From the Gulf of Mexico to the Beaufort Sea: Inuit Involvement in Offshore Oil and Gas Decisions in Alaska and the Western Canadian Arctic

by Betsy Baker

Betsy Baker is an Associate Professor at Vermont Law School.

Summary

In 2013, do the Inuit on either side of the U.S.-Canada Beaufort Sea maritime boundary have better tools for taking more meaningful part in decisions relating to offshore oil and gas development in the Arctic than they did in the wake of the 2010 Macondo/*Deepwater Horizon* explosion and spill? A review of legal and policy developments in both countries over that three-year period allows the conclusion that U.S. and Canadian officials have taken incremental but non-systematic steps that improve modestly Inuit involvement in their respective regulatory processes for Arctic offshore oil and gas activities.

This Article examines developments across three spring seasons—from 2010 to 2013—to laws, regulations, and policies affecting how Inuit in Canada and the United States participate in decisions about Arctic offshore oil and gas activity. Spring 2010 witnessed the Macondo well blowout and *Deepwater Horizon* drill rig explosion in the warm mid-latitude waters of the Gulf of Mexico.[1] The disaster set in motion official responses in both countries, including initiatives specific to the Arctic Ocean.[2] Three years later, those Arctic-relevant responses, taken together with other official Arctic measures, are numerous enough to bear scrutiny from the perspective of the people most likely to be affected by offshore oil and gas activity in the Beaufort Sea, where both countries abut the Arctic Ocean.[3] More specifically, the Article looks at whether the Inuit on either side of the Beaufort Sea maritime boundary do or do not have better tools for taking more meaningful part in related decisions than they did three years ago. It concludes that officials in both countries have taken incremental but non-systematic steps that improve modestly Inuit involvement in the respective regulatory processes for oil and gas activities that may profoundly affect their use of the Beaufort Sea's mammal-rich waters and rapidly diminishing sea ice.[4]

Of the many Arctic-specific responses over the five months that elapsed between the April 20th blowout and

Author's Note: The author presented earlier versions of the paper that underlies this Article at the Arctic Frontiers*, Tromsø, Norway, January 2010, session on Northern Communities, and at the seminar* Geopolitical and Legal Aspects of Canada's and Europe's Northern Dimensions, *May 2010, University of Alberta, Edmonton, Canada. The latter paper will appear in* Mark Nuttall & Anita Dey Nuttall, Eds., Arctic Geopolitics and Resource Futures *(Edmonton: CCI Press 2014).*

1. As is now well-documented, on April 20, 2010, the BP Macondo well suffered a catastrophic loss of control leading to the *Deepwater Horizon* explosion and fire that killed 11 workers. Numerous studies document the events surrounding the *Deepwater Horizon*. *See, e.g.*, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling, Report to the President (2011).
2. Popular reaction was also quick to draw connections between the Macondo incident and the Arctic. For example, the *New York Times* called on the Secretary of the Interior to withhold all outstanding permits and authorizations and not to allow any oil exploration in the Alaskan Arctic in 2010, or until investigations of the Gulf incident were complete. Editorial, *The Arctic After the Gulf*, N.Y. Times, May 26, 2010, at A26, *available at* http://www.nytimes.com/2010/05/26/opinion/26wed2.html.
3. While Canada's Arctic offshore also includes Nunavut in the eastern part of the country, this Article focuses on the Beaufort Sea (where the Western Canadian Arctic meets the U.S. Arctic) because the Beaufort has been the site of more oil and gas activity than Nunavut.
4. *See, e.g.*, Nuka Planning & Research Group, Oil Spill Prevention and Response in the U.S. Arctic: Unexamined Risks, Unacceptable Consequences 19 fig. 2-10, 60 fig. 4-11 (2010) (figures showing sea ice loss and bowhead whale migration routes and concentrations).

September 17th capping of the Macondo well in 2010,[5] several are notable: the National Energy Board (NEB) of Canada announced its expanded Arctic Offshore Drilling Review[6]; Mary Simon, then-President of Canada's national Inuit organization Inuit Tapiriit Kanatami, called for a moratorium on drilling in the Canadian Arctic[7]; and the U.S. president appointed the Presidential Commission on the Deepwater Horizon and Offshore Drilling.[8] By early October, the U.S. Commission had issued an Arctic-specific paper on the challenges of oil spill response in the Arctic.[9]

Three springs later, the U.S. government has issued two reports directly related to resource development in the U.S. Arctic: one from the U.S. Department of the Interior (DOI) on its expedited review of Shell's 2012 mishap-plagued Arctic exploration season,[10] for which permitting had begun prior to the Macondo incident[11]; and one from the Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska,[12] calling for Integrated Arctic Management.[13] More generally, the White House issued the five-year research plan for the Interagency Arctic Research Policy Committee (IARPC) in February 2013 through its Office of Science and Technology Policy (OSTP)[14] and, in May 2013, the National Strategy for the Arctic Region.[15] The White House issued the national Arctic strategy in time for the Ministerial Meeting of the Arctic Council in Kiruna, Sweden. The U.S. Coast Guard (USCG) soon followed with its own Arctic Strategy.[16] In June 2013, DOI launched the scoping process for a rulemaking on Alaska-specific amendments to the implementing regulations for the Outer Continental Shelf Lands Act (OCSLA), the primary piece of legislation governing oil and gas development in the U.S. offshore.[17] Finally, President Barack Obama issued an Executive Order in June 2013 establishing the White House Council on Native American Affairs at the cabinet level.[18] While not Arctic-specific, the order applies to all 229 federally recognized Alaska Native tribes.[19]

---

5. The well was sealed on July 15, 2010, and capped on September 17, 2010. *See, e.g.*, David A. Fahrenthold & Steven Mufson, *BP Macondo Oil Well Successfully Capped*, Wash. Post, Sept. 18, 2010. Over that five-month period, some five million barrels of oil had spilled and countless ocean-dependent livelihoods, flora, and fauna had been affected. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *The Amount and Fate of the Oil*, Staff Working Paper No. 3, at 16 (Oct. 6, 2010), *available at* http://www.oilspillcommission.gov/document/amount-and-fate-oil ("The emerging consensus among government and independent scientists is that roughly five million barrels of oil were released by the Macondo well . . . .").
6. The NEB announced its Arctic Offshore Drilling Review on May 11, 2010, cancelling a technical review of same-season relief-well requirements that had begun pre-*Deepwater*. Nat'l Energy Bd. (Can.), The Past Is Always Present: Review of Offshore Drilling in the Canadian Arctic: Preparing for the Future 5-6 (2011), *available at* http://www.neb-one.gc.ca/clf-nsi/rthnb/pplctnsbfrthnb/rctcffshrdrllngrvw/fnlrprt2011/fnlrprt2011-eng.html; *see also, e.g.*, Nat'l Energy Bd. (Can.), *Public Review of Arctic Safety and Environmental Offshore Drilling Requirements (Arctic Review)—Backgrounder, Regulation of Offshore Drilling in the Canadian Arctic*, File OF-EP-Gen-AODR 01 (Dec. 22, 2010), *available at* https://www.Neb-One.Gc.Ca/Ll-Eng/Livelink.Exe?Func=Ll&Objid=659374&Objaction=Browse.
7. Michel Comte, *Inuit Call for Arctic Offshore Oil Drilling Moratorium,* Agence France-Presse, May 26, 2010, http://www.google.com/hostednews/afp/article/ALeqM5i1_XTMLKiMs1AW5Su6kyLjSRwPfg (last visited Aug. 30, 2013). In June 2010, at the 11th Inuit Circumpolar Council general assembly, representatives from Alaska spoke of the Gulf of Mexico events as a "reminder of the catastrophe that could occur in Arctic waters," but also pointed to "examples of successful . . . oil and gas developments on land in Prudhoe Bay." Inuit Circumpolar Council 11th General Assembly, June 28-July 2, 2010 Proceedings, Inoqatigiinneq—Sharing Life, pp. 12, 13, http://inuitcircumpolar.com/index.php?ID=435&Lang=En (last visited Aug. 30, 2013). In February 2011, the Inuit Circumpolar Council hosted an Inuit Leaders Summit on Resource Development in the Arctic, resulting in *A Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat* (2011), which was called for at the 11th Inuit Circumpolar Council general assembly, CBC Eye on the Arctic, July 6, 2010.
8. President Barack Obama appointed the Commission on June 14, 2010. Press Release, White House Office of the Press Sec'y, President Obama Announces Members of the BP Deepwater Horizon Oil Spill and Offshore Drilling Commission (June 14, 2010), *available at* http://www.whitehouse.gov/the-press-office/president-obama-announces-members-bp-deepwater-horizon-oil-spill-and-offshore-drill.
9. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *The Challenges of Oil Spill Response in the Arctic*, Staff Working Paper No. 5 (Jan. 11, 2011), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/updated arctic working paper.pdf.
10. U.S. Dep't of the Interior, Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program (2013), *available at* http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf [hereinafter DOI Shell Review]. Shell's 2012 season involved a failed Arctic containment dome test, vessels losing anchor in rough Arctic seas, and a drilling rig almost running aground as it was being towed at the end of the season, but no oil spills and no human casualties.
11. *Id.* at 17:
    > In May 2010, while efforts to control the Macondo well blowout in the Gulf of Mexico were still ongoing, Shell submitted to DOI a list of safety measures that Shell pledged to incorporate into its Arctic drilling program, based on lessons Shell stated it had already learned from the *Deepwater Horizon* incident.

    (citing Letter from Marvin Odum, to S. Elizabeth Birnbaum, dated May 14, 2010, attached to the DOI Report at Tab 3).
12. Executive Order No. 13580, July 12, 2011, established the Working Group "[t]o formalize and promote ongoing interagency coordination, this order establishes a high-level, interagency working group that will facilitate coordinated and efficient domestic energy development and permitting in Alaska while ensuring that all applicable standards are fully met." Exec. Order No. 13580, 76 Fed. Reg. 4198 (July 15, 2011).
13. Joel P. Clement et al., Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska, Managing for the Future in a Rapidly Changing Arctic: A Report to the President (2013).
14. Executive Office of the President, Nat'l Sci. & Tech. Council, Arctic Research Plan: FY2013-2017 (2013) [hereinafter OSTP IARPC Five-Year Plan], *available at* http://www.nsf.gov/geo/plr/arctic/iarpc/arc_res_plan_index.jsp.
15. Executive Office of the President, National Strategy for the Arctic Region (2013), *available at* www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf.
16. U.S. Dep't of Homeland Security, U.S. Coast Guard, Arctic Strategy (2013), *available at* http://www.uscg.mil/seniorleadership/DOCS/CG_Arctic_Strategy.pdf.
17. U.S. Dep't of the Interior, *Bureau of Ocean and Energy Management (BOEM) and Bureau of Safety and Environment and Enforcement (BSEE) Review of Alaska Outer Continental Shelf Oil & Gas Drilling Standards*, Regulations.gov (June 6, 2013), http://www.regulations.gov/#!docketDetail;D=BOEM-2013-0035 (last visited Aug. 30, 2013).
18. Exec. Order No. 13647, *Establishing the White House Council on Native American Affairs* (June 26, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/26/executive-order-establishing-white-house-council-native-american-affairs.
19. *See id.* at (d) ("For purposes of this order, 'federally recognized tribe' means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.").

In Canada, major Arctic-specific developments over the three-year period include the NEB's simultaneous release in December 2011 of two documents: the final report of its Review of Offshore Drilling in the Canadian Arctic[20]; and Filing Requirements for Offshore Drilling in the Canadian Arctic.[21] In May 2013, the NEB published Draft Financial Viability and Financial Responsibility Guidelines, both of which are a direct outgrowth of the NEB's Arctic Offshore Drilling Review.[22] Two further events are not specific to the Arctic, but potentially relevant to development there. First, in November 2010, the Supreme Court of Canada decided that the Crown's duty to consult with Canada's aboriginal citizens exists even under modern land claims agreements.[23] Second, the new Canadian Environmental Assessment Act,[24] largely considered to have weakened environmental protections nationwide, entered into force in 2012.

In February 2013, the regulatory bodies in Canada and the United States whose responsibilities include offshore operational safety in the Arctic signed a Memorandum of Understanding (MOU) Regarding Cooperation.[25] The MOU is not specific to the Arctic or to any geographic region, but formalizes and encourages the regulators' exchange of information, best practices, and experience.

To examine how these developments are relevant to Inuit interests in the regulatory processes in both countries, the Article begins with a concise geography of the Western Canadian Arctic and the Alaskan Beaufort Sea, relating it to the governmental structures that have developed on either side of the U.S-Canadian maritime boundary. It then provides a spare outline of relevant federal rules in the United States and Canada, sufficient to connect these existing rules to the policy and regulatory initiatives identified above. Throughout, it assesses at this early stage how those initiatives have affected the systems already in place for Inuit engagement in decisionmaking processes and how they might be used to strengthen that engagement.

I. The Beaufort Sea: Some Comparative Geographic, Co-Management, and Constitutional Basics

The Beaufort Sea in the Arctic Ocean abuts both Canadian and U.S. shores. The unresolved maritime boundary between the two countries is managed through peaceful diplomatic relations.[26] The Inuvialuit Settlement Region (ISR) in Canada and the North Slope Borough (NSB) in Alaska account for the bulk of Beaufort Sea coastline. The ISR is a product of the 1984 Inuvialuit Final Agreement (IFA), a modern-day treaty between Canada and, representing the Inuvialuit, the Committee for Original Peoples' Entitlement (COPE).[27] By the treaty's terms, the Inuvialuit ceded all aboriginal rights to "adjacent offshore areas . . . within the sovereignty or jurisdiction of Canada," yet the ISR was defined to include all of the Beaufort Sea covered by the agreement, including the submarine Crown (federal) lands.[28] The ISR covers 906,430 square kilometers (km^2), of which 91,000 km^2 are terrestrial and the rest are marine areas.[29] The IFA establishes co-management and subsistence regulatory bodies, including the Inuvialuit Game Council, Wildlife Management Advisory Council, and the Fisheries Joint Management Committee.[30] The principle of equal federal and Inuvialuit representation that appears throughout the IFA applies as well to these bodies.[31]

20. NEB, The Past Is Always Present, *supra* note 6.
21. Nat'l Energy Bd. (Can.), Filing Requirements for Offshore Drilling in the Canadian Arctic 9 (2011) ("Beginning in November 2010, we held more than 40 meetings in 11 communities across Yukon, the Northwest Territories [NWT], and Nunavut. We met with Elders, hunters and trappers, community corporation representatives, students, local governments, Northern land claim organizations, territorial governments, and community residents.").
22. Nat'l Energy Bd. (Can.), Draft Financial Viability and Financial Responsibility Guidelines (2013), *available at* http://www.neb-one.gc.ca/clf-nsi/rcmmn/hm-eng.html.
23. Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53 (Can.). *See infra* Part III.2.
24. Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52 (Can.) [hereinafter CEAA 2012].
25. Memorandum of Understanding Regarding Cooperation Between the Bureau of Safety and Environmental Enforcement of the Department of the Interior of the United States of America and the National Energy Board of Canada, Feb. 4, 2013, Washington, D.C., http://www.bsee.gov/BSEE-Newsroom/BSEE-News-Briefs/2013/BSEE-and-Canadas-National-Energy-Board.aspx (last visited Aug. 30, 2013).
26. Resolution of the long-standing but well-managed maritime boundary dispute in the Beaufort Sea between Canada and the United States is now the topic of technical diplomatic discussions. Potentially relevant to any resolution is how each legal system treats resources on either side of the disputed area, given that any resolution might involve joint management of living resources and unitisation of any transboundary oil and gas resources. For further information, see, for example, Ted McDorman, Salt Water Neighbors: International Ocean Law Relations Between the United States and Canada 181-90 (2009) (providing a concise history of the dispute); Betsy Baker, *Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian-U.S. Cooperation in the Beaufort Sea*, 34 Vt. L. Rev. 57 (2001) (offering suggestions for joint oversight of the disputed area).
27. The Western Arctic (Inuvialuit) Claims Settlement Act, S.C. 1984, c. 24 (Can.), authorized the land claims settlement agreed to in the June 5, 1984, Inuvialuit Final Agreement (IFA), between the Committee for Original Peoples' Entitlement (COPE) and Canada.
28. *Id.* IFA, s. 3.(4), ceding all such areas adjacent to the NWT and in the NWT itself. *See also* The Regulatory Roadmaps Project, Oil and Gas Approvals in the Northwest Territories—Inuvialuit Settlement Region, A Guide to Regulatory Approval Processes for Oil and Natural Gas Exploration and Production in the Inuvialuit Settlement Region, at 9-2 (2001).
29. Helen Fast et al., *Integrated Management Planning in Canada's Western Arctic: An Adaptive Consultation Process*, *in* Breaking Ice: Renewable Resource and Ocean Management in the Canadian North 95 (F. Berkes et al. eds., 2005).
30. For a brief overview of this structure, and the bodies' roles in environmental assessment, see Henry P. Huntington et al., *Less Ice, More Talk: The Benefits and Burdens for Arctic Communities of Consultations Concerning Development Activities*, 1 Carbon & Climate L. Rev. 33, 39 (2012).
31. Fast et al., *supra* note 29, at 102:
> In 1999 the Inuvialuit management, co-management bodies, DFO and industry agreed to follow the model outlined in the Oceans Act and collaborate on the development of integrated management planning for marine and coastal areas in the Inuvialuit Settlement Region. The Senior Management Committee and Working Group are not formal co-management bodies, however, the balanced

In the United States, the NSB covers some 203,000 km^2 of land, which is a substantially larger area than the terrestrial portion of the ISR.[32] The NSB is the public governing body for all parts of Alaska that abut the Beaufort Sea. As a municipal government established under Alaska state law, the NSB has no interest in federal offshore waters comparable to the Inuvialuit's *sui generis* interest in the marine and terrestrial components of the ISR.[33] However, Alaska Native entities recognized by federal law may have some rights in federal marine waters (beyond three miles) that lie above the U.S. outer continental shelf (OCS).[34] Under the 1971 Alaska Native Claims Settlement Act (ANCSA) and the 1980 Alaska National Interest Lands Conservation Act (ANILCA)[35] and subsequent case law, the scope of Alaska Native nonexclusive aboriginal use rights in the waters above the federal OCS remains unresolved.[36] Co-management also exists in the U.S. Arctic, but is simply allowed—not required—under §119 of the Marine Mammal Protection Act (MMPA).[37]

In considering how the two countries regulate co-management and subsistence activity of their respective Inuit citizens, one striking difference emerges that will also prove relevant to the discussions in Parts II and III below regarding such involvement in regulatory decisions about Arctic offshore oil and gas activity. In the Canadian Beaufort, co-management and subsistence boards are the product of a negotiated treaty, the Inuvialuit Final Agreement, while in the U.S. Arctic, they have been built more haphazardly in piecemeal response to numerous legislative acts, with less direct input by the Iñupiat whom those acts affect. In addition, as Chanda Meek observes: "Unlike co-management agreements that arise from land claims or court settlements, marine mammal co-management institutions in Alaska are largely voluntary agreements based on memoranda of understanding."[38]

The striking differences continue when comparing the stated purposes and principles in each system. The IFA is founded on the principles of preserving "Inuvialuit cultural identity and values within a changing northern society"; enabling "Inuvialuit to be equal and meaningful participants in the northern and national economy and society"; and protecting and preserving "the Arctic wildlife, environment and biological productivity."[39]

By contrast, the ANCSA states its purpose, starkly, as the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims."[40] Unlike the principles of the IFA, this congressional finding of purpose for ANCSA contains no statements about culture, values, or equal participation of Alaska Natives, nor does it mention the environment.[41] ANCSA extinguished "Alaska Native aboriginal hunting and fishing rights . . . as a matter of federal law in 1971,"[42] yet remarkably did not effectively address subsistence use. In an attempt to correct this deficiency, the U.S. Congress amended ANCSA through the 1980 Alaska National Interest Lands Conservation Act (ANILCA).[43] However, the very language in ANILCA discussing subsistence establishes a rural rather than an exclusively Native preference: "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, . . . is essential to Native physical, economic, traditional, and cultural existence."[44] ANILCA does authorize subsistence regional councils; however, they can only provide recommendations to the Federal

representation on these committees is consistent with the principles of co-management outlined in the IFA.

32. Glenn Gray & Assocs., North Slope Borough Coastal Management Plan Final Draft Plan Amendment 1, 198 (2007) (noting that "[t]he NSB includes 24,564 square miles of coastal zone and 8,031 miles of coastline" and also that the NSB "encompasses 88,817 square miles of land and 5,945 square miles of water").
33. The NSB was established in 1972, one year after and independently of the Alaska Native Claims Settlement Act (ANCSA), and is neither a tribal entity nor a native corporation.
34. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§1331 et seq. (2012), provides in §1331(a): "The term 'outer Continental Shelf' means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."
35. Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§1601 et seq. (2012); Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§3120 et seq. (2012). For an introductory history of ANCSA and ANILCA, see Dalee Sambo Dorough, *Inuit of Alaska: Current Issues, in* Polar Law Textbook 199, 202 (N. Loukacheva ed., 2010) (explaining that ANCSA "transferred to the Alaska Native peoples 44 million acres of land and 962.5 million dollars in compensation for all lands lost. These so-called 'entitlements' were channelled through twelve regional and two hundred village corporations created by the Act."). For a comparison of ANCSA/ANILCA history with that of the IFA, see Barry S. Zellen, Breaking the Ice: From Land Claims to Tribal Sovereignty in the Arctic (2008). For a comprehensive history of ANCSA and ANILCA, see William H. Rodgers, Environmental Law in Indian Country §1:7 (2009).
36. *See, e.g.*, Energy, Economics and the Environment 300 (F. Bosselman et al. eds, 3d ed. 2010); Dalee Sambo Dorough, *Inuit of Alaska: Current Issues*, *in* Polar Law Textbook, *supra* note 35, at 199-217; Greta Swanson et al., *Understanding the Government-to-Government Consultation Framework for Agency Activities That Affect Marine Natural Resources in the U.S. Arctic*, 43 ELR 10872, n.33 (Oct. 2013). Swanson et al. also provide a thorough introduction to the ANSCA and the ANILCA.
37. MMPA 16 U.S.C. §§1361-1421h, ELR Stat. MMPA §§2-410. 16 U.S.C. §1388(a) allows the relevant department Secretary to "enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives." 16 U.S.C. §1388(a) (2012). For more detail on co-management in Alaska, see, e.g., Swanson et al., *supra* note 36, and Chanda Meek, *Forms of Collaboration and Social Fit in Wildlife Management: A Comparison of Policy Networks in Alaska*, 23(1) Global Envtl. Change 217-28 (2013).
38. Chanda Meek, Comparing Marine Mammal Co-Management Regimes in Alaska: Three Aspects of Institutional Performance 19-20 (2009) (unpublished Ph.D. dissertation, Univ. of Alaska, Fairbanks) (on file with Univ. of Alaska Fairbanks Library).
39. IFA, *supra* note 27, at s. 1.
40. 3 U.S.C. §1601.
41. Dorough, *supra* note 36, at 202 ("A significant omission in the Act was the fact that there was no single provision addressing the right of Alaska Native peoples to self-determination"), 203 n.6 ("Despite the so-called '1991 amendments' to the ANCSA, the threats to Native ownership and control remain and the land is still held by the corporations originally created under the Act.").
42. 3 U.S.C. §1603(b); *see also* Dorough, *supra* note 36, at 203 (stating that ANCSA "purportedly 'extinguished' aboriginal title to all other lands and aboriginal hunting and fishing rights of the Alaska Native people despite their dependence upon a subsistence-based economy") (citing ANCSA §§4(a)-(c)); David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U. Colo. L. Rev. 1009 (1989).
43. Dorough, *supra* note 36, at 204.
44. 16 U.S.C. §3111(5); *see also* Rodgers, *supra* note 35, at §1:7.

Subsistence Board concerning regulatory and land management actions that may affect subsistence uses of fish and wildlife.[45]

Section 35(1) of Canada's Constitution Act (1982) recognizes and affirms the "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada," including the Inuit (§35(2)). Section 35(3) specifies that the term "'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."[46] A detailed discussion of the case law since 1982 regarding the governmental fiduciary relationship to Canada's aboriginal citizens and the Crown's well-established duty to consult with them is beyond the scope of this Article.[47] However, the *Little Salmon/Carmacks First Nation* case mentioned in the introduction falls within its 2010 to 2013 time frame. The land claims agreement in question defined what constituted consultation and was, according to the Court, the "entire agreement" between the parties; however, the agreement existed within a larger legal framework that includes the duty to consult.[48]

The U.S. Constitution provides only a passing reference to federal relations with Native Americans, stating that the "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, *and* with the Indian Tribes."[49] Absent express constitutional provisions, the U.S. system has developed the doctrine of a federal trust relationship that is neither consistently nor well-defined in U.S. case law.[50] As the 1995 U.S. Department of Commerce (DOC) American Indian and Alaskan Native Policy states: "The trust relationship between the federal government and American Indian and Alaska Native tribes is established in a very diffuse way, by specific statutes, treaties, court decisions executive orders, regulations and policies."[51]

II. The Federal Legislative, Regulatory, and Executive Framework for Consultation Regarding the U.S. OCS in the Beaufort Sea

A. *The OCSLA*

Multiple state and federal agencies, laws, and regulations govern offshore oil and gas activity in the U.S. Arctic.[52] This Article touches only on those aspects of the federal system needed to assess how government initiatives between 2010 and 2013 might affect the involvement of Iñupiat and other Alaska Natives in regulatory decisions about such activity.[53] The primary relevant law is the OCSLA,[54] under which DOI has lead agency responsibility to regulate mineral exploration and development of the OCS. DOI does so in the Arctic[55] through the Alaska offices of the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE), which were created when the former Minerals Management Service was reorganized in the wake of the Macondo/*Deepwater Horizon* oil spill.[56] Other key agencies include the U.S. Fish and Wildlife Service (FWS), which is also in DOI; the National Marine Fisheries Service (NMFS) in DOC; the U.S. Environmental Protection Agency (EPA); and the Department of Homeland Security (through the USCG). All of these agencies have implemented or updated their tribal consultation policies or procedures in the three years that this Article studies, Spring 2010 to Spring 2013,[57]

45. 16 U.S.C. §3120.
46. Constitution Act, pt. II §35, 1982, Schedule B to the Canada Act, 1982, c. 11 (U.K.) 1982.
47. For a concise summary of recent developments, including the *Little Salmon/Carmacks* case (*see supra* note 23) as they relate to environmental assessments, see Huntington et al., *supra* note 30, at 39-40. For a more general introduction to consultation issues in Canada, see, for example, Mary C. Hurley, Library of Parliament, Law and Government Division, The Crown's Fiduciary Relationship With Aboriginal Peoples (2002); Peter Carver, *Comparing Aboriginal and Other Duties to Consult in Canadian Law*, 49 Alberta L. Rev. 855 (2012).
48. Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53 (Can.), *see supra* note 23.
49. U.S. Const. art. I, §8, cl. 3 (emphasis added).
50. The literature on the history and current exercise of the trust relationship is extensive. For an Alaska-specific analysis, see, for example, Rodgers, *supra* note 35, at §1:7. *See generally* William J. Dunaway, *Eco-Justice and the Military in Indian Country: The Synergy Between Environmental Justice and the Federal Trust Doctrine*, 49 Naval L. Rev. 160, n.162 (2002); Derek Haskew, *Federal Consultation With Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 Am. Indian L. Rev. 21 (2000).
51. U.S. Department of Commerce 1995 Policy.
52. The federal definition of the Arctic comes from the Arctic Policy and Research Act of 1984 and includes areas below the geographic Arctic Circle: "All United States territory north of the Arctic Circle and all United States territory north and west of the boundary of formed by the Porcupine, Yukon and Kuskokwim Rivers; all contiguous seas, including the Arctic Ocean and the Beaufort, Bering and Chukchi Seas, and the Aleutian chain." 15 U.S.C. §4111.112.
53. For brief but more detailed overviews of the federal regulatory system for offshore oil and gas, see, e.g., Huntington et al., *supra* note 30, and Jennifer Dagg et al., *Comparing the Offshore Regulatory Regimes of the Canadian Arctic, the U.S., the U.K., Greenland and Norway* 11 (Drayton Valley, Alberta: The Pembina Inst., 2011), *available at* http://www.pembina.org/pub/2227 [hereafter Pembina Institute Comparison].
54. OCSLA, 43 U.S.C. §§1331 et seq.
55. *Supra* note 55.
56. Following the Macondo/*Deepwater Horizon* accident, DOI delegated OCSLA responsibilities formerly handled by the Minerals Management Service (now dissolved) first to the newly established Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). Press Release, U.S. DOI, Salazar Receives Implementation Plan for Restructuring the Department's Offshore Energy Missions, July 14, 2010. *See also* U.S. DOI, Secretarial Order 3302, June 18, 2010. Subsequently, OCSLA regulatory responsibility was split between three new entities: BOEM, BSEE, and the Office of Natural Resources Revenue (ONRR). *See* http://www.boem.gov/About-BOEM/Reorganization/Reorganization.aspx (last visited Sept. 3, 2013).
57. U.S. EPA, EPA Policy on Consultation and Coordination With Indian Tribes (May 4, 2011), *available at* http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf. The policy applies nationwide. Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 Fed. Reg. 33331-02 (June 4, 2013). The policy applies nationwide. Sec'y of the Interior, Order No. 3317, Department of the Interior Policy on Consultation With Indian Tribes (Dec. 1, 2011), *available at* http://www.doi.gov/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf. The policy applies nationwide. Letter from Janet Napolitano, Sec'y of Homeland Security, to Tribal Leaders

partly—as will be seen—in response to a presidential memorandum on the topic.[58]

B. *Tribal Consultation, the OCSLA, and the MMPA*

Like the trust relationship, tribal consultation is not well-defined in U.S. law.[59] Consultation is, however, considered one way of exercising the special trust relationship between the federal government and Native Americans, including Alaska Natives.[60] Consultation obligations can arise from statute, regulation, executive action, or a combination of sources.[61] The agency consultation policies identified in the preceding section all attempt to describe, if not define, what consultation entails. These efforts cannot overcome the fact that, as with co-management and subsistence boards in the United States, the development of U.S. approaches to consultation is equally piecemeal, reactive to specific legislation, and draws on diffuse a range of sources, not all of them legally binding.

As detailed by Swanson et al. elsewhere in this issue,[62] Executive Order No. 13175 on Consultation and Coordination With Indian Tribal Governments requires every federal agency to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."[63] By definition, the Executive Order covers Alaska Native tribes.[64] The 2009 Presidential Memorandum mentioned above requires all federal agencies to institute plans of action for their interactions with Native Americans tribes, including Alaska Natives, and to file annual reports on their implementation.[65]

DOI Secretary Ken Salazar issued Secretarial Order 3317 in December 2011, to "update, expand, and clarify" the DOI Policy on Consultation With Indian Tribes.[66] The Order describes (but does not define) consultation as

> a process that aims to create effective collaboration with Indian tribes [including Alaska Native tribes] and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process.[67]

Order 3317 contains identical language as that found in the undated Final DOI Tribal Consultation Policy:

> Efficiencies derived from the inclusion of Indian Tribes in the Department's decision-making processes through Tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of Tribal input.[68]

Such language notwithstanding, it is disputed whether DOI decisions (and those of other agencies) in offshore oil and gas decisions in the U.S. Arctic are adequately "reflective of Tribal input,"[69] or that of other Alaska Natives.[70]

The 2011 DOI Secretarial Order on Tribal Consultation applies not only to BOEM and BSEE, but also to FWS. FWS, with jurisdiction in the Arctic over Pacific walrus and polar bear, is one of the two agencies involved in marine mammal co-management with Alaska Natives under the MMPA.[71] Whales, sea lions, and seals fall under the jurisdiction of another agency, the NMFS, in DOC. This split responsibility means that the subsistence users of those species are subject to different departmental consultation procedures[72] and, in some cases, different agency cultures and approaches to federal-Alaska Native relations.[73]

(May 11, 2011), *available at* http://www.mtwytlc.org/images/stories/users/01559_01039.pdf. The policy applies nationwide. U.S. EPA, 910-k-12-002, EPA Region 10 Tribal Consultation and Coordination Procedures (2012), *available at* http://www.epa.gov/region10/pdf/tribal/consultation/r10_tribal_consultation_and_coordination_procedures.pdf. The policy applies to tribes in Alaska, Idaho, Oregon, and Washington. NMFS-Alaska Region, Sustainable Fisheries Division Tribal Consultation Process, *available at* https://alaskafisheries.noaa.gov/tc/sfprocess.pdf. The policy applies only in Alaska.

58. Presidential Memorandum for the Heads of Executive Departments and Agencies, Tribal Consultation, 74 Fed. Reg. 57879 (Nov. 5, 2009).
59. There is no agreed definition of "consultation" in U.S. law. *See* Haskew, *supra* note 50, at 23. Derek Haskew does, however, cite to a judicial definition of the term: "Meaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the [federal regulatory] decision maker." Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 401 (D.S.D. 1995).
60. *See, e.g.*, Edmund Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 Envtl. L. 299, 339 (2003). Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or a Lesson in Erosion of Tribal Sovereignty?*, 15 Buff. Envtl. L.J. 97, 126 (2007-2008). ("In Klamath Tribes v. United States, the district court expressly recognized a procedural duty arising from the trust relationship that required the federal government to consult with Indian tribes in the decision-making process to avoid adverse effects on treaty resources," citing to *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509 at *8 (D. Or. Oct. 2, 1996)).
61. *See, e.g.*, Haskew, *supra* note 50, who compiles statutes and regulations requiring federal consultation with tribes at 21, n.3, and at 41-55, collects and analyzes conflicting cases interpreting consultation requirements.
62. Swanson et al., *supra* note 36.
63. 65 Fed. Reg. 67249, §5(a) (2000).
64. *See, e.g.*, Exec. Order No. 13647, *supra* note 18.
65. Presidential Memorandum, *supra* note 58. As Swanson et al. explain, tribes include all 229 federally recognized Alaska Native tribes. *Supra* note 36.
66. *Id.* Secretary of the Interior, Order No. 3317, DOI Policy on Consultation With Indian Tribes (Dec. 1, 2011), http://www.doi.gov/tribes/Tribal-Consultation-Policy.cfm (last visited Sept. 3, 2013).
67. *Id.* §4(b).
68. *Compare id.* §4(c), *with* Department of the Interior Policy on Consultation With Indian Tribes, undated, *available at* www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf (last visited Sept. 6, 2013), Part II, p.3.
69. *See* Clement et al., *supra* note 13, at 27-34 *passim*.
70. *See, e.g.*, Huntington et al., *supra* note 30.
71. 16 U.S.C. §§1331 et seq. The MMPA contains no consultation requirement similar to that in the OCSLA, but does authorize agencies to enter into co-management agreements with Alaska Native organizations. *See* 16 U.S.C. §1388(a). The MMPA defines Alaska Native Organizations as "a group designated by law or formally chartered which represents or consists of Indians, Aleuts, or Eskimos residing in Alaska." 16 U.S.C. §1362(17). Co-management in both countries is discussed further below.
72. MMPA, 16 U.S.C. §§1361 et seq.
73. *See, e.g.*, Meek, *supra* note 38.

The MMPA has multiple interfaces with the offshore oil and gas regulatory system.[74]

While some statutes do require tribal consultation,[75] OCSLA and its implementing regulations do not. The OCSLA regulations do, however, require the Secretary of the Interior to "[c]ooperate and consult with affected States, *local governments*, other interested parties, and relevant Federal agencies."[76] Whether the regulations provide a sufficiently strong role for local governments has been questioned in the context of the plans announced in June 2013 for Alaska-specific implementing regulations under the OCSLA.[77] The NSB falls under the OCSLA regulations because it is a municipal government in the state of Alaska, but Alaska Native tribes and corporations do not. They must instead engage with the regulatory process either through existing consultation or co-management mechanisms or through the public comment process for rulemaking that is open to everyone.

C. Public Comment Is Not Consultation

Consultation with tribal and Alaska Native organizations allows, at least in theory, for a different quality and degree of participation in governance than the general public comment process for administrative rulemaking that is open to all U.S. citizens, native and non-native. To identify just a few examples of public comment relevant to offshore oil and gas activity in the U.S. Arctic: The National Environmental Protection Act (NEPA)[78] requires that public comment be solicited on the environmental impact statements (EISs) that are part of required scoping of federal actions—such as the issuance of five-year lease plans for the OCS by BOEM—under the Act. NEPA's implementing regulations require the lead agency on a project to invite comment from "Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons."[79] Public comment is also required for subsequent lease sales of individual and grouped blocks as they are leased under the five-year plan. Developers submitting individual Exploration Plans and Development and Production Plans must submit environmental impact analysis information, which shall include a list of agencies and persons with whom they have consulted or will consult regarding potential impacts associated with the proposed activities.[80] Proposed activity on the U.S. Arctic OCS must also comply with permitting and authorization requirements under other federal laws, including the Endangered Species Act (ESA),[81] the Clean Air Act (CAA),[82] the Clean Water Act (CWA),[83] and the MMPA, all of which are addressed elsewhere in this publication.[84]

On paper, these requirements apply to all stakeholder groups equally. In practice, they place an enormous burden on Alaska Native communities and organizations trying to keep abreast of the federal regulatory processes for Arctic offshore development, especially as the sea ice has diminished and activity there has increased.[85] Henry Huntington et al. identify 15 comment periods "associated with just some OCS leasing and exploration activities, on the Chukchi Sea" that occurred from October 2010 through December 2011.[86] That amounts to one comment period per month for 15 months, requiring anyone interested in commenting in an informed manner to review a total of well over 8,000 document pages (not including all appendices), to attend at least some of the 29 associated public hearings, and to meet turnaround times as short as 10 days on often-overlapping comment periods.[87] And those examples cover just 15 months for the Chukchi Sea; the increased level of activity in the Beaufort Sea in that same period generated its own considerable opportunities for public comment.

One important change to the offshore regulatory process in the U.S. Arctic between 2010 and 2013 is the loss of the federal Coastal Zone Management Act (CZMA)[88] consistency review in Alaska. The National Oceanic and Atmospheric Administration (NOAA) administers the CZMA, which provides for public and local government participation in such matters as federal review of a coastal state's performance in carrying out coastal zone management (CZM) plans adopted by the state or by communities in the state.[89] The permitting process under the OCSLA requires DOI to first determine that an oil company's exploration plan (EP), development and production plan (DPP), and accompanying information are sufficient, accurate, and complete under the OCSLA regulations. DOI is then to forward the EP and the information to the governor of each affected state for a consistency review with the state(s)' coastal zone management plan (CZMP).[90]

74. Swanson et al. provide a more-detailed discussion of the MMPA interface with oil and gas permitting processes under the OCSLA. *Supra* note 36.
75. *See, e.g.*, §106 of the National Historic Preservation Act (NHPA), 16 U.S.C. §470(f), and its attendant regulations, 36 C.F.R. Pt. 800.
76. 30 C.F.R. §250.106(d) (emphasis added). The OCSLA implementation regulations are titled Oil and Gas and Sulphur Operations in the Offshore, 30 C.F.R. pt. 250.
77. Letter from Mayor Reggie Joule, to Tommy Beaudreau, BOEM (June 20, 2013), submitted as part of the public comment process in the DOI *Review of Alaska Outer Continental Shelf Oil & Gas Drilling Standards*, *supra* note 17. "The implementing regulations for OCSLA, however, do not provide a strong role for local governments in the review of OCS activities."
78. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
79. 40 C.F.R. §1501.7.
80. 50 C.F.R. §§250.221 and .261.
81. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
82. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618. Until recently, EPA had primary oversight of permitting offshore activity under the CAA. Pursuant to an appropriations rider, in December 2011, Congress transferred OCS CAA permitting for the Alaskan Arctic to BOEM for *future* leases; however, "EPA retains permitting and enforcement authority for Shell's existing operations." DOI Shell Review, *supra* note 10, at 12 & n.14.
83. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
84. *See, e.g.*, Swanson et al., *supra* note 36.
85. For a general introduction to changes in the marine and terrestrial U.S. Arctic, including diminishing sea ice, see Ronald O'Rourke, Cong. Research Serv., R41153 Changes in the Arctic: Background and Issues for Congress (Jan. 2, 2013).
86. Huntington et al., *supra* note 30, at 36-38.
87. *Id.*
88. 16 U.S.C. §§1451 et seq.
89. 16 U.S.C. §§1455, 1458.
90. 30 C.F.R. §250.232.

In states with CZMPs, the federal process cannot proceed without the state certifying that the EP complies with such a plan (or plans).[91] Alaska no longer has a CZMP because, in 2011, the state legislature failed to extend the Alaska Coastal Management Program (ACMP).[92] The ACMP, established in 1977 under the CZMA, was generally regarded as a success.[93] It gave municipalities, including indigenous communities, a powerful tool to form enforceable coastal management policies premised on the balance of economic development and conservation.[94] Alaska Native representatives view the demise of the ACMP as the loss of an important vehicle for incorporating local and traditional knowledge into the regulatory decisions about the U.S. Arctic OCS.[95]

This brief survey of relevant U.S. legislation reveals that the pattern of federal-Alaska Native relations across the U.S. laws, regulations, Executive Orders, and departmental memoranda reviewed is generally top-down. The government is given the initiative to solicit input and to begin consultation, rather than allowing Alaska Native groups to request participation or to begin consultation. There is a trend in some agencies toward allowing Alaska Native entities to initiate consultation, but lack of adequate resources to do so can make this difficult.[96]

D. U.S. Policy and Strategy Documents and Other Changes 2010-2013

As noted earlier, several different U.S. federal actors issued Arctic-specific regulatory, policy, and strategy initiatives in 2013. These are revisited briefly here to build on the preceding discussions of how Alaska Natives have engaged to date with the offshore regulatory process in the U.S. Arctic.

Of all federal documents issued in the first half of 2013, in some ways, the February OSTP/IARPC five-year Arctic research plan offers the greatest promise and most concrete recommendations toward achieving greater Alaska Native input into governmental decisionmaking. Some of the plan's relevant research priorities include involving Alaska Natives in various Arctic observing networks,[97] arctic community sustainability and resilience,[98] and strengthening and reviving languages and cultural heritage.[99] The seven priority areas the plan identifies are intended specifically to guide decisionmakers as they work toward mitigating and adapting to the "rapidly changing conditions in Arctic communities and around the world."[100]

The March 2013 Integrated Arctic Management (IAM) Report to the President, produced by the Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska,[101] speaks of all stakeholders, but clearly includes Alaska Natives when it states that constituents "feel listened to but not heard" in the regulatory processes for Arctic development.[102] The IAM Report devotes an entire section, 3.3 Tribal Governments and Alaska Native Organizations, to summarizing input from those groups. Among the key findings:

> [T]he Federal Government and tribal governments need to improve the system for effective and meaningful consultation on issues of mutual concern. Such a process should: (1) respect and take into account local and traditional knowledge; (2) provide a predictable and consistent framework for consultation; and (3) streamline consultations to minimize the workload burden on Alaska Native groups.[103]

Conservation groups also identified the need for improved and early consultation with elders, hunters, and tribal leaders as one of their recommendations to the authors of the IAM Report.[104] While the federal government also acknowledged that early consultation would improve the federal decisionmaking process, it referred more generally to consultation with "governments and

91. 43 U.S.C. §1340(c) (2012).
92. Baker, *supra* note 26, at 178.
93. *Id.*
94. *Id. See also* Richard Mauer, *Loss of Coast Zone Program Hurts Beluga Whale Case*, Anchorage Daily News, Oct. 30, 2011, http://www.adn.com/2011/10/30/2146856/coast-zone-loss-hurts-states-beluga.html (last visited Sept. 3, 2013).
95. > What about traditional knowledge? How will traditional knowledge be captured? How will local input be obtained? We don't mean to rub salt on old wounds, but what happened regarding Alaska's Coastal Zone Management Program recently was a big step backwards in our opinion. This was a huge lost opportunity for cooperation between the State and local authorities. This was a huge lost opportunity to incorporate traditional knowledge into the planning process.
>
> Jim Stotts, ICC Alaska President, Remarks to the Northern Waters Task Force (July 2011), *available at* http://housemajority.org/coms/anw/pdfs/27/Jim_Stotts_ICC_AK_President_speech.pdf.
96. *See, e.g.*, NOAA Fisheries, Tribal Consultation in Alaska, https://alaskafisheries.noaa.gov/tc/ (last visited Sept. 4, 2013) ("If an Alaska Native tribe or Native corporation would like to initiate a consultation on any issue that is under the authority of NMFS, a person representing the tribe or Native corporation should write to the Alaska Regional Administrator.").
97. OSTP IARPC Five-Year Plan, *supra* note 14, at 3 ("Combine *in-situ* and remotely sensed observation of sea ice with local community and traditional knowledge.").
98. *Id.* at 3.6.1. ("In collaboration with local communities, develop methods for assessing community sustainability and resilience and determine the efficiency of current adaptation strategies.").
99. *Id.* at 3.6.4 ("Assist Arctic communities in documenting, revitalizing, and strengthening indigenous languages and cultural heritage.").
100. *Id.* at iii.
101. Clement et al., *supra* note 13. Among the Working Group functions was to "(d) ensure the sharing and integrity of scientific and environmental information and cultural and traditional knowledge among agencies to support the permit evaluation process of onshore and offshore energy development projects in Alaska." Exec. Order No. 13580, *supra* note 12, §4(d).
102. Clement et al., *supra* note 13, at 35.
> It is clear that stakeholders are not interested in additional layers of process; existing processes already tax the capacity of many stakeholders without necessarily leaving them feeling fully informed or involved regarding federal decisions. A desire for more engagement and information may seem to contradict the desire for less process, but suggests that constituents and partners feel listened to but not heard.
103. Clement et al., *supra* note 13, at §3.3, Alaska Native Organizations.
104. Clement et al., *supra* note 13, at §3.5, Conservation Organizations, calling for "a consistent governance framework that incorporates consultation well in advance of management decisions and includes elders, hunters, and tribal leaders."

stakeholders," rather than limiting consultation only to Alaska Native entities.[105]

The consultation policies identified above[106] mostly predate the IAM Report, but may begin to address some of these concerns. To provide just one example, in its 2011 policy, EPA "takes an expansive view of the need for consultation in line with the 1984 Policy's directive to consider tribal interests whenever EPA takes an action that 'may affect' tribal interests."[107] Another example may be found with NOAA, which is currently revising its consultation procedures. The draft procedures put out for public comment in the summer of 2013 include several paragraphs on Traditional Ecological Knowledge (TEK), including how to incorporate it into NOAA decisionmaking.[108] How effectively these new consultation policies do address the concerns of Alaska Natives raised in the IAM Report remains to be seen, as does the question of whether the agencies will be able to build on the principles expressed in the IAM Report (covered incompletely here) and translate them into improved practices on the ground.

The 2013 National Arctic Strategy (NAS) issued by the White House addresses Alaska Native concerns from a slightly different tack, suggesting fewer practical steps than does the IAM Report. It does indicate that a guiding principle is to "Make Decisions Using the Best Available Information—Across all lines of effort, decisions need to be based on the most current science and traditional knowledge."[109] However, regarding consultation, the NAS simply refers back to the 2000 Executive Order No. 13175 on Consultation and Coordination With Indian Tribal Governments, discussed above, noting that it

> emphasizes trust, respect, and shared responsibility. It articulates that tribal governments have a unique legal relationship with the United States and requires Federal departments and agencies to provide for meaningful and timely input by tribal officials in development of regulatory policies that have tribal implications. This guiding principle is also consistent with the Alaska Federation of Natives Guidelines for Research.[110]

Similarly, the USCG Arctic Strategy appears to add little new regarding consultation, also referring to Executive Order No. 13175, and noting that the USCG "will consult and engage with federally recognized tribes in accordance" with it.[111] However, the Strategy continues: "The unique and valuable relationship established with tribal entities builds mutual trust and improves mission readiness."[112] In the same section, the USCG Strategy states:

> Native Alaskans, industry, and other Arctic stakeholders have untapped knowledge and resources that can help close information and operational gaps while minimizing risk. Regular information exchanges with Arctic stakeholders will take place both formally and ad hoc within the parameters of current laws and regulations.[113]

This approach seems to give less special acknowledgement to TEK than does the IAM Report.

One area in which the USCG Arctic Strategy does appear to add to the discussion and, indeed, seems to respond directly to the IAM Report, is in how it approaches the "whole-of-government" concept introduced in that Report. The first of the IAM Report's guiding principles for carrying out integrated Arctic management is "whole-of-government coordination to improve efficiency and operational certainty."[114] The USCG strategy provides content to what "whole-of-government" means by juxtaposing three paragraphs in its explanation of how it will "Support a National Approach for the Arctic." The first paragraph is the one referring to Executive Order No. 13175, just quoted, regarding tribal consultation.[115] This is followed immediately with the following two bullet points:

- The Coast Guard will seek whole-of-government solutions that create efficiencies, eliminate redundancies, and contribute to improving stewardship of resources.
- The Coast Guard will lead and participate in national-level planning and exercises that include federal, state, tribal, local, and nongovernmental partners in order to test preparedness and adaptability. This inclusive approach will identify overlap in organizational roles, responsibilities, authorities, and resources.[116]

The USCG also proposed an Arctic Policy Board internal to its home agency, Homeland Security. The board "could also conduct studies, inquiries, and fact-finding investigations in consultation with individuals and groups

105. Clement et al., *supra* note 13, at §3.7, Federal Government. ("Early consultations, outreach, and input to governments and stakeholders in Alaska will promote more effective, holistic decision-making and advance the integration of cultural, ecological, and economic perspectives.")
106. See sources at *supra* note 57.
107. EPA Policy on Consultation and Coordination With Indian Tribes, *supra* note 57, at 2.
108. Draft NOAA Procedures for Government to Government Consultation With Federally Recognized Indian Tribes, 78 Fed. Reg. 37795 (June 4, 2013), *available at* https://www.federalregister.gov/articles/2013/06/24/2013-15011/draft-noaa-procedures-for-government-to-government-consultation-with-federally-recognized-indian
> NOAA's scientific and resource management responsibilities can be greatly enriched through the incorporation of TEK. It may take NOAA scientists years to validate what local indigenous peoples know about their environment. TEK can be shared through the consultation process, as well as through less formal collaboration. These interactions can help NOAA staff identify tribal individuals who hold TEK, as well as the opportunities to ask whether and how TEK may be shared.
109. The White House, National Strategy for the Arctic Region n.2 (May 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf. "Traditional knowledge refers to a body of evolving practical knowledge based on observations and personal experience of indigenous communities over an extensive, multigenerational time period."
110. *Id.* at 11.
111. The White House, *supra* note 109.
112. U.S. Coast Guard, Arctic Strategy 32 (May 2013), *available at* http://www.uscg.mil/seniorleadership/DOCS/CG_Arctic_Strategy.pdf.
113. *Id.* at 31.
114. Clement et al., *supra* note 13, at 3.
115. U.S. Coast Guard, *supra* note 112, at 32.
116. *Id.*

in the private sector and/or with state, tribal, and local government jurisdictions among others."[117] This juxtaposition leaves room to draw connections between whole-of-government and increased Alaska Native participation in decisionmaking. However, none of the 2013 Arctic Strategy and policy documents discussed in this section explicitly addresses whether "whole-of-government" can encompass the "government-to-government" consultation doctrine that has developed in part out of the trust relationship that the federal government acknowledges with respect to Native Americans and Alaska Natives.[118]

Finally, in response to its June 2013 call for stakeholders to identify issues for the upcoming rulemaking on Alaska-specific OCSLA regulations, DOI received several comments related to Alaska Native input to regulatory decisions.[119] Some of those comments are noted above, i.e., that the current OCSLA regulations regarding local government participation are not strong enough.[120] Comments were received from the Arctic Slope Regional Corporation, the Native Village of Kotzebue IRA, and the Northwest Arctic Bureau, as well as from other stakeholder groups.[121]

III. The Legislative, Regulatory and Land Claims Framework for the Canadian Beaufort Sea Continental Shelf

A. *The Canadian Oil and Gas Operations Act and Other Legislation*

In Canada, the federal government is responsible for offshore oil and gas development in the Arctic. In independent but complementary roles, Aboriginal Affairs and Northern Development Canada, also known as the Department of Indian and Northern Affairs (DIAND), administers the rights to oil exploration,[122] and the National Energy Board (NEB) authorizes drilling on the OCS.[123] Because this Article focuses on the Beaufort Sea, it does not address arrangements in Nunavut, looking instead at the Inuvialuit Settlement Region (ISR), which covers the Canadian waters of the Beaufort.[124] Interactions of the federal regulatory process with co-management and environmental review boards established under the Inuvialuit Settlement Agreement (ISA) are detailed below, after a brief introduction to the key pieces of legislation for offshore oil and gas development in the region.

The Northern Oil and Gas Directorate of DIAND bears primary responsibility for administering the Canada Petroleum Resources Act (CPRA)[125] in the Northwest Territories (NWT). CPRA regulations apply to on- and offshore areas in the ISR. The first step in issuing and managing oil and gas interests involves a call for nominations of lands to be included in a bid. At this stage, "it is the practice of DIAND to consult with the Inuvialuit, other northerners, and the government of the Northwest Territories."[126] Requirements arising from any relevant land claims agreements are specified in the call for bids.[127]

The Canada Oil and Gas Operations Act (COGOA)[128] and its regulations also apply to Arctic offshore oil and gas development.[129] The Canada Oil and Gas Drilling and Production (COGDP) regulations that entered into force in December 2009 are just one set of regulations implementing the COGOA.[130] During promulgation, information on the COGDP Regulations was provided to "potentially interested Aboriginal groups in the Frontier areas," and meetings were held with interested Aboriginal groups, Aboriginal land claim organizations, and co-management boards in the Northwest Territories.[131] The information provided stated that "[o]n a project-by-project basis, potential impacts on land use and resources would continue to be identified during the application approvals process, which would include any environmental assessment requirement. These requirements would not change with the proposal" to amend the regulations.[132]

The original Canada Environmental Assessment Act (CEAA) (2009)[133] entered into force in 1995, after the 1984 IFA and IFA implementing legislation, thus requiring coordination and consultation on all IFA environmental requirements. "The IFA was explicit (IFA, s. 11(32)) that nothing would restrict the power of the Government to carry out environmental impact assessment and review under the laws and policies of Canada."[134] Coming into effect almost one decade after the IFA, the CEAA of 2009 set "requirements for Environmental Screening and Review that must be met in addition to the requirements under section 11 of the IFA."[135] Under the Stephen Harper government, the CEAA was amended effective in 2012.[136]

The new CEAA 2012 has been described as "an unjustified and ill-conceived rollback of federal environmental law" that "greatly expands ministerial discretion."[137]

117. *Id.*
118. *See, e.g.*, *supra* note 109 and accompanying text.
119. As noted above, that draft rule is anticipated for December 2013.
120. Letter from Mayor Reggie Joule, *supra* note 77.
121. U.S. DOI, *supra* note 17.
122. Sandy Carpenter et al., *Oil and Gas Development in Western Canada in the New Millennium: The Changing Legal Framework in the Northwest Territories, the Yukon, and Offshore British Columbia*, 39:1 Alberta L. Rev. (2001).
123. While the same rules apply across the Canadian Arctic, this Article focuses on rules applicable to the Beaufort Sea. The Yukon's oil and gas powers under the Yukon Act generally do not include the offshore, so are not discussed further here.
124. *See supra* note 3.
125. R.S.C. 1985, c. 36 (2d Supp.).
126. Carpenter et al., *supra* note 122, at 7.
127. The Regulatory Roadmaps Project, *supra* note 28, at 21-24, ¶ 1-9.
128. R.S.C. 1985, c. 0-7.
129. The Canada Oil and Gas Operations Act, Canada Gazette Part II, Vol. 143, No. 25 (2009), 2306.
130. Others include the Canada Oil and Gas Installations (COGI) regulations, SOR 96/118.
131. Canada Oil and Gas Operations Act Drilling and Production Regulations, Canada Gazette Part II, Vol. 143, No. 25 (2009), 2345.
132. *Id.*
133. S.C. 1992, c. 37 [hereafter CEAA 2009].
134. The Regulatory Roadmaps Project, *supra* note 28.
135. *Id.*
136. CEAA 2012, *supra* note 24.
137. *See, e.g.*, Canadian Environmental Law Association, Canadian Environmental Assessment Act, http://www.cela.ca/collections/justice/

In a direct if crude measure of that expanded discretion, CEAA 2012 contains only one reference to land claims agreements, down from four in the 2009 version of the Act.[138] The 2012 reference is a simple jurisdictional definition; the CEAA 2009 references to the environmental effects on land claim agreement lands are removed.[139] They had provided that in cases involving land claims territory, when the responsible authority had not deemed that an environmental assessment was necessary, the Minister of the Environment could refer the matter to a mediator or a review panel for an assessment of the environmental effects of the project on those lands, when the minister "was of the opinion that the project may cause significant adverse environmental effects on land claims lands."[140]

Another piece of legislation relevant to involving the Inuvialuit in resource decisions is the Canada Oceans Act.[141] The Act requires the Minister of Fisheries and Oceans to collaborate "with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements," as well as other government ministries and bodies, to develop "plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law."[142]

B. *The Inuvialuit Land Claims Agreement: Environmental Screening, Co-Management, and Consultation*

The IFA establishes environmental impact screening and review structures that provide for Inuvialuit involvement in offshore oil and gas development decisions, notwithstanding that the Inuvialuit ceded all offshore shelf rights in the ISR under the IFA.[143] The submarine areas of the ISR are federal Crown lands, to which the Crown holds surface and sub-surface rights.

IFA §11 establishes an Environmental Impact Screening Committee (EISC) and an Environmental Impact Review Board (EIRB). Both the EISC and the EIRB, like co-management structures established under the IFA, are comprised of equal numbers of Canadian and Inuvialuit appointees, plus a representative from the Yukon and/or Northwest Territory.[144] Development in the ISR is subject to environmental impact screening by the EISC in several instances, including if the Inuvialuit request it.[145] In June 2012, following the NEB Arctic Offshore Drilling Review, the EISC issued Environmental Impact Screening Guidelines, which specify that a project description should reflect "Demonstrated community engagement, a list of issues and concerns identified during the engagement, and how the development design and implementation is addressing the issues and concerns identified."[146]

In some cases, the EISC may send a proposed development to the EIRB for review.[147] In its final report on the Arctic Offshore Drilling Review the NEB stated: "We must see the decision and recommendations from the [Inuvialuit EIRB] before we make our regulatory decision."[148] Unlike the land claims agreement at issue in the *Little Salmon/Carmacks First Nation* case,[149] the IFA does not define consultation. In discussing that case, Huntington et al. argue that a land claim's "environmental assessment process may not effectively devolve the [Government of Canada] of its duty to consult in a settled land claim area."[150] Thus, the case in effect adds consultation as a separate tool to the Inuvialuit and other land claims environmental review boards in the appropriate circumstances.

Under IFA definitions, "Development" includes "[a]ny commercial or industrial undertaking, including support and transportation facilities related to the extraction of non-renewable resources from the Beaufort Sea, other than commercial wildlife harvesting."[151] In addition, IFA §7.(82) calls for an area-specific land use planning group for the ISR and mandates that native and Inuvialuit participation shall be equal to government participation. In 1987, the Inuvialuit Game Council, a co-management mechanism also established under the IFA, gave DIAND

canadian-environmental-assessment-act ("This new law, which is now in force, applies to a much smaller set of projects, greatly expands Ministerial discretion, and considerably narrows the nature and scope of federal environmental assessment obligations.").

138. CEAA 2009, *supra* note 133, §12(5)(c) (Definition of Jurisdiction—Responsible Authority); §40(1)(d) (Definition of Jurisdiction—Review Panels); §48 (Transboundary and Related Environmental Effects); §48(1)(c) (Environmental effects of projects carried out on lands of federal interest); §48(2)(b) Environmental effects of projects carried out on reserve lands, etc.).
139. CEAA 2012, *supra* note 24, §2(*e*) ("[jurisdiction means] any body that is established under a land claims agreement referred to in section 35 of the Constitution Act, 1982 and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project").
140. *See* CEAA 2009, *supra* note 133, §§48(1)(c) and 48(2)(b).
141. Canada Oceans Act, S.C. 1996, c. 31.
142. *Id.* §31; *see also* Preamble and §§29, 32, 33.
143. IFA, *supra* note 27.
144. IFA, *supra* note 27, §§11.(3), 11.(18).
145. Under IFA §11.(1).
> The developments subject to environmental impact screening include:
> (a) developments described in subsection 13(7);
> (b) developments in the Yukon North Slope region described in section 12;
> (c) developments in the Inuvialuit Settlement Region in respect of which the Inuvialuit request environmental impact screening; and
> (d) [certain areas where "the traditional harvest of the Dene/Metis may be adversely affected"].

146. Environmental Impact Screening Committee, Environmental Impact Screening Guidelines §12.0, Community Engagement and Consultation (June 29, 2012), *available at* http://www.screeningcommittee.ca/pdf/eisc_guidelines.pdf.
147. IFA, *supra* note 27, §11.(16):
> If, in the opinion of the Screening Committee [a governmental review process] referred to in subsection (15) does not or will not adequately encompass the assessment and review function, or if the review body declines to carry out such functions, the proposal shall be referred to the Review Board for a public review.

148. NEB, The Past Is Always Present, *supra* note 6, at 19.
149. *Salmon/Little Carmacks*, *supra* note 23.
150. *See* Huntington et al., *supra* note 30, at 40.
151. IFA, *supra* note 27, at §2.(a) Under IFA §11.(2), "Except for screening and review for the purposes of wildlife compensation, the process described in this section applies only to onshore development."

formal notice "that all developments in the ISR offshore on Crown lands within the ISR shall be submitted for Screening to the EISC."[152]

In the past, the co-management councils created by the IFA have provided grounds for support or non-support of a development. For example, in 2001, based on the Beaufort Sea Beluga Management Plan and pending "further work on Marine Protected Area Planning . . . the Inuvialuit Game Council [IGC] and Inuvialuit Regional Corporation [IRC] adopted an interim position opposing hydrocarbon exploration or development within Beluga Management Zone 1a," which covered 1,716 km^2 in the Mackenzie Bay, Kendall Island, and Kugmallit Bay areas.[153] However, oil and gas permitting procedures do not appear designed to address requests received independently of the standard statutory leasing process, such as that of the IRC for a delay in the issuance of exploration licenses pending an NEB review of offshore drilling in the Arctic following the *Deepwater Horizon* incident.[154] As will be seen, however, the Filing Requirements[155] issued in connection with the NEB Arctic Drilling Review address other aspects of Inuvialuit involvement.

This brief sketch of environmental, co-management, and land planning boards allows a general conclusion that the broad Canadian co-management framework allows more structured and formal opportunities for the boards to address specific oil and gas projects than does the consultation and public comment framework in the United States. In addition to §11 Environmental Impact Screening requirements for certain onshore development projects introduced in Part I, above, the IFA provides:

> Every proposed development of consequence to the Inuvialuit Settlement Region that is likely to cause a negative environmental impact shall be screened by the Screening Committee to determine whether the development could have a significant negative impact on present or future wildlife harvesting.[156]

The IFA co-management arrangements have had slightly longer to mature than those in the United States, given the establishment of the IFA in 1984. In the United States, most co-management agreements are relatively more recent, born of federal legislative amendments in the 1990s and subsequent agency responses in the 2000s.[157]

C. Canada Policy and Strategy Documents and Other Changes, 2010-2013

From 2010 to 2013, the most readily identifiable reflection of commitment to consult with Canadian Inuit on offshore development projects in the Arctic was the NEB Arctic Offshore Drilling Review. The Review process itself and the final report issued in 2011 indicate the Board's understanding of the need for sustained engagement with the Inuit communities that stand to be affected by such development.[158] At least one study submitted to Review stated the need to improve such consultation.[159] However, the final report contains no recommendations as such, on any subject it covered, and cannot be viewed as an action document in and of itself. The NEB concludes the report with the general statement that, in light of lessons learned in the review: "We will pursue opportunities to strengthen our regulatory framework in support of future Board decisions on Arctic offshore drilling."[160] It refers to the NEB Filing Requirements for Offshore Drilling in the Canadian Arctic, published simultaneously with the Final Report[161] as the first improvement to the regulatory process to result from the Review.[162]

Several provisions of 2011 Filing Requirements Chapter 2, on Environmental Assessment, have the potential, at least on paper, to strengthen the Inuvialuit voice in Beaufort Sea offshore oil and gas decisions: §2.1 Project Location; and, under §2.2. Proposed Description Content for Purpose of the EA, Unique Arctic Environment,[163] Consultation,[164] and Socio-economic Effects.[165] Outlining the information that the developer's Project Description must contain, §§2.1 and 2.2 are just some of the provisions that "specify the information that the Board will need to assess future applications for drilling in the Arctic offshore" and are developed based on input received in the Arctic Offshore Drilling Review.[166] The section on consultation is not limited to engagement with aboriginal citizens but applies to any group potentially affected by a proposed development.[167]

152. The Regulatory Roadmaps Project, *supra* note 28, at 9-2.
153. *Id.* at 12-7.
154. *See, e.g.*, DIAND, Results of the 2009-2010 Call for Bids: Beaufort Sea/Mackenzie Delta, Aug. 4, 2010, *available at* http://www.ainc- inac.gc.ca/nth/og/rm/ri/bsm/bsm10/index-eng.asp; Inuvialuit Regional Corporation Press Release on Offshore Drilling, May 19, 2010, *available at* http://www.itk.ca/media-centre/media-releases/national-inuit-leader-says-canada-should-invoke-temporary-moratorium-off.
155. NEB Filing Requirements, *supra* note 21.
156. IFA, *supra* note 27, at §13.7.
157. Swanson et al. discuss U.S. co-management in detail elsewhere in this issue of *ELR*.
158. Huntington et al., *supra* note 30, at 41. The authors say of the Arctic Offshore Drilling Review process, it "demonstrated a focused commitment on the part of the NEB to consult and engage with IFA institutions, the broader Inuvialuit public, and northern residents."
159. Louie Porta & Nicholas Bankes, Becoming Arctic-Ready: Policy Recommendations for Reforming Canada's Approach to Licensing and Regulating Offshore Oil and Gas in the Arctic 5 (2001), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/PewOilGasReport_web.pdf ("The government does not provide meaningful consultation with Inuit about decisions made during the call for nominations phase.").
160. NEB, The Past Is Always Present, *supra* note 6, at 54.
161. NEB Filing Requirements, *supra* note 21.
162. *Id.*
163. *Id.* at 2.2.1, addressing, e.g., sensitivity, migration, and calving seasons of marine and terrestrial mammals.
164. *Id.* at 2.2.2. The developer designs and must justify the consultation structure and protocol for each project, updating it throughout the project.
165. *Id.* at 2.2.3, which references requirements in the CEAA and the ISA, including the need to address cumulative effects.
166. NEB Filing Requirements, *supra* note 21, at 2.
167. A backgrounder on the Filing Requirements is available in Gwich'in, Innuinnaqtun, Inuvialuktun, and Inuktitut. *See* https://www.neb-one.

Imperial Oil is anticipated to be the first to submit an application to the NEB for operations the Beaufort Sea since the 2011 Filing Requirements were published. In December 2011, Imperial presented a Preliminary Information Package to the Inuvialuit Game Council.[168] However, as of July 2013, it had not yet submitted a Project Description to the NEB.

As discussed above, the new Canadian Environmental Assessment Act[169] is largely considered to have weakened environmental protections. It remains to be seen whether the environmental provisions of the NEB Filing Requirements for the Arctic will offset those changes.

The NEB's Draft Financial Viability and Financial Responsibility Guidelines,[170] posted in May 2013 for public comment, address concerns that are more than Inuvialuit-specific, and relevant to any party potentially affected by offshore oil and gas activity.[171] For example, the draft provides: "The Applicant should provide the Board with an estimated cost for environmental clean-up under the worst case scenario as well as a rationale for how those costs were derived."[172] However, as the draft points out, the IFA also contains requirements for financial liability, and both the IFA and the COGOA impose absolute liability on the operator.[173]

IV. Conclusion

This Article set out to determine whether, in 2013, the Inuit on either side of the U.S.-Canada Beaufort Sea maritime boundary do or do not have better tools for taking more meaningful part in decisions relating to offshore oil and gas development in the Arctic than they did three years ago in the wake of the 2010 Macondo/*Deepwater Horizon* explosion and spill. The answer is a qualified yes. Officials in both countries have taken incremental but non-systematic steps that modestly improve Inuit involvement in the respective regulatory processes for Arctic offshore oil and gas activities.

Almost all of these steps can be seen as responding at least indirectly to the fatal Macondo/*Deepwater Horizon* accident in the Gulf of Mexico. In the United States, those responses were at times subsumed in a notably increased momentum from the federal government in 2013 to articulate Arctic policy in formal documents, such as the Integrated Arctic Management Report, the OSTP/IARPC Five-Year Arctic Research Plan, and the Arctic Strategy documents from the White House and the USCG. That momentum was driven by preparations for the May 2013 Ministerial Meeting of the Arctic Council, by legislative mandate, and by Executive Order to address pressures to streamline the regulatory framework for offshore oil and gas activity in Alaska.[174] The Five-Year Research Plan stands out for how its research priorities and concrete steps involve Alaska Natives in research planning and traditional and local environmental knowledge in the research projects themselves. A question that remains unresolved, but also offers potential for strengthening Alaska Native voices in offshore oil and gas planning, is how the "whole-of-government" principle that guides the Integrated Arctic Management Report relates to the "government-to-government" principle set forth in many agency policies on consulting with Alaska Natives.

In Canada, most of the relevant improvements resulted from the NEB Arctic Offshore Drilling Review, as issued in the Filing Requirements in December 2011. The Review process itself reflected a commitment to engage in a serious manner with the communities in Canada's Arctic through some 40 meetings across the north and a week-long Roundtable in Inuvik.[175] The 2011 Filing Requirements provide more specifics than had existed previously on what developers must include in their Project Descriptions with regard to consultation, socioeconomic benefits to northern communities, and the unique Arctic environment and its marine mammals. The Filing Requirements also underline the key role of the IFA in environmental screening of proposed offshore activity. None of these requirements has yet been tested. One indicator of their success will be whether they prove to offset the weakening of the environmental review process in the amended CEAA of 2012.

This Article has also demonstrated how the incremental steps that strengthen Inuit involvement in offshore oil and gas planning in both countries are necessarily shaped and limited by their respective constitutional, judicial, and legislative histories of Inuit-federal relations. The top-down, piecemeal approach that the U.S. federal government has taken to consultation and trust obligations vis-à-vis Native Americans and Alaska Natives is repeated in these most recent developments for Arctic offshore oil and gas activity. By contrast, the recent changes in Canada can draw upon the more structured, agreement-based relationship between the government of Canada and its aboriginal citizens, as reflected in the IFA. Both systems will benefit from continuing to learn from each other, an effort to which this Article has attempted to make a modest contribution.

gc.ca/ll-eng/livelink.exe?func=ll&objId=773372&objAction=browse.

168. *See* Preliminary Information Package—Imperial Oil (Dec. 2012), *available at* http://www.imperialoil.ca/Canada-English/Files/PIP_Beaufort_Sea_Explor_JV_with_Cover.pdf.

169. CEAA 2012, *supra* note 24.

170. NEB, Draft Financial Viability and Financial Responsibility Guidelines, *supra* note 22.

171. The draft is open for public comment and available in Inuktitut and Inuinnaqtun, at http://www.neb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rgltnsndgdlnsprsntthrct/cndlndgsprtnsct/fnnclvbltyrspnsbltygdln/drftfnnclvbltyrspnsbltygdln-eng.html.

172. NEB, Draft Financial Viability and Financial Responsibility Guidelines, *supra* note 22, at §3.B.b.

173. *Id.* at n.3 and accompanying discussion.

174. For example, the OSTP IARPC Five-Year Arctic Research Plan, *supra* note 14, is a direct result of requirements in the Arctic Research Policy Act, Pub. L. No. 98-373 (July 31, 1984), amended as Pub. L. No. 101-609 (Nov. 16, 1990), at §102(b)(4).

175. NEB, The Past Is Always Present, *supra* note 6, at 9.