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In the Room Where It Happens: How Federal Appropriations Law Can Enforce Tribal Consultation Policies and Protect Native Subsistence Rights in Alaska

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IN THE ROOM WHERE IT HAPPENS: HOW FEDERAL APPROPRIATIONS LAW CAN ENFORCE TRIBAL CONSULTATION POLICIES AND PROTECT NATIVE SUBSISTENCE RIGHTS IN ALASKA

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Abstract: Federal-tribal consultation is one of the only mechanisms available to American Indian and Alaska Native communities to provide input on federal management decisions impacting their subsistence lands and resources. While the policies of many federal agencies "require" consultation, agencies routinely approach consultation as a procedural checklist rather than a two-way dialogue for receiving, considering, and incorporating tribal needs and concerns. Substantive failure to consult is particularly harmful for Alaska Native communities that rely heavily on subsistence resources yet lack treaties to enforce hunting and fishing rights. The Alaska National Interest Lands Conservation Act (ANILCA) contains a "rural priority" provision that expressly protects hunting and fishing rights for rural Alaskan residents, but agency policies have consistently failed to enforce this priority through consultation. This Comment harnesses two federal statutes—provisions of Public Laws 108-199 and 108-447—as means of enforcing ANILCA's rural priority to better protect Alaska Native subsistence resources. It also proposes solutions for how federal legislation can better enforce consultation procedures and promote tribal sovereignty and self-determination.

[W]e will . . . exercise our right to be in the room where the future of our ability to subsist on our lands is at issue . . . . Anything less is mere lip service and the perpetuation of age-old injustices that could well lead to the end of our way of life.[1]

Harding Sam, Iñupiaq, First Chief, Alatna Village Council

We need to reopen the doors of dialogue between Alaska Native tribes and the federal government to address the unjust

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1. Harding Sam, Clinton Bergman, Frank Thompson & Brian Ridley, *Tribes Denied Access to Subsistence Meetings in Ongoing Ambler Road Debacle*, TANANA CHIEFS CONF. (Jan. 21, 2022), https://www.tananachiefs.org/tribes-denied-access-to-subsistence-meetings-in-ongoing-ambler-road-debacle/ [https://perma.cc/A8ED-N6GH].

colonization of our peoples, lands, and resources.[2]

Evon Peter, Neetsaii Gwich'in and Koyukon,
Senior Research Scientist, University of Alaska Fairbanks

INTRODUCTION

On March 13, 2023, President Biden and the Bureau of Land Management (BLM) greenlighted ConocoPhillips' eight-billion-dollar oil and gas Willow Project in the National Petroleum Reserve in Alaska.[3] BLM approved the development of three drill sites, 199 wells, gravel roads, and other infrastructure necessary for producing and transporting oil on Alaska's North Slope.[4] The Willow Project will produce up to 180,000 barrels of crude oil every day, resulting in ten million tons of carbon dioxide emissions annually—the equivalent of adding two new coal-fired power plants to the U.S. energy grid every year.[5] It could also irreparably harm ecologically sensitive areas that sustain critical subsistence resources for Alaska's North Slope Native communities, such as the calving and migratory habitat of the Western Arctic and Teshekpuk Lake caribou herds.[6]

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2. Evon Peter, *Undermining Our Tribal Governments: The Stripping of Land, Resources, and Rights from Alaska Native Nations*, *in* THE ALASKA NATIVE READER: HISTORY, CULTURE, POLITICS 178, 181 (Maria *Shaa Tláa* Williams ed., 2009).

3. U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., WILLOW MASTER DEVELOPMENT PLAN, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT: RECORD OF DECISION 1 (2023) [hereinafter RECORD OF DECISION], https://eplanning.blm.gov/public_projects/109410/200258032/20075029/250081211/2023%20Willow%20MDP%20Record%20of%20Decision.pdf [https://perma.cc/PW5Y-JL3W]; Lisa Friedman, *Biden Administration Approves Huge Alaska Oil Project*, N.Y. TIMES (Mar. 12, 2023), https://www.nytimes.com/2023/03/12/climate/biden-willow-arctic-drilling-restrictions.html (last visited Mar. 22, 2023).

4. RECORD OF DECISION, *supra* note 3, at 3; Matthew Daly & Chris Megerian, *Biden Administration Approves Controversial Willow Oil Drilling Project in Alaska*, PBS NEWS HOUR (last updated Mar. 13, 2023, 2:20 PM), https://www.pbs.org/newshour/politics/biden-administration-approves-controversial-willow-oil-drilling-project-in-alaska [https://perma.cc/FJR5-D8SQ].

5. Ben Lefebvre & Zack Colman, *Biden Expected to OK Alaska Oil Project — a Blow to His Green Base*, POLITICO (last updated Mar. 13, 2023, 5:36 PM), https://www.politico.com/news/2023/03/11/joe-biden-climate-alaska-willow-oil-00086659 [https://perma.cc/5LSM-LUTE]; Elizabeth Kolbert, *Why Did the Biden Administration Approve the Willow Project?*, NEW YORKER (Mar. 13, 2023), https://www.newyorker.com/news/daily-comment/why-did-the-biden-administration-approve-the-willow-project [https://perma.cc/Q3GJ-A8Q4].

6. *See* Complaint at 9, Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt., No. 3:23-cv-00058-SLG (D. Alaska Mar. 3, 2023) [hereinafter Willow Complaint], https://trustees.org/wp-content/uploads/2023/03/2023-03-14-1-Complaint.pdf [https://perma.cc/X77E-PEF2] ("Willow's extensive oil and gas activities and associated pollution and industrialization will destroy, degrade,

BLM made this decision in the face of strong opposition by North Slope Native leaders. While some Alaska Native groups expressed support for the Willow Project for its economic benefits and job opportunities, others expressed concerns about the environmental and health impacts it will have on North Slope communities.[7] When the Final Environmental Impact Statement for the Willow Project leaked in early March 2023, Rosemary Ahtuangaruak, mayor of the neighboring city of Nuiqsut, sent a letter to Secretary of the Interior Debra Haaland expressing concerns that BLM had not adequately consulted Alaska's North Slope communities.[8] Specifically, Ahtuangaruak criticized BLM for not "meaningfully consider[ing]," or even documenting, the city's input on mitigation measures to subsistence resources, as required by President Biden's own Memorandum on Uniform Standards for Tribal Consultation.[9]

Charlie Sollie Hugo, President of the Naqsragmiut Tribal Council representing the Nunamiut People of Anaktuvuk Pass, expressed similar frustrations with the consultation process.[10] In a letter to Secretary Haaland and Alaska BLM Director Steve Cohn, Hugo denounced BLM's lackluster consultation efforts—which had consisted of two meetings total

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and diminish the wild and natural state of this area, will kill, injure, harm, harass, and displace wildlife (including, but not limited to caribou and threatened polar bears) and adversely affect the habitats on which these species depend."); *Conservation Groups Sue to Stop the Willow Oil Project in Alaska's Western Arctic*, DEFENDERS OF WILDLIFE (Mar. 15, 2023), https://defenders.org/newsroom/conservation-groups-sue-stop-willow-oil-project-alaskas-western-arctic [https://perma.cc/RST7-VWYH]; Anja Semanco, *Alaska Wilderness League in Lawsuit Challenging ConocoPhillips' Willow Project*, ALASKA WILDERNESS LEAGUE (Mar. 16, 2023), https://alaskawild.org/blog/alaska-wilderness-league-in-lawsuit-challenging-conocophillips-willow-project/ [https://perma.cc/NJ3L-MDJ6].

7. Kavitha George, *Conservation Groups Sue to Block Biden-Approved Willow Oil Project on Alaska's North Slope*, ALASKA PUB. MEDIA (Mar. 15, 2023), https://alaskapublic.org/2023/03/15/conservation-groups-sue-to-block-biden-approved-willow-oil-project-on-alaskas-north-slope/ [https://perma.cc/9K54-3SSR].

8. Letter from Rosemary Ahtuangaruak, Eunice Brower & Carl Brower, City of Nuiqsut, to Debra Haaland, Sec'y, U.S. Dep't of Interior (Mar. 4, 2023), https://ndncollective.org/consultation-process-inadequate-new-letter-from-nuiqsut-community-leaders-to-department-of-interior/ [https://perma.cc/6XA3-YZQ3] ("The consultation process has been deeply disappointing and contrary to the administration's obligations for tribal consultation and to consider Indigenous knowledge.").

9. *Id.* (quoting Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479, 74479 (Dec. 5, 2022), https://www.govinfo.gov/content/pkg/FR-2022-12-05/pdf/2022-26555.pdf [https://perma.cc/QC39-5ZPJ]).

10. Letter from Charlie Sollie Hugo, President, Naqsragmiut Tribal Council, to Debra Haaland, Sec'y, U.S. Dep't of Interior, and Steve Cohn, Alaska State Dir., U.S. Bureau of Land Mgmt. (Mar. 3, 2023) [hereinafter Letter from President Hugo], https://ndncollective.org/willow-project-threatens-traditional-caribou-hunting-naqsragmiut-tribal-president-writes-letter-to-the-doi-requesting-consultation/ [https://perma.cc/Z3MA-76BZ].

in 2019—as "not sufficient."[11] He requested BLM "not finalize [its] decision about whether to approve the Willow project until [the Nunamiut People] have had an opportunity for meaningful government-to-government consultation, and to express [their] concerns . . . about the potential impacts of BLM's decision."[12]

These requests for consultation went unheard. Less than ten days later, BLM issued its decision approving drilling in the Preserve.[13]

* * *

The Willow Project consultation process is the most recent example of federal land managers failing to apply and comply with their own tribal consultation policies. The federal government is supposed to consult with American Indian and Alaska Native communities before taking actions that will impact their rights and interests. But instead of inviting tribes into the "room where it happens" to listen to, incorporate, and prioritize Native perspectives in land management decisions, federal agencies often use procedural mechanisms to, quite literally, lock tribes out.

Federal-tribal consultation is the formal, two-way dialogue between federal agencies and tribal representatives intended to guide agency decision-making on actions that impact tribal communities.[14] Under

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11. *Id.* ("BLM has not come back to our community this time and we feel our people and their concerns have been overlooked."); *see also* News Release, *Proposed Willow Development Plan Available for Public Comment*, BUREAU OF LAND MGMT. (Aug. 23, 2019), https://eplanning.blm.gov/public_projects/nepa/109410/20002276/250002701/AK_19-24_Willow_MDP_DEIS.pdf [https://perma.cc/ZX9L-2CYV] (promising to consult with thirteen tribes and Alaska Native corporations on the Willow Project in an effort to "includ[e] North Slope communities potentially impacted by the proposed development").

12. Letter from President Hugo, *supra* note 10.

13. One day after BLM issued its decision, two environmental non-profit groups sued the Department of the Interior challenging the Willow Project, citing flawed federal agency review of the project's climate-related impacts and requesting preliminary injunction to halt construction pending judicial review. Ella Nilsen, *Environmental Groups File Two Lawsuits Hoping to Stop the Willow Project, Citing Climate Impacts*, CNN POL. (Mar. 15, 2023), https://www.cnn.com/2023/03/15/politics/willow-project-alaska-lawsuits-climate/index.html [https://perma.cc/2UFP-82XV]. On April 3, 2023, a U.S. District Court of Alaska judge denied the environmental groups' request, allowing construction of the project to continue during the court process because such activities "do not include the extraction of any oil and gas." Ella Nilsen, *Federal Judge Rules Willow Project Construction Can Move Forward as Environmental Groups' Lawsuits Proceed*, CNN POL. (Apr. 4, 2023), https://www.cnn.com/2023/04/03/politics/willow-project-injunction-ruling-climate/index.html [https://perma.cc/P9JS-JR2E].

14. *See Tribal Consultation*, U.S. GEN. SERVS. ADMIN. (last updated Feb. 9, 2023), https://www.gsa.gov/resources/native-american-tribes/tribal-consultation [https://perma.cc/U7XS-6NQL]; *see also* Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67249 (Nov. 9, 2000),

presidential memoranda, executive orders, federal agency policies, and (as this Comment argues) statutes, the U.S. government must engage in good-faith consultation to reach consensus with Native people on matters that directly affect their interests. In 2000, President Clinton issued Executive Order 13175, which instructed federal agencies to "establish regular and meaningful consultation and collaboration with tribal officials in the development of [f]ederal policies that have tribal implications."[15] In response, federal land managers created a flurry of tribal consultation policies intended to guide and inform decisions that impact tribal lands and resources.

Subsequent administrations have doubled down on consultation as the primary mechanism for incorporating American Indian and Alaska Native perspectives in federal decision-making. In January 2021, President Biden issued a memorandum instructing the heads of executive departments and agencies to submit "actions the agenc[ies] will take to implement the policies and directives of Executive Order 13175."[16] Reacting to this memorandum, the Departments of the Interior (DOI) and Agriculture (USDOA) published a joint notice announcing "listening sessions"

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https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments [https://perma.cc/CBE7-KFGL] (requiring agencies to develop "regulations, legislative comments or proposed legislation, and other policy statements on actions that have substantial direct effects on one or more Indian tribes"); Robert Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 57 (noting that tribal consultation "reaches far beyond just formal agency rulemaking" and that "[e]ven in formulating federal policies, agencies [are] to be guided by principles of Indian self-government and sovereignty, treaty rights, and the unique legal relationship between tribal governments and the United States").

15. Exec. Order No. 13,175, 65 Fed. Reg. at 67249. E.O. 13175 is the principal guiding policy of the federal government for engaging with tribal actors on federal projects. MARIEL J. MURRAY, CONG. RSCH. SERV., IN11606, TRIBAL CONSULTATION: ADMINISTRATION GUIDANCE AND POLICY CONSIDERATION 1 (2021), https://crsreports.congress.gov/product/pdf/IN/IN11606 (last visited May 31, 2023). Under E.O. 13175, President Clinton declared federal agencies must consult with tribes when formulating and implementing any policies that have "tribal implications." Exec. Order No. 13,175, 65 Fed. Reg. at 67250. E.O. 13175 defines this term broadly to encompass "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects" on tribes. *Id.* at 67249. The executive order requires federal agencies to develop "an accountable process to ensure meaningful and timely input by tribal officials" in the development of regulations and to consult with tribal officials "early" and regularly throughout the development process. *Id.* at 67250. Agencies must also show their work by publishing a "tribal summary impact statement" in the Federal Register and sharing written communication between the action agency and tribal officials with the Office of Management and Budget (OMB). *Id.* at 67250–51. Agencies are instructed to "explore" and "use consensual mechanisms for developing regulations, including negotiated rulemaking." *Id.* at 67251.

16. Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021), https://www.federalregister.gov/documents/2021/01/29/2021-02075/tribal-consultation-and-strengthening-nation-to—nation-relationships [https://perma.cc/BX94-2Y4Y].

between the federal government and Alaska Native tribes and corporations (ANCs)[17] on federal subsistence policy in Alaska.[18] The sessions purported to "strengthen government-to-government relationships" with Alaska Native communities and to ensure federal agencies meet their consultation requirements before making decisions affecting Native subsistence interests.[19] These listening sessions commenced in January 2022.[20] In November 2022, President Biden issued another memorandum clarifying, unifying, and heightening these consultation standards based on feedback received from Alaska Native and other Indigenous groups across the country.[21]

While Alaska Native tribes and corporations responded positively to the Biden administration's efforts to strengthen federal-tribal consultation,[22] the substantive impact of these memoranda and policies remains uncertain. As evidenced by the Willow Project consultation process, Alaska Native communities continue to be left out of federal management decisions that directly affect them. These consultation failures represent the federal government's broader failure to adequately

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17. In this Comment, I define "Alaska tribes" as Alaska-based federally registered tribes, including tribes associated with villages (i.e., the Native Village of Barrow) and regions (i.e., the Inupiat Community of the Arctic Slope). My definition excludes Alaska Native corporations, as they are defined in section 3 of the Alaska Native Claims Settlement Act. 43 U.S.C. § 1602 (2012). When referring to Alaska Native corporations (ANCs), I am explicit.

18. Notice of Consultations on Federal Subsistence Policy in Alaska, 87 Fed. Reg. 3116 (Jan. 20, 2022), https://www.federalregister.gov/documents/2022/01/20/2022-01164/notice-of-consultations-on-federal-subsistence-policy-in-alaska [https://perma.cc/D4JV-QKNH]. Federal law defines "subsistence" as:

> the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption; and for the customary trade, barter or sharing for personal or family consumption.

Alaska Federal Subsistence, U.S. BUREAU OF LAND MGMT., https://www.blm.gov/programs/natural-resources/subsistence [https://perma.cc/YV2C-UDTR].

19. Notice of Consultations on Federal Subsistence Policy in Alaska, 87 Fed. Reg. at 3116.

20. *Id.*

21. Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (Dec. 5, 2022), https://www.govinfo.gov/content/pkg/FR-2022-12-05/pdf/2022-26555.pdf [https://perma.cc/QC39-5ZPJ].

22. *See* Sam et al., *supra* note 1 (acknowledging that President Biden has promised to "honor[] federal trust and treaty responsibilities, and conduct[] regular, meaningful and robust consultation with tribal nations"); Felicia Fonseca & Fatima Hussein, *Biden Pledges New Commitments, Respect for Tribal Nations*, AP NEWS (Nov. 30, 2022), https://apnews.com/article/biden-business-native-americans-treaties-government-and-politics-1117a5c10f9cb7da1f03247bd7d1ed56 [https://perma.cc/7U48-PT69] (quoting Richard Peterson, President of Tlingit and Haida Indian Tribes: "Administrations can bring in their priorities, but they shouldn't be telling us who have lived here since the beginning of time how to manage our resources, which resources we can even access . . . . These are things that are inherent in our sovereignty.").

safeguard Alaska Native subsistence rights and resources.[23]

Alaska Native tribes face unique challenges in preserving their rights to subsistence land and resources.[24] Unlike most tribes in the "Lower Forty-Eight,"[25] Alaska Native tribes cannot rely on treaty language to protect their subsistence rights because they hold no treaties with the U.S. government.[26] While the Alaska National Interest Lands Conservation Act (ANILCA) gives preference to rural Alaskan residents in harvesting fish and wildlife resources,[27] agencies and courts consistently fail to consult with Alaska Native groups to secure this preference.[28] The fraught history between Alaska Native tribes and state and federal land managers further exacerbates these challenges.[29]

Given the limited mechanisms available to Alaska Native tribes to protect their subsistence rights, federal consultation remains one of the

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23. Under E.O. 13175, federal agencies are required to "consult" with a variety of local, state, federal, private, and tribal stakeholders when contemplating and planning federal actions under a litany of federal laws and policies. Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67250 (Nov. 9, 2000). In this Comment, I will be focusing on tribal consultation specifically, which is the government-to-government communication process between tribes and federal agencies on federal projects that may affect tribal interests. Hereinafter, I will use "consultation" as the default for federal-tribal consultation—any other forms of consultation will be specified.

24. *See* Elizaveta Barrett Ristroph, *Traditional Cultural Districts: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211, 211–12 (2014).

25. For instance, in *United States v. Washington (The Boldt Decision)*, 384 F. Supp. 312 (W.D. Wash. 1974), federal District Court Judge George Boldt held that language in the Medicine Creek and Point Elliott treaties secured in Washington tribes "the right of taking fish[] at all usual and accustomed grounds and stations," thereby preserving original Native fishing rights and extending the right to the taking of hatchery-bred fish. *Id.* at 331–32.

26. Ristroph, *supra* note 24, at 211–12; *see infra* Part III.

27. Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3114 ("Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. . . . [S]uch priority shall be . . . based on the application of the following criteria: (1) customary and direct dependence upon the populations as the mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources."); *id.* § 3121(a) ("The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public land."); *see also* Jack B. McGee, *Subsistence Hunting and Fishing in Alaska: Does ANILCA's Rural Subsistence Priority Really Conflict with the Alaska Constitution?*, 27 ALASKA L. REV. 221, 222 (2010) (clarifying that while ANILCA creates a subsistence preference for rural Alaskan populations when fish and wildlife resources are diminished, it does not create an exclusive priority).

28. *See, e.g.*, Sturgeon v. Frost, __ U.S. __, 139 S. Ct. 1066, 1073, 1087 (2019) (abrogating National Park Service authority to regulate navigable waters flowing through conservation system units in Alaska without consulting tribes on the impacts on subsistence resources).

29. *See, e.g.*, McDowell v. State, 785 P.2d 1, 9 (Alaska 1989) (holding that ANILCA's subsistence rural priority is inconsistent with the Alaska Constitution, which prohibits laws requiring that "one must reside in a rural area in order to participate in subsistence hunting and fishing"); *see also* McGee, *supra* note 27, at 222 (discussing how *McDowell* resulted in federal oversight of subsistence resources and sparked controversy on how ANILCA should be interpreted and revised).

only tools for ensuring representation of tribal interests in federal subsistence management decisions.[30] Some statutes contain explicit tribal consultation mandates;[31] however, they are rare, and only apply in limited circumstances. Most consultation procedures guiding agency decision-making reside in internal agency policies that prove difficult to enforce in federal court,[32] leaving Alaska Native tribes few options to require consultation and provide input.[33] In this way, consultation policies might look great on paper, but they are flimsy mechanisms for holding agencies to account for their land management decisions.

Rather than seeking to impose consultation through agency policies, this Comment proposes two federal statutes that could more readily serve as enforcement mechanisms for federal-tribal consultation in Alaska. First, Public Law 108-199 directs the Office of Management and Budget (OMB) to "consult" with Alaska Native corporations on the same basis as federally-recognized tribes.[34] Second, Public Law 108-447[35] subtly adds an important provision to Public Law 108-199 by extending this consultation directive to "all [f]ederal agencies."[36] This Comment examines how these two little-used provisions can strengthen Alaska Native participation in natural resource and land use development and better protect subsistence rights. Specifically, it explores how these sources of law can help implement and enforce the rural subsistence priority mandate under ANILCA by bringing Alaska Native tribes and corporations into the room where federal decisions are made.

Part I provides a brief overview of tribal consultation in U.S. law and policy and describes inherent limitations within the consultation framework. Part II outlines the current framework of federal consultation in the subsistence management context in Alaska. This Part also provides a brief overview of the turbulent history and "cooperative" structure of subsistence land management in Alaska under ANCSA and ANILCA. Part III discusses the inadequacy of current consultation procedures for protecting Alaska Native subsistence rights. Part IV examines the benefits and limitations of using Public Laws 108-199 and 108-477 as judicially

30. Ristroph, *supra* note 24, at 211.

31. *See, e.g.*, the National Historic Preservation Act, 54 U.S.C. § 302706(b) (often referred to as NHPA § 101(d)(6)); *accord* 36 C.F.R. § 800.2(c)(2)(ii) (requiring federal agencies to "consult with any Indian tribe or Native Hawaiian organization that attaches religious or cultural significance" to a property that is listed or is eligible for listing in the National Historic Register).

32. *See infra* section II.D.

33. *See* Ristroph, *supra* note 24, at 211.

34. Pub. L. No. 108-199, 118 Stat. 452 (Jan. 23, 2004).

35. Pub. L. No. 108-447, 118 Stat. 3267 (Dec. 8, 2004).

36. *Id.*

enforceable mechanisms for holding federal agencies accountable for their own consultation standards and mandates under Title VIII of ANILCA. Part V briefly explores the future of consultation in light of recent actions taken by the Biden administration[37] and a proposed bill in the House of Representatives[38] to clarify and enforce consultation standards.

I. OVERVIEW OF TRIBAL CONSULTATION IN U.S. LAW AND POLICY

Tribal consultation requirements are ubiquitous in federal law and policy—and notoriously difficult to pin down.[39] Consultation provisions exist in federal statutes, treaties, executive orders, Presidential memoranda, judicial orders, and agency policies, giving rise to a proliferation of disparate definitions, standards, and priorities with varying degrees of enforceability.[40] Impossible to reduce to a single agreed-upon definition,[41] tribal consultation finds its roots in fundamental principles of Federal Indian law—notably, tribal sovereignty and the federal trust responsibility—and has informed federal-tribal relations for nearly 200 years.[42]

A. Early Roots of Federal-Tribal Consultation

Treatymaking marks the earliest form of federal consultation with tribes.[43] Given their numbers and territorial power, American Indian tribes

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37. *See, e.g.*, Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (Dec. 5, 2022) (detailing recent clarifications to federal consultation standards).

38. Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes Act, H.R. 3587, 117th Cong. (2021) (RESPECT Act).

39. *See* Christy McCann, *Dammed if You Do, Damned if You Don't: FERC's Tribal Consultation Requirement and the Hydropower Re-licensing at Post Falls Dam*, 41 GONZAGA L. REV. 411, 433 (2011).

40. *See id.* at 438 n.182 (comparing consultation requirements "clearly codified in regulations or statutes," which are enforceable through the Administrative Procedure Act, with "consultation requirements [that] are not 'official' . . . included in internal agency policy documents," which are more "uncertain[]" in their enforceability).

41. *See* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundations of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 22–23 (2000) (acknowledging that "'consultation' remains an ill-defined term" whose requirements "vest tribes with uncertain benefits and create an unsettled set of responsibilities for federal stewards"); McCann, *supra* note 39, at 437 ("Although consultation requirements are now commonplace, their meaning and usefulness are still uncertain.").

42. *Id.* at 24.

43. *Id.* at 31. The first recorded reference to "consultation" appears in an 1857 treaty with the

were viewed as critical allies during and after the Revolutionary War.[44] Colonial forces entered treaties with tribes to encourage them to fight against British forces, share resources, allow access to lands, or remain neutral.[45] In return, these early treaties promised to provide tribes military support and actively engage them in the political formation of the United States.[46] Ultimately, between 1789 and 1871, the federal government entered into at least 366 treaties with Native nations to delineate federal and tribal territory,[47] regulate trade, clarify state and tribal sovereignty, and engage in diplomacy.[48] This era also saw increasing settler encroachment on western tribal lands and mounting violations of treaty terms by the federal government.[49] While the United States fulfilled few of its treaty promises, leading to the widespread characterization of treaty promises as empty gestures among Native communities,[50] the practice of

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Kaskaskia, Peoria, Piankeshaw, and Wea People discussing payments to the tribes in exchange for land sales to the federal government: "the President may . . . upon consultation with [the tribes], determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks." Treaty with the Kaskaskia, Peoria, Etc., 1854, art. 7, May 30, 1854, 10 Stat. 1082, 1084.

44. *See* Miller, *supra* note 14, at 45 (noting American Indian tribes were "very important to the existence and development of the nascent United States").

45. *Id.* at 44–45.

46. For instance, the first treaty between an American Indian tribe and the nascent United States, the 1778 Treaty with the Delawares, included promises for mutual aid during conflict, the building of fortifications to secure tribal communities, and even independent political sovereignty and Congressional representation. Treaty with the Delawares, arts. II, III, VI, Sept. 17, 1778, 7 Stat. 13.

47. Miller, *supra* note 14, at 46. Under the Discovery Doctrine, the United States purported to acquire European "ownership" of colonially inhabited lands upon winning the Revolutionary War. This framework provided the spiritual, political, and legal justification for colonists to seize all non-Christian lands. While the Doctrine was interpreted to preserve limited inherent rights of use and occupancy in Native inhabitants, legal title over traditional lands passed to the U.S. government as the "discovering" nation. The Doctrine was historically used as a means of systematically ignoring and invalidating Aboriginal possession of land, and it continues to remain a bedrock precedent in modern jurisprudence to this day. *See Doctrine of Discovery*, UNIV. OF ALASKA FAIRBANKS, https://uaf.edu/tribal/delete/unit_1/doctrineofdiscovery.php [https://perma.cc/Q2NF-7WST]; *see also* Haskew, *supra* note 41, at 29 (noting that the Discovery Doctrine has been used by the U.S. Supreme Court to rationalize extinguishing Aboriginal title); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 (2005) (relying on and upholding the Discovery Doctrine in finding that the repurchasing of traditional Oneida lands 200 years following treatymaking with the Oneida Nation did not restore tribal sovereignty to that land).

48. Miller, *supra* note 14, at 44–46.

49. *Peace for Property*, NAT'L ARCHIVES, http://recordsofrights.org/events/97/peace-for-property [https://perma.cc/N7SY-456Q] (noting that as colonists sought new lands to settle, treaties that had traditionally "championed peace and friendship" instead "increasingly favored American [colonial] interests").

50. *See* Haskew, *supra* note 41 (noting that the "long series of government betrayals and breaches of trust regarding Native Americans is well documented"); Peter, *supra* note 2, at 179 ("The United States has broken every single treaty made with tribes in the continental United States . . . ."). During

treatymaking nonetheless required the federal government to consider tribes as parties with equal negotiating power.[51] Thus, early treaties provide evidence that the United States recognized tribes' inherent sovereignty by engaging with them in the same manner as international actors.[52]

The United States Supreme Court also played a substantial role in characterizing the relationship between tribes and the federal government during this time. In the *Marshall Trilogy* line of cases of the 1820–30s, Chief Justice John Marshall defined the legal and political standing of American Indian nations, firmly situating tribes within the federal government's province.[53] In *Cherokee Nation v. Georgia*,[54] Marshall characterized American Indian tribes as "domestic dependent nations" that were in a "state of pupilage" and whose "relation[] to the United States resemble[d] that of a ward to [its] guardian."[55] This characterization of dependency subjected American Indian tribes to extensive treaty negotiations between 1832 and 1871 and validated increasing federal oversight of the treatymaking process, with all treaties requiring congressional ratification to be valid.[56]

At the same time, Justice Marshall affirmed tribes' "unquestionable . . . [legal] right to the lands they occupy," subject only to extinguishment by the U.S. government.[57] Thus, tribes retained both their sovereignty and a legally defensible right to their traditional lands. *Worcester v. Georgia*[58] reinforced this dual characterization of Native communities as dependent yet sovereign nations. In that case, Marshall contemplated tribes as "*distinct, independent political*

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the era of treatymaking, the Cherokee People even referred to treaties as "talking leaves" because of their ephemeral nature and tendency to "blow away" when they no longer benefitted the federal government—at least with respect to federal promises to tribes. *Rights of Native Americans*, NAT'L ARCHIVES, http://recordsofrights.org/themes/4/rights-of-native-americans [https://perma.cc/DK9W-JJ9U].

51. Miller, *supra* note 44, at 46 (noting that several treaties between tribes and the U.S. government could be rejected by either party, required consent for ratification, and were the product of "intelligent negotiation and mutual consent by both parties").

52. *Id.* (noting that early treaties were only entered into after "extensive negotiations and consultations and only with the consent of the tribal governments" and that early colonial leaders "handled them in the same fashion as [they] did international treaties").

53. *See* Haskew, *supra* note 41, at 29; FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 220 (1982) [hereinafter COHEN'S HANDBOOK 1982].

54. 30 U.S. 1 (1831).

55. *Id.* at 2.

56. *American Indian Treaties*, NAT'L ARCHIVES (last updated June 22, 2022), https://www.archives.gov/research/native-americans/treaties [https://perma.cc/WN9R-XS6S].

57. *Cherokee Nation*, 30 U.S. at 2.

58. 31 U.S. 515 (1832).

communities . . . [and] as the undisputed possessors of the soil[] from time immemorial."[59] In other words, while tribes retained their inherent sovereignty and had use and occupancy rights to the land,[60] the federal government largely treated this sovereignty as necessarily subject to, and dependent on, the overriding authority of the United States.[61] This characterization gave rise to a fiduciary-like trust relationship between tribes and the federal government, with the United States holding legal title to tribal resources and lands "in trust" and managing such resources in accordance with its federal trust responsibility.[62]

The *Marshall Trilogy* thus consolidated two principles of Federal Indian law foundational to the concept of modern tribal consultation in the subsistence management context. One is tribal sovereignty: the recognition of American Indian tribes as distinct political entities with inherent rights to occupy the land and use its resources. The other is the federal trust responsibility: the idea that the federal government, in deciding what to do with federal lands, must manage land and resources for the benefit of tribes residing thereon.[63] While the U.S. government frequently used treaties to systematically displace and divest American

59. *Id*. at 559 (emphasis added).

60. *See, e.g.*, *Cherokee Nation*, 30 U.S. at 17 ("[T]he Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government.").

61. *See id.* at 48 (clarifying rights of occupancy are "incapable of alienation, or being held by any other than common right without permission from the government"); *Worcester*, 31 U.S. at 555 (noting the relationship between tribes and the United States is "that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."); *see also* Haskew, *supra* note 41, at 30 (noting that "tribal sovereignty is subservient to United States sovereignty, such that [tribes] hold their land at the sufferance of the greater sovereign").

62. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (affirming that the United States "has charged itself with moral obligations of the highest responsibility and trust" in federal decision-making with respect to tribes). The federal trust responsibility has been recognized as "one of the primary cornerstones" of Federal Indian law by legal scholars. COHEN'S HANDBOOK 1982, *supra* note 53, at 221; *see also id.* at 220–21 ("[F]ederal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility.").

63. *See* Haskew, *supra* note 41, at 31 (observing that "[c]onsultations . . . can be roughly understood as communication by Indian beneficiaries of their desires to the federal trustees who make ultimate determinations about what happens with the lands Indians occupy"); COHEN'S HANDBOOK 1982, *supra* note 53, at 220 ("Trust obligations define the required standard of conduct for federal officials and Congress."); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 421 (noting the "trust responsibility is the foundation of the federal government's consultation duty to Indian tribes"); Miller, *supra* note 14, at 97 (noting that "Congress and [the] Executive Branch are well aware of their legal responsibilities to tribal nations under this fiduciary duty and regularly reference the trust responsibility in federal laws and regulations").

Indian tribes of their traditional lands and resources,[64] the practice of treatymaking also calcified federal recognition of tribal sovereignty and the federal trust responsibility. In this way, the *Marshall Trilogy* formed the bedrock of the modern tribal consultation standard.[65]

Federal treatymaking ended in 1871 with the Indian Appropriations Act, which ceased recognizing tribes as independent nations "with whom the United States [could] contract by treaty."[66] While treatymaking has ended, concepts of tribal sovereignty and the federal trust responsibility live on in federal statutory and decisional law as well as in modern tribal consultation standards.[67]

B. E.O. 13175 Recognized an Affirmative Federal Duty to Consult with Tribes

Modern consultation requirements were largely born of the U.S. government's shift away from wholesale termination of federal-tribal relations[68] to its recognition of tribes as sovereign, autonomous, and self-determining governments.[69] Fueled in part by the energetic advocacy and

64. *See* Haskew, *supra* note 41, at 31.

65. *Id.*; COHEN'S HANDBOOK 1982, *supra* note 53, at 220.

66. Indian Appropriations Act, 25 U.S.C. § 71; *see* Miller, *supra* note 14, at 47. Professor Robert Miller notes this drastic change was not actually due to any change in the status of tribal nations, but rather because of "congressional infighting" and the House's desire to have a greater role in Indian affairs. *Id.*; *see also The End of Treatymaking*, NAT'L ARCHIVES, http://recordsofrights.org/events/51/the-end-of-treaty-making [https://perma.cc/WD6X-AHX9] ("This dramatic shift in Federal Indian policy came from a power struggle between the House of Representatives and the Senate over control of Indian affairs.").

67. *See* Routel & Holth, *supra* note 63, at 421; FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 414 (2012) [hereinafter COHEN'S HANDBOOK 2012] (noting that "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes the federal government," including regulations and presidents' policy statements regarding tribes).

68. The end of this period is known as the "Termination Era," which characterized federal-tribal relations of the 1950s and wherein Congress adopted a series of policies and programs terminating federal obligations to tribes. The Termination Era involved the extensive forced relocation of Native communities from reservations into urban centers for employment, the termination of many tribes' federal status and the removal of their land from the federal trust, and the passing of Public Law 280, which extended some states' criminal jurisdiction into Indian Country. *See* COHEN'S HANDBOOK 2012, *supra* note 67, at 84–93 (describing the effects of Termination Era policies on tribes); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195, 249 n.313 (noting that the "lack of a land base over which to exercise authority effectively ended tribal sovereignty" as a result of Termination Era land removal policies); *see also Termination Era, The 1950s, Public Law 280*, UNIV. OF ALASKA, FAIRBANKS, https://uaf.edu/tribal/academics/112/unit-2/terminationerathe1950spubliclaw280.php [https://perma.cc/3X56-7JQG] (describing the Termination Era).

69. The beginning of the modern period of federal-tribal relations known as the "Self-

grassroots organizing of the Red Power Movement and American Indian Movement (AIM) of the late 1960s,[70] the 1970s marked a shift in federal policy toward tribes asserting greater control over their own affairs, lands, and resources.[71] In his Special Message to Congress on Indian Affairs, President Nixon soundly rejected termination and laid the modern groundwork for tribal consultation. Notably, Nixon recognized that the U.S. government "ha[s] regularly consulted with the opinions of [Native] people and their views have played a major role in the formulation of Federal policy."[72] In 1994, President Clinton issued a memorandum expanding on Nixon's statements, declaring that:

> [e]ach executive department and agency *shall consult*, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant

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Determination Era" that marked the late 1960s and ushered in a new wave of tribal leadership and self-governance. Catalyzed by strong activism among Native communities, the onset of the Self-Determination Era involved a shift in policy from Termination to a broader recognition of tribal control over local governance and social programs. This shift was also characterized by a reinstated recognition of federal trust obligations to protect tribal sovereignty and traditional resources. *See* COHEN'S HANDBOOK 2012, *supra* note 67, at 93 (noting this shift away from termination toward self-governance was "rooted in a recognition of government-to-government relationships between the federal government and individual Indian tribes"); President Nixon's Special Message to Congress on Indian Affairs (July 8, 1970), *in* 213 PUB. PAPERS OF THE PRESIDENTS OF THE U.S. 564, 576 (1971) (rejecting termination and concluding that "Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them"); *see also A Brief History of Civil Rights in the United States: The Self-Determination Era (1968–Present)*, HOWARD UNIV. SCH. OF L. (last updated Jan. 6, 2023) [hereinafter *Brief History*], https://library.law.howard.edu/civilrightshistory/indigenous/selfdetermination [https://perma.cc/QC9Z-6WXD] (describing the Self-Determination Era).

70. The Red Power Movement and AIM were civil rights groups dedicated to defending American Indian sovereignty and treaty rights. In the 1960–70s, they protested historical and continuing violence and the Bureau of Indian Affairs' oppressive termination and assimilation policies. *The American Indian Movement, 1968-1978*, DIGIT. PUB. LIBR. OF AM., https://dp.la/primary-source-sets/the-american-indian-movement-1968-1978 [https://perma.cc/L7GL-D7BN]; *Brief History*, *supra* note 69.

71. CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 177–205 (2005); *id.* at 178 (discussing the turning points in the late 1960s and early 1970s that "announced that at last Indian tribes could shape their own futures"); Miller, *supra* note 14, at 50.

72. WILKINSON, *supra* note 71, at 205; *see also* President Nixon's Special Message to Congress on Indian Affairs, *supra* note 69, at 565. ("It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. . . . [W]e must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.").

proposals.[73]

Under subsequent executive orders issued in 1998[74] and 2000,[75] President Clinton further declared that federal agencies shall consult with tribes when formulating and implementing any policies that have "tribal implications."[76] Executive Order 13175 (E.O. 13175) defines this term broadly to encompass "regulations, legislative comments or proposed legislation, and other policy statements or actions" that may have "substantial direct effects" on tribes.[77] Under E.O. 13175, federal agencies shall develop "an accountable process to ensure *meaningful* and timely input by tribal officials" in the development of such policies and consult with tribal officials early and regularly throughout the development process.[78] Agencies are also instructed to show their work by publishing a "tribal summary impact statement" in the Federal Register and sharing written communication between the action agency and tribal officials with the Office of Management and Budget (OMB).[79] Additionally, agencies should "explore" and "use consensual mechanisms for developing regulations, including negotiated rulemaking."[80] E.O. 13175 remains the federal government's guiding policy for consulting with tribal actors on federal projects. Subsequent memoranda by President Obama in 2009[81]

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73. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951, 22951 (May 4, 1994), https://www.govinfo.gov/content/pkg/FR-1994-05-04/html/94-10877.htm [https://perma.cc/3GLD-UQ6F] (emphasis added).

74. Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,084, 63 Fed. Reg. 27655, 27655 (May 19, 1998), https://www.govinfo.gov/content/pkg/FR-1998-05-19/pdf/98-13553.pdf [https://perma.cc/N6ZJ-Q8TU] (requiring that "[e]ach agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities").

75. Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67250–51 (Nov. 9, 2000) (requiring agencies to promulgate consultation procedures and prohibiting them from imposing regulations with "tribal implications" without consulting with the impacted tribe, publishing a tribal summary impact statement, and documenting tribal communications).

76. *Id.* at 67249.

77. *Id.*

78. *Id.* at 67250 (emphasis added). While E.O. 13175 mandates "meaningful" consultation with tribes that may be affected by federal actions, the term is, notably, not defined. This lack of clarity has spurred substantial litigation over the meaning of "meaningful." *See, e.g.*, Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 401 (D.S.D. 1995) (offering a standard by which to measure "meaningful" consultation).

79. Exec. Order No. 13,175, 65 Fed. Reg. at 67250.

80. *Id.* at 67250–51.

81. *See generally* Memorandum on Tribal Consultation, 74 Fed. Reg. 57879 (Nov. 9, 2009), https://www.govinfo.gov/content/pkg/FR-2009-11-09/pdf/E9-27142.pdf [https://perma.cc/VR2G-778V].

and President Biden in 2021[82] and 2022[83] sought to enhance agency accountability by requiring department heads to submit detailed consultation plans for implementing E.O. 13175.

While E.O. 13175 sets out the general policies under which agencies must consult with tribes, the order and subsequent memoranda explicitly deny conferring any judicially enforceable right or cause of action.[84] Because this order does not waive U.S. sovereign immunity, affected tribes cannot directly use E.O. 13175 to sue the government for neglecting its consultation duties. Instead, tribes must rely on other sources of law to hold agencies accountable for consulting in a manner consistent with E.O. 13175: federal statutes and internal agency policies. Given the absence of clear agency obligations, and its stark refusal of any judicially enforceable right, some legal scholars criticize E.O. 13175 as a "minimal . . . standard of 'meaningful consultation,'" providing the "fewest restrictions on government and corporate actors and the least inclusion of [I]ndigenous communities in the project-development process."[85]

C. Federal Agencies Develop Consultation Policies

E.O. 13175 requires federal agencies to develop their own tribal consultation procedures.[86] Many agencies directly borrow E.O. 13175's language and require consultation with tribes prior to any regulation or action that "may have a substantial direct effect" on a federally-recognized tribe.[87] Such policies instruct that agencies "should" consult with tribes in a "meaningful" and "good-faith" manner and, explicitly,

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82. Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491, 7491 (Jan. 29, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02075.pdf [https://perma.cc/3KCA-ERMS] (explicitly recognizing the administration's commitment to "honoring Tribal sovereignty and including Tribal voices in policy deliberation").

83. Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479, 74479 (Dec. 5, 2022). This Comment discusses the implications of President Biden's November 2022 memorandum at greater length in Part V, *infra*.

84. Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation, 87 Fed. Reg. at 74482 ("This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.").

85. Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 ARIZ. L. REV. 1301, 1305 (2011).

86. *Id.* (comparing tribal consultation policies with regular notice-and-comment rulemaking).

87. *See, e.g.*, Department of the Interior Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28446, 28446 (May 17, 2011) [hereinafter DOI Tribal Consultation Policy], https://www.govinfo.gov/content/pkg/FR-2011-05-17/pdf/2011-11971.pdf [https://perma.cc/BT9C-NXFV] (requiring consultation on matters involving "tribal cultural practices, lands, resources, or access to traditional areas").

"without compromising . . . [tribal] rights."[88] Department manuals also mirror the spirit of agency policies and E.O. 13175, directing agencies to consider tribes' "traditional needs,"[89] prioritize their "right of sovereignty and self-governance," and demonstrate "a meaningful commitment" to the consultation process.[90] Therefore, agencies' unique consultation policies can impose obligations *more* stringent than notice-and-comment rulemaking, at least in theory.[91] For instance, under their policies, federal agencies must engage in consultation with an eye toward protecting tribal interests and must provide tribes the opportunity to express concerns, while notice-and-comment rulemaking merely requires agencies to issue notice and respond to public comments.[92]

However, these consultation standards vary widely, and courts have interpreted them both narrowly and broadly, creating an uneven terrain of case law. Unpredictable legal outcomes force tribes to use creative legal arguments to assert violations of consultation standards.[93] While broad scrutiny of consultation across all tribes and federal agencies is beyond the scope of this Comment, the next section briefly examines the inherent limitations of tribal consultation policies.

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88. *Id.*

89. *Id.*

90. DEP'T OF THE INTERIOR, 512 DM 4, PROC. FOR CONSULTATION WITH INDIAN TRIBES §§ 4.4–4.6 (2015), https://www.doi.gov/sites/doi.gov/files/512-dm-4-department-of-the-interior-policy-on-consultation-with-indian-tribes.pdf [https://perma.cc/U4LW-6HV3].

91. OFF. OF FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011) [hereinafter A GUIDE TO THE RULEMAKING PROCESS], https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/U8FR-K2B9] ("Interpretive rules, policy statements, and other guidance documents may be issued anytime after a final rule is published to help the public understand . . . how a regulation applies to them and affects their interests. An agency may explain how it interprets an existing regulation or statute, how a rule may apply in a given instances, and what things a person or corporation must do to comply."); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 52 (8th ed. 2020) ("Agency activity, even when it is not immediately legally binding, always takes place in the shadow of the law.").

92. *Compare* Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67250 (Nov. 9, 2000) (requiring agencies to engage in "meaningful consultation" with tribes), *with* 5 U.S.C. § 553(b)–(c) (requiring agencies to publish "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation"). *See also* A GUIDE TO THE RULEMAKING PROCESS, *supra* note 91 (describing notice-and-comment rulemaking procedures); LAWSON, *supra* note 91, at 405–26 (outlining agency procedures for notice-and-comment rulemaking under the Administrative Procedure Act).

93. *See infra* section II.B.

D. Inherent Limitations of Tribal Consultation

While consultation can be a valuable mechanism for protecting tribal interests, several flaws plague its implementation.[94] Problems with enforcement, variability across agencies, and differential treatment by the courts augment confusion, both for tribes and federal agencies.[95]

1. The Problem with "Consultation"

First, some tribes and legal scholars find consultation itself a poor standard by which to measure tribal support for federal projects. Critics contend that, in limiting dialogue to "consultation"—whereby the federal government tells the affected tribe what it plans to do—agency policies become a "tool for bureaucratic inaction" used to justify and perpetuate age-old injustices against Native people.[96] Dubbed mere "lip service" by some critics,[97] tribal consultation creates a "procedural illusion of participation" whereby agencies check off consultation procedures without substantively or meaningfully involving tribal leaders and members in decisions affecting traditional lands and resources.[98]

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94. *See* Haskew, *supra* note 41, at 23.

95. *See id.* at 26 ("One obvious result is that the meaning of consultation, and the institutional wisdom that supports that meaning, varies between each branch of the DOI, and varies for each federal agency depending on the source of the requirement."); *id.* at 72–73 (noting that "it is not clear that consultation requirements . . . create an enforceable right in the Indian parties to participate" and "even less clear that there is a bona fide opportunity to present arguments that stand a chance of persuading the decision makers"); McCann, *supra* note 39, at 437 ("Agencies have been left to develop consultation policies independently, and this has added to the confusion of what a consultation provision does. Some agencies may take their duty to consult seriously, while others may not. Therefore, tribes are unsure whether their participation in consultations with various agencies will be meaningful." (footnotes omitted)).

96. *See* Haskew, *supra* note 41, at 25; *id.* (noting inherent tensions arise between the substantive interests of tribes, who want their interests meaningfully represented, and the procedural interests of federal agencies, who measure success in terms of whether the "proper procedures were used" to reach the decision); *see also id.* at 59 (Statement of Chief Phillip Martin: "We may have reached a point at which the Bureau [of Indian Affairs] has discovered that its best defense is the very thing it has for so long feared—tribal consultation. The Bureau is now able to use the apparent conflicts among the views of different tribes as an irrefutable reason for inaction." (quoting *Prepared Testimony of Phillip Martin, Chief, Mississippi Band of Choctaw Indians, Box 6010 Choctaw Branch, Philadelphia Mississippi, 39350, Before the Senate Committee on Indian Affairs on Bureau of Indian Affairs Reorganization*, FED. NEWS SERV. (May 18, 1995))).

97. *Id.* at 73 ("[G]iven the ever-present fact that consultation rights where they do exist ultimately create no substantive duty on the part of the agency, it is difficult to avoid the conclusion that 'consultation' is the latest federal codeword for lip service."); McCann, *supra* note 39, at 452 (describing consultation meetings between a tribe and the Federal Energy Regulatory Commission as "mere lip service" (quoting Michael Waldrup, Attorney for the Coeur' d'Alene Tribe (May 2, 2005))).

98. Haskew, *supra* note 41, at 24; *see also* McCann, *supra* note 39, at 438 (noting that because agencies do not have to actually implement tribal recommendations, just "show [that] a meaningful

Second, consultation policies and procedures vary widely by agency. For instance, some agencies interpret the "substantial direct effects" trigger for consultation broadly, while others apply it more narrowly.[99] Additionally, federal agencies, tribes, and courts alike struggle with the definition of "meaningful" in E.O. 13175.[100] Where some courts read more substantive requirements into "meaningful consultation,"[101] other courts afford agencies vast discretion to decide when and how consultation occurs and hesitate to hold them accountable.[102] Even where strong evidence exists that consultations are "meaningless,"[103] standards remain largely procedural, ambiguous, and highly fact-sensitive. According to scholar David Haskew, "the big payoff that consultations provide is the meager opportunity for [tribes] to express their opinions and desires—with no guarantee that their input will be fully considered or

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consultation occurred," abuse of discretion claims are particularly difficult to make). At their worst, consultation requirements may actually "undermine, demean and displace a thorough commitment to the federal trust responsibility." Haskew, *supra* note 41, at 73–74; *see also* McCann, *supra* note 39, at 442 ("By mimicking substantive participation, consultations have the disquieting effect of masking larger problems with the manner in which the United States government deals with Indian nations.").

99. *Compare* FED. SUBSISTENCE BD., GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION POLICY 1 (2012) [hereinafter FSB POLICY], https://www.doi.gov/sites/doi.gov/files/uploads/final_fsb_tribal_consultation_policy_2012.pdf [https://perma.cc/BG2N-YH6U] (triggering consultation on "matters that *may have* substantial effects on [federally recognized Indian tribes] and their members" (emphasis added)), *with* U.S. BUREAU OF LAND MGMT., BLM MANUAL 1780 TRIBAL RELATIONS (P) 1-15 (2016) [hereinafter BLM MANUAL 1780], https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf [https://perma.cc/JEQ9-5F9C] (triggering consultation whenever an action "*will have* a substantial *direct* effect on tribal planning issues" (emphasis added)).

100. E.O. 13175 imposes an obligation on federal agencies to engage in "regular and meaningful consultation and collaboration with tribal officials." Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67249 (Nov. 9, 2000); *see* McCann, *supra* note 39, at 437 (observing that the proliferation of agency consultation definitions and requirements has "added to the confusion of what a consultation provision does" and that "their meaning and usefulness are still uncertain," especially given agencies' varying adherence to their own consultation policies).

101. *See, e.g.*, Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 401 (D.S.D. 1995) (differentiating "meaningful" consultation as consultation that occurs "in advance with the decision maker or with intermediaries with clear authority to present tribal views to the [agency] decision maker"); Quechan Tribe of the Fort Yuma Indian Rsrv. v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1118–19 (S.D. Cal. 2010) (finding that BLM's efforts, despite producing "letters, reports, meetings, etc.," "amounted to little more than a general request for the Tribe to gather its own information . . . and disclose it at public meetings" and did not constitute "meaningful" consultation).

102. *See, e.g.*, Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs., 496 F. Supp. 2d 1044, 1056 (D.S.D. 2007), *aff'd*, 533 F.3d 634 (8th Cir. 2008) (affirming the lower court's finding that consultation "did not require the Defendants to engage in any specific type of 'consultation' as suggested by the Tribe"); *see* Ristroph, *supra* note 24, at 222–23 (noting that agencies may "independently" find that a project does not have sufficient "tribal implications to trigger the right of consultation").

103. Pueblo of Sandia v. United States, 50 F.3d 856, 862 (10th Cir. 1995).

even respected."[104] These issues compound for tribes consulting with multiple agencies because they are forced to juggle different standards and timelines to even participate in the consultation process.[105]

Third, consultation policies, by themselves, lack a judicially enforceable right to sue for inadequate consultation.[106] Agency policies promulgated pursuant to executive orders are "unofficial" to the extent they lack the force of law.[107] Unlike consultation requirements explicitly embedded in federal statutes or regulations,[108] many federal consultation policies reside in internal agency documents.[109] Because consultation policies do not "create [a] substantive duty on the part of the agency" to protect tribal interests, affected tribes face a fundamental enforcement problem.[110] In cases where the tribe's only claim stems from the agency's refusal to consult under its tribal consultation policy, courts often find tribal plaintiffs have no right to judicial review and dismiss their suits for failure to state a claim upon which relief can be granted.[111] While tribes

104. Haskew, *supra* note 41, at 73–74.

105. *Id.* at 71.

106. McCann, *supra* note 39, at 438.

107. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (clarifying that "interpretations contained in policy statements, agency manuals, and enforcement guidelines[] all . . . lack the force of law"); JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 14 (2016), https://sgp.fas.org/crs/misc/R44699.pdf [https://perma.cc/NWN2-NXXT] (noting that internal agency policies and other documents promulgated with less procedural formality are often accorded a lower degree of judicial deference); Haskew, *supra* note 41, at 27 (detailing a circuit split over the extent to which internal policy guidelines on tribal consultation are binding on agency action and how they should be enforced).

108. *E.g.*, the National Historic Preservation Act, 54 U.S.C. § 302706(b); *see also* Dean B. Suagee, *NHPA § 106 Consultation: A Primer for Tribal Advocates*, 2018 FED. LAW. 41, 44 ("Tribal officials and legal counsel should be aware that, to the extent that government-to-government consultation is based on Executive Order 13,175 . . . and associated agency policies, failure to consult is generally not subject to judicial enforcement, while NHPA § 106 consultation is based on a statutory requirement and implementing regulations and, as such, is judicially enforceable through the Administrative Procedure Act.").

109. The Administrative Procedure Act (APA) provides a cause of action for and judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see* Haskew, *supra* note 41, at 27.

110. *See* Haskew, *supra* note 41, at 73–74; McCann, *supra* note 39, at 438. Indeed, many policies directly adopt E.O. 13175's provision explicitly denying the creation of any judicially enforceable right.

111. *See, e.g.*, Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs., 496 F. Supp. 2d 1044, 1057 (D.S.D. 2007), *aff'd*, 533 F.3d 634 (8th Cir. 2008) (finding that the plaintiff tribe did not have a cause of action to sue for inadequate consultation because the agency policy denied conferring a cause of action, which defeated any "justified expectation that [the tribe] would receive a meaningful opportunity to provide[] their views"); Crow Creek Sioux Tribe v. Donovan, No. CIV09-3021-RAL, 2010 WL 1005170, at *5 (D.S.D. Mar. 16, 2010) ("[T]he tribal consultation policy 'does not create any right to administrative or judicial review . . . enforceable by a party against the United States, its

may request consultation, agencies need not respond favorably to such requests, allowing them to adopt a veneer of cooperative consultation while evading the substantive mandates of E.O. 13175.[112]

2. Conflicting Case Law Adds to the Confusion

Currently, courts are split on the judicial enforceability of these "informal" consultation requirements, with some courts finding a continuing affirmative duty on the part of agencies to follow consultation procedures and others finding no such duty.[113] The very existence of such consultation policies—especially those made pursuant to an executive order—naturally "create[] a justified expectation on the part of [tribes]" that federal decision-makers will consider their input and advice.[114] Some courts[115] and legal scholars[116] equate this expectation to a justifiable and enforceable reliance interest on the part of the tribes bringing consultation claims in federal courts.[117]

For instance, a small but growing body of case law under the *Accardi* doctrine holds that regulations and policies legally bind agency action, even when they come from internal documents.[118] In *United States* ex rel. *Accardi v. Shaughnessy*,[119] the U.S. Supreme Court held that agencies must follow their own regulations.[120] This gave rise to the *Accardi*

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agencies, or instrumentalities, its officers or employees, or any other persons.'" (quoting Complaint ¶ 40, Crow Creek Sioux Tribe v. Donovan, 2010 WL 1005170 (D.S.D. Sept. 1, 2009) (No. 3:09-CV-03021))).

112. Haskew, *supra* note 41, at 73.

113. McCann, *supra* note 39, at 438. *Compare* Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1103 (9th Cir. 1986) (finding that Bureau of Indian Affairs consultation provisions did not have the force of law and were not binding on the agency because they were mere "[g]uidelines" that "g[a]ve direction to the Bureau. . . . [but] d[id] not establish legal standards that c[ould] be enforced against the Bureau"), *with* Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979) (finding creation of consultation policies "created a justified expectation on the part of the [tribe] that they will be given a meaningful opportunity to express their views" and that agency failure to abide by its own policies violated both administrative principles and the government's federal trust responsibility).

114. *Oglala Sioux Tribe*, 603 F.2d at 721; *see also* Mescalaro Apache Tribe v. Rhoades, 804 F. Supp. 251, 261–62 (D.N.M. 1992) (finding that the Self-Determination Act "created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views" prior to agency action).

115. *Oglala Sioux Tribe*, 603 F.2d at 709.

116. Haskew, *supra* note 41, at 73.

117. *Id.*

118. *See* Marc B. Wilenzick, *Guidelines and the Rule of Law: Claims Under the* Accardi *Doctrine for Violations of Internal Rules*, 18 AM. J. CRIM. L. 357, 358–60 (outlining case law and arguing for expanded application of the *Accardi* doctrine to departmental guidelines).

119. 347 U.S. 260 (1954).

120. *Id.* at 266–27 (holding that the Board of Immigration Appeals had to follow its own regulations in immigration proceedings).

doctrine, which stands for the principle that "once an agency establishes its regulations, it must follow them."[121] Subsequent Supreme Court decisions affirmed and expanded the *Accardi* doctrine to apply to federal agency procedures and policies in a variety of contexts.[122] In particular, where internal agency guidelines establish procedures that substantively protect citizens' rights, courts have found that agencies should—and must—follow them.[123]

For instance, in *Morton v. Ruiz*,[124] the Supreme Court held that the Bureau of Indian Affairs (BIA) had to comply with a directive to publish eligibility procedures limiting the distribution of need-based federal grants to tribal members on reservations, pursuant to its own BIA manual.[125] While guidelines merely setting internal policy generally do not bind agencies, the Court reasoned that rules protecting people from arbitrary and capricious federal action are essential and should be consistently applied.[126] Thus, the BIA "must comply, at a minimum, with its own internal procedures" by informing the public of available privileges and grant eligibility requirements.[127] The Ninth Circuit also has extended the *Accardi* doctrine "beyond formal regulations" to encompass documents like agency memoranda.[128]

Federal district and circuit courts have applied the *Accardi* doctrine explicitly to the tribal consultation requirement. In *Oglala Sioux Tribe v.*

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121. Wilenzick, *supra* note 118, at 360.

122. *See, e.g.*, Service v. Dulles, 354 U.S. 363, 372 (1957) ("[R]egulations validly prescribed by a government administrator are binding upon him as well as the citizen, and . . . this principle holds even when the administrative action under review is discretionary in nature."); Vitarelli v. Seaton, 359 U.S. 535, 546–47 (1959) (Frankfurter, J., concurring in part) ("If [an action] is based on a defined procedure, . . . that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established . . . [one] that takes the procedural sword shall perish with that sword." (internal citations omitted)).

123. *See* Morton v. Ruiz, 415 U.S. 199, 235 (1974); *see also* Wilenzick, *supra* note 118, at 358 (highlighting that "[c]onsistent application of . . . rules" protecting individuals against arbitrary or capricious treatment by government officials is "especially important in these cases where the rights of individuals are affected").

124. 415 U.S. 199 (1974).

125. *Id.* at 235–37.

126. *Id.* at 235 ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.").

127. *Id.*

128. Alcaraz v. I.N.S., 384 F.3d 1150, 1162 (9th Cir. 2004) (recognizing that *Accardi* extends to non-published agency documents, but declining to extend to memoranda at issue pending remand); *see also* Church of Scientology of Cal. v. United States, 920 F.2d 1481, 1487 (9th Cir. 1990) ("Pursuant to the *Accardi* doctrine, an administrative agency is required to adhere to its own internal operating procedures."); Romeiro de Silva v. Smith, 773 F.2d 1021, 1025 (9th Cir. 1985) (noting that while INS operations "instructions are internal directives not having the force and effect of law," and may be validly amended by the agency, INS must still "comply" with such procedures).

Andrus,[129] the Eighth Circuit held that when a federal agency establishes an internal policy requiring prior consultation with a tribe, it must comply with that policy pursuant to its trust obligations.[130] Some courts go further, reading procedural consultation requirements *implicitly* into tribal treaties even where the language of the treaty or federal policy does not explicitly require consultation.[131] Courts interpreting such policies as binding imbue new vigor into the Administrative Procedure Act (APA).[132] By requiring courts to "compel agency action[s] unlawfully withheld"[133] or "set aside agency action[s] . . . found to be . . . without observance of procedure required by law,"[134] the APA can, under these circumstances, be a useful mechanism for holding agencies accountable for their own consultation regulations.

Admittedly, consultation is an imperfect mechanism for tribal involvement in federal decision-making. By failing to meet tribes' expectations, agencies may perpetuate a sense of betrayal within the federal-tribal relationship that ultimately deters tribes from seeking consultation in the first place.[135] In this way, the modern consultation framework somewhat undermines its alleged purpose of "honoring [t]ribal sovereignty" and "including [t]ribal voices in policy deliberation that

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129. 603 F.2d 707 (8th Cir. 1979).

130. *Oglala Sioux Tribe*, 603 F.2d at 721. The court reasoned that in establishing a consultation policy, the federal agency:

> created a justified expectation on the part of the [tribes] that they will be given a meaningful opportunity to express their views before [agency] policy is made, [and] that opportunity must be afforded. Failure of the [agency] to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decision-making . . . but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with [tribes].

Id.

131. *See, e.g.*, Confederated Tribes & Bands of Yakama Nation v. U.S. Dep't of Agric., No. CV-10-3050-EFS, 2010 WL 3434091, at *4 (E.D. Wash. 2010) (finding consultation with the Yakama Nation was required under the Yakama Treaty of 1855, even though the treaty contained no such language requiring consultation); Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1242 (E.D. Wash. 1997) (reading consultation into 1855 Walla Walla Treaty Council minutes when the federal general assured tribal leaders that white people would not intrude upon their lands "without [their] consent").

132. Administrative Procedure Act, 5 U.S.C. §§ 551–559.

133. 5 U.S.C. § 706(1).

134. *Id.* § 706(2)(D).

135. Haskew, *supra* note 41, at 24 ("By this view, the purpose of consultation requirements is to satisfy the desires of Native Americans to be involved in decisions that affect them, while not binding the government to anything resembling a commitment. Consultations, therefore, may confuse the real consent of Indian communities to federal actions with the procedural illusion of participation, in which Indian consent is never *really* asked for, and advice is never *really* heeded." (emphasis in original)).

affects [t]ribal communities."[136] Despite its flaws, consultation remains one of the only mechanisms for engaging tribes in federal decision-making—particularly in the subsistence management of traditional lands and resources.

II. TRIBAL CONSULTATION AND SUBSISTENCE MANAGEMENT IN ALASKA

For tribes with limited means of protecting subsistence rights, consultation is one of the only federal mechanisms for ensuring that tribal interests are represented in agency decisions.[137] This is especially true for Alaska Native tribes, which face unique challenges in preserving rights to subsistence land and resources.[138] This Part provides an overview of the subsistence management framework in Alaska.

A. ANCSA Erased Aboriginal Subsistence Rights

While ostensibly "cooperative" between the federal government, State, and tribes, subsistence land management in Alaska is anything but. Under the 1867 Treaty of Cession,[139] the United States purchased the Territory of Alaska from Russia, thereby gaining legal title to the land and subjecting its Indigenous occupants to "such laws and regulations as [it] may . . . adopt."[140] As non-Native populations grew and resource extraction fueled economic growth and national interest in Alaska's lands, there was a gradual push to extinguish Aboriginal title to the use and

136. Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491, 7491 (Jan. 29, 2021), https://www.federalregister.gov/documents/2021/01/29/2021-02075/tribal-consultation-and-strengthening-nation-to—nation-relationships [https://perma.cc/BX94-2Y4Y].

137. Ristroph, *supra* note 24, at 211.

138. *Id.*

139. Treaty of Cession, art. III, Mar. 30, 1867.

140. *Id*. Under the Discovery Doctrine, acquisition vested legal title to Aboriginal lands in the "discovering" nations and left Native inhabitants the right to use and occupy their historic homelands. Johnson v. M'Intosh, 21 U.S. 543, 568 (1823). Neetsaii Gwich'in Athabascan scholar Evon Peter has argued that this land grab was "illegitimate[]" because Alaska Native people, viewed as having "minimal recognition and rights," were "excluded from both negotiations of Russian land claims and the Treaty of Cession." Peter, *supra* note 2, at 179; *see also* William *Iggiagruk* Hensley, *Why the Natives of Alaska Have a Land Claim*, *in* THE ALASKA NATIVE READER: HISTORY, CULTURE, POLITICS 195 (Maria *Shaa Tláa* Williams ed., 2009) (noting that the sale of Alaska to the United States occurred "without consultation" with Alaska Native people and that "*[t]here was not then, nor has there ever been any agreement by the Eskimo, Indian, and Aleut people to the extinguishment of their ownership of lands in Alaska*" (emphasis in original)).

occupancy of Native lands.[141] Under the Statehood Enabling Act of 1958,[142] the United States acquired all Native property rights to land, to be held in trust "under the absolute jurisdiction and control of the United States."[143] At the same time, the Act granted the State over one hundred million acres from unreserved public lands—facilitating the extinguishment of all Aboriginal claims.[144]

Discovery of oil on Alaska's North Slope in 1968 sounded the death knell for all remaining Aboriginal title in the State. Amidst increasing pressure to open land in Alaska for oil and gas development, Congress extinguished all Native Aboriginal hunting and fishing rights and most reservations under the Alaska Native Claims Settlement Act (ANCSA) of 1971.[145] ANCSA created thirteen private, for-profit Alaska Native regional corporations and over 200 private, for-profit village corporations (collectively, ANCs) and conveyed nearly forty million acres of land and $962.5 million to these corporations, to be held in collective corporate ownership.[146] While Alaska Native negotiators worked hard to secure at least these assets,[147] the final Act said nothing about subsistence hunting, fishing, and gathering rights, expressly abolished all Aboriginal rights to

141. Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 19 (2007). Interestingly, early congressional statutes and case law also demonstrate a consistent federal policy of recognizing Alaska Native property rights. In the early 20th century, the Native right to hunt and fish were exempted from several federal mining, conservation, and wildlife laws. *Id.* at 22. And, in the 1920–30s, federal courts consistently construed statutory protections broadly, often finding encroachment by skyrocketing non-Native populations on areas important for Native subsistence uses. *Id*. at 17, 24. However, this trajectory was short-lived. *See id*. at 17.

142. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

143. *Id.* § 4.

144. *Id.* § 6(a); Anderson, *supra* note 141, at 20 n.17.

145. 43 U.S.C. § 1618(a)–(b); *see* COHEN'S HANDBOOK 2012, *supra* note 67, at 105. Alaska legal scholar Evon Peter has criticized ANCSA as a "unilateral[]" "attempt to legitimize U.S. ownership and governance over Indigenous peoples, their lands, and their resources within Alaska." Peter, *supra* note 2, at 180.

146. *See* 43 U.S.C. § 1605(a)(1) (allocating $462,500,000 from the general fund of the Treasury into the Alaska Native Fund); *id.* § 1605(a)(3) (granting another $500,000,000 pursuant to revenue sharing provisions under 43 U.S.C. § 1608); Anderson, *supra* note 141, at 35.

147. Ernest S. Burch, Jr., *Native Claims in Alaska: An Overview*, 3 ÉTUDES INUIT STUDIES 7, 9 (1979) (noting the influential work of the Alaska Federation of Natives in "coordinat[ing] [Native] efforts . . . toward the solution of common problems" and "developing and promoting the collective Native position" during ANCSA negotiations).

the land,[148] and lacked collective Native support.[149] Unfortunately, but unsurprisingly, ANCSA proved an inadequate safeguard for Native interests in Alaska's resources.[150]

B. In Response, ANILCA Proposed a "Rural Priority"

Subsequently, in 1980, Congress enacted the Alaska National Interest Land Claims Act (ANILCA).[151] ANILCA purported to resolve disputes between state and federal land managers and Native occupants by providing a "priority" for rural Alaskan residents subsisting on public lands.[152] ANILCA's purpose was twofold: to "preserve . . . certain lands and waters"[153] and to "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."[154] To fulfill the first

148. 43 U.S.C. § 1603(b) ("All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished."); Anderson, *supra* note 141, at 22. The Committee Report accompanying ANCSA shows that Congress intended the State and Department of the Interior to enact protections for subsistence rights of hunting and fishing; subsequently, no such language was included in the Act and Aboriginal title was simply lost without any legal means of securing the right to use and occupy Native lands. *Id.*; *see also* Peter, *supra* note 2, at 180 (critiquing the scope of ANCSA in extinguishing previously recognized reservations and hunting and fishing rights, and "pav[ing] the way for the oil industry and state government to access and transport oil from northern Alaska").

149. *See* Peter, *supra* note 2, at 180 ("Although a few Native people participated in the debates surrounding the passage of ANCSA, it was not a legitimately negotiated treaty or settlement between the United States and Alaska Native tribes. ANSCA was void of direct negotiation with Alaska Native tribes and was not put to a vote of the Indigenous peoples.").

150. Anderson, *supra* note 141, at 17–18. ANCSA's extinguishment of aboriginal hunting and fishing rights undermined Alaska Native tribes' territorial sovereignty and allowed increasing state incursion on Native lands, fueling resentment between tribes and state actors. *Id.*; Monica E. Thomas, *The Alaska Native Claims Settlement Act: Conflict and Controversy*, 23 POLAR RECORD 27, 34–35 (noting ANCSA's failure to protect Native subsistence rights spurred disputes between Native and non-Native users of subsistence resources under state and federal subsistence laws).

151. 16 U.S.C. §§ 3101–3233. While fish and wildlife management authority transferred to the State in 1960, the State consistently failed to adequately protect the rights of subsistence users. For instance, in 1978, the State enacted a subsistence law creating priority for subsistence users of fish and wildlife—but failed to define the term "subsistence uses." Anderson, *supra* note 141, at 36.

152. 16 U.S.C. § 3114 ("Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for non[-]wasteful subsistence uses shall be accorded *priority* over the taking on such lands of fish and wildlife for other purposes." (emphasis added)). Congress used "rural" rather than "Native" in an attempt to comply with the Alaska Constitution, which guarantees equal access to natural resources among all Alaskan residents. ALASKA CONST. art. VIII, §§ 3, 15, 17; Miranda Strong, *Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can Alaska Thaw Out Rural & Alaska Native Subsistence Rights?*, 30 ALASKA L. REV. 71, 76 (2013) (noting that the bill initially proposed a "Native" preference, but the State of Alaska successfully appealed to Congress to change it to a "rural" preference instead).

153. 16 U.S.C. § 3101(a).

154. *Id.* § 3101(c); *see also* McDowell v. State, 785 P.2d 1, 4 (Alaska 1989) ("[F]ifty percent of

objective, the Act reserved 104 million acres of federally owned land for preservation purposes[155] (known as "conservation system units").[156] For the second objective, Congress invoked its constitutional authority to "protect and provide for . . . continued subsistence uses on the public lands by Native and non-Native rural residents."[157] Under Title VIII of ANILCA, Congress recognized that "the opportunity for subsistence uses by rural residents of Alaska, including both Native and non-Natives . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence."[158] The Act also called out an increasing need to protect Native subsistence livelihoods from encroaching commercial and non-resident interests, particularly in the wake of ANCSA.[159]

The Act further declared that the use of public lands in Alaska should "cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands."[160] The Act defined "subsistence uses"[161] as the "*customary and traditional uses* by *rural*

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the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and [forty] percent of such families spend an average of [six] to [seven] months of the year in subsistence activities." (quoting H.R. Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978))); 16 U.S.C. § 3111(2) ("Alaska is unique in that, in most cases, no practical alternative means are available to replace the . . . other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses.").

155. *See* 16 U.S.C. § 410hh; Sturgeon v. Frost, __ U.S. __, 139 S. Ct. 1066, 1075 (2019); *Alaska National Interests Lands Conservation Act: Creation of Wrangell-St. Elias*, NAT'L PARK SERV. (last updated Jan. 3, 2020), https://www.nps.gov/wrst/learn/management/alaska-national-interests-lands-conservation-act.htm [https://perma.cc/88EK-3WYF].

156. 16 U.S.C. § 3101(d). ANILCA designated conservation system units in National Parks, National Wildlife Refuges, National Conservation and Recreation Areas, National Forests, National Wild and Scenic Rivers, and National Wilderness Preservation Areas. *Id.* § 410hh (designating specific units).

157. *Id.* § 3111(4). Congress recognized subsistence use as being under increasing attack by non-subsistence, non-resident uses. *See id*. § 3111(3). ("[C]ontinuation of the opportunity for subsistence uses of resources . . . in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management.").

158. *Id.* § 3111(1) ("[I]n order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.").

159. *Id.*

160. *Id.* § 3112(1).

161. Many Alaska Native communities continue to reject "subsistence" as a term of art, asserting it reduces tribes' complex cultural, historical, and ecological interactions with traditional lands,

Alaska residents of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation."[162] While the Alaska Legislature acknowledged that "customary and traditional uses . . . originated with Alaska Natives and are culturally, socially, spiritually, and nutritionally important,"[163] ANILCA did not specifically give a preference for Alaska Native communities.[164] This ambiguity continues to create substantial litigation over (1) whether an Alaskan resident or community claiming priority is "rural"[165] and (2) whether a use is "customary and traditional."[166] Nonetheless, the rural priority remains one of the only substantive protections for rural Alaska Native communities seeking to preserve their subsistence rights.

While ANILCA limited the rural priority to federal public lands, it opened the door to cooperative management. ANILCA gave the State the opportunity to "enact[] and implement[] laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in [ANILCA]" (referring to the subsistence priority).[167] In other words, if the State complied with the subsistence priority mandate in ANILCA, the federal government would delegate authority over subsistence management of all lands in Alaska to the State.

The State tried. In anticipation of ANILCA, Alaska enacted a

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waters, plants, and wildlife to nutritional value. John Sky Starkey, *Protection of Alaska Native Customary and Traditional Hunting and Fishing Rights through Title VIII of ANILCA*, 33 ALASKA L. REV. 315, 317 (2016) ("'Subsistence' lends itself to narrow interpretations associated with nutritional survival, a form of welfare necessary only for those who continue to reside in remote areas where access to grocery stores and jobs is limited.").

162. 16 U.S.C. § 3113 (emphasis added).

163. Starkey, *supra* note 161, at 317 & n.17 (quoting An Act Relating to the Taking of Fish and Game, § 1, 1992 Alaska 2d Spec. Sess. Laws ch. 1, 1–2).

164. *Id.* at 312.

165. ANILCA's use of the term "rural" instead of "Native" has been extensively criticized as a way out of recognizing Alaska Native tribal sovereignty and of opening subsistence use to non-Native people. *See* Peter, *supra* note 2, at 183 ("While 'rural' can be used as a descriptive word in relation to Alaska Native tribes, it should not be used to replace tribal recognition. The term 'rural' and other similar language has been used to minimize recognition of the fact that the federal government has already recognized tribes in Alaska and that federal Indian law must be applied in relationships with tribal governments.").

166. Starkey, *supra* note 161, at 319. In *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994), the Village of Quinhagak sued the State for a fishing ban on rainbow trout, alleging the restriction violated ANILCA's rural priority. The Ninth Circuit found that the Village demonstrated sufficient evidence to show that the ban "interfere[d] with their way of life and cultural identity," in addition to cutting off a valuable food source. *Id*. at 394; *see also* State, Dep't of Fish & Game v. Manning, 161 P.3d 1215, 1224 (Alaska 2007) (striking down an Alaska regulation imposing a rigid game ratio that dictated access to certain game species as "structurally infirm and ultimately inaccurate method of measuring applicants' access to alternative food sources").

167. 16 U.S.C. § 3115(d).

subsistence priority statute in 1978.[168] To comply with ANILCA, the State promulgated regulations in 1982 and again in 1986 to protect the rural preference.[169] For a brief time, the State's rural subsistence priority gave preference to hunting, fishing, and gathering rights over other consumptive (sport and commercial) uses. Then, in 1989, the Alaska Supreme Court killed the State's rural priority. In *McDowell v. State*,[170] the Court found that ANILCA's rural priority violated provisions of the Alaska Constitution guaranteeing Alaska residents equal access to natural resources, regardless of urban or rural status.[171] Therefore, any state regulation promulgated pursuant to ANILCA's rural priority violated Alaska's Constitution. *McDowell* doomed the State's rural subsistence priority and rendered ANILCA irreconcilable with state law.[172] While ANILCA's rural priority continues to govern Alaska Native access to subsistence resources,[173] this framework has resulted in a tenuous system of subsistence management, with tribes often bearing the brunt of federal-state management disputes.[174]

C. Alaska Native Tribes Have Limited Mechanisms for Protecting Subsistence Rights

This game of land management "hot potato" between the State and federal government left Alaska Native tribes with limited mechanisms for protecting their subsistence rights. First, as Congress ended treatymaking

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168. Anderson, *supra* note 141, at 36.

169. ALASKA STAT. § 16.05.257 (2013).

170. 785 P.2d 1 (1989).

171. *Id*. at 1. The Alaska Supreme Court held that the rural subsistence priority violated article VIII, section 3 of the Alaska Constitution (the common use clause) ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."), article VIII, section 15 (the no exclusive right of fishery clause) ("No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."), and article VIII, section 17 (the uniform application clause) ("Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."). *Id.*; ALASKA CONST. art. VIII, §§ 3, 15, 17.

172. *Tribal Hunting and Fishing Rights: Subsistence (ANILCA 1980)*, UNIV. OF ALASKA FAIRBANKS, https://uaf.edu/tribal/academics/112/unit-3/tribalhuntingandfishingrightssubsistenceanilca1980.php [https://perma.cc/2FDF-BWNR].

173. 16 U.S.C. § 1301(c).

174. DAVIS S. CASE & DAVIS A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 47 (3d ed. 2012) (noting that ANILCA's "confused jurisdiction [over state and tribal authority of subsistence resources] and lack of an Indigenous fishing and hunting preference" has spurred substantial litigation and continues to "impair[] Alaska Native 'food security'" (quoting Sophie Thériault, Ghislain Otis, Gérard Duhaime & Christopher Furgal, *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35, 36 (2005))).

just four years after the Alaska Purchase,[175] Alaska Native tribes cannot rely on treaty language to protect their subsistence rights because they do not have treaties with the U.S. government.[176] Alaska Native tribes were thus deprived a powerful mechanism for enforcing tribes' subsistence rights against federal and state interests,[177] and subsequently must rely on other sources of law to protect their lands and resources.[178]

Second, few Alaska Native tribes maintain legal title to original reserve lands.[179] While some federal statutes (such as the National Historic Preservation Act) require federal agencies to consult with ANCs, corporations themselves lack powers of governance.[180] Additionally, not all members of an Alaska Native tribe or Village are ANC members or shareholders, or have widely unequal shares, leading to intra-tribal social, political, and economic divisions with respect to federal agency decisions.[181]

Third, while the federal government has managed subsistence activities on public lands under ANILCA's rural priority since 1992, the State manages subsistence uses on state and private lands (including lands conveyed to ANCs under ANCSA)—and recognizes no such rural

175. *See* Ristroph, *supra* note 24, at 212; *see also* Peter, *supra* note 2, at 179 (offering a different justification from Professor Miller, *supra* note 44, by arguing that the United States intentionally "chose not to make treaties with Alaska Native tribes in an attempt to avoid the sovereign recognition of [their] nations").

176. *See* Ristroph, *supra* note 24, at 211–12.

177. *Compare* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 660 (1979) (reaffirming Washington tribes' treaty rights to fish "at all usual and accustomed grounds and stations"), *with* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 532 (1998) (finding that lands under the Alaska Native Claims Settlement Act are not "Indian Country" and thus not subject to similar federal protections as tribal lands in other states). *See also* CASE & VOLUCK, *supra* note 174, at 42 (noting that the federal government's trust responsibilities to tribes in Alaska are "fundamentally reduced").

178. CASE & VOLUCK, *supra* note 174, at 42 ("Because there were no treaties between Alaska Natives and the federal government, statutory manifestations (including appropriations) of their federal–Native relationship are very important. . . .[S]tatutory (and regulatory) descriptions afford an opportunity for both the federal government and Alaska Natives to define their respective obligations and expectancies.").

179. Ristroph, *supra* note 24, at 211.

180. Anderson, *supra* note 141, at 23.

181. Ristroph, *supra* note 24, at 212 n.4 (noting disagreements between the Tikigaq Corporation and the Native Village of Point Hope in response to Shell Exploration and Production Company's exploration of the Chukchi Sea for oil and gas development). Disparity in shares among ANC shareholders is also evident in the varying amounts of non-taxable shares and settlement common stock that can be inherited through family lines. *See* 43 U.S.C. § 1606(h)(2) (providing for the inheritance of settlement common stock via devise or intestacy); *id.* § 1606(r) ("The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed.").

priority.[182] Amending ANILCA to add an explicitly "Native" preference, while desirable, is politically unlikely.[183] Therefore, federal consultation with Alaska Native tribes is one of the only tools available for enforcing ANILCA's rural priority and protecting subsistence rights to traditional lands and resources.

D. Tribal Consultation and Subsistence Management in Alaska

ANILCA's rural priority protects Alaska Native subsistence rights in two main ways: (1) by requiring representation of Alaska Native interests in the direct regulation of subsistence resources by federal agencies, and (2) by requiring federal agencies to notify tribes about federally sanctioned projects that could affect subsistence resources. Both involve consultation, albeit to varying degrees. This section observes how current consultation procedures fail to enforce the rural priority under ANILCA and inadequately represent Alaska Native interests in subsistence resource management.

1. Tribal Consultation Under ANILCA

Title VIII contains few references to consultation, and none mandate consultation with Alaska Native tribes. Moreover, these provisions often require something less than consultation. Section 812 provides that the Secretary of the Interior "*shall* . . . seek data from, *consult with*[,] and make use of[] the special knowledge of local residents engaged in subsistence uses" and share such data with regional advisory councils.[184] However, this directive merely requires the federal government to *seek information* from *subsistence users* generally—not *consult* with *Alaska Native* subsistence users.

Section 802(3) boasts similarly flimsy language, declaring that federal land managers "shall *cooperate with* . . . Native Corporations" in managing subsistence activities on public lands,[185] but that ANCs need not *be consulted* on such decisions.[186] Additionally, under section 809, the Secretary of the Interior "*may* enter into *cooperative agreements* or otherwise *cooperate with* . . . Native Corporations" to satisfy the rural

182. Ristroph, *supra* note 24, at 212.

183. Starkey, *supra* note 161, at 324.

184. 16 U.S.C. § 3122 (ANILCA § 812) (emphasis added).

185. *Id.* § 3112 (ANILCA § 802(3)) (emphasis added).

186. Instead, in making subsistence and land use decisions, the Secretary need only "give[] notice to . . . appropriate local committees and regional councils [RACs]" and "give notice of, and hold[], a hearing in the vicinity of the area involved." *Id.* § 3120(a) (ANILCA §§ 810(a)(1)–(2)) (emphasis added).

priority under Title VIII.[187]

And while section 810 requires the Secretary to consider the impacts of proposed federal actions on subsistence resources, it noticeably omits any substantive consultation requirement with Alaska Native communities.[188] ANILCA thus provides a poor source of law for enforcing its own rural priority through consultation, forcing Alaska Native people to rely instead on amorphous agency policies to guide consultation procedures—weak alternatives to clear consultation mandates.[189]

2. The Federal Subsistence Board

To implement ANILCA, Congress authorized the Secretaries of the Interior and Agriculture to promulgate regulations fulfilling the Act's purposes.[190] To this end, the Secretaries created the Federal Subsistence Board (FSB) to "administer[] the subsistence taking and uses of fish and wildlife on public lands."[191] The FSB is the decision-making body that oversees the broader Federal Subsistence Management Program.[192] It makes rural determinations, imposes restrictions on subsistence uses, authorizes hunting and fishing seasons, and determines which uses are "customary and traditional."[193] The governing body is comprised of regional directors from several federal land management agencies,[194] as

187. *Id.* § 3119 (ANILCA § 809) (emphasis added).

188. *See id.* § 3120(a) (ANILCA §§ 810(a)(1)–(2)).

189. Haskew, *supra* note 41, at 73.

190. 16 U.S.C. § 3124 ("The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title."); *see also* Alaska v. Fed. Subsistence Bd., 544 F.3d 1089, 1092 n.1 (9th Cir. 2008) (explaining that Congress authorized the Secretary of the Interior and the Secretary of Agriculture to promulgate regulations, and they issued identical regulations codified at 50 C.F.R. § 100 and 36 C.F.R. § 242).

191. *Fed. Subsistence Bd.*, 544 F.3d at 1092 (citing 50 C.F.R. § 100.10(a)). Previously, the State of Alaska implemented ANILCA through state law; in 1989, the Alaska Supreme Court held that providing a subsistence priority for rural Alaskans, to the exclusion of other Alaskans, violated the Alaska Constitution, at which point the Secretaries assumed responsibility for implementing ANILCA. *Id*. at 1092, n.3 (citing McDowell v. State, 785 P.2d 1, 9 (Alaska 1989)).

192. *Id*.

193. In *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000), the "crux of [the plaintiff's] appeal [was] whether the Federal Subsistence Board's decision to impose . . . [an] antler restriction on subsistence hunters" contravened the priority requirements of ANILCA. *Id.* at 1193. The plaintiff also challenged as insufficient the FSB's reservation of certain days of a hunt to subsistence users only. *Id*. at 1195–96. Notably, although it was not at issue in the case, the court mentioned in passing that "the Board . . . authorized a harvest season running from August 10, 1995, through September 20, 1995, with the first ten days being reserved for subsistence hunts." *Id*. at 1190.

194. Including the regional directors of the U.S. Fish and Wildlife Service, National Park Service, U.S. Forest Service, Bureau of Land Management, and Bureau of Indian Affairs. 50 C.F.R. § 100.10(b)(1).

well as two rural subsistence users[195] and one chairman.[196] According to FSB's Government-to-Government Tribal Consultation Policy, the FSB dedicates itself to "establish[ing] meaningful and timely opportunities for government-to-government consultation."[197] It also promises to respond to requests from federally recognized tribes to engage in consultation, use traditional ecological knowledge, and work with tribes to improve communication, outreach, and education.[198]

Section 805 of ANILCA also establishes regional advisory councils (RACs) to provide a meaningful forum for the involvement of local community leaders to discuss subsistence uses.[199] The Federal Subsistence Management Program divides Alaska into ten subsistence resource regions, with each region having its own RAC.[200] RACs are composed of members of the public who represent different natural resource interests (e.g., subsistence, commercial, and sport[201]).[202] RAC members must reside in the region they represent and must be "knowledgeable about the region and subsistence uses of the public lands therein."[203] Each RAC meets at least twice a year and provides "all rural Alaskan resource/subsistence users" an opportunity to comment and offer

195. In 2016, President Obama made changes to the FSB by adding two member spots for rural public subsistence users. *Alaska Natives Represented on Federal Subsistence Board*, INDIANZ (Jan. 30, 2012), https://www.indianz.com/News/2012/004409.asp [https://perma.cc/F6HF-AAAW]. These users are to be appointed by the Secretaries of Interior and Agriculture and should have "personal knowledge of and direct experience with subsistence uses in rural Alaska." 50 C.F.R. § 100.10(b)(1).

196. *Federal Subsistence Management Program: Regions*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/subsistence/regions [https://perma.cc/7LB5-KY28].

197. FSB POLICY, *supra* note 99, at 2.

198. *Id*.

199. 16 U.S.C. § 3115(a)(3) (ANILCA section 805(a)(3)) ("[T]he Secretary . . . shall establish . . . a regional advisory council in each subsistence resource region . . . composed of residents of the region."). These RAC members must also be "qualified." *Id.* § 803(b); 50 C.F.R. § 100.11(a); *see also* 36 C.F.R. § 242.11(a) ("The Regional Councils shall provide a regional forum for the collection and expression of opinions and recommendations on matters related to subsistence taking and uses of fish and wildlife resources on public lands. The Regional Councils shall provide for public participation in the Federal regulatory process.").

200. *Federal Subsistence Management Program: Regions*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/subsistence/regions [https://perma.cc/7LB5-KY28]. RACs represent Southeast Alaska, Southcentral Alaska, Kodiak/Aleutians, Bristol Bay, Yukon-Kuskokwim Delta, Western Interior Alaska, Seward Peninsula, Northwest Arctic, Eastern Interior Alaska, and the North Slope. *Id*.

201. "Sport" colloquially refers to recreational or non-subsistence hunting and fishing.

202. 36 C.F.R. § 242.11(b)(1) ("To ensure that each Council represents a diversity of interests, the Board will strive to ensure that 70 percent of the members represent subsistence interests within a region and 30 percent of the members represent commercial and sport interests within a region.").

203. *Id.*

input on subsistence management issues.[204] Specifically, RACs provide recommendations on subsistence resource use on public lands to the FSB.[205] In turn, the Secretary "shall consider" the RAC's recommendations,[206] but "may choose not to follow" any recommendation that the Secretary determines is "not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to . . . subsistence needs."[207] FSB's consultation policy imposes a dual mandate on the Board to "integrate tribal input effectively into the decision-making process" and "maintain deference" to RAC recommendations, which often (but not always) seek to implement strong protections for customary and traditional uses, practices, and tribal involvement.[208]

FSB's tribal consultation policy appears, at least on the surface, more protective of Alaska Native interests than other agencies' policies. For instance, while DOI must consult only where there are "substantial *direct* effect[s]" on tribes,[209] the FSB must consult when it takes an action that "*may have* a substantial effect."[210] It also defines such actions broadly to include regulations, policies and guidance documents, budget and priority planning development.[211] Furthermore, as an Alaskan-specific federal entity, the FSB caters to the interests and hunting seasons of Alaska Native groups more specifically than other federal agencies. Through consultation, the FSB aims to "respect both the Federal subsistence management cycle and the Tribal timeframes,"[212] and "create and maintain effective relationships with Federally recognized Tribes in

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204. *Federal Subsistence Management Program: Regions*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/subsistence/regions [https://perma.cc/7LB5-KY28].

205. 16 U.S.C. § 3115(a)(3)(D)(iii) (ANILCA § 805(a)(3)(D)(iii)) ("Each regional advisory council shall [have the authority to] . . . prepar[e] . . . an annual report to the Secretary which shall contain . . . a recommended strategy for the management of fish and wildlife populations within the region to accommodate subsistence uses and needs.").

206. *Id.* § 3115(c) (ANILCA § 805(c)) ("The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, *shall consider* the report and *recommendations of the regional advisory councils* concerning the taking of fish and wildlife on the public lands within their respective regions *for subsistence uses*." (emphasis added)).

207. *Id.*; *see* Starkey, *supra* note 161, at 316.

208. FSB POLICY, *supra* note 99, at 3.

209. DOI Tribal Consultation Policy, *supra* note 87, at 28446 (emphasis added).

210. *See* FSB POLICY, *supra* note 99, at 6 (emphasis added); *id.* (defining "action with tribal implications" as "[a]ny Board regulations, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that *may have* a *substantial effect* on an Indian Tribe in Alaska" (emphasis added)).

211. *Id*. at 3.

212. *Id*. at 4.

Alaska."[213] The Board's policy also recognizes the "unique traditional values, culture and knowledge that [Alaska Native] Tribes can impart" and requires FSB to "incorporate [Alaska Native] Tribes into the training for the Board and staff."[214] Finally, the FSB consultation policy affirms the right of Alaska Native tribes to *initiate* consultation, placing the decision to consult into their hands.[215]

Still, the structure of FSB leaves subsistence management vulnerable to infringement by non-Native and commercial interests. At least some voting members of the FSB must have subsistence user experience, but they do not have to be Alaska Native or represent Alaska Native interests. While Alaska Native tribal members currently hold these positions, future administrations could easily fill these positions with non-Native members.[216] Additionally, RACs represent both subsistence and non-subsistence interests, allowing sport and commercial users to influence their recommendations.[217] Even when such recommendations advance the subsistence interests of Alaska Native communities, the FSB and Secretary have discretion to ignore the RAC's recommendations. Furthermore, like other agency policies, the FSB policy is vague[218] and affords Alaska Native tribes little opportunity to engage in subsistence management decisions.[219]

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213. *Id*. at 2.

214. *Id*. at 4.

215. *Id.* ("Consultation may be prompted by a Federally recognized Tribe in Alaska or by the Board.").

216. A recent example of excluding tribal perspectives from influential subsistence management positions is Alaska Governor Mike Dunleavy's recent controversial nomination of a fisheries executive to an open seat on the North Pacific Fishery Management Council in March 2023. While tribal and subsistence groups advocated for Mellisa Johnson, who is Iñupiaq and serves as government affairs and policy director for the Arctic-Yukon-Kuskokwim Tribal Consortium, to fill the position, Governor Dunleavy passed over her nomination and instead selected the chief operating officer of the Coastal Villages Region Fund, a Community Development Quota group with strong interests in the commercial fisheries industry. In response, Mellisa Johnson observed:

> There's still no equitable representation . . . . There is no one on [the North Pacific Fishery Management Council] that knows where I'm coming from when it comes to these crises. They can study all day long, they can have a Ph.D., they can be a CEO, whatever the title is. But if they cannot produce a tribal ID card or a BIA card, then, realistically, they don't know.

Nathaniel Herz, *Alaska Gov. Dunleavy Passes Over Tribal Advocate for Fishery Council Post, Fueling Calls for Change*, ALASKA BEACON (Mar. 21, 2023, 6:15 PM), https://alaskabeacon.com/2023/03/21/alaska-gov-dunleavy-passes-over-tribal-advocate-for-fishery-council-post-fueling-calls-for-change/ [https://perma.cc/544Y-YHUC]. With Governor Dunleavy's nomination, the North Pacific Fishery Management Council will continue to operate without tribal representation. *Id.*

217. FSB POLICY, *supra* note 99, at 4.

218. *See, e.g.*, *id.* (failing to define "substantial effect").

219. *Id.* at 4 ("*No single formula exists for what constitutes appropriate consultation*. The planning

3. Other Agency Policies Fail to Enforce ANILCA's Rural Priority

Other federal agency policies fare no better at providing a consultation mandate to enforce ANILCA. The DOI Tribal Consultation Policy and Departmental Manual parrot the language of E.O. 13175, casting consultation as a collaborative process that both informs federal decision-making and strengthens trust, respect, and shared responsibility over resources.[220] Under DOI, the Bureau of Land Management, the National Park Service (NPS), and the U.S. Fish and Wildlife Service (USFWS) each manage 253 million acres, 84 million acres, and 77 million acres of land in Alaska, respectively.[221] Each agency's policies incorporate DOI's tribal consultation policy, and more explicitly extend federal impact to tribal lands and resources. However, as previously discussed, these standards, procedures, and definitions vary widely by agency and appear in a variety of formats (from handbooks and manuals,[222] to formal policies,[223] to mere webpages[224]). They employ different consultation triggers,[225] incorporate the DOI Policy to different degrees,[226] and utilize different procedures for ensuring consistency between consultation and

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and implementation of consultation will consider all aspects of the topic under consideration. The Board will be flexible and sensitive to Tribal cultural matters and protocols. Familiarity with and use of Tribes' constitutions and consultation protocols will help ensure more effective consultation." (emphasis added)).

220. DOI Tribal Consultation Policy, *supra* note 87, at 28446; DEP'T OF THE INTERIOR, DEPARTMENTAL MANUAL § 4.3(C) (effective Nov. 30, 2022) [hereinafter DOI MANUAL], https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf [https://perma.cc/8KAY-QY2R].

221. *Federal Subsistence Management Program: Regions*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/subsistence/regions [https://perma.cc/7LB5-KY28].

222. *E.g.*, BLM MANUAL 1780, *supra* note 99, at 1-15.

223. *E.g.*, Native American Policy for the U.S. Fish & Wildlife Service, 81 Fed. Reg. 4638 (Jan. 27, 2016), https://www.govinfo.gov/content/pkg/FR-2016-01-27/pdf/2016-01615.pdf [https://perma.cc/Y9NH-FHG9].

224. *E.g.*, *Cultural and Natural Resource Consultation*, NAT'L PARK SERV. (last updated Feb. 1, 2021), https://www.nps.gov/articles/000/cultural-and-natural-resource-consultation.htm [https://perma.cc/VZ4A-SJFL] (providing links to DOI and other agency consultation policies).

225. With NPS requiring "meaningful" consultation at the "earliest possible point" for any "direct impact on tribes or tribal lands," USFWS requiring "meaningful" consultation "early in the planning process" for "policies that have tribal implications," and BLM requiring "regular and meaningful" consultation for any actions that have a "substantial direct effect" on tribes (borrowing directly from DOI's definition). *See id.*; U.S. FISH & WILDLIFE SERV., TRIBAL CONSULTATION HANDBOOK 3, 46, 12 (2018), https://www.fws.gov/sites/default/files/documents/Tribal%20Consultation%20Handbook.PDF [https://perma.cc/E64B-E5X9]; BLM MANUAL 1780, *supra* note 99, at 1-1.

226. NPS defaults to the Departmental Tribal Consultation Policy for consultation procedures, while USFWS and BLM lay out their own.

the standards that do exist in agency policies.[227] Subsequently, they have been inconsistently applied in Alaska with respect to protecting subsistence rights.

III. CONSULTATION STANDARDS HAVE BEEN INCONSISTENTLY APPLIED IN ALASKA, TO THE DETRIMENT OF ALASKA NATIVE PEOPLE

Recent case studies demonstrate inconsistent application of federal-tribal consultation standards by federal land managers and federal courts in Alaska. This Part examines instances that warranted tribal consultation, but where narrow application of consultation standards adversely affected tribes' access to subsistence resources. It then compares these cases to others in which Alaska Native tribes were consulted under substantially similar circumstances.

A. Sturgeon v. Frost*: The Dangers of No Consultation*

Alaska Native tribes are particularly susceptible to exclusion from the federal decision-making process and federal courtrooms. The U.S. Supreme Court's controversial decision in *Sturgeon v. Frost* (*Sturgeon II*)[228] demonstrates the consequences of failing to consult with Alaska Native tribes before taking action that significantly impacts tribal lands and resources. In 2016, the U.S. Supreme Court held that, under ANILCA, the federal government's regulatory authority over navigable waters in federally-protected land in Alaska "may be . . . different[]" from its authority over other public lands.[229] Then, in 2019, the U.S. Supreme Court stripped the National Park Service of its general regulatory authority over navigable waters crossing federal conservation system units in Alaska, holding that reserved water rights "merely enable[] the [federal government] to take or maintain the specific 'amount of water'—and 'no more'—required to 'fulfill the purpose of [its land] reservation.'"[230] These rights did not justify generally applicable regulations restricting activities on those waters (such as the use of mechanized hovercrafts on rivers).[231] This holding allowed the State of

227. BLM MANUAL 1780, *supra* note 99, at 1-18.

228. __ U.S. __, 139 S. Ct. 1066 (2019).

229. Sturgeon v. Frost (*Sturgeon I*), 577 U.S. 424, 441 (2016).

230. *Sturgeon II*, 139 S. Ct. at 1079 (quoting Cappaert v. United States, 426 U.S. 128, 141 (1976)).

231. *Id.* The Court reasoned that as federal regulations under ANILCA section 103(c) apply "solely" to public lands, then the hovercraft ban cannot apply to non-public lands within conservation system units. *Id.* at 1082. As ANILCA defined "lands" as "lands, waters, and interests therein," the

Alaska to assume regulatory authority over navigable waters in federally protected lands—the same land and waters that provide critical subsistence and cultural resources for Alaska's tribal communities. Despite serious implications for salmon populations and water quality due to the now unrestricted use of hovercrafts and other machinery on waters flowing through navigable waters,[232] and with predictable implications for Alaska Native tribes relying on subsistence resources, the National Park Service did not consult with tribes in the promulgation of new land management regulations.[233]

The *Sturgeon II* Court acknowledged that such a sweeping holding may "fall short of [NPS'] usual power,"[234] but purported to reconcile its holding with ANILCA's federal subsistence priority in a footnote:

> [T]he term "public lands," when used in ANILCA's subsistence-fishing provisions, encompasses navigable waters . . . . [ANILCA's] provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters.[235]

While this footnote theoretically preserved ANILCA's subsistence

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regulatory exemption in section 103(c) includes navigable waters. *Id.* at 1076–77. Subsequently, the National Park Service may not exercise its "normal regulatory authority" on non-public lands within conservation system units—which include navigable waters over submerged lands belonging to the State. As such, people may use hovercraft on navigable waters running through federally-designated lands. *Id.* at 1087.

232. *See Sturgeon II*, 139 S. Ct. at 1091 n.5 (Sotomayor, J., concurring) ("The Service cannot carry out its duty to 'manage' the park areas . . . if it is estopped from promulgating the necessary rules and regulations."); Craig Jones, *The Impact of* Sturgeon II *on Alaska Subsistence Management: A Chance for Peace in the Jurisdiction Wars*, 36 ALASKA L. REV. 221, 238–38 (2019) (noting that ANILCA requires the Park Service to preserve rivers flowing through conservation system units, a task which becomes "difficult if not impossible with only the authority to control the lands surrounding those waters"); Lindsey Williams, *Implementing* Sturgeon v. Frost*: Changes to the Park Service's Jurisdiction over Navigable Waters in Alaska*, ENV'T & ENERGY L. PROGRAM, HARV. L. SCH. (Apr. 5, 2021), https://eelp.law.harvard.edu/2021/04/sturgeon-v-frost/ [https://perma.cc/N824-36QR] (noting that *Sturgeon II* could "frustrate the purpose of Congress's delegation of management authority to NPS" by impairing its ability to enforce water quality under ANILCA, which could have "major consequences for water quality and wildlife within the parks").

233. *See generally* 36 C.F.R. § 13 (2020) (lacking explicit tribal consultation requirements); *id.* § 13.490 (allowing NPS to restrict subsistence activities only "after consultation with the State and the Federal Subsistence Board," but not with affected tribal communities); *see also* 2020–2021 Station-Specific Hunting and Sport Fishing Regulations, 85 Fed. Reg. 54076, 54102 (Aug. 31, 2020) (codified at 36 C.F.R. § 242), https://www.govinfo.gov/content/pkg/FR-2020-08-31/pdf/2020-16003.pdf [https://perma.cc/T5RN-ADM3] ("In accordance with E.O. 13175, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects.").

234. *Sturgeon II*, 139 S. Ct. at 1085–87.

235. *Id.* at 1080 n.2.

priority,[236] the Court's blanket dismissal of potential impacts on subsistence fishing ignores the complex reality of land management in Alaska.[237]

Under the mandates of E.O. 13175, and NPS policy, tribal consultation is required where any action may have a "substantial direct effect[]" on tribes.[238] Where a tribe has established water rights, and where a federal regulation may affect those water rights, the federal government has a duty to consult under the auspices of E.O. 13175.[239] While Alaska Native tribes cannot rely on treaty language to secure such water rights, many

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236. *See* Robert T. Anderson, *The* Katie John *Litigation: A Continuing Search for Alaska Native Fishing Rights After ANCSA*, 51 ARIZ. ST. L.J. 845, 872 (2019) ("Because the Supreme Court left in place the federal government's authority to enforce the subsistence priority, [prior] decisions constitute binding precedent as to the duty and power to continue to enforce Title VIII on federal reserved waters."); Jones, *supra* note 232, at 238 (noting that the Alaska Federation of Natives viewed the decision "favorably" in light of the Court's decision to leave the subsistence priority "undisturbed").

237. *Sturgeon II* had substantial direct effects on Alaska Native tribes in multiple ways. First, abrogation of the National Park Services' regular managerial authority could have substantial direct effects on subsistence fishing in navigable waters. *See* David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More Effective Voice?*, 60 U. COLO. L. REV. 1009 (1989). Second, in ceding managerial control over navigable rivers to the State, the *Sturgeon II* decision stands to undermine tribal sovereignty. In the wake of *Sturgeon II*, the federal government was forced to pass management of the lower Kuskokwim River into state jurisdictional hands, and the tribes' hard-fought role in fisheries management was thrust into uncertainty. *History & Mission*, KUSKOKWIM RIVER INTER-TRIBAL FISH COMM'N, https://www.kuskosalmon.org/mission-history [https://perma.cc/2SCR-PAYN] (noting the Commission was established as a response to salmon decline due in part to "differing approaches between state and federally-managed waters[] and increased competition between user groups" and for the purpose of developing one management system on the Kuskokwim River); Anna Rose MacArthur, *Management of Kuskokwim King Salmon Uncertain After Dunleavy Order*, ALASKA PUB. MEDIA (Apr. 1, 2021), https://alaskapublic.org/2021/04/01/management-of-kuskokwim-king-salmon-uncertain-after-dunleavy-order/ [https://perma.cc/E6R8-53CF]. Third, the consultation requirement under Alaska state policy is substantially weaker than federal consultation policies. Admin. Order No. 186 (Sept. 29, 2000), https://gov.alaska.gov/admin-orders/administrative-order-no-186/ [https://perma.cc/BUE8-DQ8V] (inviting Alaska Native tribes to enter into "voluntary ongoing consultation" with the State of Alaska to establish a framework for state-tribal relations). In conveying managerial control over all navigable waters to the State, *Sturgeon II* thereby enhances the State's discretion to make resource management decisions that could substantially affect Alaska Native tribes without requiring consultation.

238. *See* Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67249 (Nov. 9, 2000); *Cultural and Natural Resource Consultation*, NAT'L PARK SERV. (last updated Feb. 1, 2021), https://www.nps.gov/articles/000/cultural-and-natural-resource-consultation.htm [https://perma.cc/VZ4A-SJFL].

239. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng's, 255 F. Supp. 3d 101, 155–56 (D.D.C. 2017) (noting, but not deciding, that the Army Corps of Engineers might have a binding duty to consult with the Cheyenne River Tribe on actions affecting the tribe's federally-protected water rights under U.S. Department of Defense tribal consultation instructions); *see also* Winters v. United States, 207 U.S. 564, 576 (1908) (affirming the Fort Belknap Indian Reservation had an implied right to water based on the creation of the reservation, even though water rights had not been explicitly preserved in the agreement).

provisions of the Allotment Act, ANCSA, and ANILCA have "made it clear that access to and use of water was critical to the tribes."[240] Furthermore, the Department of Natural Resources has a process by which Alaska Native corporations may explicitly apply for water reservations.[241] As tribes have a subsistence fishing right to navigable waters flowing through federally reserved lands under ANILCA, federal decisions involving state or federal management of those navigable waters should have triggered a duty to consult.[242]

Additionally, the USFWS and NPS have a duty to consult with tribes for any action that may have a substantial impact on "tribal lands" or on tribal access to fish and wildlife resources.[243] Regulations promulgated pursuant to the *Sturgeon* decisions directly implicated subsistence fishing rights, with the latter impairing federal authority to preserve aquatic ecosystems and limiting non-subsistence access to navigable rivers flowing through National Park Service lands.[244] As such, all subsequent regulations may have substantial implications for tribes relying on the rural subsistence priority to ensure their hunting and fishing rights—which requires tribal consultation. Subsequently, the National Park Service should have contacted Alaska Native tribes for regulations promulgated pursuant to the Court's decision in *Sturgeon I* distinguishing between public and non-public lands in federal conservation units, and certainly following *Sturgeon II* given implications for broad federal deregulation of navigable waters.

Despite this mandate, agencies promulgated numerous regulations post-*Sturgeon* without consulting impacted tribes. For example, in December 2020, NPS revised regulations to exclude submerged lands under navigable waters in National Park System units from the Park Service's ordinary regulatory authority, pursuant to the holding in *Sturgeon II*.[245] Ignoring serious ramifications to subsistence fishing, NPS found that consultation was not required under E.O. 13175 or DOI

240. Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RES. J. 399, 406 (2006).

241. *See* JOE KLEIN, JARROD SOWA, ANN MARIE LARQUIER, KEVIN KEITHER, JASON HASS & LEAH ELLIS, INSTREAM FLOW PROTECTION IN ALASKA, 2017 24 (2017).

242. *See* Navajo Nation v. U.S. Dep't of the Interior, 996 F.3d 623, 630–31 (9th Cir. 2021).

243. *Cultural and Natural Resource Consultation*, NAT'L PARK SERV. (last updated Feb. 1, 2021), https://www.nps.gov/articles/000/cultural-and-natural-resource-consultation.htm [https://perma.cc/VZ4A-SJFL]; Native American Policy for the U.S. Fish & Wildlife Service, 81 Fed. Reg. 4638, 4638 (Jan. 27, 2016), https://www.govinfo.gov/content/pkg/FR-2016-01-27/pdf/2016-01615.pdf [https://perma.cc/Y9NH-FHG9].

244. *See* authorities cited *supra* note 237.

245. 2020–2021 Station-Specific Hunting and Sport Fishing Regulations, 85 Fed. Reg. 54076 (Aug. 31, 2020) (codified at 36 C.F.R. § 242).

consultation policy because the rule would have "no effects" on Alaska Native tribes.[246]

The *Sturgeon I* Court also failed to properly apply the consultation standard in dismissing ANILCA's subsistence-fishing provisions. While DOI's tribal consultation policy excludes "matters that are the subject of litigation,"[247] courts have an obligation to ensure agencies comply with their consultation policies in promulgating rules or policies in the wake of litigation. The Native American Rights Fund and Ahtna Inc., an Alaska Native corporation, filed amicus briefs arguing to extend federal reserved waters in *Sturgeon II*,[248] but the Court dismissed these arguments as "ANILCA's subsistence-fishing provisions . . . [were] not at issue in this case," giving no consideration to how limiting NPS authority might impact subsistence fishing more broadly.[249] At the very least, the *Sturgeon II* Court should have handed down an order directing NPS to consult with tribes prior to the promulgation of any subsequent regulation delimiting NPS regulatory authority over navigable rivers within conservation system units. This would have fallen squarely within the "court order" provision of DOI's tribal consultation policy, requiring the agency to consult on matters "for which a court order limits [the agency's] discretion to engage in consultation."[250] As the National Park Service and the *Sturgeon II* Court failed to properly apply the consultation standards under E.O. 13175 and agency policies, the result may be substantively correct—but it is procedurally contrary to law.

B. The "Ambling" Road to Nowhere: Limiting Consultation Access

The Koyukon Athabascan and Kobuk Iñupiat peoples[251] of Interior Alaska have relied on the Koyukuk River as a vital subsistence and cultural resource since time immemorial.[252] Meandering 425 miles

246. *Id.*

247. DOI Tribal Consultation Policy, *supra* note 87, at 28446.

248. Brief for Alaska Native Subsistence Users as Amici Curiae Supporting Respondents, Sturgeon II, __ U.S. __, 139 S. Ct. 1066 (2019) (No. 17-949).

249. *Sturgeon II*, 139 S. Ct. at 1080 n.2.

250. DOI MANUAL, *supra* note 220, § 4.3(B) n.1.

251. Together, "Koyukon River" communities.

252. *See* U.S. GEOLOGICAL SURV., MAPPING TRADITIONAL PLACE NAMES ALONG THE KOYUKUK RIVER—KOYUKUK, HUSLIA, AND HUGHES, WESTERN INTERIOR ALASKA (2014), https://pubs.usgs.gov/fs/2014/3105/pdf/fs2014-3105.pdf [https://perma.cc/X4AW-54KN]; *Koyukuk*, TANANA CHIEFS CONF., https://www.tananachiefs.org/about/communities/koyukuk/ [https://perma.cc/6N5Q-ANGN].

through the valleys of Western Interior Alaska, the Koyukuk[253] is the single largest contributor to the summer chum[254] salmon run on the Yukon River, and its Chinook[255] salmon population is an important subsistence and commercial fishery.[256] The river also provides essential spawning habitat for sheefish, whitefish, Arctic grayling, and other fish species integral to subsistence fishing communities.[257] The North Fork Koyukuk River passes through a major migration route for the Western Arctic caribou herd,[258] which provides a valuable seasonal food source for Koyukon River communities.[259] Subsequently, the Koyukuk River system plays a significant and enduring role in the nutritional health, cultural experience, spiritual wellbeing, and societal histories of the Athabascan and Iñupiat People.[260]

The Ambler Access Project (AAP) is a proposed 211-mile controlled industrial access road that would slice across the northern reaches of the Koyukuk River to connect the Dalton Highway to the copper-zinc rich Ambler Mining District in Northwest Alaska.[261] First proposed by the Alaska Industrial Development and Export Authority (AIDEA) in

253. The name "Koyukuk" derives from the Central Yup'ik phrase *kuik-yuk*, meaning "a river" (where *kuik* means "river" and *yuk* means "person" or "human being"). 1 STEVEN A. JACOBSON, YUP'IK ESKIMO DICTIONARY 366, 708 (2d ed. 2012).

254. Commonly called "dog salmon."

255. Commonly called "king salmon."

256. Nate Cathcart & Joe Giefer, *Fish Inventories of the Upper Kobuk and Koyukuk River Basins*, NAT'L PARK SERV. (last updated May 29, 2020), https://www.nps.gov/articles/aps-19-1-3.htm#:~:text=The%20Koyukuk%20River%20appears%20to,is%20an%20important%20subsistence%20fishery, [https://perma.cc/D2F9-NN79].

257. Complaint at 24, Alatna Vill. Council v. Padgett, No. 3:2020-cv-00253 (D. Alaska Oct. 7, 2020) [hereinafter Alatna Village Complaint], https://www.tananachiefs.org/wp-content/uploads/2021/09/2020-10-07-TCC-Tribes-Complaint-re-Ambler.pdf [https://perma.cc/4MPV-MJU9].

258. *North Fork of the Koyukuk River*, NAT'L PARK SERV. (last updated Aug. 13, 2020), https://www.nps.gov/gaar/koyukukriver.htm [https://perma.cc/U7LQ-SJRG].

259. W. Arctic Caribou Herd Working Group, *Western Arctic Herd Update*, 17 CARIBOU TRAILS 1 (2017), https://www.adfg.alaska.gov/static/home/library/pdfs/wildlife/caribou_trails/caribou_trails_2017.pdf [https://perma.cc/UAV4-KWUH].

260. U.S. GEOLOGICAL SURV., *supra* note 252; *Koyukuk*, TANANA CHIEFS CONF., https://www.tananachiefs.org/about/communities/koyukuk/ [https://perma.cc/6N5Q-ANGN]. In 2014, the Koyukon communities of Huslia, Koyukuk, and Hughes identified and posted 675 place names along the Koyukuk, recorded stories, meanings, and pronunciations, and documented historic use trail systems to preserve Koyukon cultural history and traditional area knowledge. U.S. GEOLOGICAL SURV., *supra* note 252.

261. *About*, AMBLER ACCESS ALASKA INDUS. DEV. & EXP. AUTH., https://ambleraccess.org/ [https://perma.cc/VHK9-S3TS].

2015,[262] the AAP would require the construction of an extensive road network, forty-four gravel mining sites, dozens of bridges, thousands of culverts (to allow salmon passage), and over 200 miles of compacted soil across the Koyukuk River and Interior landscape.[263] Such a sprawling project would also require lots of federal permits and review processes under a litany of environmental laws.[264] To get these permits, AIDEA submitted a consolidated application to the Bureau of Land Management (BLM) in November 2015.[265] Before approving its construction, BLM assessed the project's potential environmental impacts.[266] In its Final Environmental Impact Statement (EIS), issued in March 2020, BLM concluded that the project would likely affect "communities that harvest subsistence resources within or near the project area,"[267] have "indirect or cumulative impacts to communities who use the caribou that migrate through,"[268] and could impact the drinking water for Koyukuk River communities by oil or hazardous substance spills along the roadway route.[269] The Final EIS also identified a total of fifty-three subsistence communities potentially impacted by the project.[270]

Under BLM's tribal consultation policies, the agency must engage in "regular and meaningful consultation . . . with federally recognized tribes in the development of Federal . . . decisions that have tribal implications."[271] It must meet with tribes "early" in the project planning process, "ensure[] appropriate opportunities for tribal input," and

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262. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., AMBLER ROAD ENVIRONMENTAL IMPACT STATEMENT FACT SHEET (2019) https://www.blm.gov/sites/blm.gov/files/uploads/Planning_Alaska_AmblerRoadEIS_Fact_Sheet.pdf [https://perma.cc/922K-QC52].

263. Alatna Village Complaint, *supra* note 257, at 24.

264. Including section 404 "dredge and fill" permits under the Clean Water Act, "incidental take" permits under the Endangered Species Act, and rights-of-way permits, among others.

265. Alatna Village Complaint, *supra* note 257, at 31.

266. Pursuant to its obligations under the National Environmental Policy Act. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., AMBLER ROAD FINAL ENVIRONMENTAL IMPACT STATEMENT N-1 (Vol. 3 2020) [hereinafter AMBLER FEIS], https://eplanning.blm.gov/public_projects/nepa/57323/20015366/250020508/Ambler_FEIS_Volume_3,_Appendices_L_-_R.pdf [https://perma.cc/4E5F-4J52].

267. AMBLER FEIS, *supra* note 266, at appx. L-1, L-26.

268. *Id.*

269. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., AMBLER ROAD FINAL ENVIRONMENTAL IMPACT STATEMENT, 3-10, 3-24–3-25 (Vol. 1 2020), https://eplanning.blm.gov/public_projects/nepa/57323/20015364/250020506/Ambler_FEIS_Volume_1-_Chp_1-3_&__Appendices_A-F_.pdf [https://perma.cc/B4P9-PRWD].

270. AMBLER FEIS, *supra* note 267, at L-1, L-5–L-6 (tbl. 1).

271. BLM MANUAL 1780, *supra* note 99, at 1-1 (requiring BLM to engage in "regular and meaningful consultation . . . with federally recognized tribes in the development of Federal . . . decisions that have tribal implications").

"[f]oster . . . trust between the BLM and tribes through collaborative stewardship in the management of tribal and public land resources."[272] Despite the potential community impacts identified in its Final EIS, and its statutory and policy-imposed duty to consult with these communities, BLM issued a "Programmatic Agreement" and "Record of Decision" essentially approving the project's continuance in April and July 2020—largely without the "meaningful" involvement of affected Koyukon River communities.[273]

Instead, BLM postponed consultation processes until after it made critical decisions;[274] did not reinitiate consultation with tribes after substantial changes to permit applications or require a supplemental EIS;[275] failed to study valuable tribal resources and cultural landscapes;[276] failed to consider alternative, less-harmful routes;[277] added logistical inconveniences for consultation participants that actively discouraged tribal participation;[278] and gave presentations during meetings that provided little to no opportunity for tribal input.[279]

In response, six Koyukon Athabascan and Kobuk Iñupiat Tribal Councils and Villages,[280] the Tanana Chiefs Conference (a tribal consortium of forty-two tribes across Interior Alaska), and a host of environmental non-profit groups sued BLM and other federal land managers[281] in October 2020 for inadequately reviewing impacts of the AAP.[282] The complaint alleged violations of several federal

272. *Id.* at 1-2–1-3.

273. *See* Alatna Village Complaint, *supra* note 257, at 38–39.

274. *Id.* at 69 ("All . . . of these [federal] decisions were made long before the substantive . . . evaluation and consultations were set to begin in the post-[decision] period under the [Programmatic Agreement]. For broad landscape-level historic properties, however, the selection of the project alternative is, in itself, the most impactful decision. *After-the-fact consultation on a narrow, site-specific basis cannot meaningfully address the impacts inexorably flowing from the overall location of the route and the design features associated with the project.*" (emphasis added)).

275. *Id.* at 34.

276. *Id.* at 68.

277. *Id*. at 85.

278. *Id.* at 71.

279. *Id.* ("[T]he content of meetings consisted mainly of presentations made by Defendants to the attendees and discussions between agency officials concerning the text of the [Programmatic Agreement]. There was little or no two-way dialogue with affected Tribes about substantive . . . issues . . . .").

280. The Alatna Village Council, Allaket Tribal Council, Evansville Tribal Council, Huslia Tribal Council, Tanana Tribal Council, and Native Village of Kobuk Traditional Council. Alatna Village Complaint, *supra* note 257, at 1.

281. In addition to AIDEA, Ambler Metals, L.L.C., Alaska Native Regional Corporations, and the State of Alaska were involved as intervenor-defendants.

282. *See* Alatna Village Complaint, *supra* note 257. They were joined in the lawsuit by a variety

environmental and administrative laws[283] and sought injunctive and declaratory relief against BLM for its "unlawful decisions."[284] The tribes asserted that allowing the AAP to continue in the face of these violations would "threaten [their] inherent human right . . . to continue traditional hunting, fishing, and gathering practices that serve as the foundation of their culture, spirituality, and way of life."[285] The tribes also challenged BLM's lackluster efforts to consult on the project, calling the process "rushed, flawed, premature, and inadequate."[286] The complaint equated such flagrant violations of BLM's consultation procedures[287] to a violation of tribal sovereignty and a failure to adequately consider tribal concerns and needs in light of the federal government's "trust responsibilities and special commitments to Alaska Natives."[288]

In October 2021, District of Alaska Judge Sharon Gleason granted

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of local and national environmental nonprofit organizations, including the Center for Biological Diversity, National Audubon Society, Sierra Club, and the Wilderness Society. *See* Complaint at 2, N. Alaska Env't Ctr. v. Bernhardt, No. 3:20-cv-00187-TMB (D. Alaska Aug. 4, 2020).

283. Including the Alaska National Lands Conservation Act, National Historic Preservation Act, National Environmental Protection Act, Clean Water Act, Federal Land Policy and Management Act, and the Administrative Procedure Act. Alatna Village Complaint, *supra* note 257, at 2.

284. *Id.* at 14–15.

285. *Id.* at 4.

286. *Id.*; *see also* Natasha Singh, Press Release, *Interior Villages Join TCC in Ambler Road Lawsuit* (Oct. 7, 2020), https://www.tananachiefs.org/interior-villages-join-tcc-in-ambler-road-lawsuit/ [https://perma.cc/988A-J3EF] (statement of Harding Sam, First Chief of Alatna: "In a rush to get this decision done, the consultation processes of the government entities involved in the decision were not meaningful. Congress put into law the Alaska National Interest Lands Conservation Act, the National Historic Preservation Act, the Clean Water Act, and the National Environmental Protection Act, to require the government to consider local community input with specific standards-those laws have been violated in the issuance of the final evaluation for the Ambler Road Project."); *id.* (statement of Carl Burgett, First Chief of Huslia: "This road could change life in our region more than any other single decision in history, and yet the people most affected by it have largely been left out. We are therefore compelled to ask the courts to protect our hunting and fishing resources and activities, ancestral lands and waters of cultural and economic significance along the hundreds of thousands of acres of the proposed Ambler Road because the federal agencies failed to do so."); Alatna Village Complaint, *supra* note 257, at 71 ("These and other decisions finalized in the [programmatic agreement] were required to be made after robust and meaningful consultations with Plaintiffs, other Tribes, and other consulting parties, but Defendants failed to ensure that such consultations were carried out.").

287. Alatna Village Complaint, *supra* note 257, at 72.

288. *Id.* at 17. The Plaintiffs highlighted the specific and peculiar timing of BLM's review processes. According to PJ Simon, Chief and Chairman of the Tanana Chiefs Conference, the tribes sued BLM because it "did not follow the federal mandates of government-to-government consultation . . . during the height of the pandemic." Alena Naiden, *Environmentalists and Alaska Villages Continue Court Challenge of Permits for Ambler Road Project*, ANCHORAGE DAILY NEWS (Dec. 10, 2021) [hereinafter Naiden, *Court Challenge of Permits*], https://www.adn.com/alaska-news/rural-alaska/2021/12/10/environmentalists-and-alaska-villages-continue-court-challenge-of-permits-for-ambler-road-project/ [https://perma.cc/6ZEM-5E9T] (quoting PJ Simon, Chief and Chairman of the Tanana Chiefs Conference).

Intervenor-Defendant NANA Regional Corporation's motion for stay until late November 2021.[289] In December 2021, conservation groups filed for summary judgment, challenging the federal decision-making process and asking the court to void project-related permits that would allow noise pollution, gravel discharge into waters and wetlands, and road construction across the Koyukuk and other affected rivers.[290]

In the face of strong and continuing tribal resistance to the project,[291] BLM created a Subsistence Advisory Committee for the AAP in September 2021 "so people [could] voice their concerns about the road potentially harming wildlife and fish in the area."[292] The Committee's purpose was to provide recommendations to the AAP on project development activities and required AAP to "respond[]" to the Committee's formal recommendations.[293] AAP managers promised that Committee working groups would include representatives from "every community along the access corridor" because residents "know how better to protect the subsistence resources" than developers or state or federal entities.[294]

Again, such promises to involve tribal leaders and affected Native communities in the consultation process fell flat. In January 2022, the Committee met to discuss project impacts on subsistence resources.[295] However, when tribal chiefs and officially-delegated representatives from several Koyukon River villages showed up to attend, the leader from only one village was allowed to participate.[296] According to Harding Sam, First Chief of the Alatna Tribe and SAC working group member,[297] other tribal

289. Order Granting Defendants' Motion for Stay, Alatna Vill. Council, et al. v. Padgett, et al., No. 3:20-cv-00253-SLG (D. Alaska Oct. 27, 2021), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2021/20211027_docket-320-cv-00253_order-1.pdf [https://perma.cc/HGP4-HSQ2].

290. *See* Plaintiffs' Opening Brief for Summary Judgment at 18, N. Alaska Env't Ctr. v. Haaland, No. 3:20-cv-00187-SLG (D. Alaska Dec. 1, 2021); Naiden, *Court Challenge of Permits*, *supra* note 288.

291. *Id.*

292. Alena Naiden, *Residents Advocate for Subsistence Resources Along Ambler Road*, ARCTIC SOUNDER (Nov. 26, 2021) [hereinafter Naiden, *Residents Advocate*], http://www.thearcticsounder.com/article/2147residents_advocate_for_subsistence_resources [https://perma.cc/NU72-SMZJ] (quoting AIDEA Project Communications Manager Charlene Ostbloom).

293. AMBLER ACCESS AIDEA, AMBLER ACCESS PROJECT UPDATE (Feb. 15, 2022), https://www.doi.gov/sites/doi.gov/files/4-aidea-ambler-road-report-508.pdf [https://perma.cc/7G6W-P8YN].

294. Naiden, *Residents Advocate*, *supra* note 292 (quoting Charlene Ostbloom, Project Communication Manager at Alaska Industrial Development and Export Authority).

295. Sam et al., *supra* note 1.

296. *Id.* Harding Sam, Chief of the Alatna Tribe, was already a member of the Committee.

297. The only tribe allowed to participate in the meeting. *Id.*

leaders and representatives were "ejected from the meeting[] with no explanation or justification other than 'you are not invited.'"[298] Notably, while tribal delegates and village Chiefs were locked out, federal and state officials, development stakeholders, and ANC representatives[299] "stayed in the room, behind those closed doors."[300]

The *Ambler* litigation underscores several problems inherent in how tribal consultation policies are applied in Alaska. First, even though ANILCA requires federal land managers to consider the impact of their actions on subsistence fish and wildlife populations and habitat (through RACs and the FSB), it is unclear when the FSB's consultation duties are triggered for federal actions that may affect important subsistence resources.[301] The FSB is also limited in its authority to consult for actions it is not directly taking (i.e., direct subsistence management decisions). Even though BLM is represented on the FSB, consultation duties often fall upon the agencies directly associated with the proposed action (in this case, BLM).

Second, while BLM has a duty to consult on all actions that may have a "substantial direct effect" on Alaska Native tribes, and purports to go beyond rubberstamping,[302] these duties are highly discretionary. Under BLM's consultation policy, it must "consider . . . tribal issues and

298. *Id.* The Chief Chairman of the Tanana Chiefs Conference, the consortium of Alaska's forty-two Interior tribes, was also excluded from the conversation. *Id.*

299. Including AIDEA, NANA Regional Corp., and Ambler Metals L.L.C., among others. *Id.*

300. *Id.* In February 2023, the Allakaket and Huslia tribes announced their departure from the *Ambler* lawsuit. Press Release, Allakaket & Huslia Tribal Councils, Allakaket Tribal Council and Huslia Tribal Council Vote Unanimously to Withdraw from Ambler Access Litigation (Feb. 16, 2023), https://s3.documentcloud.org/documents/23684708/press-release-allakaket-huslia-withdraw-from-aap-lawsuit-feb-16-2023.pdf [https://perma.cc/PH2N-FQ7R]. While the two tribes still oppose the road, they also considered the economic, educational, and employment opportunities the Ambler project might bring to the villages. *Id.* Importantly, this departure occurred only after two meetings with Alaska Governor Mike Dunleavey in 2022, which marked the "beginning of several productive conversations with him and amongst [their] tribal & community members." *Id.* According to the village councils:

> [C]onstructive conversations with the project proponents and the federal agencies overseeing the project will not only be beneficial to our communities, but it also demonstrates our commitment to ensuring responsible development of our lands. Having voices that represent the communities is critical in bringing both subsistence needs and Traditional Knowledge to the forefront of the project and providing opportunities for our people.

Id.; Alex DeMarban, *2 Tribes Are Withdrawing from Lawsuit Against Proposed Ambler Road in Alaska*, ANCHORAGE DAILY NEWS (last updated Feb. 18, 2023), https://www.adn.com/alaska-news/rural-alaska/2023/02/16/2-tribes-are-withdrawing-from-lawsuit-against-proposed-ambler-road-in-alaska/ [https://perma.cc/8GH2-S4EL].

301. *See* FSB POLICY, *supra* note 99 (lacking a clear mandate for when tribal consultation should occur, and which agencies need to be involved).

302. BLM MANUAL 1780, *supra* note 99, at 1-15.

conflicts" at the start of any environmental review or land use planning.[303] However, to identify possible impacts, BLM wields vast decision-making power: it "may or may not" meet with official representatives of Alaska Native tribal governments or ANCSA Corporations,[304] need only employ "reasonable" efforts to hold meetings with tribal officials,[305] and need only give "good faith consideration" to any issues raised by tribes during consultation.[306] As demonstrated, such "reasonable" and "good faith" efforts to consult can include holding consultation meetings far from impacted areas and communities, excluding officially designated tribal members from decision-making conversations, and allowing ANCs to step in as representatives for non-ANC member communities.[307]

Even when agencies trigger consultation, they retain vast discretion in deciding how and when consultation will occur, allowing them to "follow" their own consultation processes without engaging in meaningful consultation.[308] These case studies demonstrate the inherent dangers of relying on E.O. 13175 and internal agency policies to guide consultation procedures.

C. Consultation Inconsistencies

The *Sturgeon* and *Ambler* cases (and, most recently, the Willow Project) stand in stark contrast to other instances where federal agencies consulted with Alaska Native tribes on similar subsistence management decisions.[309] For instance, in *Peratrovich v. United States*,[310] the District Court of Alaska handed down an order to the USFWS requiring the FSB to identify submerged lands that remained federal domain upon

303. *Id.* at 3-1.

304. *Id.*

305. *Id.* at 1-1 ("[C]onsultation . . . [i]ncludes a reasonable and sustained effort to invite tribes to consult, which may include several invitations and/or other methods of offering engagement."); *see also id.* at A2-2 ("An engagement with tribes that allows for a reasonable opportunity to identify their concerns, provide input on the projects effects, and participate in resolving any adverse effects.").

306. *Id.* at 1-10.

307. *See* Alatna Vill. Complaint, *supra* note 257, at 40, 77, 80, 126; Sam et al., *supra* note 1.

308. *See supra* section I.C–D. BLM's Tribal Relations Manual even sets forth factors that constitute "[s]ufficient [c]onsultation" based on district and appellate court cases—many of which were blatantly ignored during the Ambler consultation process. BLM MANUAL 1780, *supra* note 99, at A2-1–A2-2 (listing factors courts consider in deeming agency consultation efforts "sufficient"); TRIBAL RELATIONS (P) A2-2 (2016), https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf [https://perma.cc/JEQ9-5F9C] (listing consultation factors).

309. *See* Sturgeon I, 577 U.S. 424 (2016); AMBLER FEIS, *supra* note 267; RECORD OF DECISION, *supra* note 3.

310. No. 3:92-CV-0734-HRH, 2011 WL 13210232 (D. Alaska Oct. 4, 2011).

Statehood.[311] In promulgating a regulation pursuant to this order, the USFWS acknowledged that:

> The Alaska National Interest Lands Conservation Act does not provide specific rights to Tribes for the subsistence taking of wildlife, fish, and shellfish. However, *because tribal members are affected by subsistence fishing, hunting, and trapping regulations*, the Secretaries, through the [FSB], *will provide Federally recognized Tribes . . . an opportunity to consult on this proposed rule [impacting subsistence management*].[312]

This order recognized the potential direct and indirect effects of distinguishing federal and state land on Native subsistence resources and subsequently required the USFWS to consult with tribes to enforce ANILCA's subsistence priority. In turn, the USFWS promised to—and followed through on—substantively consulting with impacted tribes in the federal decision-making process.[313]

A similar rationale for consultation could have applied to the NPS regulations abrogating federal authority in the wake of *Sturgeon II*, which also affected federal authority to protect subsistence resources (fishing). It also could have justified consultation in the *Ambler* litigation, wherein the proposed permits posed a substantial threat to caribou and salmon populations on which Koyukon River communities depend. The juxtaposition of these cases exposes a highly discretionary, arbitrary, and checkerboard history of federal-tribal consultation in Alaska. Should Alaska Native tribes bring future cases involving ANILCA's subsistence priority, agency actions affecting subsistence resources will be ripe for judicial review of compliance with tribal consultation policies.

IV. PUBLIC LAWS 108-199 AND 108-447: ENFORCING CONSULTATION FOR THE BENEFIT OF ALASKA NATIVE TRIBES

Consultation policies currently fail to protect Alaska Native

311. *Id.* at *1.

312. Subsistence Management Regulations for Public Lands in Alaska, 81 Fed. Reg. 36,836, 36,837 (June 8, 2016), https://www.govinfo.gov/content/pkg/FR-2016-06-08/html/2016-13374.htm [https://perma.cc/6HNN-ES53] (emphasis added).

313. Subsistence Management Regulations for Public Lands in Alaska, 83 Fed. Reg. 3079, 3083 (Jan. 23, 2018), https://www.fws.gov/policy/library/2018/2018-00461.html [https://perma.cc/73MV-DMJZ] ("The Secretaries, through the Board, provided a variety of opportunities for consultation . . . . On April 12, 2016, the Board provided Federally recognized Tribes and Alaska Native Corporations a specific opportunity to consult on this rule prior to the start of its public regulatory meeting. Federally recognized Tribes and Alaska Native Corporations were notified by mail and telephone and were given the opportunity to attend in person or via teleconference.").

subsistence rights and enforce ANILCA's rural priority. While their framework provides an illusory nod to consulting Alaska Native tribes, federal consultation procedures function as a checkbox rather than an avenue for meaningful and substantive involvement in federal decision-making.[314] As demonstrated in the above case studies, they may even act as a mechanism by which federal agencies actively eschew their trust obligations to Alaska Native communities. Subsequently, legal scholars, tribal lawyers, and Alaska Native rights advocates have proposed numerous reforms for enforcing consultation. These proposals include heightening consultation procedures,[315] broadening judicial application of the *Accardi* doctrine,[316] and expanding the "substantial direct effects" test used for consultation triggers.[317] Others recommend amending ANILCA to provide Alaska Native residents with a more explicit priority for subsistence resources,[318] or the enactment of a consultation statute that requires agencies to consult through uniform standards.[319] Still others advocate for throwing consultation out entirely and replacing it with a consent-based framework.[320]

While these are all reforms worthy of consideration, they depend on the discretion and political motivation of agencies, courts, and state and

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314. *See* Haskew, *supra* note 41, at 74 ("[T]he big payoff that consultations provide is the meager opportunity for Native Americans to express their opinions and desires—with no guarantee that their input will be fully considered or even respected.").

315. *See, e.g.*, *id.* at 74 (advocating for "raising consultations to their optimal expression as a legal device").

316. *See, e.g.*, Unopposed Motion for Leave to File Amicus Brief of Native American Budget and Policy Institute and New Mexico Center on Law and Poverty as Amici Curiae in Support of Plaintiff's Motions for Summary Judgment at 8–9, Nos. 1:20-cv-00119-BAH, 1:20-cv-00127-BAH (D.D.C. July 13, 2020) (arguing that the U.S. Department of Agriculture violated the *Accardi* doctrine and E.O. 13175 by failing to follow its own consultation procedures and thereby "prejudicing Native governments that did not have a meaningful opportunity to consult with the agency regarding a rule that would cause harm to Native communities").

317. *See, e.g.*, Starkey, *supra* note 161, at 327 (recommending ANILCA's subsistence priority be reconstrued more explicitly as "Indian legislation" subject to liberal canons of construction and broader, more protective interpretation by courts).

318. *See, e.g.*, McGee, *supra* note 27, 239–40 (discussing the possibility of voting on a constitutional amendment allowing the State to enforce ANILCA's rural priority).

319. *See, e.g.*, Colette Routel & Jeffrey Holth, *Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 473 (2013) ("Any consultation statute enacted by Congress should create uniform rules . . . . While the statute should be flexible enough to allow particular tribes and agencies to negotiate consultation compacts that meet their individual needs, establishing a set of baseline standards that apply to all agencies absent contrary tribal agreement will simplify the current system."); Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes Act, H.R. 3587, 117th Cong. (2021) (discussed *infra* Part V).

320. *See, e.g.*, Miller, *supra* note 44, at 94–98 (arguing that the United States should adopt the United Nation's Declaration on the Rights of Indigenous Peoples' "free, prior, and informed consent" standard); Kinnison, *supra* note 85, at 1323 (arguing same).

federal legislatures to prioritize and enforce consultation actions. Instead, the most directly implementable solution to the consultation enforcement problem may not lie in judicial advocacy or legislative intervention at all, but in the existing statutory framework.[321] This Comment recommends Alaska Native claimants and litigators defending subsistence rights should use two laws to enforce consultation and ANILCA's rural priority. This Part argues how use of these laws could require federal agencies to give Alaska Native tribes a more substantive voice in actions impacting subsistence resources.

A. Public Laws 108-199 and 108-447 Were Enacted to Require Consultation

Two statutory provisions have laid dormant within the tribal consultation framework in Alaska: Public Laws 108-199 and 108-447.[322] Often overlooked, they define agency responsibilities under E.O. 13175 but have never been directly utilized in consultation litigation.[323] In 1975, Congress passed the Indian Self-Determination and Education Assistance Act (ISDEAA).[324] This Act sought to enhance tribal involvement in federal assistance programs and services and give greater autonomy to tribes in the administration of programs through government contracts—thereby promoting tribal self-determination.[325] While Title II focused on providing assistance to local school districts educating Native children, Title I sought to advance tribal self-determination in contracts between tribes and the federal governments.[326] Specifically, Title I "[d]irects the Secretary of the Interior . . . to contract with any tribal organization to carry out the services and programs the Federal Government provides to Indians."[327]

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321. *See* Haskew, *supra* note 41, at 74 ("[A]n ill-defined consultation policy is no substitute for increased recognition of tribal sovereignty, or substantive federal commitments to defend tribal interests.").

322. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004), *amended by* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3267 (2004).

323. Conversation with Professor Eric Eberhard, Univ. of Wash. Sch. of L. (Sept. 29, 2022) (notes on file with *Washington Law Review*).

324. 25 U.S.C. §§ 5301–5423.

325. *Self-Determination*, U.S. DEP'T OF INTERIOR INDIAN AFFS., https://www.bia.gov/regional-offices/great-plains/self-determination [https://perma.cc/XG4C-XN2U].

326. *See* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

327. CONG. RSCH. SERV., SUMMARY: S.1017 – 93RD CONGRESS (1973-1974), S. 1017, 93rd Cong. (1973–1974), https://www.congress.gov/bill/93rd-congress/senate-bill/1017 (last visited Apr. 30, 2023).

Title I also explicitly "[p]reserves the existing sovereign immunity of any Indian tribe" and the "existing trust responsibility of the United States with respect to the Indian people."[328] Congressional findings in the statute and its legislative history emphasized the federal government's "historical and special legal relationship with, and resulting responsibilities to, American Indian people."[329]

Congress added a note to ISDEAA in January 2004 in an appropriations law "[m]aking appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the fiscal year ending September 30, 2004, and for other purposes."[330] Under division H, detailing "[m]iscellaneous [a]ppropriations and [o]ffsets," section 161 reads:

> The Director of the Office of Management and Budget *shall hereafter consult* with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175.[331]

On its face, this provision appeared to simply clarify that the Office of Management and Budget (OMB) must consult with Alaska Native corporations (ANCs) to the same extent as individual tribes—in other words, that E.O. 13175 mandated the same duty to consult with ANCs as it did with tribes.[332] This is not a particularly interesting or novel conclusion, given the corporate land management scheme set up under ANCSA. However, what sets this provision apart from all other sources of consultation law examined thus far is where it appears, the language it uses, and the source of power it invokes: in a federal statute passed by Congress, mandating consultation ("shall hereafter consult"), with

328. *Id.* (stating that the ISDEAA "[d]eclares that the Congress recognizes a [f]ederal obligation to be responsive to the principle of self-determination through Indian involvement, participation, and direction of educational and service programs").

329. 25 U.S.C. § 5301.

330. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004), *amended by* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3267 (2004).

331. *Id.* (emphasis added).

332. *Id.*; Memorandum from Peter Orszag, Dir., Off. of Mgmt. and Budget, on Guidance for Implementing E.O. 13175, Consultation and Coordination with Indian Tribal Governments, to the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, at 2–3 (July 30, 2010) [hereinafter Memorandum from Peter Orszag] (stating that "pursuant to Pub. L. 108-199, . . . 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'"); *see also* RANDALL S. ABATE, CLIMATE CHANGE IMPACTS ON OCEAN AND COASTAL LAW: U.S. AND INTERNATIONAL PERSPECTIVES 512 (2015) (noting that, under the omnibus bill, "the requirement for OMB to consult with tribes under E.O. 13175 was explicitly extended to include Alaska Native corporations 'on the same basis as Indian tribes'" (quoting Memorandum from Peter Orszag, *supra*)).

explicit reference to E.O. 13175.[333]

Suddenly, under federal law, OMB was required to consult with Alaska Native corporations "on the same basis as" federally recognized tribes on federal actions it undertook that might have substantial direct effects on Native people.[334] Aside from NHPA's explicit statutory directive to consult with tribes,[335] and select provisions of ANILCA instructing the Secretary of the Interior to consult with ANCs on certain limited federal actions,[336] this was the first time the federal-tribal consultation duty and E.O. 13175 were directly recognized and embedded within federal statutory law.[337] But section 161 only applied the duty to consult to the Office of Management and Budget.

Congress changed this less than twelve months later. In Public Law 108-447 (Consolidated Appropriations Act, 2005), under Title V ("General Provisions"), section 518, Congress included the following language:

> Public Law 108-199 is amended in division H, section 161, by inserting "and all Federal agencies" after "Office of Management and Budget".[338]

Public Law 108-199 as amended reads as follows:

> The Director of the Office of Management and Budget *and all Federal agencies shall hereafter consult* with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175.[339]

Now, *all* Federal agencies, not just OMB, had a statutory duty to consult Alaska Native corporations on the same basis as federally-recognized tribes.[340] Two truths underlie this framework: (1) all federal agencies have a *statutory* duty to consult with federally-recognized tribes and Alaska Native corporations, and (2) this duty to consult is the same for both tribes and ANCs.

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333. Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004).

334. *Id.*

335. 54 U.S.C. § 302706(b) ("In carrying out its responsibilities under [§ 106] of this title, a Federal agency *shall* consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a)." (emphasis added)).

336. *See* 16 U.S.C. § 3112.

337. Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004).

338. Pub. L. No. 108-447, tit. V § 518, 118 Stat. 2809, 3267 (2004).

339. *Id.* (emphasis added).

340. Memorandum from Peter Orszag, *supra* note 332, at 2–3 (stating that "pursuant to Pub. L. 108-199, as amended by Pub. L. 108-447, . . . 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'"); *see* ABATE, *supra* note 332, at 512 n.47.

In 2010, OMB Director Peter Orszag issued guidance to all federal agencies affirming that tribal consultation officials must "consider[] the fundamental principles and policymaking criteria stated in [E.O. 13175] in formulating or implementing policies . . . that have tribal implications."[341] Other agencies have recognized this extension of E.O. 13175 to Alaska Native corporations.[342] In 2012, the Department of the Interior issued a notice in the Federal Register clarifying that these sections *directly* applied E.O. 13175 to Alaska Native corporations, in addition to federally-recognized tribes.[343] Thus, "[f]ederal agencies are . . . *required to consult* and coordinate with ANCSA corporations on the same basis as Indian tribes in developing policies that would affect these corporations *and their tribal shareholders*."[344] The notice stated that the purpose of this provision was to clarify that, even though the government's relationship with ANCs was fundamentally different from its relationship with individual tribes, the consultation requirements established pursuant to DOI's policies would be the same.[345] It also provided a summary of the proposed DOI consultation policy with ANCSA corporations and a request for public comment.[346]

B. Sections 161 and 518 Should Be Construed as Permanent Legislation

Section 161 (in Public Law 108-199) and section 518 (in Public Law 108-447) together recognize and impose a statutorily-enforceable mandate for all federal agencies to consult with Alaska Native tribes and corporations under the auspices of E.O. 13175—i.e., on actions that might have a substantial and direct effect on Alaska Native lands and resources.[347] Just because these laws are included in appropriations laws does not make them less binding on federal agencies today.[348] This section

341. Memorandum from Peter Orszag, *supra* note 332, at 3; *see* ABATE, *supra* note 332, at 512.

342. *See, e.g.*, *Cultural and Natural Resource Consultation*, NAT'L PARK SERV. (last updated Feb. 1, 2021), https://www.nps.gov/articles/000/cultural-and-natural-resource-consultation.htm [https://perma.cc/VZ4A-SJFL] (observing that "Congress . . . required that '(t)he Director of the Office of Management and Budget [and all Federal agencies] shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175'" (quoting Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004))).

343. Draft Policy on Consultation with Alaska Native Claims Settlement Act Corporations, 77 Fed. Reg. 13,137 (Mar. 5, 2012).

344. *Id.* (emphasis added).

345. *Id.*

346. *Id.*

347. Memorandum from Peter Orszag, *supra* note 332, at 2–3.

348. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL

analyzes the statutory construction of sections 161 and 518 and argues why they can be construed as permanent legislation.

In addition to allocating funding for specific purposes, appropriations laws often include provisions restricting appropriations or constraining the conditions of their use.[349] These come in the form of "provisos" directly attached to appropriating language and "general provisions" (or, colloquially, "this or that provisions") which may apply to a specific act or have general applicability.[350] Once a provision has been enacted into law, the difference between these provisions fades.[351] Appropriations laws are not special. Just like other statutes, they must be passed by the House and Senate and then signed by the President or sustain a veto override to be enacted.[352] Thus, through appropriations laws, Congress may enact general or permanent legislation or repeal, amend, or suspend existing statutes.[353]

However, there are limits; Congress may only pass permanent legislation through appropriations laws "so long as its intention to do so is clear."[354] While courts have adopted a "strong presumption" against interpreting such provisions as permanent, and presume legislative changes are only intended to last for that fiscal year if language is ambiguous,[355] Congress can rebut this presumption with clear language

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APPROPRIATIONS LAW 2-85 (4th ed. 2016) [hereinafter GAO PRINCIPLES], https://www.gao.gov/assets/2019-11/675709.pdf ("Provisions of this type are no less effective merely because they are contained in appropriation acts.").

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 2-59.

353. *Id.*; *see also* Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973) (noting appropriations laws are "just as effective a way to legislate as are ordinary bills relating to a particular subject").

354. *See* GAO PRINCIPLES, *supra* note 348, at 2-59; Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992); McHugh v. Rubin, 220 F.3d 53, 57 (2d Cir. 2000); Cella v. United States, 208 F.2d 783, 790 (7th Cir. 1953) ("Congress has the power to enact permanent legislation in an appropriation act." (citing United States v. Dickerson, 310 U.S. 554, 555 (1940))); Strawser v. Atkins, 290 F.3d 720, 734 (4th Cir. 2002) ("'Where Congress chooses' to amend substantive law in an appropriations rider, 'we are bound to follow Congress's last word on the matter even in an appropriations law.'" (quoting City of Los Angeles v. Adams, 556 F.2d 40, 49 (D.C. Cir. 1997))).

355. GAO PRINCIPLES, *supra* note 348, at 2-86 ("Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered."); *see* Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269, 273 (D.C. Cir. 1992) ("While appropriation acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not . . . and that when they do, the change is only intended for one fiscal year." (internal citations omitted)).

evidencing permanence.[356] The Office of the General Counsel for the U.S. Government Accountability Office (GAO) adopted the following rule to determine whether a provision appearing in appropriation acts can be construed as permanent legislation:

> A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses *language indicating futurity* or if the provision is *of a general character bearing no relation to the object of the appropriation*.[357]

Thus, identifying a provision in an appropriations law as permanent involves two steps: (1) identifying words of futurity, and (2) examining other indicia of permanence based on the statutory context and framework.[358] In analyzing sections 161 and 518 under this two-step test, the language makes clear that Congress intended this federal consultation mandate to be a permanent and ongoing one.

1. Use of "Hereafter" Suggests Permanent Intent

The first step in determining congressional intent for permanence in appropriations laws is whether Congress included "words of futurity."[359] According to the GAO, "the presence or absence of words of futurity [is] the crucial factor" in determining congressional intent for permanence.[360] The most common word of futurity is "hereafter."[361] Courts consistently hold that the word "hereafter" in appropriations law provisions evidences intent to make legislation permanent.[362] For instance, in *Cella v. United States*,[363] the Seventh Circuit held that insertion of the word "hereafter" before a provision granting the Secretary of Agriculture the authority to suspend livestock registration in the Agriculture Appropriations Acts

356. *See* Atl. Fish Spotters Ass'n v. Evans, 321 F.3d 220, 224 (1st Cir. 2003) ("Congress may create permanent, substantive law through an appropriations bill only if it is clear about its intentions. Put another way, Congress cannot rebut the presumption against permanence by sounding an uncertain trumpet.").

357. GAO PRINCIPLES, *supra* note 348, at 2-86 (emphasis added).

358. *Id.* at 2-86–2-92.

359. *Id.* at 2-86.

360. *Id.* at 2-92; *see also id.* at 2-90 ("Legislative history is also relevant, but has been used for the most part to support a conclusion based on the presence or absence of words of futurity.").

361. *Id.* at 2-89.

362. *See* Cella v. United States, 208 F.2d 783, 790 (7th Cir. 1953).

363. 208 F.2d 783 (7th Cir. 1953).

from 1925 to 1943 was permanent.[364] Noting that "[t]he use of the word 'hereafter' by Congress as a method of making legislation permanent is a well-known practice," the court thus found the provision an enactment of general and permanent legislation.[365] Similarly, in *United States v. Vulte*,[366] the U.S. Supreme Court held that inserting the word "hereafter" in the Army Appropriation Act for 1903 rendered the provision permanent.[367]

The GAO Principles also require consideration of the "precise location" of the word and the "sense in which it is used."[368] If "hereafter" modifies the subject of the sentence or a verb containing a directive, courts routinely interpret this as evidence of futurity.[369] Thus, while not a guarantee,[370] use and placement of the word "hereafter" lends strong evidence that Congress intended to give the provision permanent effect. In contrast, courts generally construe provisions lacking "hereafter" or other words of futurity as impermanent.[371]

In section 161, Congress' unambiguous use of the word "hereafter" strongly supports a finding of permanence.[372] The plain language of the provision directs that the Director of the Office of Management and Budget "shall *hereafter* consult" with Alaska Native corporations on the same basis as federally-recognized tribes.[373] Under the first step of GAO's analysis, the presence of "hereafter" provides clear congressional intent that the OMB Director "shall" consult with ANCs under the auspices of E.O. 13175 in perpetuity.[374] Consistent with the Supreme Court's and Seventh Circuit's approach in *Vulte* and *Cella*, in which Congress placed "hereafter" before similar directives in general appropriations laws, "[u]ndoubtedly this was done for the purpose of making the legislation

364. *Id.*

365. *Id.* at 790.

366. 233 U.S. 509 (1914).

367. *Id.* at 512.

368. GAO PRINCIPLES, *supra* note 348, at 2-87.

369. *See Cella*, 208 F.2d at 790.

370. *See* Auburn Hous. Auth. v. Martinez, 277 F.3d 138, 150 (2d Cir. 2002) (declining to find "hereafter" determinative of permanent effect when such a reading would require repealing another provision in the same act).

371. GAO PRINCIPLES, *supra* note 348, at 2-89 ("[T]he absence of the word 'hereafter' is viewed as telling evidence that Congress did not intend a provision to be permanent."); *see also* Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269, 274 (D.C. Cir. 1992) (refusing to impose a permanent construction on an appropriation provision in the absence of words of futurity or permanency).

372. Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004).

373. *Id.* (emphasis added).

374. GAO PRINCIPLES, *supra* note 348, at 2-76 to 2-82.

permanent."[375]

The placement and structure of "hereafter" in the context of the provision also provides evidence of permanent intent. Situated between two verbs—"shall" and "consult"—"hereafter" serves to modify the primary directive of the provision (for the OMB Director to consult) and define its temporal conditions (from enactment onward).[376] Additionally, interpretation of this provision as permanent law would not repeal another provision in Public Law 108-199, it does not face the same challenge of conflicting statutory interpretation as in other cases where "hereafter" was insufficient to confer permanence.[377]

Section 518 incorporates and preserves the meaning of "hereafter" by merely "amend[ing]" section 161 to include other parties subject to the consultation requirement (namely, "all Federal agencies"). Rather than disrupting the original meaning of "hereafter," Congress intentionally retained its temporal directive in defining the entities subject to the directive. Indeed, the addition of "all Federal agencies" could be construed as positive reinforcement of the provision's permanent intent because it preserves the grammatical integrity of the initial directive—"shall hereafter consult"—while drastically expanding the scope of its applicability. Thus, the final construction directs that both the OMB Director and all federal agencies "shall hereafter consult" with Alaska Native corporations under the mandates of E.O. 13175.[378] The use of "hereafter" in section 161 and its preservation in section 518 all but confirms Congress's intent that the consultation mandates survive as permanent legislation.

2. Other Indicia Suggest Permanence

While words of futurity are the "crucial factor,"[379] other indicia may be used to determine permanent intent for general appropriations provisions.[380] These factors include: (1) repetition of the provision in annual or subsequent acts; (2) inclusion in the United States Code; (3) legislative history; (4) phrasing as positive authorization; (5) relationship between the provision and the object of the appropriations law; and (6) whether a temporary construction would yield meaningless

375. Cella v. United States, 208 F.2d 783, 790 (7th Cir. 1953).

376. *See* Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004).

377. *See* Auburn Hous. Auth. v. Martinez, 277 F.3d 138, 150 (2d Cir. 2002).

378. *See supra* section IV.A.

379. GAO PRINCIPLES, *supra* note 348, at 2-92.

380. *Id.* at 2-89.

or absurd results.[381] The first four factors (repetition, inclusion in the United States Code, legislative history, and phrasing) are non-dispositive and are generally used as support based on the presence or absence of words of futurity.[382] Thus, they "have never been used as the sole basis for finding permanence in a provision without words of futurity."[383] The last two factors (relationship and temporary construction), in contrast, hold greater persuasive power and can furnish independent support for permanence, even in the absence of words of futurity.[384]

a. Repetition

When Congress repeats a provision in a subsequent appropriations law, the GAO noted this duplication can indicate that Congress did not intend its construction to be permanent.[385] However, given that provisions with words of futurity can be repeated, which serves instead to emphasize the law's continuing applicability as an "excess of caution,"[386] "[t]his factor is of limited usefulness."[387] The importance of words of futurity in weighing the significance of repetition further diminishes the factor's utility in isolation.[388]

Sections 161 and 518 were not repeated in subsequent appropriation acts (excepting the latter, which amended the former). This makes sense. As both provisions served as amendments to an existing statute (ISDEAA), their non-repetition furnishes Congress's intent that the legislative changes were meant to endure rather than lapse at the end of each fiscal period. In concert with the presence of "hereafter," the non-repetition of the provisions demonstrates that Congress intended sections 161 and 518 to have continuing and recurring applicability.

b. Inclusion in the United States Code

The GAO notes that formal codification of a provision is "relevant" in considering permanence, but it is "not controlling."[389] The GAO Principles require us to look to Congress's reasoning for not codifying as

381. *Id.* at 2-89 to 2-91.

382. *Id.* at 2-92.

383. *Id.*

384. *Id.*

385. *Id.* at 2-89.

386. *Id.* (quoting 36 Comp. Gen. 386, 436 (1956)).

387. *Id.* at 2-89. The GAO further notes that even when provisions with words of futurity are repeated, the intent behind the repetition can be "inconclusive." *Id.* at 2-90.

388. *Id.*

389. *Id.*

evidence of non-permanence, but "failure to include a provision in the Code would appear to be of no significance" in determining Congress's intent regarding permanence.[390]

While Congress did not codify sections 161 and 518 within the language of ISDEAA, they were both published as "statutory notes" appending 25 U.S.C. § 5301 ("Congressional statement of findings"). According to the Office of the Law Revision Counsel, the United States Code "*includes* statutory provisions set out as statutory notes . . . that implement or relate to statutory provisions in the Code."[391] Whether these notes, which can include whole acts or individual provisions, appear in the Code itself or as statutory notes is a mere "editorial decision" by the codifiers and has no bearing on its codification.[392] The Office of Law Revision Counsel makes this explicit:

> A provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note, and even when it does not appear in the Code at all. The fact that a provision is set out as a note is merely the result of an editorial decision and has no effect on its meaning or validity. Similarly, the appearance of a provision as a note should not be interpreted as a commentary on its relevance or importance, as many statutory notes provide crucial information about the Code sections they follow.[393]

While this incorporation excludes "most acts that are temporary or special, such as those that appropriate money for specific years or that apply to only a limited number of people or a specific place," public laws enacting *general* legislation—such as sections 161 and 518—are included.[394] Even though codification of these laws is not determinative of permanence, their publication as statutory notes appended to 25 U.S.C. § 5301 further evidences Congress's intent for them to inform ISDEAA's interpretation in perpetuity.

c. Legislative History

As with repetition, words of futurity dictate the significance of a provision's legislative history in determining permanence. Indeed, "[l]egislative history by itself has not been used to find futurity where it

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390. *Id.*

391. *Detailed Guide to the United States Code Content and Features*, OFF. OF THE L. REVISION COUNS., https://uscode.house.gov/detailed_guide.xhtml#notes_statutory [https://perma.cc/4GCK-VVP7] (emphasis added).

392. *Id.*

393. *Id.* (describing the "[v]alidity of statutory notes").

394. *Id.*

is missing in the statutory language."[395]

While the legislative history underlying these provisions is scant, the legislative intent to extend the directive beyond the OMB Director to "all Federal agencies" in section 518 is clear.[396] In identifying the section as an "amend[ment]," the drafters retained the original consultation directive in section 161.[397] Thus, permanence can be inferred through the amendment itself, which incorporates words of futurity[398] and imposes the same directive under those conditions to all federal agencies subject to E.O. 13175.

d. Phrasing as Positive Authorization

The GAO views a positive authorization or directive, rather than a "restriction on the use of an appropriation," as evidence of permanence.[399] However, as with the factors discussed thus far, this factor is usually considered alongside words of futurity in determining permanent intent.[400]

Sections 161 and 518 both contain explicit directives—evidenced by use of the word "shall"—to consult with Alaska Native corporations.[401] These provisions contain positive grants of authority (or rather, mandates) for the OMB Director and all federal agencies to do an action unrelated to the use of appropriations (consultation). Given that this directive is temporally continuing, widely applicable, and does not impose bounded time and place restrictions on appropriations spending, the positive phrasing evidences permanence.

e. Degree of Relationship

The degree of relationship between the subject matter of the provision and the surrounding text of the appropriations law bears strongly on permanent intent.[402] Provisions directly related to the appropriations law and specific fiscal directives demonstrate weak congressional intent for permanence.[403] Conversely, the more general and distant a provision is from the subject matter of an appropriations law, the more likely a court

395. GAO PRINCIPLES, *supra* note 348, at 2-90 (citing Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269, 274 (D.C. Cir. 1992)).

396. Pub. L. No. 108-447, tit. V § 518,118 Stat. 2809, 3267 (2004).

397. *Id.*

398. *See supra* section IV.B.1.

399. *Id.*

400. *Id.*

401. *Id.*; Pub. L. No. 108-199, div. H. § 518, 118 Stat. 3, 452 (2004).

402. GAO PRINCIPLES, *supra* note 348, at 2-90.

403. *Id.*

will view it as permanent legislation.[404] For instance, the 1984 Comptroller General of the United States, Milton J. Socolar, analyzed a provision relating to energy tax credits embedded within a miscellaneous section of the Supplemental Appropriations Act of 1983.[405] The surrounding text did not include appropriations related to taxes or energy.[406] Finding the provision in question "include[d] no such reference limiting its effect to the life of an appropriation" and "[stood] in marked contrast" to the other provisions in the section, Comptroller Socolar concluded that the provision was intended to be permanent legislation.[407]

Sections 161 and 518 are general provisions that have no relationship with their surrounding subject matter. Congress embedded both provisions within miscellaneous chapters that have no direct relation to consultation, Alaska Native corporate governance, or E.O. 13175. These chapters instead contain a varied assortment of appropriations restrictions and general legislation (titled "Miscellaneous Appropriations and Offsets" and "General Provisions," respectively).[408] Section 161 is tucked between a provision renaming a courthouse in Albuquerque, New Mexico and a provision allocating fifty million dollars for road improvements in Florida and Washington, D.C.[409] Likewise, section 518 sits between a general provision easing restrictions on government access to commercial information technology and one clarifying a proposed rule about real estate brokerage.[410] Like the tax provision in the Supplemental Appropriations Act of 1983, these provisions stand in stark contrast to the hodge-podge of appropriations and "this or that" provisions that surround them. The weak relationship between the content of sections 161 and 518 and their respective appropriations laws provides strong evidence that Congress intended them as permanent legislation.

f. Meaningless or Absurd Results

The final factor in assessing permanence is whether construing the provision as temporary would yield meaningless or absurd results.[411] "[A]

404. Sen. Hatfield, U.S. Comm. on Appropriations, B-214058 (Comp. Gen. Feb. 1, 1984) ("Where the provision is of a general nature, bearing no relation to the object of the appropriation act, it may also be found to constitute permanent legislation.").

405. *Id.*

406. *Id.*

407. *Id.*

408. Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004); Pub. L. No. 108-447, tit. V. § 518, 118 Stat. 2809, 3267 (2004).

409. Pub. L. No. 108-199, div. H. § 161, 118 Stat. 3, 452 (2004).

410. Pub. L. No. 108-447, tit. V § 518, 118 Stat. 2809, 3267 (2004).

411. GAO PRINCIPLES, *supra* note 348, at 2-91.

longstanding rule of statutory construction [is] that a statute should not be interpreted in a way which renders it ineffective or futile."[412] Numerous administrative decisions lend support to permanent constructions of otherwise useless appropriations provisions—even those lacking words of futurity. For instance, in a 1929 administrative decision, the GAO found that a provision with no other indicia of permanence was permanent when it was supposed to take effect on the last day of the fiscal year.[413] If read as temporary, the provision would have had a lifespan of less than twenty-four hours, which the GAO found was "clearly inconsistent with legislative intent."[414] Similarly, the GAO construed a provision prohibiting pay increases for federal judges as permanent when a temporary construction would have required banning increases during a period when no increases could be made.[415] Thus, only a permanent construction gave the provision teeth.

While the above examples are absurd in that a temporary construction completely guts the provision of all meaning, the GAO also recognizes permanence where a temporary construction would substantially undermine congressional intent. In a GAO opinion analyzing a general tax provision preventing retroactive application of IRS energy tax credit decisions, the agency found the provision would be "rendered substantially ineffective" if it was only temporary.[416] If the provision's lifespan was tethered to that of the appropriations law, this would allow the IRS to continue retroactive applications after a designated time period—the very evil the provision sought to remedy.[417]

Similarly, a temporary construction of sections 161 and 518 would kill their consultation directives—particularly given the latter's amendment of the former. First, section 161 would be meaningless if it was temporally bounded to the appropriations law. Given that the original law mandates consultation—itself a long and convoluted process that involves complying with the specific policies of OMB and the mandates of E.O. 13175—on a continuing basis with all Alaska Native corporations, a temporary provision that ends with the fiscal period is illogical.

Second, section 518 must be read to amend what was at the time, presumably, an active law. Reading this provision, which "insert[s] 'and

412. Sen. Hatfield, U.S. Comm. on Appropriations, B214058 (Comp. Gen. Feb. 1, 1984) (citing Fed. Trade Comm'n v. Manager, Retail Credit Co., 515 F.2d 988, 994 (D.C. Cir. 1975)).

413. A-29818, 9 Comp. Gen. 248 (Dec. 16, 1929).

414. GAO PRINCIPLES, *supra* note 348, at 2-91 (citing A-29818, 9 Comp. Gen. 248 (Dec. 16, 1929)).

415. 62 Comp. Gen 54 (Nov. 23, 1982).

416. Sen. Hatfield, U.S. Comm. on Appropriations, B-214058 (Comp. Gen. Feb. 1, 1984).

417. *Id.*

all Federal agencies' after 'Office of Management and Budget'" into the original law, it is clear Congress intended the consultation mandate in section 161 to be a permanent one. Otherwise, like the provisions found "clearly inconsistent with legislative intent," the amendment in section 518 would have nothing to amend.

Third, in amending what was presumably a permanent law, section 518 itself must be presumed to be permanent. A temporary construction of one provision but not the other would create different consultation mandates for the OMB Director (originally) and then the OMB Director and all federal agencies (as amended), an interpretation which is not supported by the legislative history and which would yield meaningless results. A clearer interpretation of both laws is that Congress intended the initial consultation mandate to be a continuing one, with section 518 simply expanding the scope of its applicability to encompass all federal agencies. To avoid meaningless and absurd results, sections 161 and 518 must be read as permanent.

C. How Public Laws 108-199 and 108-447 Can Enforce Consultation and ANILCA's Rural Priority

As permanent legislation amending the ISDEAA, sections 161 and 518 offer another source of statutory law to enforce agency consultation with Alaska Native tribes and corporations on subsistence management decisions. Specifically, these provisions clearly mandate consultation and can provide a stronger cause of action for Alaska Native claimants suing agencies for failing to uphold their consultation obligations.

First, Public Laws 108-199 and 108-447 codified the consultation directives of E.O. 13175 in statutory law. Unlike agency policies, which courts can construe as judicially unenforceable, or E.O. 13175 itself, which explicitly denies a cause of action, these laws mandate agency consultation with Alaska Native corporations pursuant to obligations under E.O. 13175.[418] In other words, all federal agencies *shall* consult with Alaska Native corporations in developing regulations, proposed legislation, and other policies or actions that have "substantial direct effects" on Alaska Native corporations and tribal shareholders.[419] This confers a clear, judicially enforceable cause of action under the

418. *See, e.g.*, Tribal Consultation and Coordination Policy of the U.S. Department of Commerce § 8 (May 21, 2013), https://2010-2014.commerce.gov/sites/default/files/documents/2013/august/doc_final_policy_1.pdf [https://perma.cc/WH6C-KLXV] ("[T]hrough two consolidated appropriations acts, Congress *required* federal agencies to consult with Alaska Native Corporations on the same basis as federally recognized Indian Tribes under E.O. 13175." (emphasis added)).

419. Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67249 (Nov. 9, 2000).

Administrative Procedure Act (APA).[420]

Under the APA, a court must "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action, findings, and conclusions" that violate the law or are "arbitrary and capricious."[421] While it is notoriously difficult to sue an agency for inaction,[422] an agency's failure to consult an Alaska Native corporation would subject to it to judicial enforcement as an "action unlawfully withheld" or as an action that violates the clear mandates of Public Laws 108-199 and 108-447. Like the National Historic Preservation Act (NHPA), which directs that agencies "shall consult with any Indian tribe . . . that attaches religious and cultural importance to property," the directive to consult under these appropriation acts is "based on a statutory requirement . . . , and, as such, is judicially enforceable through the [APA]."[423] Therefore, Alaska Native corporations would not need to resort to creative legal arguments or apply *Accardi* to encourage courts to enforce internal consultation policies. As permanent legislation, these appropriation acts could provide a stronger, statutory cause of action enforceable under the APA.

Second, while these laws only apply to Alaska Native corporations, Alaska Native tribes and non-corporate representatives could leverage them to recognize a broader consultation right under E.O. 13175. The language of sections 161 and 518 not only commands agencies to consult with ANCs, but also presumes that federal agencies must consult with "federally recognized tribes" under E.O. 13175. This provides a standalone statutory requirement that all federal agencies must also consult with Alaska Native tribes under E.O. 13175. Therefore, non-corporate tribal members could turn to Public Laws 108-199 and 108-447 to enforce consultation obligations.

Third, ANC and Alaska Native tribes could use sections 161 and 518 to enforce the rural priority and subsistence rights under ANILCA. In framing consultation as an affirmative duty embedded in statute, ANCs and tribes are more likely to win on claims alleging procedural deficiencies (for instance, failure to act pursuant to the mandates of

420. 5 U.S.C. §§ 701–706.

421. *Id.*

422. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658 (2004) (noting the Supreme Court's "reluctance to allow judicial review of [agency] inaction"); JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION (2016), https://sgp.fas.org/crs/misc/R44699.pdf [https://perma.cc/NWN2-NXXT].

423. *See* Suagee, *supra* note 108, at 44.

E.O. 13175 or acting contrary to such mandates).[424] While other statutory consultation mandates have limited scope and applicability,[425] Public Laws 108-199 and 108-447 could expand the reach of tribal consultation to contexts beyond historical preservation—such as subsistence management and protection of ANILCA's rural priority.

Following enactment of Public Law 108-447, federal agencies issued a flurry of statements, orders, press releases, and policies promising to consult with Alaska Native corporations on the same basis as federally-recognized tribes and as required by E.O. 13175.[426] Many of these commitments recognized the consultation mandate as a "relationship *required by* statute for consultation and coordination with Alaska Native corporations."[427] While E.O. 13175 "is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law,"[428] the appropriations provisions constitute a clear "mandate to agencies to fulfill trust obligations in part through consultation."[429] By grounding consultation in statutory law, Congress issued a clear directive that "all Federal agencies" must consult with impacted Alaska Native groups on federal actions that could affect subsistence resources.[430] Thus, agency decisions impacting Native subsistence rights—like the regulations impacting federal management in *Sturgeon*, or approval of resource extraction activities in *Ambler* or *Willow*—must be made in consultation with ANCs and tribes.

This interpretation is squarely in line with ANILCA's rural priority, mandating that rural residents of Alaska receive priority for subsistence uses of fish and wildlife resources. If agencies ignore their statutory mandate to consult with impacted ANCs and tribes on actions affecting

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424. *See* ABATE, *supra* note 332, at 512 (noting that "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"); Suagee, *supra* note 108, at 44.

425. *See, e.g.*, the National Historic Preservation Act, 54 U.S.C. § 302706(b) (often referred to as NHPA § 101(d)(6)). NHPA only applies to the preservation of historical and cultural tribal property (through federal registration of TCPs). The NHPA has primarily been utilized to preserve sites and objects of religious and cultural significance for tribes; however, recent scholarship has explored the expansion of TCPs to entire subsistence species or populations and natural landscapes of cultural and historic significance (such as rivers). *See* Ristroph, *supra* note 24; Suagee, *supra* note 108, at 44.

426. *E.g.*, Tribal Consultation and Coordination Policy of the U.S. Department of Commerce § 8 (May 21, 2013), https://2010-2014.commerce.gov/sites/default/files/documents/2013/august/doc_final_policy_1.pdf [https://perma.cc/WH6C-KLXV]; Subsistence Management Regulations for Public Lands in Alaska, 77 Fed. Reg. 12477, 12479 (Mar. 1, 2012).

427. Subsistence Management Regulations for Public Lands in Alaska, 77 Fed. Reg. at 12479.

428. Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67252 (Nov. 9, 2000).

429. ABATE, *supra* note 332, at 512.

430. *Id*.

subsistence resources, they are clearly not prioritizing rural interests.[431] Subsequently, Alaska Native corporations or tribes could use the statutory mandate of Public Laws 108-199 and 108-447 to bring failure to consult claims under the APA and enforce their subsistence rights under ANILCA's rural priority. As the effects of climate change on Alaska's resources loom large, using these appropriations laws to enforce consultation procedures may be an increasingly vital tool for protecting Alaska Native subsistence rights.[432]

D. Inherent Limitations of Using Public Laws 108-199 and 108-447

Public Laws 108-199 and 108-447 are not silver bullets for enforcing consultation or protecting Alaska Native subsistence interests. There are inherent challenges to using these statutes as the basis of failure to consult claims.

First, the provisions incorporate and rely on the vague language and standards set forth under E.O. 13175. As previously discussed, agencies and courts have difficulty determining when agencies have fulfilled their consultation obligations. For instance, a reviewing court could find that the two meetings between BLM and the Nunamiut People of Anaktuvuk Pass in 2019 to discuss the Willow Project satisfied the "meaningful consultation" requirement under E.O. 13175, and thus that BLM satisfied the consultation directive under sections 161 and 518. These provisions merely require federal agencies to *consult* with Alaska Native groups; it does not require that they consult well, or that they incorporate Alaska Native perspectives into their decisions.

Second, E.O. 13175 *itself* is not judicially enforceable. While this Comment argues these statutes embed and codify E.O. 13175 standards into a judicially enforceable claim under the APA,[433] E.O. 13175 remains

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431. *See* Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3114 ("Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.").

432. ABATE, *supra* note 332, at 512 ("With climate change, . . . federal agencies are making myriad decisions that may affect tribal trust resources, including those related to oil and gas development, shipping, safety of life at sea, and protection of species threatened by climate change. In the fact of such climate-related federal action, consultation is gaining prominence as an important component of federal agency decision-making processes.").

433. *See* GAO PRINCIPLES, *supra* note 348, § E (discussing the enforceability of appropriations provisions in federal spending packages); ABATE, *supra* note 332, at 512 ("Although EO 13175 'is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law,' OMB Guidance states that the tribal consultation official must certify that EO requirements are met 'in a meaningful and timely manner' when submitting draft regulations to OMB." (first quoting Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67249, 67252 (Nov. 9, 2000); and then quoting Memorandum from Peter Orszag, *supra* note 332, at 4))).

vulnerable to revocation or amendment by subsequent administrations. Revoking E.O. 13175 would severely undercut the enforceability of sections 161 and 518. As both provisions require federal agencies to consult with Alaska Native corporations "on the same basis as Indian tribes under [E.O.] 13175," eliminating E.O. 13175 would jeopardize their consultation mandate. Therefore, these laws could stand as statutory requirements that are judicially enforceable under the APA—so long as E.O. 13175 stands as a valid federal order.

Third, the statutes extend the mandates of E.O. 13175 explicitly to Alaska Native *corporations*—but not to Alaska Native tribal village or community members who are not ANC shareholders. Under ANCSA, Alaska Native tribes had the option of "buying in" to the corporate framework or "opting out" through regaining traditionally reserved land.[434] Therefore, not every Alaska Native community or village is necessarily represented by a village or regional ANCSA corporation. Among those villages and regions that did incorporate under ANCSA, there is substantial and increasing competition between regional and village corporations and between regional for-profit corporations and Native representatives.[435] Even within a single village, there may be ANC shareholders and non-ANC shareholders—all of whom are entitled to a rural priority under ANILCA, but only a portion of whom are statutorily entitled to consultation with federal agencies under Public Laws 108-199 and 108-447.[436] While this Comment argues the statutory language carries an inherent, underlying order to also consult with "federally recognized tribes," a reviewing court could find this interpretation beyond the scope of Congress' intent. By extending consultation to corporations, these provisions could perpetuate existing inequities within the corporate framework set forth under ANCSA.[437]

Despite these drawbacks, Public Laws 108-199 and 108-447 provide a statutory basis for viable statutory causes of action for Alaska Native groups bringing failure to consult claims.

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434. *See* Gary C. Anders, *Social and Economic Consequences of Federal Indian Policy: A Case Study of the Alaska Natives*, 37 ECON. DEV. CULTURAL CHANGE 285, 290 (1989).

435. *Id*. at 291.

436. Conversation with Neesha Stellrecht, U.S. Fish & Wildlife Serv. (Nov. 5, 2021) (notes on file with *Washington Law Review*) (discussing internal conflicts between ANC and non-ANC members in Nuiqsut over subsistence fishing and whaling practices); *see also* Nathaniel Herz, *ANCSA Made Only Natives Born Before December 1971 Corporate Shareholders. Those Born After Want Change.*, ANCHORAGE DAILY NEWS (last updated Dec. 21, 2021), https://www.adn.com/business-economy/2021/12/16/ancsa-made-only-natives-born-before-december-1971-corporate-shareholders-those-born-after-want-change/ [https://perma.cc/7EYR-AGDG] (documenting intergenerational disputes between original ANC shareholders and non-shareholder descendants).

437. *See supra* section II.C.

V. THE FUTURE OF CONSULTATION IS UNCERTAIN, BUT OPTIMISTIC

Recent shifts in federal-tribal consultation policy provide reasons for optimism. President Biden's January 2021 memorandum nudged the narrative toward greater agency respect for tribal sovereignty and increased involvement of tribal actors in federal decision-making.[438] Tribal leaders responded positively to the memorandum. According to Fawn Sharp, President of the National Congress of American Indians:

> President Biden has demonstrated that the needs of tribal nations are an urgent priority for his administration. I am both excited and encouraged that the Biden Administration is taking so many meaningful and significant steps towards Tribal Nations' priority issues—respect for sovereignty, racial equity, urgent action on climate change, protection of sacred sites and ancestral ecosystems, and the commitment to meaningful Tribal consultation.[439]

Following Biden's memorandum, the Department of the Interior (DOI) announced a series of regionally-specific consultations with tribal leaders to better ensure that future agency efforts at addressing crises, such as COVID-19, economic security, racial justice, and climate change, are "inclusive of Tribal Nations' priorities and recommendations."[440] These conversations were meant to identify best practices to improve consultation and clarify the "[m]eaningful consultation" standard.[441] According to DOI Tribal Governance Officer Ann Marie Downes, these talks were important for "center[ing] Tribal voices [in] address[ing] the health, economic, racial justice, and climate crises—all of which disproportionately impact American Indians and Alaska Natives."[442]

In November 2022, Biden issued another memorandum in response to feedback received from tribes aimed at clarifying "uniform standards for tribal consultation."[443] In addition to providing a litany of requirements

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438. *Biden Reaffirms Tribal Sovereignty*, NATIVE NEWS ONLINE (Jan. 27, 2021), https://nativenewsonline.net/currents/biden-reaffirms-tribal-sovereignty [https://perma.cc/7KLM-623F].

439. *Id.*

440. Press Release, U.S. Dep't of the Interior, Interior Announces Series of Tribal Consultations in Recognition of the Importance of Nation-to-Nation Relationship (Feb. 11, 2021), https://www.doi.gov/pressreleases/interior-announces-series-tribal-consultations-recognition-importance-nation-nation [https://perma.cc/4GY4-Y4XS].

441. *Id.*

442. *Id.*

443. Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (Dec. 5, 2022).

and procedures for how agencies can best comply with the mandates of E.O. 13175,[444] Biden recognized that the "Nation-to-Nation relationship" between the U.S. government and tribal Nations exists "under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions."[445] In light of these heightened consultation requirements and enhanced attention on consultation as a means of fulfilling the government's federal trust responsibility, Public Laws 108-199 and 108-447 might receive new life. However, President Biden's recent decision to approve the Willow Project, against the protests of North Slope Native leaders calling for consultation, stands contrary to his declared commitment to promote the "right of Tribal governments to self-govern and supports Tribal sovereignty and self-determination" through "regular, meaningful, and robust consultation."[446] President Biden should continue his efforts to prioritize tribal sovereignty by clarifying and strengthening consultation requirements and refusing to approve projects affecting tribal interests until agencies have fulfilled their consultation obligations.

In May 2021, Representative Raúl Grijalva of Arizona introduced H.R. 3587, called the Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes Act (RESPECT Act).[447] Representative Grijalva proposed H.R. 3587 to address the U.S. government's rampant abuse of check-box consultation procedures and its consistent failure to provide timely notice, consider tribal interests, and satisfy its consultation duties.[448] H.R. 3587 sought to heighten and specify consultation requirements and included a mandate that agencies satisfy them prior to federal decision-making. Unlike E.O. 13175 and agency policies, H.R. 3587 construed the consultation trigger—"tribal impacts"—broadly.[449] "Tribal impacts" means "*any* Federal action that *may have an impact* on one or more Tribal Governments" on any matter touching tribal lands, practices, resources, treaty rights, or the "Federal

444. Including, but not limited to: designating an agency point of contact; determining whether consultation is appropriate; providing notice of consultation; conducting the consultation; documenting and keeping a record of the consultation; and requiring training for all agency employees working with tribes or on policies with tribal implications. *Id.* at 74,480–82.

445. *Id.* at 74,479.

446. *Id.*

447. RESPECT Act, H.R. 3587, 117th Cong. (2021).

448. *Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes (RESPECT) Act: Hearing Before the H. Comm. on Nat. Res.' Subcomm. for Indigenous Peoples of the U.S.*, 117th Cong. (2021) (statement of Stacy L. Leeds, Foundation Professor of Law and Leadership, Sandra Day O'Connor College of Law, Arizona State University) ("In some cases the United States is more concerned about protecting itself from future liability than in effectively executing its trust duties to Indian nations and people.").

449. H.R. 3587 § 5(11), 117th Cong. (2021).

Government's trust responsibility to Tribal Governments."[450] If enacted, this bill would have firmly grounded the federal trust responsibility in statutory law and agency consultation obligations.

Additionally, under the proposed bill, agencies would be required to perform specific tribal consultation procedures, including preparing tribal impact statements,[451] identifying sacred sites in good-faith,[452] establishing outreach and meeting arrangements,[453] and executing a memorandum of agreement between the agency and tribal government prior to any decision that might have tribal implications.[454] H.R. 3587 also sought to clarify notoriously ambiguous consultation standards (such as those defining "good faith" consultation),[455] require that the head of tribes be recognized as equal signatories in consultation agreements,[456] and detail how the United States can better fulfill its federal trust responsibility.[457] Unlike ANILCA and other statutes "requiring" consultation, H.R. 3587 was replete with specific consultation mandates.[458]

If enacted as law, H.R. 3587 would have bulldozed the way for tribes seeking to enforce their consultation rights. Tribes would no longer have to rely on creative arguments under the *Accardi* doctrine and APA to convince courts to find agency policies judicially enforceable. Nor would they have to suffer through the regulatory shell game of empty

450. *Id.*

451. *Id.* § 201(1).

452. *Id.* § 201(2).

453. *Id.* § 202.

454. *Id.* § 202(e)

455. *Id.* § 202(f)(1) ("The agency, or lead agency, shall make a good faith effort through sustained interaction and collaboration to reach a consensus resulting in a memorandum of agreement.").

456. *Id.* § 202(e) ("[C]onsultation shall conclude only upon the execution of a memorandum of agreement signed by the head of the agency, or lead agency, and the head of the affected Tribal Government or the members of the designated Tribal Leader Task Force.").

457. *Id.* § 3(a)(4) ("[O]wing to this trust relationship, the United States has a responsibility to consult with Tribal Governments on a government-to-government basis when formulating policies and undertaking activities that may have impacts on Tribal lands and interests.").

458. *See, e.g.*, *id.* § 101 ("Consultation with Tribal Governments *shall occur* before undertaking any proposed Federal activity or finalizing any Federal regulatory action that may have Tribal impacts. Additionally, consultation with Tribal Governments *shall occur* for all activities that would affect any part of any Federal land that shares a border with Indian Country." (emphasis added)); *id.* § 201 ("[T]he agency, or lead agency, *shall prepare* a Tribal Impact Statements . . . make a good faith effort to identify areas that contain sacred sites . . . and publish the completed Tribal Impact Statements in the Federal Register." (emphasis added)); *id.* § 202 ("The agency, or lead agency, *shall negotiate* with each affected Tribal Government to determine the format, agenda, and goals of a consultation meeting, and *shall keep thorough documentation* of all steps taken to engage the affected Tribal Government in consultation meetings." (emphasis added)); *id.* § 202(f) ("The agency, or lead agency, *shall make a good faith effort* through sustained interaction and collaboration to reach a consensus resulting in a memorandum of agreement." (emphasis added)).

consultation procedures that allows agencies to eschew their consultation obligations. Nor would Alaska Native tribes and corporations be limited to reliance on Public Laws 108-199 and 108-447 as legal hooks to enforce consultation duties and ANILCA's rural priority under E.O. 13175. Indeed, the bill explicitly included Alaska Native tribes as entities subject to its protections.[459] H.R. 3587 would effectively sweep away all uncertainty regarding the enforceability of consultation mandates by providing an umbrella cause of action for inadequate consultation claims.

This would be a just and overdue outcome—but it remains a highly theoretical one. The most recent action taken on the bill was in November 2022, when it was referred to the subcommittee on Antitrust, Commercial, and Administrative Law.[460] The bill died in committee, and it has not been reintroduced in the 118th Congress.[461]

President Biden's memoranda and Representative Grijalva's bill could represent a sea change in federal-tribal relations by directly engaging and prioritizing Alaska Native needs and concerns. The U.S. government should continue to prioritize tribal sovereignty and self-determination by enforcing consultation between agencies and impacted tribal communities. In the wake of Willow, whether it will abide by its own consultation policies is less certain.

CONCLUSION

While imperfect, federal-tribal consultation is often the only mechanism available for tribes to provide input on federal subsistence management decisions that might affect their traditional lands and resources. Substantive failure to consult is particularly harmful for Alaska Native communities that rely heavily on subsistence resources and lack treaties to enforce their traditional hunting and fishing rights. Agency consultation policies have historically failed to hold federal land managers accountable for consulting on actions that may affect subsistence resources on which Alaska Native tribes and village communities depend. While it would be desirable to force courts to adopt protective interpretations of consultation policies under the *Accardi* and *Oglala*

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459. *Id.* § 5(10) ("The term 'Tribal Government' means the governing body of any Indian *or Alaska Native Tribe*, band, nation, pueblo, village, community, component band or component reservation, individually identified (including parenthetically) in the list published most recently as of the date of enactment of this Act pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994." (emphasis added) (citations omitted)).

460. *Id.*

461. *See* OFF. OF LEGIS. OPERATIONS, CALENDARS OF THE U.S. HOUSE OF REPRESENTATIVES AND HISTORY OF LEGISLATION, 118TH CONG., H.R. DOC. NO. 39-038 (May 5, 2023) (lacking any reference to Representative Grijalva's proposed bill).

frameworks, or embed a consultation mandate directly into ANILCA itself, these are unlikely solutions given the current political climate and sluggish pace of legislative action. President Biden's 2022 Memorandum and H.R. 3587 evidence an optimistic policy shift towards Indigenous sovereignty by heightening consultation standards and forcing agencies to engage directly with tribal interests. But effects of these administrative memoranda are uncertain, and H.R. 3587 remains a legislative pipe dream.

Until such changes occur, sleeping provisions in Public Laws 108-199 and 108-447 codifying E.O. 13175 as it relates to Alaska Native corporations, if awakened, could provide a viable cause of action for ANCs under the APA. While such statutes are vulnerable to future administrative changes and codify vague consultation standards, they are currently one of the strongest, and most underutilized, mechanisms for Alaska Native tribes and corporations to enforce ANILCA's rural priority. If Alaska Native communities continue to be locked out of the room where subsistence management decisions are made, these appropriations laws could at least give them the key to a very different room: the courtroom.