

1-1-2008

Some Thoughts on Comanagement

Eric Smith Hon.

Follow this and additional works at: https://repository.uchastings.edu/hastings_environmental_law_journal



Part of the [Environmental Law Commons](#)

Recommended Citation

Eric Smith Hon., *Some Thoughts on Comanagement*, 14 *Hastings West Northwest J. of Env'tl. L. & Pol'y* 763 (2008)

Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol14/iss1/25

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Environmental Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Some Thoughts on Comanagement

*The Honorable Eric Smith**

I. Introduction

There has been growing interest in the Alaska Native community in the idea of "comanagement" both as a means of increasing Native involvement in and control over hunting and fishing by Alaska Natives, and as a vehicle for improving overall management of fish and wildlife populations. Commonly termed "subsistence" in Alaska, the use of fish and wildlife is a central component of the culture, nutrition and daily life of every Alaska Native tribe. To date, subsistence hunting and fishing has been almost totally controlled by federal and state law and regulations—regulations which impose western concepts of management and fairness on very different cultural practices. Comanagement is seen as a way of righting this balance by integrating Native knowledge, practices, and management systems into the overall management of fish and wildlife, thereby achieving an enriched and, through vested interest, a better enforced management system.

There is a wealth of literature on comanagement, largely discussing either the concept of comanagement or particular comanagement arrangements.¹ The focus of this article will be to address some of the key

* Superior Court Judge, Palmer, Alaska. Formerly in private practice (Alaska Native and environmental issues), Anchorage, AK; J.D., 1979, Yale Law School; B.A., 1975, Swarthmore College. An earlier version of this article was prepared for the Rural Alaska Community Action Program (RurAL CAP) and appeared in the RurAL CAP publications, "Village Voices" and "Comanagement: Establishing Principles, Policies and Protocols." The author would like to thank RurAL CAP for supporting the research and writing of this article, and the following people for their invaluable review and comments on previous drafts: Many Kancewick, Carl Jack, Carol Torsen, Carl Hild, Caleb Pungowiyi, Larry Merculieff, and Polly Wheeler. The comments in this article are the personal views of the author.

1. See e.g., CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES (Evelyn Pinkerton ed., 1989); TRADITIONAL KNOWLEDGE AND RENEWABLE RESOURCE MANAGEMENT IN NORTHERN REGIONS (Freeman & Cabyn eds., 1988); Fikret Berkes et al., *Co-management: The Evolution in Theory and Practice of Joint Administration of Living Resources*, 18 ALTERNATIVES 12 (1991); David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More 'Effective Voice'?*, 60 U. COLO. L. REV. 1009 (1989); GAIL

issues involved in the construction of a comanagement agreement, in the hope of providing concrete guidance to tribes and government officials alike as they begin to integrate this relatively new management system into fish and wildlife management, especially in Alaska.

II. A Brief Overview of Hunting and Fishing Laws in Alaska

It is difficult to discuss comanagement structures outside of the particular context in which they arise. The context of this article is hunting and fishing by Alaska Natives. As such, before turning to the structural issues which are the focus of this article, it is important to briefly describe the basic laws currently governing hunting and fishing by Alaska Natives.

The most significant such law is Title VIII of the Alaska National Interest Lands Conservation Act.² Title VIII creates a priority for "subsistence uses" of fish and wildlife over all other consumptive uses; subsistence uses may not be restricted in any way unless and until all other uses are fully curtailed.³ "Subsistence uses," in turn, are defined 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 inedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter or sharing for personal or family consumption; and for customary trade.⁴

While the priority applies to "rural residents" of Alaska, and not to Alaska Natives *per se*, the priority was adopted in substantial part to protect subsistence uses by Alaska Natives,⁵ and most Alaska Natives do benefit from it since they live in rural Alaska.⁶

OSHERENKO, SHARING POWER WITH NATIVE USERS: CO-MANAGEMENT REGIMES FOR ARCTIC WILDLIFE (Canadian Arctic Resources Committee Policy Paper No. 5, 1988); PETER USHER, THE DEVOLUTION OF WILDLIFE MANAGEMENT AND THE PROSPECTS FOR WILDLIFE CONSERVATION IN THE NORTHWEST TERRITORIES (Canadian Arctic Resources Committee Policy Paper No. 3, 1986).

2. Alaska National Interest Lands Conservation Act of 1994 (hereinafter ANILCA), 16 U.S.C. § 3111-26, Pub. L. No. 96-487.

3. ANILCA § 804, 16 U.S.C. § 3114 (1994).

4. ANILCA § 803, 16 U.S.C. 3113 (1994).

5. See ANILCA § 801(1), (4), 16 U.S.C. § 3111(1), (4) (1994). See also 126 CONG. REC. 29,278-79 (1980) (Statement of Rep. Udall); *Village of Gambell v. Clark*, 746 F.2d 572, 580 (9th Cir. 1984).

6. The priority also applies only on the "public lands," i.e., lands, waters, and interests therein title to which is held by the United States. See 16 U.S.C. § 3102(1) (1994). Prior to

The subsistence priority is implemented through regulations adopted by the Federal Subsistence Board (the Board), which is composed of a Chair—currently an Alaska Native hunter—and the regional directors of the federal land management agencies in Alaska.⁷ The Board, in turn, is advised by a set of ten regional councils, whose members are subsistence users living in rural Alaska.⁸ The councils make recommendations to the Board concerning proposed hunting and fishing regulations—those recommendations are entitled to great deference, as they may only be rejected by the Board under relatively limited circumstances.⁹

ANILCA does not apply to marine mammals or migratory birds.¹⁰ Harvest of marine mammals is governed by the Marine Mammal Protection Act.¹¹ Section 101(b) of the MMPA¹² authorizes Alaska Natives to take marine mammals for subsistence or for the making of handicrafts, provided that the take is done in a non-wasteful manner. Importantly, the federal government may not regulate Native harvest of marine mammals unless and until it makes a finding that a particular species or stock is "depleted," at which time the government may adopt regulations governing the take of that particular species or stock.¹³

As a practical matter, the prohibition on federal regulation of Native harvest of marine mammals has meant that Alaska Natives themselves regulate the take of marine mammals—they are the "managers" through their own regulations. Alaska Natives have done so both at the tribal level¹⁴ and through

1990, the laws of the State of Alaska were deemed to be consistent with Title VIII and hence, pursuant to § 805 of ANILCA, 16 U.S.C. § 3115 (1994), the priority applied on all lands in Alaska and was administered by the State. However, the Supreme Court of Alaska ruled in *McDowell v. State*, 785 P.2d 1 (Alaska 1985), that the State could not constitutionally provide a priority only to rural residents. The State thereby fell out of compliance with federal law and hence lost management authority over subsistence uses on public lands. The State continues to provide a subsistence priority on state and private lands, ALASKA STAT. § 16.05.258, but all Alaskans qualify for the priority. *Id.*

7. See 50 CFR § 100.10 (1995).

8. See ANILCA § 805(a), 16 U.S.C. § 3115(a) (1994).

9. See ANILCA § 805(c), 16 U.S.C. § 3115(C) (1994). The Board must accept a regional council recommendation unless it "is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs." *Id.*

10. See ANILCA § 805(4), 16 U.S.C. § 3115(4) (1994).

11. See Marine Mammal Protection Act (hereinafter MMPA), 16 U.S.C. §§ 1361-1421h (1994).

12. 16 U.S.C. § 1371(b) (1994).

13. See *id.*

14. For example, several villages have adopted tribal ordinances governing marine mammal hunting.

Native commissions that are formed around particular species of marine mammals. One of the most well-known of these commissions is the Alaska Eskimo Whaling Commission (AEWC), which has signed a cooperative agreement with the National Oceanic and Atmospheric Administration (NOAA) under which the Inupiat and Yup'ik whaling captains assume principal responsibility for both regulating whaling by their people and enforcing the whaling regulations—NOAA essentially serves in a back-up role, assuming enforcement responsibility when the AEWC indicates that it is unable to do so.¹⁵

The harvest of migratory birds—principally geese and ducks—is an important part of the subsistence way of life for all Alaska Native cultures. The 1916 Treaty between the United States and Canada banned this harvest during the spring and summer, when most of the birds are in Alaska.¹⁶ Alaska Natives nevertheless have continued to take the birds during these times, because of their nutritional and cultural importance. Recognizing that it basically was powerless to stop the harvest,¹⁷ the United States Fish and Wildlife Service (FWS) decided to work with Alaska Natives to assure that declining bird species were protected. This led to the landmark Yukon-Kuskokwim Delta Goose Management Plan, under which Yup'ik Eskimos in western Alaska agreed not to harvest certain species of birds in exchange for a promise by FWS that it would not bring enforcement action against persons taking other species of birds.¹⁸ This again effectively enabled Alaska Natives to govern their own harvest of most species of migratory birds.

The United States and Canada recently signed a Protocol amending the 1916 Treaty to authorize spring and summer subsistence hunts by Alaska and Canadian Natives.¹⁹ The Protocol itself and language accompanying the agreement note the importance of full involvement by Native peoples in the management of migratory birds.²⁰ This no doubt will lead to further and more comprehensive agreements between FWS and Native tribes and tribal organizations.

15. See Milton Freeman, *The Alaska Eskimo Whaling Commission: Successful Comanagement under Extreme Conditions*, in CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES, *supra* note 1.

16. 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States.

17. There has been a long history of Native resistance to efforts by FWS to enforce the ban on spring and summer hunting. The most famous of these was the "Barrow duck-in," when federal agents cited a Native state legislator from Barrow for hunting ducks out of season. Two days later, 1385 other men from Barrow also shot ducks and showed up with them at the game warden's office. See OSHERENKO, *supra* note 1, at 47.

18. See *id.* at 33-40.

19. See Protocol Between the Government of California and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, signed December 14, 1995.

20. See *id.*; Protocol Interpretation of U.S. Delegation.

The agreements between NOAA and the AEWC, and between the FWS and the Yup'ik Eskimos, are often cited as examples of "comanagement."²¹ This article turns now to a brief discussion of the concept of comanagement, and then discusses a variety of implementation issues.

III. The Concept of Comanagement

A. The Sharing of Responsibility

The term "comanagement" generally refers to the sharing of responsibility for management functions by indigenous people and the government.²² There are many ways to strike the balance of power and responsibility. Government control over management decisions, with limited input from indigenous peoples, marks one end of the spectrum. Indigenous control, with input from the government, marks the other end. Between these two poles are virtually endless possibilities for shared decision-making authority.

One commonly accepted model, as adapted for Alaska by the Native American Fish and Wildlife Society, identifies eight levels of comanagement. This model can be quite helpful in evaluating the desired or appropriate level of Native control in a particular comanagement agreement.

The sharing of responsibility embodied in the concept of comanagement can be informal, as when state troopers decline to cite someone for a violation of a game regulation, thus leaving the matter to a tribal village council. It can also be formal, through signing a formal comanagement agreement with the federal and/or state governments.²³ These formal agreements are sometimes called "comanagement regimes."²⁴

B. Classifying Comanagement Decisions

In deciding on what an "appropriate" system of comanagement might be, it is helpful first to evaluate the types of "management" functions that are involved. Basically, these functions fall into four interrelated categories: research, regulation, allocation, and enforcement. Among other things, research includes the gathering of baseline biological data on fish or wildlife populations, as well as gathering harvest data (numbers, timing, and methods of harvest). Regulation involves any applicable restrictions on harvest, such as seasons, bag limits, location, limitations on which fish and wildlife can be harvested (e.g., no females), etc. Allocation, in turn, refers to

21. See e.g., Freeman, *supra* note 15; OSHERENKO, *supra* note 1; Case, *supra* note 1.

22. See OSHERENKO, *supra* note 1, at 13.

23. See *id.*

24. *Id.*

who is allowed to harvest what fish or wildlife—for example, the AEWC allocates a certain number of whales which may be struck or harvested to each of the whaling villages in Alaska.²⁵ Finally, enforcement involves ensuring that the applicable regulations are followed,

These different management functions are interrelated. Research is a key underlying basis for regulations, since it helps determine such factors as the number of animals which may be harvested to ensure a healthy population, as well as the extent to which a regulation may have an unwarranted and unnecessary impact on hunting customs. In many cases, allocations are put forth as regulations. And often enforcement considerations may dictate the form of the regulations themselves. For example, in order to ensure that there is not an excessive harvest, western game management relies heavily on individual bag limits, as these are easy to enforce.²⁶

C. Six Key Questions

Deciding whether to include all or some of these management function in a comanagement agreement is just one of the many decisions that need to be made in structuring such agreements. Dalee Sambo Dorough has identified the six key questions that must be answered in any comanagement agreement:

The questions of *who* has management authority, jurisdiction, and enforcement powers are all necessary to address in a fair, just and respectful fashion. It is also necessary to identify *what* species are covered by the regime and what interests indigenous peoples and others have in the protection and management of the species. The period of time that the regime covers should be clearly identified: *when* does it take effect and how long will it last? A further important aspect is the mapping of the territory and boundaries involved, or essentially *where* the management regime would be applicable. Also, the matter of *how* a co-management regime would actually work must be addressed: what mechanisms will be put in place, what regulations or "pertinent laws" will be adopted, and who drafts these rules and regulations? And, ultimately, the question of *why* such a regime is being established must be answered by all parties. This intent or goal should be stated at the outset of the agreement, and be the guiding principle of the overall agreement.²⁷

25. See Freeman, *supra* note 15, at 144-45.

26. See OSHERENKO, *supra* note 1, at 3-4.

27. Dalee Sambo Dorough, Minimum Standards and Fundamental Principles for 'Comanagement' Regimes with Alaska Natives, 4 (unpublished manuscript on file with the author).

Before turning to the factors involved in each of these questions, one last point needs to be made. Many different types of agreements have been styled "comanagement" agreements. These include contracts to gather subsistence use information,²⁸ agreements on migratory bird enforcement policy,²⁹ management of the bowhead whale hunt,³⁰ and various complex settlements of Native land claims in Canada.³¹ The word "comanagement" has also taken on an important symbolic meaning, referring to the strongly-held desire of Native tribes and organizations to exert real control over research, regulation, allocation and enforcement.³² "Comanagement" thus has what might be called a technical meaning, as when it refers to any of the different levels of power sharing between Native groups and a governmental entity, and a normative meaning, as when it refers to a particular level of community authority that is felt to be the appropriate one. In view of the vast range of possible types and levels of comanagement agreements, and in order to avoid selecting one particular norm, this article will use "comanagement" in its technical sense of power sharing between Native Groups and Government.

IV. The Goals of a Comanagement Agreement

A. Choosing Forms of Management and Levels of Control

Determining the goal of the agreement is the first decision to be made in formulating a comanagement agreement. As noted above, comanagement

28. Section 809 of ANILCA, 16 U.S.C. § 3119, authorizes the federal government to enter into cooperative agreements with the State of Alaska, Native corporations, and other appropriate organizations to carry out the purpose of Title VIII of ANILCA. The federal government has entered into such agreements with several Native organizations, primarily to carry out harvest monitoring activities, but also to engage efforts as minimizing conflicts among users of specific game populations. Among the more successful of the latter agreements is the Qavilnguut Caribou Herd Management System, a three-part agreement between the FWS, the Alaska Department of Fish and Game, and eighteen Yup'ik Eskimo villages in southwestern Alaska which seeks to resolve management issues involving the Qavilnguut (or Kilbuck) caribou herd through consensus by all parties. See *infra* text accompanying note 50; Spaeder, *The Qavilnguut (Kilbuck) Caribou Herd: An Alaskan Example of Cooperative Management* (June 1995) (unpublished manuscript on file with the author).

29. See *supra* text accompanying notes 16-20.

30. See *supra* text accompanying note 15.

31. See *e.g.*, Berkes, *Co-Management and the James Bay Agreement*, in CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES, *supra* note 1; Nancy C. Doubleday, *Co-Management Provisions of the Inuvialit Final Agreement*, in CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES, *supra* note 1.

32. See *e.g.*, Dorrough, *supra* note 27.

implicates two distinct sets of factors: the level of community authority and the specific form of management. A Native tribe or organization considering a comanagement agreement will need to decide on the forms of management in which it wants to participate and how much control it desires—or, in many cases, what it can obtain given the constraints of federal law. Depending upon the type of activity, the tribe or organization may choose an agreement that incorporates several of the levels previously discussed.

This can best be illustrated through some examples. First, suppose that a Native marine mammal commission decides that it is more appropriate for individual tribes, not the commission itself, to regulate or allocate Native take, and that the commission's role is most properly one of research and advocacy. In that case, the comanagement agreement negotiated with a federal agency might need to address only scientific research protocols, respective roles for research, and full consultation on proposed government regulatory and enforcement initiatives. However, the commission may also decide that it should have principal responsibility for conducting research and for regulating the conduct of scientists who do research in the communities. In this case, the commission's comanagement agreement would incorporate several of the eight levels, notably the higher levels with respect to research and the lower ones with respect to the federal government's assertion of its authority.

By contrast, a tribe whose members take marine mammals might decide that it wants to control the activities of its members largely independent of any government control. More specifically, the tribe might conclude that it should have principal responsibility over writing the regulations, allocating the harvest in the event that an allocation would be needed, and enforcing the regulations. The comanagement agreement it would negotiate might focus on these three elements of management, calling for a high level of community authority.

The AEWG represents yet another example of how the overall framework issues might be addressed. The AEWG has taken responsibility for all four forms of management, conducting its own research, developing whaling regulations, allocating the whale quota among the villages, and enforcing both the quota and the regulations. The research is conducted both independently and in partnership with whale biologists from other organizations; regulation and allocation among the villages is almost entirely the responsibility of the AEWG and its members; and the AEWG has principal responsibility for enforcement, with the federal government providing a backup role. On the other hand, with respect to setting the overall quota, the AEWG merely has an opportunity to participate in the meetings of the International Whaling Commission (IWC) as a member of the U.S. delegation—it has no real authority over the IWC's deliberations or decisions.³³

33. See generally Freeman, *supra* note 15; Huntington, *The Alaska Eskimo Whaling Commission: Effective Local Management of a Subsistence Resource*, in CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES, *supra* note 1.

B. Political and Legal Constraints

As this last example illustrates, the extent of community control by a Native tribes or organizations is governed to a large degree by the western legal and political framework. With respect to marine mammals, Native tribes and organizations have a considerable amount of flexibility, since, as noted above, Native take cannot be regulated or allocated by the federal government unless a species is found to be depleted. By contrast, spring and summer hunting of migratory birds currently is flatly prohibited by the treaty with Canada—at least until the Senate ratifies the new Protocol Amendment to that treaty. Native groups wishing to pursue comanagement agreements on migratory birds therefore have had to focus on enforcement, as has been done quite successfully with the Yukon-Kuskokwim Delta Goose Management Plan. That agreement essentially represents a sharing of authority over enforcement of migratory bird hunting, under which the federal government enforces a set of agreed upon bans of hunting and/or egging of four species of birds while Native groups regulate hunting of all other species.³⁴

The western legal and political framework is particularly important to consider in the context of tribal control over fishing and hunting of territorial mammals. Some Alaska Native activists believe that comanagement can only be properly implemented in this context if full authority and jurisdiction are vested in the tribes.³⁵ At present, however, the federal and state governments have claimed virtually complete jurisdiction over tribal hunting and fishing, leaving little room for tribal control.³⁶ This suggests that achieving full authority for the tribes will require a substantial change in federal policy, and perhaps in federal law. Tribes and Native organizations

34. See *supra* text accompanying note 18.

35. See *e.g.*, Dorough, *supra* note 27.

36. Tribes generally can have jurisdiction over fish and wildlife only to the extent that that jurisdiction is preserved by a federal statute or treaty or is exercised within "Indian country." See generally, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 441-70 (1982). The U.S. Court of Appeals recently ruled in *State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286 (9th Cir. 1996), that the lands comprising the former Venetie Reserve are Indian country. The language of the court's opinion suggests that other lands owned by Alaska Native village corporations organized pursuant to the Alaska Native Claims Settlement Act also may be Indian country. Whether such recognition of Indian country will mean tribal jurisdiction over fish and wildlife is not clear at this point. The State of Alaska has appealed the *Venetie* decision to the U.S. Supreme Court—the State has consistently strongly advocated against tribal jurisdiction over fish and wildlife. In June 1997, the U.S. Supreme Court granted certiorari. See *Alaska v. Native Village of Venetie Tribal Gov't*, 117 S. Ct. 2478 (1997). The case is schedule to be argued in December, 1997.

will need to address whether they can or will accept a comanagement agreement that embodies anything less than full tribal control. In answering this question, tribes and Native organizations might want to consider the following:

1. Whether full tribal control is necessary to meet their needs in a particular comanagement agreement.
2. Whether full tribal control must be an immediate objective that must be attained before beginning the process of negotiating comanagement agreements, or whether this is a long-term goal to be attained in part through negotiating comanagement agreements embodying ever-increasing amounts of community authority.

In summary, in deciding on the goal of a comanagement agreement, it is important to determine the type or types of management that will be covered and the level of community control that is desired. In making this decision, the legal and political context will govern, to some extent, what is possible—but the negotiations themselves may well push the government authorities into agreeing to something they initially thought was not possible.

V. Who Has Comanagement Authority

Who are the appropriate Native parties to be entering into comanagement agreements with the federal and/or state governments? Several Alaska Native marine mammal commissions have signed memoranda of agreement with the federal government;³⁷ the Waterfowl Conservation Commission (WCC) is the principal Native signatory to the Goose Management Plan, and several Native non-profit organizations have signed agreements with the Fish and Wildlife Service pursuant to section 809 of ANILCA. Other Native organizations are also looking into comanagement, and there is undoubtedly, considerable interest among tribes in developing comanagement agreements with the government on regulation of hunting and fishing by their members.

Obviously, there is some potential for overlap in these agreements. For example, a marine mammal commission might be interested in signing a comanagement agreement that gives it considerable authority to regulate hunting, at the same time that individual tribes are approaching the government for the same purpose. Accordingly, there is a need for careful coordination and communication among the various interested parties, so that

37. These include the AEWC, the Eskimo Walrus Commission, and the Alaska Sea Otter Commission.

the appropriate entities assume proper roles. In particular, there may well need to be some agreement or framework established to set out a process for determining which entity should take on which management tasks with respect to a particular area or a particular species, be it a tribe, a Native non-profit or other regional group, or a Native commission.³⁸ This will be particularly important with respect to comanagement agreements entered into under section 119 of the MMPA,³⁹ which may be a source of funding for implementing comanagement agreements⁴⁰—since the funding will be limited, careful coordination will be needed to avoid competition and duplicative efforts.

VI. The Species Covered by a Comanagement Agreement

To date, most comanagement agreements between Native groups and the federal government have concerned either a particular species, such as walrus, bowhead whales, and sea otters, or a particular issue, such as migratory bird hunting or subsistence uses on federal lands. This trend is likely to continue with respect to marine mammal commissions, the WCC, and the section 809 agreements. But again, there is a strong potential for overlap among the different possible comanagement agreements.

For example, a tribe might want to enter into a comanagement agreement covering hunting of *all* species used by its members, including marine mammals, birds, and terrestrial mammals. This obviously creates the possibility of overlap and perhaps even inconsistency with agreements signed by other entities, such as an agreement concerning walrus and the Goose Management Plan. In addition, the species used by the tribe's members often may be used by members of other tribes, which will require coordination with the other tribes to ensure that there are no conflicts or inconsistencies.

As these considerations indicate, any framework for comanagement agreements also will need to cover a process for communication and coordination as to the species covered by a particular agreement. This, again, will be particularly important in the section 119 process, since both

38. As relevant to this article, there are three general types of Native organizations in Alaska. The first is the federally recognized tribes. A second type consists of what are generally termed the "non-profits"—these are tribal organizations, organized on a regional level, which are empowered by their member tribes to deliver services (such as health, realty, and advocacy) to the member tribes and tribal members. Finally, Native commissions have been created to advocate of behalf of the users of particular species of animals, mostly marine mammals—the Alaska Eskimo Whaling Commission is among the more well known of these organizations.

39. See 16 U.S.C. § 1388 (1994).

40. Section 119 of the MMPA authorizes up to \$2.5 million to be appropriated by Congress to develop comanagement agreements with Native organizations. See *id.*

tribes and commissions may be interested in developing comanagement agreements for the same species.

VII. The Time Period of an Agreement

In general, most comanagement agreements either contain a specific expiration date, with an opportunity for renewal, or are designed to last unless and until one of the parties formally notifies the others that it wishes to terminate the agreement. The advantage of a specific term for the agreement is that it forces the parties to revisit the agreement periodically, so that they can change it to accommodate altered or different circumstances. This has been of great benefit in the Goose Management Plan, since conditions have changed since the first Plan was adopted.⁴¹

On the other hand, being forced to renegotiate can impose burdens and expense on the parties which can be needless if there is no reason to change the agreement on a regular basis. Avoiding this cost is probably the principal advantage to making the agreement remain in effect unless, and until it is terminated. Of course, if the latter type of agreement cannot be amended, then it can lack the necessary flexibility to adapt if circumstances do change. This can easily be avoided, however, by including a provision in the agreement that it can be modified by the parties if necessary.

It probably is easiest not to include a specific term in a comanagement agreement, but to provide that the agreement can be modified by mutual consent of the parties. Where circumstances—such as levels of funding or populations of particular species—do change on a yearly basis, it may make sense either to include a specific term or to make specific parts of the agreement subject to renegotiation each year.

VIII. Where a Comanagement Agreement Could Apply

In most cases, the geographic area covered by a comanagement agreement will be quite important. This is clearest with respect to comanagement agreements with tribes, since they can only exert authority within their territorial jurisdiction. This, of course, will require the federal government to recognize tribal jurisdiction if tribes are fully to manage hunting and fishing in a manner consistent with the tribe's inherent authorities.

Other comanagement agreements which would need to define the relevant geographic territory include agreements on research and on collecting subsistence use data in particular areas, agreements on enforcement of migratory bird hunting, and any regional management plans for marine mammals. On the other hand, some agreements may not need a territorial component. One example would be a

41. Interview with Calvin Simeon, Natural Resources Director, Association of Village Council Presidents, in Bethel, Alaska.

marine mammal agreement pertaining to research and communication with respect to a particular species, since the agreement would pertain to any and all activities regarding the species, regardless of where they occur.

There may, again, be a possibility for overlap in comanagement territories. For example, a tribe and a regional organization might seek a comanagement agreement on how research may be conducted in the tribe's area. As a general matter, however, this territorial issue should ordinarily coincide with the issue of who should enter into the agreement, and so can be resolved at the same time.

IX. The Content of a Comanagement Agreement

As discussed above, existing comanagement agreements address a variety of topics with varying levels of Native control over decision-making. Underlying the choices that have been made in each agreement are decisions as to each of the five issues addressed above. Needless to say, these decisions only set the framework for what the agreement actually will achieve. There are, in turn, at least three sets of considerations involved in addressing this issue: the management functions of research, regulation, allocation, and enforcement; a dispute resolution mechanism; and funding.

A. Management Functions

The relevant factors involved in designing a comanagement agreement can be evaluated in part by reference to each of the four functions implicit in management of fish and wildlife resources: research, regulation, allocation, and enforcement.

I. Research

The Native community is in the process of developing research protocols to guide western scientists in their work in Native villages.⁴² Of equal importance are efforts presently underway to develop systems for integrating the traditional knowledge of Native peoples into western scientific research and into the decision-making process.⁴³ A third key factor involves how federal and

42. For example, the Alaska Federation of Natives developed a set of protocols to guide research in any Native community, under which researchers are asked to communicate with the community before conducting their research, to make it clear just what the object of the research is, to work with the community to avoid any unintended violations of local culture rules, and to inform the community of the results of the research.

43. Alaska Natives have created an Alaska Native Science Commission, which has as a primary goal the collection and integration of Native knowledge into the decision making process.

state agencies use the information they are provided, be it through western science or by individual Natives and Native tribes and organizations. This is especially true with respect to subsistence uses of fish and wildlife—all too often, Natives have found that the information they provide is used against them.⁴⁴ Once the basic decisions are made as to how to approach each of these factors, they can be worked into a framework that all future comanagement agreements focusing on research can use.

2. Regulation

Regulation often proves to be among the most intractable issues, since both the state and federal governments are particularly jealous of their authority to regulate uses of fish and wildlife for conservation purposes. They also tend to bring a bias against forms of management that differ from what they are taught in fisheries and wildlife management courses, which generally are based on a sport or commercial use framework.⁴⁵ In the United States, this has generally translated to a "we manage and you cooperate" sort of arrangement, with relatively little power granted to Native tribes or organizations.⁴⁶ The Canadians have (at least in theory) been more open to fuller indigenous participation, structuring most of their land claims to include management boards composed of equal numbers of Natives and government officials. These boards operate by consensus, but their decisions are subject to review, modification, and even reversal by the appropriate Canadian minister. Apparently, the minister rarely changes or rejects what a board recommends, precisely because they are conducted by consensus.⁴⁷

In view of these constraints, Native tribes and organizations will likely be faced with making the hard decision as to how much regulatory authority to press for in comanagement negotiations. While this decision will no doubt need to be made for any of the management functions, it is particularly important in the context of regulation, since this is where the constraints and the disputes can be the strongest. There are a variety of possibilities in this respect. The Native community could, as a whole, arrive at a level of community authority that it feels is necessary in order to sign any comanagement agreement, or it could leave the decision as to the appropriate level of involvement to each individual negotiation. The Native community could also identify particular standards as goals, rather than minimum guarantees, that must underlie any agreement.

44. KOTZEBUE FISH AND GAME ADVISORY COMMITTEE, REGULATION REVIEW: A REVIEW OF THE GAME REGULATIONS AFFECTING NORTHWEST ALASKA (Oct. 1986).

45. See Usher, *supra* note 1, at 2-3.

46. See KOTZEBUE FISH AND GAME ADVISORY COMMITTEE, *supra* note 44.

47. See Berkes, *supra* note 31.

3. Allocation

Allocation issues arise in two contexts: allocation within the Native community, and allocation between Native and non-Native users. Allocation between Native and non-Native users raises the same sets of concerns as regulation of fishing and hunting. There obviously are strong interests involved here, most notably sport hunters, sport fishermen, and commercial fishermen, but also "nonconsumptive users" who value looking at wildlife or just appreciate knowing the wildlife is there. Representatives of these groups may want some role in deciding allocations. The role of other users will have to be factored into both a comanagement agreement and any framework on comanagement that the Native community devises.

There seems to be no reason that government agencies outside of the tribe should get involved in the internal issue of how to allocate fish and wildlife within a Native community or among different Native communities. The key question for outside managers is the total overall Native harvest, not who takes the animal. This type of allocation is best left to the Native entity or entities.

4. Enforcement

Federal and state agencies also tend to be quite intent on preserving their overall authority to enforce federal and state law. On the other hand, they have been willing essentially to delegate that authority in limited contexts, most importantly to the Alaska Eskimo Whaling Commission with respect to whaling, and, to a lesser extent, to tribes in the Yukon-Kuskokwim Delta with regard to migratory birds.⁴⁸ The approach used in these contexts, whereby the Native entity takes on initial and principal enforcement authority, with the government serving a backup role in the event that Native enforcement is not successful, would seem to be one that should work in most areas, and so perhaps could be an element of the framework on comanagement developed by the Native community.

B. Dispute Resolution

The very concept of comanagement revolves centrally around the notion that responsibility over management must be shared in some fashion between indigenous people and the federal and/or state governments. The manner in which that responsibility is shared should, for the most part, itself provide the principal mechanism by which disputes between Native users and government managers are resolved. For example, the Goose

48. See *supra* text accompanying notes 15-20.

Management Plan effectively resolved a dispute over enforcement of the Migratory Bird Treaty by identifying the species that Natives would hunt without federal interference and those that Natives agreed not to hunt.

On the other hand, there may well be many occasions where disputes will arise in implementing a comanagement agreement. For example, Native users may have different ideas regarding the health of a wildlife population from the federal biologists, and so would push for different allowable levels of harvest. To the extent that a comanagement agreement does not place sole authority over these decisions with either Native users or the government, there will need to be some mechanism that resolves such disputes. In Canada, for example, the management boards discuss these issues and attempt to arrive at a consensus.⁴⁹ This is also the case with respect to the Kilbuck Caribou herd on the Yukon-Kuskokwim Delta, where caribou hunters and the government arrive at a consensus position each year on how many caribou may be harvested, and present that position to the relevant state and federal agencies for approval.⁵⁰

In both of these cases, the consensus position is subject to final review and approval by the government. Alaska Natives may want to consider whether this is an appropriate approach for all comanagement agreements, whether they want to push for a stronger role in this respect, or whether they want to leave the matter for negotiation in each comanagement agreement. It seems clear, in any event, that any dispute resolution mechanism will require two elements: a process of meeting between the various sides in order to attempt to resolve the matter, and some agreed-upon entity with final decision making authority.

C. Funding

It is obvious that there can be no effective comanagement if Native tribes or organizations lack the funding and/or trained personnel to implement a comanagement agreement. Adequate funding has been a key reason behind the effectiveness of the Alaska Eskimo Whaling Commission,⁵¹ and it has enabled several Native non-profits to engage in their own research and data collection on Native subsistence uses in their area.⁵² Thus, a central element of any comanagement negotiation will involve how the Native tribe or organization will be able to pay for its work.

Funding mechanisms can be built directly into the comanagement agreement, as is contemplated by section 119 of the MMPA; they can be

49. See Berkes, *supra* note 31.

50. See Spaeder, *supra* text 28.

51. See Case, *supra* note 1.

52. Interview with Calvin Simeon, *supra* note 41; interview with George Yaska, Wildlife and Parks Director, Tanana Chiefs Conference, in Fairbanks, Alaska.

guaranteed through a contract with a federal agency; or they can be provided independently, as is the case with the Whaling Commission. The Native community may wish to address whether to insist, in a comanagement framework, that funding be part of any agreement, or whether to leave this to the individual negotiations.

One issue that a framework usually must address is resolving competition for limited funding. This is likely to arise in the implementation of section 119 of the MMPA. Funding under this section is key to ensuring the success of any comanagement agreements, signed pursuant to this section, yet only a limited amount of money is likely to be available. This means that many Native tribes and organizations may be competing for the same funds. In order to avoid disputes, and more importantly, to avoid federal government priorities rather than the Native community's priorities controlling the funding decisions, it is important that the Native community arrive at its own framework for deciding how to allocate these limited funds.

X. Summary and Conclusion

The factors discussed in this paper apply to any comanagement agreements that are signed with federal and/or state agencies and to any overall framework designed by the Native community to guide Native tribes and organizations in their negotiations. In many cases, such as deciding which types of management functions to include in the agreement and which entity is the most appropriate one to participate, the decision probably will have to be made on a case-by-case basis respecting a particular comanagement agreement, through discussions among the different Native entities involved. In other cases, an overall framework can serve as an effective way to protect the Native community's interests as the comanagement process moves forward.

The following issues appear to be the most likely candidates for inclusion or discussion in an overall comanagement framework:

1. Research protocols.
2. Mechanisms for inclusion of traditional Native knowledge in decision-making.
3. Mechanisms for assisting Native organizations in discussing allocation of overlapping authority over a particular species or topic (e.g., tribal versus regional authority over hunting marine mammals.)
4. The extent to which principal authority for comanagement should be vested in tribes.
5. Standards for deciding the minimum levels of community authority acceptable to the Native community in different contexts.
6. The manner in which enforcement authority should be shared, e.g., an insistence on the Whaling Commission model.

7. Standards for dispute resolution mechanisms.
8. Assurances of adequate funding for comanagement activities on an ongoing basis, and mechanisms for preventing competition for limited funds.

Comanagement is potentially a very powerful tool for managing fish and wildlife in Alaska in a manner that both conserves the species and meets the needs of the Native community. While they are becoming more receptive to the idea, federal and state agencies remain suspicious of the concept and jealous of their authority and funding. This gap can be bridged, and comanagement can be advanced, through the development of a framework for comanagement agreements, for this will assist Native tribes and organizations in formulating what they believe to be an acceptable comanagement regime, as well as federal and state agencies in understanding the real value of these regimes.