorities that hold the relevant positions and how to contact them. Like all institutions, tribal bodies experience turnover in leadership and staff.

Through the interviews, the authors identified several different mechanisms that agencies use to try to maintain a list of appropriate contacts or otherwise identify opportunities for engagement. These include creating individual program contact lists that are updated by the tribal coordinator for the program, using collaboration software to enable shared lists within an agency, using the Bureau of Indian Affairs contact list, developing lists of regional tribal gatherings (e.g., Kawerak Inc.’s Bering Strait annual regional conference), and maintaining strong ongoing relationships with communities so the agency staff know the right people to contact. However, the authors did not identify a single shared and accepted contact list or approach to knowing who to contact on a given issue.

How to Contact Tribal Authorities

Agencies use a variety of methods to contact tribal authorities to provide notice of consultation opportunities, with varying levels of success. The following approaches to providing notice were identified by interviewees:

- Issuing public notice in the federal register and local newspapers (e.g., the Nome Nugget and Tundra Times)
- Using public radio stations in Barrow and Nome to announce opportunities
- Sending letters to tribal contacts via mail
- Distributing flyers to communities and asking specific contacts to post them
- Having staff in the field give notice by word of mouth
- Calling individual contacts
- Sending notice to regional organizations and/or ANOs and requesting distribution to relevant tribes

The amount of notice (i.e., the number of attempts to make contact) and different forms that the notice takes (e.g., telephone calls, emails, newspaper notices) varies substantially among federal agencies. Some agencies have specific procedures that require agency personnel to make several attempts using one or more forms of notice. In other cases, agencies may only send one or more letters. For example, one interviewee noted that an agency typically sends out letters a couple of times during a given process, leaving it in the hands of the tribal authorities to respond by requesting a consultation.

Several people noted deficiencies in the ways tribes are given notice of consultation opportunities. While general announcements may be helpful, one agency interviewee noted that it is important to identify and send a letter (or make a phone call) to a particular person, in part to provide appropriate respect. Another interviewee noted that a general letter to the tribal council without addressing a specific person does not suffice as outreach for consultation, as the person who sorts incoming mail may not have the expertise to evaluate the contents of the letter and therefore may not flag the opportunity in time or with the appropriate person—a challenge linked to the limited capacity of some tribes to engage in the many relevant federal processes underway.

A related issue is whether agencies have a positive duty to consult, not just a duty to offer consultation opportunities. As it stands now, agencies send notices about opportunities to consult but leave it to the tribal authorities to initiate the process. This approach helps ensure that all potentially affected communities receive notice, as it can be difficult for agencies to determine which of the 229 tribes in Alaska may be affected by a particular decision – the agency can send the notice to a broad group of tribes and tribally authorized bodies and then follow up with communities that request consultation.

Interviewees noted that communities can also request consultation without prior agency notice. In fact, one interviewee noted that the agency sometimes engages in consultation on issues where it is not the action agency. However, some interviewees expressed concern about this as a more passive approach, and felt that agencies had a duty to take greater efforts to engage in consultation processes with appropriate tribal authorities.

When to Contact Tribal Authorities

The timing of contact and consultation is part of a broader issue of timing and is discussed in *Section III(7)*.

5. Ensuring appropriate participation

Agency Participants

When viewed as a whole, a variety of agency actors may be involved in the consultation process—from tribal liaisons who have frequent interactions with communities, to scientists who provide technical information to support a decision, to the actual decision-makers.

There is no uniform practice among the agencies. Agencies like the Department of the Interior, the Coast Guard, and the Environmental Protection Agency use tribal liaisons who build and maintain connections with communities (along with scientists and others). These same tribal liaisons are often involved in the consultation process. NOAA, on the other hand, does not have a funded tribal liaison to coordinate and engage in consultations. Furthermore, agencies vary in terms of what person with decision-making authority and/or scientific expertise participates in the consultation practice.

Some interviewees voiced concerns about agency participants, from the type of people who participate in consultations to the consistency of participants through time, including the following:

- Agencies should have tribal liaisons that participate in the consultation process.
- Agency staff turnover or otherwise changing consulting parties requires communities to restate concerns, leads to a lack of sustained understanding of relevant issues, and creates additional burden on communities to re-explain issues.
- Agencies need to send people to consult who are capable of making decisions (*see also the discussion of accountability, Section III(9)*).
- Effectiveness of consultation depends on relationships, and strained relationships or difficult personalities can undermine an effective process.

Tribal Participants

The issue of who represents a community for purposes of consultation is one that is interconnected to the challenge of consultation in the context of the broader engagement framework, the various leadership roles that community members have, and the interconnectedness of a given agency action with various community bodies.

In the simplest form, a given tribe speaks with one voice through a tribal council that has been appointed to engage in consultation. However, as described earlier, other tribal entities such as ANOs and Alaska Native corporations potentially have roles to play in the consultation process as well. Furthermore, a tribe may designate someone to represent it. One interviewee commented that it is sometimes difficult to know who a particular person is representing and/or how much a particular view

is in line with others in the community. Another noted that asking clarifying questions about who a person is representing and under what authority can be viewed as disrespectful. Other interviewees noted that the role that various entities, such as tribal councils and ANOs, play varies from community to community, so there is no one-size-fits-all approach to identifying the appropriate type of tribal participants for consultation.

6. Exchanging the right information at the right time

Information exchange is a crucial part of the consultation process. It can occur before, during, and after consultation, and challenges arise in all three contexts.

Before Consultation

Agencies often share some information in advance of meetings, but the approach taken varies. Information may be shared by posting it on a website, sending technical documents via email or post mail, sharing other information by email, hosting information sharing sessions, developing and sharing factsheets and summaries, outreach to committee members, phone calls, and meetings.

Several interviewees identified challenges associated with existing approaches to sharing information, including the following:

- Information is not shared far enough in advance of the meeting to allow adequate time for the recipients to review.
- Communities may lack capacity or technical expertise to evaluate the information shared.
- In practice, consultation participants may not read shared materials in advance of the meetings due to competing obligations and time restrictions.
- Some communities have slow internet connections, which makes it difficult to download large documents.
- Some communities do not have easy access to high-resolution printers, which makes it difficult to produce and share hard copies.
- Information may not be shared broadly enough with the right members of the community (e.g., one interviewee noted that information shared only with one person or group may not be redistributed to communities in a timely fashion in all instances).

During Consultation

Information exchange is part of the consultation process. However, some interviewees noted that consultation meetings sometimes take the form of information-sharing events with agencies giving presentations followed by question and answer periods. In this context, one interviewee noted that outreach and education should occur before consultation and not be considered consultation meeting itself. That said, recognizing that some participants may not have the opportunity to review materials in advance of a meeting, the consultation meeting likely needs to include an information-sharing component.

Another aspect of information-sharing is the information being shared by the community with the agency. This includes sharing of traditional ecological knowledge (TEK). One interviewee noted that when agencies seek information, it is with a management imperative bias that may cloud evaluation of the information received. Another comment related to the need to collect TEK using a well-designed initiative rather than taking a more passive approach to gathering and understanding such information.

Some interviewees commented that while information was shared with agencies during the consultation process, there was sometimes little indication that the agency participants were recording or making note of the information and views of the tribal participants.

After Consultation

Information is shared in three separate ways following consultation. First, agencies may share meeting minutes, summaries, and decisions that flow from the consultation with participating communities. Second, agency participants may share consultation information with other agency personnel, including higher level decision-makers. Third, agencies may share information with the public or a broader audience.

How agencies share information with communities following consultation is highly variable and unsatisfactory to many of the Alaska Native community members and representatives interviewed. Interviewees identified the following approaches for agencies to share information with communities post-consultation:

- Distribute meeting minutes
- Host telebriefing and provide transcript of consultation, and have the note-taker produce a written summary
- Provide summary of meeting upon request from tribe
- Convey impact of consultation via verbal communication
- Bring meeting notes to subsequent meeting and review at the outset of meeting
- Send closure letter to each tribe conveying what was heard and how the information informed the decision

Agency interviewees identified the following approaches to sharing information with other agency personnel:

- Have decision-makers participate in consultation
- Share information with decision-maker after consultation

One interviewee noted that the consultation process requires that the decision-maker to be aware of what is vocalized at the consultation meetings.

Interviewees identified additional approaches to sharing information about consultation meetings with a broader public audience:

- Incorporate information from consultation into NEPA documents or other decision documents
- Post summaries of public engagements online
- Track specific recommendations and how the agency has responded to them

7. Consulting at the right time

As previously noted, communities are overburdened with myriad activities and commitments. Therefore it can be immensely challenging to plan consultation meetings at times when appropriate leaders are available, and during appropriate regulatory windows. Some of the issues identified by interviewees include the following:

- Congressionally-mandated schedules (e.g., statutory and regulatory scheduling requirements) do not necessarily align with subsistence harvest schedule.
- Agency decision-making typically moves at a faster pace than community engagement can.
- Community calendars are filled with many activities including community meetings, agency meetings, and industry meetings, among many other commitments.
- Agency calendars are also full, and agency personnel sometimes cancel meetings because of conflicts, which can strain relationships.
- Knowing the subsistence and community calendars is difficult because it varies from village to village; timing of subsistence varies somewhat based on presence of target species; and many communities do not have publicly accessible event calendars that agencies can consult.
- Decisions outside of the regulatory cycle may be deemed “emergency” decisions and bypass consultation requirements.

Often the best time of year to consult and engage with subsistence communities is during the winter, when subsistence activities are at a minimum. For agencies, however, decisions are made throughout the year, and mandated review periods may constrain an agency’s flexibility to engage in consultation at more community-appropriate times.

8. Establishing a flexible and collaborative process

The challenges with creating a flexible and collaborative process generally focus around three key issues. First is the need to increase predictability in the consultation process, so that community members tasked with engaging in various consultation processes are not constantly trying to figure out the particulars of different agency procedures. Second is the need to maintain flexibility in the process, so that it can be adapted to the needs of the participating entities and the circumstances at hand. Third is the need for consultation to be a two-way dialog, rather than a one-way presentation.

Increasing predictability

The need to increase predictability is the result of the varying processes and procedures of the federal agencies that engage in consultation in coastal Alaska. Often times the same people within a tribe are tasked with engaging in consultation with a variety of different agencies, on a spectrum of tribal issues, which means they may be dealing with multiple different sets of policies and procedures. This creates the potential for confusion and inefficiency in the process. At the same time, as more than one interviewee noted, federal agencies often experience turnover, which can make it difficult to keep a standard approach in place. This challenge focuses on the procedural need to create greater consistency in and understanding of the steps of consultation process, so that participants understand how the process will progress and can prepare themselves for each step. As one interviewee put it, there is a need for greater clarity in the process, even though there might not be a right answer about what the process should be. Another interviewee emphasized the challenge by noting that even definitions of key consultation terms can vary by agency.

Maintaining flexibility

As noted above, when people know what to expect in a process, they are generally better able to participate in it. However, the second procedural challenge is balancing the need for increased predictability with the need to maintain flexibility. Community priorities, needs, structures, and circumstances vary throughout Alaska, as do environmental and resources conditions. For communities to be able to meaningfully and appropriately engage in consultation, the process has to be able to adapt to these variations. In addition, different agencies have different demands and face different statutory and regulatory requirements, and the process must be able to accommodate their needs. One session participant suggested the need for “flexible consistency” in agency communication with tribes. An interviewee also highlighted the challenge of implementing policies that are developed by high-level agency officials who don’t have in-depth knowledge of Alaska or Alaska Native tribes.

A two-way dialog

The third challenge is ensuring that consultation is a true two-way dialog between the agency and tribal participants. This links with some of the challenges noted above in the context of *Information Exchange*. As one interviewee noted, it is important to allow enough time for meaningful discussion to take place. This may necessitate multiple meetings, which may need to be properly spaced to allow participants to digest and consider information. In addition, multiple people emphasized the need for consultation to occur early in the process. As one person noted, it needs to occur early enough to meaningfully distinguish it from a specialized public comment opportunity.

9. Ensuring accountability and transparency

Closely linked to post-consultation information sharing is the issue of accountability and transparency. One of the most overarching criticisms of the consultation process is the lack of accountability mechanisms that ensure that information shared during consultation is properly considered in the decision-making process. While the consultation Executive Order calls for consensus when appropriate,

it is not required and is far from the norm. There are no other explicit legal requirements or procedures that ensure that agencies adopt or effectively consider the information being shared during the consultation process.

In lieu of specific mandates to incorporate the input received, one of the best remaining accountability mechanisms is transparency. Transparency helps those engaged in consultation know how information is being received and informing decisions. In most instances communities receive no feedback about how comments and recommendations affect the decision-making process. If the agency does not report back, the only explanation communities receive of their effect on the process is whether their input was included in the final rule or other decision. If they are not, consultation participants may perceive that their voices are not being heard. As one interviewee noted, a lack of reporting can degrade trust. In addition, as one interviewee noted, in the absence of clear tracking mechanisms it can be unclear to community members when they need to repeat input provided in other consultation processes or contexts.

Multiple interviewees, both from communities and agencies, stated that agencies need to explain why management decisions were made, and if community recommendations were not adopted, why not. That said, some interviewees pointed out that agencies lack the capacity and resources to do such follow-up. An important point to highlight is that several interviewees noted that many communities understand that their suggestions cannot always be accommodated—the frustration stems from the lack of transparency into the process, not the decision itself.

Some interviewees stated that decisions should be consensus-based, and the consultation process should be used to achieve consensus. One person commented that the process should be one of joint draft and review. However, other interviewees point out that consultation does not mean consensus-based decision-making, and agencies and others should be clear not to over-promise potential outcomes of consultation.

10. Operating with limited capacity and resources

Most federal agencies and tribal authorities lack the resources needed to effectively engage in consultation with the appropriate parties on a regular basis for all issues that are relevant. This section provides an overview of the capacity challenges generally, from the perspective of the Alaska Native communities, and from the perspective of the federal agencies.

General Challenges with Capacity and Resources

As described in the introduction, Alaska is home to over 200 federally-recognized tribes to which the Executive Order policy for consultation applies. While agencies may not need to consult with all tribes in all instances, and all tribes may not wish to consult in all instances, the sheer number of tribes in Alaska makes the challenge of government-to-government consultation a daunting one in light of existing capacity and resources.

In part, the capacity and resource challenge is a reflection of the size of the state, the remote nature of the communities, and therefore the high cost of in-person engagement as described in *Section III(1)*, especially recognizing that many interviewees agree that in-person engagement is required at least to establish relationships.

Alaska Native Community Capacity and Resource Challenges

While some Alaska Native communities and institutions have relatively well-staffed programs, most Alaska Native communities face substantial capacity and resources challenges when it comes to effective participation in consultation processes. The key challenges identified by interviewees can be characterized under three headings:

- Lack of technical expertise
- Lack of time
- Lack of resources

First, many communities lack staff with the technical knowledge to wade through the large amounts of information provided by the agencies that is relevant to the consultation process. For example, one interviewee noted that tribes may want to consult on a potential regulation but do not have the technical expertise necessary to adequately critique the proposed agency action.

Second, many interviewees commented on the issue of overburdened community leaders. The small size of communities plus the large number of activities that may affect such communities means that many community leaders are overburdened with meetings not only with agencies but also with industry representatives, consulting firms, researchers, and others. For example, one tribal council member estimated that the council received approximately one consultation request per week.

In addition to governance activities, many community leaders participate in subsistence harvest of resources—activities that take up a substantial amount of time during certain parts of the year. Further adding to the time constraint burden are all of the additional activities within the community that the leadership may be a part of—e.g., community events and community and family emergencies. Finally, some community leaders participate in governance activities as volunteers and still have other jobs to earn wages, which further constrains their ability to participate.

Third, many communities and tribally authorized organizations lack the financial resources to fund participation in the consultation process.

Federal Agency Capacity and Resource Challenges

Federal agency interviewees also noted the challenges with capacity to engage in consultation and resources available. Agency constraints identified by interviewees included a lack of resources to hire

one or more tribal liaisons and a lack of resources to allow tribal liaisons to take a more proactive approach to outreach and engagement.

As one interviewee noted, the Executive Order calling for consultation is an unfunded mandate to agencies. Therefore the extent to which agencies can participate in consultation depends upon funding available through other programs. For example, EPA is known for its relatively robust consultation program, which relies on its staff from a grant-based program to facilitate engagement. Some interviewees noted that the level of resources provided for engagement is seen as an indication of the level of commitment the agency has to the consultation process. In addition to funding staff to work on consultation, agencies also face constraints on expenditures on direct costs, such as travel ceilings.

11. Coordinating consultation

Several interviewees described how lack of coordination among agencies affects the communities' ability to effectively participate in consultation and engagement opportunities. This issue links closely with that of capacity and resources, since uncoordinated actions translate to more meetings on potentially related topics.

Also, communities may not be familiar with the differences among agencies' authorities and duties—agencies may meet with communities on the same general issue (e.g., oil and gas development in the Arctic) but for different purposes (e.g., air permits, water quality permits, incidental take authorizations, and more). When these consultations take place in isolation, it can leave communities feeling like they are repeating their concerns and recommendations, especially when the roles of each agency (or different people within one agency) are unclear.

Agencies recognize the challenge. Two interviewees described coordination within the agency to allow coordinated meetings among programs. Among agencies, however, several interviewees recognized the general lack of coordination with only a couple of identified exceptions (e.g., coordinated 5-year EIS meetings with NOAA and the Bureau of Ocean Energy Management (BOEM)). While some interviewees recognized the need for a more coordinated approach, they also made note of the challenges with regulatory timelines that constrain the ability of agencies to coordinate consultation efforts.

Some efforts have been made to improve coordination within agencies and among communities. One person described an effort to get agencies to come together to work on Arctic food security issues. Another person discussed efforts to coordinate communities, ANOs, and agencies to address Arctic shipping. Also, per Executive Order 13580, the Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska is working to improve federal agency efficiency.²⁴

²⁴ Executive Order 13580, Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska (July 12, 2011).

12. Establishing trust

A topic that cuts across the consultation challenges is that of building trust between agencies and communities so that effective approaches can develop. A variety of concerns were voiced that relate to all aspects of the consultation process. Discussed elsewhere, the following list demonstrates the need to establish trust among the consultation participants:

- Most interviewees agreed that initial meetings during a consultation process should occur in-person, and that long-term trust requires the development of in-person relationships.
- Some comments reflected the idea that consultation was an essential formal process that occurred among decision-makers, but that the more frequent communications (e.g., meeting attendance, phone calls, emails, presentations at regional meetings) can help establish necessary linkages with community members and build trust, so that when consultation does occur, there is a greater chance for successful outcomes.
- Two interviewees noted that actions of agency officials—and in particular enforcement officials—who are outside of the consultation process can lead to mistrust of the entire agency.
- Some interviewees voiced concerns that consultation could provide a mechanism to undermine co-management partnerships, allowing agencies to cherry pick one tribal perspective over another.
- Effectiveness of consultation depends on relationships, and strained relationships or difficult personalities can undermine an effective process.
- Agency calendars are full, and agency personnel sometimes cancel meetings because of conflicts, which can strain relationships.
- If agencies do not report back on how the consultation information was used, consultation participants may perceive that their voices are not being heard. As one interview noted, lack of reporting back to communities can degrade trust.

IV. OPTIONS FOR IMPROVING GOVERNMENT-TO-GOVERNMENT CONSULTATION

In this section, the authors identify potential options to improve the government-to-government consultation process (Table 2). The options come both from the author’s research and expertise, as well as from the interviewees. For each option examined, the authors explain the option, examples of the approach in practice (if they exist), and the potential limitations of the approach.

The options are divided into the following categories: staffing; broader engagement; before consultation; during consultation; and after consultation. Within each category are options for agency action, tribal action, and/or actions by agencies and tribes.

It is important to note that the options are not an interconnected set of recommendations – they do not depend on one another, and some of them are alternatives to each other, so they can be implemented individually. The options are intended to serve as a menu of possible solutions to some of the challenges in the current consultation process.

Table 2. Summary of Options for Improving Government-to-Government Consultation in Alaska

Staffing	
1.	Expand tribal liaison staff in federal agencies and sub-agencies.
2.	Establish positions in communities to build long-term relationships.
3.	Establish third-party ombudsman to help facilitate consultation processes.
Before Consulting	
4.	Start the consultation process early, at the equivalent of a ‘scoping’ stage.
5.	Improve notice of consultation opportunities by providing sufficient information and effectively reaching potential participants.
6.	Establish a collective federal agency calendar that includes consultation opportunities, timelines, processes, and plans.
7.	Establish and maintain regional or village subsistence and cultural event calendars to share with federal agencies in order to avoid overlap between key subsistence activities and consultation.
8.	Clarify consultation contacts. Alaska Native communities could provide agencies with guidance on who to consult with on different issues.
During Consulting	
9.	Ensure in-person engagement is a first step when working with communities.
10.	Go slower to the extent allowed by statutes and regulations in order to fit better with Alaska Native community needs.
11.	Design and use a standard federal protocol for recording input received during consultation.
12.	Track input and multi-party decision-making during the consultation process to improve transparency and accountability.
13.	Establish information exchange procedures to ensure information is shared far enough in advance and in an appropriate format to enable sufficient time to review and formulate responses.
After Consulting	
14.	Establish and use a standard protocol for follow up after consultation to provide participants with a

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

Staffing

To address challenges with capacity and advance trust among the parties involved, the authors identified three potential options that relate to staffing: expanding tribal liaison staff, establishing agency positions in communities, and establishing third party ombudsman. All of these options would require substantial additional investment by the agencies in the consultation process.

1. Federal agencies could expand tribal liaison staff in federal agencies and sub-agencies.

Explanation: In current practice, a tribal liaison is a federal agency representative who works on linkages between the agency and tribal governments. Ideally, there would be tribal liaisons representing each key agency or sub-agency relevant to Alaskan offshore management, to help create connections between Alaska Native communities and federal agencies.

Problems addressed: Some agencies have designated tribal liaisons, who act to support the consultation and engagement between Alaska Natives and the federal government. E.O. 13175 and the OMB Guidance require each department or agency to have a tribal consultation official, and some departmental/agency policies require and have tribal liaisons at the sub-agency level and/or at the regional level. However, many interviewees indicated that the existing level of tribal liaisons is inadequate to effectively link Alaska Native communities and agencies. Expanding the tribal liaisons for key agencies could achieve better information flow to communities, improve transparency and accountability through more frequent communication, and enable a shift toward greater engagement with communities.

Potential challenges: The most significant challenge identified to this approach is the lack of dedicated resources available to fund tribal liaison positions.

Examples: Pursuant to E.O. 13175's requirement that each agency designate "an official with principal responsibility for the implementation of [the] order,"²⁵ in June 2013 NOAA designated a tribal liaison for the agency.²⁶ EPA designates regional tribal coordinators, who serve the role of tribal liaisons; at the time of this report, the agency employs 13 tribal coordinators for Alaska.²⁷ FWS' Alaska Native Affairs office includes three lead staff.²⁸

2. Federal agencies could establish positions in communities to build long-term relationships.

Explanation: To truly support the development of relationships between agency staff and tribal members, agencies could establish permanent physical presences in communities. While it is unrealistic to think agencies could station staff in each village—or even that such an approach would be desirable—it may be possible for agencies to establish regional offices in major rural hubs (such as Barrow and Nome). Another option described by an interviewee is to establish certain 'community liaisons,' who would be community members employed by the agency on a part-time basis to act as an intermediary between the agency and tribes. Such approaches could allow for more robust engagement throughout the year.

Problem(s) addressed: Establishing a permanent agency presence in a community is a mechanism to build trust and respect, create a direct link between the agency and a community, and help the agency

²⁵ E.O. 13175 §5(a).

²⁶ NOAA, Tribal Relations, <http://www.legislative.noaa.gov/tribalrelations.html>.

²⁷ U.S. EPA, Region 10-The Pacific Northwest, *Tribal Coordinators*, at <http://yosemite.epa.gov/R10/tribal.NSF/webpage/tribal+coordinators>.

²⁸ U.S. FWS, Alaska Native Affairs, <http://www.fws.gov/alaska/external/nativeamerican.htm>.

understand important aspects of the community so that it can tailor a communication or consultation process to the community's needs. In addition, a permanent presence may increase trust that the results of a given communication or consultation process will be shared with the community members that participated in it. In short, it may be a mechanism to:

- Build trust between federal agencies and Alaska Native communities;
- Increase agency understanding Alaska Native communities' structures and culture;
- Provide a direct communication link between agencies and Alaska Native communities; and
- Help agencies identify appropriate contacts, timing, and location for consultation.

Potential challenges: While a physical presence would help improve communication between agencies and communities, it would be expensive to support and staff the offices. Also, if staff turnover was high in a rural office, such turnover could severely impact the potential benefits gained by such positions.

Example: The North Slope Borough Department of Wildlife Management has had extensive success in collaborations among scientists and community holders of traditional ecological knowledge. As noted in interviews, the success appears to be at least in part due to the fact that the collaborating scientists are residents in the community, rather than visiting researchers.

At the federal level, the Fish and Wildlife Service opened a Barrow Field Office in 2010.²⁹ The Bureau of Land Management opened a Barrow Field Station in 2006.³⁰ In contrast, NMFS' northernmost office in Alaska is located in Anchorage.³¹ The Coast Guard has air stations in Sitka and Kodiak, and life-saving service and Coast Guard stations in Juneau, Ketchikan, and Valdez.³²

3. Parties to consultation could establish a third-party ombudsman to help facilitate consultation processes.

Explanation: A third-party tribal liaison or ombudsman would be someone who is not employed by the federal or tribal governments involved in consultation; rather, they would be employed by some other entity or process (for example, a specific federal fund for liaisons). Such a liaison or ombudsman would serve as a neutral party to facilitate consultation processes.

²⁹ See *U.S. Fish and Wildlife Service employees begin to work in Barrow*, ARCTIC SOUNDER, Jan. 13, 2013, http://www.thearcticsounder.com/article/1202us_fish_and_wildlife_service_employees_begin (last visited Nov. 1, 2013).

³⁰ See Dep't of the Interior, Bureau of Land Management, *BLM Opens New Field Station in Barrow*, http://www.blm.gov/ak/st/en/fo/fdo/arctic_field_office/barrow_field_station.html (last visited Nov. 1, 2013).

³¹ A list of NMFS office locations in Alaska is available at NOAA Fisheries, NMFS Alaska Regional Office, Contact Information and Office Locations, <http://alaskafisheries.noaa.gov/contactinfo.htm> (last visited Nov. 1, 2013).

³² A Coast Guard station in Nome was discontinued in 1949. A list of active stations is available at U.S. Coast Guard, U.S. Lighthouse Service, Life-Saving Service, Revenue Cutter Service & Coast Guard Bases, Depots, Stations & Other Shore Facilities, http://www.uscg.mil/history/Station_Index.asp (last visited Nov. 1, 2013).

Problems addressed: While many people support the role of a tribal liaison in the consultation process, some have expressed concern about the independence of tribal liaisons. Having a third-party liaison or ombudsman could alleviate perceptions and possibilities of bias. Furthermore, a neutral and nonpartisan voice during consultation could help agencies and tribes reach decisions that are satisfactory to all parties.

Potential challenges: There are currently no funds to support third-party mediators for consultation. In addition, a third-party mediator may have less influence over an agency's actions and behavior if deemed to be an outsider to the process.

Examples: In its tribal consultation guidance, FWS mentions the possibility of including third-party mediators to assist with dispute resolution during consultation.³³

Before Consulting

Several options relate to activities that could occur prior to consultation. These include: starting consultation at the equivalent of a "scoping" stage; improving the methods for providing notice to tribes; sharing anticipated actions annually to provide advance notice of upcoming opportunities; establishing a federal agency calendar; establishing regional or village subsistence/cultural event calendars; and clarifying consultation contacts. All of these actions are relatively low cost actions that have the potential to enable consultation at the right time to inform decisions and allow key participants to be involved.

4. Federal agencies could start the consultation process early, at the equivalent of a 'scoping' stage.

Explanation: To ensure input is integrated into the entire decision-making process, consultation should occur early and continue throughout the decision-making process. Meaningful consultation may often require more than a one-time discussion.

Problems addressed: When consultation occurs relatively late in the decision-making process, it may feel more like an opportunity to comment rather than an opportunity to truly affect the process. Beginning consultation at the equivalent of a 'scoping' stage helps ensure that the Alaska Native input proffered can be integrated into the agency approach from the start.

³³ U.S. FWS, Tribal Consultation Handbook (Apr. 2013), available at http://www.fws.gov/mountain-prairie/tribal/documents/Tribal_Consultation_Guide_Apr_2013.pdf.

Potential challenges: Ultimately the challenge is one of efficiency. Consult too early and time may be wasted on potential activities that will not come to fruition, and it may be difficult to have robust conversation without the beginnings of a draft. Act too late, however, and consultation occurs after agencies are well down the path to making the decision. The challenge for the agencies is the quantity of resources required to consult with communities early and often. The challenge for Alaska Native communities is the potential multiple rounds of engagement, which adds to the heavy meeting schedule burden.

Examples: No specific examples identified as model approaches. However, this option of early consultation is similar in concept to the scoping stage that occurs during development of an environmental impact statement.

5. Federal agencies could improve notice of consultation opportunities by providing sufficient information and effectively reaching potential participants.

Explanation: One of the first ways that information is exchanged during the consultation process is when the federal agency sends a notice to potentially affected tribes about an upcoming consultation opportunity. Agencies should provide concise yet robust information in these notices so that tribes have sufficient information to decide whether they want to engage in consultation on the issue. Ideally, agencies would adopt similar standards for these notices, so that tribes can more easily identify and review them; the notices would be addressed to a specific person, contain contact information for the person organizing the consultation process, and include explanation of the decision being considered; and the letter would be phrased in ordinary language with sufficient detail that the recipients understand what is involved, including the interests that might be affected, what the consultation process may entail, and when it might occur.

(Please refer to Appendix 1 for suggestions of components to include in consultation notices.)

Problems addressed: Providing adequate notice is a critical first step for consultation, as the information contained in the letter forms the basis for the tribe's decision about whether to engage in consultation on the issue. However, consultation notice letters often do not contain clear information about the nature of the opportunity, the issues being considered, and next steps (such as coordinator contact information). It can be easy for notice recipients to overlook a consultation notice, not realizing that it is one; for notices to sit unchecked because they are not addressed to an individual person, or they are addressed to a former tribal employee; and for recipients to forego engaging on a topic they would have liked to consult on because the letter does not indicate clearly enough the particular issue being considered.

Potential challenges: Revising the consultation notice template and procedures will only require a nominal increase in the agency staff time invested. There will be a slight short-term investment in the form of staff time spent on the revision of the template, including possible coordination with other agencies to increase similarities between agency notices. There will be a slight long-term investment in the form of additional staff time spent on the preparation of consultation notices, including making sure to address notices to specific individuals.

Examples: Many of the sample agency notices the authors reviewed were not addressed to specific individuals, but rather to generic tribal representatives. Some of the notices combined alerts about public comment opportunities with alerts about consultation opportunities, which may be confusing and buries the mention of consultation. Important pieces of information which do not always appear in the notices include the timeframe for responding about consultation and the anticipated timeframe and procedures for the consultation itself.

6. Federal agencies could establish and maintain a collective agency calendar that includes consultations, timelines, processes, and plans.

Explanation: To enable better transparency and exchange of information, agencies could develop or coordinate multi-agency online calendars that identify upcoming possible consultation opportunities and the expected timeline for those actions.

Problems addressed: One of the challenges of consultation is the number of decision-making processes that Alaska Natives could participate in. It may be helpful to have an online resource where the information is made easily accessible to communities in Alaska. The calendars could identify the lead agency contacts, current stage of the process, projected timeline, and post relevant information for the decision-making process. If done at a multi-agency or regional level, the calendar could yield additional benefits by increasing opportunities to coordinate and minimize overlapping or conflicting planning and scheduling.

Potential challenges: There are few obstacles to developing a calendar. The primary requirements are coordination and cooperation with the various departments within an agency and across the various departments of multiple agencies. However, the hope is that centralizing the efforts would reduce duplicative efforts and reduce overall cost of such an approach.

Examples: There are currently no *multi-agency* consultation tracking calendars. However, there are several potential useful examples. First, EPA has developed an agency-specific consultation calendar. The calendar includes a summary of the decision-making at issue, starting dates, and links to documents

related to the agency action.³⁴ The information can be easily sorted by region so that the reader only views processes within Region 10. The EPA approach provides a model for a government-wide approach. A second federal endeavor is the implementation of the National Ocean Policy,³⁵ which has included the development of regional data-sharing portals.³⁶ If an Alaska data portal is developed it could act as the gateway to share an agency action calendar. Third, the U.S. Arctic Research Commission has a daily listserv that includes upcoming events.³⁷

7. Alaska Native communities could establish and maintain regional or village subsistence/cultural event calendars to share with federal agencies in order to avoid overlap between key subsistence activities and consultation.

Explanation: Alaska Native communities, ANOs, regional non-profits or other Alaska Native entities could create a calendar for each village and/or region, as necessary, that provides a general time frame for key subsistence activities and key cultural events, so that agencies have a better understanding of when key community leaders may be available to engage in a consultation process.

Problems addressed: Several interviewees noted that agencies schedule meetings during times that interfere with subsistence activities. Also, interviewees have commented that, in some instances, community participation in consultation or other engagement activities is poor. Especially in instances when agencies do not have frequent contact or robust relationships with villages, a subsistence calendar and a cultural event calendar could improve the timing of consultation, especially in instances where there is some flexibility in timing for the regulatory process. Furthermore, having such a calendar could help agencies better understand the myriad activities that constrain the ability for community leaders to fully engage in collaborative governance activities.

Potential challenges: One note of caution is that agency personnel need to understand subsistence calendars are not set in stone but rather provide general timelines based on availability of resources. Cultural event calendars may face similar uncertainties. Especially in light of climate change, the subsistence calendar may shift due to life cycle shifts caused by changing climatic conditions.

Examples: Many areas have local or regional calendars, such as Barrow and Nome, but they do not provide information about subsistence activities. As a general matter, the calendars seem to be oriented either towards visitors (e.g., highlighting events visitors may be interested in) calendars or local

³⁴ EPA, Tribal Consultation Opportunities, at <http://tcots.epa.gov/oita/TConsultation.nsf/TC?OpenView>.

³⁵ Executive Order 13547, Stewardship of the Oceans, Our Coasts, and the Great Lakes (2010).

³⁶ See e.g., Mid-Atlantic Regional Council on the Ocean, Data Portal, at <http://portal.midatlanticocean.org/portal/>.

³⁷ U.S. Arctic Research Commission, *Publications: Arctic Update Daily Email Newsletter*, at http://www.arctic.gov/arctic_update_archive/index_general.html.

or regional meetings (e.g., facility hours, sports schedules, and meetings of regional authorities). A more comprehensive calendar might help federal agency staff ensure that meetings and requests do not take place during very busy times for the community. On the other hand, several interviewees indicate that agency personnel with close linkages to communities understand the subsistence calendar and when important cultural events occur.

8. Alaska Native communities could clarify consultation contacts, including providing agencies with guidance on who to consult with on different issues.

Explanation: This recommendation includes the sharing of existing tribal authorization documents or creation of new or amended documents that clearly indicate what consultation authority has been granted by tribes to Alaska Native bodies that represent them.

Problems addressed: Consultation is, first and foremost, a process conducted between federal and tribal governments. There are many additional Alaska Native bodies that play important roles in the management of the marine environment, however, including marine mammal co-management bodies, other Alaska Native organizations (ANOs), Alaska Native regional non-profits, and Alaska Native corporations, among others. Alaska Native tribes have the authority to determine who should engage in consultation on their behalf, both from the perspective of tribal council participants as well as participants from tribally-authorized organizations that may represent one or more tribes. However, it may be difficult for federal agencies to know who the appropriate representatives are to consult with on particular issues, including which entities have delegated consultation authority from the tribe. The result can be that the federal agencies direct all consultation requests to the tribes, who must then pass along the requests to the authorized representatives. This is a burden on the tribes, who receive large quantities of consultation requests that often must be responded to relatively quickly. To make this process more efficient, Alaska Native tribes could document the consultation roles and responsibilities of various entities, organizations, and individuals, and provide that instruction to the federal agencies. This would help the federal agencies target the right participants when initiating consultation.

Potential challenges: Several challenges exist to this approach. Some interviewees expressed concern that requests to clarify or update existing tribal authorizations would indicate a lack of respect for the existing Alaska Native tribal governance framework. It is important to emphasize that this option is meant to help the federal government understand the Alaska Native tribal government authorizations, so that they can help reduce the burden of distributing consultation requests, not to question the authorizations.

Examples: None identified.

During Consultation

The following options relate to actions during the consultation process. For the purposes of this section, the consultation process is considered broadly, including both meetings of decision-makers as well as other activities such as science-based information sharing and other related activities that support consultation among tribal and federal decision-makers. The potential options include: ensuring in-person engagement for using electronic or phone approaches to meetings; going slower to the extent allowable by law; developing standard protocols for recording input and applying such protocols to practice; tracking input and multi-party decision-making; and establishing information exchange procedures. The option of ensuring in-person engagement as a first step is a high cost approach. Other options are relatively low cost and take advantage of technology available that can be used to improve the consultation process.

9. Federal agencies could ensure in-person engagement is a first step when working with communities.

Explanation: While it may be appropriate and effective for parts of the consultation process to occur via electronic means, it may be important to make efforts to establish connections in-person between the agency and Alaska Native participants at the beginning of the process. This may include agency staff aiming to meet and work with Alaska Native communities in person, potentially by traveling to villages, as a first step in building relationships with communities that facilitate the consultation process.

Problems addressed: Most interviewees recognize that the best way to build effective working relationships is with in-person meetings that take place within communities. While hosting all consultation activities within communities may be ideal from the perspective of effective communication and relationship-building, it is not feasible given current capacity and resources of agencies to engage in consultation. Given capacity and resource constraints, most interviewees agree that initial meetings can lay the groundwork with follow up meetings happening by teleconference or other electronic communication.

Potential challenges: The major constraints for in-person meetings are the federal agencies' often limited resources, including staff time and budgets.

Examples: Many interviewees noted the importance of in-person meetings to develop relationships and understanding.

10. Go slower to the extent allowed by statutes and regulations in order to fit better with Alaska Native community needs.

Explanation: To the extent practicable and necessary, agencies should slow down their decision-making processes to allow for timely and meaningful engagement with all of the relevant Alaska Native communities and bodies.

Problems addressed: As noted several times in the “Information Exchange” section, a significant challenge for Alaska Native involvement in consultation is that the agency decision-making frequently operates on short timescales as compared to most community processes. In some cases, the agency does not have flexibility to change this, as the agency action may be constrained by mandatory triggers and timeframes laid out in the authorizing statute or regulations. When the agency does have some discretion, however, it may be helpful to extend the time allowed for the individual parts of the decision-making process. This especially includes efforts to avoid having stages occur during times of heavy community activity, such as key subsistence hunting periods.

Potential challenges: One of the key challenges is the limitation of statutory and regulatory requirements that agencies act within certain timelines. For example, an agency may be required to act in response to a particular trigger, and that response may have to happen within a specified window of time. Also, slowing down decision-making may limit the utility or relevance of certain agency actions.

Examples: No specific approaches identified.

11. Federal agencies could design and use standard protocols for recording input received during consultation.

Explanation: Consultation may take place in a variety of ways, and is typically intended to be a dialog rather than a formal submission of comments. However, a consistent system for recording the input received from participating tribal and community members provides assurance to the contributors that the information is being not only heard but also tracked. Without a consistent system, one runs the risk of contributing to a perception that the information neither persists beyond the individual process nor is passed along to others involved in the decision-making process. With a consistent system, not only is there a recognized method for recording and transferring information, but over the long term participants can tailor their engagement to the particular system.

Variations:

1. *Basic* – A standardized recording protocol for a federal agency to use when engaging in consultation.
2. *Advanced* – A standardized recording protocol for all federal agencies to use when engaging in consultation.

Problems addressed: The goal of standardizing the recording protocol is to systematize and make transparent the agency’s procedures for recording input and information received during consultation. This makes it easier to record information over the long-term, so that information provided in one meeting can be used in other relevant meetings as well, and also makes it clear to participants that information can be transferred to other agency staff that are not present at the meeting. This is particularly important when the final decision-maker is not participating in the meeting.

Potential challenges: One important consideration is that agency documents are typically not privileged, and thus can be made available to the public at large. Some consultations may involve the sharing of information between Alaska Native and federal agency participants that the Alaska Native participants do not wish to make public.

There are few logistical barriers to standardizing procedures for recording input. The greater challenges are associated with tracking the input and information (see below). The key is to choose a method that provides flexibility, when it is needed, and does not require significant resources that may not be consistently available (for example, taking handwritten notes versus video recording the meeting).

Examples: Both EPA Region 10’s procedures and NOAA’s handbook on government-to-government consultation mention the need for the agency and Alaska Native participants to discuss the best format for record-keeping for a given consultation meeting (e.g., given potential sensitivities of the information exchanged and the generally public nature of agency documents).³⁸

12. Federal agencies could track input and multi-party decision-making during the consultation process to improve transparency and accountability.

Explanation: A frequently expressed challenge with consultation in Alaska is that Alaska Native participants end up repeating the same input at multiple meetings. This is frustrating for the tribal participants, who are asked to participate in a huge number of meetings; and it is also challenging for agency participants, who hear similar input in various meetings. A potential method to help alleviate the perceived need to repeat key points from meeting to meeting is to develop a tracking system for the

³⁸ See EPA Region 10 Tribal Consultation and Coordination Procedures, EPA 910-K-12-002 (Oct. 2012), at 14-15; NOAA, NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations, NOAA 13175 Policy (Nov. 12, 2013), at 11.

input provided during consultation. If the system is publicly accessible, participants can review the database and see if/how their input was recorded. Ideally, the system would also include a method for tracking agency response to the input and/or any actions taken.

Variations:

1. *Basic* – An internal agency database that contains the name of the contributor, the date the information was provided, and summarizes key comments.
2. *Intermediate* – A publicly-accessible database that contains the name of the contributor, the date the information was provided, and summarizes key comments.
3. *Advanced* – A publicly-accessible database that contains the name of the contributor, the date the information was provided, summarizes key comments, and notes the agency's response to or actions taken to address the input.

Problems addressed: The goal of standardizing the recording protocol is to systematize and make transparent the agency's procedures for recording input and information received during consultation. This makes it easier to record information over the long-term, so that information provided in one meeting can be used in other relevant meetings as well, and also makes it clear to participants that information can be transferred to other agency staff that are not present at the meeting. This is particularly important when the final decision-maker is not participating in the meeting.

Potential challenges: There are few barriers to standardizing procedures for recording input. The greater challenges are associated with tracking the input and information (see below). The key is to choose a method that provides flexibility, when it is needed, and does not require significant resources that may not be consistently available (for example, taking handwritten notes versus video recording the meeting).

Examples: An example of a simple tracking system that is available to the public and tracks agency action related to input received is the Bureau of Land Management's Subsistence Advisory Panel recommendation tracking spreadsheet.³⁹ The Microsoft Excel spreadsheet includes columns to note when the recommendation was received, the name of the source, the recommendation itself, and the result or solution. The resource enables anyone who is interested to see what recommendations have been proposed to the panel and what actions have resulted from them.

³⁹ A recent copy of the spreadsheet is on file with the authors; while undated, the report contains recommendations gathered between 1999–2011.

13. Federal agencies could establish information exchange procedures to ensure information is shared far enough in advance and in an appropriate format to enable sufficient time to review and formulate responses.

Explanation: Federal agencies must determine methods for providing information to participants on adequate timescales to enable review and response before the actual consultation meeting. Each agency may establish a default timeline for providing background information, which may be adjusted as appropriate for a given consultation process. The information must also be provided in an appropriate format for the target communities. This may vary by agency, tribe, and issue, from providing hard copies by mail to engaging in a preliminary information sharing meeting before the consultation meeting(s) begin.

Problems addressed: Many of the issues that trigger consultation are complex ones that involve substantial quantities of technical information. Consultation participants must receive background information about the decision in advance, so that they can review, digest, and formulate responses to it; they may also need this advance time to gather relevant information to reciprocally share with the agencies. The information must also be provided sufficiently far in advance to allow for review. Moreover, to be useful, it must be in a format appropriate for the recipient communities. Lengthy documents that require advanced technical training are not likely to be useful, as opposed to a concise summary of key aspects of the issue being considered and the information being relied upon. Without the provision of information in advance, in an appropriate format, the concern is that a consultation meeting may turn into a one-way presentation of agency information rather than a two-way dialog between the participants.

Potential challenges: There are two primary challenges associated with sharing information. The first is that the agency may face constraints that limit the amount of time it can give the communities for review before the consultation takes place (e.g., statutory deadlines). The second is that sharing information requires resources, both in terms of the cost of the materials and the staff time involved. The cost varies greatly depending on the selected format. While face-to-face information sharing might be ideal, most agencies are unlikely to have sufficient financial resources to enable multiple in-person meetings with each community over the course of a consultation.

Examples: Federal agency practice in this regard appears to vary greatly. EPA Region 10 provides an example of efforts to make sure the information is provided in a useful, appropriate format. Aware of the challenges of reviewing lengthy technical documents ahead of time, staff have developed summaries and provided them to participants shortly before the consultation meeting.

After Consultation

Agencies and tribes could establish and implement approaches for post-consultation follow up in order to establish transparency in how the consultation process informs decisions and to establish accountability mechanisms.

14. Federal agencies could establish and use a standard protocol for follow up after consultation to provide participants with a record of information exchanged and how consultation affected the decision.

Explanation: It can be beneficial for agencies to provide a record of the input received during consultation. A record of the consultation process could include a summary of what comprised the consultation, the input received, and the final decision. It could be provided at the conclusion of a consultation process, to make transparent to the communities what was heard and what the final outcome was; and it could also be reiterated at the beginning of the next related consultation process, to affirm past input and allow the conversation to progress. It could take a number of forms, such as a written copy of minutes from or transcript of the meeting(s), a closure letter summarizing what the agency heard through the meeting(s) and how that informed the final decision, or an in-person meeting or telebriefing discussing the consultation process and results.

Variations:

1. *Basic* – Providing meeting minutes/meeting summary
2. *Intermediate* – Providing consultation summary and overview of final decision
3. *Advanced* – Providing consultation summary, overview of final decision, and explanation of how input received affected that decision

Problems addressed: Clear and consistent follow-up achieves two objectives. First, it provides a method for reporting back to the community, to assure community participants that their input was heard and recorded. Second, it helps conversations progress over time – as discussed previously, without a record of the fact that their input was heard previously, community participants may feel the need to repeat information they have already given, which is inefficient and can be frustrating to involved parties.

Potential challenges: One potential challenge is the resources, primarily staff time but also financial if in-person meetings occur, needed to draft the follow-up materials or convey the follow-up information.

Example: EPA Region 10's tribal consultation and coordination procedures require that staff "provide feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final action." The feedback is to be provided in written communication.⁴⁰

⁴⁰ EPA Region 10 Procedures, *supra* note 38, at 17.

15. Alaska Natives communities could develop standards for the type and format of follow up they desire from federal agencies subsequent to a consultation meeting.

Explanation: Agencies follow up about consultation in different ways. They may provide a written set of meeting minutes, a meeting summary, or a description of the effect the consultation had on the final decision; they may convey information through telephone or in-person conversations; or they may not engage in specific follow-up activities. The variation may be due to a lack of resources, other limitations, or a lack of understanding of how the community would like follow-up to take place. The purpose of Alaska Native-developed guidance for follow-up and reporting is to provide a clear goal for agencies to strive towards in their follow-up procedures.

Problems addressed: Communities that take the time to participate in consultation want and deserve to know what the final outcome of the consultation and related agency decision-making process. Not all agencies engage in such follow-up; of the ones that do, the process appears to vary significantly. Developing a tribal, community-wide, or regional protocol may help create consistency between the methods and practices of the agencies engaged in consultation.

Potential challenges: The greater the similarities between tribal, community, or regional requests for follow-up, the easier it will be for the agency to adhere to them. Achieving this would entail coordination between the various communities in the development of the protocols.

Examples: None identified.

Cross-Cutting

Several cross-cutting options are identified. These options include sharing information at state and regional meetings, expanding the number and type of federal activities in communities establishing uniform processes to the extent feasible, creating an interagency form to coordinate consultation activities, developing a glossary of key terms, developing tribal consultation policies, examining the system of federal-Alaska Native engagement, clarifying when consensus-based decision-making is appropriate, training agency participants and tribal participants to support their roles in consultation, and exploring ways to minimize burdens and costs and maximize engagement.

16. Federal agencies could share anticipated actions annually at key annual state and/or regional meetings to flag issues and identify preliminary consultation needs/requests..

Explanation: There are numerous regional and statewide meetings that occur each year across Alaska that many federal agencies already attend. Federal staff could develop specific sessions designed to provide annual projections of agency actions as a first step to identify consultation needs and requests and provide advance notice to communities about what issues may be important and on the horizon for consultation. Sharing such information would help maximize the time that Alaska Native communities have to prepare for a consultation process.

Problems addressed: One of the challenges of consultation is that it typically occurs on a short timeframe compared to the speed of most Alaska Native processes. When possible, it is helpful for the agencies to lengthen the timetables as much as possible. However, the timeframes are often inflexible due to statutory and regulatory constraints on the agency (for example, mandatory timelines included in the Endangered Species Act). In such cases, communities may be inundated with large quantities of information that they must digest rapidly in order to engage in a consultation process. To help address this challenge, agencies could increase proactive efforts to share information *before* consultation formally begins. Such information could be shared during some of the regional and statewide meetings that regularly occur each year. There are two aspects to the information that could be shared: (1) a list of the possible consultation opportunities that agency staff think *might* arise over the coming year, with the understanding that the list is not definitive; and (2) background information relevant to one or more of possible consultation opportunities, so that individuals have the option of familiarizing themselves before a formal decision-making process is initiated.

This option relies on sharing information at existing meetings, which could help minimize burden on community leaders who are already taxed with too many meetings. Finally, it is clear that agencies do not have the resources to visit and work in a meaningful way with all Alaska Native tribes individually. By sharing information at major events, the agencies may be able to reach a broader segment of the Alaska Native population.

Potential challenges: One challenge is the staff time and resources required for agencies to engage in state and regional meetings. However, many agencies already participate in many of the meetings, and it may be possible to coordinate the information-sharing efforts. A second challenge is managing expectations about opportunities that may not materialize – for example, an agency may think that they will undertake a relevant action in a particular year, but for any number of reasons the decision may be postponed or cancelled. Another drawback to the approach of information sharing at regional and state meetings is that it could create confusion about whether a particular meeting is considered “consultation” versus something else.

Examples: Several agencies, including FWS, NOAA, BOEM, and the Coast Guard regularly participates in regional and statewide meetings to share information about their current activities. Their presentations provide community members with an opportunity to learn about relevant issues and circumstances potentially before specific tribal interests are implicated.

Two annual meetings stand out as examples of ways that agencies can share information with communities and others: the Arctic Open Water Meeting hosted by NOAA to share monitoring results and plans and solicit community feedback, and the Alaska Forum on the Environment, which began as the Alaska Federal Facility Environmental Roundtable and brought together agencies and communities to address issues related to hazardous waste, contaminants, and the like. Examples of regional and statewide meetings to consider include:

- Alaska Forum on the Environment (annual)
- Alaska Federation of Natives annual meeting
- Alaska Symposium on the Marine Environment (annual)
- Kawerak Bering Strait Regional Conference (annual)
- Association of Village Council Presidents annual meeting

17. Federal agencies could expand federal engagement, including the number and type of community engagement activities.

Explanation: The essence of consultation is the ability for participants to have meaningful, respectful, and appropriate dialogues about potential agency actions that would affect tribal trust resources. This recommendation focuses on agencies engaging in broader engagement efforts to supplement consultation, including information sharing sessions and trainings, in order to build the mutual understanding and trust necessary for successful consultation.

Problems addressed: Engagement activities may help build long-term relationships between federal agencies and Alaska Native tribes. Such engagement relates to communication between the parties on a regular basis, not just during official consultation. This approach may increase communication efficiency and efficacy when opportunities to consult arise. Second, it will help agency staff better understand local circumstances and consultation participants. In short, it is a mechanism to:

- Build trust between federal agencies and Alaska Native communities;
- Increase agency understanding of Alaska Native communities' structures and culture; and
- Help agencies identify appropriate contacts, timing, and location for consultation.

Potential challenges: The primary challenge associated with expanding and improving engagement efforts is limited resources. Engagement requires staff time and potentially financial support to cover travel and other costs. In addition, engagement activities require time to interact. With already crowded agency and community calendars, opportunities to expand engagement could be limited.

Example: The U.S. Coast Guard provides an example of engagement activities. It conducts substantial outreach and engagement activities throughout Alaska by providing support, education, and safety services to Alaska Native communities. Among other things, the Coast Guard coordinates and engages with Alaska Native villages in the Arctic in establishing temporary summer bases, and its Arctic Crossroads program involves both outreach to villages and increased deployment. Typical summer operations include a spectrum of activities, including Arctic domain awareness, cutter operations, tailored force package deployment, safety and rescue exercises, and other engagement.⁴¹

18. To the extent practicable and appropriate, federal agencies could collaborate to create more uniform consultation processes.

Explanation: Consultation policies and procedures vary across the federal agencies engaged in Alaska, but there are also many common elements. Agencies could seek to increase the consistency between their approaches, which would make it more predictable for the Alaska Native communities with whom they consult.

Problems addressed: The myriad agencies, policies, and procedures that relate to consultation may create difficulties for the Alaska Native communities who engage with many of the agencies and end up having to do so according to numerous different systems. This may be especially difficult for Alaska Native communities who do not have full time employees that can act as agency liaisons. This suggestion is designed to create more consistency between consultation policies and procedures so that each agency does not have its own separate process.

Potential challenges: Agencies are limited by existing laws, regulations, and policies that could make a more consistent consultation approach challenging to some extent. As agencies have recently taken substantial efforts to develop consultation policies, and in some instances procedures as well, it is unlikely that uniform policies would be adopted in the near future. If new efforts were to be undertaken, agencies would need to invest time and effort to work together to identify appropriate procedures. It is also important to emphasize the need for flexibility in consultation processes – any procedures should allow for adjustment and amendment on a case-by-case basis so that the process is appropriate for the specific issue and decision and for the people involved.

⁴¹ DHS, U.S. Coast Guard, *USCG D17 Arctic Brief*, Jan. 27, 2011, at 42.

Examples: Agencies in Alaska are taking some steps to improve consistency with the work of the tribal liaisons. For example, the tribal liaisons within the Department of the Interior meet regularly and sometimes meet with the other relevant liaisons from federal agencies in Alaska. Such approaches can help advance uniformity of approach without having to adjust policies.

19. Federal agencies could establish an interagency forum for ongoing discussion among tribal liaisons and other agency representatives to improve interagency coordination on consultation and communication with Alaska Native communities.

Explanation: Agency leaders could improve interagency collaboration and coordination by hosting regular conference calls or meetings among tribal liaisons and other staff involved in government-to-government consultation. Among other things, the conversations could address: potential opportunities to coordinate activities; processes for sharing information and lessons learned; and possible ways to align the policies and procedures of multiple agencies without sacrificing the agency's individual needs and approaches.

Problems addressed: There is no existing system of collaboration among tribal liaisons from all the federal agencies active in coastal Alaska. Often, an issue or resource managed by one agency is related to an issue or resource managed by one or more additional agencies. Actions and engagement by multiple agencies is challenging for community members whose frame of reference is the community and the ecosystem, rather than elements of the regulatory process. Although statutory, regulatory, logistical, and/or practical barriers may inhibit collaborating or coordinating on consultation activities, through regular conversations agency staff may be able to identify some opportunities for improving linkages and coordination. Improved coordination could result in more efficient agency processes, and fewer financial and time burdens on agency and community participants in the consultation processes. Overall, this could increase synergy between agency approaches by providing a forum for discussion of various methods and lessons learned.

Potential challenges: Challenges include the commitment of staff time and costs of convening conference calls or traveling to periodic meetings.

Examples: Tribal liaisons are taking steps to better coordinate. As previously stated, the tribal liaisons within the Department of the Interior meet regularly, and the tribal liaisons at the Environmental Protection Agency also work collaboratively. Also, there are some efforts among the tribal liaisons to meet with relevant liaisons from federal agencies in Alaska. In addition, tribal liaisons have developed shared contact lists for key people in communities. At the national level, the Administration has

established an interagency working group to help coordinate agency action related to energy development and permitting in Alaska.

20. Federal agencies and Alaska Native communities could develop a glossary of key terms frequently used in consultation and communication.

Explanation: Establishing glossaries of common terms used in consultation may help create consistency in usage despite changes in who participates in consultation over time. A glossary would be useful to help avoid slowly changing definitions or rapid changes due to staff turnover.

Problems addressed: Different people may define common terms slightly differently. This means that when the participants in consultation change, such as due to staffing changes, they may begin using terms in altered ways. In addition, even constant participants may slowly change how they use a particular word or phrase over time. Developing a glossary that defines frequently used terms may help increase clarity for all participants involved.

Potential challenges: It may be somewhat difficult to identify the appropriate definitions. Other than the decisions involved, there are no major costs anticipated with creating a glossary.

Examples: Many agencies include definitions of basic terms in their consultation policies or procedures. However, the definitions are usually not extensive, either in the quantity of terms included or in their explanations.

Sample definition lists:

Native Village of Tanacross Policy⁴²

Collaboration
Consult
Consultation
Deference
Deferential
Implement
Sovereign

NOAA Consultation Procedures⁴³

Federally recognized Indian Tribe
Consultation
Consultation protocol
Policies that have tribal implications
Tribal official

⁴² Native Village of Tanacross, Government-to-Government Consultation Policy (1999), available at <http://www.denix.osd.mil/na/upload/Native-Village-of-Tanacross-Gov-to-Gov-Relationship-Policy.pdf>.

⁴³ NOAA Procedures, *supra* note 38.

21. Alaska Native communities could develop and share their consultation policies and procedures with federal agencies.

Explanation: Alaska Native communities could develop their own approaches to consultation and share their policies with federal agencies. While these approaches may not be mandatory for the agencies to adopt, it would provide them with reference points when they are trying to decide how to approach a given consultation process. This could occur at whatever scale the Alaska Native community desires, from a single village to a single agency or at a more regional or multi-agency level.

Problems addressed: By providing a clear articulation of how the community would like consultation to occur, this approach could help agencies better understand the community needs and best procedures to ensure meaningful and multi-party decision-making. It may also help create consistencies between the different agencies' procedures, by providing a central goal for how they approach consultation with a particular Alaska Native community.

Potential challenges: There may be lack of interest by communities to engage in the development of consultation policies and procedures, if consultation is viewed as an ineffective process for cooperative decision-making. Also, substantial time and resources may be needed to enable communities to undertake consultation policy development. This burden could be minimized by developing policies for a few initial communities that could then be used as models for other communities.

Examples: The Native Village of Tanacross has developed a consultation policy.⁴⁴ The policy states that for the Village, "consultation is more of a collaborative approach. A collaborative approach to consultation involves both governments beginning the negotiations early on, before outcomes have been decided."⁴⁵ The policy sets forth consultation procedures, including contacting the tribe before a decision is made.

NOAA's consultation procedures also describe the possibility of NOAA and federally-recognized tribes working together to develop protocols, noting that "[p]rotocols can make communication more routine and predictable and can better incorporate tribal needs and views early in the policy or regulatory development process."⁴⁶

⁴⁴ Native Village of Tanacross, Government-to-Government Consultation Policy (1999), available at <http://www.denix.osd.mil/na/upload/Native-Village-of-Tanacross-Gov-to-Gov-Relationship-Policy.pdf>.

⁴⁵ *Id.* at 3.

⁴⁶ NOAA, NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations, NOAA 13175 Policy (Nov. 12, 2013).

22. Federal agencies and Alaska Native communities could examine the system of federal-Alaska Native engagement in order to develop model communication approaches that could be adapted by villages and/or regions.

Explanation: To help improve the ways that federal agencies and Alaska Native communities work together, these parties could support the development of model communication approaches in the context of consultation, co-management, public participation, and research as a way to support clarification of when and how agencies and communities can effectively engage in activities together.

Problems addressed: Consultation is one activity in a broader framework of engagement that includes things such as co-management, emergency response, planning, research, and more. Because of these various processes that co-occur, there is a lack of clarity about how the various components of engagement fit together to form a cohesive system of communication between Alaska Natives and federal agencies.

Potential challenges: Model approaches can provide templates for improving the communication framework, but regional and even village by village differences will mean that such model approaches would need to be tailored to specific locations and specific issues.

Examples: None identified.

23. Federal agencies could work with Alaska Native communities to clarify when consensus-based approach to decision-making is appropriate.

Explanation: Agencies could work with Alaska Native communities to identify specific processes or decisions that call for consensus-based decision-making, and work collaboratively to develop an appropriate process. Consensus usually indicates a decision that is acceptable to all parties involved.

Problems addressed: The Executive Order calls for consensus-based decision-making for agency actions that affect tribal trust resources, among other things, but limits this requirement to “where appropriate, us[ing] consensual mechanisms for developing regulations, including negotiated rulemaking.”⁴⁷ Several interviewees noted that consultation should be consensus-based decision-making. In contrast, other interviewees indicated that consensus-based decision-making was not possible in most circumstances. The lack of clear process or policies about when consensus is appropriate may exacerbate perceptions

⁴⁷ EO 13175, *supra* note 3, § 5(d).

that consultation is an ineffective process. This option aims to clarify the existing confusion and create a mechanism for agencies and Alaska Native communities to identify when such an approach is needed and possible.

Potential challenges: Alaska Native communities and federal agencies are likely to disagree about when consensus is required. Consensus may be difficult to achieve considering the number of potential consultations with different villages, ANOs, and corporations on a given issue.

Examples: None identified.

24. The parties to consultation could establish a system to train federal agency personnel about how best to work with Alaska Native communities.

Explanation: Federal agencies and Alaska Native communities could work together to develop short training courses for those who have minor engagement with communities, increasing the course time and content for those who are substantially involved with communities. Training could be done by the tribal liaison or other tribal engagement expert in collaboration with key Alaska Native community members.

Problems addressed: Some interviewees pointed out that agency personnel turn-over makes it challenging to build long-term relationships with the agency and means that community leaders have to teach new people about the engagement process. While such turnover may be difficult to prevent, agencies could take additional steps to ensure that institutional knowledge is maintained over time. Training is one way to do this. Some agencies, like the Coast Guard, already have a training program in place. However, there are still perceptions that agencies lack appropriate understanding of communities, cultures, subsistence life-style, traditions, etc. A training program can support agency knowledge and understanding about how to best engage and work with communities and lead to improved relations.

Potential challenges: Agency personnel and Alaska Native community members may have limited time to engage in a training program, and the utility of the training program is likely to vary in accordance to the amount of time invested in participation. Also, such an approach would require investment of staff and resources to develop and host the training program.

Example: The U.S. Coast Guard has a training program for its staff working in Alaska. The materials cover an explanation of the role of the agency in Alaska, the history of the Coast Guard in Alaska, an overview of the federal government's historical treatment of Native Americans, including past and present legal frameworks, key Alaska legislation, consultation requirements, Alaska Native governance

structures, consultation triggers, tribal interests, Coast Guard response to specific issues (e.g., aviation response when walrus are spotted), community relations and cultural values, cultural differences, and some specifics about Nome and Barrow.⁴⁸

The Federal Subsistence Board also emphasizes the importance of training in its policy. The policy recognizes the importance of training both Board members and staff about traditional Alaska Native hunting and fishing activities, and of providing Federal Subsistence Management training to tribal representatives and members.⁴⁹

25. The parties to consultation could establish systems to train Alaska Native communities to improve their ability to engage in consultation processes.

Explanation: Community training would be designed to help community members engage effectively in the consultation process. This could include, for example, training about the broader framework of engagement, specific consultation policies, agency procedures, etc, as well as providing training on how to be effective in the process.

Problems addressed: Alaska Native communities are often ill-equipped to participate in consultation decisions in a meaningful way for a variety of reasons, including lack of technical knowledge and understanding of the federal agency policies and procedures. Community training could help Alaska Native communities better understand consultation processes and procedures and how to successfully engage with agencies in a consultation process.

Potential challenges: Key challenges include identifying necessary funding to train communities about consultation processes and procedures. Also, there may be a lack of interest by community leaders to engage in training if consultation is viewed as an ineffective process for cooperative decision-making. Finally, overburdened community leaders may find it difficult to find the time needed to participate in a training program.

Examples: None identified.

⁴⁸ Example presentation on file with authors.

⁴⁹ FSB, Government-to-Government Tribal Consultation Policy (May 2012), at 4.

26. Federal agencies and Alaska Native communities could work together to explore ways to minimize burdens and costs and maximize engagement in order to address the extreme challenge of engagement in a time of substantial budget and capacity constraints.

Explanation: Alaska Native communities could work with federal agencies to explore ways to establish more efficient mechanisms for consultation that would satisfy the needs of both parties. For example, the parties could explore whether there are appropriate regional or statewide bodies that can facilitate consultation or serve a role in guiding collective consultation processes.

Problems addressed: Both Alaska Native communities and federal agencies are substantially constrained by budgets and capacity to meaningfully engage in consultation in many instances. These constraints limit the utility of the consultation process in Alaska where the large number of tribes, extremely remote nature of communities, and harsh conditions make engagement costly and challenging. Coordinated mechanisms of consultation may have the added value of strengthening the ability of Alaska Natives to speak with one voice on key issues.

Potential challenges: While this Report has attempted to identify some approaches to establish efficiencies in the consultation process, few of the mechanisms explored would satisfy the needs of both agencies and communities. For example, on the one hand, from a federal perspective it would be more cost and time efficient to consult with a tribally authorized sub-group on a regional or statewide basis (e.g., a regional non-profit or an ANO for decisions related to the relevant subsistence species). However, such an approach would shift the burden from the agency to collect information and consult with individual villages to the regional or statewide organization, which would be responsible for ensuring the information flows between the villages and the regional or statewide organization. From a community perspective, it would be most cost and time efficient for the federal agency to work with and visit in-person all relevant tribal councils and any other tribally authorized body.

Also, while speaking with one voice can bolster the weight of the Alaska Native perspective in a decision-making process, looking to regions or statewide agencies to serve as consultation representatives would mean that important village by village needs, distinctions, and knowledge may be lost to the process.

Examples: In 2012, the Marine Mammal Commission co-hosted a meeting with the Indigenous People's Council for Marine Mammals that focused on how to improve the consultation process as it relates to marine mammal resources. Similar cooperative approaches could be used in the future to further advance discussions and efforts to find mutually agreeable ways to improve consultation.

V. CONCLUSION

Consultation can and should be a meaningful, effective, and just process that enhances sustainable management of marine resources. Alaska Native voices must be heard during federal decision-making covered by the consultation requirement in Executive Order 13,175, as a matter of law, as a matter of equity, and as a matter of practicality. Alaska Native communities have expertise and understanding built up over countless generations—knowledge that has the potential to improve management across many different subject areas, including marine subsistence resources. While many federal agencies and Alaska Native communities are making valiant efforts to engage in consultation, it has proven difficult to make consultation a consistently meaningful and effective process. However, the potential is there. Consultation could be an important pillar of sustainable management in a rapidly changing Arctic.

The Report explored key challenges to successful consultation related to marine resources in Alaska and options for how such challenges could be overcome. It is the hope of the authors that this Report will help advance the dialogue between Alaska Native communities and federal agencies to find ways to make the consultation process an effective and meaningful one for all parties involved in Alaska. In the process, it is our hope that consultation achieves its potential to support sustainable management, in order to confront the challenges ahead for a region that will continue to face rapid changes.

Appendix 1. Model Consultation Notice Request

Based on input received and review of sample letters, the authors identified the following factors as important components of consultation notice letters:

Addressing the letter

- Subject heading should specify it is a government-to-government consultation opportunity
- Letter should be addressed to a specific person
- Contact information should be provided for the main organizer, not just the ultimate decision-maker – and more than just their phone number or email
- Should also break down expectations of what they might want to be in contact about, and if there are any associated timelines
- Request confirmation of who they should coordinate with?

Included content

- Paragraph 1: In ordinary language, explain the issue at play and why the tribe is being contacted (how it may affect tribal interests)
- Paragraph 2: Explain consultation and what it may entail; specifically distinguish from public participation, which will also occur
- Paragraph 2: Provide a specific timeline of the process, both what has occurred and what else will occur (e.g., table or timeline format)
- Paragraph 2: Provide an overview of community and tribal engagement that has occurred to date
- Attachment 1: Consultation procedures and options
- Attachment 2: Executive summary of the decision undergoing consideration and identification of additional resources to learn more
- Attachment 3: Agency contacts

Appendix 2. Comparison of Consultation Provisions Found in Co-Management Agreements

Table 1 summarizes the consultation provisions found in the co-management agreements between (1) the National Oceanic and Atmospheric Administration (NOAA) or the National Marine Fisheries Service (NMFS) and Alaska Native Organizations (ANOs) and (2) the Department of the Interior's (DOI's) Fish and Wildlife Service (FWS) and Alaska Native Organizations (ANOs). In addition to summarizing the consultation provisions the Table 1 summarizes information relevant for determining whether or not the ANO has exclusive consultation authority for relevant issues.

It should be noted that Table 1 does not resolve the issue of whether an ANO has exclusive consultation authority on any given issue. To make such a determination, it would be necessary to review tribal authorization documents and/or contact tribal leaders to understand the extent of the authorities delegated to ANOs.

Table 1. Consultation Provisions in Co-Management Agreements

ANO	Consultation Authority
Agreements with National Marine Fisheries Service (NMFS)	
Ice Seal Committee (ISC)⁵⁰	NMFS and ISC to consult "on a routine basis as set forth in this Agreement" (§ VIII.A). For listing decisions (related to depleted designation under MMPA or threatened/endorsed under ESA), "the Co-Management Committee shall: 1. Consult and recommend about a possible need to list; 2. Consult and recommend about management strategies to avoid a possible listing; 3. After listing, consult and recommend about possible regulations; and 4. After listing, consult and recommend about possible arrangements for ensuring compliance and enforcement" (§ VIII.C). Consult prior to initiating contact with media on issues contained within agreement (§ VIII.A).
Tribal Government of Saint Paul (TGSNP)⁵¹	TGSNP and NMFS to consult to identify and resolve any conflicts associating with managing the northern fur seal or sea lions (§ III.D). STGTC and NMFS will consult on a routine basis on issues related to agreement and parties are to communicate on issues as needed concerning matters deemed suitable for consultation (§ VII). In cases of disagreements, Co-Management Council is to meet to try to resolve the problem (§ VII). Endeavor to consult before initiating contact with media on topics contained within agreement (§ X.E).

⁵⁰ Agreement between the Ice Seal Committee and the National Marine Fisheries Service for the Co-Management of Alaskan Ice Seal Populations (Oct. 25, 2006), *available at* <http://alaskafisheries.noaa.gov/protectedresources/seals/ice/comanagement/agreement1006.pdf>.

⁵¹ Agreement between the Aleut Community of St. Paul Island and the National Marine Fisheries Service (June 30, 2000), *available at* <http://alaskafisheries.noaa.gov/protectedresources/seals/fur/stpaul.pdf>.

ANO	Consultation Authority
Aleut Marine Mammal Commission (AMMC) ⁵²	In addition to co-management committee meetings, NMFS representatives and AMMC commissioners are to consult at least once a year (¶ VII.A) ; NMFS & AMMC shall consult on a routine basis “as set forth in this Agreement” (¶VII.B). For issues related to listing decisions for harbor seals under the ESA or MMPA, the Co-Management Committees (in the AMMC region and the ANHSC region—see next) shall: “1. Consult and recommend about a possible need to list; 2. Consult and recommend about management strategies to avoid a possible listing; 3. After listing, consult and recommend about possible regulations affecting subsistence use; and 4. After listing, consult and recommend about possible arrangements for ensuring compliance and enforcement of regulations affecting subsistence use” (¶VII.D). For issues related to the western distinct population segment of Steller sea lions (endangered and depleted), the AMMC Co-Management Committee shall: “1. Consult and recommend about any possible future change in status under the MMPA or ESA; 2. Consult and recommend about management strategies to promote a positive change in status under the MMPA or ESA; 3. Consult and recommend about possible regulations affecting subsistence use; and 4. Consult and recommend about possible arrangements for ensuring compliance and enforcement of regulations affecting subsistence use” (¶VII.E). Both parties agree to “endeavor to consult” with each other about media issues.
Alaska Native Harbor Seal Commission (ANHSC) ⁵³	NMFS and ANHSC to consult on routine basis “as set forth in this Agreement”(¶ VII.A). ANHSC Executive Director and NMFS Harbor Seal Program Coordinator shall communicate on matters concerning Alaska harbor seals. For issues related to listing decisions for harbor seals under the ESA or MMPA, the Co-Management Committee shall: “1. Consult and recommend about a possible need to list; 2. Consult and recommend about management strategies to avoid a possible listing; 3. After listing, consult and recommend about possible regulations; and 4. After listing, consult and recommend about possible arrangements for ensuring compliance and enforcement” (¶VII.C). Both parties agree to “endeavor to consult” with each other about media issues.
Alaska Eskimo Whaling Commission (AEWC) ⁵⁴	NOAA will consult with AEWC on any disputes related to number of whales landed or struck or other factual matters (¶5(1)). NOAA and AEWC to consult regarding agreement and “all other matters related to bowhead whales which either party believes are suitable for such consultation,” including any action or proposed action by any agency that may affect bowhead whales or subsistence harvest of the whales (¶8). Also, NOAA agrees to “use its best efforts” to have other agencies participate in relevant consultations.
Alaska Beluga Whale Committee (ABWC) ⁵⁵	“The ABWC and NMFS shall consult on an as-needed basis concerning matters related to the management of Western Alaska beluga whales which [sic] either party believes are suitable for such consultation,” including matters having the potential to affect the Western Alaska beluga whale stock or subsistence harvest of the stock; decisions related to MMPA and ESA designations or status; and other changes in regulations or agreements that are relevant to the stock (¶ VI).

⁵² Agreement between the Aleut Marine Mammal Commission and the National Marine Fisheries Service (Nov. 9, 2006), *available at* <http://alaskafisheries.noaa.gov/protectedresources/seals/fur/stpaul.pdf>.

⁵³

⁵⁴ Cooperative Agreement between the National Oceanic and Atmospheric Administration and the Alaska Eskimo Whaling Commission as amended 2008 (April 3, 2008), *available at* <http://alaskafisheries.noaa.gov/protectedresources/agreements/aewc2008.pdf>.

⁵⁵ Agreement between the National Marine Fisheries Service and the Alaska Beluga Whale Committee for Co-Management of the Western Alaska Beluga Whale Population (Dec 23, 1999).

ANO	Consultation Authority
St. George Traditional Council (STGTC) ⁵⁶	STGTC and NMFS to consult to identify and resolve any conflicts associating with managing the northern fur seal or Steller sea lion (¶ III.D). STGTC and NMFS will consult on a routine basis “as set forth in this Agreement” and parties are to communicate on issues as needed concerning matters deemed suitable for consultation (¶ VII). In cases of disagreements, Co-Management Council is to meet to try to resolve the problem (¶ VII). Both parties are to endeavor to consult before initiating contact with media on topics contained within agreement (¶ X.E).
Cook Inlet Marine Mammal Council (CIMMC) ⁵⁷	“In the event of any unusual loss of beluga whales through strandings or other causes, NMFS, CIMMC and NVT [Native Village of Tyonek] shall enter into consultation to determine whether to proceed with the hunt permitted by this agreement” (¶ V.11). In asserting its authority to enforce any provisions of the MMPA that are applicable to the beluga whale harvest, NMFS will first consult with CIMMC (¶ VII.A). “NMFS, in consultation with CIMMC, may conduct research on the biology, natural history, and traditional knowledge of the CI population of beluga whales” (¶ VII.C).
Agreements with Fish and Wildlife Service (FWS)	
Alaska Nanuuq Commission	<i>Agreement not available.</i>
Alaska Sea Otter Commission (ASOC) ⁵⁸	No mention of consultation in 2004 cooperative agreement (<i>document refers to Attachment 1 and 1994 Memorandum of Agreement from February 1, 1994 for further information</i>)
Eskimo Walrus Commission (EWC) ⁵⁹	EWC has authority to “[i]dentify, consult, and jointly work with the Service to resolve any conflicts or disagreements that may arise regarding co-management of subsistence use of Pacific walrus by Alaska Native subsistence users.” And it has the authority to “[c]onsult and work with the Service to identify and implement activities or agreements consistent with Section 119 of the Marine Mammal Protection Act of 1994.”

⁵⁶ Co-Management Agreement between the Aleut Community of St. George Island and the National Marine Fisheries Service (July 27, 2001), *available at* <http://alaskafisheries.noaa.gov/protectedresources/seals/fur/stgeorge.pdf>. It should be noted that the St. George Traditional Council (STGTC) is named as representing The Aleut (Unangan) Community of St. George Island, and that STGTC is designated to represent the Community for conservation and co-management interests and customary/traditional practices. However, unlike most ANOs, the STGTC represents only one community.

⁵⁷ Agreement between the National Marine Fisheries Service and the Cook Inlet Marine Mammal Council for the Co-Management of the Cook Inlet Stock of Beluga Whale for the Year 2006 (July 13, 2006), *available at* <http://alaskafisheries.noaa.gov/protectedresources/whales/beluga/2006cimmcagreement.pdf>.

⁵⁸ Cooperative Agreement between U.S. Fish and Wildlife Service, Region 7 and the Alaska Sea Otter and Steller Sea Lion Commission, FWS Agreement Number 701814J584.

⁵⁹ Cooperative Agreement Award F12AC01628 from U.S. Fish and Wildlife Service to the Eskimo Walrus Commission (September 19, 2012)

Figure 1 shows the number of co-management agreements that have specific consultation provisions. Most often, the co-management agreements call for consultation on an as-needed basis and specifically on issues related to the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), to resolve disputes, and media relations related to the agreement. Four additional consultation provisions occur in only one co-management agreement, including those that relate to research, other agency activities, timing, and unusual loss of species.

Figure 1. Numbers of co-management agreements with specific consultation provisions.

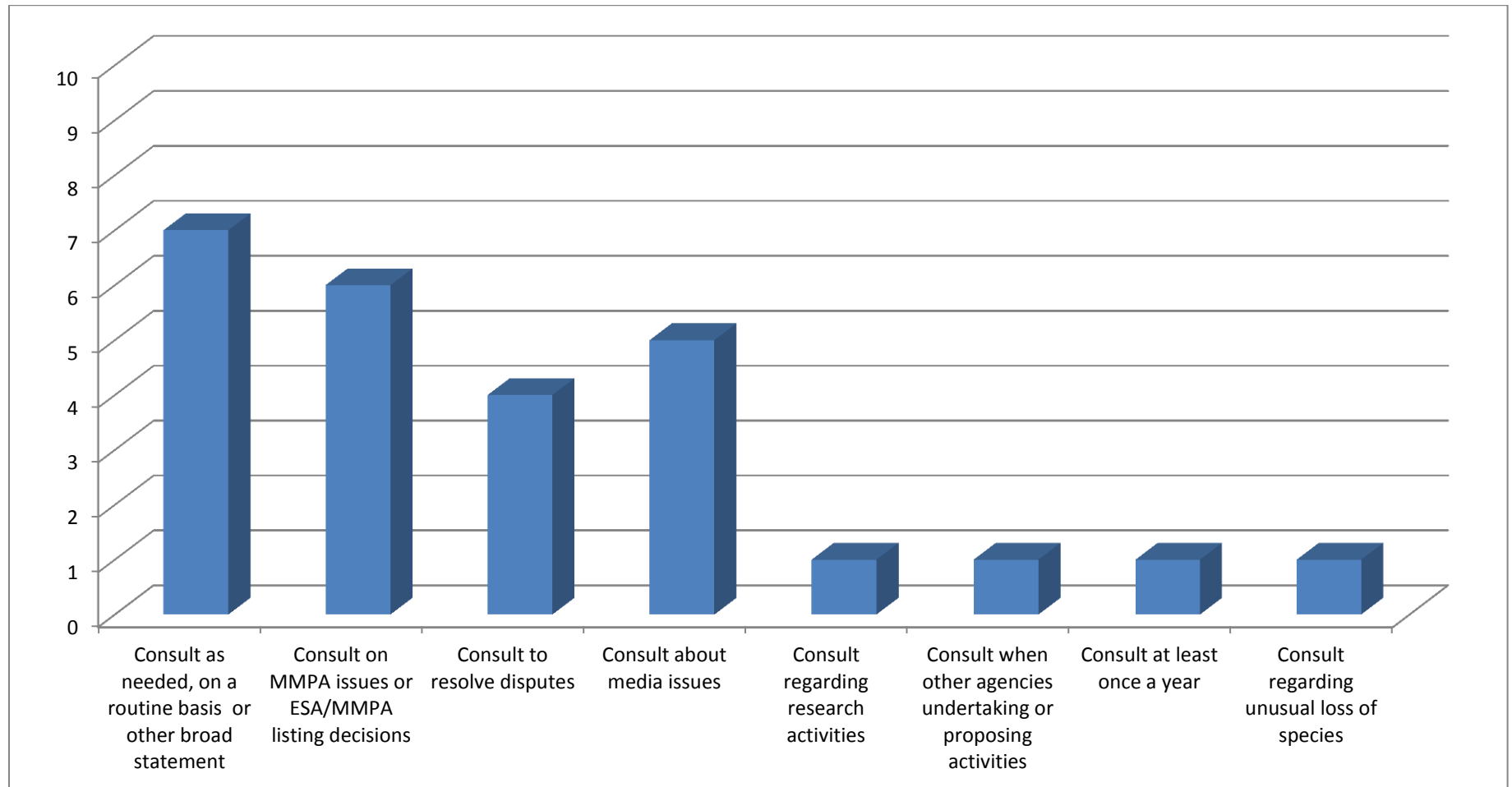


Table 2 shows a break-down of the consultation language as it occurs in each of the co-management agreements.

Table 2. Comparing the consultation language found in the co-management agreements.

	ISC	TGSNP	AMMC	ANHSC	AEWC	ABWC	STGTC	CIMMC	EWC	ASOC	ANC
Consult as needed, on a routine basis or other broad statement	X	X	X	X	X	X	X	-	-	-	
Consult on MMPA issues or ESA/MMPA listing decisions	X	-	X	X	-	X	-	X	X	-	
Consult to resolve disputes	-	X	-	-	X	-	X	-	X	-	
Consult about media issues	X	X	X	X	-	-	X	-	-	-	
Consult regarding research activities	-	-	-	-	-	-	-	X	-	-	
Consult when other agencies undertaking or proposing activities	-	-	-	-	X	-	-	-	-	-	
Consult at least once a year	-	-	X	-	-	-	-	-	-	-	
Consult regarding unusual loss of species	-	-	-	-	-	-	-	X	-	-	

Table 3 is a broader summary of the co-management agreements between federal agencies and ANOs.

Table 3. Comparison of Co-Management Agreements between Alaska Native Organizations and Federal Agencies

	Ice Seal Committee	St. Paul Island Co-Management Council	Aleut Marine Mammal Commission	Alaska Native Harbor Seal Commission	Alaska Eskimo Whaling Commission	Alaska Beluga Whale Committee	St. George Island Co-Management Committee	Eskimo Walrus Commission
Authority to enter into agreement with agency	Authorizing resolutions from tribes, tribal consortiums, or tribally-authorized organizations	Authority from constitution and bylaws of the Aleut Community of St. Paul Island	Authorizing resolutions from Aleut tribes	Authorizing resolutions from tribes and tribally-authorized organizations	AEWC is association which governs Alaska Eskimo bowhead whale hunters	Authorizing resolutions from tribes, tribal consortiums, or tribally-authorized organizations	Authority from constitution and bylaws of the Aleut Community of St. George Island	None stated in document
Co-management	5 ISC and 3 NMFS representatives	3 TGSNP and 3 NMFS	3 AMMC and 3 NMFS	3 ANHSC and 3 NMFS	Co-management	Co-management based on the	3 STGTC and 3 NMFS	None stated in document

	Ice Seal Committee	St. Paul Island Co-Management Council	Aleut Marine Mammal Commission	Alaska Native Harbor Seal Commission	Alaska Eskimo Whaling Commission	Alaska Beluga Whale Committee	St. George Island Co-Management Committee	Eskimo Walrus Commission
committee		representatives	representatives	representatives	based on the cooperative agreement	agreement	representatives	
Who develops the management plan?	Co-management committee	Co-management council develops overarching plan. TGSNP and NMFS develop local management plans.	Co-management committee	Co-management committee	AEWC creates management plan and cooperative agreements	ABWC has a management plan; also regional management plans to be developed	Co-management council develops management plans; STGTC and NMFS develop local management plans	No management identified in document
What is included in the management plan?	<ul style="list-style-type: none"> • population & harvest monitoring • education • research • management issues including fisheries and other anthropogenic issues • training • traditional knowledge • other recommendations 	<ul style="list-style-type: none"> • monitoring & research • harvest & rookery management • local regulations & enforcement plans • future goals & activities 	<ul style="list-style-type: none"> • population monitoring • harvest management • education • research • other recommendations • encourages development of local or regional harvest management plans 	<ul style="list-style-type: none"> • population monitoring • harvest management • research • other recommendations that can include other impacts on harbor seals • encourages development of regional or local harvest management plans 	<ul style="list-style-type: none"> • sets specific limits • exclusive enforcement mechanism • AEWC inspection, reporting, and allocation 	<ul style="list-style-type: none"> • Conservation • subsistence harvesting • use • reporting & monitoring • research • public involvement • enforcement 	<ul style="list-style-type: none"> • monitoring & research • harvest & rookery management • local regulations & enforcement plans • future goals & activities 	N/A
Who has authority to manage the subsistence harvest?	Through management plan, ISC is to establish harvest and use guidelines	Co-management of the subsistence harvest includes lead from the Tribal Ecosystem Conservation Office (ECO) Co-directors; also a harvest foreman,	Action Plan to set out responsibilities	Action plan is to set out responsibilities	AEWC manages, in cooperation with NOAA	ABWC manages; NMFS has primary management responsibility, but if asserts will first consult with ABWC	Co-management of the subsistence harvest includes roles for Harvest Foreman and NMFS representative	Agreement calls upon FWS to “consult and cooperate with the Commission on co-management of subsistence use.” No

	Ice Seal Committee	St. Paul Island Co-Management Council	Aleut Marine Mammal Commission	Alaska Native Harbor Seal Commission	Alaska Eskimo Whaling Commission	Alaska Beluga Whale Committee	St. George Island Co-Management Committee	Eskimo Walrus Commission
		humane observer, and NMFS representative						specific discussion of management of subsistence harvest.
Who has authority to regulate and enforce harvest rules?	Recognition of “existing tribal authority to regulate tribal members during the conduct of the subsistence harvest” NMFS?	Recognition of existing tribal authority to regulate their members’ conduct of the subsistence harvest; tribal authority to monitor and locally regulate (in consultation with NMFS) and develop cooperative enforcement plans with NMFS	Recognition of existing tribal authority; NMFS can also enforce MMPA	Recognition of “existing tribal authority to regulate tribal members during the conduct of the subsistence harvest” NMFS?	Federal civil penalties apply to violations; AEWC has exclusive enforcement mechanism (with provision for federal involvement if disputed)	Recognition of “existing tribal authority to regulate tribal members during the conduct of the subsistence harvest;” NMFS has “primary” enforcement and management authority	Recognition of existing tribal authority to regulate their members’ conduct regarding the traditional uses of seal and sea lions; tribal authority to monitor and locally regulate (in consultation with NMFS) and develop cooperative enforcement plans with NMFS	Not discussed in agreement
Who has responsibility / authority to monitor and report on the harvest?	Regional representatives report to ISC; harvest monitors from villages, if possible	Tribal ECO monitors the subsistence take numbers	Action Plan to set out	Action plan to set out	AEWC counts strikes and landings, reports to NMFS	ABWC has primary responsibility to obtain harvest information	Co-management council monitors take	Not discussed in agreement
Consultation authority	NMFS and ISC to consult on the agreement; ISC project director and NMFS Ice Seal program coordinator	TGSNP and NMFS to consult on a routine basis; also TGSNP president and NMFS	In addition to co-management committee meetings, NMFS representatives and AMMC	NMFS and ANHSC to consult on routine basis; ANHSC Executive Director and NMFS Harbor Seal	NOAA and AEWC to consult regarding agreement; NOAA to	NMFS shall consult with ABWC on matters regarding western Alaska	STGTC and NMFS to consult on a routine basis; also STGTC president and NMFS	EWC has authority to “[i]dentify, consult, and jointly work with the Service to resolve any

	Ice Seal Committee	St. Paul Island Co-Management Council	Aleut Marine Mammal Commission	Alaska Native Harbor Seal Commission	Alaska Eskimo Whaling Commission	Alaska Beluga Whale Committee	St. George Island Co-Management Committee	Eskimo Walrus Commission
	to consult on all matters concerning ice seals	representative for St. Paul Island shall communicate on matters related to northern fur seals and sea lions	commissioners to consult at least 1x/year; NMFS & AMMC shall consult on matters concerning Stellar sea lion and northern fur seal; NMFS shall consult with AMMC and ANHSC when concerns over possible listing of a species	Program Coordinator shall communicate on matters concerning Alaska harbor seals; if listing concerns, then co-management committee shall consult at the different steps	consult with AEWC on any action which could affect bowhead whales; also to encourage other agencies to consult with AEWC on their actions which could affect bowhead whales	beluga whales; also NMFS shall consult with ABWC if it asserts its primary federal management authority	representative to consult on an as-needed basis on matters related to northern fur seals and sea lions	conflicts or disagreements that may arise regarding co-management of subsistence use of Pacific walrus by Alaska Native subsistence users.” And it has the authority to “[c]onsult and work with the Service to identify and implement activities or agreements consistent with Section 119 of the Marine Mammal Protection Act of 1994.”
No change clause (from MMPA Section 119(c))	The agreement does not change tribal government jurisdiction or change the political or legal status of Alaska Native entities	The agreement does not change tribal government jurisdiction or change the political or legal status of Alaska Native entities	The agreement does not change tribal government jurisdiction or change the political or legal status of Alaska Native entities	The agreement does not change tribal government jurisdiction or change the political or legal status of Alaska Native entities	No clause	No clause	The agreement does not change tribal government jurisdiction or change the political or legal status of Alaska Native entities	No clause
What/who the co-management body represents	Conservation and co-management interests of ice seal hunters and subsistence users in the defined	Aleut community of St. Paul	Aleut tribes	conservation and co-management interests of harbor seal hunters and subsistence users in defined geographic	All registered Alaska Eskimo bowhead whale captains (voting members) and	Alaska Native beluga whale hunters (Western Alaska beluga whale) who are	Aleut community of St. George	Represents subsistence users and Eskimo walrus hunters. It includes

	Ice Seal Committee	St. Paul Island Co-Management Council	Aleut Marine Mammal Commission	Alaska Native Harbor Seal Commission	Alaska Eskimo Whaling Commission	Alaska Beluga Whale Committee	St. George Island Co-Management Committee	Eskimo Walrus Commission
	geographic area			area	crews (non-voting members) (Bylaws, sec.3)	registered with ABWC		representatives from 19 villages in Western and Northern Alaska, an Executive Director, EWC Specialist and a Chairman.
Other authorities				Action plan suggests research on impacts of cruise and other ships, contaminants, and fisheries bycatch				

The Environmental Law Institute (ELI) makes law work for people, places, and the planet. For nearly four decades, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, ELI is an internationally recognized independent research and education center known for solving problems

and designing fair, creative, and sustainable approaches to implementation.

The Institute delivers timely, insightful, impartial analysis to opinion makers, including government officials, environmental and business leaders, academics, members of the environmental bar, and journalists. ELI serves as a clearinghouse and

a town hall, providing common ground for debate on important environmental issues.

The Institute's board of directors represents a balanced mix of leaders within the environmental profession. Support for ELI comes from individuals, foundations, government, corporations, law firms, and other sources.

Environmental Law Institute

1730 M Street, N.W., Suite 700

Washington, D.C. 20036

Telephone: (202) 939-3800

Fax: (202) 939-3868

www.eli.org



ENVIRONMENTAL
LAW • INSTITUTE®