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Tribal Management under the MMPA: A Way Forward for Local Control

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Cover Page Footnote

Associate Professor of Resources Law and Policy, School of Natural Resources and Extension, University of Alaska Fairbanks. This work was supported in part by the U.S. Department of Agriculture National Institute of Food and Agriculture, Hatch project ALK-10-05. My thanks to Jessica Lefevre and E. Barrett Ristroph for their comments and suggestions. This work is solely the responsibility of the author; any errors or omissions are my own.

TRIBAL MANAGEMENT UNDER THE MMPA: A WAY FORWARD FOR LOCAL CONTROL

Julie Lurman Joly*

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INTRODUCTION

Over the last several decades, the United States government has expanded self-governance opportunities for Native American tribes, reflecting the recognition that self-governance is a fundamental sovereign function. This development in federal policy has been implemented in several different ways, but the two primary approaches can be found in the Tribal Self-Governance Act (TSGA) and the “Treatment as State” (TAS) amendments of several

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environmental statutes. This Article examines the potential application of these two approaches toward transfer of authority to tribes under the Marine Mammal Protection Act (MMPA), which explicitly contemplates the transfer of management authority to states, but not to tribes. This Article ultimately concludes that an integrated approach, combining elements of both strategies, would be the most effective solution.

In the Marine Mammal Commission's (MMC) 2008 report, the following recommendation was made: "[t]o prevent depletion of subsistence species, ANOs [Alaska Native Organizations], the IPCoMM [Indigenous People's Council for Marine Mammals], and federal agency partners should continue to advocate for amendments to the MMPA that would authorize co-management partners to adopt enforceable harvest limits in appropriate circumstances."¹ Similarly, the Alaska Federation of Natives (AFN) has proposed changes to the MMPA in order to strengthen the Alaska Native co-management role.² In a 2008 list of priorities, the Alaska Federation of Natives included a desire to see greater authority for tribes "to regulate the subsistence take of marine mammals."³ Essentially, MMC, AFN, and others suggest that Tribes be given at least a portion of the authority that the MMPA contemplates giving to states—delegated management authority over marine mammals—particularly in relation to harvest and conservation regimes.⁴ The

¹ Marine Mammal Commission, *Review of Co-Management Efforts in Alaska*, MMC 15 (2008), http://www.mmc.gov/wp-content/uploads/mmc_comgmt.pdf.

² Alaska Federation of Natives, *2012 Annual Convention Food Security and Management of Subsistence Resources Action Plan*, NATIVE FEDERATION 2 (Nov. 11, 2012), <http://www.nativefederation.org/wp-content/uploads/2013/03/Food-Security-Action-Plan-as-amended-112012.pdf>.

³ Alaska Federation of Natives, *2008 Federal Priorities: Protection of Subsistence Hunting, Fishing and Gathering in Alaska*, NATIVE FEDERATION 5–6 (2008), www.nativefederation.org/wp-content/uploads/2012/09/2008-afn-federal-priorities.pdf. To that end, AFN has worked with IPCoMM, Marine Mammal Commission, U.S. Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS) to develop a package of MMPA amendments. See also Alaska Federation of Natives, *Alaska Native Priorities for 2012-2013 Presidential and Congressional Transition*, NATIVE FEDERATION 7–8 (Dec. 2012), http://www.nativefederation.org/wp-content/uploads/2012/10/AFN_TransitionWhitePaper_121912.pdf.

⁴ Additionally, "NOAA Fisheries, FWS, the Marine Mammal Commission, and Alaska Native Groups have recommended that the provisions for development and implementation of co-management regimes be expanded in the MMPA to

next step in the evolution of tribal self-governance may be the application of these principles to the MMPA. Because the State of Alaska cannot take over management control under the MMPA,⁵ and Alaska Natives have such a close and statutorily protected connection to marine mammals, Alaska provides an excellent case study to test this theory.

Section 109 of the MMPA gives states the opportunity to apply to the federal government for management jurisdiction under the statute.⁶ If the federal government approves the transfer of authority, then the state becomes the primary management authority for marine mammals within that state's boundaries. This increases the level of access and input each state's citizens have in the marine mammal management process and may make it more likely that management takes into account local cultural norms, needs, and concerns. However, in Alaska, where marine mammals are particularly vital to Alaska Natives on the coast for economic, cultural, and subsistence purposes, management authority cannot devolve to the state. And while co-management opportunities for Alaska Natives exist, these opportunities are still more limited than those a state would receive, even though recognized Tribes are considered quasi-sovereigns, as states are.⁷

The MMPA, furthermore, is intended by design to have management authority devolve to a more local level of government (states) where possible, though that is not happening (and in the case of Alaska cannot happen). Several articles argue that Native Americans have inherent legal authority to manage or co-manage wildlife and other public resources based on reserved treaty rights

make them binding on subsistence hunters" since currently compliance with harvest limits set by cooperative agreements is voluntary. Donna Christie, *Living Marine Resources Management: A Proposal for Integration of United States Management Regimes*, 34 ENVTL. L. 107, 163 (2004).

⁵ This point will be fully explored in Part II of this Article.

⁶ 16 U.S.C.A § 1379 (West 2016).

⁷ "[T]ribal governments are sovereign and have inherent powers of self-government. For this reason, there is a unique government-to-government relationship between federally-recognized tribes and the federal government." Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585, 594 (2008).

in those resources.⁸ However, Alaska Natives, for the most part, did not sign treaties with the federal government.⁹ The central statute defining Alaska Native land rights, the Alaska Native Claims Settlement Act, extinguished all indigenous hunting and fishing rights,¹⁰ so theories based on reserved treaty rights cannot apply in Alaska.¹¹

Native American tribes have received TAS authority from the federal government under the auspices of other statutes. “Alaska native villages are tribes in the political sense of that term and are similar in all significant respects to the tribes of the contiguous forty-eight states.”¹² Since the State of Alaska cannot be given management authority, and therefore protect the interests of its citizens, could Alaska Native Tribes be given TAS authority instead and take over MMPA management directly? Alternatively, in the absence of the congressional action needed to achieve TAS, could the existing principles of the TSGA provide expanded MMPA management opportunities for tribes, at least with respect to species managed by the U.S. Fish and Wildlife Service (FWS)? This Article attempts to answer these questions.

Part I of this Article explains why the State of Alaska cannot currently assume management over the MMPA. This Part also lays out the differences between co-management authority, which the MMPA already grants to Native groups, and transfer authority, which the statute currently only makes available to state governments. Part II describes the “Treatment as State” approach that has been applied to other statutory schemes in order to allow

⁸ See, e.g., Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475 (2007); Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-Management as a Reserved Right*, 30 ENVTL. L. 279 (2000); and Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1 (2000).

⁹ Two exceptions are Venetie, whose original treaty and reservation were revoked by the passage of the Alaska Native Claims Settlement Act, and Metlakatla, which is the only remaining reservation in Alaska. See DAVID CASE & DAVID VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 96 (2d ed. 2002).

¹⁰ 43 U.S.C. § 1603(b) (2006).

¹¹ Elizabeth Barret Ristroph, *Alaska Tribe's Melting Subsistence Rights*, 1 ARIZ. J. ENVTL. L. & POL'Y 47, 67 (2010).

¹² CASE & VOLUCK, *supra* note 9, at 384.

tribes to assume the same rights and responsibilities already accorded to states under those laws. This part explains how TAS could be applied under the MMPA and what the drawbacks of this approach are. Part III describes the TSGA approach to transferring authority over federal programs to tribes. This Part also describes how such an approach might work under the MMPA, and what the drawbacks of this approach are likely to be. Part IV provides an integrated solution to tribal assumption of power under the MMPA by drawing on the most useful pieces of the TAS provisions and the TSGA to create a new approach to this type of federal-tribal power sharing arrangement. This Part also presents how the Nez Perce Tribe was successfully given off-reservation authority to manage wildlife. Finally, Part IV concludes that the integrated approach solves the present deadlock in the most complete manner, without creating additional difficulties as the other approaches singly may do.

I. UNDERLYING ISSUES

A. Why Can't Alaska Assume Management Authority under the MMPA?

The Alaska State constitution conflicts with certain aspects of the MMPA; therefore, the state is barred from implementing that statute. The MMPA permits "any Indian, Aleut or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean" to take marine mammals for "subsistence purposes."¹³ In a 1979 court case, *Togiak v. United States*,¹⁴ the court determined that the Native exemption to the marine mammal harvest ban in the MMPA, which allows Alaska Natives to continue to harvest marine mammals under certain conditions, was an exercise of the United States' trust responsibilities to Native Americans, "and an abandonment of those responsibilities should not be lightly presumed."¹⁵ This decision forestalled a planned return of management authority over walrus to the State of Alaska, because

¹³ 16 U.S.C. § 1371(b) (2003).

¹⁴ *Togiak v. United States*, 470 F. Supp. 423 (D.D.C. 1979).

¹⁵ *Id.* at 428.

some of the State's planned regulations would have "had the effect of prohibiting Native walrus hunting in some areas."¹⁶ In 1981, amendments to the MMPA would again have allowed the state to assume jurisdiction over marine mammals as long as the state protected *rural* Alaskans' subsistence rights to harvest marine mammals.¹⁷

Unfortunately, the State is barred by its constitution, which requires equal access to natural resources and forbids residency-based subsistence preferences, from implementing rural subsistence hunting programs.¹⁸ When the state returned management authority over walrus back to the federal government in 1979, the State made it clear that it would not pursue further transfers of authority under the MMPA.¹⁹ Since the State cannot implement the MMPA's Native harvest provisions, it cannot retain management authority of marine mammals under the present statute unless and until the state's constitution is amended. There have been at least two major efforts—in 1990 and 1992²⁰—to amend Alaska's constitution to correct this conflict with federal law,²¹ but all efforts have failed.²² To date, no state has been given MMPA authority over any marine mammal species.²³

¹⁶ CASE & VOLUCK, *supra* note 9, at 279.

¹⁷ 16 U.S.C.A. § 1379(f) (West 2016).

¹⁸ McDowell v. Alaska, 785 P.2d 1 (Alaska 1989).

¹⁹ MICHAEL BEAN & MELANIE ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 145 (3d. ed. 1997); Marine Mammals; Suspension of Hunting and Killing of Walrus under the 1976 Waiver of the Moratorium, 44 Fed. Reg. 45,565 (Aug. 2, 1979).

²⁰ Alaska Humanities Forum, *Modern Alaska—Subsistence*, AK HISTORY COURSE, www.akhistorycourse.org/articles/article.php?artID=259 (last visited May 12, 2016). See also CASE & VOLUCK, *supra* note 9, at 273 n.102.

²¹ The state finds itself out of compliance not only with the dictates of the MMPA, but with the Alaska National Interests Lands Conservation Act as well, which also mandates a rural subsistence preference. 16 U.S.C. § 3114 (1998). See also CASE & VOLUCK, *supra* note 9, at 294–302.

²² CASE & VOLUCK, *supra* note 9, at 273 n.102 (stating that "it has proven politically impossible to amend the Alaska Constitution to permit residency-based subsistence preferences required under federal law").

²³ Donald C. Baur, Michael L. Gosliner & Nina M. Young, *The Law of Marine Mammal Conservation*, in OCEAN AND COASTAL LAW AND POLICY 484 (Donald C. Baur et al. eds., 2008).

B. Native Co-Management v. Transfer Authority under the MMPA

In order to determine what changes are needed in the current approach to MMPA implementation, it must first be understood what management authority the MMPA already grants to Alaska Natives. Section 119 of the MMPA authorizes the federal government to enter into cooperative or co-management arrangements with Alaska Native groups. However, these agreements are statutorily limited to areas of conservation and subsistence use and contemplate no other area of marine mammal management.²⁴ Furthermore, funding for these arrangements is limited to collecting and analyzing population data, monitoring harvests, participating in research, and developing co-management structures.²⁵ Therefore, these agreements are largely limited to sharing authority over subsistence use and data collection. For example, the FWS has entered into co-management agreements with Native entities, including the Eskimo Walrus Commission (EWC).²⁶ “But while FWS has cooperated with EWC in terms of funding, monitoring, and outreach, there has been no real transfer of authority to EWC. FWS continues to conduct its own law enforcement, and the two entities have separate goals regarding walrus conservation.”²⁷

Federal agencies are naturally reluctant to voluntarily share or delegate their regulatory authority. As a result, there is an assumption that the agencies will manage while the tribes will cooperate, “with relatively little power granted to Native Tribes or organizations.”²⁸ On the other hand, Section 109 of the MMPA

²⁴ 16 U.S.C. § 1388(a) (2016).

²⁵ 16 U.S.C. § 1388(b) (2016).

²⁶ See Marine Mammal Commission, *Co-Management and Alaska Native Tribal Consultation*, MMC, <http://www.mmc.gov/priority-topics/arctic/co-management-and-alaska-native-tribal-consultation/> (last visited May 11, 2016).

²⁷ Ristroph, *supra* note 11, at 75.

²⁸ Honorable Eric Smith, *Some Thoughts on Comanagement*, 4 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 1, 8 (Summer 1997). One exception may be the cooperative agreement between the Alaska Eskimo Whaling Commission and NOAA Fisheries. This agreement often held up as a model which gives the Native organization an unusual amount of authority, however, even though “the AEWC co-management agreement contains provisions for regulation, research and enforcement, the AEWC clearly does not have equal management authority for the bowhead [whale]. The management powers of the AEWC are limited by the fact that it cannot set the quotas itself, nor is the AEWC a formal participant

authorizes the federal government to transfer management authority, for the “conservation and management” of marine mammal species, to the states if certain criteria are met.²⁹ This power-sharing arrangement is much more demanding of the receiving state, but also provides a much greater breadth of authority. The statute states that “[t]he Secretary may delegate to a state the ‘administration and enforcement’ of the MMPA,”³⁰ but “[t]he MMPA does not define the term ‘administration,’ which arguably could include any of the Secretary’s duties.”³¹ While the native co-management arrangement provides Alaskan Natives with an important opportunity, it does not provide an opportunity for management of all the variables affecting marine mammal populations and the effect of subsistence harvest.

It is also worth noting that Native subsistence harvest activities are unregulated by the federal government unless the species in

in the process of quota setting by the International Whaling Commission.” Jennifer L. Schorr, *The Integration of Traditional Ecological Knowledge and Science Under Marine Mammal Protection Act Co-Management Agreements* 27 (1998) (unpublished Master’s thesis, University of Washington) (on file with the University of Washington Library). Furthermore, it is widely recognized that the AEWC was only able to secure so much authority for itself because it secured the co-management agreement under § 112 of the MMPA. 16 U.S.C. § 1382(c) (2016). § 112 provides the opportunity for greater authority than § 119 but agencies have become very reluctant to employ § 112 and generally default to § 119 rather than the more commonly used § 119, and because it is also operating under the auspices of the International Convention for the Regulation of Whaling and Whaling Convention Act. Interview with Jessica Lefevre, counsel for the Alaska Eskimo Whaling Commission, Lefevre Law (July 30, 2015); *see also* Jessica Lefevre, *A Pioneering Effort in the Design Process and Law Supporting Integrated Arctic Ocean Management*, 43 ENVTL. L. REP. 10893, 10894 (Oct. 2013). Finally, the difference can also be attributed to the fact that the AEWC is unusually well-funded through support from the North Slope Borough, which is supported by tax revenues from the Prudhoe Bay oil fields, a revenue source not available to other groups. Interview with Jessica Lefevre, counsel for the Alaska Eskimo Whaling Commission, Lefevre Law (July 30, 2015); *see also* Jessica Lefevre, *A Pioneering Effort in the Design Process and Law Supporting Integrated Arctic Ocean Management*, 43 ENVTL. L. REP. 10893, 10895 (Oct. 2013).

²⁹ 16 U.S.C. § 1379 (2016). The terms “conservation” and “management” are not defined by the statute in this context but are also not limited only to the area of subsistence use as they are in § 119.

³⁰ 16 U.S.C. § 1379(k) (2016).

³¹ BEAN & ROWLAND, *supra* note 19, at 143–44. As the authors state, there are some express limitations found elsewhere in the statute. *Id.* at 146; *see also* 16 U.S.C. §§ 1379(b)(3)(B)(i)–(ii), (d)(1) (2016).

question is listed as “depleted” under the MMPA,³² or “threatened” or “endangered” under the Endangered Species Act.³³ However, tribes play a small role in the federal government’s decision making process regarding whether to limit subsistence if or when marine mammal populations decline.³⁴ Co-management authority as it currently exists under the MMPA, while an important and useful tool, is not comparable to the level of control provided for by the transfer of authority to state provision of the statute; it could be significantly expanded.

C. Importance of Subsistence for Alaskan Natives

David Case wrote that the term subsistence stands for the “traditional Alaska Native way of life” and therefore “the ability of Alaska Natives to maintain subsistence as a way of life is a measure of their ability to achieve self-determination.”³⁵ Promoting Indian self-determination has been a goal of federal Indian policy since the Nixon administration.³⁶ Alaska Native cultural and nutritional needs are inextricably linked to subsistence harvest; this is particularly true for remote Arctic communities dependent on marine mammals.³⁷ “[A]dverse impacts to subsistence resources can affect the social and nutritional health of thousands of indigenous people residing in Arctic Alaska.”³⁸ Protecting subsistence and Native control over subsistence contributes to the achievement of Indian self-determination.

³² 16 U.S.C. § 1371(b) (2003).

³³ 16 U.S.C. § 1539(e) (2016).

³⁴ Ristroph, *supra* note 11, at 71.

³⁵ David S. Case, *Subsistence and Self-determination: Can Alaska Natives Have a more “Effective Voice”?*, 60 COLO. L. REV. 1009, 1010 (1989).

³⁶ *See id.* at 1010; *see also* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–58 (2016); Tribal Self Governance Act of 1994, 25 U.S.C. §§ 458aa–58hh (2014); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000); Memorandum from President Barack Obama for the Heads of Executive Dep’ts and Agencies on Tribal Consultation (Nov. 5, 2009), *available at* <https://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

³⁷ Jessica Lefevre, *A Pioneering Effort in the Design Process and Law Supporting Integrated Arctic Ocean Management*, 43 ENVTL. L. REP. 10893, 10894 (Oct. 2013).

³⁸ *Id.*

Marine mammal populations are threatened by climate change, off-shore oil and gas exploration and development, shipping activity, naval exercises, the cruise ship industry, and incidental take by commercial fishing operations. Congress has expressly recognized the importance of marine mammals to Alaskan Native communities several times.³⁹ Yet, Alaska Natives who depend upon marine mammals for sustenance and cultural identity have little significant control over their management. Giving primary management and enforcement authority to the local community is often beneficial since community pressure can be more effective in achieving compliance than government enforcement.⁴⁰ As sovereign entities, and ones with unique cultural and essential subsistence connections to the resource, Alaska Native Tribes should be given a similar opportunity as the states to accept responsibility to manage these resources, particularly in Alaska where there would be no possibility of conflict with state management.

II. LEGAL APPROACH #1: TAS AUTHORITY

“Treatment as State,” whereby Congress decides to treat tribal entities as equivalent to states for the purposes of implementing and managing certain federal programs, is not a new concept. Congress has amended several statutes to include TAS authority, so that tribes can attain regulatory primacy, receive federal grant funding, and be consulted and informed as appropriate.⁴¹ The Indian Self-Determination Act defines “Indian tribe” in part to include “any Alaska Native village or regional or village corporations as defined in or established” under Alaska Native Claims Settlement Act.⁴² “Most major federal environmental laws operate on a principle of

³⁹ ANILCA states that “the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence.” 16 U.S.C. § 3111(1) (2014). Similarly, the MMPA states that one duty of the Marine Mammal Commission is to make recommendations “for the protection of the Indians, Eskimos, and Aleuts whose livelihoods may be adversely affected by actions taken pursuant to this Act.” 16 U.S.C. § 1402(a)(7) (2016).

⁴⁰ Schorr, *supra* note 28, at 32.

⁴¹ See, e.g., 42 U.S.C. § 7601(d)(1)(A) (2016); 33 U.S.C. § 1377(e) (2014); 24 U.S.C. § 300j-11 (2014); 42 U.S.C. § 9626 (2016).

⁴² 25 U.S.C. § 450b(e) (2016).

cooperative federalism.”⁴³ Federal statutes establish minimum national standards and encourage states to apply for “primacy”—that is primary regulatory authority—to implement those standards within state borders.⁴⁴ Many environmental laws have been adapted to allow tribes a similar authority. “Tribal self-determination persists as the official federal policy and is a central underpinning for Congress’ recent amendment to the federal environmental regulatory programs on a similar basis to states.”⁴⁵ Amending the statute to include a TAS provision would be the most direct way to grant Alaska Natives management authority over marine mammals, comparable to what a state is entitled to under existing MMPA provisions.

A. A Brief History of TAS Authority

Most federal environmental laws contain mechanisms through which authority under the statute can devolve from the federal government (usually the Environmental Protection Agency (EPA)) to the state. This cooperative federalism arrangement allows environmental laws to be tailored to local environmental, political, and/or economic conditions; gives local levels of government more control over local risks and benefits; and increases the opportunity of input by local citizens. States have been taking advantage of these opportunities since the 1960s.

In 1984, the EPA adopted regulations recognizing tribes as “sovereign entities with primary authority and responsibility for the reservation populace.”⁴⁶ EPA policy at that time was to assume that tribal governments had the authority to set standards and manage environmental programs on reservations.⁴⁷ This approach was challenged in *Backcountry Against Dumps v. EPA*.⁴⁸ That case held that where a statute clearly establishes a role for tribes, agencies

⁴³ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW §10.02[1] (2012 ed.).

⁴⁴ *Id.*

⁴⁵ Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 230 (1996).

⁴⁶ Jana Milford, *Tribal Authority under the Clean Air Act: How is it Working?*, 44 NAT. RESOURCES J. 213, 219 n.35 (2004).

⁴⁷ *Id.* at 219.

⁴⁸ *Backcountry against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996).

cannot allow tribes to assume any other role.⁴⁹ The result was that since the Resource Conservation and Recovery Act, which was at issue in that case, clearly provided a role for tribes, the EPA could not on its own authority prescribe any other roles to tribes.⁵⁰ This is in contrast to statutes like the Toxic Substances Control Act⁵¹ and the Emergency Planning and Community Right-To-Know Act,⁵² which do not explicitly assign roles to tribes. For these latter statutes, the legislative gap left the way open for the EPA to interpret the statutes in ways that allow tribes to be treated as states for the implementation of certain programs.⁵³ Therefore, because the MMPA explicitly provides a role for tribes through co-management, congressional action is needed before agencies can treat tribes as states.

Beginning in the 1980s, Congress enshrined the EPA's regulatory maneuver into law by passing a series of statutory amendments to the Clean Air Act (1990),⁵⁴ Clean Water Act (1994),⁵⁵ Safe Drinking Water Act (1986),⁵⁶ and the Comprehensive Environmental Response Compensation and Liability Act (1986).⁵⁷ These amendments, all similar in language and structure, create a statutory opportunity for recognized Indian tribes to apply to the EPA for TAS authority under the various laws.

B. How TAS Works

TAS provisions typically allow Tribes to qualify for TAS if they have a governing body capable of carrying out substantial government functions and meeting the specific statutory

⁴⁹ *Id.* at 149–51; *see also* COHEN, *supra* note 43, §10.02[2].

⁵⁰ The Resource Conservation and Recovery Act defined tribes as municipalities and did not provide an opportunity for municipalities to take on the authority sought by the tribe. *Backcountry*, 100 F.3d at 149–50.

⁵¹ 15 U.S.C. §§ 2601–29 (1976).

⁵² 42 U.S.C. §§ 11001–05 (1986).

⁵³ *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981); *see* COHEN, *supra* note 43, § 10.02[2].

⁵⁴ 42 U.S.C. § 7601(d)(1)(A) (2016).

⁵⁵ 33 U.S.C. § 1377(e) (2014).

⁵⁶ 24 U.S.C. § 300j-11 (2014).

⁵⁷ 42 U.S.C. § 9626 (2016); In addition, the Federal Insecticide Rodenticide and Fungicide Act has contained such a provision since 1978. 7 U.S.C. § 136u (2016).

requirements.⁵⁸ Once a tribe has TAS authority it must seek primacy, like states do, from the EPA. If a tribe does not seek primacy or if a tribe's program, in the opinion of the federal agency, does not meet federal criteria, then the EPA retains primacy—just as it would with state applicants.⁵⁹ Tribes with TAS authority may choose to assume primacy over only a subset of regulatory functions if they prefer.⁶⁰ The governmental roles offered to Tribes by the TAS provisions mirror the full spectrum of regulatory roles available to states: “from basic monitoring to standard setting and from permit issuing to enforcement.”⁶¹

To date, all of the existing TAS provisions effect tribes' abilities to perform certain on-reservation regulatory functions. TAS typically applies to lands “within the boundaries of the reservation or other areas within the tribe's jurisdiction.”⁶² The EPA has also determined that TAS applies to other off-reservation lands as long as they qualify as Indian Country, meaning for as long as Indian groups can assert legal jurisdiction over it. This typically covers private lands within the exterior boundaries of the reservation but includes lands exterior of the reservation boundaries as well.⁶³ For instance, the D.C. Circuit in *Arizona Public Service Co. v. EPA* found that § 7601(d) of the Clean Air Act, which is the TAS provision, applies to the management of air resources “within the exterior boundaries of the reservation or other areas within the [tribe's] jurisdiction,” even if the land is owned in fee simple by non-Indians.⁶⁴ Similarly, in *Oklahoma Tax Commission*, the Supreme Court defined the term “reservation” to include “trust lands that have been validly set apart for the use of a tribe even though the

⁵⁸ See, e.g., 33 U.S.C. § 1377(e) (2014), 42 U.S.C. § 7601(d)(2) (2016), and 42 U.S.C. § 300j-11(b) (2014).

⁵⁹ See, e.g., Purpose and Scope, 40 C.F.R. § 123.1(h) (2015), Purpose and Scope, 40 C.F.R. § 271.1 (2015).

⁶⁰ See, e.g., Partial Delegation of Administrative Authority to a Tribe, 40 C.F.R. § 49.122 (2016); see Milford, *supra* note 46, at 221.

⁶¹ James Grijalva, *EPA's Indian Policy at Twenty-Five*, NAT. RESOURCES & ENVTL., Summer 2010, at 13.

⁶² See, e.g., 42 U.S.C. § 7601(d)(2)(B) (2016).

⁶³ See William C. Scott, *The Clean Air Act: “Treatment as States” Rule*, March 26, 2008, available at <http://corporate.findlaw.com/law-library/the-clean-air-act-treatment-as-states-rule.html>.

⁶⁴ *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000).

land has not been formally designated as a reservation,” in addition to the common understanding of the term “reservation.”⁶⁵ In *Village of Venetie*, the Supreme Court determined that corporate owned native land, which makes up the bulk of Native lands in Alaska, did not qualify as Indian Country.⁶⁶ Most Native lands in Alaska are owned in fee simple by Native corporations. Therefore, in Alaska, tribes do not currently have reservation lands⁶⁷ and marine mammal management would necessarily be an off-reservation, off-shore activity anyway.

The fact that Alaska Natives do not have the territorial sovereignty associated with tribes in the continental U.S. is irrelevant because the jurisdiction being sought necessarily extends beyond the boundaries of tribal lands anyway. Therefore, a TAS provision under the MMPA would have to be somewhat different from existing TAS provisions and explicitly provide for management authority outside of Indian Country. The moral/legal authority for TAS lies in the sovereignty of tribes and the fact that Indian Country is a trust resource protected by the federal government on behalf of tribes. Alaskan tribes also retain their inherent sovereignty and marine mammals have likewise been recognized as a trust resource protected by the federal government on their behalf.⁶⁸

Existing TAS provisions come with the possibility of financial support to assist tribes in developing capacity and/or carrying out

⁶⁵ 63 Fed. Reg. 7,254, 7,258 (Feb. 12, 1998) (citing *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991)).

⁶⁶ *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (holding that lands owned by Alaska Native corporations are not Indian Country because they are not permanently set aside for the exclusive use of tribes). Similarly, the Clean Water Act defines “Federal Indian Reservation” as all land within the limits of any Indian reservation under the jurisdiction of the United State Government.” 33 U.S.C. § 1377(h)(1) (2014).

⁶⁷ With the single exception of Annette Island Reserve at Metlakatla, which is the only reservation in Alaska,

⁶⁸ See *Togiak v. United States*, 470 F. Supp. 423, 428 (D.D.C. 1979) (construing the exemptions for Native Alaskan hunting found in statutes, such as the Marine Mammal Protection Act and the Endangered Species Act, as imposing a trust responsibility on the federal government to protect Alaskan Natives’ rights to subsistence hunting).

the functions of the relevant statute.⁶⁹ As with other TAS provisions, financial support would be essential under the MMPA, both to help tribes build capacity in order to meet the criteria necessary to be treated as a state, and to earn transfer authority for specific programs. This type of financial support is not unique to TAS agreements; states have also always been eligible to receive financial support under the environmental statutes⁷⁰ and under the MMPA.⁷¹

Another challenge is that “tribes do not have criminal authority to punish non-Indians who violate tribal, state, or federal laws.”⁷² Under *Montana v. United States*,⁷³ the Supreme Court held that tribes cannot enforce tribal rules against non-Indians unless the non-Indians have entered into consensual agreements with the tribe or tribal members, or the conduct in question threatens the tribe’s political integrity, economic security, or health and welfare.⁷⁴ In *Plains Commerce Bank v. Long Family Land & Cattle Co.*,⁷⁵ the Supreme Court held that the *Montana* test was applicable only to non-Indian conduct that “imperils the subsistence or welfare of the tribe” such that tribal regulation is “necessary to avert catastrophic consequences” for tribal self-government. Therefore, the issue of enforcement may be a stumbling block to Native management, but the problem can be circumvented.

Under existing TAS provisions, tribes overcome this problem by passing on enforcement requests to the EPA, which does the

⁶⁹ See e.g., 42 U.S.C. § 7601(d)(B) (2016) and 33 U.S.C. § 1377(c), (e), (f) (2014); see Actions under Section 301(d)(4) Authority, 40 C.F.R. § 49.11(b) (2015).

⁷⁰ See e.g., 42 U.S.C. §§ 7405, 7406 (2014).

⁷¹ 16 U.S.C.A. § 1379(j) (West 2016).

⁷² Rob Roy Smith, *At a Complex Crossroads: Animal Law in Indian Country*, 14 ANIMAL L. 109, 112–13 (2007).

⁷³ *Montana v. United States*, 450 U.S. 544 (1981). In this case the Crow tribe of Montana attempted to regulate hunting and fishing by non-Indians on land owned by non-Indians within the boundaries of the reservation.

⁷⁴ *Id.* at 565–66. See also *United States v. Mazuvie*, 419 U.S. 544 (1975) (finding that tribes have regulatory authority over non-Indians if Congress delegates that power to them).

⁷⁵ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008). In this case the tribe attempted to regulate the sale of non-Indian lands within the external boundaries of the reservation, but the court found that the facts did not rise to the level necessary to meet the criteria of the *Montana* exemptions.

enforcement on behalf of tribes. Congress and the EPA developed clear lines of authority in the area of off-reservation enforcement over non-Indians in order to circumvent such enforcement problems. The statutory and regulatory provisions recognize tribes' inherent sovereignty to develop air and water quality standards; however, it is the EPA that is "the entity that ultimately adopts and enforces the standards that apply to non-Indians, and the process involves opportunity for public comment and challenge of the tribal proposals."⁷⁶

III. LEGAL APPROACH #2: TSGA AND TRANSFER OF DOI OFF-RESERVATION PROGRAMS TO TRIBES

Tribal self-determination is "the recognition that Tribal governments are the fundamental governmental units to implement Indian policy."⁷⁷ As the Congressional Statement of Findings in the TSGA states:

transferring control to tribal governments . . . over funding and for Federal programs, services, functions, and activities . . . is an effective way to implement the Federal policy of government-to-government relations with Indian Tribes; and transferring control to tribal governments . . . strengthens the Federal policy of Indian self-determination.⁷⁸

A. Brief History of TSGA

In 1975 Congress passed the Indian Self-Determination and Education Assistance Act (ISDEAA).⁷⁹ This statute attempts to stimulate Native American self-governance by encouraging tribes to undertake management and implementation of federal Indian

⁷⁶ Goodman, *supra* note 8; *see also* Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1288–89 (D.C. Cir. 2000); Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998); Albuquerque v. Brower, 97 F.3d 415, 419 (10th Cir. 1996) (all upholding EPA enforcement of tribal standards against non-Indians off-reservation).

⁷⁷ Brett Kenney, *Tribes as Managers of Federal Natural Resources*, 27 NAT. RESOURCES & ENVTL., Summer 2012, at 1.

⁷⁸ Tribal Self-Governance Act of 1994, Pub. L. No. 103–413, 108 Stat. 4250 §202(5)(a) (1994).

⁷⁹ 25 U.S.C.A. § 450 (West 2016).

programs.⁸⁰ Federal bureaucracy and paternalism were recognized as having eroded tribal self-governance, and the new statute created a process through which Indian programs were removed from Bureau of Indian Affairs administration and placed in the hands of tribal governments.⁸¹ This approach explicitly includes federal funding to assist tribes in carrying out these functions.⁸² In 1994, ISDEAA was amended by the Tribal Self Governance Act,⁸³ which expands the scope of programs which can be transferred to tribal governments beyond simply those programs initially administered by the Bureau of Indian Affairs, to programs administered by other Department of the Interior (DOI) agencies.⁸⁴

The MMPA divides management over marine mammal species between the Department of Commerce and the Department of the Interior, such that the National Oceanic and Atmospheric Administration (NOAA) Fisheries manages cetaceans and pinnipeds other than walrus, and the FWS manages all other marine mammals, including: sea otter, walrus, polar bear, dugong, and manatee.⁸⁵ Because of the limitation of TSGA's application to DOI agencies,⁸⁶ using TSGA to gain greater tribal authority over marine mammals will only be relevant to expanded tribal management of species currently managed by the FWS.

B. How TSGA Works

The TSGA creates a process through which management authority over DOI off-reservation programs that have "special geographic, historical, or cultural significance" to a tribe may be transferred to a tribal government.⁸⁷ This potentially authorizes the transfer to tribal management of a wide variety of off-reservation programs, and once a program is transferred then funding becomes available as well.⁸⁸ The transfer of federal programs is accomplished

⁸⁰ 25 U.S.C.A. § 450a(b) (West 2016).

⁸¹ See King, *supra* note 8, at 494–95; see 25 U.S.C.A. §§ 450a, f (West 2016).

⁸² 25 U.S.C. § 450j-1 (2000).

⁸³ 25 U.S.C.A. §§ 458aa-hh (West 2016).

⁸⁴ 25 U.S.C. § 458cc(B)(2) (2006).

⁸⁵ 16 U.S.C. § 1362(12)(A) (2003).

⁸⁶ 25 U.S.C. § 458cc(b)(2) (2006).

⁸⁷ 25 U.S.C. § 458cc(c) (2006).

⁸⁸ Kenney, *supra* note 77.

through negotiated Annual Funding Agreements which transfer both authority over a program and the funding necessary to administer the program to the tribal government.⁸⁹ Because this tool applies to off-reservation programs, the existence of “Indian Country” is unnecessary and Alaska Native Tribes may participate.

To be eligible for program management under the TSGA, tribes must complete a planning phase, request participation by official resolution or action by a tribal governing body, and demonstrate at least three years of fiscal stability.⁹⁰ Tribes can then petition for management of entire programs or only portions of programs.⁹¹ This flexibility may suit Alaskan Tribes that do not wish to assume authority over the entire MMPA program, or even all management functions for a single species, but do want greater authority over programs like harvest administration or habitat management. Under the TSGA, tribes are allowed to come together as consortia to take over a DOI program.⁹² Existing tribal consortia like IPCoMM, the Alaska Eskimo Whaling Commission, and others may already be well positioned to take advantage of this opportunity.⁹³

Each DOI agency retains discretion over whether to transfer the requested program to the relevant tribe.⁹⁴ The TSGA prohibits the transfer to tribes of “inherently federal functions,”⁹⁵ and the question of which functions are “inherently federal” is left open for the DOI to answer.⁹⁶ In 2010, the Office of Management and Budget (OMB) published a policy letter defining “inherently governmental function” and the definition’s application to all federal agencies.⁹⁷ The definition adopted by OMB states that the term “means a function that is so intimately related to the public interest as to require performance by Federal [g]overnment employees.”⁹⁸

⁸⁹ King, *supra* note 8, at 478; 25 U.S.C. §§ 458cc(b)(2), (g) (2006).

⁹⁰ 25 U.S.C. § 458bb(c) (1996).

⁹¹ 25 U.S.C. § 458cc (2006); *see also* King, *supra* note 8, at 501.

⁹² 25 U.S.C. § 458cc(c) (2006).

⁹³ The Alaska Eskimo Whaling Commission currently manages bowhead whaling by Alaska Natives in ten Arctic villages. Ristroph, *supra* note 11, at 73.

⁹⁴ Kenney, *supra* note 77, at 48.

⁹⁵ 25 U.S.C. § 458cc(k) (2006).

⁹⁶ King, *supra* note 8, 502.

⁹⁷ Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188 (Mar. 31, 2010).

⁹⁸ Work Reserved for Performance by Federal Government Employees,

Ultimately, a great deal of discretion is left in the hands of the agencies to determine whether a program is inherently a federal function or not, and it is not clear how the FWS might interpret a petition to manage all or some programs under the MMPA. As King writes, the agencies “are obligated to negotiate, but not to come to an agreement.”⁹⁹ However, since the MMPA itself contemplates delegating this very same authority to states, it seems unlikely that these functions could be described as “inherently federal” so as to exclude the possibility of tribal control.

Like the TAS arrangement, enforcement of tribal rules over non-tribal members, especially off-reservation, could be a problem for TSGA implementation. However, enforcement over non-Indians could simply be left to the federal agency since tribes may request authority over only certain aspects of programs if they choose. Finally, the TSGA allows the Secretary to retract programs that have been delegated to tribes where there is “imminent jeopardy to a physical trust asset, natural resources, or public health and safety.”¹⁰⁰

The federal government’s policy has been to encourage tribal self-governance in areas pertaining to tribal members’ health and welfare.¹⁰¹ However, tribes are not given the opportunity for equal status to that of states under the MMPA; they are essentially being treated as though they are not the separate sovereign entities they are known to be.¹⁰² For many tribes in Alaska, the fluctuation of marine mammal populations impacts the economic security, health, and welfare of the tribe, and tribal governments may be the best able to anticipate and mitigate those impacts.

75 Fed. Reg. at 16,193 (the definition also providing a non-exclusive list of examples of inherently governmental functions, none of which provide a definitive answer with regard to the types of delegation of authority that might be sought under the MMPA).

⁹⁹ King, *supra* note 8, at 505.

¹⁰⁰ 25 U.S.C.A. § 458cc(d) (West 2014).

¹⁰¹ Courtney A. Stouff, *Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty*, 108 PENN. ST. L. REV. 375, 394 (2003) (arguing that the Homeland Security Act of 2002 should similarly be amended to include TAS provisions to protect tribal sovereignty).

¹⁰² See CASE & VOLUCK, *supra* note 8, at 369.

IV. COMBINING FRAMEWORK OF TSGA WITH THE TRIBAL SELF-
GOVERNANCE INTENTIONS OF TAS COULD LEAD TO A BETTER
OVERALL SOLUTION

Congressional action combining the underlying principles of the TSGA with the more practical framework of the TAS provisions could provide a good model for the MMPA. Congressional action is preferable because it provides needed legitimation, moral leadership, and specific statutory authority.¹⁰³

There are several obstacles in the way of applying either the TAS or TSGA approaches individually, as they currently exist, to the MMPA. First, the TAS provisions have so far only been applicable to on-reservation functions. On the other hand, the TSGA has already been expressly applied to tribal management off-reservation, which seems to be more applicable to the MMPA context. The downside of the TSGA approach is that it only creates the opportunity for management authority over programs designated as eligible (not inherently federal) by the agency in charge; therefore, certain programs or functions can be excluded from tribal management at the agency's discretion. TAS provides unequivocal authority for tribes to assume authority over certain federal programs if the tribes meet basic federal requirements. This provides a certainty that is not available under the TSGA. Additionally, the TSGA provisions only apply to DOI agencies. MMPA management is divided between the FWS (DOI) and NOAA (Department of Commerce), with certain marine mammal species being assigned to each agency. Therefore, only a few species would even be eligible for tribal management under the TSGA.

On the other hand, it should be relatively easy to integrate the two approaches. Both the TSGA and TAS¹⁰⁴ provisions can be applied to tribal consortiums, and both TAS and TSGA resolve many difficulties in similar ways. For instance, under both scenarios enforcement over non-Indians can be left to the federal agency. Additionally, both approaches retain strict federal oversight so that programs can be withdrawn from tribal management if statutory requirements are not being met. Therefore, the two programs,

¹⁰³ Goodman, *supra* note 8, at 360.

¹⁰⁴ EPA Review of Tribal Clean Air Act Applications, 40 C.F.R. § 49.9(f) (2015).

though they contain several significant differences, are very compatible.

For various reasons, tribes have been slower than anticipated in taking up the opportunity presented by the TAS amendments. To counter that slow response, the EPA has now established an additional program that allows tribes to use EPA's own federal implementation of pollution laws. This does not require TAS status or tribal program development. Instead, tribes may take over the EPA's own implementation including "setting standards, issuing permits, and regulating underground injections" under the Clean Water Act and hazardous waste management under the Resource Conservation and Recovery Act.¹⁰⁵ This is a non-DOI agency taking an approach through regulation that is remarkably similar to the one found in the TSGA. Co-management, as it currently exists, has so far proved insufficient to meet the tribes' purposes. If Congress combines the most applicable aspects of both the TSGA and the TAS approaches, an MMPA amendment could be fashioned that creates meaningful opportunity for management transfer to Tribes under the MMPA, one that mimics what states have already been offered.

It is not unprecedented for the federal government to delegate off-reservation wildlife management authority to tribes. One prominent example is that of the Nez Perce taking over state-wide management authority of the gray wolf beginning in 1996.¹⁰⁶ This was possible because the federal government's more obvious partner, the State of Idaho, passed a series of laws and approved several wolf management plans that explicitly conflicted with federal objectives. These actions made it impossible for the State to cooperate with the federal government on the matter.¹⁰⁷ This

¹⁰⁵ Grijalva, *supra* note 61, at 16.

¹⁰⁶ A second, more recent, example is the Kootenai Tribe of northern Idaho which the Fish and Wildlife Service recently announced will be given authority to create an updated recovery plan for the endangered Selkirk Caribou herd. Reuters, *Tribe Takes Lead in Saving Reindeer Herd in Rocky Mountains*, NY TIMES (Aug. 29, 2015), http://www.nytimes.com/2015/08/30/us/tribe-takes-lead-in-saving-reindeer-herd-in-rocky-mountains.html?_r=0.

¹⁰⁷ See Patrick Impero Wilson, *Wolves, Politics, and the Nez Perce: Wolf Recovery in Central Idaho and The role of Native Tribes*, 39 NAT. RESOURCES J. 543 (1999) (detailing full account of this history).

certainly echoes the current marine mammal management situation in Alaska.

CONCLUSION

Alaskan tribes may not currently have the capacity to meet the management requirements necessary for transfer of authority under the MMPA, regardless of the legal mechanism employed. However, there is nothing to preclude them from developing and ultimately exercising such capacity. The EPA and Congress have built funding for capacity building into the TAS program, and funding has also long been contemplated in the TSGA program as well. The MMPA itself contemplates providing funding to states to assist them in developing and administering marine mammal management programs.¹⁰⁸ Any approach attempted on behalf of tribes under the MMPA should do likewise.

Alaska Native tribes, like states, are sovereign entities. Furthermore, tribes have important historic, cultural, economic, and sustenance ties to marine mammals and marine resources. The federal government has many times reiterated its position that Native sovereignty must be respected and Native self-governance encouraged. Additionally, Congress explicitly intended MMPA management authority to devolve to a more local level of government. Expanding the scope of Native authority under the MMPA is the next logical step in reaching these federal objectives.

¹⁰⁸ 16 U.S.C.A § 1379(j) (West 2016).