

# **Tribal and Native Hawaiian Input on Implementing Joint Secretarial Order 3403 on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters**

*NOAA Executive Summary and Response*

**December 20, 2024**



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## I. Background

### Joint Secretarial Order 3403

On November 15, 2021, Interior Secretary Deb Haaland and Agriculture Secretary Thomas J. Vilsack signed Joint Secretarial Order 3403 (Order or JSO 3403), entitled “Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters.”

On November 21, 2022, in coordination with the Department of Interior and the Department of Agriculture, JSO 3403 was amended to include the Department of Commerce (DOC). The National Oceanic and Atmospheric Administration (NOAA) was identified as the primary bureau responsible for implementing JSO 3403 for the Department of Commerce, although other DOC bureaus are not precluded from implementing the Order.

The Order recognizes the Federal Government’s unique nation-to-nation relationship with Tribal Nations and that public lands and waters are the ancestral homelands of Native American and Alaska Native Tribes, and the Native Hawaiian Community. The purpose of JSO 3403 is to ensure federal lands and waters are managed in a manner that protects the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes, including the Native Hawaiian Community, with an emphasis on co-stewardship. It also directs the Departments’ agencies to facilitate agreements with federally recognized Indian Tribes and the Native Hawaiian Community to collaborate in the co-stewardship of federal lands and waters and to strengthen Tribal and Native Hawaiian homelands.

NOAA recognizes that Tribal Nations and the Native Hawaiian Community have stewarded our lands, waters, atmosphere and ecosystems since time immemorial and is committed to further developing partnerships and co-stewardship opportunities with Tribal Nations and the Native Hawaiian Community within the scope of NOAA’s existing authorities. However, unlike the Departments of Interior and Agriculture, NOAA is not a federal land manager. NOAA’s mission is focused on science, service, and stewardship to better understand and predict changes in climate, weather, oceans and coasts, to share that knowledge and information with others, and to conserve and manage coastal and marine ecosystems and resources (<https://www.noaa.gov/our-mission-values-and-vision>). NOAA derives its authorities from the laws created by Congress that give NOAA specific directives or authority, such as the Magnuson-Stevens Fishery Conservation and Management Act (MSA) or National Marine Sanctuaries Act (NMSA). This approach differs from agencies that operate under an “Organic Act<sup>1</sup>.” As a result, a significant product initiated by JSO 3403 was NOAA’s thorough review of the statutes and authorities that could support co-stewardship within NOAA’s broad mission.

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<sup>1</sup> An organic statute is a statute enacted by Congress that creates an administrative agency and defines its authorities and responsibilities.

Many of the land-related priorities in JSO 3403 are not directly applicable to NOAA because NOAA is not a federal land manager and NOAA's land, water and wildlife resource management authorities generally do not extend to the terrestrial portions of Indian Country or Native Hawaiian Lands. NOAA's mission and focus on the ocean, atmosphere, and climate generally involves areas that encompass overlapping jurisdictions between federal, state, Tribal, or international governments. Due to this complex overlap, NOAA exercises its authorities and fulfills its trust responsibilities in close coordination with other relevant managers of these shared-use areas.

The Order is specific in that it does not grant NOAA any new authorities to implement Tribal and Native Hawaiian co-stewardship. However, NOAA has routinely engaged with Tribal Nations and the Native Hawaiian Community and consortia to develop short- and long-term partnerships and cooperative agreements. Many of these past and ongoing partnerships and collaborations were not defined as co-stewardship, but nonetheless meet the purpose, principles, and spirit of the Order. As a result, it is important to understand that with or without JSO 3403, NOAA can and already does practice co-stewardship with Tribal Nations and the Native Hawaiian Community within the scope of NOAA's authorities.

Stewardship and co-stewardship are not formally defined and can be interpreted differently across federal, state, and Tribal governments (Murray, 2023). Conflation of terminology, such as co-stewardship and co-management, can cause confusion and misinterpretations. NOAA's interpretation of Tribal co-management is similar to that of the Department of Interior, which describes co-management as a collaborative or cooperative arrangement that is undertaken pursuant to federal authority that requires or authorizes the delegation of some aspect of federal decision-making or that makes co-management otherwise legally necessary. NOAA cannot create new authority to co-manage, or delegate its decision-making authority, without Congressional authorization. In contrast, for purposes of JSO 3403 implementation, NOAA interprets co-stewardship as a more expansive concept to improve stewardship of significant resources and environments with Tribes and Native Hawaiian Community to support trust responsibility. It is one pathway for the inclusion of Indigenous Knowledge into NOAA decision-making.

#### Tribal Consultation and Native Hawaiian Engagement

As the DOC bureau responsible for implementing JSO 3403, NOAA conducted consultation and engagement sessions in 2023 to:

- 1) Create an opportunity for NOAA to share and receive perspectives on the concepts and definitions of "stewardship" and "co-stewardship" that underpin JSO 3403;
- 2) Solicit ideas for relationship-building strategies to identify co-stewardship

opportunities; and

3) Begin establishing NOAA points of contact for future consultation or engagement on co-stewardship.

It was critical for NOAA to receive Tribal and Native Hawaiian perspectives prior to the completion of NOAA's legal review of NOAA's existing authorities.

Dear Tribal Leader letters were sent to federally recognized Indian Tribes, Alaska Native Corporations (ANCs), and Native Hawaiian Community Leaders on August 23, 2023, to request verbal input at four sessions, which occurred on October 3rd, 5th, 13th, and 17<sup>th</sup>. A session was added for a small subset of Alaska Tribes on November 3rd, 2023, who were unable to participate in October due to conflicting regional meetings. Written comments were also accepted on these topics through November 9, 2023.

Each invitation letter contained framing questions highlighting key topics for Tribal Nation and Native Hawaiian Community input. These questions included:

1. The definitions of stewardship and co-stewardship in the context of your Tribe. (NOAA prepared draft definitions as a starting point for this dialog);
2. Examples of co-stewardship agreements that should be modeled or avoided;
3. Involvement of Indigenous Knowledge in co-stewardship (i.e., agreements, work, decision-making); and,
4. Any other thoughts and input that you may have for NOAA as we work collectively to advance the goals of JSO 3403, such as opportunities for further relationship-building.

NOAA hosted the Tribal consultations and Native Hawaiian Community engagement on a GoToWebinar format. Dr. Zachary Penney, Senior Advisor for Tribal Engagement, welcomed the Tribal and Native Hawaiian Community representatives and participated on each call. Representatives from over 40 Tribal Nations and their affiliates (i.e., commissions) and the Native Hawaiian Community attended the consultations and engagement.

During the sessions, NOAA provided a broad overview of JSO 3403, posed the four questions listed above, and provided draft NOAA definitions for stewardship and co-stewardship. The draft definitions were as follows:

**Stewardship:** *Stewardship refers to NOAA activities relating to management, conservation, and preservation of Federal lands and waters, including wildlife and its habitat. These activities include the conservation and management of coastal and marine ecosystems and resources, including vegetation, fish, marine wildlife, habitats, and other resources; the conduct of scientific research to support management and services; the development of*

*informational products and services, including weather forecasts, warnings, and climate monitoring; the protection of cultural resources; and the provision of recreational and educational opportunities associated with these resources.*

**Co-stewardship:** *Co-stewardship broadly refers to collaborative or cooperative arrangements between Bureaus and Tribes and Native Hawaiian Organizations related to shared interests in Federal lands and waters. Collaborative and cooperative arrangements can take a wide variety of forms. These may include, for example, sharing technical expertise; combining the capabilities of Bureaus and Tribes and Native Hawaiian Organizations through cooperative agreements or other means to improve resource management and advancing the responsibilities and interests of each; and incorporating Indigenous knowledge, experience, and perspectives in NOAA's management of these resources.*

After the consultations and engagement sessions, participants were sent the webinar recording and presentation slides, and given contact information and a link to NOAA's Tribal Resources webpage for more information. In total, NOAA received six written submissions.

The remainder of this report summarizes verbal and written Tribal and Native Hawaiian Community input NOAA received during the consultations and engagement and comment period. NOAA considered all the input received, whether it was provided verbally or in written comments, or both. We define the commenters, whether a Tribal Nation, ANCs, Tribal consortium, Tribal organization, Indigenous or Native Hawaiian Community member as an 'Indigenous representative' for anonymity and simplicity in this document.

Moreover, this document includes in Appendix 1 the NOAA Legal Review of Current Land, Water, and Fish/Wildlife Treaty Responsibilities and Authorities that can support co-stewardship and Tribal stewardship.

## **II. Summary of Comments & NOAA Response**

The goal of these consultations and engagement was to develop a better understanding of Tribal Nation and Native Hawaiian Community perspectives on stewardship and co-stewardship and identify pathways to advance the goals of JSO 3403 at NOAA and DOC. The consultations and engagement help set the stage for future dialog with individual Tribal Nations and Native Hawaiian Community representatives on opportunities for co-stewardship agreements. Oral and written comments submitted have been considered in NOAA's effort to finalize the Legal Review and the stewardship and co-stewardship definitions provided therein. In addition, these consultations and engagement will help to inform how NOAA institutionalizes the goal of co-stewardship within the NOAA workforce.

This document is organized into four sections aligned with the four framing questions, which are: Definitions of Stewardship and Co-stewardship; Examples of Co-stewardship Agreements; Involvement of Indigenous Knowledge; and Other Related Topics. Each section summarizes the input received and provides a NOAA response.

### **Comments on the Definitions of Stewardship and Co-stewardship**

NOAA received numerous comments about the definitions of stewardship and co-stewardship and how NOAA should properly interpret these terms. Draft definitions for these terms were provided in August when the invitational letters were sent to Tribal leaders and the Native Hawaiian Community. The comments received included the following themes:

- **Suggested revisions to the definitions of stewardship and co-stewardship**

*Many Indigenous representatives requested edits to the draft definitions of stewardship and co-stewardship and shared the following comments:*

- o *Co-stewardship definition is brief and focused on the types of co-stewardship but does not define what co-stewardship actually is or means.*
- o *Definitions must acknowledge and prioritize treaty and trust obligations, honor the community, recognize Tribal rights, and incorporate the significance and importance of cultural values to the resources.*
- o *The language does not include any reference to Native people.*
- o *The definition needs to include Indigenous worldviews or ways; the definition does not reflect Indigenous approaches.*
- o *Stewardship definition should convey a dual responsibility: stewardship of the environment and stewardship of the trust and treaty commitments to Tribal Nations.*
- o *The term “restoration” or “restoration and other nature positive goals” should be added to the definition.*
- o *Prefer the term stewardship because it focuses on an approach of taking care of something rather than trying to manage it.*
- o *Foremost in the language is that it honors, prioritizes, empowers the home people. Recognizing knowledge.*
- o *Stewardship definition lacks teeth/enforcement.*
- o *The language includes a lot of loopholes.*
- o *There should be language around decision-making processes and conflict resolution.*
- o *Co-Stewardship should be defined not merely as a practice or policy but as an evolving relationship.*
- o *The definitions are confusing because it almost purports to have to choose and really granularly define what it is that they're looking for.*
- o *Confused about definitions because stewardship is defined as activities that*

*NOAA's conducting and then co stewardship is an agreement.*

- o The co-stewardship definition is missing the concept of equity, which leads to the goal of sharing power and control.*

- **Comparing co-stewardship and co-management**

*The majority of the feedback that NOAA received supported strengthening co-stewardship initiatives between Tribal and Native Hawaiian Community and NOAA. However, some of the comments centered on concepts of co-management and equating it with co-stewardship. While some expressed that co-management and co-stewardship are the same or similar, many others shared concerns of the two tools being conflated or marginalizing efforts to strengthen co-management. These are the comments that were shared with NOAA:*

- o Recommend having a definition of co-management.*
- o Tribal Nations have inherent management authority. Concerning to hear discussions about what co-stewardship means and what co-management means when it means one and the same.*
- o NOAA's co-stewardship definition loosely follows our definition of co-management on paper but not in practice. Co-management is a collaborative effort to develop an agreement in which two or more sovereigns mutually negotiate, define and allocate amongst themselves in sharing of the management functions, entitlements, and responsibilities for a given territory, area or set of natural resources.*
- o Co-stewardship, from our perspective, implies an equal partnership where the Tribal Nation and NOAA work collaboratively respecting our sovereignty and treaty rights.*
- o Seek equal management authority within a National Marine Sanctuary noting that Tribal Nations only have an advisory role.*
- o Recommend hands-on Tribal co-management of renewable and nonrenewable resources within ancestral homelands.*
- o Definitions do not create the understanding what it is that most Tribes want, which is a seat at the table to manage this shared resource.*
- o Tribal Nations should have co-management jurisdiction over these federal projects within federal waters and yet we're not even required signatories on these Memorandum of Agreements.*
- o Seek co-management agreement with Tribes in Alaska to allow for observer opportunities under the NOAA observer program to help monitor by-catch.*
- o Expand co-management relationships for marine mammals inclusive of accessing funding.*

- **Objections to co-stewardship arrangements**



*A group that represented several Tribal communities in Alaska distinguished co-stewardship and co-management. They pointed out that co-stewardship undermines existing marine mammal co-management relationships by exacerbating limited resources, funding, and capacity.*

### NOAA Response

In response to the comments providing suggestions to improve the draft definitions of stewardship and co-stewardship, NOAA has revised the finalized definitions in the finalized Legal Review. The definitions from the finalized Legal Review are included below (see also Appendix I). Within the context of JSO 3403, “stewardship” can be understood to include activities in or relating to the management of lands and waters by NOAA and by Tribes or the Native Hawaiian Community.<sup>2</sup> As referenced in JSO 3403, “co-stewardship” is the collaborative work of stewardship between the federal government and Tribes or the Native Hawaiian Community. NOAA has prepared the following definitions for use by Line Offices implementing JSO 3403’s policies and procedures:

#### *Definition of Stewardship*

Draft definition with edits	Revised definition
<p><b>Stewardship.</b> Stewardship refers to NOAA activities relating to management, conservation, and preservation of <del>F</del>federal lands and waters, including wildlife and its habitat. These <del>activities may</del> include the conservation and management of coastal and marine ecosystems and resources, including vegetation, fish, marine wildlife, habitats, and other resources; the conduct of <del>monitoring, scientific</del> research (<del>inclusive of scientific research and, where appropriate, Indigenous Knowledge</del>) to support management and services; the development of informational products and services, including weather forecasts, warnings, and climate monitoring; the protection of cultural resources <del>and practices</del>; and the provision of recreational and educational opportunities associated with these resources.</p>	<p><b>Stewardship.</b> Stewardship refers to NOAA activities relating to management, conservation, and preservation of federal lands and waters, including wildlife and its habitat. These may include the conservation and management of coastal and marine ecosystems and resources, including vegetation, fish, marine wildlife, habitats, and other resources; the conduct of monitoring, research (inclusive of scientific research and, where appropriate, Indigenous Knowledge) to support management and services; the development of informational products and services, including weather forecasts, warnings, and climate monitoring; the protection of cultural resources and practices; and the provision of recreational and educational opportunities associated with these resources.</p>

<sup>2</sup> Although JSO 3403 also pertains to stewardship and co-stewardship of federal lands, NOAA’s authorities to support co-stewardship are primarily related to management of federal waters, wildlife and its habitat.

### Definition of Co-Stewardship

Draft definition with edits	Revised definition
<p><b>Co-Stewardship.</b> Co-stewardship broadly refers to collaborative or cooperative arrangements between <del>Bureaus</del> NOAA and Tribes <del>or the and</del> Native Hawaiian <del>Organizations</del> Community related to shared interests in <del>F</del>federal lands and waters, <del>including wildlife, culture and resources</del>. Collaborative and cooperative arrangements can take a wide variety of forms <del>reflecting the unique relationship and shared interests of the parties</del>. These may include, for example, sharing technical expertise, <del>or</del> combining the capabilities of <del>Line Offices</del> <del>Bureaus</del> and Tribes <del>or the and</del> Native Hawaiian <del>Community Organizations</del> through cooperative agreements or other means. <del>The shared goals of these arrangements are to:</del> improve resource management; <del>foster consensus in decision-making where possible; and</del> advance the responsibilities and interests of <del>the parties each</del> including the federal Government's responsibility to protect Tribal treaty and reserved rights in federal decision-making and regulatory processes; and <del>incorporating</del> include where appropriate <del>Tribal</del> Indigenous Knowledge, experience, and perspectives to inform <del>in</del> NOAA's decision-making and management <del>and policies related to of</del> these resources.</p>	<p><b>Co-Stewardship.</b> Co-stewardship broadly refers to collaborative or cooperative arrangements between NOAA and Tribes or the Native Hawaiian Community related to shared interests in federal lands and waters, including wildlife, culture and resources. Collaborative and cooperative arrangements can take a wide variety of forms reflecting the unique relationship and shared interests of the parties. These may include, for example, sharing technical expertise, or combining the capabilities of Line Offices and Tribes or the Native Hawaiian Community through cooperative agreements or other means. The shared goals of these arrangements are to: improve resource management; foster consensus in decision-making where possible; advance the responsibilities and interests of the parties including the federal Government's responsibility to protect Tribal treaty and reserved rights in federal decision-making and regulatory processes; and include where appropriate Indigenous Knowledge, experience, and perspectives to inform NOAA's decision-making and management and policies related to these resources.</p>

In response to the comments received during consultation and engagement, the definition of stewardship was updated to expressly reference inclusion of "Indigenous Knowledge" as part of NOAA's research activities, and to include the protection of cultural practices in addition to cultural resources within NOAA's scope of stewardship activities. The definition of co-stewardship was updated to acknowledge that co-stewardship arrangements may vary in form "reflecting the unique relationship and shared interests of the parties." The definition was also revised to include an expanded and refined list of

shared goals for co-stewardship arrangements. Specifically, the goals of fostering consensus decision-making where possible, advancing the federal Government's responsibility to protect Tribal treaty and reserve rights, and including Indigenous Knowledge, where appropriate, to inform federal decision making.<sup>3</sup>

NOAA also notes the use of the phrase "where appropriate" reflects NOAA's respect for Indigenous Knowledge sovereignty and the acknowledgement that only the Tribal Nation or Native Hawaiian Community can make the determination if and when they would like to include their knowledge in federal documents and decision-making..

These JSO 3403 implementation definitions of stewardship and co-stewardship will be institutionalized within NOAA as a common reference for stewardship and co-stewardship, but may be updated in future consultations or policy development.

Consistent with many of the comments received, NOAA also included a definition of "co-management" in the Legal Review. This definition distinguishes co-management from co-stewardship, and is similar to the definition that the Department of Interior provided in its Legal Review.

- *Co-Management*, as applied to NOAA authorities, refers to collaborative or cooperative arrangements undertaken pursuant to federal authority that authorize the delegation of some aspects of federal decision-making or function, provide for joint roles in stewardship, or make co-management otherwise legally necessary, such as cooperative agreements between National Marine Fisheries Service and Alaska Native Organizations for the conservation of marine mammals and management of subsistence use by Alaska Natives, which is authorized by law. Co-management authorities may also arise from established Tribal Treaty rights such as those adjudicated in *U.S. v Washington*.<sup>4</sup>

In response to the concerns raised by the numerous Tribal representatives that co-stewardship would shift focus and resources away from co-management relationships, NOAA is committed to bolstering its collaboration with Tribal Nations and Native Hawaiian Community. The Order envisions the Departments' efforts to seek pathways that could enhance or broaden support for improving resource management. The intent of the Order is not to shift resources, funding, or attention away from co-management responsibilities. Rather, NOAA is pursuing opportunities that enable us to be creative across our mission and authorities to bring in a broader scope of NOAA's existing

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<sup>3</sup> NOAA notes that additional revisions for clarity and legal sufficiency were also made to the definitions included in the final Legal Review.

<sup>4</sup> See 443 U.S. 658 (1974).

resources and authorities in a way that supports co-stewardship and Tribal stewardship while not infringing on co-management arrangements that NOAA has authority to undertake.

### Comments on Examples of Co-stewardship Agreements

Tribal representatives and Native Hawaiian Community members discussed examples of co-stewardship agreements that should be modeled or avoided. Under this discussion, Tribal representatives and Native Hawaiian Community members provided illustrations of how NOAA should implement the Order. The comments included:

- **Suggested models of co-stewardship**

*Indigenous representatives highlighted some examples they believed is a model of how co-stewardship, as they understand it to be, has been used with respect to certain natural and cultural resources.*

- *The Papahānaumokuākea Marine National Monument co-management model currently exists but is highly under-resourced.*
- *There may be something that can be learned from our nearshore communities here in Hawai‘i. Two Community-Based Subsistence Fishing Areas were developed at Hā‘ena, Kaua‘i and Miloli‘i, Hawai‘i.*
- *Tribal Nation has had successful agreements with the U.S. Forest Service for the Los Padres National Forest, and with the Department of Defense for the Vandenberg Space Force base.*
- *U.S. Indigenous Marine Stewardship Areas in California have effective tools and management provisions.*
- *Under the Indian Trust Asset Reform Act, there’s untapped authority for federal agencies to enter into a trust asset management agreement with Tribal governments.*
- *US Fish and Wildlife Service’s Gravel to Gravel Initiative may potentially have some lessons learned with respect to co-stewardship.*
- *Tribal Nations in the region are directly involved in how the Great Lakes Restoration Initiative Distinct Tribal Program (Environmental Protection Agency) is designed and operated and incorporates flexibility to access funding.*

- **Missed opportunities for co-stewardship**

*Indigenous representatives also shared examples where co-stewardship could have been beneficial.*

- *Recommended traditional Hawaiian medicine and practices were not accepted by NOAA for the Hilo Marine Mammal Response Network (2008-2011).*
- *In 2016, the state of Hawai‘i, working in partnership with Loko I‘a (traditional*

*Hawaiian fishpond) practitioners developed a new streamlined permitting program. The federal government, which was initially a partner in the process, allowed federal restoration permits to continue to be an obstacle.*

- **Suggestions on implementing the Order**

*Tribal Nations, the Native Hawaiian Community, and federal agencies may use and apply co-stewardship in different ways. During the comment period, Tribal and Native Hawaiian representatives provided the following input on the ways NOAA should implement the Order:*

- *Prepare implementation guidelines that are equally clear and strong as the Order including how a Tribal Nation or Indigenous community can enter into a co-stewardship agreement with NOAA and include granular information about legal responsibilities of each party.*
- *Replicate CEQ's guidance on cooperating agencies where Tribal governments are designated specialized expertise within their immediate regions or areas that affect them.*
- *Use self-governance compacts.*
- *Look at place-based collective when considering a holistic approach for stewardship initiatives.*
- *Balance economic development and preservation.*
- *Assess conservation and subsistence practices.*
- *Hold meaningful government-to-government consultations, especially in Offshore Wind Energy Projects, to obtain mutual understanding of the impacts of federal undertakings on the environment, cultural and archaeological resources. Agreements should not be aggressively and hastily pushed on Tribal Nations.*
- *Coordinate directly with Tribal Nations to identify and address issues that are impacting marine ecosystems and treaty resources. Co-stewardship agreements should involve regulatory changes by the agency.*
- *Do not apply a one-size fits all or project-based restoration strategy limited to an agency by agency basis.*
- *Outline a consensus seeking model similar to the Department of Interior's manual 512 Parts 4 and 5.*
- *Identify whether co-stewardship initiatives would be undertaken by the regional offices or headquarters.*
- *Indicate how the Order will be considered in terms of designation and collaboration on sanctuary management.*
- *Identify how NOAA regional offices are being directed to follow these mandates.*
- *Develop language that ensures compliance with the Order.*
- *Pinpoint NOAA's role inclusive of any permitting or approval process.*

- o *Ascertain plans that will assist Indigenous communities.*
- o *Improve communication across other federal agencies to obtain data and evaluate how that data impacts communities.*
- o *Explain how the Order impacts existing advisory entities and detail the implications in the co-stewardship agreements.*
- o *Conduct face-to-face community meetings to engage with local people.*

### **NOAA Response**

NOAA appreciated the feedback on examples of how to best apply co-stewardship agreements with Tribal Nations and Native Hawaiian Community. Each co-stewardship agreement will need to be developed on a case-by-case basis because of the unique aspects and cultural significance of an environment or area. NOAA's strategy will continue to foster ongoing collaboration with Tribes and the Native Hawaiian Community to preserve and promote Indigenous cultural heritage, uphold NOAA's trust and treaty responsibilities, and recognize shared use areas. NOAA will leverage resources and investments as it works to implement its statutory authorities and policy initiatives.

While collaborative stewardship of federal lands and waters with Tribal Nations and the Native Hawaiian Community is not a new concept or practice, NOAA recognizes that more can be done to advocate for and partner with Tribal Nations and Native Hawaiian Community. NOAA is reviewing numerous existing collaborative agreements to determine areas of improvement and techniques that we can replicate. In addition, NOAA intends to advance key strategies to remove administrative burdens and improve community engagement approaches.

### **Comments on Indigenous Knowledge**

Tribal and Native Hawaiian representatives provided valuable input on the involvement of Indigenous Knowledge in co-stewardship (e.g., agreements, projects, decision-making). There was overwhelming support for inclusion and acknowledgement of Indigenous Knowledge via co-stewardship to support NOAA's mission and ability to meet U.S. trust responsibilities to Tribal Nations and the Native Hawaiian Community. The comments included:

- **Recognition of the Indigenous relationship and cultural ties to the land, water, and resources within**

*Many Tribal and Native Hawaiian representatives shared stories of their traditional practices involving natural resources and how those cultural practices shaped their relationships to care for the land and water. Many highlighted that one cannot*

*understand the impacts to traditional lands and waters without first understanding the vantage points of Indigenous Peoples who are inextricably connected to the environment. Commenters pointed out that recognizing the Indigenous relationship is respecting the Indigenous languages, culture, practices, contributions, values, place names, songs, and stories. Indigenous representatives noted that Indigenous Knowledge should inform all aspects of NOAA's decision-making in stewardship and co-stewardship projects, from habitat restoration to the management of fish stocks.*

- **Concerns that Indigenous Knowledge is not consistently and meaningfully included in federal decision-making**

*Several Tribal and Native Hawaiian representatives shared disappointment that many times federal agencies are not elevating the role of Indigenous Knowledge in federal policy and decision-making. They shared the following recommendations:*

- o Say Indigenous Knowledges (plural) because we know that the knowledge of individual Indian Tribes and communities is not a monolith across the board.*
- o Acknowledge, practice, and understand the international principles of Free, Prior, and Informed Consent (FPIC).*
- o Expand upon NOAA's best practices on Indigenous Knowledge by including a rationale why relevant Indigenous Knowledge was not used in the final decision.*
- o Before a final product is posted, published, or used it should be reviewed and approved by the contributing knowledge holder.*
- o Value Indigenous Knowledge on the same footing, if not more, than western science.*
- o Ensure traditional knowledge can be used more effectively to manage waters under NOAA's jurisdiction.*
- o Protect Indigenous Knowledge from the Freedom of Information Act (FOIA) and other disclosures, and consider supporting legislative proposals to address the challenges under FOIA.*
- o Incorporate Indigenous Knowledge in the decision-making process whether it comports with the Administration's goals or not.*
- o Refrain from marginalizing or dismissing the use of Indigenous Knowledge because there are times when science has been wrong because it was based on limited information.*
- o Weigh Indigenous Knowledge equal to or greater than professional qualifications.*
- o Read, understand, and follow the best practices laid out in the Indigenous Knowledge Guidance for Federal Agencies.*
- o Spell out good governance in the Indigenous Knowledge guidance.*
- o Incorporate accountability in the Indigenous Knowledge Memo.*

## **NOAA Response**

NOAA acknowledges that Tribal Nations and the Native Hawaiian Community have been the stewards of the ecosystems since time immemorial. Throughout this time, and today, Tribal Nations and the Native Hawaiian Community continue to implement proven sustainable and conservation practices rooted in Indigenous Knowledge. Stewardship is a pillar of the NOAA's mission and creating equitable partnerships with Tribal Nations and the Native Hawaiian Community and inclusion of their knowledge is an important step towards building a climate-ready nation with those who have lived here the longest. Through bringing together Indigenous Knowledge and science, we enhance our understanding of the marine and coastal environments, develop questions we need to drive our research and monitoring, and aid in evidence-based and adaptive decision-making.

In July 2023, NOAA released its updated Indigenous Knowledge guidance. NOAA conducted Tribal consultations in January 2022 and sought public comment through the Federal Register on the guidance. The Indigenous Knowledge guidance was originally developed in 2019 and was updated in 2022 through a collaborative effort across NOAA. The purpose of the guidance is to encourage the inclusion of Indigenous Knowledge, as appropriate and to the extent practicable and permitted by law, in NOAA's environmental science, policy and decision-making process to inform agency decisions and to build partnerships with Tribal Nations and the Native Hawaiian Community. The Administration has an interagency working group (IWG) on Indigenous Knowledge that is co-chaired by the White House Council on Environmental Quality and White House Office of Science and Technology Policy. The IWG facilitated the development of a White House Indigenous Knowledge guidance, released in November 2022. The NOAA Indigenous Knowledge guidance corresponds with the White House Indigenous Knowledge guidance and terminology. NOAA continues to be part of the IWG to further implement and advance the inclusion of Indigenous Knowledge in federal work. Many of the practices highlighted in NOAA's Indigenous Knowledge guidance were used in the development of the IWG's Indigenous Knowledge guidance.

NOAA's Indigenous Knowledge Guidance is intended to be a living document that will be updated and improved over time. NOAA anticipates continued engagement with Tribal Nations and the Native Hawaiian Community on this document as it continues to mature and we will take into consideration the recommendations provided during NOAA's consultation and engagement sessions related to JSO 3403.

## **Comments on Other Related Topics**

NOAA also received numerous comments when asked for other thoughts and input. They



are summarized below:

- **Continuous employee training is crucial**
  - *The Department can improve its relationship with Tribal governments by gaining a deeper understanding about the difference between federally recognized Tribes and other Tribal groups.*
  - *Federal employees should learn federal Indian law and the canons of construction.*
- **Capacity building and appropriate funding is necessary**
  - *Engage directly with Tribal and Native Hawaiian technical experts in developing conservation plans.*
  - *There is no co-stewardship without the investment of adequate resources (e.g., funding, capacity, tools, technical assistance) in Indigenous communities and federal programs that support co-stewardship and collaboration. Specifically on the role of consultations and engagements, Indigenous representatives recommended that NOAA and the federal government set aside or create a line item budget to offset the burdens that fall on Indigenous communities.*
- **Respect Tribal treaty rights**
  - *Prioritizing treaty resources for protection in all efforts using the precautionary principle to err on the side of treaty resource protection, if things are unclear, and using authorities to advance the restoration, fish and wildlife habitats and populations.*
  - *Establish a program for direct coordination with Indian Tribes on technical levels to identify and act upon issues impacting treaty resources.*
  - *Review and revise regulations and enforcement activities to ensure they support, rather than undermine, treaty rights.*
  - *NOAA's role is not only as a steward but as an enforcer of these treaty rights.*
  - *The suggestions provided in the 17-agency Memorandum of Understanding for the Protection of Tribal Treaty Rights and Reserved Rights should be taken as foundational elements.*
  - *Create an Office of Indian Treaty Rights Protection within the Department.*
  - *Work with Tribal governments to develop statutory amendments to the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). The ESA and the MMPA should be invalidated in their application to hatcheries and fisheries because both Acts interfere with a defined treaty fishing rights.*
  - *We'd like to see a stronger attention given to incorporating the adjudications and the legal rights that have been defined by the courts into how the agency moves forward with its co stewardship relationship. One example, the agency has never really elevated and incorporated the adjudication of the treaty rights*

*subsequent to the enactment of the Endangered Species Act.*

- ***Address individual requests and recommendations***

- *Certain Indigenous representatives would like to be notified of marine mammal strandings and be part of the emergency response team.*
- *NOAA needs to support the Indigenous communities' ceremonial, religious, and subsistence practices through the take of whale parts. Currently take is only allowed for "educational" purposes.*
- *Require NOAA's Ocean Exploration Program to notify Indian Tribes of current and future undertakings including but not limited to expeditions, exploration, mapping, and sonar.*
- *Improve the treatment and recognition of Native Hawaiians.*
- *Include Native Hawaiians living abroad in the conversations.*
- *Stop the permitting of wind turbines or request a moratorium in offshore wind energy projects while Tribal Nations evaluate the information. NOAA has specialized expertise that could support Indian Tribes in their reviews and compiling comments including providing technical assistance.*
- *Expressed interest in co-stewardship of federal waters in and around Cape Cod, Nantucket Shelf Regions.*
- *Inquired an explanation as to why Alaska Native tribes in the Bering Sea Region were left out of the Community Development Quota (CDQ) program.*
- *Enhance and expand the NOAA Observer Program monitoring and data collection to prioritize impacts to the marine ecosystem by offshore wind.*
- *Request for government to government consultation on the Order.*

### **NOAA Response**

Although these comments go beyond the scope of the subject consultation and engagement and are not responded to directly herein, the summary of these comments are being shared with appropriate NOAA line and staff offices for consideration as they implement their programs and engage with Tribal Nations and Native Hawaiian Community. NOAA is committed to continuing employee training and furthering Indigenous engagement to build lasting partnerships.

## **III. Conclusion & Next Steps**

NOAA appreciates the thoughtful comments and feedback received from Tribal Nations and the Native Hawaiian Community. The comments we received will greatly help NOAA in advancing co-stewardship to better meet the needs of Tribal Nations and the Native

Hawaiian Community. Furthermore, the feedback received will help improve the implementation of other programs beyond those specifically implicated by the Order, as well as our overall engagement strategy with Tribal Nations and the Native Hawaiian Community. Even before the Secretary of Commerce signed JSO 3403 in 2022, NOAA was supporting and implementing various co-stewardship arrangements with Tribal Nations and Native Hawaiian Community. The information gathered from these consultations and engagement will be shared with the NOAA workforce and used to develop further training and core competencies related to co-stewardship.

NOAA intends to hold training workshops across the NOAA workforce to discuss the JSO 3403 definitions and legal authorities. These trainings also provide an opportunity to share the feedback we received during consultation and engagement. The training workshops will focus on the exchange of managerial, technical, and professional knowledge, and sharing best practices to fulfill the requirements of the Order. These efforts will allow NOAA to establish a robust framework for how NOAA engages and implements co-stewardship. When appropriate, NOAA Line, Staff, and Regional Offices will be responsible for implementing procedures and best practices consistent with the Order, and evaluating progress toward meeting the objectives and goals of the Order and NOAA's trust responsibility.

Further information on any collaborative agreements or JSO 3403 initiatives will be posted on NOAA's Tribal Resources website when available.

NOAA will continue to engage and keep Tribal Nations and the Native Hawaiian Community updated as the Order is implemented. NOAA remains committed to ensuring federal lands, waters, wildlife and its habitat are managed in a manner that protects the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes, including the Native Hawaiian Community, with an emphasis on co-stewardship. We look forward to further collaboration with Tribal Nations and the Native Hawaiian Community in the co-stewardship of federal lands and waters driven by local needs, challenges, assets, and resources.

## References

Murray, Mariel J. (2023, May 18). Tribal Co-management of Federal Lands: Overview and Selected Issues for Congress. (CRS Report No. R47563)

#### **IV. Appendix: Legal Review of Land, Water, and Fish/Wildlife Treaty Responsibilities and Authorities**

*This legal review is an overview of legal authorities and is not intended to provide any legal opinions or advice regarding the authorities or programs set forth herein. This review briefly describes many legal authorities and is not an exhaustive description of those authorities. Moreover, the laws, regulations, policies, and programs referenced are frequently amended. Please contact the appropriate NOAA General Counsel Section for further assistance.*

## **I. INTRODUCTION**

On November 21, 2022, the Secretary of Commerce signed Joint Secretarial Order No. 3403, Amendment No. 1 (JSO 3403),<sup>1</sup> on fulfilling the trust responsibility to Tribes<sup>2</sup> in the stewardship of federal lands and waters. JSO 3403 Section 1(d) directs the U.S. Departments of Commerce (DOC), Interior, and Agriculture to complete a legal review of their “current land, water, and wildlife treaty responsibilities and authorities that can support co-stewardship and Tribal stewardship” within one year of the date of the JSO.<sup>3</sup> This report constitutes that legal review providing a summary of those relevant authorities implemented by the National Oceanic and Atmospheric Administration (NOAA).<sup>4</sup>

## **II. JSO 3403 AND STEWARDSHIP**

This section explains the various stewardship arrangements discussed in JSO 3403 and reviews NOAA authority applicable to the establishment of co-stewardship arrangements between NOAA and Tribes related to the management of federal lands, waters, wildlife and its habitat under NOAA’s jurisdiction.<sup>5</sup>

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<sup>1</sup> U.S. DEP’T OF THE INTERIOR, U.S. DEP’T OF AGRIC., and U.S. DEP’T OF COM., J. SECRETARIAL ORDER NO. 3403, AMEND. NO. 1, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2022).

<sup>2</sup> For purposes of JSO 3403 and this legal review, the term “Tribe” refers to entities having a government-to-government or government-to-sovereign relationship with the United States (*i.e.*, federally recognized Indian Tribes and the Native Hawaiian Community, which relies on Native Hawaiian organizations as its informal representatives). *See* JSO 3403, § 3.

<sup>3</sup> An earlier iteration of the JSO was signed by the U.S. Department of the Interior and the U.S. Department of Agriculture on November 15, 2021. *See* U.S. DEP’T OF THE INTERIOR AND U.S. DEP’T OF AGRIC., J. SECRETARIAL ORDER NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021).

<sup>4</sup> NOAA wishes to acknowledge the support of the Department of the Interior Office of the Solicitor and the Department of Agriculture Office of the General Counsel whose work to develop the Departments’ respective JSO 3403 Legal Reviews greatly informed the development of this document. *See* U.S. DEP’T OF THE INTERIOR, *Current Land, Water, and Wildlife Authorities that Can Support Tribal Stewardship and Co-Stewardship Final Report*, November 2022, and U.S. DEP’T OF AGRIC., *Joint Secretarial Order 3403 and Stewardship Authorities*, 2022.

<sup>5</sup> Although JSO 3403 also pertains to stewardship and co-stewardship of federal lands, this legal review primarily focuses on federal waters, wildlife and its habitat consistent with NOAA’s mission and statutory authorities.

## A. JSO 3403

NOAA manages federal waters, wildlife<sup>6</sup> and its habitat, many of which have been and are currently stewarded by Tribes. These waters, wildlife and habitats hold natural and cultural resources of continuing significance to Tribes, some within areas reserved by ratified treaties for Tribal subsistence, religious and cultural uses, and to support a moderate living. Given the United States' government-to-government and government-to-sovereign relationship with, and trust obligations to, Tribes, JSO 3403 sets forth DOC policy that NOAA will seek to ensure management of federal waters, wildlife, and habitats under its jurisdiction in a manner that protects the established treaty, religious, subsistence rights, and the cultural interests of Tribes. To achieve that goal, JSO 3403 enumerates the steps NOAA should take when undertaking stewardship activities.

### 1. Federal Stewardship

JSO 3403 directs each agency to ensure that its decisions relating to federal stewardship of lands, waters, and wildlife under its jurisdiction include consideration of how to safeguard the interests of any Tribe those decisions may affect.<sup>7</sup> JSO 3403 further directs NOAA, consistent with applicable law, to make agreements with Tribes to collaborate in the co-stewardship of federal lands and waters under its jurisdiction, including wildlife and its habitat.<sup>8</sup> In so doing, NOAA is guided by the principles of implementation described in section 3 of the JSO 3403.<sup>9</sup>

### 2. Tribal Stewardship

In JSO 3403, the signatories recognize that it is the policy of the United States to promote Tribal stewardship. For purposes of promoting Tribal stewardship of lands, JSO 3403 directs the Departments to “support consolidation of [T]ribal landholdings within reservations, including

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<sup>6</sup> Wildlife resources managed by NOAA include marine fisheries, marine mammals and endangered and threatened species, and other species in marine protected areas.

<sup>7</sup> JSO 3403 § 1(a).

<sup>8</sup> *Id.* § 1(b).

<sup>9</sup> *Id.* § 3. In fulfilling the requirements of JSO 3403, NOAA is directed to: (a) recognize that Tribes can directly engage with the Department to address matters of mutual interest concerning federal lands and waters management; (b) work with Tribes to give them an integral role in management decisions affecting federal lands and waters through consultation, capacity building, and other means consistent with applicable authority; (c) engage affected Tribes in meaningful consultation on federal land management, including giving due consideration to Tribal recommendations; (d) incorporate applicable Tribal management plans to the maximum extent possible with respect to certain restoration and conservation planning; (e) collaborate with Tribes to promote education about the role Tribal governments play in the stewardship of federal lands, waters, and wildlife; (f) duly consider Tribal expertise and Indigenous Knowledge in federal land management decisions, especially for resources subject to reserved treaty rights; (g) include dispute resolution procedures in collaborative agreements with Tribes; and (h) incorporate non-recognized Tribes and Indigenous Peoples in implementation of JSO 3403 where authorized.

Tribal acquisition of federal lands and private in holdings, in furtherance of this Order and consistent with applicable law.”<sup>10</sup>

### 3. Co-Stewardship with Tribes

With respect to co-stewardship, JSO 3403 directs agencies to make agreements with Tribes to collaborate in the co-stewardship of federal lands, waters, wildlife and its habitat under an agency’s jurisdiction.<sup>11</sup> JSO 3403 further directs agencies to endeavor to engage in co-stewardship activities:

- Whenever federal lands or waters subject to an agency’s activities are within or adjacent to a Tribe’s reservation;
- Whenever a Tribe has, pursuant to ratified treaties and agreements with the United States, subsistence or other rights or interests in non-adjacent federal lands; or
- Whenever a Tribe requests an agency to do so.<sup>12</sup>

If co-stewardship activities are not permitted under applicable law, NOAA should nonetheless give consideration and deference to Tribal proposals, recommendations, and Indigenous Knowledge that affect management decisions on NOAA-managed areas and resources. To advance co-stewardship, JSO 3403 Section 5 further directs each agency to:

- Promote use of collaborative agreements or provisions in land management plans consistent with DOC’s obligations under existing law;
- Develop and implement, whenever possible, employee performance review standards that evaluate progress toward meeting the objectives of JSO 3403, including progress on developing new collaborative stewardship agreements and enhancing existing ones;
- Coordinate and cooperate on co-stewardship efforts and initiatives between the Departments;
- Use agreements to foster cooperation on protection of treaty, subsistence, and religious rights consistent with consensual policy-making referenced in EO 13175; and,
- Evaluate and update manuals, handbooks, policies and other guidance documents for consistency with JSO 3403.

In considering co-stewardship opportunities, it is important to consider the equities of all Tribal interests with regard to particular resource values and land and water management actions and the Tribe’s desire to enter into a co-stewardship arrangement with NOAA.

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<sup>10</sup> *Id.* § 6.

<sup>11</sup> *Id.* § 1(b).

<sup>12</sup> *Id.* § 5.

### III. TERMINOLOGY

#### A. Tribe

JSO 3403's policies and directives apply to collaborative and cooperative arrangements with federally recognized Tribes and the Native Hawaiian Community,<sup>13</sup> which uses Native Hawaiian Organizations as its informal representatives,<sup>14</sup> and, in limited instances, non-federally recognized Tribes.<sup>15</sup> Based on this, NOAA has prepared the following definitions for use by Line Offices in implementing JSO 3403's policies and procedures:

- **Federally Recognized Tribe or Tribes.** Federally recognized Tribe or Tribes refer to 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.<sup>16</sup>
- **Native Hawaiian Community.** Native Hawaiian Community refers to the distinct Native Hawaiian Indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.
- **Native Hawaiian Organization.** Native Hawaiian Organization refers to the informal representatives of the Native Hawaiian Community that can engage NOAA and address matters of mutual interest with respect to the management of federal lands and waters.<sup>17</sup>

#### B. Stewardship, Co-Stewardship, and Co-Management

The ordinary meaning of the term “stewardship” is “the conducting, supervising, or managing of something,” especially “the careful and responsible management of something entrusted to one's care.”<sup>18</sup> Read within the context of JSO 3403 as a whole, “stewardship” can be understood to

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<sup>13</sup> *Id.* § 1 (to ensure management of federal lands and waters in manner seeking to protect “the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes, including the Native Hawaiian Community”); *id.* § 3(a) (Indian Tribes and Native Hawaiian organizations).

<sup>14</sup> *Id.* § 3(a).

<sup>15</sup> *Id.* § 3(h). Although some of the co-stewardship authorities identified herein may support arrangements with non-federally recognized Tribes (e.g., the general authority under the Fish and Wildlife Conservation Act to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations), the Office of the General Council has not identified any NOAA-specific authority expressly authorizing co-stewardship arrangements with non-Federally recognized Tribes.

<sup>16</sup> 25 U.S.C. §§ 5130, 5131.

<sup>17</sup> A Directory of Native Hawaiian organizations registered on the U.S. Department of the Interior's Native Hawaiian Organization Notification List is available on the Department of the Interior's website at: <https://www.doi.gov/media/document/directory-nho-interiors-nho-notification-list-pdf>.

<sup>18</sup> See [www.merriam-webster.com/dictionary/stewardship](http://www.merriam-webster.com/dictionary/stewardship).



include activities involved in or relating to the management of lands and waters by NOAA and by Tribes. These activities may include, landscape- or watershed-scale restoration and conservation planning and other federal land management planning efforts; resources management; and management decisions for federal lands, waters, wildlife and its habitat. As referenced in JSO 3404, “co-stewardship” is the collaborative work of stewardship between the federal government and Tribes and Native Hawaiian Organizations. NOAA has prepared the following definitions for use by Line Offices implementing JSO 3403’s policies and procedures:

- *Stewardship*. Stewardship refers to NOAA activities relating to management, conservation, and preservation of federal lands and waters, including wildlife and its habitat. These may include the conservation and management of coastal and marine ecosystems and resources, including vegetation, fish, marine wildlife, habitats, and other resources; the conduct of monitoring, research (inclusive of scientific research and, where appropriate, Indigenous Knowledge) to support management and services; the development of informational products and services, including weather forecasts, warnings, and climate monitoring; the protection of cultural resources and practices; and the provision of recreational and educational opportunities associated with these resources.
- *Co-Stewardship*.<sup>19</sup> Co-stewardship broadly refers to collaborative or cooperative arrangements between NOAA and Tribes or the Native Hawaiian Community related to shared interests in federal lands and waters, including wildlife, culture and resources. Collaborative and cooperative arrangements can take a wide variety of forms reflecting the unique relationship and shared interests of the parties. These may include, for example, sharing technical expertise, or combining the capabilities of Line Offices and Tribes or the Native Hawaiian Community through cooperative agreements or other means. The shared goals of these arrangements are to: improve resource management; foster consensus in decision-making where possible; advance the responsibilities and interests of the parties including the federal Government’s responsibility to protect Tribal treaty and reserved rights in federal decision-making and regulatory processes; and include where appropriate Indigenous Knowledge, experience, and perspectives to inform NOAA’s decision-making and management and policies related to these resources.

While “stewardship” can be understood to include management-related activities, it is important to distinguish “co-stewardship” as used in JSO 3403 from “co-management,” which is a distinct legal term. Co-management, for example, is used in Section 119 of the Marine Mammal Protection Act (MMPA), and allows the National Marine Fisheries Service (NMFS) or the U.S.

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<sup>19</sup> NOAA developed this definition following a series of Government-to-Government consultations in 2023 with Tribes from across the country. NOAA also engaged with members of the Native Hawaiian Community in the development of this definition.

Fish and Wildlife Service (FWS) to establish agreements with Alaska Native Organizations (ANOs), including, but not limited to, Alaska Native Tribes and Tribally authorized co-management bodies for the conservation of marine mammals and to provide for co-management of subsistence use by Alaska Natives through cooperative agreements.<sup>20</sup>

NOAA has prepared the following definition of “co-management” for use by Line Offices in implementing JSO 3403’s policies and procedures:

- *Co-Management.* As applied to NOAA authorities, refers to collaborative or cooperative arrangements undertaken pursuant to federal authority that authorize the delegation of some aspects of federal decision-making or function, provide for joint roles in stewardship, or make co-management otherwise legally necessary, such as cooperative agreements between NMFS and ANOs for the conservation of marine mammals and management of subsistence use by Alaska Natives, which is authorized by law. Co-management authorities may also arise from established Tribal Treaty rights such as those adjudicated in *U.S. v Washington*.<sup>21</sup>

#### C. Statutory Authorities Supporting Co-Management

##### *Marine Mammal Protection Act*<sup>22</sup>

NMFS may enter into cooperative agreements with ANOs to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.<sup>23</sup> Such cooperative agreements (also known as co-management agreements) encourage the exchange of information regarding the conservation, management, and utilization of marine mammals in waters in and around Alaska through close cooperation and communication between NMFS and ANOs, hunters, and subsistence users. Each agreement defines how co-management for that particular ANO will be achieved, such as whether there will be consensus decision-making. Co-management cooperative agreements under the MMPA do not authorize any expansion or change in the respective jurisdiction of federal, state, or tribal governments over marine resources.

NMFS currently has eight co-management agreements (a ninth agreement involved a Council that has disbanded). More information can be found here:

<https://www.fisheries.noaa.gov/alaska/marine-mammal-protection/co-management-marine-mammals-alaska>.

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<sup>20</sup> 16 U.S.C. § 1388(a).

<sup>21</sup> 443 U.S. 658 (1974).

<sup>22</sup> 16 U.S.C. §§ 1361 et seq.

<sup>23</sup> 16 U.S.C. § 1388(a).

More information on the MMPA and co-stewardship is included in the subsection on Authorities Supporting Co-Stewardship.

#### D. Indigenous Knowledge

JSO 3403 directs the Department to consider Tribal expertise and/or Indigenous Knowledge as part of federal decision-making relating to federal lands, particularly concerning management of resources subject to reserved Tribal treaty rights and subsistence uses.<sup>24</sup> NOAA has established guidance and best practices for engaging and including Indigenous Knowledge in Decision-Making.<sup>25</sup> NOAA has adopted the following definition of Indigenous Knowledge:

- *Indigenous Knowledge*. Generally refers to a cumulative body of knowledge, practice and belief evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.<sup>26</sup>

As further discussed in the NOAA Indigenous Knowledge Guidance, NOAA encourages the inclusion of Indigenous Knowledge, as appropriate and to the extent practicable and permitted by law, in the Line Offices' environmental science, policy and decision-making process, to better facilitate consultations as required by E.O. 13175. It also helps to fulfill federal trust responsibilities, respect treaty rights, understand environmental justice concerns as directed by E.O. 12898, inform agency decision making, and build partnerships with Indigenous Peoples.<sup>27</sup> Co-stewardship can be an important mechanism to ensure Indigenous Knowledge is included in NOAA decision-making and management.

### IV. Co-Stewardship

NOAA implements a number of existing authorities that support collaborative and cooperative co-stewardship arrangements with federally recognized Tribes and the Native Hawaiian Community. Determining authorities that could support a co-stewardship arrangement in a particular case requires consultation with the NOAA Office of General Counsel (OGC). For this

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<sup>24</sup> JSO 3403, § 3(f).

<sup>25</sup> National Oceanic and Atmospheric Administration. May 17, 2024. *NOAA Guidance and Best Practices for Engaging and Including Indigenous Knowledge in Decision-Making*. <https://www.noaa.gov/media/file/noaa-indigenous-knowledge-guidance-and-appendix>.

<sup>26</sup> See National Oceanic and Atmospheric Administration. June 2023. *NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribal Governments*. [https://www.noaa.gov/sites/default/files/2023-07/NOAA\\_Tribal\\_Consultation\\_Handbook\\_2023\\_FINAL.pdf](https://www.noaa.gov/sites/default/files/2023-07/NOAA_Tribal_Consultation_Handbook_2023_FINAL.pdf).

<sup>27</sup> *NOAA Guidance and Best Practices for Engaging and Including Indigenous Knowledge in Decision-Making* at 1. See also, Office of Science and Technology Policy and Council on Environmental Quality. November 30, 2022. *Guidance for Federal Departments and Agencies on Indigenous Knowledge*. <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf> (describing more fully the concept of Indigenous Knowledge).

reason, NOAA Line Offices are encouraged to consult with the appropriate Section of NOAA OGC as early in the process as possible.

#### A. General Federal Authorities

There are a number of specific requirements under federal law that guide agency employees when undertaking co-stewardship activities. These requirements are generally described below and should be applied whenever developing possible co-stewardship arrangements.

##### 1. Treaty Rights

Treaties are legally-binding formal agreements between two or more sovereign nations. In addition to the U.S. Constitution and federal laws, treaties are the supreme law of the United States that remain valid and enforceable unless Congress clearly expresses its intent to abrogate them. Treaties are superior to conflicting state laws and regulations. As such, a state cannot qualify the rights guaranteed to Indian Tribes under Treaties.

From 1778 to 1871, the United States' relations with American Indian tribes were defined and conducted largely through treaty-making.<sup>28</sup> Through these treaties, Indian Tribes ceded land and other natural and cultural resources to the United States, while retaining all rights not expressly granted. Many of these treaties guaranteed the signatory Tribes a unique set of rights both on and, where applicable, off reservation, including rights reserved by Tribes relating to natural resources, such as the right to hunt, fish, and gather on land ceded by Tribes and on reservation land retained by Tribes. Where such treaties exist, they form the foundation of the federal-Tribal relationship and federal agencies must consider potential impacts to Treaty rights when making agency decisions.<sup>29</sup>

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<sup>28</sup> The U.S. Government lacks valid treaties with many Federally recognized tribes, instead, the relationship with these tribes has been formalized and/or codified by Congressional acts, Executive Orders, and Executive Agreements. It is also important to note that the treaties that were made often contain commitments that have either been fulfilled or subsequently superseded by Congressional legislation.

<sup>29</sup> The majority of Alaska Native tribes do not have treaties. Statutes like Alaska Native Claims Settlement Act (ANCSA; 43 USC §§ 1601 et seq.), which settled land claims by Alaska Natives and created 12 regional profit-making Alaska Native corporations to manage the resource, and Alaska National Interest Lands Conservation Act (ANILCA; 16 USC §§ 3101 et seq.), which placed over 104 million acres of Alaska land into national parks, preserves, refuges, monuments, wilderness and wild and scenic river areas, and contained a provision in its Title VIII to give rural Alaskans a subsistence use priority on federal public lands and waters in Alaska, largely govern federal relationships with Alaska Native Tribes. Although JSO 3403 does not expressly reference Alaska Native corporations, many of the authorities identified herein are sufficiently broad to also authorize NOAA to enter into arrangements with these groups.

## 2. Sub-delegation Doctrine

Sub-delegation involves the delegation of an agency's authority—which Congress had delegated to that agency—to another party.<sup>30</sup> Absent affirmative evidence of Congressional authorization for that delegation to another party, the sub-delegation of agency authority in this manner is barred as an abuse of discretion, not in accordance with the law, and in excess of an agency's statutory jurisdiction.<sup>31</sup> Accordingly, the sub-delegation doctrine effectively limits the scope of potential co-stewardship arrangements to those that do not involve an impermissible delegation of agency authority.

This legal review of authorities to support co-stewardship recognizes the limitations imposed by the sub-delegation doctrine and distinguishes between co-stewardship and co-management. Co-stewardship arrangements are those collaborative and cooperative agreements in which the government is not delegating its congressionally-granted authority, whereas co-management agreements are those arrangements in which some aspect of federal authority has been delegated to a Tribe—consistent with Congressional authorization—or is otherwise legally necessary.<sup>32</sup>

### B. Authorities Supporting Co-Stewardship

NOAA has authority under various statutes that may support co-stewardship, including entering into cooperative agreements, memorandums of understanding (MOUs) or memorandums of agreement (MOAs) and other similar arrangements with Tribes for various purposes related to the management of water and wildlife resources. Although NOAA has little authority expressly authorizing co-stewardship arrangements, the Agency does have generally broad authority to work with external groups—including Tribes—via a number of statutes that NOAA implements. This section describes many of those key authorities that NOAA staff may utilize to support co-stewardship arrangements.

#### 1. NMFS Authorities

##### *Marine Mammal Protection Act*<sup>33</sup>

The MMPA provides authority to the Secretaries of Commerce and Interior, delegated to NMFS and FWS, respectively, to prevent marine mammal species and population stocks from declining through protection-based policies of resource management, the primary objective of which is to

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<sup>30</sup> Daniel Franz, *The Subdelegation Doctrine as a Legal Tool for Establishing Tribal Co-management of Public Lands: Through the Lens of Bears Ears National Monument*, 32 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 1 (2021).

<sup>31</sup> *Nat'l Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 21 (D.D.C. 1999).

<sup>32</sup> As noted above, NOAA is authorized with limited co-management authority.

<sup>33</sup> 16 U.S.C. §§ 1361 et seq.

maintain the health and stability of the marine ecosystem. NMFS is responsible for the protection of whales, dolphins, porpoises, seals, and sea lions. The MMPA implements this broad mandate through a moratorium on the taking and importation of marine mammals and marine mammal products. One relevant exemption to the general prohibition on the take of marine mammals is for subsistence purposes or for the creating and selling of authentic native articles of handicrafts and clothing by Alaska Natives.<sup>34</sup>

Provisions of the MMPA may support aspects of co-stewardship with Alaska Native or Indian Tribal organizations. For example, the MMPA expressly contemplates the inclusion of Alaska Native or Indian Tribal organizations on take reduction teams.<sup>35</sup> Within parts of the Columbia River Basin, section 120 of the MMPA specifically enumerates certain Tribes as eligible entities to participate in the removal of sea lions for the purpose of protecting certain fish stocks.<sup>36</sup> To carry on the purposes of the MMPA, Section 112 authorizes the Secretary of Commerce to enter into contracts, leases, cooperative agreements, or other transactions as may be necessary, and on such terms as deemed appropriate, with any federal or state agency, public or private institution, or other person.<sup>37</sup> This authority could potentially be used to enter into a co-stewardship arrangement with Tribes to support applicable MMPA purposes.

NMFS also has exercised its authority under sections 101(a)(3) and 103 of the MMPA to grant the Makah Tribe a waiver and adopt regulations authorizing the Tribe to resume a ceremonial and subsistence hunt of eastern North Pacific gray whale as provided in the Treaty of Neah Bay (1855). The hunt regulations establish a detailed scheme allowing the Tribe to manage and conduct a hunt consistent with the requirements of the MMPA in coordination with NMFS.

#### *Magnuson-Stevens Fishery Conservation and Management Act*<sup>38</sup>

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) establishes a national program for conservation and management of fishery resources with federal jurisdiction over such resources within the exclusive economic zone (EEZ). To assist in fishery management, the MSA established eight regional fishery management councils (Councils), which have responsibilities within specific geographic areas.<sup>39</sup> Regulation of fisheries is accomplished through fishery management plans, amendments to those plans (hereinafter, collectively referred to as FMPs), and implementing regulations. For FMPs that it approves, NOAA promulgates

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<sup>34</sup> 16 U.S.C. § 1371(b). In each case, the exempted taking must be conducted in a manner that is not wasteful. If NMFS determines any species or stock of marine mammal subject to taking by Alaska Natives is depleted, regulations may be prescribed on such takings. Such regulations may only be prescribed after public notice and an agency hearing on the proposed rule, necessitating coordination and consultation with the affected Alaska Natives.

<sup>35</sup> 16 U.S.C. § 1387(f)(6)(C).

<sup>36</sup> 16 U.S.C. § 1389(f).

<sup>37</sup> 16 U.S.C. § 1382(c).

<sup>38</sup> 16 U.S.C. §§ 1801 et seq.

<sup>39</sup> 16 U.S.C. § 1852(a).

implementing regulations. NOAA must determine that FMPs and their implementing regulations are consistent with the Act and "other applicable law."<sup>40</sup>

Other applicable law has been determined in the Ninth Circuit to include treaty rights and federal law regarding Tribal fishing rights.<sup>41</sup> Fishery management plans are required to contain a description of the fishery, including the nature and extent of Indian treaty fishing rights, if any.<sup>42</sup> The Pacific Fishery Management Council has responsibilities regarding fisheries in the EEZ off the U.S. West Coast. NMFS and the Pacific Fishery Management Council routinely develop, and NMFS promulgates and implements, regulations that provide for Tribal allocations for Tribes with federally recognized fishing rights, consistent with the applicable treaties, executive orders, and case law interpreting those.<sup>43</sup>

Voting members of the Councils include federal, state, and territorial fishery management officials, and individuals nominated by state governors and appointed by the Secretary who are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of fishery resources within the Councils' geographic areas.<sup>44</sup> Only one Council, the Pacific Council, has a requirement that at least one council seat must be held by a Tribal member, who must be from a tribe with federally-recognized fishing rights.<sup>45</sup> For the Western Pacific Council, the MSA provides that the Secretary shall appoint at least one voting member from each of the following: the State of Hawai'i, the U.S. Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands.<sup>46</sup> In addition, in letters to the Governor of Alaska requesting nominations to the North Pacific Fishery Management Council, the Department of Commerce and NMFS have encouraged the Governor of Alaska to nominate the appointment of Council members that are subsistence users and Tribal members.<sup>47</sup>

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<sup>40</sup> 16 U.S.C. § 1854.

<sup>41</sup> *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *Midwater Trawlers v. Dept of Commerce*, 393 F.3d 994 (9th Cir. 2004). The Ninth Circuit Court of Appeals has jurisdiction over Alaska, Arizona, California, Guam, Hawai'i, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon and Washington.

<sup>42</sup> 16 U.S.C. § 1853(a)(2).

<sup>43</sup> *See e.g.*, 50 C.F.R. 660.50.

<sup>44</sup> 16 U.S.C. § 1852(b).

<sup>45</sup> 16 U.S.C. § 1852(a)(1)(F), (b)(5).

<sup>46</sup> 16 U.S.C. § 1852(a)(1)(H).

<sup>47</sup> For example, in a January 19, 2024, letter to the Governor of Alaska, the NMFS Assistant Administrator stated that "[m]embers of federally-recognized fishing tribes within your state bring important perspectives to the Council process and may fall into any of the three sector categories," which includes the commercial and recreational fishing sectors or individuals from the "other" sector who have knowledge of, and experience in, biological, economic, or social sciences; environmental or ecological matters; consumer affairs; and associated fields. In an October 24, 2023, letter, the Secretary of Commerce stated: "Viewpoints of Alaskans who depend on fisheries for survival and livelihoods are important. Including perspectives from Tribal and subsistence users impacted by commercial and sport fisheries ensure the Council is fair and balanced. Not only does including Alaska Native subsistence representation balance the commercial and recreational perspectives currently on the Council, but it achieves environmental justice in fisheries management."

Each Council has a scientific and statistical committee (SSC) that provides ongoing scientific advice for fishery management decisions, a fishing industry advisory panel (AP) or committee, and other ad hoc committees to assist the Council in carrying out its functions under the Act.<sup>48</sup> Members of the SSCs and APs must be federal employees, State employees, academicians, or independent experts and must have strong scientific or technical credentials and experience. Appointments to a fishing industry advisory panel or committee must be made in such a manner as to provide fair representation to commercial fishing interests in a Council's geographic area. At least one regional fishery management council, the North Pacific Fishery Management Council, has designated one seat on their advisory panel as the Alaska Native Tribal seat, to ensure Tribal perspectives are included and represented in the process, which is documented in that Council's statutorily-required Statement of Organization, Practices, and Procedures.<sup>49</sup> The designated seat in no way limits the number of Alaska Natives who may serve as members of the North Pacific Fishery Management Council's Advisory Panel.

Under Section 318, the MSA requires that "[t]he Secretary of Commerce, in consultation with the Councils, shall establish a cooperative research and management program to address needs identified under the MSA and under any other marine resource laws enforced by the Secretary. The program shall be implemented on a regional basis and shall be developed and conducted through partnerships among federal, state, and tribal managers and scientists (including interstate fishery commissions), fishing industry participants (including use of commercial charter or recreational vessels for gathering data), and educational institutions."<sup>50</sup>

#### *Anadromous Fish Conservation Act*<sup>51</sup>

The Anadromous Fish Conservation Act authorizes the Secretaries of Interior and Commerce to enter into cooperative agreements with States and other non-federal interests for conservation, development, and enhancement of anadromous fish, including those in the Great Lakes. The Act allows the agencies to contribute a federal share of the cost of carrying out such agreements to benefit anadromous species. As described in the statute's implementing regulations a non-federal interest would be "[a]ny organization, association, institution, business, school, individual, or group of individuals, municipality and others outside the federal government, in addition to State fishery agencies, which desire to cooperate within the terms of the Act."<sup>52</sup> A Tribe would be considered a non-federal interest and NOAA may enter into cooperative agreements with Tribes under the Act.

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<sup>48</sup> 16 U.S.C. § 1852(g).

<sup>49</sup> NPFMC SOPPs § 2.3.2.B.

<sup>50</sup> 16 U.S.C. § 1867.

<sup>51</sup> 16 U.S.C. §§ 757a-757g.

<sup>52</sup> 40 C.F.R. 401.2(e).



### *Endangered Species Act*<sup>53</sup>

The Endangered Species Act (ESA) provides authority to the Secretaries of Commerce and Interior, delegated to the NMFS and FWS, respectively, to protect and conserve endangered and threatened species (through listing), to conserve the ecosystems upon which such species depend (through designation of critical habitat), and to take such steps as may be appropriate to achieve the purposes of international treaties and conventions for the conservation of species. The ESA also requires federal agencies to consult with the Services to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.<sup>54</sup> Further, the Act generally prohibits the take and importation of any species listed as endangered and any species listed as threatened, if the Secretary prescribes protection regulations.<sup>55</sup>

Similar to the MMPA, the ESA provides an exemption to the general prohibition on take of endangered and threatened species, as well as the importation of any such species, if the take is for subsistence purposes by Alaska Natives.<sup>56</sup> Non-edible byproducts of species taken pursuant to this exemption may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing. However, should NMFS determine that such taking by Alaska Natives materially and negatively affects the threatened or endangered species, regulations may be prescribed upon the taking of such species. Such regulations may only be prescribed after public notice and an agency hearing on the proposed rule, necessitating coordination and consultation with the affected Alaska Natives.

*Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (Depts. of Interior and Commerce) (Jun. 5, 1997)*

Secretarial Order (S.O.) 3206 provides extensive policy guidance to staff of the Departments of the Interior and Commerce in an effort to harmonize the federal trust responsibility to Tribes and the statutory missions of these Departments in implementing the ESA. There are numerous provisions in S.O. 3206 that offer formal opportunities for collaboration, consultation, and information sharing.

Specifically, the Order requires consultation on ESA actions that may impact Tribal resources, rights, or lands, and requires the Departments to consider Tribal traditional knowledge and efforts to protect species on their lands through their own conservation practices. The

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<sup>53</sup> 16 U.S.C. §§ 1531 et seq.

<sup>54</sup> 16 U.S.C. § 1536(a)(2).

<sup>55</sup> 16 U.S.C. § 1538(a).

<sup>56</sup> 16 U.S.C. § 1539(e).

Departments acknowledge that Tribes are sovereign entities with the ability to make laws and administer resources on their own lands. To further these Tribal efforts, the Departments must offer and provide scientific and technical assistance and information as may be available. The Departments shall give deference to Tribal conservation and management plans and shall consult regarding how those plans can be incorporated into federal ESA actions, and shall, when appropriate and at the request of a Tribe, enter into intergovernmental agreements involving sensitive species (including candidate, proposed, and listed species). Before imposing federal conservation restrictions impacting Tribal equities, the Departments are directed to notify Tribes and consult, and undertake certain other procedures should the federal restriction have the potential result in take by an existing Tribal activity.

Finally, numerous provisions in the Appendix to the Order provide guidance on how Tribes should be involved in listing decisions and section 7 consultations that impact the Tribes.

#### *Fish and Wildlife Coordination Act*<sup>57</sup>

The purpose of the Fish and Wildlife Conservation Act (FWCA) is to ensure that wildlife conservation receives equal consideration, and is coordinated with, other aspects of water resources development. The FWCA requires federal departments and agencies that undertake an action, or issue a federal permit or license that proposes to modify any stream or other body of water, for any purpose including navigation and drainage, to first consult with FWS, appropriate state fish and wildlife agencies, and in some cases, NMFS.<sup>58</sup> The federal and state resource agencies provide recommendations and comments to the federal action agency that should provide for the conservation of fish and wildlife resources by preventing loss of or damage to the resources. The action agency then must give equal consideration to the conservation of fish and wildlife resources in making water resource development decisions.

The Department of the Interior, NMFS and state agencies may develop reports that determine the possible damage to fish and wildlife resources and recommend means and measures that should be adopted to prevent the loss of or damage to fish and wildlife resources while allowing for the development and improvement of such water resources. Agencies shall include an estimate of the wildlife benefits or losses expected from the project in any reports to Congress supporting a recommendation for authorization of any new project. Action agencies must specifically consult with NMFS if their action has potential to adversely affect marine and anadromous fish resources. NMFS responds with comments and recommendations to conserve the fish and their habitat.

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<sup>57</sup> 16 U.S.C. §§ 661-666c.

<sup>58</sup> Reorganization Plan 4 of 1970 created the National Oceanic and Atmospheric Administration within the Department of Commerce and also extended the authorities of the FWCA to this new agency. See Agreement Regarding Shared Fish and Wildlife Coordination Act Authority. Aug. 9, 2018.

NMFS fulfills its responsibilities under the Act by consulting with the U.S. Army Corps of Engineers on permits and water resource development projects, with the Federal Energy Regulatory Commission in decisions regarding hydroelectric project licensing, and on various other federal actions involving water resources development.

The FWCA authorizes NMFS to provide assistance to, and cooperate with, federal, state, and public or private agencies and organizations—which may include Tribes—in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of this Act. It further authorizes NMFS, as delegated, to enter into cooperative programs with other federal agencies, states and public or private agencies - including Tribes - for the purpose of providing wildlife conservation equal consideration with water resource development programs.

#### *Fur Seal Act Amendments of 1983*<sup>59</sup>

The purpose of the Fur Seal Act of 1966 (FSA) is to protect and conserve North Pacific fur seals (now known as northern fur seals), to provide for the administration of the Pribilof Islands, to conserve fur seals and other wildlife on the Pribilof Islands, and to protect sea otters on the high seas. The FSA includes three titles: Fur Seal Management, Administration of the Pribilof Islands, and Enforcement. Title 1 of the FSA, among other things, implements a now-defunct Convention on the Conservation of North Pacific Fur Seals and the North Pacific Fur Seal Commission, which was the decision-making body under the Convention and included members from the U.S., Japan, Russia, and Canada. When the Commission was operative, the FSA also allowed for the appointment of one Alaska Native from each of the two inhabited Pribilof Islands (St. Paul and St. George) to serve as Advisors to the U.S. Commissioner and as liaisons between the U.S. Commissioner and Alaska Natives of the Pribilof Islands, and the Commission was advised by a Scientific Committee that included similar international representation. The Convention and FSA were originally conceived to manage the commercial harvest of fur seal skins, which ended in 1984 but had been conducted for over a century on the Pribilof Islands. After the cessation of the commercial harvest, NMFS continued to manage northern fur seals pursuant to the FSA as well as other legal authorities.

The FSA prohibits the taking of fur seals in the North Pacific Ocean or on lands or waters under the jurisdiction of the United States. The FSA also authorizes NMFS, as delegated, to implement regulations for the taking of fur seals necessary and appropriate for the conservation,

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<sup>59</sup> 16 U.S.C. §§ 1151-1175.

management, and protection of the fur seal population. Under this broad authority in the FSA, NMFS has authorized the taking of fur seals by Alaska Natives for subsistence purposes on the Pribilof Islands and has in recent years amended regulations to provide for expanded opportunities to engage in subsistence use to ensure increased food security on the Pribilof Islands and the continuation of Unangan cultural and traditional practices.

In tandem with the authority under the MMPA, NMFS engages in the co-management of northern fur seals with the Tribes of the Pribilof Islands (the Aleut Community of St. Paul Island and the Traditional Council of Saint George Island). While the FSA authorizes NMFS to enter into agreements with any public or private agency or person for the purpose of carrying out provisions of the FSA, NMFS has not used this authority under the FSA to enter into agreements with Tribes for the conservation, management, and protection of northern fur seals. Instead, as noted above, NMFS has co-management agreements with the Aleut Community of St. Paul Island and the Traditional Council of Saint George Island. These agreements provide for shared decision-making in the subsistence use and conservation of marine mammals on the Pribilof Islands, including northern fur seals, consistent with both the MMPA and FSA. The purposes of the co-management agreements include to promote the conservation and preservation of fur seals; to utilize traditional and Indigenous knowledge, wisdom, and values, as well as conventional science, to establish the best possible management actions; to share responsibilities for cooperative management and conservation, including research; to identify and resolve management conflicts through a collaborative and consensus process; and to provide subsistence users, the Tribal communities, and others with increased understanding of sustainable subsistence use. Finally, the FSA authorizes NMFS to permit the taking of fur seals for educational, scientific, or exhibition purposes. NMFS addresses individual and joint research activities involving northern fur seals, and other marine mammals, through the co-management framework.

Title 2 of the FSA is intended for the administration of government land on the Pribilof Islands and to provide civil service benefits to the residents of the Pribilof Islands who were engaged in or employed by the federal government to harvest and cure fur seals skins. The FSA provides that NMFS shall administer the fur seal rookeries and other federal real and personal property on the Pribilof Islands and ensure activities on federal property are consistent with the purposes of conserving, managing, and protecting northern fur seals and other wildlife, and for other purposes consistent with that primary purpose. Federal land administration on the Pribilof Islands has been ad hoc, with some discussions of land administration addressed between NMFS and the Tribes through the co-management process under the co-management agreements with the Tribes. Through agreement with co-management partners, the Tribes have assisted with some aspects of federal land administration, such as the posting of signs closing access to rookeries on federal lands. The remaining sections of Title 2 of the FSA relate to responsibilities of the State of Alaska and of other federal agencies, distribution and eligibility for civil service benefits,

establishment of the Pribilof Islands Trust, and transfer of federal property. Title 3, Enforcement, defines authority to enforce and collect associated fines for violations of the Act.

#### *The Lacey Act Amendments of 1981*<sup>60</sup>

The Lacey Act prohibits the trafficking and possession of any wildlife, fish, or plant taken in violation of domestic, foreign, state, or Indian tribal law, and prohibits the import, export, or transport of fish or wildlife unless the container or package is appropriately marked. The Secretaries of Commerce, Interior, Transportation, and Treasury must enforce the Act and have discretionary authority to enter agreements with government agencies or Indian Tribes to further these efforts.<sup>61</sup>

#### *The National Aquaculture Act*<sup>62</sup>

The National Aquaculture Act directs the Secretaries of Agriculture, Commerce and the Interior to establish a National Aquaculture Development Plan (NADP) in consultation with appropriate federal officers, States, Regional Fishery Management Councils and the aquaculture industry, that shall, among other things, identify aquatic species which have potential for culturing, recommend actions necessary to achieve such potential and specify time frames for completion of actions and which department has responsibility for implementation of each action.

The National Aquaculture Act further directs the Secretaries to maintain a continuing assessment of aquaculture in the United States and to provide advisory, educational and technical assistance regarding aquaculture to interested persons, encourage implementation of aquacultural technology to rehabilitate and enhance publicly owned fish and shellfish stocks, and prescribe such regulations as are necessary to carry out the Plan. The Secretaries may each carry out any action that such Secretary is responsible for implementing under the Plan subject to applicable restrictions of the Act; shall conduct a study of capital requirements of the U.S. aquaculture industry and formulate a plan to act upon this study; and shall coordinate to conduct a study of state and federal regulatory restrictions on aquaculture.

The Act specifically defines persons to include "any Indian tribe" and contemplates consultation and coordination with "interested persons" on development of the NADP and for providing advisory, educational, and technical assistance to interested persons. The Act also gives the Secretaries the authority to carry out actions they are responsible for under the NADP through grants or contracts with any person (including an Indian tribe).

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<sup>60</sup> 16 U.S.C. §§ 3371-3378.

<sup>61</sup> See 16 U.S.C. §§ 3375(a), 3376(b).

<sup>62</sup> 16 U.S.C. §§ 2801-2810.

*The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 and National Invasive Species Act of 1996*<sup>63</sup>

The Act provides that the Governors of the States and the governments of the Indian Tribes involved in an interstate organization may jointly prepare and submit a comprehensive management plan to the Aquatic Nuisance Species Task Force for approval which identifies areas or activities within the interstate region for which assistance is needed to eliminate or reduce the risks associated with aquatic nuisance species.<sup>64</sup> The Secretary of Commerce and the National Fish and Wildlife Foundation also have authority to establish a “Coastal Aquatic Invasive Species Mitigation Grant Program” and award grants to eligible entities, including Indian Tribes.<sup>65</sup> In addition, the Act provides for a Great Lakes and Lake Champlain Invasive Species Program administered by EPA, in coordination with NOAA and other federal agencies, and in collaboration with other entities, including Tribal agencies.<sup>66</sup>

*The Northern Pacific Halibut Act of 1982*<sup>67</sup>

This Act implements provisions of the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed in Ottawa, Canada on March 2, 1953, as amended by the Protocol Amending the Convention, signed in Washington, D.C., on March 29, 1979 (Halibut Convention).

Article III of the Halibut Convention established the International Pacific Halibut Commission (Commission) to, among other things, develop regulations for Pacific halibut that will produce the optimum yield from the fishery and maintain the fishery at that level. The Commission annually determines the Total Constant Exploitation Yield (TCEY; formerly known as the Total Allowable Catch), which is the total fishery mortality allowable in a given year. The Commission distributes the TCEY across Commission regulatory areas in U.S. and Canadian waters.

The Halibut Act, among other things, assigns general responsibility to carry out the Convention and the Act in U.S. waters to the Secretary of Commerce and allows the Secretary of State, with the concurrence of the Secretary of Commerce, to accept or reject, on behalf of the United States, recommendations made by the Commission. In addition, under the Halibut Act, the Regional Fishery Management Council having authority for the geographic area concerned may develop fishing regulations which are in addition to, and not in conflict with regulations adopted by the

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<sup>63</sup> 16 U.S.C. §§ 4701-4751.

<sup>64</sup> 16 U.S.C. § 4724.

<sup>65</sup> 16 U.S.C. § 4729.

<sup>66</sup> 16 U.S.C. § 4730 (the term “Tribal agencies” is utilized in the statute).

<sup>67</sup> 16 U.S.C. § 773.

Commission. These regulations are implemented with the approval of the Secretary of Commerce.

The Pacific Fishery Management Council, which includes a voting member from an Indian Tribe with federally recognized fishing rights, has exercised its authority under the Halibut Act through adoption of a “catch sharing plan” which allocates fishing privileges among fisheries in Commission regulatory Area 2A (off the coasts of Washington, Oregon and California). In 1993, in a sub-proceeding to *U.S. v. Washington*, the District Court for the Western District of Washington held that NOAA “must accord treaty fishers the opportunity to take 50% of the harvestable surplus of halibut in their usual and accustomed fishing grounds, and the harvestable surplus must be determined according to the conservation necessity principle.”<sup>68</sup>

Following this decision, the federal government and the Tribes reached a settlement agreement providing the Washington treaty Tribes 35% of the Area 2A TCEY. The Council adopted this allocation agreement in a long term catch sharing plan in 1995 and the Commission and NOAA have issued regulations consistent with this allocation since then. As described in the catch sharing plan, the Washington treaty Tribes independently manage a commercial fishery and a ceremonial and subsistence fishery.

In Alaska, the NMFS Alaska Region has promulgated regulations under the Halibut Act that authorize a subsistence halibut program.<sup>69</sup> In this subsistence halibut fishery, subsistence halibut is caught by a rural resident or a member of an Alaska Native Tribe for direct personal or family consumption as food, sharing for personal or family consumption as food, or customary trade. Before fishing under the subsistence halibut regulations, eligible fishermen must obtain a Subsistence Halibut Registration Certificate (SHARC). Special permits for community harvest, ceremonial, and educational purposes also are available to qualified Alaska communities and Alaska Native Tribes. An Area 2C or 3A rural community or Alaska Native tribe eligible to fish for subsistence halibut may apply for a Community Harvest Permit, which allows an eligible rural community or Alaska Native tribe to appoint one or more individuals from its respective community or tribe to harvest subsistence halibut from a single vessel under reduced gear and harvest restrictions. An Area 2C or Area 3A Alaska Native tribe that is listed in regulation at 50 C.F.R. 300.65(g)(2) may apply for a Ceremonial or Educational Permit, allowing the tribe to harvest up to 25 halibut per permit issued. Permit holders must comply with SHARC registration and reporting processes.

### *The Pacific Salmon Treaty Act*<sup>70</sup>

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<sup>68</sup> *United States v. Washington*, 18 F. Supp. 3d 1172 (W.D. Wash. 1991), Subproceeding No. 92–1 (Dec. 29, 1993).

<sup>69</sup> 50 C.F.R. part 300, subpart E.

<sup>70</sup> 16 U.S.C. §§ 3631-3644.

This Act implements the Pacific Salmon Treaty between the U.S. and Canada, which was signed January 28, 1985. It establishes a Commission and regional panels, each composed of members from both the U.S. and Canada. The Treaty governs the fisheries that occur in the ocean and inland waters of Oregon, Washington, British Columbia, the Yukon, and southeast Alaska, and includes the rivers that flow into these waters. The Act governs the selection of the four U.S. Commissioners. These include a federal official (nonvoting, usually a NOAA employee), a resident of the State of Alaska, a resident of the States of Oregon or Washington, and an individual "nominated by the treaty Indian tribes of the States of Idaho, Oregon, or Washington."<sup>71</sup> The Commission recommends salmon fishery management regimes for the stocks of common interest, and the two countries must manage their fisheries consistent with any regimes recommended by the Commission and approved by the U.S. and Canada. The Treaty establishes a process through which all parties involved from both countries interact to create, apply, and monitor science-based fishery management practices relevant to their areas. The Department of Commerce consults with the Secretaries of State and Interior regarding State's approval of Commission and Panel recommendations.<sup>72</sup> NOAA, in cooperation with the appropriate Fishery Management Councils, the States, and Tribes, prepares all necessary reports and information for transmission by the Secretary of State to the Commission.<sup>73</sup> NMFS, as delegated, may arrange for cooperation with agencies, treaty Tribes, and private organizations in carrying out the provisions of the Treaty and the Act and is authorized to execute memoranda as may be necessary to reflect such agreements.<sup>74</sup>

#### *Pacific Whiting Act of 2006*<sup>75</sup>

The transboundary stock of Pacific whiting, also known as Pacific hake, is managed via the Agreement Between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting of 2003, commonly known as the Pacific Hake/Whiting Treaty. This Treaty established that the United States has a right to 73.88% of the overall total allowable catch (TAC) and Canada has a right to 26.12 percent. The U.S. domestically implements this Treaty via the Pacific Whiting Act of 2006. Among other things, the Act requires that one of the U.S. members of the joint management committee (JMC) shall be appointed from a list submitted by treaty Tribes with treaty fishing rights to the offshore whiting resource. Under the Treaty, the JMC recommends an annual overall TAC of Pacific whiting. The U.S. allocates its portion of the overall TAC through domestic fishery management processes and a percentage of the U.S. TAC is allocated to treaty Tribes each year. To identify the Tribal allocation of Pacific whiting, NMFS coordinates and consults with the Indian Tribes with treaty fishing rights to the offshore whiting resource.

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<sup>71</sup> 16 U.S.C. § 3632.

<sup>72</sup> 16 U.S.C. § 3633(a)(2).

<sup>73</sup> 16 U.S.C. § 3633(c).

<sup>74</sup> 16 U.S.C. § 3634.

<sup>75</sup> 16 U.S.C. §§ 7001-7010.



### *Western and Central Pacific Fisheries Convention Implementation Act*<sup>76</sup>

The Western and Central Pacific Fisheries Convention Implementation Act establishes the framework to implement the United States' international obligations under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. This Convention covers management of highly migratory fish stocks throughout the Western and Central Pacific Ocean, including both high seas and the U.S. Exclusive Economic Zone waters surrounding Hawai'i, Guam, the Commonwealth of the Northern Mariana Islands, and Pacific Remote Islands Area, and American Samoa. The Act requires that the U.S. be represented on the Western and Central Pacific Fisheries Commission by five Commissioners, including one member of the Western Pacific Fishery Management Council (which, in turn, represents fishery interests in Hawai'i and the US-associated Pacific islands), as well as individuals who are "knowledgeable or experienced concerning highly migratory fish stocks and commercial fishing in the Western and Central Pacific Ocean."<sup>77</sup> The Act also establishes an Advisory Committee composed of individuals "from the various groups concerned with the fisheries covered by the WCPFC Convention," including representatives from the Western Pacific Fishery Management Council and the U.S. Territories of American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. In carrying out authority under the Act, NMFS, as delegated, is authorized to cooperate with any public or private institutions or organizations—which may include Tribes and Native Hawaiian Organizations—within the United States.<sup>78</sup>

### *Whaling Convention Act of 1949*<sup>79</sup>

The Whaling Convention Act of 1949 (WCA), authorizes NMFS, as delegated, to implement the provisions of the International Convention for the Regulation of Whaling (ICRW) and to issue regulations necessary for this purpose. The ICRW established the International Whaling Commission (IWC) to manage whaling at the international level. Currently, the ICRW has imposed a moratorium on commercial whaling, thus the only whaling managed by the IWC is aboriginal subsistence whaling (ASW). The U.S. is one of four ASW countries. In conducting the duties prescribed under the WCA, NMFS cooperates with other federal agencies, state governments, and other independent institutions, as well as any other government party to the Convention. NMFS also leads the U.S. delegation to the IWC, participating in biennial meetings. This work mandates close cooperation, coordination, and consultation with the Alaska Eskimo Whaling Commission (AEWC) and the Makah Tribe to domestically implement the ASW quotas

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<sup>76</sup> 16 U.S.C. §§ 6901-6910.

<sup>77</sup> 16 U.S.C. § 6902.

<sup>78</sup> 16 U.S.C. § 6907(a).

<sup>79</sup> 16 U.S.C. §§ 916 et seq.

established by the IWC for bowhead whales and gray whales, respectively. Pursuant to the regulations implementing the WCA, ASW whalers must enter into a “cooperative agreement” with NMFS, which is defined as “a written agreement between NOAA and a Native American whaling organization for the cooperative management of aboriginal subsistence whaling operations.”<sup>80</sup>

## 2. National Ocean Service Authorities

### *National Marine Sanctuaries Act*<sup>81</sup>

The National Marine Sanctuaries Act (NMSA) directs the Office of National Marine Sanctuaries, as delegated, to identify and designate as national marine sanctuaries areas of the Great Lakes and marine environment which are of special national significance and to manage these areas as the National Marine Sanctuary System. Among other things, the NMSA authorizes NOAA to enter into cooperative agreements, contracts or other agreements with, or make grants to any entity—including Tribes—to carry out the purposes and policies of the Act, including the development and implementation of coordinated plans for the protection and management of National Marine Sanctuaries with Native American Tribes and organizations.<sup>82</sup> The NMSA further authorizes the Office of National Marine Sanctuaries to establish one or more sanctuary advisory councils to advise and make recommendations to Sanctuary Superintendents, as delegated, regarding the management of national marine sanctuaries.<sup>83</sup> The membership of these advisory committees may include Tribal representatives that represent local user groups, conservation and public interest organizations, scientific organizations, educational organizations, or others interested in the protection and multiple use management of sanctuary resources.<sup>84</sup>

### *Coastal Zone Management Act*<sup>85</sup>

The Coastal Zone Management Act (CZMA) provides for the management of the nation’s coastal resources, including the Great Lakes. The goal is to “preserve, protect, develop, and where possible, to restore or enhance the resources of the nation’s coastal zone.”<sup>86</sup> The CZMA consists of two principal programs: the National Coastal Zone Management Program and the National Estuarine Research Reserve System. NOAA administers and oversees both programs and provides a wide range of technical, educational, management, policy, and conflict resolution

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<sup>80</sup> 50 C.F.R. 230.2.

<sup>81</sup> 16 U.S.C. §§ 1431 et seq.

<sup>82</sup> 16 U.S.C. § 1442(a).

<sup>83</sup> 16 U.S.C. § 1445A(a).

<sup>84</sup> 16 U.S.C. § 1445A(b).

<sup>85</sup> 16 U.S.C. § 1456.

<sup>86</sup> 16 U.S.C. § 1452.

assistance to U.S. coastal and Great Lakes states and territories (collectively referred to as coastal states), federal agencies, and other stakeholders. NOAA coordinates and consults with Tribes on CZMA matters, pursuant to applicable Executive Orders and agency guidance.

Under the CZMA, Tribes are not included in the definition of a “coastal state” and as such, are not eligible to receive CZMA grants directly from NOAA.<sup>87</sup> However, under NOAA’s regulations, Tribes may be allocated a portion of CZMA funds through a state’s coastal management program for projects that a state decides to fund if the state certifies such projects are compatible with its NOAA-approved coastal management program and demonstrates the projects would or could directly affect the state’s coastal zone.<sup>88</sup> Tribes are also eligible for grants under the National Coastal Resilience fund, which is a partnership between NOAA and the National Fish and Wildlife Foundation to enhance fish and wildlife habitat and protect coastal communities.

In addition, the CZMA established the National Estuarine Research Reserve (NERR) System that provides NOAA authority to designate coastal sites to protect and study estuarine systems in collaboration with and service to surrounding communities. Although the NERR program is a partnership between NOAA and the coastal states, NOAA recognizes the importance of including the needs and perspectives of Tribes and Indigenous Peoples in conservation, research, education, and management decisions at the Reserves. As such, coastal state partners are encouraged to nominate and manage NERRS in partnership with Tribes and Indigenous Peoples.

### *Digital Coast Act*<sup>89</sup>

The Digital Coast Act provides authority for the Office for Coastal Management, as delegated, to establish a program to provide an enabling platform that integrates geospatial data, decision-support tools, training, and best practices to address coastal management issues and needs with the goal of enhancing resilient communities, ecosystem values, and coastal economic growth and development by helping communities address their issues, needs, and challenges through cost-effective and participatory solutions. In carrying out the authority, NOAA may enter into financial agreements; including grants, cooperative agreements, interagency agreements, contracts, or any other agreement on a reimbursable or non-reimbursable basis, with Tribal entities.

### *Marine Debris Act*<sup>90</sup>

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<sup>87</sup> See 16 U.S.C. § 1453(4).

<sup>88</sup> 15 C.F.R. 923.92(b)(2).

<sup>89</sup> 16 U.S.C. § 1467.

<sup>90</sup> 33 U.S.C. § 1952.

The Act requires the program to “identify, determine sources of, assess, prevent, reduce, and remove marine debris and address the adverse impacts of marine debris on the economy of the United States, marine environment, and navigation safety.” As part of this authority, the Act directs the NOAA Administrator to, among other things, provide national and regional coordination to assist States, Indian Tribes, and regional organizations in the identification, determination of sources, assessment, prevention, reduction and removal of marine debris. To accomplish the purposes set forth in the Act, the Administrator, acting through the Marine Debris Program, is authorized to enter into cooperative agreements and contracts and provide financial assistance in the form of grants for projects to accomplish the purpose set forth in the Act. Eligibility for the grant program includes any “tribal government whose activities affect research or regulation of marine debris...”<sup>91</sup>

#### *Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*<sup>92</sup>

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes the United States, States, and Indian Tribes to seek damages for injury, destruction, or loss of natural resources under their respective trusteeship.<sup>93</sup> Under CERCLA and its implementing regulations, an “Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”<sup>94</sup> NOAA, as a designated natural resource trustee, may work cooperatively with other natural resource trustees, including States or Indian Tribes (as defined under CERCLA), through agreements or settlement agreements to assess injury to and restore natural resources lost or damaged by the release of a hazardous substance.

#### *Oil Pollution Act*<sup>95</sup>

The Oil Pollution Act (OPA) authorizes the United States, States, and Indian Tribes to seek a claim for natural resource damages for injury to, destruction of, loss of, or loss of use of, natural resources under their respective trusteeship.<sup>96</sup> Under OPA’s implementing regulations, an “Indian tribe means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the

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<sup>91</sup> 33 U.S.C. § 1952(d)(4).

<sup>92</sup> 42 U.S.C. §§ 9601 et seq.

<sup>93</sup> 42 U.S.C. § 9607(f)(1).

<sup>94</sup> 43 C.F.R. 11.14(uu); 42 U.S.C. § 9601(36).

<sup>95</sup> 33 U.S.C. §§ 2701 et seq.

<sup>96</sup> 33 U.S.C. § 2706.

tribe, as defined in section 1001(15) of OPA.”<sup>97</sup> NOAA, as a designated natural resource trustee, may work cooperatively with other natural resource trustees, such as States or Indian Tribes (as defined and designated under OPA), through agreements or settlement agreements to assess injury to and restore for the loss of natural resources from a discharge or substantial threat of discharge of oil.

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<sup>97</sup> 15 C.F.R. 990.30. *See also*, 33 U.S.C. § 2701(15).