

**Strategies for Strengthening Alaska Native Village Roles
in Natural Resource Management**

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

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

II. INTERNATIONAL OPTIONS

A. Pursuing an International Claim

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

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

¹⁵ See ALASKA STAT. § 16.05.258 (2016).

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

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

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

3. International Maritime Organization

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

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

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

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

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

⁴⁵ *Id.*

III. WORKING WITH FEDERAL AGENCIES

A. Government-to-Government Consultation

1. Consultation Federal Agency Consultation Policies Applicable to Tribes

Executive Order No. 13,175 requires each agency to “have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”⁴⁶ To make this Order more meaningful, President Obama’s 2009 Presidential Memo directed each agency to submit a detailed

a. Department of Interior

The Department of the Interior (DOI) includes three major land management agencies in Alaska: the Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service (FWS);

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

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

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

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

⁵³ 512 Dep’t Manual 5.5(B)(2).

⁵⁴

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

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

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

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

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

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

b. National Oceanic and Atmospheric Administration

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

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

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

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

e. Army Corps

When a proposed project would require dredging or filling of navigable waters, a permit from the Army Corps of Engineers (under the Department of Defense) is required under Section 404 of the Clean Water Act.⁸¹ This and other activities⁸² trigger consultation between the Army Corps and tribes. Unlike some other policies stating that consultation is not the same as agreement, the Army Corps' policy states, "To the extent

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

The Department's Office of the Special Representative for Global Intergovernmental Affairs is responsible for maintaining a plan of action to implement

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

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

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

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

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

⁹⁷ *Id.*

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

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

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

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

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

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

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

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

¹⁰⁴ *Id.*

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

3. Other Federal Consultation/Participation Opportunities

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

a. National Historic Preservation Act

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

For purposes of cultural protection, the right to consultationulec.00(s) -0.2 (t) 0.2 (l) 0.2 ((onul) (C

tribes in Executive Order No. 13,175.¹⁰⁸ First, it is a statute rather than an executive order. This means that it cannot be changed by a future president—only by an act of

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

b. Alaska National Interest Lands Conservation Act § 810

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

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

¹¹³

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

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

¹²⁹ *Id.* Under ANILCA 805, "The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife

2. Tribal Self-Governance Act

The 1994 Tribal Self-Governance Act (TSGA) allows federal agencies to transfer authority over aspects of federal programs, including land management, to Indian tribes.¹⁵⁶ TSGA permits tribes to petition DOI agencies to manage federal programs that are of "special geographical, historical, or cultural significance"

Perhaps a more successful and well known example is the agreement between the Alaska Eskimo Whaling Commission (AEWC) and NOAA to manage the bowhead whale hunt, which has been renewed every few years since 1981. AEWC is responsible

in the Register—and get many of the benefits of listing—without ever being formally nominated or listed on the Register.¹⁸⁷

IV. WORKING WITH THE STATE

A. Consultation

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

1. Alaska Department of Fish and Game

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

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

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

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

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

B. State Advisory Committees for Fish and Game Boards

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

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

¹⁹⁹ *Id.* at 4.

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

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

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

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

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

The Group is made up of 13 member seats representing elders, subsistence

D. Working with a Borough

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

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

²¹⁷ ALASKA STAT. § 29.03.010 (2015).

²¹⁸ Alaska Const., Art. X, §6 (2015).

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

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

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

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

Unincorporated regions of the state that meet certain requirements²²⁴ may

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

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

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

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

²²⁷ *Id.*

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

²²⁹ ALASKA STAT. § 29.65.030 (2005).

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

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

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

234

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

b. Oil Spill Contingency Mitigation Agreement

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

V. EXERTING TRIBAL JURISDICTION

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

²⁴² See, e.g.

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

A. Exercising Jurisdiction over Allotments and Townsites

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

On the North Slope, both ICAS and NVB have exercised their authority to require use permits for industry activities taking place on allotments.²⁴⁶ These permits are processed through the Bureau of Indian Affairs (BIA). NVB has had problems with lack

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

B

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

2. Kaktovik Polar Bear Viewing Guidelines

Commercial guides that conduct polar bear tours in Kaktovik are subject to a number of regulations, including the State of Alaska's insurance requirements, FWS's special use permit for commercial polar bear viewing operations in the Arctic National Wildlife Refuge, NSB's commercial recreation ordinances, and the City of Kaktovik's permit requirement for commercial filming of polar bears.²⁵⁰ FWS has a set of guidelines for polar bear viewing in the areas over which the agency has jurisdiction, including the land and waters of the Arctic Refuge outside of Kaktovik.²⁵¹ The content for these guidelines was provided by the Kaktovik Polar Bear Committee (KPBC).²⁵² KPBC also established similar guidelines for polar bear viewing wial73 0 0Tm /2 (l (K) -0.2 (P) -0.2 (BCo)] TJ ET

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

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

C. Drafting Resolutions

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

If the land is being acquired for business purposes, the tribe must submit a plan specifying the anticipated economic benefits.²⁶⁹ The state and local governments have 30

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

*Native Village of Eyak v. Blank*²⁷⁵

- The claimant had (and has) the capacity, technology, and opportunity to hunt and fish in far and deep waters;
- The claimant had the capacity (and population level) to occupy the area;
-

- International Issues: Follow international case law and the proceedings of bodies such as the Arctic Council. Evaluate whether the current participants are sufficiently representing the tribe's international interests.
- Consultation: Consider entering into consultation MOUs with federal and state agencies as well as other entities (such as Alaska Native Corporations, other tribes, and municipalities) that the tribe regularly deals with, even if these entities lack consultation policies. The MOU could set the terms for government-to-government consultation and provide for regular and joint meetings if warranted.
- Specific Projects: Follow proposed development projects on or near the tribe's subsistence areas and consider the benefits of becoming a cooperating agency in a

SPRING

